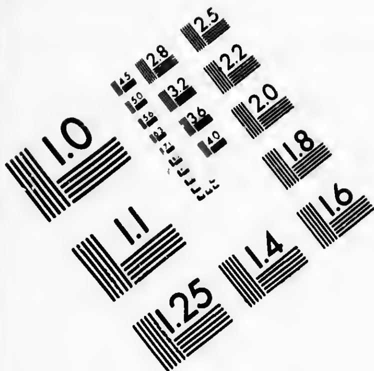

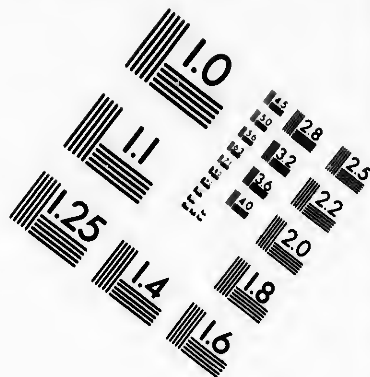

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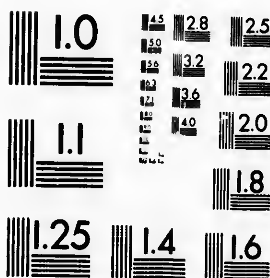

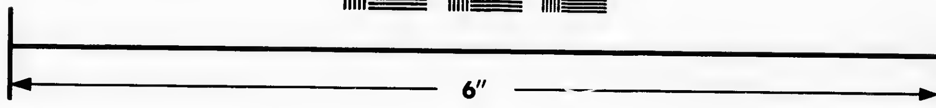

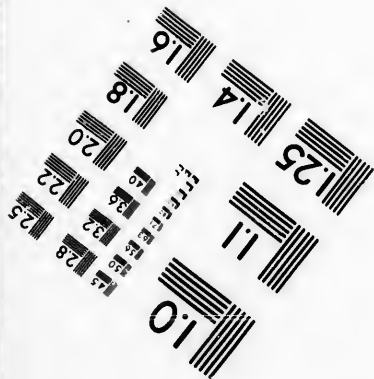

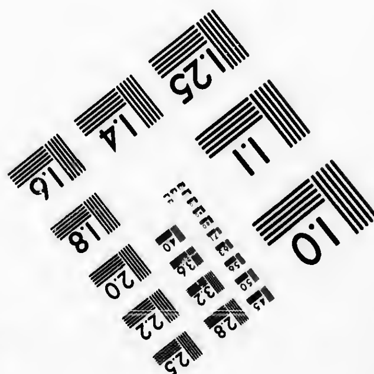

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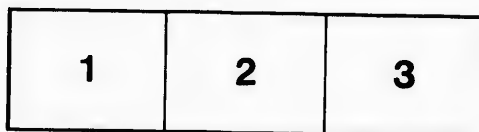

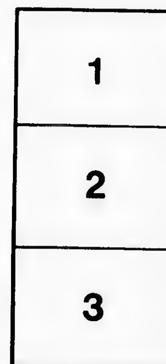

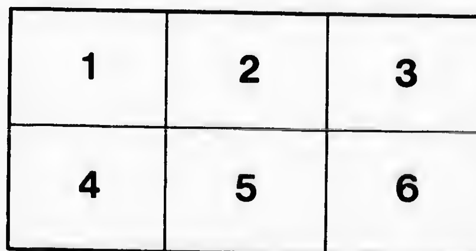

THE BILLS OF SALE AND CHATTEL MORTGAGE ACTS OF ONTARIO,

BEING A COMPLETE AND EXHAUSTIVE ANNOTATION OF THE REVISED STATUTES OF ONT., CHAP. CXIX.,

AND OF

THE MORTGAGES AND SALES OF PERSONAL PROPERTY AMENDMENT ACT, 1880,

(43 Vict., Chapter 15, Ont.)

PRECEDED BY AN

INTRODUCTORY TREATISE ON THE LAW OF BILLS OF SALE AND CHATTEL MORTGAGES,

AND HAVING APPENDED CHAPTERS 66, 95, 98 AND 118 OF THE REVISED STATUTES OF ONTARIO, AND THE ACT 29 VICTORIA, CHAP. 28, D., IN SO FAR AS THE SAME AFFECT THE LAW OF BILLS OF SALE AND CHATTEL MORTGAGES IN ONTARIO, TOGETHER ALSO WITH A CAREFULLY PREPARED AND USEFUL

APPENDIX OF FORMS.

BY

JOHN A. BARRON,

OF OSGOODE HALL, BARRISTER-AT-LAW.

Expertus disces, quam gravis iste labor.

TORONTO:
CARSWELL & CO., LAW PUBLISHERS,
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TO

THE HONOURABLE

SAMUEL HUME BLAKE,

ONE OF THE VICE-CHANCELLORS OF THE COURT OF CHANCERY

FOR THE

PROVINCE OF ONTARIO,

This Volume

IS,

WITH HIS PERMISSION,

MOST RESPECTFULLY

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PREFACE.

It is due to those of the profession, who have been anticipating this book, that an explanation should be made of the delay in its publication. When far advanced, towards completion, it was deemed advisable, in expectation of further legislation in the Law of Mortgages and Sales of Personal Property, to stop all further progress in the work, until it was ascertained, with some reliability, what changes were likely to be effected. Consequent upon the amendment to the law, made by "The Mortgages and Sales of Personal Property Amendment Act," 1880, a period of nearly two months was necessarily lost, between the stoppage and the continuation of the work, in the hands of the Publishers. This Act, in the passage of the Bill through the House of Assembly, was spoken of and discussed as "An Act intended to remove doubts known to exist in the law of Bills of Sale and Chattel Mortgages, under Revd. Stat. Ont., Chap. 119." Indeed, the necessity for such a removal would have been a fitting preamble to the Act itself, for, among other matters, the new Statute sets at rest a moot question, under certain circumstances, as to the place of registration of instruments within the operation of the Statutes relating to Bills of Sale and Chattel Mortgages (*post* p. 174, 195); and practically it disposes of any further argument as to the correctness, on the one hand of the judgments of the Court of Common Pleas in *O'Hallaran* v. *Sills* (12 U. C. C. P. 464), in *Saulter* v. *Carruthers* (9 U. C. L. J. 158), and in *Reynolds* v. *Williamson* (25 U. C. C. P. 49); and on the other hand of the judgment of Mowat, V.C., in *Walker* v. *Niles* (18 Grant, 210), of the Court of Queen's Bench in *Barber* v. *Maughan* (42 U. C. Q. B. 134), and of the Court of Appeal in *Sloan* v. *Maughan* (3 App. R. 222) (*post* p. 194). Possibly there

yet is room for much amendment; but, as each new amendment creates fresh subject matter for doubting and questioning, perhaps it would be wiser, in many instances, to be conservative in legislation, and rely more upon the Courts in cases of doubt, for a definite and final construction of existing Statutes, when that construction is in keeping with the spirit and policy of the law.

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 Victoria, Chap. 74, became law. This Statute is the foundation of the subsequent Acts relating to Mortgages of Goods and Chattels. Though long since repealed, the Statute law, in many instances, is the same now, as then. For this reason, it would be convenient, and of assistance to the enquirer, that an epitome of the provisions of the Statute, 12 Victoria, Chap. 74, should here be given. In many instances, authorities (and there are many such) decided under this Statute will, where not overruled, necessarily be authorities under the Statute law, as at present existing. By a comparison of the Statutes, the enquirer can then conveniently satisfy himself of the adaptability of his references.

This Statute enacted:

Mortgages of personals in Upper Canada made after the passing of this Act, to be void unless filed as herein directed.

SECTION I. "That every Mortgage or conveyance intended "to operate as a Mortgage of Goods and Chattels made after "the passing of this Act, in Upper Canada, which shall not "be accompanied by an immediate delivery, and be followed "by an actual and continued change of possession of the "things mortgaged, shall be absolutely void as against the "creditors of the mortgagor, and as against subsequent pur-"chasers and mortgagees in good faith, unless the Mortgage "or conveyance or a true copy thereof, together with an affi-"davit of a witness thereto, sworn before a Commissioner of the "Queen's Bench, of the due execution of the Mortgage or "conveyance, or of the due execution of the Mortgage or "conveyance of which the copy to be filed purports to be a "copy, shall be filed as directed in the succeeding section of "this Act."

SECTION II. "That the instruments mentioned in the "preceding section shall be filed in the office of the Clerk of "the District Court of the District where the mortgagor "therein, if a resident in Upper Canada, shall reside at the "time of the execution thereof, and if not a resident, then in "the office of the Clerk of the District Court of the District "where the property so mortgaged shall be at the time of "the execution of such instrument: And such Clerks are "hereby required to file all such instruments as aforesaid, "presented to them respectively for that purpose, and to en- "dorse thereon the time of receiving the same, and shall de- "posit the same in their respective offices to be kept there "for the inspection of all persons interested."

Such Mortgages to be filed in office of Clerk of District Court, and open for inspection.

SECTION III. "That every Mortgage or copy thereof filed "in pursuance of this Act, shall cease to be valid as against "the creditors of the person making the same, or against "subsequent purchasers or mortgagees in good faith after the "expiration of one year from the filing thereof, unless within "thirty days next preceding the expiration of the said term "of one year, a true copy of such Mortgage, together with a "statement exhibiting the interest of the mortgagee in the "property thereby claimed by virtue thereof, shall be again "filed in the office of the Clerk of the said District Court."

Copy of Mortgage to be filed again one year after first filing.

SECTION IV. "That a copy of any such original instru- "ment, or of any copy thereof, so filed as aforesaid, including "any statement made in pursuance of this Act, certified by "the Clerk in whose office the same shall be filed, shall be "received in evidence, but only of the fact that such instru- "ment, or copy and statement, was received and filed accord- "ing to the endorsement of the Clerk thereon, and of no "other fact; and in all cases the original endorsement by "the Clerk, made in pursuance of this Act upon such instru- "ment or copy, shall be received in evidence only of the "facts stated in such endorsement."

Copies of Mortgages filed with certificate of Clerk to be evidence of such filing.

SECTION V. "That the Clerks of the Courts aforesaid "shall respectively number every such instrument or copy "which shall be filed in their offices, and shall enter in books, "to be provided by them, alphabetically, the names of all the

Clerks of the said Courts to number instruments filed with them, &c.

"parties to such instruments, with the number endorsed "thereon opposite to each name, which entry shall be re- "peated alphabetically under the name of every party "thereto."

This Act not to apply to Mortgages of Vessels registered under 8 Vic. cap. 5.

SECTION VI. "That this Act shall not apply to Mortgages "of Vessels registered under the provisions of an Act passed "in the eighth year of Her Majesty's Reign, and intituled "*An Act to secure the right of property in British Plantation* "*Vessels navigating the inland waters of this Province, and not* "*registered under the Act of the Imperial Parliament of the* "*United Kingdom, passed in the third and fourth years of the* "*Reign of His late Majesty King William the Fourth, in-* "*tituled An Act for the registering of British Vessels, and to* "*facilitate transfers of the same, and to prevent the fraudulent* "*assignment of any property in such Vessels.*"

Fees allowed to Clerks for registering Mortgages.

SECTION VII. "That for services under this Act, the "Clerks aforesaid shall be entitled to receive the following "fees: for filing each instrument and affidavit, and entering "the same in a book as aforesaid, one shilling and three "pence; for searching each paper, six pence; and for copies "of any documents filed under this Act, six pence for every "hundred words."

From a perusal of the foregoing provisions, it will at once be observed, that the Statute did not extend to the case of a sale of goods and chattels, nor did the Statute require that, which now is such an important essential in every registered Chattel Mortgage or Bill of Sale, namely, the affidavit of *bona fides*. Consequently we find, in the next session of the same Parliament, that an Act—13 & 14 Victoria Chap. 62—was passed. This Statute altered and amended the Statute 12 Victoria Chap. 74, by adding to the end of the first section of the latter Act, the following:

"And that every sale of goods and chattels, which shall "not be 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 the "said Act; and that the Mortgages and conveyances men- "tioned in the said Act, and the writing or conveyance "mentioned in this Act, shall be accompanied with an affi- "davit of the mortgagee or bargainee of such goods, sworn "before a Commissioner of the Queen's Bench or Common "Pleas, to the effect,—in the case of a Mortgage, that the "mortgagor therein named is justly and truly indebted to "the mortgagee in the sum mentioned in the said Mortgage, "that it was executed in good faith, and for the express pur- "pose of securing the payment of the money so justly due, "and not for the purpose of protecting the goods and "chattels mentioned therein against the creditors of the "mortgagor,—and in case of an absolute sale, that the sale "is *bona fide* and for good consideration (setting it forth), and "not for the purpose of holding or enabling the bargainee to "hold the goods mentioned therein against the creditors of "the bargainor; otherwise such Mortgage or sale shall be "absolutely void as against the creditors of the mortgagor "and as against the subsequent purchasers and mortgagees in "good faith."

Sales of personal property (when not accompanied by an immediate delivery and followed by an actual and continued change of possession), were thus put upon the same footing with Mortgages as regarded registration (*Harris* v. *Com. Bank*, 16 U. C. Q. B. 449), and the affidavit of *bona fides*, in the case of either a Mortgage or conveyance, was by this amendment first made necessary. The requisites in this affidavit, were the same then as they are now, except that, in the case of a Mortgage, the affidavit must now state, in addition to what then was necessary, that the Mortgage has not been executed for the purpose of preventing the creditors of the mortgagor from obtaining payment of any claim against him; and in the case of a conveyance the affidavit may now refer to the deed for the consideration, instead of setting it forth (*per* Burns, J., *Harris* v. *Com. Bank*, 16 U. C. Q. B. 448).

Under these Statutes, the question never was raised, as to

whether or not a copy of an instrument of sale, instead of the original, could be registered. Very probably the registration of a copy would have been allowed, because the Statute "13 and 14 Victoria, Chap. 62," provided that what was therein enacted should be added to the first section of the Statute "12 Victoria, Chap. 74," and thus, by forming part thereof, have secured the application of the law to both Sales and Mortgages. But these Statutes were both repealed, and the subsequent Acts all clearly draw a distinction between Mortgages and Sales and it is the received opinion now that the registration of a copy of an instrument of sale, is not a compliance with the law (*Harris* v. *Com. Bank,* 16 U. C. Q. B. 437). These Statutes, it will further be observed, did not provide for the affidavit of *bona fides* being made by an agent of a mortgagee or bargainee. The Statute, 13 and 14 Victoria, Chap. 62, imperatively required that the mortgagee himself should make this affidavit. It was, therefore, decided in *Holmes* v. *Vancamp* (10 U. C. Q. B. 511), that this affidavit could not be made by an agent of the mortgagee. It was in consequence of this decision, no doubt, that, when the Statute, "20 Victoria, Chap. 3," became law (1st of August, 1857), provision was therein made, whereby this affidavit could be made by the agent of a mortgagee or bargainee. This Statute it was too, which first made necessary the refiling of a Mortgage to be accompanied by an affidavit of the mortgagee (*post* p. 197). A year or two later the provisions of the Statute, "20 Victoria, Chap. 3," were all incorporated and consolidated in the Consolidated Statutes of Upper Canada. By far the greater number of authorities, bearing upon Chattel Mortgages and Bills of Sale, have been decided under the Consolidated Statutes of Upper Canada, Chap. 45. For this reason the provisions of this latter Statute are here given, thus facilitating a comparison with the provisions of Revd. Stat. Ont., Chap. 119. The practitioner can thus conveniently ascertain the application of his authorities.

The Consolidated Statutes of Upper Canada, chap. 45, enact as follows:—

1. "Every Mortgage, or conveyance, intended to operate "as a Mortgage, of goods and chattels made in Upper Cana- "da, 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 five "days from the execution thereof, be registered as herein- "after provided, together with the affidavit of a witness "thereto, of the due execution of such Mortgage, or convey- "ance, or of the due execution of the Mortgage, or convey- "ance, of which the copy filed purports to be a copy, and also "with the affidavit of the mortgagee or his agent, if such "agent be aware of all the circumstances connected therewith "and properly authorized in writing, to ta[illegible]ch Mortgage "(in which case a copy of such authority shall be registered "therewith). 20 V. c. 3, s. 1."

Mortgages of goods not attended with change of possession, shall be registered, or else be void as against creditors, &c., of the mortgagor with an affidavit, &c.

2. "Such last mentioned affidavit, whether of the mort- "gagee 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 pay- "ment 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 pre- "venting the creditors of such mortgagor from obtaining pay- "ment of any claim against him."

Contents of affidavit.

3. "In case such Mortgage, or conveyance, and affidavits "be not registered as hereinbefore provided, the Mortgage, or "conveyance, shall be absolutely null and void as against "creditors of the mortgagor, and against subsequent pur- "chasers or mortgagees in good faith for valuable considera- "tion. 20 V. c. 3, s. 1."

Unless registered, mortgage void.

4. "Every sale of goods and chattels, not accompanied by "an immediate delivery and followed by an actual and con- "tinued change of possession of the goods and chattels sold, "shall be in writing, and such writing shall be a conveyance "under the provisions of this Act, and shall be accompanied "by an affidavit of a witness thereto of the due execution "thereof, and an affidavit of the bargainee, or his agent duly

Sales of goods not attended with delivery shall be registered, or else be void as against creditors, &c., of the vendor.

"authorized in writing to take such conveyance (a copy of "which authority shall be attached to such 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 such conveyance "and affidavits shall be registered, as hereinafter provided, "within five days from the executing thereof, otherwise the "sale shall be absolutely void as against the creditors of the "bargainor and as against subsequent purchasers or mort- "gagees in good faith. 20 V. c. 3, s. 2."

Mortgages of goods to secure advances on, or to indemnify indorser, &c., to be valid, if duly registered.

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, the time of repay- "ment 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 indorsement "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 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 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 be- "tween 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 exe- "cuted in good faith and for the express purpose of securing

" the mortgagee repayment of his advances or against the pay-
" ment 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 recov-
" ering any claims which they may have against such mort-
" gagor, and in case such Mortgage is registered as hereinafter
" provided, the same shall be as valid and binding as Mort-
" gages mentioned in the preceding section of this Act. 20
" V. c. 3, s. 3."

The property to be well described.

6. "All the instruments mentioned in this Act, whether for
" the sale or Mortgage of goods and chattels, shall contain
" such sufficient and full description thereof, that the same
" may be thereby readily and easily known and distinguished.
" 20 V. c. 3, s. 4."

HOW REGISTERED.

Chattel mortgages to be registered in office of County clerk.

7. "The instruments mentioned in the preceding sections,
" shall be registered in the office of the Clerk of the County
" Court of the county or union of counties where the mort-
" gagor or bargainor, if a resident in Upper Canada, resides
" at the time of the execution thereof, and if he be not a re-
" sident, then 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 such clerks shall file all such instruments
" presented to them respectively for that purpose, and shall
" endorse thereon the time of receiving the same in their re-
" spective offices, and the same shall be kept there for the
" inspection of all persons interested therein, or intending or
" desiring to acquire any interest in all or any portion of the
" property covered thereby. 20 V. c. 3, s. 5."

Who shall enter the same.

8. "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 num-
" bers endorsed thereon opposite to each name, and such en-
" try shall be repeated alphabetically under the name of every
" party thereto. 20 V. c. 3, s. 6."

How to proceed if goods mortgaged are removed to another county.

9. "In the event of the permanent removal of goods and "chattels mortgaged as aforesaid from the county or union of "counties in which they were at the time of the execution of "the mortgage, to another county or union of counties, be- "fore the payment and discharge of the Mortgage, a certified "copy of such Mortgage, under the hand of the Clerk of the "County Court in whose office it was first registered, and "under the seal of the said Court, and of the affidavits and "documents and instruments relating thereto filed in such "office, shall be filed with the Clerk of the County Court of "the county or union of counties to which such goods and "chattels are removed, within two months from such re- "moval, 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 for valuable consideration, as if "never executed. 20 V. c. 3, s. 7."

Mortgages of chattels must be periodically renewed else cease to be valid.

10. "Every Mortgage, or copy thereof, filed in pursuance "of this Act, shall cease to be valid as against the creditors "of the persons making the same, and against subsequent "purchasers or mortgagees in good faith for valuable con- "sideration, after the expiration of one year from the filing "thereof, unless within thirty days next preceding the ex- "piration of the said term of one year, a true copy of such "Mortgage, together with 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, be again filed in the office of the Clerk of the said "County Court of the county or union of counties wherein "such goods and chattels may be then situate, with an affida- "vit of the mortgagee or his agent, duly authorized in writ- "ing for that purpose (which authority shall be filed there- "with), stating that such statements are true, and that the "said Mortgage has not been kept on foot for any fraudulent "purpose. 20 V. c. 3, s. 8."

The clerk's certificate to be evidence of registration.

11. "A copy of such original instrument, or of a copy "thereof, so filed as aforesaid, 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 "shall be received in evidence in all Courts, but only of the "fact that such instrument, or copy and statement were re- "ceived and filed according to the endorsement of the clerk "thereon, and of no other fact; and in all cases the original "endorsement 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 such endorsement. 20 "V. c. 3, s. 9."

Who to administer the affidavit and fee.

12. "All affidavits and affirmations required by this Act "shall be taken and administered by any Judge or Com- "missioner of the Courts of Queen's Bench or Common Pleas, "or Justice of the Peace in Upper Canada, and the sum of "twenty cents shall be paid for each and every oath thus ad- "ministered. 20 V. c. 3, s. 13."

The interest of mortgagor or his equity of redemption saleable in execution.

13. "On any writ, precept or warrant of execution against "goods and chattels, the sheriff or other officer to whom such "writ, warrant or precept is directed, may seize and sell the "interest or equity of redemption in any goods and chattels "of the party against whom such writ has issued, and such "sale shall be held to convey whatever interest the mortga- "gor had in such goods and chattels at the time of seizure. "20 V. c. 3, s. 11."

Fees for services.

14. "For services under this Act the clerks aforesaid shall "be entitled to receive the following fees:

(1.) "For filing each instrument and affidavit, and for en- "tering the same in a book as aforesaid, twenty-five cents;

(2.) "For searching each paper ten cents; and

(3.) "For copies of any document with certificate pre- "pared, filed under this Act, ten cents for every hundred "words. 20 V. c. 3, s. 12."

Act not to apply to vessels duly registered.

15. "This Act shall not apply to mortgages of vessels re- "gistered under the provisions of any Act in that behalf. 20 "V. c. 3, s. 10,—see 8 V. c. 5."

b

Existing rights saved.

16. "All mortgages and sales of goods and chattels registered under the provisions of any former Acts in that behalf, shall be held and taken to be as valid and binding as if the said Acts had not been repealed. 20 V. c. 3, s. 14."

It was but a short time after the foregoing Statute came into force, when a new ground of dispute arose. An examination of its provisions will discover no enactment as to the period of time from whence a Mortgage or conveyance, registered under the Act, should take effect. Owing to the absence of any such provision, a direct conflict of judgment arose between the Courts of Queen's Bench and Common Pleas, the former supporting, the latter opposing the view that when registered within the proper period, the Mortgage or conveyance related back, and took effect from the time of its execution (*Feehan* v. *Bank of Toronto,* 10 U. C. C. P. 32; *Shaw* v. *Gault,* 10 U. C. C. P. 236; *Haight* v. *McInnis,* 11 U. C. C. P. 518; *Feehan* v. *Bank of Toronto,* 19 U. C. Q. B. 474). It was this contrariety of opinion, no doubt, which resulted in the passing of the Statute "26 Vic. cap. 46." This Statute amended the Con. Stat. of U. C. Cap. 45 by adding to the end of section one the following:

> "And every such Mortgage or conveyance shall operate "and take effect upon, from and after the day and time of "the execution thereof."

This provision now forms a section by itself in Rev. Stat. Ont., cap. 119 (see *post* p. 146).

The next amending Statute on the subject of Mortgages and Sales of Personal Property was the Statute "32 Vic. Cap. 49," Ont., which, however, merely gave greater facilities for the registration of Chattel Mortgages and conveyances, when made or executed, or which affected personal property within the District of Muskoka, and then was passed the Statute "40 Vic. cap. 8," sec. 29. This latter amendment was induced by the judgment of the Court of Queen's Bench in *Morrow* v. *Rourke,* (39 U. C. Q. B. 500). The argument in this case was that the Legislature intended to use the words "in good faith," in sec-

tion nine (9) of Con. Stat. U. C. Cap. 45 after the words purchasers and mortgagees, just as these words were to be found in sections three and four of this Statute: that the omission of them in section nine (9) was accidental, and reading all the sections together, the Court ought to supply the omission. The Court, however, declined to incorporate these words "in good faith" into section nine (9), and said, "Looking at the Act as Judges, we have no more power to insert the words 'in good faith' in section nine than we have to strike them out of sections three and four. Such a change would be so violent as to amount to framing a new section instead of interpreting what we find (also *per* Williams, J., in *Green* v. *Wood*, 7 Q. B. 179), When we notice the language of Harrison, C. J., in *Morrow* v. *Rourke*, wherein he says: "It is much safer for the Court to read the section as it finds it, leaving to the Legislature to amend the section, if the reading be not that which the Legislature intended," and then observe that the Legislature at once amended the Statute so as to operate against the construction put upon it by the Court, it then becomes evident that the Court did not give that reading to the section which it was intended by the Legislature it should have.

The last amending Statute, prior to the Revised Statutes of of Ontario, Cap. 119, was the Statute 40 Vic. Cap. 21. The provisions of this statute, as well as of 40 Vic. Cap. 8, sec. 29, are re-enacted in the Rev. Statutes of Ont. Chap. 119, so need not therefore here be given.

In issuing this book, I ask the indulgent criticism of my professional brethren. Since reperusing its pages I can see in repeated instances wherein my text could have been improved and my references perfected. I have avoided giving my own opinion, and confined myself, as much as possible, to annotating the opinions of others. The limited library at my command has

necessarily interfered with the extent of the work; though, at most, the Statutes are not such as admit of a very extensive annotation. The Imperial Statutes (17 & 18 Vic. Cap. 36, and 41 and 42 Vic. Chap. 31), differing so materially from our own, prevent the application to our law of many of the English authorities; but I have given such of the American authorities as I believed would be found useful.

I indulge the hope, amounting to confidence, that my efforts will prove of service, since that able jurist, the Honourable Vice-Chancellor Blake, with characteristic kindness, found time, amid his many calls of duty, to glance through the greater part of the proof. For the condescension, kind advice, and friendly counsel of such a person I am very grateful.

I am indebted to Alfred Passmore Poussette, Esq., of Peterborough, for the completeness of the index of subjects; and I here thank him for his kind and efficient assistance.

If I am to be so happy as to find the work esteemed worthy of a place on the library shelves of the profession, I shall have received my reward.

JOHN A. B.

LINDSAY, June, 1880.

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TABLE OF ABBREVIATIONS.

Abbreviation	Meaning
A. & E.	Adolphus and Ellis' Reports.
Ad. & E.	" " "
Ala	Alabama Reports.
Alb. L. J.	Albany Law Journal.
Allen	Allen, Massachusetts.
App. Cases	Law Reports, H. of L. and Jud. Com. N. S.
App. R.	Appeal Reports for Ontario.
Ark	Arkansas Reports.
Atk	Atkyn's Reports.
B. & A.	Barnewall and Adolphus' Reports.
B. & Ad.	" " " "
B. & Ald.	Barnewall and Alderson's.
Barb	Barbour's Reports, N. Y.
Barb. Ch.	Barbour's Chancery Reports, N. Y.
B & B.	Ball and Beatty's Reports.
B. & C.	Barnewall and Cresswell's Reports.
Beav	Beavan's Reports.
Benjamin	Benjamin on Sales. (1st Am. Ed.)
Bing	Bingham's Reports.
Bing. N. C.	" " New cases.
Bl. R.	Blackstone (Mr. Justice) Reports.
B. Monroe	Monroe B. Kentucky.
B. & P. or	
Bos. & Pull.	Bosanqnet and Pullen's Reports.
B & P. N. R.	" " " New Reports.
Bosw	Bosworth's Reports (N. Y.), Superior Court.
Brock	Brockenbrough's Reports. (4th Circuit U. S.)
B. & S.	Best & Smith.
Bulst	Bulstrode's Reports.
Burr	Burrows' Reports.
Cal	California Reports.
Camp	Campbell's Nisi Prius Reports.
C. B.	Common Bench.
C. B. N. S.	" " New Series.
Chan. Cham.	Chancery Chamber Reports.
Chit.	Chitty's Reports.
C. & J.	Crompton and Jervis Reports.
Clarke's Insol. Act.	Clarke's Insolvent Act, 1875.

Abbreviation	Meaning
Cl. & F.	Clarke and Finnelly's Reports.
C. L. J.	Canada Law Journal.
C. M. & R.	Crompton, Messon and Roscoe Reports.
Conn.	Connecticut Reports.
Con. Stat. U. C.	Consolidated Statutes of Upper Canada.
Cow	Cowper's Reports.
Cowp.	" "
Cowen.	Cowen New York.
Cox	Cox's Reports Chancery.
C. & P.	Carrington and Payne Reports.
Cush	Cushing, Massachusett's Reports.
De G. F. & J.	De Gex, Fisher and Jones' Reports.
De G. & J.	De Gex and Jones' Reports.
De G. M. & G.	De Gex, Macnaghton and Gordon.
Denio	Denio New York.
D. & L.	Dowling and Lownde.
Doug	Douglass' Reports.
Dow	Dow's Reports in Parliament.
Dowl	Dowling's Prac. Cases.
Dowl, N. S.	" " " New Series.
Dowl. P. C.	" " " "
Drap. K. B. Rep.	Draper's Reports King's Bench, U. C.
Drew	Drewry's Reports Chancery.
D. & R.	Dowling and Ryland.
Duer	Duer N. Y. Superior.
E. & App. R.	Error and Appeal Reports, Upper Canada.
East.	East's Reports.
E. & B.	Ellis and Blackburn.
E. B. & E.	Ellis, Blackburn and Ellis.
E. B. & S.	Ellis, Best and Smith.
Edm. Sel. Cases	Edmond Select Cases, N.Y.
E. D. Smith	Smith E. D., N. Y. C. P.
Edw.	Edwards Chancery, N. Y.
E. & E.	Ellis and Ellis.
Ell. & Bl.	Ellis and Blackburn.
Eq.	Equity Reports.
Eq. Ca. Ab.	Equity Cases Abridged.
Esp	Espinasse.
Ex	Exchequer.
Exch	"
Ex. D	Law Reports, Exchequer Division.
Exch. D	" " "
F. & F.	Foster and Finlayson's N. P. R.
Fla.	Florida Reports.
Fo. & Fin	Foster and Finlayson's N. P. R.
Ga.	Georgia Reports

Geo. ....George Miss. Reports.
Giff.................Giffard's Reports.
G. & J.............Glynn and Jameson Bankruptcy Reports.
Gr...................Grant's Chancery Reports U. C. and Ontario.
Grant.... .... " " " " "
Grant. E. & A......Error and Appeal Reports U. C. and Ontario.
Gray...............Gray Mass. Reports.
Green.... ....Green, New Jersey.

Hagg. Con..........Haggard's Consistory Reports.
Hare..............Hare's Reports (Chy).
Hawks. ....Hawke's Reports, N. C.
Hayes (Ir.).........Hayes' Reports Exch., Ireland.
H. & C.............Hurlstone and Coltman's Reports (Eq.)
Hilt.................Hilton's Reports, N. Y. C. P.
Hobart ....Hobart's Reports, K. B.
How.................Howard's Reports, U. S. Supreme Court.
Hump...............Humphrey's Reports, Tenn.
H. & N.............Hurlstone and Norman's Reports.
Hurlst. & Colt......Hurlstone and Coltman's Eq. Reports.

Ill............ .....Illinois Reports.
Ind.................Indiana "
Inst.................Coke's Inst.
Iowa................Iowa Reports.
Ir. Ch. R...........Irish Chancery Reports.
Ir. C. L. R......... " Common Law Reports.
Ir. Eq.............. " Equity Reports.

Jac. & Wal........Jacob and Walker's Reports.
Johns...............Johnson's Reports, N. Y.
Johnson........... " " "
Jur. N. S...........Jurist, New Series.

K. & J.............Kay and Johnstone's Reports.
Kay & J.......... " " "

La ....Louisiana Reports.
Leon................Leonard's "
L. J. Ch............Law Journal Chancery.
L. J. Ch. App...... " " Chancery Appeal.
L. J. C. P.......... " " Common Pleas.
L. J. Ex............ " " Exchequer.
L. J. Q. B.......... " " Queen's Bench.
L. J. U. C. N. S.... " " Upper Canada, New Series.
Lord Raym.........Lord Raymond's Reports.
L. R. Chy. D.......Law Reports, Chancery Division.
L. R. C. P.......... " " Common Pleas.
L. R. C. P. D...... " " " " Division.
L. R. Ex........... " " Exchequer.

Abbreviation	Meaning
L. R. Ex. D	" " " Division.
L. R. Eq	" " Equity.
L. R. Q. B	Law Reports, Queen's Bench.
L. R. Q. B. D	" " Division.
L. T	Law Times.
L. T. N. S	" " New Series.
M. & G	Manning and Granger.
Marsh	Marshall.
Mass	Massachusetts Reports.
Mau. & Sel	Maule and Selwyn's Reports.
Md	Maryland Reports.
M. D. & D	Montagu, Deacon & De Gex.
Md. Ch	Maddocks Chy. Reports.
Me	Maine Reports.
Met	Metcalfe's "
Mich	Michigan "
Miss	Missouri "
Miss	Mississippi "
Mo	Missouri "
Moo	Moore's "
Moore C. P	Moore's Common Pleas Reports.
Moore P. C	" Privy Council Cases.
Moore Q. B	Sir F. Moore's Reports.
Mood	Moody's Chy. Cases
Moore, J. B	J. B. Moore's Reports C. P.
Morris	Morris' Iowa Reports.
M. & Rob	Moody and Robinson's Reports.
M. & S	Maule and Selwyn's "
M. & W	Meeson and Welsby's "
McLean	McLean's Reports (U. S. 7th Circuit).
N. C	Bingham's New Cases.
N. C	North Carolina Reports.
N. Chip	N. Chipman's Reports. Vermont.
N. J. Eq	New Jersey Equity Reports.
N. H	New Hampshire Reports.
N. R	New Reports, Bosanquet and Pullen.
N. Y	New York Reports.
Ohio	Ohio Reports.
Ohio St	Ohio State Reports.
O. S	Old Series, Upper Canada.
Page or Paige.	Paige Reports, N. Y. Chancery.
Peakes N. P. C	Peakes' N. P. cases.
Penn	Pennsylvania Reports.
Pet	Peters' Reports, N. S.

Pick ....Pickering's Reports, Mass.
Prac. Rep......... ..Practice Reports, U. C. and Ontario.
" R............ " " " "
Price................Price's Reports (Exch).
P. Wms..............Peere Williams' Reports.
P. W.............. " " " .

Q. B................Adolphus and Ellis, Q. B. Reports, N. S.
Q. B. D............Law Reports, Queen's Bench Division.

Raym..................Raymond (Lord).
Rawle............. ..Rawle's Pennsylvania Reports.
R. S. O.............Revised Statutes of Ontario.
Rev. Stat. O........ " " "
Rich. Eq............Richardson's Equity, S. Carolina.
Rob. N. Y..........Robertson's N. Y. Sup. Court Reports.
Roll...................Roll of the Term.

Sand. Ch...............Sandford Chancery, N. Y.
Saund..............Saunders.
Scott................Scott's Reports.
Scott N. R..............Scott's New Reports.
Sim..................Simon's Reports.
Sm. & G............Small and Gifford's Reports.
Sm. L. Cases........Smith's Leading Cases.
Storey ....Storey U. S. (1st Circuit).
Stra...................Strange's Reports.
Strobb...............Stobbarts Law South Carolina.
Swans...............Swanston Reports.

Taunt...............Taunton's Reports.
T. & C...............Thompson ar ook, N. Y. Superior Court
Tex..... ....Texas Repc..s.
Tex. R. Ct. App.... " " Court of Appeal.
T.R.................Term Reports.

U. C. L. J..........Upper Canada Law Journal.
U. C. L. J.,N. S..... " " " " New Series.
U. C. C. P........ " " Common Pleas.
U. C. Q. B. .... " " Queen's Bench.
U. C. R............ " " Queen's Bench.

Vern..... ....Vernon's Reports.
Ves.................Vesey's Senior Reports.
Ves. Jun............Vesey's Junior Reports.
Vt...................Vermont Reports.

Wend..............Wendell's Reports, N. Y.
Wendell............ " " "
Whart. Law Lex....Wharton's Law Lexicon.

Wh. & T. Lg. Cas. . . White and Tudor's Leading Cases.
Wis. . . . . Wisconsin Reports.
W. Bl. . . . . William Blackstone's Reports.
Willes. . . . . Willes' Reports.
W. R. . . . . Weekly Reporter.
W. & S. . . . . Walls and Sargent's Reports, Penn.

Yelv. . . . . Yelverton's Reports.
Yerg. . . . . Yerge, Tennessee.
Y. & J. . . . . Younge and Jervis.
Younge & Coll. . . . . . Younge and Collyer.
Younge. . . . . Younge's Reports.

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INTRODUCTION.

A Bill of Sale, What it is.

A Bill of Sale is an instrument in writing: generally, but not necessarily, under hand and seal, whereby one man transfers to another the property he has in goods and chattels (Beaumont on Bills of Sale, 1), and is properly a bill to denote a sale, (*per* Parke, B., *Simpson* v. *Wood*, 21 L. J. (Ex.) 153.)

Personal Chattels, how transferred.

The property in personal chattels, may be transferred either by a mere contract of sale, or by a writing.

29, Ch. II, c. 3, 9 Geo. IV. c. 14.

When the property in goods is transferred by virtue of a mere contract of sale, the law, appertaining thereto, is to be found in the Statutes 29, Ch. II, c. 3, s. 17, and 9 Geo. IV., c. 14, s. 7 (Lord Tenterden's Act).

Sales, over £10

Under these Statutes, in order to make valid sales of personalty, of and exceeding £10 in value, one of three alternatives must exist. There must be—

(1) Acceptance and actual receipt; or,

(2) The passing of something to bind the bargain, or by way of part payment; or,

(3) A note in writing of the bargain, signed by the party to be charged, or his agent lawfully authorized (Millar's Bills of Sale, 9).

In a handibook, such as it is hoped this will be, it would be foreign to the subject to engage in a

dissertation upon these Statutes; but, as pointed out in Millar's Bills of Sale, it is opportune heró to remind the reader, that under the third alternative, in order to satisfy the word "bargain" the names of both parties must appear in the memorandum (*Vandenbergh* v. *Spooner*, L. R. 1 Ex. 316; *Cooper* v. *Smith*, 15 East, 103), although, only the signature of the party to be charged is necessary; and the price for which the goods are sold should also be stated (*Elmore* v. *Kingscote*, 5 B. & C. 583; *Hoadley* v. *M'Laine*, 10 Bing. 482).

Familiarity with the former Statute will, nevertheless, be found useful in its application to property; for it affords a guide as to property, the subject matter or not, of a Chattel Mortgage or Bill of Sale. (See *Evans* v. *Roberts*, 5 B. & C. 829; *Parker* v. *Staniland*, 11 East, 362; *Warwick* v. *Bruce*, 2 M. & S. 205; Wms. Saunders, vol. 1, 277 c; *Sainsbury* v. *Matthews*, 4 M. & W. 343; *Smith* v. *Surman*, 9 B. & C. 561; *Jones* v. *Flint*, 10 Ad. & El. 753; *Carrington* v. *Roots*, 2 M. & W. 248; *Rodwell* v. *Phillips*, 9 M. & W. 505, see post sec. 1, note (c).

The law, applicable to absolute and conditional sales, will, to a great extent, be found embodied in the law relating to the latter, so in the following pages, though it may appear that the difference is lost sight of; a reference to absolute transfers, when necessary, will not be omitted.

Origin of Mortgaging.

The Jews are said, by some, to have originated the notion of mortgaging and redemption (Cunœus 11, 12, 13, 14, Ancient Univers. History, vol. 2, 130, 131; Bacon's Abr. Tit. Mortgage), and to have transmitted it to the Greeks and Romans (Herman on Mortgages, p. 23).

The Jewish system was planned with the view of keeping their lands in the same tribes and families. With this object, the Jewish law did not permit a transfer of any interest in lands, for a period longer than until the then next general Jubilee. This Jubilee occurred once in every fifty years, and, when it arrived, a general restoration of property to the original owners took place. According to the time, preceding the next Jubilee, that the alienation happened, so was the extent of the interest in the land, as to time, that could be transferred to the buyer.

Jewish system

The vendor had, however, at any period, the right of redemption, upon payment of the value of the lands, from the date of redemption to the next approaching Jubilee, upon the arrival of which, if not in the meantime redeemed, the lands reverted, released from the debt, to the vendor and his heirs (Powell on Mortages, 4th Ed., pp. 1, 2).

Right of Redemption.

Mortgaging, as practised in modern times, seems to owe its introduction to the Civil Law, and the following description from the Roman law, is applicable to a mortgage of chattels—"*Si a te comparavit* "*is, cujus meministi, et convenit, ut si intra certum* "*tempus soluta fuerit data quantitas, fit res in-* "*empta, remitti hanc conventionem rescripto nostro* "*non jure petis. Sed si se subtrahat, ut jure do-* "*minii eandem rem retineat: Denunciationis et* "*obsignationis depositionisque remedio contra* "*fraudem potes jure tuo consulere.*" (Cod. l. 4, t. 54, s. 7.)

Modern system introduced by Civil law.

The word Chattel-Mortgage is a compound word, formed of the two words Chattel and Mortgage (Herman on Mortgages 1).

Derivation of "Chattel-Mortgage."

Definition of Chattel.

In general, 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. (Whart. Law Lex.)

Two classes.

Chattels—Real.

Chattels Real are those which 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 (1 Inst. 118).

An Estate for years is a Chattel Real. It is an interest in land, and is known generally as a term.

Chattels—Real not within the Act.

Chattels Real, not being, in their nature, movable, capable of delivery from hand to hand, are not the subject of a Chattel Mortgage under our Statutes (*Frazer* v. *Lazier*, 9 U. C. Q. B. 679).

Chattels—Personal.

Chattels Personal may be defined as those things which belong immediately to the person of the owner, and for which, if they are injuriously withheld from him, the owner has no other remedy than by a personal action. (Whart. Law Lex.)

Chattels Personal, therefore, are divisible into two classes. (1) They consist, in part, of things, which exist only in contemplation of law; things of which a person has not the possession, or actual enjoyment, but only a right to, or a right to demand by action; as for instance, a right to recover money due on a contract—a chose in action. (2) They consist of movable things only, as belonging immediately to the person and which can only be delivered over from hand to hand, such as books, wares and merchandize. (Whart. Law Lex. 577; Herman on Mortgages, 3.)

Definition of Chattel within the Act.

The Chattel Mortgage Acts apply to Chattels Per-

sonal within the latter definition (*Frazer* v. *Lazier*, 9 U. C. Q. B. 679); and for definition of the words "Goods and Chattels" as used in Revd. Stat. O., cap. 119, s. 1, see post sec. 1, note (c).

Derivation of word Mortgage.

The word Mortgage is derived from the two French words "mort," meaning dead, and "gage," meaning pledge (Wharton's Law Lexicon, 2nd Ed.). According to Littleton, Coke and others, a mortgage is called a dead pledge because, in case of nonpayment of the debt, at the time limited, the land was for ever dead, and gone from the mortgagor; and, in case of payment, it became dead as to the mortgagee (Worcester's Dict. 933; Beam's Glanville 252).

Distinction between Pledge and Mortgage.

A Pledge is not so comprehensive as a Mortgage, while a mortgage is a pledge and more. In the case of a mortgage, the mortgagee has, after the condition is forfeited, an absolute interest in the property mortgaged. In the case of a pledge, the pawnee or pledgee has but a special property in the goods, the right to detain them for his security, until the payment of a certain sum, by express stipulation (Story's Equity Jurisprudence, § 1030; *Ratcliff* v. *Davis*, 1, Bulst. 29, Yelv. 179). The goods must too, of necessity, be and continue in the possession of the pawnee or his agent (*Ryall* v. *Rowles*, 1 Ves. 348; *Reeves* v. *Capper*, 5 Bing. N. C. 136); and at the time the obligation is contracted, the goods must be delivered over to the pawnee (Year Book, 5 Hen. 7, fol. 1; *Rosse* v. *Bramstede*, 2 Roll. 438; see also *Tucker* v. *Wilson*, 1 P. Wms. 261; *Lockwood* v. *Ewer*, 2 Atk. 303; *Kemp* v. *Westbrook*, 1 Ves. 279; Story on Bailments, § 310; *Franklin* v. *Neate*, 13 M. & W. 481).

To a pledge no writing necessary; a deed improper

In making a pawn or pledge, delivery of the chattels is all that is re-

quired, a deed or writing being unnecessary and a deed improper (Millar's Bills of Sale; see further 2 Vez. Jun. 378, for a distinction between a mortgage and a pledge).

Mortgage, definition of.

A Mortgage is a contract entered into between parties, of whom one is the mortgagor and the other the mortgagee, 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, and that the mortgagor, in the meantime, and, until default, is to have possesion and the use of the goods and chattels sold, assigned and transferred. (See more fully post Revd. Stat. O., cap. 119, sec. 1, note (a).

Mortgage, properly by deed.

Unlike a pledge, a Mortgage, being a conveyance upon a condition, should properly be made by deed, though this is not absolutely necessary, and it may even be made without writing (*Flory* v. *Denny*, 7 Ex. 581, 21 L. J. (Ex.) 223; *Halpenny* v. *Pennock*, 33 U. C. R. 229; *Paterson* v. *Maughan*, 39 U. C. R. 379).

Valid, without deed.

A Mortgage, made without deed, may be valid, although no transfer of possession of the chattel mortgaged has taken place (*Maughan* v. *Sharpe*, 17 C. B. N. S. 443; 34 L. J. C. P. 19; 11 Jur. N. S. 989).

Object of writing.

The only utility of a writing, not under seal, being, to prove, with precision and accuracy, the nature of the interest intended to be passed (*per* Tindall, C.J., *Reeves* v. *Capper*, 5 Bing. N. C. 139).

Verbal Mortgage, when good.

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 in an office selected for that purpose (see post Revd. Stat. O., cap. 119, sec. 1, note (a).

No particular form necessary

Although a writing is necessary to constitute a valid Mortgage as against others than the immediate parties, no particular form of conveyance is requisite, so long as the formalities of the Chattel Mortgage Acts are complied with.

An instrument absolute may be conditional.

Though, on the face of the instrument, it be an absolute Bill of Sale, it may yet be shewn to be conditional ; but, only when originally it was intended as a security; for unless, in its inception, it was in reality a conditional conveyance, a subsequent act cannot alter its character (Millar's Bills of Sale, 23; *Lund* v. *Lund*, 1 N. H. 33; *Holmes* v. *Grant*, 8 Paige 243; *Swetland* v. *Swetland*, 3 Mich. 482); and when originally the conveyance was intended as a conditional assignment, it will be so treated, even though the parties, may have subsequently agreed that the property shall not be redeemable, or that the right of redemption shall be confined to a particular time, or to a particular class of persons (*Dixon* v. *Parker*, 2 Ves. 225; *Dougherty* v. *McCrady*, 6 G. & J. 275; Herman on Mortgages, p. 40, cases there cited).

Will be conditional, when.

Power of Redemption incident to every mortgage.

Incident to every Mortgage is the power of redemption, and every transaction, that resolves itself into a security, is a Mortgage. And so inseparable to every mortgage transaction is the power of redeeming, that no act of the mortgagor, however formal, performed at the outset of the transaction will

be allowed to bar a mortgagor in exercising the power of redemption or of transferring it to another. This is an exception to the rule "*Quilibet potest renunciare juri pro se introducto*" (2 Inst. 183). But the mortgagor may at a 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.

Parol evidence to show nature of instrument.

An instrument, absolute upon its face, may yet be shewn to be a conditional conveyance, and parol evidence will be received to shew what was the intention of the parties: and all the circumstances, in connection with the instrument, will be looked at in determining this. Parol evidence will be received, not that the instrument may thereby be contradicted, but for the purpose of raising an equity paramount to its terms. (*Le Targe* v. *De Tuyll*, 3 Gr. 369; *Holmes* v. *Matthews*, 3 Gr. 379; *Dabney* v. *Green*, 4 H. & N. 101; *Parks* v. *Hall*, 8 Pick. 206; *Tyler* v. *Strange*, 21 Barb. 198; *Walker* v. *Walker*, 2 Atk. 99; *Dixon* v. *Parker*, 2 Ves. 225; *Young* v. *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).

Conditional Sale.

Wherever there is a conditional sale, there exists an equity to redeem; and for the reason that, wheresoever a person has the opportunity of redeeming, the ends of justice are most apt to be attained, and fraud and oppression prevented, the Courts will generally treat a doubtful instrument as a Mortgage (*Perry* v. *Medocraft*, 4 Beav. 197; *Williams* v. *Owens*, 10 Sim. 368).

Courts favour redemption.

Mortgagee's reciprocal remedy.

But, though the Courts favour redemption, a mortgagee has his reciprocal remedy. It seldom happens in practice, that a mortgagee of personal chattels, seeks the assistance of the Court of Chancery, by foreclosure, yet such a course is open to him. Foreclosure is the converse of redemption, and, by it, a mortgagee may acquire an absolute title in the property mortgaged, in default of payment of the amount of the mortgage money, interest and costs (*Cook* v. *Flood*, 5 Gr. 463; *Slade* v. *Rigg*, 3 Hare, 35; *Wayne* v. *Hanham*, 9 Hare, 62; *Lonquet* v. *Scawen*, 1 Ves. 453). It was, however, at one time questioned whether a mortgagee was entitled to any other relief than a sale of the property and payment of the debt and costs (*Dyson* v. *Morris*, 1 Hare, 422; *Kemp* v. *Westbrook*, Belt's suppl. to Ves. Sen. 121; from Millar's Bills of Sale, p. 24).

Foreclosure a remedy.

Parties to Bills of Sale and Mortgages.

Sheppard in his "Touchstone" (Atherly's Edition, p. 241; Perkin's "Grant," § 90), 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.

13 Eliz. c. 5, 27 Eliz. c. 4.

The Statutes of Elizabeth (13 Eliz. c. 5, and 27 Eliz. c. 4), the former of which was made for the protection of creditors, the latter in favour of purchasers, declare all conveyances and dispositions of property, real or personal, made with the intention

of defrauding creditors and purchasers, to be null and void as against them.

These Statutes it has been observed (*per* Lord Brougham in *Rickards* v. *Atty.-General*, 12 Cl. & F. 44; and see *Ryall* v. *Rolle*, 1 Atk. 178; *Barton* v. *Vanheythuysen*, 11 Hare, 126, 132; Co. Lit. 76 a, 290 b; 3 Rep. 82 b,) merely declare what previously was the common law of the land. Lord Mansfield, in commenting on the Statute (13 Eliz. c. 5) in *Cadogan* v. *Kennett*, 2 Cowp. 434, is stated to have said "That the principles and rules of the Common Law, as now universally known and understood, are so strong against fraud in every shape, that the Common Law would have attained every object proposed by the Statutes 13 and 27 Eliz., * * * * so, if a man know of a judgment and execution, and, with a view to defeat it, purchase the debtor's goods, it is void because the purpose is iniquitous."

Cadogan v. Kennett.

In the last sentence is enunciated the rule at Common Law, which, at all events, is more expressly laid down, and clearly defined, by the Statutes of Elizabeth than prior thereto, when it was so general, as to be vague and difficult of application (May on Fraudulent Alienations of Property, p. 3).

These Statutes, then, appear to render assistance in ascertaining who may give or take a Bill of Sale or Chattel Mortgage.

Who may invalidate a Mortgage.

See post.

Whosoever hath a former right, title, interest, or demand, may avoid a sale or mortgage subsequently made by fraud. Hence "where a man having judgment for his debt against another, and between the judgment and execution the debtor gives, sells, or mortgages his goods to another by fraud, the judgment creditor may have execution of such goods

(Shep. on Deeds, 186), and the fact that the transaction was one for valuable consideration will avail him nothing, if it was entered into to defeat and delay his creditor. Lord Mansfield in *Cadogan* v. *Kennett*, 2 Cowp. 434, said, "If the transaction be not *bona fide*, the circumstance of its being done for valuable consideration will not alone take it out of the Statute. I have known several instances where persons having given a fair and full price for goods, and where the possession was actually changed, yet being done for the purpose of defeating creditors, the transaction has been held fraudulent and void."

Intent to defraud.

No one, then, with intent to defraud, can give or take a Bill of Sale or Chattel Mortgage, and the fact of there being a valuable consideration, if fraud exists, will not avail the deed.

When execution bound goods at Common Law.

At Common Law a debtor was permitted to dispose of his goods until the writ of execution was issued; but all writs were supposed to relate, and have reference back to the first day of the preceding term, the result of which was that any alienation of goods made prior to the issue of a writ of *fi. fa.*, but subsequent to the first day of the term preceding would have been declared void. By virtue of the 16th section of the Statute of Frauds this injustice was remedied and writs of execution were made to bind "the property of the party against whom such writ of execution was sued forth from the time that such writ shall be delivered to the Sheriff, Under-Sheriff or Coroner to be executed;" therefore such a debtor cannot now give a Bill of Sale or Chattel Mortgage on his goods and effects subsequent to the date of the delivery of a writ to the Sheriff, so that the conveyance shall operate upon the goods in preference to the execution.

29 Car. II. c. 3, s. 16.

When *Fi. fa.* now binds goods, as against Mortgages.

Not applicable to Division Courts.

This provision, however, only applies to writs issued out of the Superior or County Courts, and not to writs issued out of "Division Courts," which are "inferior Courts, having only a statutory existence, and whose officers have only the powers expressly given them by Statute." Sheriffs derive their power from the Common Law, Division Court Bailiffs from Statutory enactment. While the Statute (29 Car. II., cap. 3, s. 16) establishes the time, from whence a Superior or County Court writ binds goods, there is nothing in the Statute or at Common Law, which makes a Division Court execution bind goods except from seizure. In *Culloden* v. *McDowell*, 17 U. C. R., 359, Robinson, C.J., in his judgment, says the writ "could not bind the property before it came into the Bailiff's hands, if, indeed it could before an actual seizure was made under it, for it is not to be assumed that an execution from an inferior Court, binds from the time of delivery to the Bailiff."

Culloden v. *McDowell*.

Priority, between Mortgages and Division Court Executions.

It is the generally received opinion that a Division Court execution binds goods only from actual seizure; therefore a chattel mortgage made for good consideration, and in good faith, to an innocent mortgagee, will retain the property as against writs previously delivered to a Division Court Bailiff, but under which no seizure has been made until subsequent to the execution of the mortgage.

Mortgage valid, while goods under levy.

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

When Trader cannot give valid Mortgage.

If a debtor be a trader within the meaning of the Insolvent laws, he cannot make a valid Bill of Sale

or Chattel Mortgage of all or the main part of his goods and effects to secure a pre-existing debt, without first obtaining the consent of his creditors, or satisfying their claim (Insolvent Act of 1875, s. 3, ss. *j*; *Kalus* v. *Hergert*, 1 App. R. 75; *McEdwards* v *Palmer*, 28 U. C. C. P. 132).

It must be taken, that every person intends that which is the necessary consequence of his own act; and if a trader makes a Chattel Mortgage or Bill of Sale which to the knowledge of the creditor necessarily has the effect of defeating or delaying his creditors, he must be taken to have made the deed with that intent, and the deed in consequence will generally be adjudged fraudulent (*Jenkyn* v. *Vaughan*, 3 Drew. 419; 2 Jur. N. S. 109; 25 L. J. Ch. 338; *Freeman* v. *Pope*, L. R., 5 Ch., App. 541; *per* Jervis, C. J., in *Graham* v. *Chapman*, 21 L. J. 172, C. P.; *Crawford* v. *Meldrum*, 3 Grant, E. & A., 101).

Present equivalent.

When a trader "gets a present equivalent for his goods," and the sale is strictly in the course of his business, a Bill of Sale or Mortgage on the whole of his stock to a *bonâ fide* purchaser or mortgagee will not necessarily be invalid, though creditors may be ultimately delayed or defeated in their claims; but because a pre-existing debt is not a present equivalent, a mortgage to secure such on all the debtor's effects, having the effect of delaying and hindering creditors, is a fraudulent transfer, with intent to effect that object.

Per se, Act of Bankruptcy.

Such a mortgage constitutes of itself an act of bankruptcy (Insolvent Act of 1875, s. 3; *Woodhouse* v. *Murray*, L. R. 2 Q. B. 634, 4 Q. B. 27; *Ex parte Foxley, Re Nurse*, L. R. 3 Ch. App. 515; *Siebert* v. *Spooner*, 1 M. & W. 714; *Wilson* v. *Day*, 2 Burr.

827; *In re Wood*, L. R. 7 Ch. 302). "The principles upon which such a conveyance is declared to be an act of bankruptcy are, first, because the debtor necessarily deprives himself of the power of carrying on his trade, and, secondly because it is an attempt to make a distribution of his effects different from what the Bankrupt laws direct; and, if it is made to creditors as security for a pre-existing debt, then it is fraudulent and void, for the further reason that such a conveyance must either be fraudulently kept secret or produce an immediate bankruptcy" (Edgar & Chrysler's Insolvent Act of 1875, p. 48, and cases there cited, viz., *Dutton* v. *Morrison*, 17 Ves. 193; *Worsley* v. *Demattos*, 1 Burr. 481; *Linden* v. *Sharpe*, 6 M. & G. 895; *Ex parte Scudamore*, 3 Ves. 84; and see *Simpson* v. *Sikes*, 6 M. & S. 312; *Wedge* v. *Newbyn*, 4 B. & Ad. 831; *Smith* v. *Cannan*, 2 E. & B. 35, 290).

Such a conveyance will none the less be an act of bankruptcy, because it is executed by the debtor, under arrest at the suit of the particular creditor (*Newton* v. *Chantler*, 7 East, 138; but see *Jones* v. *Harber*, 6 Q. B. 77); or is intended not to operate as an act of bankruptcy (*Botcherby* v. *Lancaster*, 1 Ad. & El. 77).

Qualification of Doctrine.

But though the doctrine is established "that while an assignment of the whole of a debtor's estate to secure a pre-existing debt cannot stand, whatever may have been the motives that led to it" (*Sierbert* v. *Spooner*, 1 M. & W. 714; *Newton* v. *Chantler*, 7 East, 138; *Wilson* v. *Day*, 2 Burr. 827; *Smith* v. *Cannan*, 2 E. & B. 35; *Woodhouse* v. *Murray*, L. R. 2 Q. B. 635, 4 Q. B. 27; *Re Lillburne*, 12 L. T. N. S. 209; *Young* v. *Fletcher*, 3 H. & C. 732;

Ex parte Bailey, 3 DeG. M. & G. 534; *Ex parte Bland*, 6 DeG. M. & G. 757; *Philps* v. *Hornstedt*, L. R. 1 Ex. D. 62), a similar assignment is valid where a further advance is made, and there is a *bona fide* intention and expectation, that thereby the business of the debtor will be carried on" (Moss, J. A., *Kalus* v. *Hergert*, 1 App. R. 78; see *Bittlestone* v. *Cook*, 6 E. & B. 296; *Meggot* v. *Mills*, Lord Raym. 286; *Kidd* v. *Rawlinson*, 2 Bos. & Pull. 59; *Martindale* v. *Booth*, 3 B. & Ad. 504; *Ex parte Fisher*, L. R. 7 Chy. App. 636; *Ex parte King*, L. R. 2 Ch. D. 256; *Lomax* v. *Buxton*, L. R. 6 C. P. 107), although the advance be made for the purpose of paying off a pre-existing debt (*Hutton* v. *Cruttwell*, 1 Ell. & Bl 20; 22 L. J., 78 Q. B.; *Lomax* v. *Buxton*, *supra*).

The advance must be a substantial one.

The fresh advance must, however, be a substantial advance. As a matter of law the smallness of the amount of the advance does not make the assignment an act of bankruptcy, but it must be such an advance as not merely to give colour to a security which, in reality, is made only for the purpose of securing a pre-existing debt. And a mere nominal exception from the debtor's property is a sign and mark of fraud (see *Twyne's case*, 1 Sm. L. Cases), and will not prevent the application of the rule that an assignment of all a debtor's property in security for a pre-existing debt is an act of bankruptcy.

Exception from property must be substantial.

As the advance necessary to take an assignment out of the rule, must be substantial, so also must the exception of part of the property be one of such a substantial part, as will not prevent the debtor carrying on his business in the ordinary and usual course. If an assignment includes all the property, and is made in consideration of a past debt and of a

a further advance made at the time, the further advance, if substantial, has the same effect as a substantial exception out of the property, and a substantial exception out of the property has the same effect as a substantial advance (*Ex parte Hawker, In re Keely*, L. R. 7 Ch. 214; *Ex parte King, In re King*, L. R. 2 Ch. D. 256; *Ex parte Trevor, In re Burghardt*, L. R. 1 Ch. D. 297; *Ex parte Foxley, In re Nurse*, L. R. 3 Ch. 515; *Carr* v. *Burdis*, 4 L. J. 60 Ex.; *Cook* v. *Pritchard*, 12 L. J. 121 C. P.; *Brown* v. *Kempton*, 19 L. J. 169 C. P.). But, even though there be made a substantial advance, at the time of the assignment, it will avail nothing as against the above rule, unless there be a *bona fide* intention, with such advance, to carry on the debtor's business (*Ex parte Winder, In re Winstanley*, L. R. 1 Ch. D. 290; *Ex parte King, In re King*, L. R. 2 Ch. D. 256; *Ex parte Fisher*, L. R. 7 Ch. 636; *Newton* v. *Ont. Bank*, 15 Gr. 283; *Risk* v. *Sleeman*, 21 Gr. 250; *In re Ash*, L. R. 7 Ch. 636). "The crucial test is the existence of a *bona fide* intention to carry on the business" (Moss, J. A., *Kalus* v. *Hergert*, 1 App. R. 79).

Intention to carry on business, to be *bona fide*.

Assignment and advance, need not be contemporaneous.

It is not obligatory that the assignment be made contemporaneously with the advance. If executed in good faith, by the debtor at a subsequent date, in pursuance of a prior agreement entered into at the time the advances were made, the assignment will not necessarily be treated as an act of bankruptcy, and therefore void (*Ex parte Izard, In re Cook*, L. R. 9 Ch. 271; *Mercer* v. *Peterson*, L. R. 2 Ex. 304; 3 Ex. (Ex. Ch.) 105; *Allan* v. *Clarkson*, 17 Gr. 570; Griffith & Holmes on Bankruptcy, p. 1097; *Hutton* v. *Cruttwell*, 22 L. J. 78 Q. B.), and an assignment of sub-

stantially the whole of a mortgagor's property to secure a previously existing debt, and further advances will not in itself constitute an act of bankruptcy, if there is a contemporaneous parol agreement on the part of the mortgagee to make further advances to a substantial amount, and such advances are after wards in fact made (*Ex parte Winder, In re Winstanley*, L. R. 1 Ch. D. 290).

Contemporaneous parol agreement.

But where there is no stipulation for further advances, if the mortgagee afterwards voluntarily make them, he cannot, thereby, be permitted to claim the assignment as valid (*Pennell* v. *Reynolds*, 11 C. B. N. S. 709; *Ex parte Foxley*, Law Rep. 3 Ch. 515).

Voluntary advance where no agreement.

It may not be out of place here to notice that a mortgage of the whole of a mortgagor's property, given by way of renewal of a former one given to secure advances, but not registered, is, if no fresh advance be made by the mortgagee, an act of bankruptcy and void though duly registered (*Ex parte Stevens, In re Stevens*, 20 Eq. 786; see also *Ex parte Cohen, In re Sparks*, L. R. 7 Ch. 20).

Ex parte Stevens.

Conveyances by an infant are generally voidable by him, or his heirs, either before or if not ratified, on attaining majority (*Gilchrist* v. *Ramsay*, 27 U. C. Q. B. 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), therefore, although an infant may be a party to a Bill of Sale or Chattel Mortgage, he is at liberty to avoid the same either prior to or if not ratified, after he reaches the age of twenty-one years. But an infant cannot avoid a contract, and at the same time affirm it; "When, therefore, an infant bought a horse, and gave back a

Conveyances by an Infant.

Infant cannot both avoid and affirm a contract.

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" by virtue of the mortgage (*Grace* v. *Whitehead*, 7 Gr. 591; see *Featherstone* v. *McDonell*, 15 U. C. C. P. 162; *Heath* v. *West*, 28 N. H. 101; Herman on Mortgages, p. 478, cases there cited). If an infant is of sufficient discretion to be capable of committing a fraud, he will be affected by it; therefore, if an infant misrepresents his age, and thus induces another to take a conveyance or mortgage from him, he will not be permitted to afterwards dispute the fact, upon the faith of which, that other took the mortgage or conveyance (*Leary* v. *Rose*, 10 Gr. 346; *Watts* v. *Cresswell*, 2 Eq. Ca. Ab. 515,) and a Bill of Sale or Mortgage from an infant, may be upheld, and the infant bound by it, where it is given in payment of or to secure payment for necessaries supplied to such infant.

Mortgage by one of a Partnership.

If a blind or illiterate person desire to have 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. "If the party that is to seal it be a blind or an illiterate man, and desire to hear it read, it must be so read, for, if such man be to seal a deed, and he desire to hear it, or to hear the contents of it read or declared to him first, and it be not done, and he afterwards seal and deliver it, this is no good deed" (Shep. Touch, 56, see *Owens* v. *Thomas*, 6 U. C. C. P. 383; *Bennett* v. *Wade*, 2 Atk. 327). A blind or illiterate man cannot, therefore, be bound by an instrument, not read over and explained to him, which he has improvidently signed, but which he has requested to have read over, before signing.

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 (Lindley on Partnership, *Cameron* v. *Stephenson*, 12 U. C. C. P. 389). As a Chattel Mortgage need not be under seal (see post sec. 1, R. S. O., note (b) 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 (*Paterson* v. *Maughan*, 39 U. C. Q. B. 37; *Halpenny* v. *Pennock*, 33 U. C. R. 229; *Cooley* v. *Hobart*, 8 Iowa, 358). And, because a Chattel Mortgage is valid without a seal (*Paterson* v. *Maughan*, *supra*, *Halpenny* v. *Pennock*, *supra*), the addition by a mortgagor (one of a partnership) of a seal does not vitiate it (*Milton* v. *Mosher*, 7 Met. 244).

Mortgage, by a blind or illiterate person.

Seal, unnecessary.

Seal, addition of, will not vitiate a Mortgage by one of several partners.

It is not customary in practice to insert recitals, where the security is given for a pre-existing debt; but, in all cases, they are useful, as indicating the purposes for which the Mortgage is given. The accurate conveyancer will always recite the fact of the pre-existing debt, and also the fact of the creditor requiring security, and that the instrument is executed for the purpose of carrying out the intention of the parties.

Recitals.

In some instruments, executed under the Chattel

Revd. Stat. O. cap. 119, s. 6.

Mortgage Acts (Revd. Stat. Ont., cap. 119, s. 6, post), it is absolutely necessary to their validity, 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.

Recital, object of.

Recitals are inserted to show what the consideration is, and, upon the genuineness of the consideration, depends the validity of the instrument.

Variance between Recitals and consideration.

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.

Recitals, object of.

The object which the Statute has in view, by the insertion of 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 the notes or other instruments which it is intended to secure, with reasonable certainty, and if, to an adequate description, the recital contains that, which is inapt and erroneous, the latter will not thereby invalidate the former (*quicquid demonstratæ rei additur satis demonstratæ frustra est*).

Real character of debt necessary to be recited.

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 (see also post sec. 6, Rev. S. O., cap. 119).

A voluntary consideration will not, of itself, make a deed void (*per* Wood, V.C., *Holmes* v. *Penny*, 3 K. & J. 90; see also *Thompson* v. *Webster*, 4 Drew. 628; H. of L., 7 Jur. N. S. 531). 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. Lord Hardwicke (in *Walker* v. *Burrowes*, 1 Atk. 94) says, "he had hardly known one case of a voluntary settlement, where, the person making it, was indebted at the time, that had not been deemed fraudulent." Natural love and affection, not being a valuable consideration, will not suffice to support a Bill of Sale against creditors (*Matthews* v. *Feaver*, 1 Cox, 280). 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.

Voluntary consideration.

When deemed fraudulent.

Natural love and affection.

In *Peacock* v. *Monk*, 1 Ves. 128, Lord Hardwicke in his judgment says: "where any consideration is mentioned, as of love and affection only, if it is not also said 'and for other considerations' you cannot enter into the proof of any other; the reason is because it would be contrary to the deed, for when the deed says it is in consideration of such a particular thing, that imports the whole consideration and is negative to any other." But notwithstanding this sound reasoning, in *Gale* v. *Williamson*, 8 M. & W. 405, wherein the facts were that a father, by deed, assigned to his son, "in consideration of natural love and affection" his dwelling house and all his personal estate, and the son brought an action against the Sheriff, for levying on goods, part of such estate, under a *fi. fa.* against the father, the Court of Exchequer decided that it was competent to the plaintiff

Gale v. *Williamson*.

to prove that by a bond, bearing even date with the deed of assignment, he bound himself to maintain his father's wife and children; and that the jury having found that it was a part of the same transaction, and that the assignment was *bona fide*, it was not void against creditors under the Statute, 13 Eliz. c. 5.

Consideration of natural love, &c., *prima facie* fraud.

Alderson, B., in that case, said "The rule of law is, that a deed made merely in consideration of natural love and affection *prima facie* imports fraud, that alone shows, not *conclusively*, but only *presumptively*, that it is fraudulent. It follows, therefore, that evidence may be adduced to show that no fraud was in fact intended. This is not a case in which the parties to a deed are contesting some right arising out of the deed; the question is, whether there was in the transaction in question an intention to defeat or delay creditors. Under such circumstances surely it is reasonable that the party should be allowed to show, by a bond of even date with the assignment to which the fraudulent purpose is ascribed, that it was made, not voluntarily with intent to delay creditors, but in truth as a consideration for the support of his father's family." (See *Mulholland* v. *Williamson*, 12 Gr. 91.)

13 Eliz. cap. 5.

The Courts in construing the Statute of Elizabeth (13 Eliz. cap. 5) have held it to include deeds made without consideration, as being *prima facie* fraudulent, because necessarily tending to delay creditors; and for the reason that conveyances made on voluntary considerations are presumed to be fraudulent, extrinsic evidence is admissible to establish or negative the existence of fraud (Taylor's Law of Evidence, 6th edition, p. 992, cases cited p. 993).

Extrinsic evidence admissible to negative fraud.

Fraud presumed under Revd. Stat. O. cap. 119, as under Statute of Eliz.

The Chattel Mortgage Acts do not repeal the Statutes of Elizabeth concerning fraudulent conveyances. They only add other grounds upon which assignments absolute or conditional can be attacked and declared void. And an instrument filed under the Chattel Mortgage Acts is still as open to the presumption of fraud as ever.

Affidavit necessary under Revd. Stat. O. cap. 119.

The Chattel Mortgage Acts, however, make necessary to a valid Bill of Sale within its operation, that the bargainee shall make an affidavit that the sale is *bona fide*, and for good consideration, and that, in the affidavit, the consideration be set out. Having sworn to a consideration of "natural love and affection," it would hardly avail the bargainee anything, to be permitted to show a further and other consideration, for, by so doing, he would be contradicting his own affidavit, which alone would render the assignment void within the Chattel Mortgage Act.

Consideration of Marriage, the highest consideration.

The consideration of marriage is a good consideration. It is the highest consideration recognised by law. A marriage consideration in a settlement made prior to marriage, or in pursuance of articles entered into before marriage, runs through the whole settlement, as far as it relates to the husband and wife and issue, and it protects them (Whart. Law Lex. 474). A marriage contract differs somewhat from other agreements "For as soon as the marriage is had, 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" (A. Wilson, J., *Leys* v. *McPherson*, 17 U. C. C. P. 272; and see *Lloyd*

v. *Lloyd*, 2 M. & Cr. 192; *Rancliff* v. *Parkyns*, 6 Dow, 208; *Harvey* v. *Ashley*, 3 Atk. 610).

Bill of Sale upon consideration of marriage.

A Bill of Sale upon a consideration of marriage, is a valid instrument within our Chattel Mortgage Act (*Leys* v. *McPherson*, *ante*) when the settlement or agreement for a settlement is ante-nuptial. In *Campion* v. *Cotton*, 17 Ves. 264, 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, &c., 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 moveable effects might be so settled, and neither the joint possession which I. L. had of the furniture, nor the want of an inventory, would invalidate the settlement. It is clear also, that the fact of his being indebted at the time, and of his intended wife knowing him to be so, would not affect its validity. Then, assuming the falsehood of the declaration that the property had been purchased with the money of the intended wife, will that circumstance prevent her acquiring, as against him, and those claiming under him, all the rights

which the settlement acknowledged her to have and professed to secure to her? I apprehend it to be clear, that the husband not only could not controvert her right to any part of the property, but was compellable to do whatever acts might be necessary to invest her with a complete title to it. He 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 circumstances as to make his bounty to her a fraud upon any one."

13 Eliz. cap. 5, required good faith and a consideration.

The Statute of Elizabeth (13 Eliz. c. 5) 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*." It is now settled that a good consideration alone will not suffice, the conveyance must also be *bona fide;* It was resolved in Twyne's case, 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 Revd. Stat. O., cap. 119, good faith and good consideration required.

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 (1 Smith's Leading Cases), 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. had judgment against Pierce, and had a *fieri facias* directed to the Sheriff of Southampton, 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 said 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 a good and lawful consideration. And whether this gift, on the whole matter was fraudulent and of no effect by the said Act of 13 Eliz. or not, was the question, * * * * and in this case divers points were resolved.

Twyne's case.

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

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

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

(4) It was made pending the writ.

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

(6) The deed contains, that the gift was made, honestly, truly and *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 Act of 13 Eliz., by which it was provided that the said Act shall not extend to any estate or interest in the lands, &c., 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.

Statute easily evaded.

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 chattles of the debtor, and preserve them thus from seizure, or the amount might be wholly disproportioned to the value of the goods, which of itself is such a suspicious circumstance as to justify a strong conviction that the object of the assignment was not for the sake of the creditor intended to be

secured, but for the convenience and protection of the debtor (*Fleming* v. *McNaughton*, 16 U. C. Q. B. 194). Hence it was in Twyne's case that the advice was given "Let the goods and chattels be appraised by good people to the very value, and take a gift in particular in satisfaction of your debt."

Affidavit of good faith and of a good consideration.

But when, in addition to a good consideration, the conveyance must be in good faith, and still further under the Chattel Mortgage Acts, the bargainee must make affidavit to the *bona fides* of the transaction, creditors are given the protection of statutory requisites which shew to persons desirous of shielding creditors, the uselessness of the attempt, and the *bona fides* to be dealt with, where a consideration passes, being that of the person from whom the consideration moves (*Holmes* v. *Penny*, 3 Kay & J. 90; 3 Jur. N. S. 80; 26 L. J. Ch. 179), places the responsibility upon the bargainee of preventing dishonest dealing.

Consideration, from whom, moves.

In general the consideration moves directly from the mortgagee to the mortgagor, but this is not absolutely necessary. It is a sufficient legal consideration for a mortgage, that the consideration moves from one party, and the mortgage is taken to another (Herman on Mortgages, p. 103). But when the consideration is of such a nature that the affidavits of *bona fides* required under the Chattel Mortgage Act can not be properly taken, then the mortgage is none the less valid, because it cannot come within the scope of the Act (*Baldwin* v. *Benjamin*, 16 U. C. Q. B. 52).

Consideration not within the Act.

Contingent liability of. consideration of.

A contingent indebtedness or liability is a good consideration, and is expressly provided for by the 6th section of the Chattel Mortgage Act. Due pre-

caution must be taken in mortgages executed under this section to set forth fully by recital or otherwise the nature of the transaction between the parties (see *Thomas* v. *Olney*, 16 Ill. 53).

Forbearance of legal proceedings, Consideration of.

Forbearance of legal proceedings is a good consideration for a mortgage by a third person, though such person derive no actual benefit (*Smith* v. *Algar*, 1 B. & A. 603), and so is an undertaking to accept payment of a debt at a future date, and give time in the meanwhile to the mortgagor (*Morton* v. *Burn and Vaux*, 7 A. & E. 19), and the abandoning a suit, instituted to try a question respecting which the law is doubtful, is a good consideration for a mortgage for a stipulated sum (*Longridge* v. *Dorville*, 5 Barn. & Ald. 117; *Llewellyn* v. *Llewellyn*, 15 L. J. Q. B. 4).

Where no cause of action

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

If a person is about to sue another for a debt, for which the latter is undoubtedly not answerable, the mere consideration of forbearance in such a case is not sufficient to support a mortgage (*per* Holroyd, J., *Longridge* v. *Dorville*, *supra*).

Release from illegal arrest, bad consideration.

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

When forbearance a good consideration.

In order that forbearance may be a good consideration, it is necessary to show some right in one party, which he can exercise with probable effect against the other (*Jones* v. *Ashburnham*, 4 East, 455). It is laid down that an action does not lie, if a party promise, in consideration of a surrender of a lease at will; 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 (*Jones* v. *Ashburnham, supra*; *Bunn* v. *Guy*, 4 East, 190; *Longridge* v. *Dorville, supra*). Where disputes and doubts exist as to the exact amount due, and there be no admission as to any debt due, a compromise and settlement of the claim for a sum certain will not support a mortgage for that sum; but the case might be different if there be an admitted sum due from mortgagor to mortgagee (*Edwards* v. *Baugh*, 11 M. & W. 641).

Benefit or advantage good consideration.

Consideration of forbearance as to Assignee in Insolvency.

Though forbearance is generally a good consideration as between the parties to an instrument; as between creditors or the assignee in insolvency it sometimes fails. In *Ex parte Cooper, In re Baum*, L. R. 10 Ch. D. 313, a trader executed a Bill of Sale of substantially the whole of his property to secure a debt, for which the grantee had recovered 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 given 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 (see *Woodhouse* v. *Murray*, L. R. 2 Q. B. 634 *ibid*, 4 Q. B. 27). And the Court, recognising the authority of this case, in *Ex parte Payne, In re Cross*, L. R. 11 Ch. D. 539, *held*, that under a Bill of Sale of the whole of the grantor's property, given for value, the forbearance of the grantee to seize the property comprised in such Bill of Sale, was not, as against the trustee in bankruptcy of the grantor, good consideration for the giving of a new Bill of Sale in lieu of the first; but the new Bill of Sale given under such circumstances without any fresh advance to the grantor, was an act of bankruptcy, and void as against the trustee in bankruptcy of the grantor. It made no difference to the result of this case, that the first Bill of Sale was invalid (see *Ex parte Stevens*, Law Rep. 20 Eq. 786).

In re Cross.

It has been before stated that under the Chattel Mortgage Acts, the affidavit of *bona fides* required to be made is such, that, to conform to the Act, it would be impossible to take a Mortgage given upon a consideration not contemplated by the Statute. When such is the case, the instrument not being within the Statute will not require registration at all, and will be considered and treated upon Common Law principles.

Mortgages upon considerations not within Act treated as at Common Law.

A debt barred good consideration.

A debt which is barred by the Statute of Limitations is of course a good consideration for a Chattel Mortgage, and it is laid down in *Merrills* v. *Swift*, 18 Conn. 268, that it will be valid as against creditors.

Future advances and endorsements.

Future advances, or endorsements of notes, or any other liabilities incurred by a mortgagee for a mortgagor, are regarded as a good consideration for a Chattel Mortgage. This consideration is one specially provided for by the 6th section of the Chattel Mortgage Act, and is surrounded with certain safeguards in the interest of creditors, subsequent purchasers, and mortgagees in good faith for valuable consideration; a strict attention to which is necessary to the validity of Chattel Mortgages based upon such considerations. For instance, it is necessary that the future advances shall be for the purpose of enabling the borrower to enter into and carry on business with such advances, and that the time of repayment thereof shall not be longer than one year from the making of the agreement.

Application of future advances.

Endorsements liability limited to time.

In the case of endorsements or other liability incurred by the mortgagee for the mortgagor, it is also necessary that the liability of the mortgagee shall not extend for a longer period than one year. Besides this, it is necessary that the affidavits required by the Act to be made, shall be strictly in accordance with the Statute. An unintentional defect, even when unintentional, will, in most cases, prove fatal, for, to overlook an unintentional omission might encourage an intentional evasion of the Statute.

Technical defect fatal.

Liabilities to be incurred.

Liabilities to be incurred, or endorsements to be given, are a good consideration for a Chattel Mort-

gage; but such a consideration is not contemplated by the above section, and hence Mortgages given to secure such are freed from an application of the Statute (see post sec. 6, Rev. Stat. O. cap. 119).

It is explained, hereafter, how necessary it is that the real terms, nature and effect of the agreement should be truly set forth in the Mortgage, a failure in which will invalidate the instrument.

Operative part of the instrument.

The operative part of a Bill of Sale or Mortgage requires consideration.

"The words should be such as are apt and proper, according to the mode in which the instrument is intended to operate" (Leith's Blackstone, 258).

Chattels indivisible at law.

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

In Equity.

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 (Beaumont on Bills of Sale, 14; *Smith* v. *Butcher*, L. R. X Ch. D. 113).

Operative words in Bill of Sale and Mortgage.

The operative words in a Bill of Sale usually are "bargain, sell, assign, transfer and set over" (Beaumont on Bills of Sale, 17), and in a Mortgage "grant, bargain, sell and assign."

Past and present tense.

There is no necessity to use other than the present tense in the operative part of the Bill of Sale or Mortgage, any more than in a conveyance of land. If a chattel is sold at one time, and no delivery made, and at a later period a Bill of Sale is

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

A general assignment.

It has elsewhere been shewn from the Report of Twyne's case, that it was the general assignment of all a man's goods and chattels which largely influenced the Court in avoiding the deed; but the doctrine has long since exploded, if it ever existed, that the naked fact of a general assignment of all a mortgagor's goods and chattels, avoided the deed as fraudulent. We have seen, however, that if the assignor be a trader, within the Insolvent Laws, then that a general assignment is void, except it be to secure further advances, and there be a *bona fide* intention, with such advances, to carry on the business of the debtor, as otherwise it is in itself an Act of Bankruptcy.

Particular words may restrict general words.

If it be the intention to assign all the goods of a bargainor or mortgagor, care should be used to avoid both general and particular words in the assignment, for the latter may have the effect of restricting the operation of the former. This often arises when there is a description of the articles in the instrument, and they are enumerated in a schedule attached. In *Wood* v. *Rowcliffe*, 6 Ex. 407; 20 L. J. Ex. 285, the Bill of Sale assigned "all the household goods and furniture of every kind and description whatsoever in the house, No. 2 Meadow Place, more particularly set forth in an inventory or schedule of

Wood v. *Rowcliffe*

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 *Barton* v. *Dawes*, 19 L. J. C. P. 302, and of *Morrell* v. *Fisher*, 19 L. J. Exch. 273, that the Bill of Sale only operated as an assignment of the "goods and furniture specified in the inventory." In *Kingston* v. *Chapman*, 9 U. C. C. P. 130, a Bill of Sale was given granting "all and singular the goods, chattels, furniture and household stuff, now in Sword's Hotel, Toronto, or particularly mentioned and expressed in a certain schedule marked 'A' hereunder written or hereunto annexed," and in this case it was held the Bill of Sale did not give the grantee any title in goods not mentioned and described in the schedule (see also *Gunn* v. *Ruttan*, 7 U. C. C. P. 516).

Kingston v. Chapman.

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 (*Tapfield* v. *Hillman*, 12 L. J. C. P. 311). Therefore, if it be the intention of the parties to affect future acquired property, that intention must clearly appear upon the face of the deed (*per* Gwynne, J., *Mason* v. *McDonald*, 25 U. C. C. P. 439).

Words, not intention, given effect to.

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

General assignment of goods at a particular place.

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

Power to seize, not warrant seizure.

Power not property.

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

License to enter and seize.

The mere licence to enter and take possession of after-acquired goods may be revoked, it not being incident to a valid grant, because the words of the assignment are not sufficient to make a valid grant of the after-acquired property. "A license under seal is as revocable as a license by parol, and on the other hand a license by parol coupled with a grant is as irrevocable as a license by deed, provided only that the grant is of a nature capable of being made by parol. But where there is a license by parol coupled with a parol grant, or pretended grant, of something which is incapable of being granted otherwise than by deed, then the license is a mere license, it is not an incident to a valid grant, and it

is therefore revocable" (*per* Alderson, B., *Wood* v. *Leadbitter*, 13 M. & W. 844).

License when irrevocable.

But the case is different where the intention of the deed is clear, as to the property it professes to pass. When it is clear that the assignment is intended to pass after-acquired property, and there be a *novus actus interveniens* (without which at law a grant of after-acquired property was of no avail) then the license to seize is something more than a mere naked license, and cannot be revoked. Without a *novus actus*, however, the license was but a mere license, because at law, however decided might be the intention of the deed, a valid grant to operate in *presenti* could not be made of goods which were in *posse*. Until, therefore, there be a *novus actus interveniens*, a license to seize could be revoked.

Present property.

Of course where present property is comprised in the assignment, a license will be irrevocable, for then the power is coupled with an interest. As we shall

Rule in Equity

see hereafter, however, the rule in equity (post s. 1, R. S. O. cap. 119, note (c.) is very different, and a valid grant may be made of after-acquired property, and in equity a power to seize such is not revocable (*Lepard* v. *Vernon*, 2 Ves. & B. 51; *Broomly* v. *Holland*, 7 Ves. 28) not even by the death of the grantor (*Spooner* v. *Sandilands*, 1 Y. & C. 390). Though the goods assigned be not in *esse*, no *novus actus* is in equity needed to give effect to the words of the assignment, and recent legislation has so far removed the conflicting differences between law and equity, that the rules of the latter are entitled to prevail over those at law. So that at law, now, as well as in equity, a license to seize after-acquired property is irrevocable, because by force of the equitable doctrines it becomes coupled with a valid grant.

Words capable of passing after-acquired property.

In *Re Thirkill, Perrin* v. *Wood*, 21 Gr. 492, will be found words capable of passing after-acquired property.

At a subsequent page is considered the right a man hath at law to grant not only that in which he hath the actual, but that in which he hath the potential, ownership as well. And though a thing of which a man is the owner potentially at the date of the grant, may be future property, yet a man cannot grant at law future acquired property, in which, at the time of the grant, he hath neither the actual nor potential ownership. It is quite easy to understand how impossible it is for a man to grant or mortgage that which is not in existence, or that which he hath not, at the time of the grant or mortgage. And the principle has been well settled at law that things not in *esse*, are not the subject of a mortgage any more than those things which a man hath not "*qui non habet, ille non dat.*" Lord Bacon, in commenting on his 14th maxim, refers to the law as follows:—"The law doth not allow of grants, except there be a foundation of an interest in the grantor; for the law will not accept of grants of titles or things in action, which are imperfect interests, much less will it allow a man to grant or incumber that which is no interest at all, but merely future. But of declarations precedent before any interest vested, the law doth allow, but with this difference, that there be some new act or conveyance to give life and vigour to the declaration precedent. Now, the best rule of distinction between grants and declarations is, that grants are never countermandable, not in respect of the nature of the conveyance or instrument, though sometimes in respect of the interest

granted they are, whereas declarations evermore are countermandable in their natures."

Interpretation of 14th maxim.

The interpretation put by the Courts upon the above maxim is that grants are good at law where there is a foundation for an interest. "That although a disposition of an after-acquired interest is inoperative, yet that such disposition may be considered as a declaration precedent to derive its effect from some new act of the grantor after the property is acquired (*Lunn* v. *Thornton*, 1 C.B. 379; 9 Jur. 350; 14 L. J. C. P. 161; Millar's Bills of Sale, p. 38).

Novus actus, what required to be.

What this new act is required to be depends upon the nature and circumstances of each transaction.

Lunn v. *Thornton*.

In the case of *Lunn* v. *Thornton* the plaintiff by deed sold to the defendant "all his goods, furniture, plate, linen, china, stock, and implements in trade, and other effects whatsoever then remaining and being, or which should at any time thereafter remain and be in, upon, or about his dwelling house," and also all his other effects elsewhere.

The intention to pass after-acquired property, it will be seen, was clearly evinced by the deed; but because property not in *esse*, in which the grantor had not the potential ownership, could not be assigned at law, this deed would be held void; but the deed evidencing the intention to pass after-acquired property was considered as a declaration precedent to pass that "which should at any time thereafter be in or upon or about his dwelling house," which would derive its effect from some new act. The new act relied on by the plaintiff was that of the defendant merely bringing the goods in dispute upon the plaintiff's premises; but it was held that such an act was not a sufficient *novus actus* to bring the

after-acquired property within the operation of the deed.

Where, however, possession is taken of the after-acquired property, by the grantee with the acquiescence of the grantor, then there is a subsequent act abundantly sufficient to satisfy the rule at law (*Hope* v. *Hayley*, 5 E & B 830; 2 Jur. N. S. 486; 25 L. J. Q. B. 155). But the property must be reduced into possession of the grantee, and the grantor consent thereto, before other rights are acquired by third parties (*Langton* v. *Horton*, 1 Hare 549; see *Chapman* v. *Weimar*, 4 Ohio, S. 481), and the right of seizure when exercised is equivalent only to a present delivery, and does not relate back to the time of the grant (*Parott* v. *Congreve*, 18 L. J. Ch. 278).

Chattel must be ascertained

To transfer the right of property in a chattel, the chattel must be ascertained and identified at the time of the transfer; but, between a mortgagor and mortgagee, that specific description necessary under the Statute is not required (see post Rev. S. O. cap. 119 s. 23, note (b). For instance it is said that, if I grant two or more books that can be distinguished from the rest, and I grant one more of them, the grant is good for this that it is certain what thing is granted. (*Lunn* v. *Thornton*, 1 C. B. 379; *Gale* v. *Burnell*, 7 Q. B. 850, 14 L. J. Q. B. 340; *Robinson* v. *Macdonell*, 5 Mau. & Sel. 228). "Or if a man have five horses in his stable, and he gives to me one of his horses in his stable, now I shall take which of the horses I will" (Perk. Prof. Bk., pl. 74; *Harding* v. *Colburn*, 12 Met. 333; *Smith* v. *McLean*, 24 Iowa, 322); because the horse given is easily separable from the others. But such a grant

would be void as against a creditor, from the uncertainty of the identity of the horse. In *Rose* v. *Scott*, 17 U. C. R. 385, Robinson, C. J., was of opinion that certain articles, trucks, waggons, carriages, were so described that they did not pass by the deed, and he says p. 388 "For these are not in any manner described, so that if Mr. Fraser owned more of any such articles of property than the number set down in the deed, it would be impossible to tell which of the class were intended to be assigned; where a man has a number of horses or cows, and mortgages two of each, how can it be known which of them are to be passed by the deed? It may be that the numbers mentioned in the deed were all that the mortgagor had of the kind, but it does not say so."

When subject matter not ascertained, no right of property passes.

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 (Herman on Mortgages, 76) because the subject of the grant was not ascertained and identified. The case of *Bryans* v. *Nix* (4 M. & W. 774) fully illustrates the law, as to the appropriation of a chattel necessary to a valid grant. In that case, the facts were as follows:—T, on the 31st of January, obtained from the masters of two canal boats (No. 604 & No. 54) receipts signed by them for full cargoes of oats, therein stated to be shipped on board the boats, deliverable to the agent of T in Dublin, in care for, and to be shipped to, the plaintiffs at Liverpool. At that time, boat No. 604 was loaded, but no oats were then actually shipped on board boat No. 54. On the 2nd February T enclosed the receipts to the plaintiffs, and drew a bill on them against the value of the cargoes, which the plaintiffs accepted on the seventh and paid when due.

Bryans v. *Nix*.

On the 6th February, W, an agent of the defendant, who was T's factor for sale in London, arrived at Longford and pressed T for security for previous advances. T on that day gave W an order on T's agent in Dublin, to deliver to W the cargoes of boats 604 and 54 on their arrival there. Boat 604 had then sailed from Longford, but boat 54 was only partially loaded. The loading was completed on the 9th, and T then transmitted to W in Dublin a receipt signed by the master of the boat (in the same form as those sent to the plaintiffs) making the cargo deliverable to W. W received this on the 10th. On their arrival in Dublin W took possession of both cargoes for the defendant. It was held that the property in the cargo of boat 604 vested in the plaintiffs on their acceptance of the bill, and that they were entitled to maintain trover for it; but they could not maintain trover for the cargo of boat 54, since none of it was on board, *or otherwise specially appropriated to the plaintiffs when the receipt for that boat was given by the master.* In the course of the argument 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 loaded on board the boat No. 54, at the time when the receipts were transmitted, were still in Tempany's premises, and he might have performed his contract with the plaintiffs by supplying any other oats of the same quality and amount. Your argument must go to the extent that Tempany would have been liable in trover if he had substituted others for them." 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

Bryans v. Nix.

A grant inoperative becomes an executory contract, and amounts to a covenant to deliver.

the transfer has nothing to operate upon), *Godts* v. *Rose*, 17 C. B. 229; *Logan* v. *LeMesurier*, 6 Moore P. C. 116; *Campbell* v. *Mersey Docks*, 14 C. B. N.S. 412; it becomes an executory contract, and amounts to a covenant to deliver 100 bushels of wheat, on breach of which an action is sustainable; when once the appropriation is made and assented to by the vendee, then the property in the goods passes, and their value may be recovered by the vendor under a count for goods bargained and sold; and the action will lie as soon as a selection is made by the vendor, (if part of a large parcel of goods is sold,) and 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 (*Rohdes* 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). When once the appropriation is made the property becomes specific, and then the vendee is excused from a performance of his contract, if it became impossible for him to fulfil it, through causes for which he is not answerable. This is the case when the sale is one of specific property, or a portion of property which is specific; the contract then is subject to the implied condition that the parties shall be excused, if before breach, performance becomes impossible, from the perishing of the thing without default of the contractor (*Howell* v. *Coupland*, L. R. 1 Q. B. D. 258; *Taylor* v. *Caldwell*, 3 B. & S, at p. 833; *Appleby* v. *Meyers*, L. R. 2 C. P. 651). 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 (*Howell* v. *Coupland, supra* ; *McIlhargy* v. *Martin*, C. C. Dean J. January Term, 1880). The law of appropriations is full of subtle distinctions and "the subject gives rise to an infinite number of circumstances, under which its application becomes necessary in commercial dealings." A reference to the cases found in "Benjamin on Sales," from which the above quotation is taken will be found of use (Benjamin on Sales, 290 ; *Dutton* v. *Solomonson*, 3 B. & P. 219 ; *Alexander* v. *Gardner*, 1 Bing, N. C. 671 ; *Wilkins* v. *Bromhead*, 6 M. & G. 963 ; *Sparkes* v. *Marshall*, 2 Bing, N. C. 761 ; *Godts* v. *Rose*, 17 C. B. 229, & 25 L. J. C. P. 61 ; *Langton* v. *Higgins*, 4 H. & N. 402 ; *Campbell* v. *The Mersey Docks*, 14 C. B. N. S. 412 ; *Hanson* v. *Meyer*, 6 East, 614 ; *Rugg* v. *Minett*, 11 East, 210 ; *Brown* v. *Hare*, 3 H. & N. 484 ; *Tregelles* v. *Sewell*, 7 H. & N. 571 ; *Calcutta Co.* v. *De Mattos*, 32 L. J. Q. B. 322 ; *Jenner* v. *Smith*, L. R. 4 C. P. 270 ; *Ex parte Pearson*, L. R. 3 Ch. Appeal, 443 ; *Cunliffe* v. *Harrison*, 6 *Ex.* 903 ; *Hart* v. *Mills*, 15 M. & W. 85 ; *Dixon* v. *Fletcher*, 3 M. & W. 145 ; *Levy* v. *Green*, 28 L. J. Q. B. 319 ; *Mucklow* v. *Mangles*, 1 Taunt. 318 ; *Bishop* v. *Crawshay*, 3 B. & C. 415 ; *Atkinson* v. *Bell*, 8 B. & C. 277 ; *Elliott* v. *Pybus*, 10 Bing. 512) ; but see also *Box* v. *Provincial Ins. Co.* (18 Gr. 280), in which case it was held by the Court of Appeal, that the purchaser of 3500 bushels of wheat, had an insurable interest therein, although the wheat sold was never separated from other wheat of the seller ; but the judgment of the Court appears to have proceeded on the principle, not that the property was absolutely vested in the Plaintiff, but that "they clearly had a right derivable out of some contract, about the wheat

and that right might be lost sight of if the wheat was destroyed by fire before the Plaintiff required a delivery.

Rule of Equity

The rule of equity, as to granting after-acquired property, was, as we have seen, very different to that at law.

At law, after-acquired property is not assignable. In equity it may be so. At law, the right to acquire after acquired property must be exercised, else no property passes even between the parties. In equity the instrument operates upon the property so soon as it comes into existence.

At law, property non-existing, but to be acquired at a future time, is not generally assignable: in equity it is. At law, although a power is given in the deed of assignment to take possession of after-acquired property, no property is transferred even as between the parties themselves, unless possession is actually taken. In equity it is not disputed that the moment the property comes into existence, the agreement operates upon it, *per* Lord Chelmsford, *Holroyd* v. *Marshall*, 10 H. of L. cases 191; and in the same case Lord Westbury says, " But 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 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. 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."

Holroyd v. Marshall.

The facts in *Holroyd* v. *Marshall*, were: T sold certain machinery in a mill to one H. The machinery was not removed, but continued in the possession of T. A deed was executed, wherein it was recited that T desired to purchase the machinery, but was unable to do so; wherefore it was conveyed to B, in trust to transfer it to T, when he should pay the money, but if he did not pay it then to hold it absolutely for H. T covenanted that all other machinery which should be placed in the mill should be subject to the same trusts. T sold some of the original machinery and purchased fresh, and sent the accounts of these sales and purchases to H; but the latter did nothing to take possession of the new machinery. H subsequently served T with a demand for payment, and afterwards an execution against T was put in by a creditor. The case seems to have been often up for judicial opinion. The report of it in 2 Giff. 382, when first it was before the Court, shews a decision in favour of the mortgagees. On appeal it was brought before the then Lord Chancellor (Lord Campbell), and it is reported in 2 DeG. F. & J, 596, that the former decision was reversed, on the ground of the necessity for, and absence of a *novus actus*

The case then was brought before the House of Lords, and Lords Campbell and Wensleydale, for the reason reported in 2 DeG. F. & J. 596, favoured the decision there reported. The case was, however, argued a second time, when (Lord Campbell in the meanwhile having died), Lord Westbury, Lord Wensleydale and Lord Chelmsford, reversed the decision of Lord Campbell (see *Reeve* v. *Whitmore*, 33 L. J. Ch. 63; *Belding* v. *Read*, 3 H. & C. 955; 34 L. J. Ex. 212, and see more fully, R. S. O. cap. 119, s. 1, note (e), post.

Intermingling of property.

Sometimes it happens that the property of one man is so intermingled, or confused with that of another, that the property of either cannot be distinguished and separated. If I give a mortgage upon 100 bushels of wheat, in a certain granary in my barn, and then I mix with it fifty more bushels of wheat, from a different part of my barn, it is the rule of law that I lose my right to the whole 150 bushels; but if a restoration of 100 bushels of wheat would place the mortgagee in substantially the same position, as he was in before the mixture, then the rule of law is different. It is carried no further than is necessary in each particular case, and each case is governed by its own circumstances. If the goods can be readily distinguished and separated, then no change of property will take place. If the property of each is of the same description, and a restoration to each of the same quantity or quantum, as they each formerly had, can be made, then the rule will not be applied.

But, where, as in the case put, I purposely intermix my 50 bushels of wheat with the 100 I have mortgaged, so that the mortgaged property cannot be distinguished, or the mortgagee put in substan-

tially the same position by a restoration of the 100 bushels, the rule that the whole becomes the property of the mortgagee is carried to the extent that the mortgagee is entitled thereto, as against my consignee, or even as against a purchaser for value from my consignee, for the reason that the 50 bushels became accessorial to the property mortgaged, and subject to the lien of the mortgage (*Boys* v. *Smith*, 8 U. C. C. P. 241; *Dunning* v. *Sterns*, 9 Barb. 630; *Colwell* v. *Reeves*, 2 Camp. 575; *Frost* v. *Willard*, 9 Barb. 440; *Martin* v. *Porter*, 5 M. & W. 350; *Willard* v. *Rice*, 11 Me. 493; *Robinson* v. *Holt*, 39 N. H. 557; *Inglebright* v. *Hammond* 19 Ohio, 337). It has been decided by the American case of *Duke* v. *Strickland* (43 Ind. 494), that, where 10 acres of growing wheat were mortgaged, and the mortgage duly recorded, and afterwards the mortgagor, without the consent or knowledge of the mortgagee, harvested, threshed, removed and sold the wheat, and the purchaser converted it to his own use, by mixing it with other wheat, such purchaser was liable to the mortgagee for the value of the wheat.

But if the mortgagee be in any way a party to the confusion of property, then the rights of third parties will not be interfered with (*Hamilton* v. *Rogers*, 8, Md. 301; see also post R. S. O. cap. 119, s. 23, note (d). "It is impossible that articles of furniture can be blended together, so as to create the same difficulty as exists where a man puts corn into my bag in which there is more corn." For example, where a plaintiff owned a stock of goods and some furniture, and shop fixtures, and sold out to S, taking from him a chattel mortgage in security, and S continued the business, bought in other goods, until becoming involved, he

absconded, and the sheriff, upon an attachment being placed in his hands, seized the property in the store, it was held, that the goods being of such a nature as could easily be distinguished, the sheriff was liable for trespass (*Boys* v. *Smith*, 8 U. C. C. P. 248).

Locality mentioned.

It is generally stated in the Mortgage or Bill of Sale in whose possession the property mortgaged or sold is, and the locality of the property, at the time of the execution of the mortgage, is usually also described.

Absence of all fraud, necessary.

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

The law has regarded the absence of change of possession as one matter which goes to show that the transaction is fraudulent.

Twyne's case.

In Twyne's case, the donor continued in possession, and this fact was made an important element in the case, because, by reason thereof, the donor traded and trafficked with others, and defrauded and deceived them.

13 Eliz. cap. 5.

It was held under 13 Eliz. cap. 5, that where a Bill of Sale was executed of chattel property from a debtor to his creditor, and the creditor agreed to leave the property in the possession of the debtor, this alone made the deed fraudulent (*Edwards* v. *Harben*, 2 T. R. 587). In this case the argument treated the want of possession in the vendee as only evidence of fraud, not as, *per se*, invalidating the deed as fraudulent, and the Court said, "That is the point we have considered, and we are all of the opinion that if there be nothing but the absolute conveyance without the possession, that, in point of law, is fraudulent;" and Lord Ellenborough said

***Edwards* v. *Harben*.**

(*Wordall* v. *Smith*, 1 Camp. 333) that "there must be an exclusive possession under the assignment, or it is fraudulent and void, as against creditors." Therefore, in the latter case, where an action was brought against the Sheriff of Middlesex for a false return to a writ of *fieri facias*, sued out by the plaintiff against John Mason, and returned by the Sheriff *nulla bona*, and where, pon the trial, it appeared that Mason had, before the issuing of the *fi. fa.*, assigned all his effects to a creditor, whose servant was immediately put into the house and remained conjointly with Mason, a verdict was directed to be entered for the plaintiff, Lord Ellenborough further saying, "To defeat the execution, there must have been a *bona fide* substantial change of possession. It is a mere mockery, to put another person in, to take possession, jointly with the former owner, of the goods" (from *Latimer* v. *Batson*, 4 B. & C. at p. 652; *see* also *Reid* v. *Blades*, 5 Taunt. 212; *Paget* v. *Perchard*, 1 Esp. 205).

Edwards v. *Harben* not followed

However, the rule laid down in *Edwards* v. *Harben* does not seem to have been followed in the subsequent cases, the tendency of which was to hold that the simple absence of transmutation of property was not, of itself, fraudulent, but only presumptive evidence of fraud, which could be rebutted, when there were circumstances which clearly showed that no fraud was intended.

Latimer v. *Batson.*

In *Latimer* v. *Batson*, 4 B & C. 652, in which, on the argument *Wordall* v. *Smith supra* was relied upon, Abbott, C. J., said, "I perfectly agree, that possession is to be much regarded; but, that is to ascertain the good or bad faith of the transaction" (see also *Leonard* v. *Baker*, 1 M. & S. 251; *Watkins* v. *Birch*, 4 Taunt. 823;

Joseph v. *Ingram*, 8 Taunt. 838). And in *Martindale* v. *Booth* (3 B. & Ad. 498), Parke, J., said, "I think the want of delivery of possession does not make a deed of sale of chattels absolutely void. . . The want of delivery is only evidence that the transfer was colourable. . . . It may be a question for a jury whether, under the circumstances, a Bill of Sale of goods and chattels be fraudulent or not."

Distinction, when no change of possession between absolute and conditional conveyances.

In the latter case, as in the earlier one of *Edwards* v. *Harben*, *ante*, the difference was recognised between absolute conveyances where there is no transmutation of possession, and conveyances intended to operate by way of mortgage. In transactions of the latter class, "as the nature of the transaction does not call for any transmutation of possession, the absence of such transmutation seems to be no evidence of fraud."

Fraud, one of fact, and for jury to decide.

The question of fraud in all these cases is one of fact, and for the decision of a jury (*Reed* v. *Blades*, 5 Taunt. 212).

Redemise clause.

In the interest of a mortagee, though, perhaps, not in justice to all the parties to a mortgage, it is advisable to omit the clause known as the Redemise Clause.

This is the clause allowing the mortgagor to remain in possession until default or breach of any of the covenants. Its absence, "though the mortgagor remains in possession, does not prevent the application of the usual well-established rule, that the possession follows the property whenever the right of possession is in the owner" (*Porter* v. *Flintoft*, 6 U.C.C.P. 335). The result of which is that a mortgagee, before any default, can, at any time, take pos-

session of the mortgaged property (*Samuel* v. *Colter*, 28 U. C. C. P. 240; *Bunker* v. *Emmany*, 28 U.C.C.P. 438; *McAulay* v. *Allan*, 20 U.C.C.P. 417; *Ruttan* v. *Beamish*, 10 U.C. C. P. 90; *Porter* v. *Flintoft*, *supra*).

Presumption, by implication, in ordinary mortgages.

The presumption arises by implication in the ordinary mortgage transaction that the intention of the parties is that the mortgagor shall remain in possession of the property until default. There is never any intention when a mortgage is executed either on the part of mortgagee or mortgagor, that an absolute sale shall take place, and surely when the mortgage contains, as it usually does, a stipulation, that upon default in payment, or breach of other covenants, the mortgagee may enter upon and seize the property, the inference from such stipulation is that, before default or breach he may not so enter and seize.

McAulay v. *Allen.*

Mr. Justice Gwynne, in *McAulay* v. *Allen*, *supra*, and in *Samuel* v. *Colter*, *supra*, dissents entirely from the view taken by the other Judges as to the effect of an absence of the redemise clause. In the former case he says, "The right of a mortgagor to remain in possession of chattels mortgaged may arise, in my opinion, as well by implication as by express proviso; it is the intention of the parties which is to govern, and that is to be gathered from the whole deed; and I cannot but think that we are at liberty to look at the nature of the property mortgaged to assist us, if that will assist us, in arriving at that intention; as, for example, where the property mortgaged consists of material for making carriages, with a proviso that upon default the mortgagee may enter and take possession of all material then on hand and all carriages which shall in the meantime be built by the

mortgagor of the material mortgaged, surely an implication would there arise that the mortgagor should remain in possession to enable him to build; and so, in the case before us, where it is machinery in a mill which is mortgaged, can it be supposed that it was intended that the mortgagee might enter the day after the mortgage was executed, and take it out and separate it from the mill, and so render the mill useless? Until default committed how can the mortgagee justify entering upon the premises where the machinery was, and if he could not enter upon the premises where the machinery was until default, how could he take the machinery itself into his exclusive possession before default?"

View held by U. S. Courts.

Many of the United States Courts adopt the same view as that held by Mr. Justice Gwynne. The ordinary proviso that upon default being made the mortgagee is at liberty to enter and take possession entitles the mortgagor, according to their law, to remain in possession until default (*Babcock* v. *McFarland*, 43 Ill. 381; *Hall* v *Sampson*, 35 N. Y. 274; *Curd* v. *Wunder*, 5 Ohio, s. 92; *Fairbanks* v. *Bloomfield*, 5 Duer, 434). And it certainly appears equitable that a mortgagor should retain possession until default.

It may be that his use and possession of the mortgaged property is the only means he may have of satisfying his debt; and if the mortgagee may, the very day after a mortgage is executed enter and take possession, and thus put it beyond the power of a mortgagor to do that upon which the mortgage will be satisfied and his property released, though this right may be law, its exercise was never intended.

Herman's opinion.

Mr Herman in his work on mortgages, says upon

this subject, "The true rule is, that, whenever a mortgage is executed which contains no provision in regard to possession, the mortgagor has a right to the continued possession and use of the property, until breach of condition or forfeiture, unless expressly denied in the mortgage, in a manner similar to a mortgage on real estate (*McNight* v. *Gordon*, 13 Rich. Eq. 222; *Barnett* v. *Timberlake*, 57 Mo. 499; *Streble* v. *Curt*, 56 Mo. 437). Many Courts, in deciding that the mortgagee is entitled to possession, when the instrument is silent upon that point, announce, as a reason for their decision, that it is in accordance with the Common Law rule. At Common Law, mortgages were held valid without change of possession, in the absence of fraud, even against subsequent *bona fide* purchasers and creditors.

"If the principle is correct that 'registration is equivalent to actual delivery or change of possession,' a mortgagee has such actual possession as must, as a matter of course, prevent the application of the general Common Law rule to Chattel Mortgages. So that a strict compliance with the Statute, in regard to registration, abolishes the Common Law rule in this respect. The Common Law rule being established as a means of notice to purchasers and creditors, a mortgagee's possession being notice of his rights, any system which results in affording such notice consequently abrogates the Common Law rule."

Rule in Ontario.

It is clearly established, however, by cases in our own Courts, which are above cited, that the absence of a redemise clause gives the mortgagee the power to enter and take possession at any time.

Reason for passing of Statutes.

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 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, the last of which is Revd. Stat. Ont. cap. 119.

Absence of change of possession not presumption of fraud when Statute complied with.

By this Statute a mortgagor or bargainor is now permitted, without suffering from a presumption of fraud, to retain possession of the mortgaged or sold property; but this permission is dependent upon a due and proper compliance with the Statute in all its provisions. The absence of transmutation of possession by this Statute will wholly invalidate all conveyances of chattel property, upon condition or otherwise, as against creditors, subsequent purchasers, or mortgagees, where there is wanting any of the substitutes for change of possession made necessary by the Statute (*Chamberlain* v. *Green*, 20 U. C. C. P. at p. 311).

Provisions of Statute to be observed, or change of possession.

When a sale or mortgage transaction takes place, the above Statute will now apply to it, and render it of no effect as against creditors, subsequent purchasers or mortgagees, unless either its provisions are observed, or there is a complete change of possession. Not only must the change of possession be complete, but there must be an immediate delivery of the property mortgaged, and the change of possession must be actual and continued (see R. S. O. cap. 119, note (c)as to the words actual and continued change of possession).

Possession, test of ownership.

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 appearing to the world as its owner, when in reality he is not.

If mortgage *bona fide*, mortgagee entitled to possession against everybody.

We have seen that, where an instrument contains no redemise clause, the mortgagee is entitled, by law, to enter and take possession of the property mortgaged, notwithstanding default may not have happened; and 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*.

Mortgagee may maintain trespass.

And therefore, he may maintain trespass against a Sheriff seizing the mortgaged goods under a *fi. fa.* issued at the suit of a creditor (*Porter* v. *Flintoft*, 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).

Sheriff cannot take goods from mortgagee.

It follows then that a Sheriff cannot take the goods out of the possession of the mortgagee, after the latter has taken possession of them under his mortgage (*Paterson* v. *Maughan*, 39 U. C. R. 371; *Watson* v. *Henderson*, 25 U. C. C. P. 562; *Nelson* v. *Wheelock*, 46 Ill. 25; *Moore* v. *Murdock*, 26 Cal. 514).

Action does not lie at suit of mortgagor.

Nor will an action lie at the suit of a mortgagor against a mortgagee for seizure of the chattels before default in payment, when there is no proviso in the mortgage for possession by the mortgagor until default (*McAuley* v. *Allen*, 20 U. C. C. P. 417; *Samuel* v. *Coulter*, 28 U. C. C. P. 240).

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 (Herman on Mortgages, p. 350-351). 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 (*Overton* v. *Bigelow*, 10 Yerg. 48). His losses must be his own, and he cannot charge the mortgagor with them.

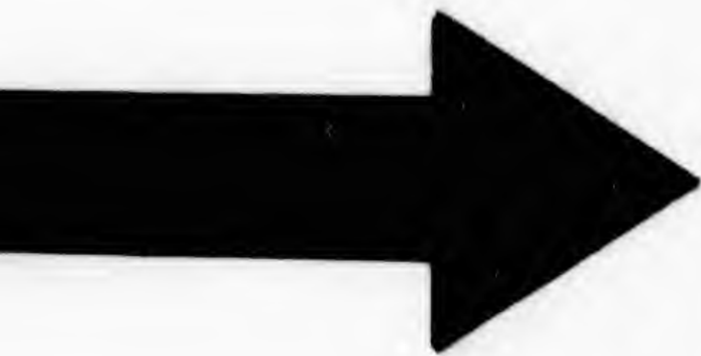
Mortgagee taking possession before default, how he must act.

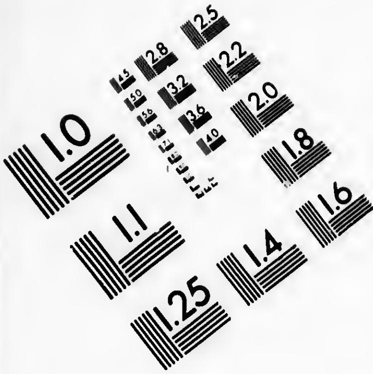
Where the instrument provides, that, until default, the mortgagor may retain quiet possession of the property mortgaged, then because the mortgage vests the title to the property mortgaged absolutely in the mortgagee upon condition broken, so soon as default is made in the payment of the money, the mortgagee has the right to actual possession, and may enter the premises of the mortgagor at any time by night or by day (unless the mortgage otherwise provides) to get possession of the property mortgaged.

Upon condition broken mortgagee may take possession.

In fact possession by the mortgagor, after default, has been regarded in the States of Alabama, Kentucky, New Hampshire, South Carolina, New York, and Illinois as evidence of fraud, though, of course, capable of being rebutted (Herman on Mortgages, pp. 352, 354). Possession by the mortgagor is not, however, adverse to that of the mortgagee, and the latter is not bound to take possession upon the first default, or breach of any of the covenants contained in the mortgage, but he may wait until the whole debt matures (*Martindale* v. *Booth*, 3 B. & A. 498; Herman on Mortgages, 221).

Possession of mortgagor after default, in certain States regarded as fraud.





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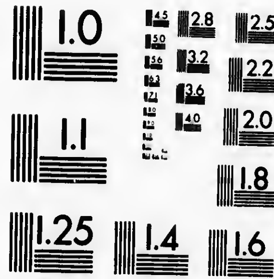

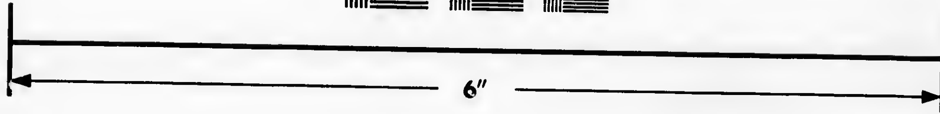

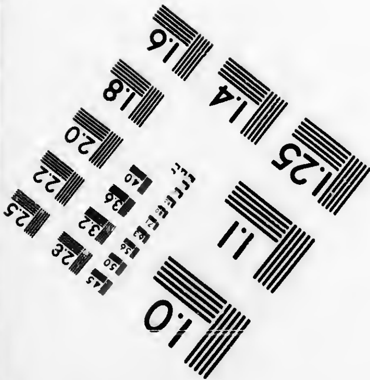

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Mortgagee, to get possession, must not create breach of Criminal Law.

The right to possession, however, will not justify a mortgagee in creating a breach of the Criminal Law in order to acquire the property (*London Co.* v. *Drake*, 6 C. B. N. S. 768). And, it is necessary when the mortgagee takes possession, that some act of a public character should be done by the mortgagee before he can vest in himself the title, discharged from all equity of redemption on the part of the mortgagor. The change must be *bona fide*, and not collusive so as to mislead the public. And a mortgagee in possession may, without fraud, redeliver possession of the property to the mortgagor, as his agent, and may bring trover against third persons for its conversion (*Cotton* v. *Marsh*, 3 Wis. 221).

How mortgagee should act on taking possession.

But where, on default, a 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 (*Chamberlain* v. *Green*, 20 U. C. C. P. 304).

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 (*Paget* v. *Perchard*, 1 Esp. 205). It is not enough that a person is put in to keep possession jointly with the assignor (*Wordall* v. *Smith*, 1 Camp. 333, Lord Ellenborough).

Covenants entitling mort-

The ordinary Chattel Mortgage usually contains

a covenant on the part of the mortgagor, that, upon default in payment of the money secured, or that 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 any of the property being taken in legal process at the instance of any creditor.

gagee to enter, on breach.

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 (*Porter* v. *Flintoft*, 6 U. C. C. P. 90; *Ruttan* v. *Beamish*, 10 U. C. C. P. 90; *McAuley* v. *Allen*, 20 U. C. C. P. 417; *Samuel* v. *Colter*, 28 U. C. C. P. 240).

Limits beyond which mortgagor must not remove property.

The limits usually inserted in a mortgage, beyond which the mortgagor is not permitted to remove the property, are the limits of the county within which the goods are situate; and then, though the debt be not due, the mortgagee may obtain possession of the property if the mortgagor attempt to remove it beyond the county (*Russell* v. *Butterfield*, 21 Wendell, 400). This he may also do if the mortgagor sell the property, or in any way part with it, or commit a breach of, or fail to perform any of the covenants contained in the mortgage, if the mort-

If mortgagor sell, &c.

gage so stipulates (Herman on Mortgages, p. 211; *Nattrass* v. *Fair*, 37 U. C. Q. B. 158).

As to written consent of mortgagee.

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 mortgagee for the mortgagor to execute a second mortgage to another party, and the mortgagee, notwithstanding his written consent, is titled to enter and take possession of the goods. The authority to sell cannot be a power by which the mortgagor can charge the mortgaged property with a debt he owed, or to enable him to borrow a sum of money upon it (*Closter* v. *Headley*, 12 U. C. Q. B. 364).

Sale on verbal consent.

In the event of a sale upon a verbal consent of the mortgagee, the mortgagee will not be permitted afterwards to claim the goods and set up the want of a written consent (*Loucks* v. *McSloy*, 29 U.C.C.P. 54; *Shearer* v. *Babson*, 1 Allen, 486). "Where the verbal assent was either admitted or proved clearly to have been given and acted upon, it is a very intelligible equity to prevent the setting up of the

formal provision as to a written assent" (*per* Hagarty, C. J., *Bunker* v. *Emmany*, 28 U. C. C. P. 442). And a mortgagee may so act as to estop himself from denying that the property passed to the purchaser when even there is an absence of either a verbal or written assent, as *e.g.*, 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, or by concealing the fact of his security induces another to buy the property (*Loucks* v. *McSloy*, 29 U.C.C.P. 54; *Waller* v. *Tate*, 4 B. Monroe, 529).

Mortgagee may be estopped from denying that property passed.

In some of the New England States it is made a crime for a mortgagor to sell without the consent of the mortgagee thereto in writing, and if he does sell it is no answer to an indictment that a verbal consent was first obtained by the mortgagor (*State* v. *Plaisted*, 43 N. H. 413). In some of the States, also, possession of the mortgagor coupled with a power to sell, defeats the instrument as being fraudulent (see numerous authorities, Herman on Mortgagees, p. 233). But many United States' authorities have also established that a mortgage of a stock of goods with power to sell is valid (Herman on Mortgages, p. 233, cases cited).

According to the cases above mentioned the ordinary stipulations entitling a mortgagee to take possession will not interfere with his right to take possession under a mortgage wherein there is no redemise clause. It is important, therefore, and in the interest of a mortgagee, when the redemise clause is inserted in a mortgage, that the mortgage should likewise contain the ordinary stipulations above mentioned for taking possession upon breach

of any of the covenants or conditions contained therein.

Rights of Landlords.

Though it is said a mortgagee is entitled to the possession of goods mortgaged as against everybody including the mortgagor (see *Porter* v. *Flintoft*, *supra*), this must not be understood to be an inflexible rule. For as against landlords and other persons having a right of distress against the grantor the rule may find exceptions.

"A distress" is defined as the taking, without legal process, cattle or goods, as a pledge, to compel the satisfaction of a demand, the performance of a duty, or the redress of an injury (Woodfall's L. & T., 11th edition, p. 374)

With the exception of fixtures (*Hellawell* v. *Eastwood*, 6 Ex. 295) animals *feræ naturæ* (Co. Lit. 47, Bullen 90), things in actual use (*Simpson* v. *Hartopp*, 1 Smith L. C., 4 Am. Edn. 187), things in the custody of the law (Woodfall's L. & T., p. 403), goods delivered to a third person in the way of his trade (*Swire* v. *Leach*, 34 L. J. C. P. 150), goods of a lodger, and a few other exceptions, all cattle, goods and chattels, found upon the demised premises, whether they be the goods of the tenant or of a stranger, may be distrained for rent due to a landlord from his tenant. Therefore though a mortgagee may have the right to possession of the mortgaged property, that right may be lost by a distress being regularly made at the instance of a landlord of the premises, upon which the goods are, at the time of the distress. The reason is that the landlord has a lien upon these goods, in respect of the place in which they are found, and not in respect of the person to whom they belong (Woodfall's L. & T., p. 396).

How landlord may lose his remedies.

But the landlord, even after distress, may lose his right to the goods, when the distress is not succeeded by the goods continuing in the custody of the law; as, for instance, where they are allowed to remain in the possession of the tenant for a considerable time, he being constituted the landlord's agent for that purpose; in such a case a mortgagee, who succeeds in removing the goods under his mortgage, will be preferred (*Roe* v. *Roper*, 23 U. C. C. P. 76; *King* v. *England*, 4 B. & S. 784).

11 Geo. 2, cap. 19.

By 11 Geo. 2, cap. 19, s. 1, a landlord may within thirty days seize the goods and chattels *of the tenant* wheresoever they are found, provided the tenant has fraudulently or clandestinely removed them to prevent the landlord distraining. But this Statute only relates to the goods of the tenant not to the goods of a stranger (*Foulger* v. *Taylor*, 5 H. & N. 202); therefore goods, to the possession of which a mortgagee has the right, when once removed from off the demised premises 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; but the landlord must be satisfied that the goods were removed to elude a distress (*Parry* v. *Duncan*, 7 Bing. 243), and the rent must have been in arrear at the time of the fraudulent removal (*Watson* v. *Main*, 3 Esp. 15; *Rand* v. *Vaughan*, 1 Bing. N. C. 767; *Dibble* v. *Bowater*, 2 El. & Bl. 564), though it was, at one time, doubted if a landlord could not follow and distrain goods, fraudulently removed from the

premises the night before the rent became due (*Furneux* v. *Fotherby*, 4 Camp. 136).

Revd. Stat. O., cap. 180, s. 93.

By Revised Statutes Ontario, cap. 180, s. 93, it is provided that in case any person neglects to pay his taxes for fourteen days after demand, the collector may by himself, or his agent, levy the same with costs by distress of the goods and chattels of the person who ought to pay the same, or of any goods or chattels in his possession wherever the same may be found within the county in which the local municipality lies, or of any goods or chattels found on the premises, the property of, or in the possession of, any other occupant of the premises.

It will thus be seen that a mortgagee has greater risk to run at the hands of the collector of taxes than at the hands of a landlord.

A landlord can only distrain the mortgaged goods when on the premises out of which the rent issues, or follow them and distrain them off the premises within thirty days next ensuing the day of their removal, when by the terms of the mortgage, the mortgagee has not the right of possession, and the goods have been fraudulently removed, after the rent became due, to purposely elude a distress.

But the collector of taxes may seize and sell the goods mortgaged, if they be the goods of the person who ought to pay the taxes (*Holcomb* v. *Shaw*, 22 U.C.Q.B. 92), or any goods in his possession whether on or off the premises, but within the county (see *Fraser* v. *Page et al.*, 18 U. C. Q. B. 340; *Anglin* v. *Minis*, 18 U. C. C. P. 170).

Rights of an Assignee in insolvency.

An assignee in insolvency, to whom is transferred the possession of goods by a mortgagor, who had mortgaged his property, and who, at the time of his

insolvency, was himself in possession of the goods assigned, does not become a wrongdoer by simply taking possession of the goods assigned; therefore the mortgagee cannot maintain trover against such assignee, but his remedy, if any, is by summary application under the 125th section of the Insolvent Act (*Crombie* v. *Jackson*, 34 U. C. Q. B. 580).

Mortgagee's remedy under 125th section Insol. Act, 1875.

The remedy of a mortgagee under this section "is certainly better for all parties than any remedy which replevin or a bill for specific performance would afford, and it is better than treating the assignee as a trespasser or a wrongdoer by some supposed or implied act of conversion, merely because by process or provision of law he has performed a *quasi* public duty, not for his own benefit, but for others of whose rights he is the guardian" (*per* Wilson, J., *Crombie* v. *Jackson supra; Ex parte Baum, In re Edwards*, L. R. 9 Ch. 673).

In the case of an insolvent mortgagor, the assignee is interested in the property affected by the mortgage, more or less, according to its value relatively to the claim upon it; and, if the mortgagor be in possession of it, and transfer that possession to the assignee, the latter cannot be a wrongdoer by taking that possession, and keeping possession in right of the creditors he represents. The mortgagee cannot (where actual possession is in the mortgagor and the goods are assigned by the mortgagor or by the sheriff to an assignee in insolvency) enforce any claim for a right of property in the goods in the possession of the assignee by a suit at law. Nor, in such a case, does it better the possession of the mortgagee, that default has been made in the payment of the mortgage, so long as the goods remain

in the actual possession of the mortgagor (*Dumble* v. *White*, 32 U. C. Q. B. 601). In either case a mortgagee's remedy is under the 125th section of the Insolvent Act (Clarke's Insolvent Acts, 1877, p. 295).

125th section not applicable to strangers.

But this section is not to be construed so as to compel a person (not a creditor of the insolvent, nor having anything to do with the distribution of his estate, and who claims the goods in question as his own, and denies that they are, or ever were, the property of the debtor), to apply to the Judge of the County Court for relief, and to debar him from every other remedy. Therefore where the goods of A, having been seized by the Sheriff, under an execution against B, have been handed over by the Sheriff to an assignee, to whom B had made a voluntary assignment in insolvency, it was held that A might maintain replevin against the assignee, and also that section 50 of the Insolvent Act of 1869 could not apply against the plaintiff who was not a creditor, or in any way interested in the estate of the insolvent (*Burke* v. *McWhirter*, 35 U. C. Q. B. 1).

The ordinary remedies at law are still open to a person whose goods and effects have been wrongfully taken as the property of the debtor or insolvent, and the fact that the goods are in *custodia legis* does not deprive him of his legal redress (*Burke* v. *McWhirter*, *supra*).

It was decided in this case even that the remedy by replevin was open to him notwithstanding Con. Stat. U. C. cap. 29, s. 2. This latter Statute has since been repealed by 40 Vic. cap. 7, sched. A, 92 (see Revd. Stat. Ont., cap. 53, s. 3), and the substituted section may not admit of the same construction as the one repealed (see the full judgment of Gwynne, J., in *Jamieson* v. *Kerr*, 6 Prac. Rep. 3).

Prior to the provision in the Insolvent Act (whereby "all remedies sought or demanded for enforcing any claim for a debt, privilege, mortgage, hypothec, lien or right of property, upon, in or to any effects or property in the hands, possession, or custody of the assignee, might be obtained by the order of the Judge on summary petition, and not by any suit") a creditor who had a mortgage could enforce his remedy without regard to the Insolvent Law, as he was not obliged to rank on the estate unless he chose to do so (*Gordon* v. *Ross*, 11 Grant, 124). The effect of this provision in the Insolvent Act now is to compel all creditors who have proved, or, who can prove on the estate, although they have not made themselves parties to the insolvency, to enforce their rights by way of summary petition, but, notwithstanding this, a mortgagee is not deprived of his remedy by way of foreclosure. *Henderson* v. *Kerr*, 22 Gr. 91.

Assignee still liable for an illegal act.

But this provision cannot exempt the assignee from responsibility for an illegal act; and, "a mortgagee of goods who is entitled to the immediate possession of them may bring an action of trespass against the assignee for a wrongful taking of them, and he is not obliged to apply to a Judge on summary petition as provided by the above section" (Clarke's Ins. Act, 1877; *Archibald* v. *Haldan*, 30 U. C. Q. B. 30).

When mortgagee in possession.

If, however, the mortgagee is in possession, he cannot have the goods taken from him (if he is lawfully in possession), unless on payment of his claim, or on an adjudication of his rights under the Insolvent Act (*Dumble* v. *White*, 32 U. C. Q. B. 601). A Sheriff has no right, either as representing an attach-

ing creditor or an assignee, to deprive a mortgagee of the possession of the goods, without first satisfying the amount of the lien (*per* Harrison, C. J., *Paterson* v. *Maughan*, 39 U. C. Q. B. 371), and if he does so he will be liable for the full amount of the mortgagee's interest therein (*Parish* v. *Wheeler*, 22 N. Y. 494; *Manning* v. *Monnahan*, 1 Bosw. 459).

When Insolvent Act applies.

"In every case in which the Insolvent Court can work out all the rights and remedies of persons having claims against the estate, the Court may, and therefore it is bound to work out complete justice between the parties; but, beyond this, the Insolvent Court cannot go, and cases not brought within this rule are outside the jurisdiction of such Court" (*per* Blake, V. C., *Henderson* v. *Kerr*, 22 Gr. 92). We have seen that the mortgagee of chattels, like a mortgagee of real estate, is entitled to a foreclosure in default of payment of the amount secured thereby (*Cook* v. *Flood*, 5 Gr. 463; *Slade* v. *Rigg*, 3 Hare, 35; *Wayne* v. *Hanham*, 9 Hare, 62). When default has once taken place in the payment of the mortgage, the mortgagee thereupon becomes the owner of the mortgaged property, subject to the rights of the assignee (if the mortgagor has become insolvent since the execution of the mortgage) to exercise his equity of redeeming. A mortgagee, filing his bill for foreclosure, does not then "come as a creditor and ask for payment out of the assets of the estate, but he asks that, within a specified time, the defendant shall avail himself of the equity which allows him to redeem, and that, in default, it shall be barred;" and it is because the Insolvent Court has no machinery for calling in claimants; for service out of the jurisdiction; and for working out all the

Mortgagee of chattels entitled to foreclosure.

details of a foreclosure suit, that the jurisdiction of the Court of Chancery to decree foreclosure upon a mortgage is not taken away by the Insolvent Act; and a mortgagee must still proceed in the Court of Chancery to obtain relief by foreclosure against the official assignee of the mortgagor (*Henderson* v. *Kerr*, 22 Gr. 91).

Discharge in insolvency renders void a mortgage.

If an insolvent mortgagor obtain his discharge under the Insolvent Act, then, because a mortgage is only a security for the debt, the discharge in bankruptcy renders void the mortgage, so far, at least, as the liability of the mortgagor upon his covenant is concerned (*Thompson* v. *Cohen*, L. R. 7 Q. B. 527; *Cole* v. *Kernott*, L. R. 7 Q. B. 534).

The habendum.

The habendum in a Mortgage or Bill of Sale is of course made to the mortgagee, or bargainee, his executors, administrators, and assigns.

Proviso for redemption.

Then follows in a Mortgage the 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.

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.

When payable on demand.

The Mortgage may be made payable on demand, in which case it is due at any time. The mortgagee

in such case may commence legal proceedings without previous demand, the commencement of proceedings being a sufficient demand (*Gillet* v. *Balcom*, 6 Barb. 370).

Effect of punctual payment, and of default.

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 remedy left; viz., the equity of redemption.

Right to redeem.

At Common Law, under the ancient system of mortgaging, the right to redeem did not exist; but Courts of Equity, looking at the intention of the parties, have established the right, and Courts of Law have adopted it.

Equity of redemption, what it is.

The equity of redemption is the right which the mortgagor has of redeeming his property after it has been forfeited at law for non-payment of the mortgage debt at the time stipulated in the Mortgage, and the right will only be granted on payment of the whole debt, and, if they are incurred, costs also. The right to redeem exists so long as the mortgagee has possession and until, by legal sale of the goods, or foreclosure, he cuts off the equity of redemption, or the right to redeem has become barred by the Statute of Limitations.

Redemption not extinguished by improper sale.

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.

Foreclosure, the converse of redemption.

Foreclosure is in default of redemption: where the right to foreclose exists, the right to redeem exists also. The mortgagee and mortgagor occupy the relative position of creditor and debtor; the creditor being secured by the debtor, through means of a lien. Any holder of a subsequent lien may, therefore, pay off a prior lien to prevent his own lien from being cut off. As a mortgagee of chattels, like a mortgagee of real estate, is entitled to a foreclosure, so a mortgagor of chattels, like a mortgagor of land, is entitled to redemption, and nothing a mortgagor can do (except subsequently to the original transaction) will generally be allowed to impair his power of exercising his right or of transferring it to another. The right is paramount to the instrument itself, and may be enforced even in opposition to its terms.

Redemption, what it is.

Redemption 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 (Herman on Mortgages, p. 459).

13 Eliz. cap. 5

We have seen that the rights of creditors are respected, both by the Common Law and by 13 Eliz. cap. 5, see R. S. O. cap. 95, s. 13 and R. S. O. cap. 118, s. 2.

Conveyances that are void, either at Common Law, or by these Statutes, are none the less so now, by reason of the Chattel Mortgage Acts; the latter Statutes are additionally in the interests of credi-

tors, and lay down further rules and requirements, which must be observed and performed, in order to uphold transactions within their purview.

Right to alien at Common Law.

At the Common Law, a debtor was allowed to alien his goods until the writ of execution was issued; but, as by a fiction of law, all judicial proceedings formerly related back to the first day of the term to which they belonged, goods which had been sold after such first day of term, might be seized under a writ of *fi. fa.* subsequently issued. This injustice was remedied by section 16 of the Statute of Frauds (29 Car. 2, cap. 3), which enacts that "no writ of execution shall bind the goods of the party against whom such writ of execution is sued forth, but from the time that such writ shall be delivered to the Sheriff, Under-Sheriff or Coróners, to be executed" (Beaumont on Bills of Sale, 92). A creditor then, by force of this Statute, will be preferred to a mortgagee or bargainee of a debtor's goods, if against such goods the creditor has delivered to the Sheriff for execution a writ of *fi. fa.* anterior to the execution of the instrument under which the mortgagee or bargainee claims.

29 Car. 2, cap. 3, s. 16.

When a writ delivered to Sheriff loses its priority.

It will be observed that the words of the Statute are "delivered to the Sheriff for execution." Hence it is that if a writ of *fi. fa.* is delivered to a Sheriff with instructions not to levy, or it be otherwise countermanded, it is not a writ "delivered to the Sheriff for execution" upon which he can act, and therefore it loses its priority (*Payne* v. *Drewe*, 4 East, 523; *Jones* v. *Atherton*, 7 Taunt. 56; *Samuel* v. *Duke et al.*, 6 Dowl. P. C. 536; *Hunt* v. *Hooper et al.*, 1 D. & L. 626; *Howard* v. *Cautry*, 2 D. & L. 115; *Foster* v. *Smith*, 13 U. C. Q. B. 243; *Castle* v. *Ruttan*,

4 U. C. C. P. 252; *Kerwan* v. *Jennings*, 3 Ir. C. L. R. 48; *Strange* v. *Jarvis*, 6 O. S. 160; *Re Fair* v. *Buest*, 2 U. C. L. J., N.S., 216).

Fraction of a day considered

At a subsequent page it is shewn by authorities that the Courts will consider a fraction of a day when the justice of the cause requires them to do so (*Beekman* v. *Jarvis*, 3 U. C. Q. B. 280). Hence it is advisable in anticipation of a possible conflict between an execution creditor and a mortgagee, that the conveyancer should always note the day and hour of the execution of the instrument, as the Sheriff does the receipt of the execution. Of course the *careful practitioner* never fails to examine the Sheriff's Office for encumbrances against the property mortgaged or to be mortgaged; but, it is as well, always to take the extra precaution of noting the day and hour of the execution of the instrument. It is from the execution of the instrument, not from its date, that the Mortgage or Bill of Sale, as the case may be, relates and has effect (see post). An instrument is presumed to be executed upon the date it bears; but this presumption is rebuttable, and, in any event, the day inserted, affords no information as to the hour of that day when the execution took place.

From whence a Division Court execution binds goods.

The reasons have been given (at page 12, *ante*), accounting for a Division Court execution binding the goods of a debtor only from actual seizure. As between Division Court executions, therefore, and mortgagees or bargainees of goods, priority is determined differently than it is between the latter and Superior or County Court execution creditors. But should the goods mortgaged happen to be in the custody of the law, then probably they would be

bound from the delivery of the execution to the Division Court Bailiff; because when goods are already in *custodia legis*, a writ of *fi. fa.* binds upon them at once without any actual seizure. The writ in such cases attaches upon the goods, as if there had been a seizure (*Beekman* v. *Jarvis*, 3 U. C. Q. B. 280).

Goods, in *custodia legis.*

Rights of creditors.

Prior to default and foreclosure or sale, creditors of the mortgagor have rights which will be protected both at law and in equity. The Con. Stat. U. C. cap. 45 (sec. 13) made provision for the sale under any writ, precept, or warrant of execution, by the Sheriff or other officer to whom such writ, warrant, or precept was directed, of the interest of a mortgagor or of his equity of redemption. In the consolidation of this Statute, by the Revised Statutes of Ontario, cap. 119, this section (13) was omitted, but inserted, as section 27 in cap. 66 of the Revised Statutes of Ontario as follows: "On any writ, precept, or warrant of execution against goods and chattels, the Sheriff or other officer to whom the same is directed may seize and sell the interest or equity of redemption in any goods or chattels, including leasehold interests in any lands, of the party against whom the writ has issued, and such sale shall convey whatever interest the mortgagor had in such goods and chattels at the time of the seizure."

R. S. O., cap. 66, s. 27.

Rights of Mortgagee.

Whilst, however, Courts will consider the interest of a creditor, they will also protect the rights of a mortgagee, and, if property is taken from the possession of a debtor, by an execution creditor, the mortgagee may, if his Mortgage so provide (and the ordinary form of Mortgage usually does so pro-

vide) recover possession of the property mortgaged. The mortgagee has such a special ownership in the property, as to give him the right to recover it, for the purpose of satisfying his claim.

Interest of a Mortgagor saleable.

Whatever interest the mortgagor has in goods, that interest can be sold and the Revd. Stat. Ont., cap. 66, s. 27, authorizes its sale (*Ross* v. *Simpson*, 23 Gr. 552). The purchaser will be placed in the position of the mortgagor, and in the opinion of Burns, J., 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. That was the effect, he considered, of Con. Stat. U. C. cap. 45, s. 13 (*Smith* v. *Cobourg & Peterboro' R. W. Co.*, 3 Prac. R. 113). But the interest of a mortgagee in goods mortgaged was not, it was held, such an interest as could be sold under a *fi. fa.* (*Ferrie* v. *Cleghorn*, 19 U. C. Q. B. 241) because his claim was a mere chose in action (*Prout* v. *Roat*, 116 Mass. 410; *Thornton* v. *Wood*, 42 Me. 282). But see Revd. Stat. Ont., cap. 66, s. 28, whereby it is provided that a Sheriff, acting upon a writ issued out of the Superior or County Court, may seize any mortgages, or other securities for money belonging to the person against whom the writ of *fieri facias* was issued.

Rev. Stat. O., cap. 66, s. 28.

When rights of a mortgagee accrue.

The moment any of the covenants or conditions are broken or violated through the instrumentality of an execution creditor, then the rights of the mortgagee accrue to him. The right of property may, by the terms of the instrument (when the redemise clause is omitted), be possessed by the mortgagee prior to default or violation of the terms of the instrument; and after default, or breach of the con-

ditions, the right to possession at once arises, so that in either of these events trespass can be maintained

Against whom trespass can be maintained.

against an officer seizing and selling under a *fi. fa.* (*Porter* v. *Flintoft*, 6 U. C. C. P. 335), and a mortgagee may also maintain an action for damage to his reversionary interest against a person selling mortgaged property, when the right of possession is in the mortgagor and the reversionary interest in himself (*McLeod* v. *Mercer*, 6 U. C. C. P. 197; *Googins* v. *Gilmore*, 47 Me. 9). The action may be had also against the execution creditor, if he has authorized, or in any way ratified and adopted the action of the Sheriff or other officer seizing (*Watson* v. *Henderson*, 25 U. C. C. P. 562). 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 (*McLeod* v. *Fortune*, 19 U. C. Q. B. 98).

Interpleader suit usually brought.

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; but the mortgagee has also his remedy either in trespass or trover, and

probably even by replevin; for, wherever the action of trespass or trover is maintainable for personal property, in such case also will lie the remedy by replevin (Revd. Stat. Ont., cap. 53, s. 2), and this, notwithstanding the strong language of 40 Vic. cap. 7, sch. A (92) (*Burke* v. *McWhirter*, 35 U. C. Q. B. 1; *Boys* v. *Smith*, 9 U. C. C. P. 27).

13 Elizabeth.

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

Existing and subsequent creditors contemplated by 13 Eliz. and by Chattel Mortgage Act.

It was, at one time, doubted if the Statute of Eliz. applied to any creditors but those who were such at the time of the conveyance (*Kidney* v. *Coussmaker*, 12 Ves. 136). But there is no doubt that the Act makes no distinction between creditors; and a fraudulent assignment is void against both subsequent and existing creditors (*Graham* v. *Furbur*, 14 C. B. 410, 33 L. J. C. P. 51; *Mackay* v. *Douglas*, L. R. 14 Eq. 106).

These remarks have reference more particularly to an Assignment or Mortgage not within the Chattel

Mortgage Act. This latter Statute will have to be read, in relation to instruments within its scope, and section (4) recognizes no distinction between existing and subsequent creditors (see post).

Both the Statute of Elizabeth and the Chattel Mortgage Act as well as R. S. O. cap. 118, s. 2, make use of the term creditors; and though, by merely trusting or giving credit, a person brings himself within the definition of a creditor, yet, if he wants to attack an instrument as being void under either of these Statutes, he must put himself in a situation to complain by getting a judgment for his debt (*per* Gwynne, J., *McGiverin* v. *McCausland*, 19 U. C. C. P. 460; *Colman* v. *Croker*, 1 Ves., jun., 161; *Porter* v. *Flintoft*, 6 U. C. C. P.335 *Martyn* v. *Padger*, 5 Burr. 2631; *White* v. *Morris*, 11 C. B. 1015, overruling *Bessey* v. *Windham*, 6 Q.B. 166).

Rights of Assignee in Insolvency.

Re Andrew, 2 App.

It has been decided that an assignee in insolvency represents the creditors for the purpose of avoiding a mortgage, for want of compliance with the Chattel Mortgage Act (*Re Andrew*, 2 App. R. 24). The contention against this view, is, that the assignee, taking the position of the debtor, so far represents him and him only, that he cannot do that which the debtor himself could not do, and, as a technical defect, or non-compliance with the Act, will avail the debtor nothing, therefore the assignee, representing the debtor, should not be placed in a better position than the debtor himself.

The point seems to be involved in considerable doubt, and is now, the writer understands, before the Court of Appeal. The language of Mr. Justice Paterson, therefore, taken from the case of *Re Andrew*, 2 App. R. 24, is given in full.

He says, at page 29: "But it is contended that the Mortgage, being good as between the parties to it, is good against the assignee in insolvency of the mortgagors. The Statute (Con. Stat. U. C., cap. 45, sec. 3) declares that in case the Mortgage and affidavits are not registered as provided, the Mortgage shall be absolutely null and void as against creditors of the mortgagor. The argument is that the assignee does not represent the creditors for the purpose of avoiding the mortgage, but takes only such interest in the assets of the insolvent as the insolvent could himself have asserted. Carrying this a step farther towards its legitimate consequences, it maintains that a transaction, which a creditor could successfully impeach, becomes impregnable, and excludes the creditors as soon as insolvency intervenes. The law is not so defective as to permit this result. Treating of the Statute, 13 Eliz. cap. 5, and of the rights of creditors to avoid conveyances under the Statute, the following passage from *May* on Fraudulent Conveyances at page 149, states the English doctrine. "The representatives of creditors are considered as creditors within the Statute. An assignee, therefore, or trustee of an insolvent or bankrupt, although in right of the debtor, he only takes such interest as the debtor was beneficially entitled to. Yet he represents the creditors also for all purposes; and if any fraud against creditors exists in a transaction, to which the insolvent or bankrupt was a party, the assignee or trustee may take advantage of it. A deed, which is void as against creditors, is void also as against those who represent creditors. It was indeed said by Abbott, C.J., in *Robinson* v. *McDonnell*, 2 B. & Ald. 137-6, 'The Bill of Sale might be

void under the Statute of Elizabeth as against creditors, but not as against the parties who executed it, and their assignees are in this respect in no better situation.' But it is submitted that the assignees are to be looked at in a double character; not only as representing the bankrupt (one of the parties to the deed), but also as standing in place of and entitled to exercise all the rights of creditors—*qua* the representatives of the bankrupt they can have no power to set aside the deed, but *qua* the representatives of the creditors they have that power; for, as Lord Loughborough said, in *Anderson* v. *Maltby*, 2 Ves. 244-245, 'assignees have all the equity which the creditors have, and may impeach transactions which the bankrupt himself would be stopped from impeaching,' in fact, assignees have frequently been allowed as creditors under the Statute without question." Whatever question may have been possible under the Insolvent Act of 1864, sec. 4, of which sub-section 9 empowered the assignee only to sue for the recovery of debts due to the insolvent, and to take proceedings that the insolvent might have taken with respect to the estate, and to intervene and represent the insolvent in all suits and proceedings by or against him, was removed by the Act of 1869, sec. 42, which is followed by sec. 39 of the Act of 1875.

"Those sections add to the powers expressly given by the Act of 1864, the power to sue for the rescinding of agreements, deeds and instruments made in fraud of creditors, and for the recovery back of moneys alleged to have been paid in fraud of creditors, and to take, both in the prosecution and defence of all suits, all the proceedings that the creditors might have taken for the benefit of creditors generally.

This leaves no foothold for the argument that under our Statute the assignee represents the insolvent only." See also *Bertram* v. *Pendry* (27 U. C. C. P. 380), wherein Mr. Justice Hagarty mentioned the point, but left it undecided (see also *Paterson* v. *Maughan*, 39 U. C. Q. B. at p. 382; *Re Mapleback*, L. R. 4 Ch. D. 150; *Doe dem. Grimsby* v. *Ball*, 11 M. & W. 530; *Holmes* v. *Penny*, 3 Kay & J. 90, 3 Jur. N. S. 80, 26 L. J. Ch. 179; *Ware* v. *Gardner*, L. R. 7 Eq. 317). It was the generally received opinion that the assignee in insolvency stood so far in the position of the insolvent as to preclude him taking technical objections to the instrument, under which he, for the insolvent, claimed; but that he is allowed, wherever there exists fraud to set aside the transaction, as a creditor himself would be allowed to do: but the Court of Appeal has, the writer has ascertained, decided the law in favour of the judgment of Mr. Justice Paterson, in *Re Andrews* (supra).

A Mortgagee always a creditor.

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 (Herman on Mortgages, p. 35), and it is because a Chattel Mortgage is a mere security for a debt that it becomes void (so far as the mortgagor's liability on his covenant is concerned) when the debtor has been released by a discharge in bankruptcy (*Thompson* v. *Cohen*, L. R. 7 Q. B. 527; *Cole* v. *Kernott*, L. R. 7 Q. B. 534).

Mortgage void when debtor obtains discharge in Insolvency.

6

Rev. Stat. O., cap. 98, s. 18.

The Revised Statutes of Ontario, cap. 98, at section 18, 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 encumbrance, or for falsifying pedigree (see post), and 29 Vic. cap. 28 (The Law Property and Trusts Act), at sec. 20, 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).

As to fraud on part of Mortgagor.

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* (22 Beav. 59). The defendant, in any such action, might decline to answer questions in regard to the transaction, on the ground that he might thereby criminate himself, and expose himself to prosecution under the provisions of the latter Statute. In *Michael* v. *Gay* (1 Fos. & Fin. 410) during the trial, the Court expressly cautioned a witness that he was not bound to answer questions, which might expose him to prosecution under the 3rd section of the Act of Elizabeth, which rendered a person convicted of a fraudulent conveyance liable to imprisonment for the space of six months (see, however, *Bunn* v. *Bunn* 12 W. R. 561).

Mortgaged goods in possession of Mortgagee.

We have seen (*ante* p. 56) that 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 the Mortgage. When a mortgagee has possession, and sells under the power of sale ordinarily con-

tained in Mortgages, then the creditor's proper remedy to recover the balance in the hands of the mortgagee, is by garnishee process against the mortgagee (*Pike* v. *Colvin*, 67 Ill. 227). But though the mortgaged property sell for more than enough to pay the Mortgage debt, interest and costs, if the property is exempt then the mortgagor is entitled to the surplus and not the creditors garnishing (*Michie* v. *Reynolds*, 24 U. C. Q. B. 303). Suppose a mortgagee finds that from some cause his Mortgage is invalid as against creditors, can he, by taking possession under his Mortgage, and selling, put the mortgaged property in the hands of a purchaser beyond the reach of creditors of the mortgagor? The Statute (Revised Statutes of Ontario, cap. 119. s. 1) enacts that, as the alternative for registration and a proper compliance with its enactments, there must be "an immediate delivery" (*Frazier* v. *Lazier*, 9 U. C. Q. B. 679) "and an actual and continued change of possession." It is self-evident that delivery is not immediate when the mortgagee takes possession at a time subsequent to the giving of the Mortgage, and only because he discovers the invalidity of his security. The Mortgage, being invalid, the mortgagee cannot, it would seem, perfect his title as against creditors, having executions, by taking possession under the terms of an instrument invalid as against creditors. There may be nothing to prevent the mortgagor and mortgagee from entering upon a fresh agreement, abandoning the former transaction entirely and making a new Mortgage, either verbally, accompanied with an immediate delivery, and an actual and continued change of possession, or in writing, followed by a due and proper compliance

Exempt property.

Mortgagee taking possession under invalid Mortgage.

with the requisites of the Statute; but, possession taken by a mortgagee, under an invalid Mortgage, though the change be actual and continued, yet there not being an immediate delivery, cannot put the mortgaged property beyond the reach of such of the mortgagor's creditors as have prior rights under execution. Then if a mortgagee, having taken possession under an invalid Mortgage, sells, does he thereby place his vendee in any better relation towards such creditors of the mortgagor, than he himself bore? It is true that as between himself and the mortgagor, the Mortgage is valid, and, possession being rightfully taken as against the mortgagor, the latter will be estopped from setting up any title as against a purchaser if the sale is warranted and properly conducted: but the mortgage being invalid, as against creditors, and their rights having accrued prior to possession being taken by the 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, where the authority for selling is a mortgage, then it behoves 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: but, though the mortgage may be void as against creditors, yet, as against such whose rights have not accrued by virtue of writs of execution, the law will probably be found to be different. A mortgagee

may perfect his title as against such creditors, and if he sells, the sale will pass a good title to the purchaser, unless such creditors could show that the whole transaction was a device to defraud creditors (*Allen* v. *Cowan*, 23 N. Y. 502; *Maugham* v. *Sharpe*, 17 C. B. N. S. 442). Formerly, a creditor might be diligent in securing his debt, by chattel mortgage from his debtor, and the instrument could not be impeached, if otherwise unimpeachable, simply because the parties intended to defeat thereby the execution of a judgment creditor (*Wood* v. *Dixie*, 7 Q. B. 896; 9 Jur. 798; *Everleigh* v. *Purssord*, 2 M. & Rob. 539—Rolfe; *Gottwalls* v. *Mulholland*, 15 U. C. C. P. 62; 3 E. & App. R. 194; *Dalglish* v. *McCarthy*, 19 Grant, 578); 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, chapter 5, by Lord Mansfield, in *Worseley* v. *Demattos* (1 Burr. 467), and is now the effect ascribed to the Act by the Declaratory Statute, 35 Victoria, cap. 11 (now Rev. Stat. O. cap. 95, s. 13). 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. (Rev. Stat. O. cap. 95, s. 13, post).

Formerly, transaction not void, though intent was to hinder creditors; now, such fraudulent, even though valuable consideration and intention to pass property.

If two parties, for a fraudulent purpose, agree that one of them shall raise money by mortgage or bill of sale, in his own name, on the other's goods, and a third party be induced to lend the money upon the security, believing the goods to be the goods of the mortgagor or bargainor, the instrument will be upheld as against the creditors of the real owner of the goods, because, in effect, the mortgagor or bargainor is the agent of the real owner of the goods, and the mortgage or bill of sale was valid (*Low* v. *McGill*, 12 W. R. 826, 10 L. T. N. S. 495—Q. B.).

Former rule.

At one time, it was held that the mere fact of the mortgagor being indebted, rendered the mortgage void as against creditors (*Russell* v. *Hammond*, 1 Atk. 15; *Walker* v. *Burrows*, 1 Atk. 93). The exact *quantum* of debt which may invalidate a conveyance or mortgage of goods and chattels, may vary according to circumstances; but the insolvent circumstances of a vendor or mortgagor will not *per se* invalidate a Bill of Sale or Mortgage (*Hersee* v. *White*, 29 U. C. Q. B. 232; *Smith* v. *Pilgrim*, L. R. 2, Ch. D. 127). It is only a circumstance raising a presumption that the instrument was executed with the intent to defraud, just as is the fact of a mortgagee taking a mortgage on all a debtor's property of the most minute character as security for a debt, wholly disproportioned to the value of the property mortgaged (*Fleming* v. *McNaughton*, 16 U. C. Q. B. 194; *In re Pearson, Ex parte Stephens*, L. R. 3 Ch. D 807; *Freeman* v. *Pope*, L. R. 5 Chy. 538; *Crossley* v. *Elwerthy*, L. R. 12 Eq. 158; *Mackay* v. *Douglass*, L. R. 14 Eq. 106; *Ware* v. *Gardner*, L. R. 7 Eq. 317; *Bloom* v.

Insolvent circumstances will not alone invalidate a mortgage.

v. *Noggle*, 4 Ohio, § 45; *Atkinson* v. *Tomlinson*, 1 Ohio, § 237; *Doremus* v. *O'Hara*, 1 Ohio, § 45). This presumption 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 under Con. Stat. U. C. c. 26, s. 18 (now Rev'd Stat. O. cap. 118, s. 2) (*Bank of Toronto* v. *McDougall*, 15 U. C. C. P. 475; *Tuer* v. *Harrison*, 14 U. C. C. P. 449; *Gotwalls* v. *Mulholland*, 15 U. C. C. P. 63; *Smith* v. *Pilgrim*, L. R., 2 Ch. D. 127) and in the former case it was held 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 be withdrawn from them.

Notice of an existing mortgage no bar to creditor attacking it.

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

Good faith between Mortgagor and Mortgagee.

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 back from any one purchasing it, provided of course that the mortgage under which he claims is duly recorded so as to effect notice.

There is nothing however fraudulent or wrong in a mortgagor selling mortgaged property subject to the mortgage. It may not interfere with the rights of the mortgagee or hinder or delay him; but the terms of a mortgage usually are such as to require the consent of a mortgagee to any such sale. A mortgagee has no right of possession to the property until he has a right to have his debt paid, providing the mortgage contains no redemise clause. And if a mortgagee attempts to take possession he will be restrained, or the mortgagor will be entitled to 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 damage done to such interest (*Chinery* v. *Viall*, 5 H. & N. 288; *Brierly* v. *Kendall*, 17 Q. B. 937; *McAulay* v. *Allen*, 20 U. C. C. P. 417).

Quantum of damages in action by mortgagor against mortgagee.

If a mortgagee seizes and sells a portion of the mortgaged property whereby his debt, interest and costs are satisfied, he must not sell the remainder of the property, his title to which is extinguished by his mortgage being already satisfied, and if he does the mortgagor will be entitled to an action of trover, and can recover the full value of the goods so wrongfully converted (*Charter* v. *Stephens*, 3 Denio, 33). An action of trover may lie at the suit of a mortgagor in possession against a Sheriff seizing under a *fi. fa.* against goods of the mortgagor. There may be trespass to the possession of a mortgagor when in possession with the assent and by the will of the mortgagee, for the execution does not bind upon the

goods; then, "*quoad*" these goods, the Sheriff is a wrong-doer, and the mortgagor would be entitled to an action (*Corbett* v. *Sheppard*, 4 U. C. C. P. 43).

Sale under Power of Sale.

A mortgagee, who has advertized under his power of sale, has the right in the interest of all parties to adjourn the sale from time to time (*Hosmer* v. *Sargent*, 8 Allen, 97). Indeed, if a mortgagee does not do so, and the property by reason thereof is wilfully sacrificed or from negligence in the mortgagee, the sale fails to realize enough to pay off the mortgage debt, it will be a good defence in an action to recover the balance of such debt, that, if the sale had been *bona fide* the property would have been sold for more than enough to pay the debt (*Howard* v. *Ames*, 3 Met. 308), and it will 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 in equity, even when the goods repurchased were subsequently exchanged for land, the necessary enquiries would be directed, and steps taken to ascertain the true value of the land in order that the defendant might derive the benefit of any profit from the exchange after satisfaction of the mortgage debt (*Annes* v. *Dornan*, 10 U. C. C. P. 299; see *Fox and Mackreth*, 1 Wh. & T. Lg. Cases, 1 Am. Ed. 105; *Morrison* v. *Judge*, 14 Ala. 182). 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 such departure from the terms of the instrument.

Insuring the property.

It often occurs in practice that the mortgagor covenants with the mortgagee that he will insure and keep insured the property given in security. Both the mortgagor and mortgagee have an insurable interest (*Richards* v. *Liverpool and L. Insce*, 25 U. C. Q. B. 400), and though the latter insure in his own behalf the former may do so also. The former has an insurable interest to the full value of the goods or property insured; the latter to the amount of the sum secured by the Mortgage (*Glover* v. *Black*, 1 Bl. R. 396; *Robertson* v. *Hamilton*, 14 East, 529, 593; *Crawford* v. *Hunter*, 8 T. R. 16, 17; *Stockdale* v. *Dunlop*, 6 Mott. 224; *Powles* v. *Innes*, 11 M. & W. 10), and the fact of the mortgagor continuing in possession of the goods mortgaged will not affect the right of the mortgagee to insure upon his own account (*Ogden* v. *Mon. Insce. Co.* 3 U. C. C. P. 497).

Ogden v. Ins. Co.

A mortgage cannot, before default, by verbal promise, be extended to other claims, or claims generally of the mortgagee, not mentioned or specified therein; for a mortgagee cannot be allowed to tack subsequent advances by parol (Roberts on Stat. of Frauds, 94-5), therefore where a mortgage is under seal, and the mortgagee insures before default, he cannot recover on his policy, more than the amount appearing on the face of the mortgage at the time of insurance (*Ogden* v. *Mon. Insce. Co.* 3 U. C. C. P. 497). But it would seem, that, if the insurance was effected for the joint benefit of both mortgagor and mortgagee, the latter might recover in respect of the mortgagor's interest as well as his own, if the insurers at the time of the insurance were notified that it was for the

joint benefit of the mortgagor and mortgagee (*Ogden* v. *Mon. Insce. Co.* 3 U. C. C. P. 497).

This case also decides that where the mortgagor, in effecting an insurance in the name of the mortgagee, omits to mention the amount of the mortgage, such omission does not render the policy void, "If the insured has an insurable interest in the property, that is sufficient, although the nature of such interest be not declared or inserted in the application or policy" (*Geach* v. *Ingall*, 14 M. & W. 95; *Crowley* v. *Cohen*, 3 B. & A. 478; *Carruthers* v. *Shedden*, 6 Taunt. 14).

In the event of a loss by fire the question between the insurer and insured is not whether the insured has lost his debt, but whether he has lost his security for his debt. Therefore an insurance company cannot set up the defence, to an action on a policy, that the mortgagor is perfectly solvent and able to pay the mortgage debt; but if, before a loss by fire occurs, the mortgagee's debt is paid, then his insurable interest terminates.

If there is no agreement between a mortgagor and mortgagee about insurance, and the mortgagee insures, in the event of a loss the mortgagee will recover to the extent of his interest; but he cannot charge the mortgagor with the premiums (*Dobson* v. *Land*, 8 Hare, 216; *Saunders* v. *Frost*, 5 Pick. 259). But where, as usually is the case, there is a covenant on the part of the mortgagor to insure, and in default of his doing so, the mortgagee may insure, then if there is a loss it is the loss of the mortgagor, and he will be entitled to have the insurance money appropriated in the payment of his indebtedness to the mortgagee. The relying upon and waiting for an-

other party, from whom security 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 made a condition, upon the non-performance of which, the right to possession should accrue to the mortgagee (see Herman on Mortgages, p. 342).

And where 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 (*Fowler* v. *Hoffman*, 31 Mich. 215).

As to Mortgages valid between representatives of parties.

Upon the death of any one his personal property vests in the law, or its agent, for the purpose of satisfying its owner's debts; but of course subject to the liens or mortgages against it.

If mortgages, therefore, are valid between a mortgagee and mortgagor, they will be none the less so, between a mortgagee and the administrator, executor, or personal representative of the mortgagor, and *vice versa*, and this, though they may be void as against creditors (Herman on Mortgages, p. 348).

The administrator, or other representative, of a mortgagee, is justified after default, in detaining the goods mortgaged from the mortgagor, and, until the latter shew that he has satisfied the mortgage debt, he cannot make such representative a wrong-doer (*Ruttan* v. *Beamish*, 10 U. C. C. P. 90).

Where the administrator of a mortgagee is in possession of the mortgaged property by reason of

default, or is in actual possession before default, where the rule "that possession follows the property, whenever the right of possession is in the owner" can be applied (*Dixon* v. *Yates*, 5 B. & A. 340), then in an action either of trover or in detinue at the suit of the mortgagor, the administrator is at liberty to set up the *jus tertii.* He can defend his possession, as against the mortgagor, by shewing, that the mortgagor has no property, or right of possession, because such rights are vested in third parties—subsequent mortgagees—for instance. But the case would be different, if the mortgagor himself were in possession, and the administrator asserts a right under the mortgage to his intestate, and takes the goods, for which the mortgagor sues him, the administrator then would not be permitted to set up the *jus tertii* (*Ruttan* v. *Beamish*, 10 U. C. C. P. 90; *Leake* v. *Loveday*, 4 M. & G. 972; *Thorne* v. *Tilbury*, 3 H. & N. 534).

On default, Mortgagee may enter.

We have seen that the mortgagee on breach of condition, or default in payment of the principal and interest, if so authorized by the instrument, may enter and take possession for the purpose of satisfying the mortgage debt. By reason of the breach a forfeiture occurs, and all the remedies provided by the instrument accrue to the mortgagee. Courts do not, however, favour forfeitures, and will relieve against them whenever possible. Should the mortgage be payable in instalments, and a forfeiture arises by reason of default in payment of the first instalment, a Court will stay proceedings entered upon by the mortgagee, and relieve against the forfeiture, on payment of the moneys then due upon the mortgage and costs.

Court will relieve against forfeitures.

Forfeiture may be waived

A forfeiture under the mortgage may be waived by the mortgagee, and very slight acts on his part will be construed by Courts of Equity as a waiver of forfeiture.

A demand of payment made by the mortgagee may have the effect of waiving his rights consequent upon some breach of condition in a mortgage. But when default happens, or a breach of condition occurs, and the mortgagee does nothing to operate as a waiver, and deter him from exercising his rights, he may maintain replevin, or bring trover, or detinue, or sue upon his covenants, or he may exercise his remedies by power of sale, or he may foreclose. He may take possession of the property mortgaged, and so long as the right to redeem exists, he may, notwithstanding his possession, sue and recover on the covenant contained in the mortgage. All these remedies may be enjoyed by an assignee of a mortgage.

Assignee of Mortgage entitled to same remedies.

Surety, also.

Entitled to position of Creditor.

A surety also, when compelled to pay the debt to the creditor, will be entitled to the benefit of all the securities in the hands of the creditor; and if, besides the security of the surety, the creditor holds a chattel mortgage upon the debtor's effects, the surety upon payment by him, is entitled to be placed in the same position towards the debtor as the creditor was in. But if the surety take a new mortgage to secure him in the payment of the money paid by him, he will then be taken to have waived all his rights under the first mortgage to the original creditor.

Remedy under Power of Sale.

If the mortgagee, his assignee, or the surety proceed to enforce the mortgage security, they may, as we have seen, adopt the remedy under the power of

sale, and, in practice, recourse is generally had in this way, to realize the moneys secured by the mortgage. And, if a mortgagor stand silently by at the sale and acquiesce therein, he will not be permitted afterwards to set up a title as against the purchaser. He will be estopped from claiming that the mortgage is void or that it has been paid.

Mortgagor acquiescing in Sale.

In the event of the mortgage being assigned, the Statute now provides for the registration of the instrument of assignment. The Statute does not however make registration of the instrument compulsory (see Rev'd Stat. Ont. cap. 1, s. 8, subs. 2), except when it becomes necessary to renew a mortgage under sec. 10 of the Chattel Mortgage Act; then, by sec. 11, the assignment must be registered. It is however always advisable to register the assignment as speedily as possible, because registration is notice to the mortgagor (*N. Y. Life* v. *Smith*, 2 Barb. Ch. 82; *Reed* v. *Markle*, 10 Paige, 409). If registration is omitted, then the Assignee should give notice to the mortgagor of the assignment, and thus prevent himself being prejudiced by any further dealings between the mortgagee and mortgagor in regard to the mortgage. A still better plan to adopt is to make the mortgagor a party to, and have him execute the assignment as a consenting party thereto.

Registration of assignment of Mortgage.

The Chattel Mortgage Act specially protects purchasers; and registration, or delivery and change of possession, is necessary in order to validate mortgages as to subsequent purchasers. And, even though a purchaser has notice of an encumbrance on chattels, he may purchase them, and will be protected in his purchase, if it be in good faith, and the incumbrance be not registered, or there has been no change

Purchase, with notice of Mortgage.

of possesion (*Travis* v. *Bishop*, 13 Met. 304 : *Sharpleigh* v. *Wentworth*, 13 Met, 358).

Purchasers in "good faith."

It will be observed that the statute (Revised Stat. Ont. cap. 119) mentions the purchasers whom it it will protect, as purchasers in good faith ; hence it is that where a purchase is made, with intent to defraud the mortgagee the purchase transaction as to to the mortgagee will be void (*Fuller* v. *Paige*, 26 Ill. 358), even though the statutory formalities have been neglected by the mortgagee.

Purchaser subject to Mortgage bound thereby.

When a mortgagor sells property, subject to an encumbrance by way of mortgage, and the purchaser buys subject thereto, the latter cannot afterwards object to the Mortgage. If it is valid between the parties to it, it is good as against such a purchaser, and he will not be permitted afterwards to avail himself of objections, good only at the instance of creditors, subsequent purchasers, and mortgagees in good faith (*Patten* v. *Moore*, 32 N. H. 382: *Sanger* v. *Eastwood*, 10 Wend. 515 ; *Lewis* v. *Palmer*, 28 N. Y. 271 ; and cases cited at p. 370 Herman on Mtges).

Purchase valid upon verbal assent of the Mortgagee.

We have seen (*ante*) that though the instrument provides that no sale shall be valid without the written consent of the mortgagee, yet a verbal assent will estop the mortgagee from objecting to sale. A purchaser, therefore, may establish his title, as against a mortgagee, to such property as he buys, by proving a verbal license from the mortgagee to the mortgagor to sell, although the mortgage contains a provision prohibiting a sale without the written assent of the mortgagee (Herman on Mtges, pp. 374, 375), and lapse of time may be sufficient to

Lapse of time protects purchaser.

protect a purchaser's title, as where a mortgagee acquiesces in a sale by a mortgagor (Herman on Mtges, p. 375).

Valid Mortgage between parties binding on execution sale, subject to Mortgage.

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

A purchaser at an execution-sale, has all the rights of an execution creditor, and while the latter can impeach the Mortgage, the former may also, so long as the terms of the sale were not such as to bar the purchaser from his right (Herman on Mtges. p. 378).

"Delivery."

The last requisite to the validity and completion of a Bill of Sale or Chattel Mortgage is its delivery, preparatory, of course, to filing it in compliance with the statute.

Delivery and acceptance alone, without more, will be sufficient as between the parties to the instrument, but, as against creditors, subsequent purchasers and mortgagees in good faith, a still further requisite is necessary, namely, a proper registration under the Statute; and before that can be had, the affidavit of execution and of *bona fides* must be made.

Instrument operates from delivery.

It is from the delivery, however, that the instrument takes effect, even as against the persons pro-

tected by the Statute; the Statute enacting that, when registered, instruments shall relate back, and have effect from and after the day and time of execution thereof.

Execution, in what it consists.

Execution consists of the "signing," "sealing" and "delivery," by the parties, as their own acts in the presence of witnesses (Whart. Law Lex.). "Delivery" is the last essential to execution, therefore it is from delivery that the instrument takes effect. 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.

In order to complete delivery, acceptance by a mortgagee or bargainee is necessary.

As to date.

When there is a date to the instrument, the presumption is, that delivery was upon that date; 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 are at liberty to show the true time of delivery (2 Bla. Com.: *Burdett* v. *Hunt*, 25 Me. 419; *Partridge* v. *Swazey*, 46 Me. 414). 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, an affidavit of *bona fides*, both in the case of a Mortgage and Sale, must be made; and this being so, the matter would then be less a question as to 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.

REVISED STATUTES OF ONTARIO, CAP. CXIX.

AN ACT

RESPECTING

MORTGAGES AND SALES

OF PERSONAL PROPERTY.

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

REGISTRATION OF CHATTEL MORTGAGES AND SALES OF GOODS, WHERE POSSESSION IS UNCHANGED.

Mortgages of goods not attended with change of possession shall be registered, or else be void as against creditors, &c., of the mortgagor, with an affidavit, &c.

1. "Every Mortgage (*a*) or conveyance intended to operate as a Mortgage (*b*) of goods and chattels (*c*) made in Ontario (*d*), which is not accompanied by an immediate delivery, and an actual and continued change of possession of the things mortgaged (*e*), or a true copy thereof (*f*), shall, within five days from the execution thereof (*g*) be registered as hereinafter provided, together with the affidavit of a witness thereto, of the due execution of such Mortgage or conveyance (*h*), or of the due execution of the Mortgage or conveyance of which the copy filed purports to be a copy (*j*), and also with the affidavit of the mortgagee, or of one of several mortgagees (*k*), 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 a copy of such authority shall be registered therewith)" (*l*). C. S. U. C. c. 45, s. 1; 40 V. c. 7, Schd. A. (134).

Affidavit by agent.

(*a*) A Chattel Mortgage is a written instrument, executed by one party, who is called the mortgagor, to another party, who is called the mortgagee. Without a consideration there cannot be a Mortgage: the very essence of a Mortgage is, that there shall be a debt, the security for which is the Mortgage. As between the parties themselves it may be a verbal Mortgage; but, to secure its validity, as to third persons, it must be in writing. It is the creation of an interest in property, defeasible or liable to be annulled upon the payment of money, or the fulfilment of a certain condition, or the performance of some act; but should the money not be paid, or 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 (*Sands* v. *Standard Ins. Co.*, 26 Gr. 116). "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" (Coote Mort.). "The debt is the principal, and the Mortgage the incident" (*Jackson* v. *Willard*, 4 Johns. 4). "It is not only a lien for a debt, but a transfer of the property itself, as a security for the debt (*Conard* v. *At. Ins. Co.*, 1 Pet. 386), defeasible by the performance of the condition according to its legal effect" (*Erskine* v. *Townsend*, 2 Mass. 495).

The distinction between a Mortgage and a pledge enables one to comprehend more easily what is within the former definition.

By a pledge, the pawnee has but a special property in the goods, the right to detain them for his security, the right to withhold them, until payment of a certain sum by express stipulation; but his interest in the property never becomes absolute and indefeasible (see *ante*, page 5).

(*b*) Under the words, "Every Mortgage or conveyance intended to operate as a Mortgage," are included all assignments, transfers, declarations of trust without transfer, and assurances

of goods and chattels existing, as growing crops, or non-existing, as crops to be thereafter planted, (*McIlhargy* v. *Martin*—C. C., Dean J.,) leases, with conditions giving the lessor a lien on the tenant's property as security for the rent (*Jackson* v. *Green*, 4 Johns. 186; *Polemus* v. *Trainor*, 30 Cal. 685; *Johnson* v. *Crofoot*, 53 Barb. 574). Written agreements, properly executed, stipulating that the amount due for rent of land should be paid before the crops are removed, are Mortgages of the crops (*Weed* v. *Stanley*, 12 Fla. 166), 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 (*Beecher* v. *Austin*, 21 U. C, C. P. 334), or for the performance of a condition (Add on Contracts, p. 818; *Morton* v. *Woods*, L. R. 3 Q. B. 658; 4 Q.B. (Ex Ch.) 293, 307; *Stephenson* v. *Rice*, 24 U. C. C. P. 250) are Mortgages also. But a Mortgage of a vessel, registered under the provisions of any Act in that behalf (sec. 25, *post*), is not within the Act; nor is a Mortgage of a vessel with all her apparel, furniture, &c., as part of the vessel (*Patton* v. *Foy*, 9 U. C. C. P. 512); nor is the ordinary rent receipt of a piano with right of purchase (*Stevenson* v. *Rice*, 24 U. C. C. P. 245; *ex parte Crawcour, In re Robertson*, L. R. 9 Ch., D. 419); because at no time does the property ever pass to, or vest in the lessees, or pass from the lessors; nor is a building agreement, in which is a provision that all materials brought upon the ground should be considered as attached to the premises, and not removable without the landlord's assent, and that he might enter and take possession of the material on certain default (*Brown* v. *Bateman*, L. R. 2 C. P. 272; 15 W. R. 350; *Blake* v. *Izard*, 16 W. R. 108). A Mortgage of what passes by a grant of the land need not be registered (*Ex parte Belcher*, 4 D. & Ch. 703; *Ex parte Reynal*, 2 M. D. & D. 443; *Hutchinson* v. *Kay*, 23 *Beav.* 413); but an agreement for giving a future Mortgage, or a covenant for a

right to take possession of chattels on a prescribed default, or contingency, may be defeated, as against creditors, for non-compliance with the Act. An executory contract (as when a vendor agrees to manufacture and deliver certain timber to a vendee, or a tradesman agrees to make up articles for a customer) is not within the Chattel Mortgage Act (*Robertson* v. *Strickland*, 28 U. C. Q. B., 221; *Middlebrook* v. *Thompson*, 19 U. C. R. 311; *Bank of U. C.* v. *Killaly*, 21 U. C. Q. B. 1).

To be within the first and second 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 (*Beecher* v. *Austin*, 21 U. C. C. P. 334; *Middlebrook* v. *Thompson*, *supra*).

The owner of land, upon which there are fixtures, such as machinery in a mill, has the undoubted right to sever the chattels from the realty, and therefore a Chattel Mortgage, by such a person upon the fixtures, is within the operation of the Act (*Rose* v. *Hope*, 22 U. C. C. P. 482; *Dewar* v. *Mallory*, 26 Gr. 618).

An instrument, in the form of an absolute Bill of Sale, is within the section of the Act, if it appears that the intention of the instrument was to secure a debt (*McMartin* v. *McDougall*, 10 U. C. Q. B. 399); and evidence can be gone into to show what the intention was, but the proof should be clear and convincing (*Dabney* v. *Green.*, 4 H. & N. 101; *Herman* on Mtgs. p. 48, cases there cited). Should an instrument be of such a nature that the affidavit required by the Act, for the purpose of registration, could not be properly made, or legally received, then the statute does not apply, for it would be manifestly contrary to reason to hold a Mortgage void for want of registration, when to comply with the Act, the mortgagee would require to do an impossibility (*Lex non cogit ad impossibilia*).

Ordinarily, Mortgages, under the Act, are given by, and taken to, the parties immediately interested in the transaction, by the debtor himself to the creditor himself; still any one who is personally responsible to others for the money he advances, may legally take a Mortgage by way of security for it in his own name. An agent or trustee 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 (*White* v. *Brown*, 12 U. C. Q. B. 477). The fact that the debt is not due to the mortgagee himself does not prevent the Mortgage from being registered under the Statute.

A treasurer of a mutual insurance company may take a Mortgage to himself under the Act as mortgagee for a debt due to the company; but the more obvious and proper course would be to take the Mortgage direct to the company or corporation, for they have power to take it (*Brodie* v. *Ruttan*, 16 U. C. Q. B. 207). Such treasurer, as mortgagee, may maintain an action against a wrong-doer 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. When taken directly to the company, some person, of course, is instrumental in its being done; and if this person be the president or other principal officer of the institution, he exercises the corporate powers of the institution in the only way in which they can be exercised; he does not act as an agent, and so the affidavit of *bona fides* is sufficiently made by him, without the authority in writing, necessary under the Act in the ordinary case of an agent. He acts directly and in chief and not by delegation. "The metaphysical body never can in fact act; but as, in contemplation of law, it does act, its functions must be performed through the instrument-

alities of others, but such others are no more agents in the proper acceptation of the term than the amanuensis who writes the name of another in his presence, and at his request, or who takes hold of the hand and guides the movement of the marksman is an agent." "In both these cases the principals are acting for themselves, but through the co-operation of some one else actually present, and so it may be said, that the president, or other principal officer of a corporation, acts in like manner for the body corporate, which he represents" (*Brodie* v. *Ruttan supra*; *Wych* v. *Meal*, 3 P. W. 310; Grant on Corporations, 57; *Bank of Toronto* v. *McDougall*, 15 U.C.C. P. 475; *Baldwin* v. *Benjamin*, 16 U.C. Q. B. 52; *Taylor* v. *Ainslie*, 19 U, C. C.P. 78). It is competent to a joint stock company, established for trading purposes, to give a Mortgage as security for goods sold to, or work done for, them (*Shears* v. *Jacob*, L.R. 1 C. P.513; *Deffell* v. *White*, L. R. 2 C.P. 144). 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 (*McGee* v. *Smith*, 9 U. C. C. P. 89); and banks may take, hold, and dispose of Mortgages upon personal property, by way of additional security for debts contracted to the bank, in the course of its business (34 Vic. cap. 5, s. 41 D).

There is no necessity for a Chattel Mortgage to be under seal. Conveyances of real and personal property differ in this respect, that the latter can be transferred without deed, the former only by deed (*Patterson* v. *Maughan*, 39 U. C. R. 379; *Reeves* v. *Capper*, 5 Bing. N. C. 136; *Flory* v. *Denny*, 7 Ex. 581; *Halpenny* v. *Pennock*, 33 U. C. R. 229; Revd. Stat. Ont. cap. 98, § 5; *Switzer* v. *Mead*, 5 Mich. 107; *Milton* v. *Mosher*, 7 Met. 244; *Gerry* v. *White*, 47 Me. 504).

(*c*) In seeking to ascertain the meaning of the words "Goods and Chattels" they must be read in conjunction with the subsequent word "delivery" and the subsequent words "possession

of the thing mortgaged." This being done, it will then become apparent, that the Statute applies to Mortgages of goods and chattels in the restricted sense of movable goods, and not to Mortgages of terms for years in real estate (*Frazer* v. *Lazier*, 9 U. C. Q. B. 679; *Harrison* v. *Blackburn*, 17 C. B. N. S. 678; 34 L. J. C. P. 109; 10 Jur. N. S. 1131; 13 W. R. 135; 11 L. T. N. S. 453). If no consideration were paid to the terms "delivery," "possession," &c., then there could be no doubt, but that a lease or rent for a term of years, being a chattel real, would be within the meaning of the Act (Whart. Law Dict.) unless it could be argued that the conjunction "and" imparted to the words "goods and chattels" but one meaning, that of things personal, as distinguished from things real. But have these words, now under discussion, the effect of so far restricting the meaning of the term "chattel" as to render it no more comprehensive than the word "goods"? A chattel, in the legal acceptation of the word, includes goods movable and immovable, and has been construed to embrace debts, bills, bonds, policies of insurance, shares in joint stock companies, things corporeal as well as things incorporeal (*Hornblower* v. *Proud*, 2 B. & Ald. 327; Whart. Law Dict.); in a word every species of property which is not real estate or a freehold (Burrit Co. Litt. 118, b); whilst the word "goods" is shewn to be far less comprehensive in its operation (*Humbler* v. *Mitchell*, 11 A. & E. 205; *Hesseltine* v. *Siggers*, 1 Exch. 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 Exch. 222, and 24 L. J. Ex. 53; *Powell* v. *Jessop*, 18 C. B. 336; *Lawter* v. *Griffin*, 40 Ind. 593) being limited to what is movable personal property, to things which are tangible and visible, and have a local situation (Worcester's Dict.; *Hewitt* v. *Corbett*, 15 U. C. Q. B. 39). Whatsoever is capable of delivery, of being handed from one to another, in fact, whatever is movable personal property is within the mean-

ing of the term "goods;" hence the word "delivery," inserted in the Statute, restricting the sense in which the term "chattel" is ordinarily used to such things as are capable of being passed from hand to hand, gives to it no wider signification than is possessed by the term "goods." "The English Act," an Act for preventing frauds upon creditors by secret Bills of Sale of personal chattels (17 & 18 Vic. cap. 36) expressly exempts from the expression "Personal Chattels," shares or interests in stock, funds or securities of any government, or in the capital or property of any incorporated or joint stock company, choses in action, stock or produce upon any farm (§ viii.), and defines the sense in which the term "Personal Chattel" shall be used as meaning articles, &c., capable of complete transfer by delivery —and this must mean a present delivery. Hence growing crops are not within the English Act, they being no more capable of removal than the land itself (*Brantom* v. *Griffits*, L. R. 1 C. P. D. 349; 2 C. P. D. 212, overruling *Sheridan* v. *McCartney*, 11 Ir. C. L. (N. S.) 506; *Ex parte Payne, In re Crosse*, L. R. 11 Ch. D. 539).

The English Act, it will thus be noticed, purposely employs the term "transfer by delivery" to define what is meant by the expression "Personal Chattels" (§ viii., sub.-§ 2), whilst in the Provincial Act the terms "delivery," "possession," etc., though not inserted with any such direct intention, give nevertheless from their use, to the words "Goods and Chattels," a circumscribed meaning (*Frazer* v. *Lazier, supra; Hewitt* v. *Corbett*, 15 U. C. Q. B. 39); but the words "delivery" and "possession of the thing mortgaged," do not, it seems, under our Act, convey the idea of a "present delivery." They have relation to the property mortgaged at the time, not when the mortgage is given, but when the mortgagee insists on his charge (Blake, V.C., *Re Thirkell, Perrin* v. *Wood*, 21 Gr. at p. 509).

Now, as it appears, that the Statute only contemplates movable goods, to be the subject of a Chattel Mortgage, a question

arises whether the Statute applies to existing things only things *in esse;* or can things not *in esse,* but *in posse,* be brought within the scope of the Act. However alienable the property in personal chattels may be, unless a party has the actual or potential property in that, which he professes to alien, he cannot, in law, make a valid grant. He cannot, at law, grant the product of that which he hath not, but he undoubtedly can of that which he hath. The owner of land may grant its future yield of fruit, and property in the fruit shall pass as soon as the fruit is extant; as (21 Hen. 6 a) a parson may grant all the tithe-wool he shall have in such a year, yet perhaps he shall have none (*Grantham* v. *Hawley,* Hobart, 132; *Petch* v. *Tutin,* 15 M. & W. 110). So a grant is good of the next year's wool off sheep a man has got, because he has a potential property in such wool; there is in such a grant, a foundation for an interest *in futuro;* but an actual sale is bad in law of the next year's wool off sheep a man has not; for he may never have them, and the possibility of his ever having property in the wool, is in no way connected with an actual property in the sheep (*per* Pollock, C. B., 15 M. & W. 116; Parsons on Contracts, pp. 522, 523; Shep. Touch., Atherly's Edn., 241, 242). And a grant is good in law of hay to be grown on the grantor's field, or the milk that his cows will yield in the coming month (*Wood & Foster's case,* 1 Leon. 42; *Robinson* v. *Macdonald,* 5 M. & S. 228), and so it was held, that a party could pass no title to fish, thereafter to be caught (11 Am. Rep. 357), or mortgage a thing which is not his at the time the Mortgage is given (*Jones* v. *Richardson,* 10 Metc. 481), or sell something to be afterwards acquired. It therefore is plain that, at law, things not yet *in esse,* having regard to their transfer, are divisible into two classes: Firstly, those things which have a potential existence, such as the next season's wool from a grantor's sheep; and Secondly, those things not connected with the present ownership of property, such as the next season's crop off

any land the grantor may buy within six months. At law, the former are the subject of transfer; the latter can only be made the subject of an agreement to sell, that is, the subject of an executory contract. There can then be no question but that the first of these two classes is within the intention of our Statute. In the United States, however, it can hardly be said that the law is so settled, though the tendency has been, of late, to sustain Mortgages given upon unplanted crop, at least, to the extent of one season (*Wyatt* v. *Watkins*, 16 Alb. L. J. 205; *Dupree* v. *McClonahans*, Tex. R. Ct. of App.).

The second class, however, covering such things as are not yet acquired, things not capable of a present positive transfer, operative *in presenti* "but things, the subject of a present contract, to take effect and attach as soon as the things come *in esse*" (Story's Equity Jurisprudence, § 1040) has given rise to much discussion, and not a little contrariety of opinion. At law, there is no doubt, as a general principle, that the existence of the things sold, or the subject matter of the contract, is essential to the validity of the contract, and a mere contingent possibility, not coupled with an interest, is no subject of a sale. There must be either an actual or potential ownership, at the time to make a valid grant at law (Parsons on Contracts, pp. 522, 523). Though, as we shall afterwards see, the rule in equity is different. To make a valid sale of a thing, at law, the vendor must have a vested interest in the article, at the time of the sale, so that a sale or mortgage of goods, not owned by the vendor or mortgagor at the time of the transaction, but afterwards acquired by him, was held to be void (*Jones* v. *Richardson*, 10 Metc. 481; *Rice* v. *Stone*, 1 Allen, 566; *Head* v. *Goodwin*, 37 Me. 181; *Low* v. *Pew*, 108 Mass. 347). And it was held that a sale, purporting to convey present property, as well as all such that the vendor might afterwards acquire, passed only such property as was in the vendor's possession at the time of the sale (*Wilson* v. *Wilson*, 37 Md. 1; 11 Am.

Rep. 518). But, on the other hand, the same country, that furnishes the above authorities, supplies others going to shew that property in things, subsequently acquired, vests in the purchaser immediately the title is acquired by the vendor, provided the vendee has not in the meantime repudiated the transaction (*Frazer* v. *Hilliard*, 2 Strobh. 309; *Blackmore* v. *Shelby*, 8 Hump. Tenn, 439). However, it is well settled with us, that when the subject of a contract is something non-existing, or to be subsequently acquired one can, at law, make a valid agreement to sell, but not an actual sale (*Lunn* v. *Thornton*, 1 C. B. 379; *Cummings* v. *Morgan*, 12 U. C. Q. B. 565; Coote on Mortgages, 235; *Short* v. *Ruttan*, 12 U. C. Q. B. 79; *Gale* v. *Burnett*, 7 U. C.Q. B. 850; *Belding* v. *Read*, Exch. 11 Jur. N.S. 547; 3 Hurlst. & Colt. 955; *Congreve* v. *Evetts*, 10 Exch. 298, and 23 L. J. Exch. 273; *Hope* v. *Hayley*, 5 E. & B. 830; 25 L. J. Q. B. 155; *Chidell* v. *Galesworthy*, 6 Com. B. N. S. 471; *Allat* v. *Kerr*, 27 L. J. Exch. 385). But though, at law, property non-existing is not assignable, or in other words, at law, there cannot be a "prophetic conveyance," importance is to be attached to the subsequent acts of vendor and vendee as the law lays hold of certain acts to carry out the evident intention of the parties. A sale, though void, will be upheld, if there is a *novus actus interveniens* on the part of the vendor, whereby he evinces a desire to confirm a previous sale of after-acquired property. *Licet dispositio de interesse futuro sit inutiles tamen potest fieri declaratio præcedens quæ sortiatur effectum interveniente novo actu* (Bacon's Maxims, 14th; *Lunn* v. *Thornton*, 1 C. B. 379; 9 Jur. 350; 14 L.J.C.P. 161; *Re Thirkell, Wood* v. *Perrin*, 21 Gr. 501; *Holroyd* v. *Marshall*, 33 L.J.N.S.193; 10 H. of L.Cases, 191). So also it is necessary, in order to make a sale effectual of after-acquired property (should there be no other *novus actus*) for the vendee to exercise his power of seizure, should the deed contain one, and, when the power has been properly exercised, to the extent of taking possession of

the after-acquired property by the grantee thereof, it is the same, as if the grantor had himself put the grantee in actual possession (*Belding* v. *Read*, 3 H. & C. 955; 34 L. J. Ex. 212). But it is very necessary that the power, or authority, should be strictly executed (*Belding* v. *Read*, *supra*; *Toms* v. *Wilson*, 4 B. & S. 442; *Gale* v. *Burnell*, 7 Q. B. 850; 14 L. J. Q. B. 340; *Congreve* v. *Evetts*, 10 Ex. 298; 23 L. J. Ex. 273; 18 Jur. 655; *Hope* v. *Haley*, 5 El. & Bl. 830; 2 Jur. N. S. 486; 25 L. J. Q. B. 155), otherwise the principle of a *novus actus interveniens* will not apply. In some of the States of the Union, the law as decided by *Frazer* v, *Hilliard*, and *Blackmore* v. *Shelby*, *ante*, page 110, passes the title to the purchaser, or grantee the moment of its being acquired by the vendor. With us, however, if nothing is done anew respecting after acquired property the title remains in the vendor or assignor, The vendee has only a *jus ad rem* until he, or the vendor, does some subsequent act, clearly evincing the intention of the parties to ratify the original agreement; a judgment creditor will therefore be preferred as against a mortgagee of property not in existence, or not in the possession of the mortgagor, at the time of the execution of the Mortgage, unless, before the creditor obtains his interest in the property, the mortgagee perfects his title *interveniente novo actu* (*Holroyd* v. *Marshall*, *supra*). It has been argued that this case is conclusive upon the point that, even at law, after-acquired property passed, but subsequently it was held that the doctrine established by *Holroyd* v. *Marshall* applied only to property afterwards acquired, when so described that it could be readily and easily identified (*Belding* v. *Reed*, 3 H. & C. 955; 34 L.J. Ex. 212), and the opinion is ventured that, in the case of *Holroyd* v. *Marshall*, there was a *novus actus interveniens* for the new machinery, which was the property in dispute, had been affixed to the old machinery, clearly evincing the intention of all parties to bring the after-acquired property within the scope of

the instrument. And the writer takes courage in his venture from the words of Blake, V. C., when discussing this case in his judgment in *Wood* v. *Perrin*, 21 Gr. 504. But though the law is such with regard to assignments of things which have no actual or potential existence, the rule in equity is different, supporting also assignments of contingent interests and expectancies (*Bennett* v. *Cooper*. 9 Beav. 252; *Curtis* v. *Auber*. 1 Jac. & Wal. 532; *In re Ship Warre*, 8 Price 269, n; *Douglas* v. *Russell*, 4 Sim 524; *Lindsay* v. *Gibb*, 22 Beav. 522; *Langton* v. *Horton*, 1 Hare, 549; 11 L. J. Ch. 299). Rev. Stat. Ont. cap. 98, s. 5, provides for the granting at law of contingent, executory, future interests and possibilities coupled with an interest in land and rights of entry immediate or future, vested or contingent, but the statute does not make valid assignments of contingent interests or possibilities not coupled with an interest (Taylor, Eq. Jurisprudence, 862). Courts of Equity, however, will support assignments, not only of choses in action, and of contingent interests and expectancies, but also of things which have no present actual or potential existence, but rest in mere possibility, not certainly as a present positive transfer operative *in presenti*, for that can only be of things *in esse*, but as a present contract to take effect and attach as soon as the thing comes *in esse* (Story's Equity Jurisprudence, § 1040). When considering the general rule of law therefore, it is well to bear in mind, that in equity a different rule prevails on the subject, and that a contract, for the sale of chattels to be afterwards acquired, transfers the beneficial interest in the chattels, as soon as they are acquired to the vendee, if the property be of such a nature that specific performance would be decreed (Add on Contracts, p 815; Benj. on Sales, 1 Am. Ed. sec. 81; *Langton* v. *Horton*, 1 Hare, 549; *Congreve* v. *Evetts*, 10 Exch. 298; *Hope* v. *Hayley*, 5 E & B.; *Allatt* v. *Carr*, Exch. 6 W. R. 578; *Douglas* v. *Russell*, 4 Sim. 524; *Re Ship Warre*, 8 Price, 269; *Calkens* v. *Lockwood*, 16

Conn. 276; *Mitchell* v. *Winslow*, 2 Storey, 636: *Wilson* v. *Wilson*, 37 Md. 1; *Pennock* v. *Coe*, 23 How. (U.S.) 117), and this is the rule in equity, 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 (Story on Sales, 185). Thus, it will be seen that an assignment, invalid at law, from the absence of some subsequent act of the assignor, or assignee of goods which the assignor has not in his possession, but which he acquires after the execution of the instrument, will be upheld in equity, for the rule at law does not prevail in equity, nor does it in insolvency proceedings, nor does it in the Division court (*Perrin* v. *Wood*, 21 Gr. 493; Revd. Stat. Ont. chap. 47, s. 54, subs. 2). And now (since the passing of the Administration of Justice Act of 1873, 36 Vic. Ont. cap. 8), the power given to the common law courts is such as to enable them to do complete justice between the parties (*Kennedy* v. *Brown*, 21 Gr. 95; *McCabe* v. *Wragg*, 21 Gr. 97), it would appear that in a court of law, as in a court of equity, an assignment or mortgage of non-existing property (such as a quantity of square timber) subsequently to be had and manufactured (*Cummings* v. *Morgan*, *supra*), or that is thereafter to be made (*Short* v. *Ruttan*, *supra*), or such stock as should be purchased thereafter during the currency of the Mortgage (*Perrin* v. *Wood*, *supra*), or crops to be afterwards raised (*McIlhargy* v. *Martin*—C. C., Dean J.), will be upheld and sustained, and that the distinctions between the doctrines of law and equity are now but a matter of history (*Randall* v. *Rayner*, 2 Johnson, 430; *Austin* v. *Sawyer*, 9 Cowen, 39; *Whitmarsh* v. *Walker*, 1 Metcalf, 313). It must, however, clearly appear upon the face of the instrument, that it is the intention of the parties thereto, to subject future acquired property to the terms of the deed, and a bill of sale, assigning all furniture and effects in a certain house, will not relate to goods not in the house, but brought in after the execution of the deed (*Mason* v. *McDonald* 25 U. C. C. P. 439; *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); and where, as in *Thirkell* v. *Perrin*, *supra*, the mortgage covers future acquired stock, yet if, having regard to the terms of the mortgage, there is an implied license for the mortgagor to carry on his business and sell the stock, then *bona fide* purchasers from the mortgagor will have a good title, notwithstanding the mortgage was duly registered (*Nat. Mer. Bank* v. *Thompson*, L. R., 5. Q.B.D. 177). In seeking to ascertain what fruits of the soil are, and what are not, independent chattels within the meaning of the Act, it will be well to bear in mind the distinction between *fructus industriales* and *fructus naturales*; under the former definition, and within the scope of the Act, are fruits produced by the annual labour of man, in sowing and reaping, planting and gathering (*Jones* v. *Flint*, 10 A. & E. 753; *Carrington* v. *Roots*, 2 M. & W. 248; *Simsbury* v. *Matthews*, 4 M. & W. 343; *Warrick* 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; Wms Saunders. vol. 1, 277 e; *Parker* v. *Stainland*, 11 East. 362) for, at common law, a growing crop produced by the labour and expense of the occupier of lands was, as the representative of that labour and expense, considered an independent chattel (Benj. on Sales, 1 Am. Ed. 120; *per* Bailey, J. in *Evans* v. *Roberts*, 5 B. & C. 836; *Kingsley* v. *Holbrook*, 45 N. H. 313, 318, 319; *Dunn* v. *Fergusson*, 1 Hayes (Irish) 542). Within the latter definition, and beyond the scope of the Act before severance, is the natural growth of the soil as grass, timber, fruit on trees, &c., &c. The latter are an interest in land, and, as such, embraced within the fourth section of the Statute of Frauds (*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. 99; *Rodwell* v. *Phillips*, 9 M. & W. 505). The former are chattels, and, as such, within the 17th section of the same statute. But here again there is a distinc-

tion to be observed. It may, and often does happen that a sale of fruit or trees is a contract for the sale of goods and chattels and thus within the statute; 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" (*Marshall* v. *Green*, L. R. 1 C. P. D. 35; *Smith* v. *Surman*, 9 B. & C. 568; Lord Abinger, *Rodwell* v. *Phillips*, 9 M. & W. 505: Rolfe, B. *Washbourne* v. *Burrows*, 16 L. J. Exch. 266; 1 Exch. 115; *Woodruff* v. *Roberts*, 4 La. 127; *Couch* v. *Smith*, 1 Md., Ch. 401; *Claflin* v. *Carpenter*, 4 M[illegible]; *Douglas* v. *Shumway*, 13 Gray, 498). If allowed to rem[illegible] in the possession and under the control of the vendor after severance, then the statutory requisites must be complied with (*McMillan* v. *McSherry*, 15 Gr. 133). Fixtures, too, may and may not be within the operation of the Act. The intention of the parties, in dealing with the fixtures, will decide their character. If they 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 (*Hallen* v. *Runder*, 1 C. M. & R. 266; *Helliwell* v. *Eastwood*, 6 Exch. 312; *Wick* v. *Hodgson*, 12 Moo). The owner of land, upon which there are fixtures, has the right to sever the fixtures from the freehold, and a Mortgage by him upon the fixtures will not be prejudiced by a subsequent Mortgage of the land (*Rose* v. *Hope*, 22 U. C. C. P. 482; see *In re Eslick, ex parte Alexander*, L. R. 4 Ch. D. 503). "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 thereon to secure the purchase money, a prior mortgagee cannot claim them as subject to the lien of the Mortgage, although they are subsequently annexed to the freehold; upon failure to pay the Chattel Mortgage, the mortgagee or vendor is entitled to their delivery"

(*Tift* v. *Horton*, 53 N. Y. 377; *Goddard* v. *Gould*, 14 Barb. 662; *Mott* v. *Palmer*, 1 N. Y. 564). And, where the same person is mortgagee of land and of personal property, and the Mortgages are assigned to different parties, the assignee of the Chattel Mortgage is entitled, as against the assignee of the Real Estate Mortgage, to the personal property mortgaged, which has been attached to the freehold (*Sheldon* v. *Edwards*, 35 N. Y. 279). 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 (*Potts* v. *N. J. Arms, &c., Co.*, 2 Green (N. J.), 395). In *Dewar* v. *Mallory*, (reported in 26 *Grant* 618), the owner of a mill, originally constructed for the purpose of sawing, afterwards added to it machinery for planing the lumber, and subsequently executed a Mortgage of the land and a Chattel Mortgage of the machinery, treating and calling the machinery chattels, it was held by the Chancellor that the mortgagee of the realty had no right to look to the machinery as security for his claim; although in the absence of the acts of the owner in severing the machinery from the realty, it would have been considered part of the freehold. This case has been reheard and reversed, but on other grounds.

(*d*) In this Act "Ontario" is substituted for "Upper Canada" in Con. Statutes U. C., cap. 45, s. 1. The inference from the words "made in Ontario" certainly is, that the Act only applies to instruments, executed under the Act within the Province. Though this appears to be the effect from the use of these words, such was clearly not contemplated, as by 41 Vic. cap. viii., s. 12, sub-s. 2, including section 24 *post*, persons out of the Province, authorized to take affidavits in and for the Court of Queen's Bench or Common Pleas for Ontario, are expressly empowered to administer affidavits under this Act. And, by section 7 *post*, it would appear that provision is made for registration of instruments by residents out of Ontario, of property within the Province.

(*e*) 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 (*Curtis* v. *Leavitt*, 17 Barb. 309; *Tyler* v. *Strong*, 21 Barb. 198; *Adams* v. *Wheeler*, 10 Pick. 99; *Purshall* v. *Eggart*, 52 Barb. 367); 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 (*Fry* v. *Miller*, 45 Penn. 441; *Morse* v. *Powers*, 17 N. H. 286). In determining this question, these circumstances must be looked at and considered, and often result in very nice decisions. From the very diversity of things, what, in one instance, would be possible, in another, would be impossible. The law is reasonable, and requires not that which is impossible (*McMartin* v. *Moore*, 27 U. C. C. P 397; *Maulson* v. *Com. Bank*, 17 U. C. Q. B. 30). In many cases, it is not possible to make an immediate and complete delivery, and, in such cases, as near an approximation to delivery, of which the property is susceptible, must be made, and if this be done, the Mortgage or Sale will be effectual (Wms. Per. Prop. 8 Ed. p. 35; *Richardson* v. *Grey*, 29 U. C. Q. B. 360), and there will remain no necessity for registration under the Act. Thus, where goods in a shop or other occupied building, under lock and key, are sold by the owner, and the key delivered to the purchaser, who goes to the place and examines and checks over the goods, and then locks up the place again, an actual and continued change of possession will be constituted, so as tosatisfy the Statute, and the purchaser need not, either personally or by some one for him, remain in possession or remove the goods (*McMartin* v. *Moore*, *supra*, Herman on Ch. Mtges., p. 203). And

so, 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, he 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, it was held that the grantor did not occupy the rooms, and that the goods were not in his apparent possession (Add. on Contracts, 820; *Robinson* v. *Brigg*, L. R. 6 Ex. 1; 40 L. J. Ex. 17). And, where goods are in an unoccupied shop, or warehouse, under lock and key, the mere delivery of the key has been held to constitute a sufficient compliance with the Act (*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. 244; *Ryall* v. *Rowles*, 1 Ves. Sen. 362; 1 Atk. 171; *Ward* v. *Turner*, 2 Ves. Sen. 443; Herman on Mtges. 203). And, where a mortgagee does everything in his power to get possession of goods mortgaged to him; but is kept at arm's length by the mortgagor, this would not be considered as leaving the goods in the possession of the mortgagor (Herman on Mortgages, p. 203; *Ryall* v. *Rowles*, 1 Ves. 348; *Porter* v. *Parmley*, 52 N. Y. 185; *Bullis* v. *Montgomery*, 50 N. Y. 352). Hence too, when the goods are such as are not capable of delivery, but as is often done, the key of the warehouse containing them is given up, but the key is afterwards withheld, and detinue is brought by the mortgagee, the institution of the action rebuts the presumption of consent to the property remaining with the mortgagor (Herman on Mtges., p. 203). But where the assignee, under a Bill of Sale of household furniture immediately sent a person to the house to take and keep, and who took and kept possession, but the assignor, down to the date of the bankruptcy, continued to live in the house, and use the furniture, as he had previously been accustomed to do, it was held that the goods were in the apparent possession of the assignor (*Ex parte Lewis, in re Henderson*, L. R. 6 Ch. 626; *Ex parte Hooman, In re Vining*, L. R. 10 Ex. 63). And so, in our Courts, where the debtor assigned all his property to

trustees, for the benefit of his creditors, with the most minute accuracy, and his sign was taken down, but he remained on with his clerks in possession of the goods, selling them as before the assignment, as if they were his own property, yet still accounting to the vendee, the jury having negatived the possession of the trustees, it was held that their verdict for the defendant should not be interfered with (*Armstrong* v. *Moodie*, 6 O. S. 538). This decision was anterior to any of our Chattel Mortgage Acts; but with a determination to free every conveyance of property, whether real or personal, from fraud or collusion (which are things the Common Law universally abhors, and therefore makes void all acts that depend upon them, though otherwise in themselves good), several Statutes were passed (50 Edw. III, cap. 6; 13 Eliz. cap. 5; 27 Eliz. cap. 4; 21 Ja. I. cap. 19; R. S. O. cap. 118, s. 2; R. S. O. cap. 95, s. 73), which open too wide a field to enter upon in a little epitome such as this work is intended to be. But they may here be mentioned, as shewing the foundation upon which the numerous authorities are based, prior to the Chattel Mortgage Acts. In *Heward* v. *Mitchell*, (10 U. C. Q. B. 535), a step further was made, than in *Armstrong* v. *Modie*, *supra*, to perfect the change of possession, and the transferee travelled and took possession, but at once re-delivered to the debtor, as agent of the creditors, and still the change of possession was not sufficient; for the delivery to the agent was held only equivalent to a symbolical delivery, and therefore of a character not intended by the Statute (12 Vic. cap. 74; 13 & 14 Vic. cap. 62) that the title to personal property, capable of delivery from hand to hand, should, for the future, depend upon (*Pickard* v. *Marriage*, L. R. 1 Ex. D. 364; *Ancona* v. *Rogers*, L. R. 1 Ex. D. 285; *Chamberlain* v. *Green*, 20 U. C. C. P. 304; Herman on Ch. Mtges, p. 200). 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, 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 of possession (*McMartin* v. *McDougall*, 10 U. C. Q. B. 400), 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, that was capable of actual delivery (Wms. Pers. Prop., 8th edition, 35: *per* Pollock, C. B., *Tanner* v. *Scovell*, 14 M. & W. 37, correcting a dictum of Taunton, J., 2 A. & E. 57). Mere words of delivery are insufficient, where for instance, a mortgagor points out a drove of cattle, and says "I deliver the property to you" (*Porter* v. *Parmley*, 52 N. Y. 185; *Bullis* v. *Montgomery*, 50 N. Y. 252; *Doyle* v. *Stephens*, 4 Mich. 87; *Smith* v. *Moore*, 11 N. H. 55; *Menzies* v. *Dodd*, 19 Wis. 343). It has been held that if one of two partners in trade, mortgages the plant, stock-in-trade, debts and profits, to secure the re-payment of a sum of money lent the other, and the mortgagor is allowed to continue in possession of the things mortgaged, and to retain the management and visible ownership of them, the Mortgage will be void, as against creditors, if lacking registration (*Longman* v. *Tripp*, 2 B. & P. N. R. 67; *Toss, ex parte*, 2 DeG. & J. 230; *West* v. *Skipp*, 1 Ves. 240). Though timber may be delivered by marking it with the initials of the assignee (Wms. Per. Prop. 35; *Stoveld* v. *Hughes*, 14 East. 308), our Statute requires, besides delivery, an actual and continued change of possession of the things mortgaged. Hence in *Short* v. *Ruttan* (12 U. C. Q. B. 79), a delivery, if such it could be called, of saw logs by marking with the transferee's mark, was considered but a symbolical delivery, the assignor continuing in possession as before, and therefore the delivery, not being followed by an actual and continued change of possession of the thing mortgaged, the necessity for registering the assignment arose under the express words of 12 Vic. cap. 74. Both *Cummings* v. *Morgan*, 12 U. C. Q. B. 565, and *Middlebrook* v. *Thompson*, 19 U. C. Q. B. 207,

are distinguishable from *Short* v. *Ruttan, supra*. In the former case, though the timber remained in the possession of the assignor, as it had done previously, and the 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, and, in any event, 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 (*McMillan* v. *McSherry*, 15 Gr. 133).

It has already been noticed that our Statute requires, besides delivery, "an actual and continued change of possession" of the things mortgaged, and however decided the delivery may be, without the subsequent requirement, the Statute will not be complied with (*Heward* v. *Mitchell, supra*; *Short* v. *Ruttan, supra*). 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 unmistakeable acts of control and ownership, as a prudent man would exercise (Herman on Ch. Mortgages, p. 201). 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 (*Carruthers* v. *Reynolds*, 12 U. C. C. P. 596). And, even when removed to a different part of the vendor's premises, and separated from other articles of the same kind, and marked with the purchaser's mark, but

the vendor still remains in possession, there is yet not such a sufficient, actual, and continued change of possession as to satisfy the Statute. It is necessary, also, to pay attention to the nature of the delivery, which is required to be immediate. 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 (*Frazier* v. *Lazier*, 9 U. C. Q. B. 679). It has been urged that the words in the Statute are so strict as to require that the change of possession be visible. Visible change of possession, however, is nowhere in the Statute mentioned, and even though the change be visible, the requirements of the Statute may yet not be fulfilled, for there still may lack that change of possession apparent from an honest transaction (*Wilson* v. *Kerr*, 17 U. C. Q. B. 170; *Reid* v. *McDonald*, 26 U.C.C.P. 147). The object for which the property is required is a circumstance, as has before been mentioned, to be considered in ascertaining whether or not the Act applies. Therefore material sold and delivered, to be worked up in repairing a vessel by the plaintiff's foreman, as well as by the vendor, though it be left on the vendor's premises, where the work was to be performed, and apparently in his possession as before, was held to have sufficiently changed possession, to do away with the necessity of a registered instrument (*Gildersleeve* v. *Ault*, 16 U. C. Q.B. 401; and see *McPartland* v. *Read*, 11 Allen, 231; *Laflin* v. *Griffiths*, 35 Barb., 58; *Wheeler* v. *Nichols*, 32 Me. 233; *Weld* v. *Cutler*, 2 Gray, 195; *Patrick* v. *Meserve*, 18 N. H. 300; *Doyle* v. *Stephens*, 4 Mich. 87). In cases where the vendor has not the property in his possession, nor yet the right to its possession, until the happening of a subsequent event, on his part to be performed, the Act will not apply (*Gurney* v. *James*, 19 U. C. Q. B. 157), nor does it apply where, from the circumstances of the case, things are incapable of a change of possession, consistently with the object of the

agreement in regard thereto (*Burton* v. *Belhouse*, 20 U. C Q. B. 60), nor again does it apply to goods in customs, subject to duties, for they are not capable of delivery; but the Act would apply if the directions of the Customs Acts had been followed, prior to the assignment (*Harris* v. *Com. Bank*, 16 U. C. Q. B. 437.) Whether or not there has been an immediate and sufficient change of possession, to satisfy the Statute, is not a question of law, but one of fact, and as such a question for the jury (*Waldie* v. *Grange*, 8 U. C. C.P. 431 : *Swift* v. *Thompson*, 9 Conn. 63; *Howe* v. *Kelly*, 27 Conn. 538; *Warren* v. *Carlton*, 22 Ill. 415; but see *Young* v. *McClure*, 2 W. & S. 147; *Carpenter* v. *Meyer*, 5 Watts, 243; *Milne* v. *Henry*, 40 Penn. 302; *Cadbury* v. *Nolan*, 5 Penn. 320; *Burrows* v. *Stebbins*, 26 Vt. 659). And, where there was clearly a delivery of goods, and it was shewn that the assignees had empowered the assignor's clerk, as their agent, to keep and sell the goods in the shop, and make weekly returns of sales to the assignees, which was done, the finding of the jury that there was an actual and continued change of possession was upheld, notwithstanding in some instances (but without the assignees' knowledge) the agent had permitted the proceeds of the goods to be applied in payment of the assignor's claims, and once had paid money into a bank to the credit of the assignor, and, indeed, had taken no steps to give public intimation of the change of possession, either directly or by removing the assignors' name, as the party carrying on the business (*Foster* v. *Smith*, 13 U. C. Q. B. 243); and though the assignor remained upon the premises, and assisted in disposing of the goods as formerly, the jury's finding that there had been sufficient change of possession was not interfered with (*Maulson* v. *Com. Bank*, 17 U. C. Q. B. 30; but see *Carscallen* v. *Moodie*, 15 U. C. Q. B. 92). For, where an assignment is made for the benefit of the creditors, it is not to be expected, from the nature of the transaction, that the assignees should remove the goods, or take exclusive possession. And when the creditors put an agent in possession, even though he be previously in the employ of the assignor, and his duty

is to dispose of the stock and collect the debts, and he acts in this duty, there will be a sufficient change of possession within the meaning of the Act (*Harrison* v. *Com. Bank*, 16 U. C. Q. B. 437; *Taylor* v. *Com. Bank*, 4 U. C. C. P. 447).

A deed, though it may be void with respect to one parcel of property for want of registration is not therefore avoided *in toto*, or rendered invalid as to goods, which go with, and remain in, the possession of the assignees (*Taylor* v. *Whittemore*, 10 U. C. Q. B. 440); but, it cannot be upheld as to other goods, of which possession could not, in the nature of things, have been changed at the time of making the deed (*Short* v. *Ruttan*, 12 U. C. Q. B. 95); nor can it be held good in part, when successfully attacked on the ground of fraud for, so far as any portion of the deed is concerned, "it is a statute that makes the deed void and not merely a principle of the common law, and it is a maxim that in such cases the deed must be taken to be altogether void, and not merely as to that part to which the objection of illegality applies. And in the next place, it is also a maxim, that when a deed or instrument is objected to on the ground of fraud, if liable to be objected to at all, it must be avoided altogether, and not allowed to stand good, so far as regards any portion of it, to which the objection of fraud may not apply" (Robinson, C. J., in *Short* v. *Ruttan*, 12 U. C. Q. B., p. 85; *Olmstead* v. *Smith*, 15 U. C. Q. B. 421; *Harrison* v. *Com. Bank*, 16 U. C. Q. B. 437; *Hewitt* v. *Corbett*, 15 U. C. Q. B. 39). It sometimes may happen when, after assignment it becomes necessary to protect his interests, that the assignee or mortgagee should take possession. Actual possession, taken by the grantee, on an unregistered bill of sale, even though taken wrongfully, 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 (*ex parte Fletcher In re Henley*, L. R. 5 Ch. D. 809). Where, according to the terms of the in-

strument, the grantee, upon default made by the grantor, is entitled to the possession of the goods, upon demand, and makes demand, but does not take the goods out of the grantor's possession, there is not such a change of possession as to prevent the application of the Act (*Ancona* v. *Rogers*, L. R. 1 Ex. D. 285). If a bargainee, or mortgagee, does not actually, get possession, diligence, in attempting to get it, will not help him (*per* Mellish, L. J. in *Ex parte Jay*, L. R. 9 Ch. 697, p. 705). But, if the mortgagor prevents the mortgagee from taking possession, and the mortgagor at once brings detinue against him, the pursuit of the goods in a Court of Law prevents the operation of the Act (Herman on Mtges. p. 203). We have seen, that the possession, which might not be sufficient in the case of a wrong-doer, may yet be extended to exclude the operation of the Act in the case of a rightful taking possession. A mortgagee, before default, may or may not be a wrong-doer, in taking possession. "If in a Chattel Mortgage there is no covenant that the mortgagor shall remain in possession, until default, yet, though such mortgagor remains in possession the application of the rule, that possession follows the property, wherever the right of possession is in the owner, is not prevented." Hence it is, that the absence of a redemise clause, in a Mortgage, entitles the mortgagee rightfully to take possession of the property mortgaged, though no default may yet have been made by the mortgagor (*Samuel* v. *Coulter*, 28 U. C. C. P. 240; *Bunker* v. *Emany*, 28 U. C. C. P. 438; *McAuley* v. *Allen*, 20 U. C. C. P. 417; *Ruttan* v. *Beamish*, 10 U. C. C. P. 90; *Porter* v. *Flintoft*, 6 U. C. C. P. 340). As stated by Parke, J., "Where there is a sale of goods generally, no property in them passes, until delivery, because, until then, the goods sold are not ascertained. But where, by the contract itself, the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take that specific chattel, and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The very appropriation of the chattel is equivalent to

delivery by the vendor, and the assent of the vendee to take the specific chattel, and to pay the price, is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the bargainee" (*Dixon* v. *Yates*, 5 B. & Ald. 313). A mortgagee, taking possession before default, or breach of any of the covenants contained in a Mortgage, in which there was contained a redemise clause, will be a wrong-doer, and an action will lie, at the suit of the mortgagor against the mortgagee, for his so doing; but the damages to which the mortgagor would be entitled would be only to the extent of his interest in the goods, and for the damage done to such interest, instead of, as in the case of a wrong-doer, for their full value (*McAuley* v. *Allen*, 20 U. C. C. P. 417; *Briely* v. *Kendall*, 17 Q. B. 937; *Fenn* v. *Bittleston*, 7 Exch. 153; *Flanders* v. *Chamberlin*, 24 Mich. 305; *Ashworth* v. *Dark*, 20 Tex. 825). And when the Mortgage contains no redemise clause, and is *bona fide*, a mortgagee is entitled to an action of trespass against the Sheriff, seizing under a *fi. fa.* against the mortgagor (*Porter* v. *Flintoft*, 6 U. C. C. P. 335).

(*f*) As the alternative of filing the Mortgage itself, the Statute gives the power of filing a true copy thereof. It generally is the practice to register the Mortgage itself, and, for the party entitled thereto, to keep the copy. It is submitted that the better course would be to register the copy, and for the party entitled thereto to keep the original. By this means, in the event of the instrument being questioned in a Court of Law, the expense and trouble of the officer attending to produce the original is avoided. By section 12 (*infra*) a certified copy of the original instrument, or of a copy thereof, is evidence only of the fact that such instrument, or copy, was received and filed according to the endorsement, and of no other fact. To prove the execution of the instrument, the original must, of course, be produced, and, to do this, under the system generally prevailing of registering the original, the Clerk of the Court, with whom it is filed, must be subpœnaed to attend. Far more convenient would it be, therefore, in view of litigation, involving the

contents, construction, or execution of a Mortgage, to file a copy, retaining the original, or to make duplicate originals, filing one, and retaining the other, having attached to the latter the Clerk's certificate (but see sec. 4 *post* (147) *Emmott* v. *Marchant*, L. R. 3 Q. B. D. 555). When considering section 5 (*infra*) we shall see that considerable doubt exists as to whether a copy of an absolute assignment or Bill of Sale may be filed, as well as a copy of a Mortgage, though the weight of authority is in favour of the affirmative (*Harris* v. *Com. Bank*, 16 U. C. Q. B. 437).

(*g*) The words "within five days from the execution thereof," exclude either the first or the last day, so that a Mortgage executed upon the first of January, is properly registered upon the sixth of January following. Should a Sunday intervene it is counted as one day, but if a Sunday should be the first or the last day, then such Sunday becomes a *dies non*. The rule of computation given by 2 Geo. IV. ch. 1, does not apply, as this is a term appointed by a Statute, not by a rule of Court. When there is no provision otherwise, then the general rule as to computation must be followed, which is to make the first day inclusive and the last day exclusive, or *vice versa* (*Scott* v. *Dickson*, 1 Prac. R. 366; *Ex parte Fallon*, 5 T. R. 283; *Williams* v. *Burgess*, 9 Dowl. 544; *Webb* v. *Fairmaner*, 3 M. & W. 473; and see *Lester* v. *Garland*, 15 Vesey, 247; *Pellow* v. *Wonsford* 9 B. & C. 134; *Young* v. *Higgin*, 6 M. & W. 49; *Blunt* v. *Hislop* 3 Ad. & E. 577; *Isaacs* v. *Roy. Ins. Co.*, L. R. 5 Ex. 296; *Boulton* v. *Ruttan*, 2 O. S. 396; *Clarke* v. *Garrett*, 28 U. C. C. P. 75). When expressed to be "so many days from," &c., then the day of the act from which the future time is to be ascertained, must be excluded from the computation (*Weeks* v. *Hall*, 19 Conn. 376; *Bigelow* v. *Wilson*, 1 Pick. 485; *Wiggin* v. *Peters*, 1 Met. 127, 129; *Henry* v. *Jones*, 8 Mass. 453; *Woodbridge* v. *Bridgham*, 12 Mass. 403; *Blake* v. *Crowninshield*, 9 N. H. 304; *Avery* v. *Stewart*, 2 Conn. 69; *Aiken* v. *Appleby*, 1 Morris, S. 8; *Cornell* v. *Moulton*, 3 Denio, 12; *Boulton* v. *Ruttan*, 2 O. S. 396). When expressed to be "clear days," or "so many days at least," or "between so many days," both the first and last days

are exclusive (*Liffin* v. *Pitcher*, 1 Dowl. N. S. 769; *Regina* v. *Justices of Shropshire*, 8 A. & E. 173; *Dempsey* v. *Dougherty*, 7 U. C. Q. B. 313; *Rex* v. *Justices of Herefordshire*, 3 B. & Ald. 581; *Zouch* v. *Empsey*, 4 B. & Ald. 522; *In re Prangley*, 4 A. & E. 781; *Mitchell* v. *Foster*, 9 Dowl. P. C. 527; *Young* v. *Higgon*, 6 M. & W. 49; *Chambers* v. *Smith*, 12 M. & W. 2; *Blunt* v. *Heslop*, 9 Dowl. P. C. 982; *McIntosh* v. *Vansteenburg*, 8 U. C. Q. B. 248; *In re Sanes & Toronto*, 9 U. C. Q. B. 187; *Atkins* v. *Boyston, F. & M. Insce. Co.*, 5 Met. 440; *Richardson* v. *Ford*, 14 Ill. 332; *Cook* v. *Grey*, 6 Ind. 335). So also the expression from a day to a day excludes both days in the count: thus from the 15th to the 18th of a month excludes both the 15th and the 18th (*Newby* v. *Rogers*, 40 Ind. 9), and the word "until" is also exclusive (*People* v. *Walker*, 17 N. Y. 502, *Kerr* v. *Jeston*, 1 Dowl. N. S. 538; *Blunt* v. *Heslop*, *supra*). A fraction of a day will sometimes be reckoned. To carry out the ends of justice, the Court will divide a day, or even an hour, and thus give the party equitably entitled thereto, the benefit of every moment of time (*In re Sheriff of Newcastle*, Drap. K. B. Rep. 503; *Pugh* v. *Duke of Leeds*, 2 Cowp. 720; *Pewtress* v. *Annan*, 9 Dowl. 828; *McMartin* v. *McDougall*, 10 U.C.Q.B. 399; *Thomas* v. *Desanges*, 2 B. & Al. 585). When time is prescribed by rules of Court, then it must be reckoned inclusively of both the first and the last day, unless the last day shall happen to fall on any day on which the offices are not required to be open, in which case the time shall be reckoned exclusively of the last day (Reg. Gen. Prac. 166, Trin. Term, 1856). Under the earlier Statutes, relating to Chattel Mortgages (12 Vic. ch. 74; and 13 and 14 Vic. ch. 62), there was no time allowed, within which the instrument was required to be registered, nor was it required that instruments should be registered immediately and forthwith. Still it was held that an execution coming in before the filing of an assignment, which required to be filed, was entitled to prevail, though a reasonable time for filing may not have elapsed since the execution of the assignment (*Carscallen* v. *Moodie*, 15 U. C. Q. B. 92). Since

20 Vic. cap. 3, however, which repealed 12 Vic. cap. 74, and 13 and 14 Vic. cap. 62, a period of five days has always been allowed, from the time of the execution of the instrument for registering the same. But here another difficulty arose. For want of statutory enactment the Common Pleas and Queen's Bench differed as to the effect of this period of five days, in relation to writs of execution placed in the Sheriff's hands, between the date of the execution of the instrument and the date of its registry; the Common Pleas holding, that the registering of a Chattel Mortgage did not cause it to operate and have relation back to the day of its date, but that it took effect only from its registration, and, in consequence, that a *fi. fa.* placed in the Sheriff's hands between the execution of the deed and its registry would cut it out (*Feehan* v. *Bank of Toronto,* 10 U. C. C. P. 32; *Shaw* v *Gault et al.*, 10 U. C. C. P. 236; *Haight* v. *McInnes,* 11 U. C. C. P. 518); whilst the Queen's Bench held that, where an assignment was filed within the five days, the filing did cause it to relate back to its execution and the assignee to be entitled, as against a *fi. fa.* placed in the Sheriff's hands, after the assignment was executed and before it was registered (*Feehan* v. *Bank of Toronto,* 19 U. C. Q. B. 475), by analogy to the cases of deeds of bargain and sale in England, enrolled within the six months allowed for that purpose. Under the Imperial Act (17 and 18 Vic., cap. 36), twenty-one days is the period allowed for the filing of the Bill of Sale, and the view taken by our Court of Queen's Bench was the same as that held by the English Court where it was decided that the assignee had twenty-one days in which to complete his title by registering his Bill of Sale (*Marples* v. *Hartley,* 30 L. J. Q. B. 92); so that a Bill of Sale, not registered, is not invalid as against a seizure by the Sheriff before twenty-one days have elapsed (*Banbury* v. *White,* 2 H. & C. 300, 2 N. R. 286). The late Imperial Act, of 41 & 42 Vict. cap. 31, reduced the period to seven days). It is easy to imagine the dissatisfaction resulting from this contrariety of opinion, and the Legislature (26 Vic., cap. 46) soon set the matter at rest, by settling the law in favour of the

view entertained by the Court of Queen's Bench, enacting that every Mortgage or conveyance should operate and take effect upon, from, and after the day and time of the execution thereof, and this is the law as it now stands (sec. 3 *post*). A Mortgage or Bill of Sale, that has been ineffectually registered, may during the five days be taken off the file and re-registered (*In re Wright*, 27 L. T. 192); but not after the time for registering has elapsed. In that case a new Mortgage or Bill of Sale must be made and filed with a fresh affidavit (*In re O'Brien*, 10 Ir. C. L. R.App. xxxiii), and if a mortgagee take possession under his mortgage before the expiration of the five days, then he need not register the mortgage at all (per Sir A. Cockburn, C.J., in *Marples* v. *Hartley*, *supra*). 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 is, that the execution was upon the day of the date of the instrument, but this can 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 in the deed, which sometimes may be an impossible day (*Beekman* v. *Jarvis*, 3 U. C. Q. B. 280; 2 Bla. Com).

A Mortgage under this Act executed on a Sunday is not void under Revised Statutes of Ontario, cap. 189, s. 7. The giving or taking in security not being a buying or selling within the Act (*Lai* v. *Stall*, 6 U. C. Q. B. 506; *Wilt* v. *Lai*, 7 U. C. Q. B. 535). But, should there be no redemise clause in the Mortgage, the well established rule applies that the possession follows the property whenever the right of possession is in the owner, and it might be argued that such omission so far changes the character of the instrument as to bring it within the meaning of the above section of the Revised Statutes (*Porter* v. *Flintoft*, 6 U. C. C. P. 335; *Ruttan* v. *Beamish*, 10 U. C. C. P. 90; *McAuley* v. *Allen*, 20 U. C. C. P. 417; *Samuel* v. *Coulter*, 28 U. C. C. P. 240); but even with the absence of a redemise clause, the mortgagor has, by implication, a special property in the goods mortgaged, until default (*Wheler* v. *Mon-*

tefore. 2 Q. B. 133; *Albert* v. *Grosvenor Invest. Co.*, L. R., 3 Q. B. 123).

(*h*) The Act requires that, together with the Mortgage or conveyance, must be filed an affidavit of execution thereof by a witness thereto. The words "together with" in this section mean not merely "also" but "simultaneously" or "along with" (*Grindell* v. *Brendon*, 6 C. B. N. S. 698; 5 Jur. N. S. 142; 28 L. J. (C. P.) 333). It is not stated how far this affidavit is required to go, or what it should contain. Though it be wide of technical form, it yet will be sufficient, so long as it shows the due execution of the instrument. The Act does not require that a Mortgage shall bear date the day it is executed, and for this very reason it would be better, if the Legislature required (which it does not) the affidavit of execution to disclose the time of such Mortgage being given, as is made necessary by the Imperial Act. It then would become expedient to insert the true date in the Mortgage (Beaumont on Bills of Sale, 39). 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 him. 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 (*DeForrest* v. *Bunnell*, 15 U. C. Q. B. 370), and the clerk ought not to receive and file an instrument under the Act without an affidavit of execution (*Grindell* v. *Brendon*, 6 C. B. N. S. 698; 28 L. J. (C. P.) 333).

Execution consists of three acts, viz., "Signing, Sealing and Delivery." The latter completes the efficacy of the deed and is from whence it takes effect, though there be a false, or impossible, or no date. If the affidavit should shew these three acts the Statute will be complied with. Attestation is not positively

essential to the execution of a deed, unless it be required by the particular Statute or power under which the deed is executed Under the present section, attestation is not necessary (*Shears* v. *Jacob*, 14 W. R. 609; *Defell* v. *White*, L. R. 2 C. P. 144; 36 L. J. (C. P.) 25; *Defell* v. *Miles*, 15 L. T. (N. S.) 293). The Act merely requires the affidavit to be of a witness thereto, no mention is made of such witness being required to attest the instrument. Robinson, C. J., (in *Armstrong* v. *Ausman*, 11 U. C. Q. B. 498,) dissented very strongly against this view of the law, holding that the expression of "a witness thereto," meant as much a subscribing witness, as did the expression "witness to the execution of such deed," as used in the Registry Act; and as the latter had universally been understood to mean a subscribing witness, so should the words used in the present section. But the decision in that case was that attesting or subscribing, which are synonymous terms, was not necessary. An affidavit of execution therefore omitting that portion which usually states, "That the name ——— subscribed thereto is of the handwriting of this deponent," would still be sufficient, and the omission of the deponent's addition is no objection to the affidavit (*Brodie* v. *Ruttan*, 16 U. C. Q. B. 207). Nor is it an objection that the second Christian name of the deponent is not written in full, but the initial only given, and there is nothing in the Act which makes the affidavit inadmissable on this ground. 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 (*De Forrest* v. *Bunnell*, 15 U. C. Q. B. 370). Neither need the affidavit state the date of the Mortgage, or on what day it was executed (*McLeod* v. *Fortune*, 19 U. C. Q. B. 100). But an affidavit, sworn before a mayor of a foreign town is useless (*De Forrest* v. *Bunnell*, *supra*; see, however, sec. 24, *post*; Revd. Stat. O. cap. 62, s. 38). It may now be sworn before any Judge or Commissioner, or other person in or out of the Province, authorized to take affidavits in a

the Courts of Queen's Bench, or Common Pleas, or a Justice of the Peace (*post*, sec. 24 and 41 Vic. cap. 8, s. 12). Should the party administering the affidavit omit to sign the jurat, the Mortgage will be void (*Argue* v. *McNeelley*, C. C., Dean, J.; *Ex parte Heymann, In re Heymann*, L. R. 7 Ch. 488; *Nisbet* v. *Cock*, 4 App. R. 200). On the same reasoning, upon which a mortgage is void, if the Commissioner neglect to sign the jurat, a mortgage will be void if the jurat omit the word "Sworn," or the word "affirmed," (per Dartnell, J.J). Affidavits of this nature will not be treated with the same particularity as affidavits used in proceedings before the Court. Objections which rest on a non-compliance in the affidavit, with certain rules of Court established to regulate the practice and proceedings thereon, are not sustainable, for in affidavits sworn under a Statute it is not necessary to conform to the technicalities required by rules of Court (*Moyer* v. *Davidson*, 7 U. C. C. P. 521; *De Forrest* v. *Bunnell*, *supra*, p. 132). It is interesting to notice that the Imperial Act is most particular regarding this affidavit, making it imperative that it should give a full description of the residence and occupation of the person making or giving the Bill of Sale, and the same also of the attesting witness. There must be a sufficient description of the grantor by residence to guide the person in his search (*Briggs* v. *Boss*, L. R., 3 Q. B. 268; 37 L. J. (Q. B.) 101), and the definition of occupation must be by the grantor's principal business in life (*Tuton* v. *Sanoner*, 3 H. & N. 280 4 Jur. (N. S.) 365). "Gentleman" is not a sufficient description of a person who has a definite occupation, and the description of a merchant or professional actor, manager and lessee of a theatre as "Esquire," or of a woman engaged in trade as "Widow" is insufficient (*Fulton* v. *Sanoner*, 3 H. & N. 280; *Allen* v. *Thompson*, 1 H. & N. 15: 25 L. J. (Ex.) 249; *Beales* v. *Tenant*, 29 L. J. (Q. B.) 188; *Adams* v. *Graham*, 33 L. J. (Q. B.) 71; *In re O'Connor*, 27 L. T. 27: 8 Ir. Jur. (N. S. vol. i.) 198; *Ex parte Hooman, in re Vining*, L. R. 10 Eq. 63; *Crosbie* v. *Murphy*, 8 Ir. C. L. R. 301).

(*j*) Should the copy be filed, as permitted by the Act, in place of the original, then of course the affidavit, in addition to shewing the execution of the Mortgage, must shew that the copy filed is, or purports to be, a true copy of such original.

(*k*) The importation into this section by 40 Vic. cap. 7, Sched. A, 134, Ontario, of the words "or of one of several mortgagees, or of the agent of the mortgagee or mortgagees," sets at rest any doubt as to the validity of a Mortgage filed with an affidavit of *bona fides* made by but one of several mortgagees. Prior to 20 Vic. cap. 3, an affidavit made by one of several bargainees, or assignees of goods, was held sufficient (*Heward* v. *Mitchell*, 11 U. C. Q. B. 625; *Balkwell* v. *Beddome*, 16 U. C. Q. B. 203). The Interpretation Act, 12 Vic. cap. 10, s. 5, enacted that, in construing 12 Vic. cap. 74, words importing the singular number, or the masculine gender, only shall include more persons, parties or things of the same kind than one, and females as well as males, and the converse. Then came its amending Act, 13 and 14 Vic. cap. 62, the recital to which was that the former Statute required to be amended, amongst other things, so as to require an affidavit that the Mortgage in the former, and the Bill of Sale in the latter Act, were *bona fide* and just, and not for the purpose of protecting such goods against the creditors of the mortgagor or bargainor. One affidavit, embracing the requisites of the Statute, affords the necessary information as well as if it were contained in more than one affidavit. The language of the recital clearly shews that the Legislature intended that an affidavit of *bona fides* made by one of several assignees should be sufficient, there being no direction in either of these two Statutes that if all the assignees do not make the affidavit there will be a non-compliance with the Act. After the passing of 20 Vic. cap. 3, the question was raised in *McLeod* v. *Fortune*, 19 U. C. Q. B. 98, and the Court there held (when a Bill of Sale was made to two jointly, and filed on an affidavit of *bona fides* made by one, but the evidence shewed that the consideration was made up of two debts due both the vendees separately) that the affidavit

was still sufficient. This section is not limited to the case of joint mortgagees, who are connected in business, either of whom would be aware of all the circumstances connected with the mortgage; but that one of two mortgagees, even if not connected in business, is capable of taking the affidavit, with a full knowledge of the circumstances (*Servern* v. *Clarke*, 30 U.C.C.P. 363).

(*l*) It was not until the passing of this latter Statute (20 Vict. cap. 3), that an agent could make the affidavit of *bona fides*, the 13 and 14 Vic. cap. 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 (*Holmes* v. *Vancamp*, 10 U. C. Q. B. 510). The 40 Vic. cap. 7, went still further in favour of the agent, and gave to him the power to make the affidavit when acting for several mortgagees. The affidavit can now be made, first by the mortgagee, second by one of several mortgagees, third by an agent of a mortgagee, fourth by an agent of the mortgagees. It does not appear, however, that an agent of one of several mortgagees can make it, and though he has power to make an affidavit he cannot invest another with his power delegated to him from his principal *delegatus non potest delegare.*

If the agent make the affidavit, it should state, besides the requirements necessary by section two, *infra*, the fact that he is aware of all the circumstances connected with the giving and taking of the Mortgage; 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. It will be noticed here that though the original Mortgage may be registered, yet when taken in the principal's name by an agent, a copy of the latter's authority, and not the original authority, is required to be registered. The authority of the agent is not required to be under seal (*Beecher* v. *Austin*, 21 U. C. C. P. 342), and it will be revoked by

the death of the principal (*Jacques* v. *Worthington*, 7 Gr. 192; *Wallace* v. *Cook*, 5 Esp. 118) unless it provide otherwise (R. S. O. cap. 95, s. 14). 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 (R. S. O. cap. 95, s. 15). Until the late Act, "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 has made the necessary amendments to enable an agent (on and after the 1st of October, 1880), to take and renew mortages, on a general authority for that purpose (See *post*). We have seen (*ante*) that the treasurer of an insurance company can take a Mortgage direct to himself, although he has no beneficial interest in the Mortgage whatsoever. When the Mortgage is taken to a company, then if the affidavit of *bona fides* be made by the manager, treasurer or other principal official of the company without the written authority, mentioned in the Statute, being filed with the Mortgage, the Mortgage will be held void (*Freehold L. & S. Co.* v. *Bank of Commerce*, 44 U. C. R. 284). But it was held that the president of the institution, taking such a security, "does not act as an agent. He is exercising the corporate powers in the only way in which they can be exercised at all. He acts directly and in chief, and not by delegation. * * * The affidavit could be thus considered as the affidavit of the mortgagee made in the only way the mortgagee could make the affidavit, namely, through its administrative officer" (*Bank of Toronto* v. *McDougall*, 15 U. C. C. P. 475). But the manager of a company stands in a different position to its president. "The latter is one of the corporation, the chief partner, and in a sense its organ and representative.

The manager is an executive officer, not a corporater, a mere agent, with certain specified executive functions, acting under the authority and direction of the president and board of directors." It is "impossible on any principle of construction to regard him in such a matter as in any other position than that of an agent" (*per* Hagarty, C. J., *Freehold L. & S. Co.* v. *Bank of Commerce*, 44 U. C. Q. B. 284)

Gowan, Co. J. is reported to have decided that, under this section, where the payments to be made upon a chattel-mortgage extend beyond one year from the date of the mortgage, the mortgage is void as contrary to public policy. Judge Gowan is stated to have said in substance, when giving judgment, that as the security afforded by the mortgage under the Act "ceases to be valid" at the end of the year from its date, it could not, at its inception, be made security for longer than a year, though a renewal of the security is contemplated (*O'Neill* v. *Small & Sheriff*, 15 Can. Law Journ. 114). But with the greatest deference, the writer questions the soundness of this decision. In fact the opposite view has been taken by County Court Judges. It would be difficult to conclude that the Legislature did not contemplate the case of a mortgage being taken under the present section for more than one year, when by section six (*post* 160) such a mortgage is expressly prohibited, and under the present section there is no such prohibition.

2. Such last mentioned affidavit (*a*), whether of the mortgagee (*b*) or his agent (*c*), shall state (*d*) that the mortgagor therein named is justly and truly indebted to the mortgagee in the sum mentioned in the Mortgage (*e*), that it was executed in good faith and for the express purpose of securing the payment of money justly due or accruing due (*f*), and not for the purpose of protecting the goods and chattels (*g*) mentioned therein against the creditors of the mortgagor (*h*), or of preventing the creditors of such mortgagor from obtaining payment of any claim against him (*k*). C. S. U. C. c. 45, s. 2.

Contents of affidavit of *bona fides.*

(*a*) It is not necessary that the affidavit of the truth of the debt and *bona fides* required by this and section (1) *supra*,

should be made on the same day that the Mortgage is executed (*Perry* v. *Ruttan*, 10 U. C. Q. B. 637); the decision in *Perry* v. *Ruttan* was under 13 & 14 Vic. cap. 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. cap. 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" (see section 1 *ante* foot note (h). 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." A Court will not exact what a Statute does not require, where the effect would be rather to defeat, than to advance the object which the Legislature has in view (*Perry* v. *Ruttan*, 10 U. C. Q. B. 637). It is not necessary in affidavits sworn under a Statute, to conform to the technicalities required by a rule of Court (*Moyer* v. *Davidson*, 7 U. C. C. P. 521; *De Forrest* v. *Bunnell*, 15 U. C. R. 370; *Cobbett* v. *Old Field*, 16 M. & W. 469). Where, therefore, the jurat to the affidavit of *bona fides* used the words "sworn and affirmed," without saying which of the two deponents swore, and which affirmed, and omitting the words severally, the affidavit was still held sufficient (*Moyer* v. *Davidson*, 7 U. C. C. P. 521). It is no objection that the second Christian name of the deponent is not written in full, but the initial only given (*De Forrest* v. *Bunnell*, 15 U. C. Q. B. 370), or that the deponent's addition is wanting (*Brodie* v. *Ruttan*, 16 U. C. Q. B. 207; *Allen* v. *Thomp-*

son, 1 H. & N. 15; 2 Jur. (N. S.) 451; 25 L. J. (Exch.) 249). It is sufficient if the affidavit identifies the deponent as being the mortgagee or the mortgagee as being the deponent (*Sladden* v. *Sergeant*, 1 F. & F. 322, Willis J.; *S. P. Nicholson* v. *Cooper*, 3 H. & N. 384; 27 L. J. Exch. 392; *Brodie* v. *Ruttan*, 16 U. C. Q. B. 207). If the signature of the Commissioner, or other person before whom the affidavit is made, be omitted, the omission is fatal to the instrument, which will thereby be rendered invalid as against subsequent execution creditors; and this will be the case, even though the omission of the signature be through inadvertence, and even though it be satisfactorily proved that the oath really was in fact administered, and in every respect the security be an honest one. 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 (see section 24 *infra*), and must then be filed along with the Mortgage. This was obviously for the purpose of enabling creditors to satisfy themselves not merely of the existence of claims against the goods of the debtor, but of the existence of a statement made under the sanction of an oath and in compliance with the terms of the Statute. To the attainment of this end it seems indispensable that it should appear that the affidavit was sworn before some officer having authority to administer the oath. It never could have been intended that the creditor should be left at his peril to assure himself by extrinsic evidence of the presence or absence of this requisite. A paper purporting to be an affidavit but not authenticated as sworn, is quite consistent with the supposition that at the last moment the mortgagee had shrunk from swearing to the necessary statements" (*Nesbit* v. *Cock*, 4 App. R. 200).

The test as to the sufficiency of the affidavit is not, as has

been supposed, whether or not perjury could be assigned, "but whether the paper filed with the Chattel Mortgage is such an affidavit as the Statute requires" (*Nesbit* v. *Cook, supra;* see *Regina* v. *Atkinson*, 17 U. C. C. P. 295; *Ex parte Hayman*, L. R. 7 Ch. App. 488; *Bill* v. *Bament*, 8 M. & W. 317).

It might be, and sometimes is, the case, that the nature of the transaction between the parties is such, as not to be within the application of the Statute, and it is impossible under the circumstances for the mortgagee to make the affidavit which this section requires. No Chattel Mortgage can be registered without the affidavit, "and it would be repugnant to reason to hold that a Chattel Mortgage is within the Act, so as to make registry with the county clerk indispensable to its validity, and yet that it is a Mortgage of such a kind, that the affidavit, positively required by the Statute to be made in order to registration of a Mortgage, 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 this section cannot be complied with, then it cannot be held illegal for want of registration (*Baldwin* v. *Benjamin*, 16 U. C. Q. B. 52; *Mathers* v. *Lynch* 28 U. C. Q. B. 354; *Walker* v. *Niles*, 18 Gr. 212).

(*b*) The introduction, after the word mortgagee, of the words "or of one of the several mortgagees, or of the agent of the mortgagee or mortgagees" would improve this section. 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 mortgagees.

(*c*) Though the mortgagee, or his agent, only are mentioned in this section, it must not be understood that the affidavit can only be legally and properly made by the mortgagee or his agent. He who is personally responsible to another for the money he advances, may legally take a mortgage, by way of security for it, in his own name, and make the affidavit of *bona*

fides required by this section (*White* v. *Brown*, 12 U. C. Q. B. 477; *Heward* v. *Mitchell*, 11 U. C. Q. B. 625). It matters not for whose business the advance is made. The Statute is not limited in its application to transactions wherein the debt is due absolutely to the mortgagee himself. 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. Hence it is, that the manager or treasurer of a corporation can take a Mortgage direct to himself for a debt due to the corporation, and can make the affidavit required by this section; but the more obvious and proper course would be, for the manager or treasurer to take the Mortgage to the corporation, in which event he would make the affidavit as agent, and a copy of his authority would require to be registered. This authority may now be a general one to take and renew Mortgages under the Act; until the late Act, however, a new authority had to be executed each time it was necessary to take or renew a Mortgage. This needless procedure is now done away with (post). When, however, the president or principal officer of a corporation makes the affidavit, he does not act as agent, "he acts directly and in chief, and not by delegation," and therefore the authority to an agent in such case need not be given (*Taylor* v. *Ainslie*, 19 U. C. C. P. 78; *Brodie* v. *Ruttan*, 16 U. C. Q. B. 207; *Wych* v. *Meal*, 3 P. W. 310; Grant on Corporations, 57; *Bank of Toronto* v. *McDougall*, 15 U. C. C. P. 475; *Baldwin* v. *Benjamin*, 6 U. C. Q. B. 52). 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 behalfof the Queen (*McGee* v. *Smith*, 9 U. C. C. P. 89).

(*d*) Four things are required by the affidavit.

(1) That the mortgagor therein named, is justly and truly

indebted to the mortgagee in the sum mentioned in the Mortgage;

(2) That the Mortgage was executed in good faith and for the express purpose of securing the payment of money so justly due or accruing due;

(3) And not for the purpose of protecting the goods and chattels mentioned therein against the creditors of the Mortgagor; or

(4) Of preventing the creditors of such mortgagor from obtaining payment of any claim against him.

(*e*) 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 mortgagee, who assumes the debt of another renders himself liable for it, and if he takes a Chattel Mortgage in security from that other, for his own indemnity, can properly make affidavit as to all these four requisites. If it were not so, then a Mortgage taken under such circumstances would not be within the Statute (*Baldwin* v. *Benjamin*, 16 U. C. Q. B. 52; *Farker* v. *Roberts*, 3 U. C. R. 114; *Swayne* v. *Ruttan*, 6 U. C. C. P. 399).

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 indorsement, and not for the purpose of protecting the goods against the creditors of the mortgagor," is sufficient where the Mortgage does fully set forth the consideration, so that the true transaction between the parties is disclosed (*Valentine* v. *Smith*, 9 U. C. C. P. 59). 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 doubt-

ful if the affidavit would be sufficient; the words "or thereabouts" might easily enable a person, so disposed, to evade swearing to the indebtedness of the mortgagor in the sum mentioned in the Mortgage (*Knox* v. *Meldrum*, C. C, Dean J.). 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 not shown that there were more goods than would satisfy that amount (*McGee* v. *Smith*, 9 U. C. C. P. 89; *Biddulph* v. *Goold*, 2 N. R. 420; 11 W. R. 882). 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 (*North* v. *Crowell*, 10 N. H. 151; *Cooly* v. *Hobart*, 8 Iowa, 358; *De Wolf* v. *Strader* 26 Ill. 225; *Maitland* v. *Citizen's National Bank*, 40 Md. 540). But a Mortgage will, as against unpaid creditors, be invalid, when taken in great part for a debt not actually existing at the time it is given (*Robinson* v. *Patterson*, 18 U. C. Q. B. 55). And when a debtor mortgages all his personal property of every description, including the most trifling things, to secure a sum of money wholly disproportioned in amount to the value of the property mortgaged, it becomes a suspicious circumstance, that the mortgagor intended to embrace everything in the Mortgage for a purpose, and though the *bona fides* of the debt be not disputed, it is a question for the jury whether these circumstances are not sufficient to show that the deed was made, not for the security of the assignee, but for the purposes of the debtor, and to shield his property from other creditors (*Fleming* v. *McNaughton*, 16 U. C. Q. B. 194; *Twyne's case*, 3 Co. 81; *Benton* v. *Thornhill*, 7 Taunt 149, 2 Marsh, 427).

(*f*) 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*. It is sufficient if the consideration is due at the date of the Mortgage (*Beecher* v. *Austin*, 21 U. C. C. P. 339). A Mortgage, given to secure a mortgagee in a debt that is barred by the Statute of Limitations is still a valid security as against creditors (*Murillo* v. *Swift*, 18 Conn. 268). Where a Chattel Mortgage is given by the mortgagor to the mortgagee to secure an existing debt which the mortgagor has the option of repaying, according to the proviso for redemption, either in money, or some other commodity, the affidavit, under this section, of the indebtedness of the mortgagor to the mortgagee in the sum mentioned, is sufficient, and the fact that the defeasance clause in the Mortgage, providing for the repayment of the Mortgage, in the sum advanced, or in some other commodity, and referring to another agreement between the parties as shewing the manner in which such other commodity is to be delivered, none the less requires the affidavit to be made under this section, and the Mortgage can be still upheld against the objection that it does not truly shew the real transaction between the parties (*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).

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 correctly made, 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, even though it is not paid for some months afterwards (*Walker* v. *Niles*, 18 Gr. 210)

It is not necessary that the affidavit should state either the debt to be wholly due, or wholly accruing due, or partly one, and partly the other, according to the circumstances of the case, but it is sufficient when it states that the Mortgage was executed for the purpose of securing the payment of the money so justly "due or accruing due," being in accordance with the terms of the Act (*Squair* v. *Fortune*, 18 U. C. Q. B. 547.)

(*g*) The words "estate and effects" are more comprehensive

than the words "goods and chattels," the former including besides the latter, realty debts and choses in action; therefore, where an affidavit of *bona fides* to a Mortgage states that it was *bona fide*, &c., &c., and not for the purpose of holding, &c., "the estate and effects mentioned therein," instead of "the goods and chattels," the substituted words sufficiently comply with the Act (*Mason* v. *Thomas*, 23 U. C. Q. B. 305).

(*h*) 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 (*Boulton* v. *Smith*, 17 U. C. Q. B. 404). An affidavit that the Chattel Mortgage was not made for the purpose of preventing the creditor "instead of creditors of such mortgagor obtaining payment of any claims against him," is insufficient, even though the omission of the letter "s" be a mere mistake by the person who wrote the affidavit. It being the duty of the Court to guard against any artful attempts at evasion, by insisting upon such affidavit being made as the Statute requires (*Harding* v. *Knowlson*, 17 U. C. Q. B. 564; *Nesbitt* v. *Cook*, 4 App. R. 200).

(*k*) 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. The omission to state against "him, the mortgagor," clearly does not comply with the Statute. Words cannot be added to the affidavit, any more than to an Act of Parliament, to supply an omission which may be thought, on merely conjectural grounds, to have been unintentional (*Re Andrews*, 2 App. R. 24; *Morrow* v. *Rourke*, 39 U. C. Q. B. 500; *Nesbit* v. *Cock*, 4 App. R. 200). 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 (*Bertram* v. *Pendry*, 27 U. C. C. P. 371).

From whence the instrument takes effect.

3. (*a*) Every such Mortgage or conveyance shall operate and take effect upon, from, and after the day and time of the execution thereof. 26 V. c. 46, s. 1.

(*a*) This is taken from 26 Vic. cap. 46, s. 1., p. 114. Until the passing of this 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 Vic. cap. 3, that limited the period of five days, within which instruments under the Act should be filed. Before then, though a reasonable time may not have elapsed since the execution of an assignment, a writ of *fi. fa.*, coming in before the filing of the assignment, was held entitled to prevail (*Carscallen* v. *Moodie & Dafoe*, 15 U. C. Q. B. 92), and likewise it was held by the Court of Common Pleas, after the passing of the Statute 20 Vic. cap. 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 its date and its registry, would therefore cut it out (*Feehan* v. *Bank of Toronto*, 10 U. C. C. P. 32; *Haight* v. *McInnis*, 11 U. C. C. P. 518; *Shaw* v. *Gault*, 10 U. C. C. P. 236). But the Court of Queen's Bench held differently (*Feehan* v. *Bank of Toronto*, 19 U. C. Q. B. 474); and can it be argued, that the Statute made void an instrument (as against creditors) registered within the period allowed by Statute, by reason of a writ being placed in the hands of the Sheriff prior to the registry of the instrument, the Statute all the while negatively saying that if such instrument is registered within the time limited, it shall be valid as against creditors of the mortgagor.

The ruling of the Court of Common Pleas seems to be the same as that of some of the States of the Union. As to creditors, subsequent encumbrancers and purchasers, a Mortgage with them takes effect only from the time of its delivery to the Recorder (*Doe* v. *Bank*, 3 McLean, 140; *Frederick* v. *Barr*, 3 Ohio S. 471; *Tousley* v. *Tousley*, 5 Ohio S. 78; *Corvall* v. *Duvall*, 2 Ark. 136; *Brown* v. *Kirkman*, 1 Ohio S. 116; *McGee* v. *Bentley*, 8 Ohio

S. 396). The English Courts, however, favour the views taken by our Court of Queen's Bench. Under the Imperial Act (17 and 18 Vic. cap. 36), a period of twenty-one days was allowed an assignee to perfect his title by registration, and a Bill of Sale not registered, was yet valid as against a seizure by the Sheriff, until twenty-one days had elapsed (*Marples* v. *Hartley*, 30 L. J. Q. B. 92; *Banbury* v. *White*, 2 H. & C. 200, 2 N R. 286). The 17th and 18th Vic. cap. 36, has been repealed, and the time within which an instrument must be filed under the Imperial Act, is reduced now to seven days (41 and 42 Vic. ch. 31, Imp. Act).

Unless registered, mortgage or conveyance void.

4. In case such Mortgage or conveyance (*a*) and affidavits (*b*) are not registered, as hereinbefore provided (*c*), the Mortgage or conveyance shall be absolutely null and void as against (*d*) creditors of the mortgagor (*e*), and against subsequent purchasers or mortgagees in good faith (*f*) for valuable consideration (*g*). C. S. U. C. c. 45, s. 3.

(*a*) 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 the first section, yet, while the latter section permits a true copy to be registered, this clause makes no reference to such. It therefore would be safer, in all instances, to register the original Mortgage itself.

(*b*) The affidavits are—

1st. The affidavit of execution (see section 1).

2nd. The affidavit of *bona fides* (see section 2.)

(*c*) This clause refers to what has gone before for information as to registration. Section 1, however (the only clause having any reference to registration), provides merely that the registration shall be within five days, and there is nothing prior to section 7, *infra*, giving instructions as to how the Mortgage is really to be registered.

(*d*) There are three classes of persons, as against each of which the Mortgage shall be absolutely null and void. These are—

1st. Creditors of the mortgagor.

2nd. Subsequent purchasers in good faith for valuable consideration.

3rd. Mortgagees in good faith for valuable consideration.

The reason of the Statute declaring void a Mortgage, as against these three classes of persons, unless its requisites are complied with, will appear 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.

In the absence of fraud, at Common Law, a Mortgage would be valid against subsequent *bona fide* purchasers, even though the Mortgage was not registered, and the mortgagor remained in possession. But the written law now requires possession or registration. One or other of these requisites must exist, and he who fails in both, must suffer for improperly enabling another to appear to the world as absolutely owning property which in reality 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, or as against any other title inferior to the Mortgage (except a subsequent Mortgage or sale recorded prior thereto), 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 (*Robinson* v. *McDonald*, 2 B. & A. 134; *Boughton* v. *Boughton*, 1 Atk. 625); and it will be valid and effectual as against any person consenting to it (*Steel* v. *Brown*, 1 Taunt. 381; see *Oliver* v. *King*, 1 Jur. N. S. 1066). 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 a cause of action" (*Scoble* v. *Henson*, 12 U. C. C. P. 65; *Watts* v. *Brooks*, 3 Ves. 612; *Cottington* v. *Fletcher*, 2 Atk. 155, 6; *Curtis* v. *Perry*, 6 Ves. 739, 747; *Montefiori* v. *Montefiori*, 1 W. Bl. 364; *Hawes* v. *Leader*, Cro. Jac. 270; *Philpotts* v. *Philpotts*, 10 C. B. 85: 20 L. J. (C. P.) 11).

But as regards the three classes of persons above mentioned the law is very different. The Mortgage, as to them, can only be made effectual by registration, or change of possession of the property mortgaged, either of which occurrences, the Statute, in effect, settles, as being sufficient and proper notice to those classes of persons who might be prejudiced were they not put upon their guard. But, though the object and effect of registration is to give notice to all those who desire to avail themselves of the opportunity given them by Statute, it does not follow that because notice is given by registration, the Mortgage is nevertheless valid. "The Act was passed, not with a view of making good a title, which would not have been good before" the passing of the Act, but simply for the protection of creditors, purchasers and mortgagees (May on Fraudulent Conveyances, p. 120; *Mercer* v. *Peterson*, L. R. 2 Ex. 304; *Darvill* v. *Terry*, 6 H. & N. 812; *Oriental Bank* v. *Coleman*, 3 Giff. 11; *Re Daniel, ex parte Ashby*, 25 L. T. 188).

Unless the Mortgage, when registered, complies in all particulars with the requisite technicalities of the Statute it will be invalid. Hence for example it is, that, should a Mortgage not contain a sufficient description of the goods mortgaged, it yet is void as against subsequent purchasers in good faith, and notice of such a Mortgage to the purchaser will not affect his right (*Moffatt* v. *Coulson*, 19 U. C. Q. B. 341; *Edwards* v. *English*, 7 E. & B. 564; May on Fraudulent Conveyances, p. 120; *Doe Otley* v. *Manning*, 9 East 71). In the States, where a Statute provides for a change of possession or registration, in order to give a Chattel Mortgage any validity against subse-

quent purchasers or creditors, no notice of a Mortgage however full or formal will supply the place of registration (*Robinson* v. *Willoughby*, 70 N. C. 358; *Bevans* v. *Balton*, 31 M. 437); and this is the same, under our Act, as the result of its declaring all instruments, covered by the Act, absolutely null and void unless registered according to its provisions (sec. 4 *supra*).

(*e*) By creditors of the mortgagor is meant any one to whom a debt is owed by the mortgagor. It makes no difference whether the debt be one created by the mortgagor before or after the execution of the Mortgage (*Graham* v. *Furber*, 14 C. B. 410, 23 L. J. C. P. 51; *Ex parte Stevens*, L. R. 3 Ch. D. 807; *Mackay* v. *Douglass*, 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. 27; *Taylor* v. *Jones*, 2 Atk. 601; *Jenkyn* v. *Vaughan*, 3 Drew, 425), and the creditor must be an opposing creditor (*Bank of Montreal* v. *McWhirter*, 17 U. C. C. P. 506). But the Statute 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 shews that he represents a creditor, and he can only do this by showing a Judgment (*Martyn* v. *Podger*, 5 Burr, 2631; *White* v. *Morris*, 11 C. B. 1015; *Porter* v. *Flintoft*, 6 U. C. C. P. 338; *Gront* v. *McLean*, 3 O. S. 443; *Powers* v. *Ruttan*, 4 O. S. 58; *Coleman* v. *Crocker*, 1 Ves. Jun. 161).

It will be observed that, while the Imperial Act (17 and 18 Vic. cap. 36) declares null and void a Bill of Sale, for want of due compliance with the technical formalities of the Statute, as against all assignees of the estate and effects of the person whose goods, or any of them, are comprised in the Bill of Sale under the laws relating to Bankruptcy or Insolvency, our Statute has no such provision. Whether an assignee in insolvency could or could not urge technical objections to a Mortgage not in any way impeachable on the insolvent laws, was referred to but not decided in *Bertram* v. *Pendry*, 27 U. C. C. P. 380. It was, however decided in the affirmative in *Re Andrews*, 2

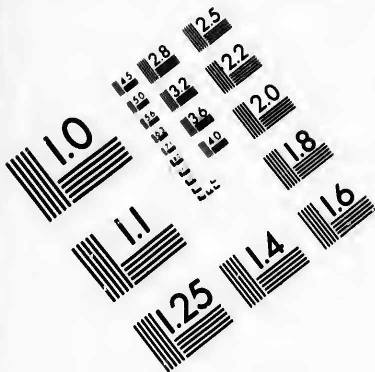
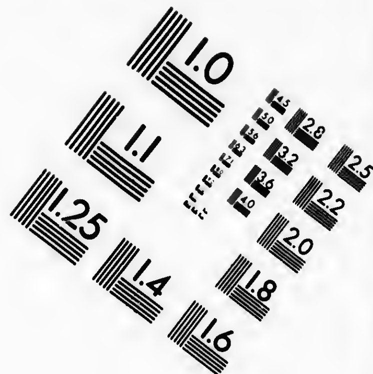
App. R. 24 (see *ante* p. 78). Mr. Justice Patterson there stating that the law is not so defective as to permit a transaction, which a creditor could sue on successfully, to become impregnable and to exclude creditors, so soon as insolvency intervenes (May on Fraudulent Conveyances, p. 149; Miller's Bill of Sale, 132; *Doe dem Grimsby* v. *Ball*, 11 M. & W. 531; *Ware* v. *Gardiner*, L. R. 7 Eq. 317; *Anderson* v. *Maltby*, 2 Ves. 244; Insolvent Act, 1875, s. 39). There was a very strong opinion against the view taken by Mr. Justice Patterson, but his judgment has lately been upheld by the Court of Appeal.

(*f*) It will be observed that in this section the words "good faith" are added, requiring that a purchaser or mortgagee should be such in good faith. Until lately these words were omitted from section 9, *infra*. A purchaser or mortgagee, for valuable consideration, though he may have notice of the existence of a Mortgage, is still a purchaser in good faith, where the Mortgage from some cause is insufficient to pass the property. 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 be defeated as being a purchaser in bad faith (*Edwards* v. *English* 7 E. & B. 564; *Morrow* v. *Rourke*, 39 U. C. Q. B. 500; *Moffatt* v. *Coulson*, 19 U. C. Q. B. 341). Nor is a creditor 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 (*Edwards* v. *Edwards*, L. R. 2 Ch. D. 291).

(*g*) As to valuable consideration, see *ante* p. 21, *et seq.*

Sale of goods not attended with delivery, shall be registered, or else void as against creditors of Vendor.

5. Every sale (*a*) of goods and chattels (*b*), not accompanied by an immediate delivery, and followed by an actual and continued change of possession (*c*) of the goods and chattels sold, shall be in writing (*d*), and such writing shall be a conveyance under the provisions of this Act (*e*), and shall be accompanied (*f*) by an affidavit of a witness thereto of the due execution thereof (*g*), and an affidavit of the bargainee (*h*), or his agent duly authorized in writing to take such conveyance (a copy of which authority shall be attached to such convey-

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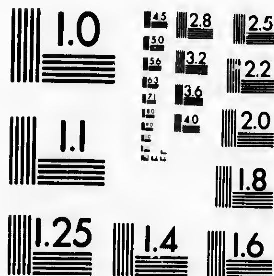
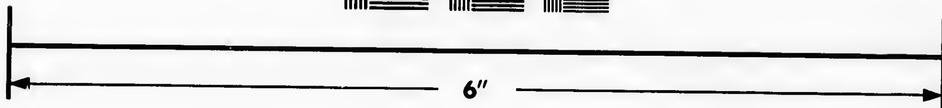

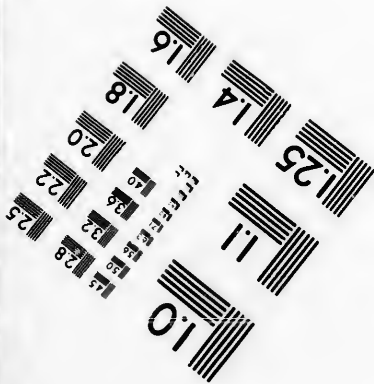
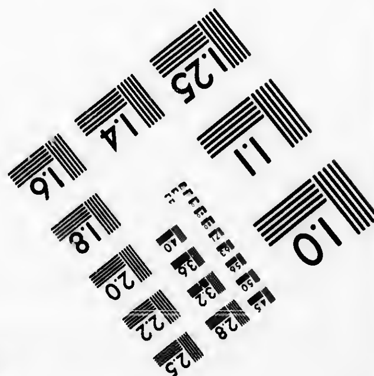

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ance) (*k*) that the sale is *bona fide* and for good consideration (as set forth in the said conveyance) and not for the purpose of holding or enabling the bargainee to hold the goods mentioned therein against the creditors of the bargainor (*l*), and such conveyance and affidavits shall be registered as hereinafter provided (*m*), within five days from the executing thereof (*n*), otherwise the sale shall be absolutely void as against the creditors of the bargainor, and as against subsequent purchasers or mortgagees in good faith (*o*). C. S. U. C. c. 45, s. 4.

(*a*) In all instances in which, for a valuable consideration, the absolute beneficial interest passes from seller to buyer, there exists a sale within the meaning of this section (*Stephenson* v. *Rice*, 24 U. C. C. P. 245; 2 Bl. 446; 2 Kent, 615, 11th Ed.; *Williamson* v. *Berry*, 8 How (U.S.) 544; *Gardner* v. *Lane*, 12 Allen, 39). The question of property passing is generally one of intention (*Ogg* v. *Shuter*, L. R. 10, C. P. 159; *Stephenson* v. *Rice, supra*). To constitute a valid sale, there must be a concurrence of the following elements, viz., 1st, parties competent to contract; 2nd, mutual assent; 3rd, a thing, the absolute or general property in which is transferred from the seller to the buyer; and 4th, a price in money paid or promised (Benj. on Sales, 2). 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, declarations of trusts without transfers, and other assurances of goods and chattels, agreements for future Bills of Sale, and covenants for right to take possession. An inventory of goods with receipt for purchase money attached, the vendor remaining in possession of the goods is a sale in writing within the Act (*Ex parte Cooper, in re Baum*, L. R. 10 Ch. D. 313; *Ex parte O'Dell in re Walden*, L. R. 10, Ch. D. 76). Whilst the Imperial Act (17 & 18 Vic. cap. 36) excepts from its operation assignments for the benefit of creditors, our Statute gives no indication of what it includes, except what can be gathered from the words "every sale of goods and chattels," and it has

been held that assignments, for the benefit of creditors are comprehended by the Statute (*Heward* v. *Mitchell*, 11 U. C. Q. B. 625; *Harris* v. *Com. Bank*, 16 U. C. Q. B. 437).

But, a Bill of Sale, by the Sheriff, of an execution debtor's goods to a purchaser, whether he be plaintiff in the execution or not, is not within the operation of the Act (*Kissock* v. *Jarvis*, 6 U. C. C P. 393; and see *Woodgate* v. *Godfrey*, L. R. 4 Ex. D. 59, L. R. 5, Ex. D. 24). The Statute, not applying to Bills of Sale made by the Sheriff, what rights have creditors of the execution debtor, when the latter, after the Sheriff's sale, continues in possession, as theretofore? To ascertain this, reference must be had to the common law (*Paterson* v. *Maughan*, 39 U. C. Q. B. 371; *Baldwin* v. *Benjamin*, 16 U.C.Q.B. 52). In case goods are left in the possession of a debtor, it is a question for a jury, whether the tranaction was fair or fraudulent; whether it was a *bona fide* sale, and the money really paid by the purchaser or whether it was in fact paid by the debtor, and whether it was a colourable transaction (*Latimer* v. *Batson*, 4 B. & C. 652); in *Edwards* v. *Harben*, 2 T. R. 587, the Court were all of the opinion that "if there be nothing but the absolute conveyance without the possession that, in point of law, was fraudulent." But in *Kidd* v. *Rawlinson* (2 B. and P. 59), Lord Eldon pointed out the difference between *Edwards* v. *Harben* (which was cited as an authority), and *Kidd* v. *Rawlinson*. In the former case the transaction was between the debtor, himself and his creditor, in the latter case it was not so, but the goods were purchased at a public sale by a person who had never acquired the character of a creditor, and were then lent to the original owner for a temporary and honest purpose. The facts in *Kidd* v. *Rawlinson* were as follows:—"An execution having issued against the goods of one Auburn, his furniture was taken and put up for sale by the Sheriff of Surrey, The plaintiff, who was Auburn's brother-in-law, but not a creditor, became the purchaser, and a Bill of Sale was made to him. He allowed Auburn to keep possession so as to be able to carry on his business; but Auburn, afterwards being

arrested for debt, made a Bill of Sale to the defendant, who took possession and sold, after having received a notice from the plaintiff of the latter's prior title. On an action by the plaintiff for money had and received by the defendant. Lord Eldon desired the jury to say what they considered was the object of the Bill of Sale, and whether there was any fraud between the plaintiff and Auburn, and they, being of opinion that there was no fraud, but that it was intended that the Bill of Sale should be a security for the money advanced to the Sheriff, the plaintiff got a verdict." It follows then, that if goods, sold at a Sheriff's sale, be left in the possession of the execution debtor, unless the transaction be a fraudulent and colourable one, the real owner, who purchased at the sale, cannot be defeated in his title, from the fact alone of possession continuing with the execution debtor. And if fraud exist, filing the Bill of Sale, according to the Statute, will not better the transaction, for the Act is not intended to make valid an invalid transaction.

(*b*) For what are goods and chattels, see *ante* section 1, note (c)

(*c*) For information as to the construction of the words, "not accompanied by an immediate delivery, and followed by an actual and continued change of possession," see *ante* section 1, note (e).

(*d*) It is difficult to imagine what reason the Legislature had in providing that the sale "shall be in writing," more especially as the words do not appear in the first section relating to Mortgages. The word "writing" includes words printed, painted, engraved, lithographed, and otherwise traced or copied (Revd. Stat., Ont., cap. 1, s. 8, sub-s. 14). If the words "shall be in writing," were omitted, could a sale of chattels by parol without a change of possession be held valid, when the Act requires every sale to be registered? The requirements of the Act could not be complied with, if the sale be by parol, and it would be no answer to make, that because registration was impossible, it therefore became unnecessary (*Cummings* v. *Morgan*, 12 U. C. Q. B. at page 567).

(*e*) The writing shall comply with all the provisions of the Act.

(*f*) See section 1 note (h).

(*g*) The affidavit of execution need not be by a subscribing witness (*Armstrong* v. *Ausman*, 11 U. C. Q. B. 498), and it need not be made upon the same day as the Bill of Sale is executed, but 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 the date of the Bill of Sale, or on what day it was executed (*McLeod* v. *Fortune*, 19 U. C. Q. B. 100). See also section 1 *ante*, note (h).

(*h*) For affidavit of bargainee see also *ante* section 1, notes (k) and (l). As power is given by section 1 to an agent of a mortgagee to make the affidavit of *bona fides*, so in this section, is power given to the agent of the bargainee to make a similar affidavit. It will be observed though, that a like amendment, as was made to sec. 1, by 40 Vic., cap. 7, Sched. A (134), giving, by express enactment, power to one of several mortgagees, or to the agent of mortgagees, to make the affidavit of *bona fides* was not made to this section in favour of one of several bargainees, or to the agent of bargainees. The Courts, however, have held that, when there are more bargainees than one, the affidavit, to accompany registration, is sufficient if made by one of the bargainees (*Heward* v. *Mitchell*, 11 U. C. Q. B. 625; *Olmstead* v. *Smith*, 15 U. C. Q. B. 421). And it still is sufficient, when made by one of them where the conveyance is to two, jointly, and the consideration is made up of two debts due to the vendees separately (*McLeod* v. *Fortune*, 19 U. C. Q. B. 100). And it is also sufficient if made by the agent of the bargainees.

(*k*) Under this section, not only must the agent's authority be registered with the conveyance, but the words of the Act are that "it must &c. be attached thereto." The latter is not required in the case of an agent of a mortgagee, taking the affidavit under sec. 1, but, in the case of a Mortgage, the agent is required by Statute to be aware of all the circumstances

connected with the transaction, a requirement not expressed to be necessary in the agent of a bargainee under this section; though, however possible it might be for an agent, properly acting under this section, not to be fully aware of all the circumstances in connection with the taking of the conveyance, it would be difficult to perceive how he could honestly make the affidavit without possessing a full knowledge of all the circumstances. By 43 Vic. cap. 15 (post) an agent may, on and after the first day of October, 1880, take a particular conveyance under the Act, on a general authority from his principal to take all conveyances, under this Act, for him.

(*l*) The affidavit of *bona fides* must state:

1. That the sale is *bona fide* and for good consideration (as set forth in the conveyance).

2. 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.

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 (*Mason* v. *Thomas*, 23 U. C. Q. B. 305; *Holmes* v. *Penny*, 3 Kay & J., 90; 3 Jur., N. S. 80; 26 L. J. Ch. 179); and the words "that the Bill of Sale was executed in good faith, and for good consideration," when the affidavit should state that the sale is *bona fide*, and for good consideration, renders the instrument invalid (*Boynton* v. *Boyd*, 12 U. C. C. P. 337.)

The *bona fides* to be considered is that of the person from whom the consideration moved (per Wood V. C.—*Holmes* v. *Penny*, 3 K. & J. 90; see also *Thompson* v. *Webster*, 4 Drew, 628; 4 DeG. & Jo. 600; 7 Jur. N. S. H. L. 531; *Cornish* v. *Clarke*, L. R; 14 Eq. 184).

So the conveyance must shew the true and full consideration for which it is given. Hence it was, that an assignment (registered under the Statute) for the nominal consideration of five

shillings, with a separate declaration of trust, referred to, and forming part of the instrument (but not registered), was held invalid (*Fraser* v. *Gladstone*, 11 U. C. C. P. 125; *Arnold* v. *Robertson*, 8 U. C. C. P. 147).

Marriage, being the most valuable of all considerations, is the highest consideration recognised by law (*Townshend* v. *Windham*, 2 Ves. Sen. 4; *Ford* v. *Stuart*, 15 Beav. 495, 499; 1 Bl. Com. 421; *Dalrymple* v. *Dalrymple*, 2 Hagg. Con. 54, 62; 1 Broom Com. 523; 2 Steph. Com. 260) "and one which it is the policy of the law to give paramount force to" (May on Fraudulent Conveyances, 315) and is a good consideration for a conveyance under the Statute (*Leys* v. *McPherson*, 17 U. C. C. P. 266, see *Ex parte Marsh*, 1 Atk. 158; *Brown* v. *Jones*, 1 Atk. 187; *Lanoy* v. *Duke of Athol*, 2 Atk. 445; *Champion* 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 E. 115; *Russell* v. *Hammond*, 1 Atk. 15; *Arundell* v. *Phipps*, 10 Ves. 139; *Ward* v. *Shallet*, 2 Ves. 18; *Ramsden* v. *Hylton*, 2 Ves. 308). But a blood consideration, or a consideration of natural love and affection, is not a good consideration within the Act (*Matthews* v. *Feaver*, 1 Cox, 280; *Twyne's case*, 3 Rep. 80; 1 Sm. L. C. 1).

The words "not for the purpose of holding or enabling the bargainee to hold the goods, &c., against the creditors of the bargainor," must be read as meaning "that the bargainee should swear, that the object of the conveyance was, not merely to enable him to protect, or hold fraudulently or colourably the goods for the benefit of the bargainor against his creditors" (*Arnold* v. *Robertson*, 8 U. C. C. P. 147). 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 unintentional 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 (*Mason* v. *Thomas*, 23 U. C. Q. B. 305). Though there be two bargainees, and the affidavit of *bona fides* states that the "conveyance was not for the purpose of enabling the bargainee to hold the goods against the creditors," &c., the instrument will not be made void (*Tyas* v. *McMaster*, 8 U.C.C. P.446), but should the word "creditor" instead of "creditors" be written in the affidavit the conveyance is void (*Harding* v. *Knowlson*, 17 U. C. Q. B. 564). See foot notes to sec. 2.

(*m*) The conveyance, with the affidavit of *bona fides*, and affidavit of execution, shall be registered as provided by section 7, *infra*. The question whether a copy of a Bill of Sale, with the necessary affidavits, can be filed under this section, in substitution of the Bill of Sale itself, came up for the opinion of the Court in *Harris* v. *Com. Bank*, 16 U. C. Q. B. 437. McLean, J., there concurring with Robinson, C. J., in his remarks, that this section should be read in conjunction with section 1 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." Burns, J., on the other hand, was of opinion that the registering a copy was not a compliance with the Act. The 13 & 14 Vic. cap. 62, which put sales upon the same footing with Mortgages, as to registration, amended 12 Vic. cap. 74 by adding to section 1 the portion relating to sales. But 20 Vic. cap. 3 makes a distinct and different clause of that part of the Statute relating to sales. Under the repealed Acts the question never was decided, and Burns, J., in his judgment, says, "The new Act, as I read it, clearly draws a distinction between Mortgages and sales. * * * This section applies exclu-

sively to sales, and it enacts that the conveyance shall be accompanied by an affidavit of the bargainee that the sale is *bona fide*, and shall be registered as thereinafter provided. Not a word is said about registering a copy, or any such provision with regard to the affidavit of execution, as in the case of Mortgages. * * * Whatever may have been the reason for making the distinction between Mortgages and sales, it is apparent to me that it exists, and that the conveyance or sale of the goods must be registered and not merely a copy. The affidavit of the execution filed in this instance is that of the execution of the original, of which the copy annexed purports to be a copy. This is no compliance with the provisions of the second section of the Act, unless that section is to have incorporated with it the provisions of the first section relating to a different subject altogether. No warrant exists for such a construction. In my opinion the provisions of the two sections are distinct, and each complete in itself without reference to the other, and if the Legislature had contemplated that a copy of the conveyance of sale might be registered, instead of the original deed, the section might either have referred to the other, or have re-enacted the same provision with respect to the affidavit of execution. It is very true the second section does say that the conveyance of sale shall be in writing, and shall be a conveyance under the provisions of the Act; but then that applies to the deed itself, what it shall be, and not to any copy, and cannot incorporate with it the idea that registration is also part of the conveyance.

"It must be assumed, therefore, as I take it, that it was intended that notice to the public, by means of registration of the dispositions of property should be different without our endeavouring to find satisfactory or sufficient reasons for it."

(*n*) As to the period of five days, see *ante* section 1, note (g).

(o) As to creditors, purchasers, "etc.," against whom the conveyance shall be void. See *ante* sec. 2 and sec. 4.

Mortgages of goods to secure advances or to indemnify endorses, &c., to be valid if duly registered.

6. (*a*) In case of an agreement in writing for future advances (*b*) for the purpose of enabling the borrower to enter into and carry on business with such advances (c) the time of re-payment 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 such Mortgage (*d*) and in case the Mortgage is executed in good faith (*e*) and sets forth fully, by recital or otherwise, the terms, nature and effect of the agreement (*f*) and the amount of liability intended to be created (*g*), 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 (*h*), 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 (*i*), then, if accompanied by the affidavit of such agent (*j*), 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 (*k*), and in case such Mortgage is registered, as hereinafter provided,—the same shall be as valid and binding as Mortgages mentioned in the preceding sections of this Act (*l*). (C.S.U.C., c. 45, s 5).

(*a*) Until 20 Vic. cap. 3, the Chattel Mortgage Acts contained no provision for the giving and taking of instruments

comprehended by the section. The affidavit of *bona fides*, required by 12 Vic. cap. 74, and 13 and 14 Vic. cap. 62, was such, that it could not be made, when the consideration for the Mortgage was a future advance, or a liability incurred by a person for the mortgagor, for which he himself was responsible. (see *Page* v. *Ordway*, 40 N. H., 253).

(*b*) 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 (*Bittlestone* v. *Cook*, 6 El. & Bl. 296; *Mercer* v. *Peterson*, L. R. 2 Ex. 304, L. R. 3 Ex. 104; *Lomax* v. *Buxton*, L. R. 2 C. P. 109; *Hutton* v. *Crutwell*, 1 E. & B. 15). A deed executed in pursuance of a prior agreement by which money is advanced, before the execution of the deed, will also be upheld, as against creditors, as if the deed had been executed at the time of making the agreement (*Ex parte*, Izard, L. R., 9 Ch. 271; *Ex parte* King, L. R., 2 Ch. D. 256; *Ex parte* Fisher, L. R., 7 Ch. 636).

There is nothing more common, than for a person seeking assistance, in order to enter upon and carry on business, to secure the person rendering the assistance, whether it be in goods, or in money, by a Mortgage upon his property.

A Mortgage that is given to secure an existing debt only, will come under the operation of the first 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, to assist him in business, or of indemnifying a mortgagee against the payment by him of endorsements he may have given, or of any other liability he may have incurred for the mortgagor.

(*c*) The purpose of the future advances must be, to enable the borrower to carry on business (*Risk* v. *Sleman*, 21 Gr. 251), 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 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 provided, the observance of which, will be necessary to their validity. A compliance with these statutory safeguards can never interfere with an honest transaction, while it gives to the public that protection which it is the policy of the law to secure against fraudulent and covinous transactions. It is of the first necessity to secure good faith "and prevent error and imposition in dealing," and the statute therefore makes requisite that the Mortgage should state the true consideration (*Arnold* v. *Robertson*, 8 U. C. C. P. 155), and should set forth "fully by recital or otherwise, the terms, nature and effect of the agreement, and the amount of the liability likely to be created," besides requiring affidavits of good faith to be made by parties interested. No particular forms of words are necessary to create the agreement in writing, so long as it embraces all the requisites and formalities of the Act. Being a conveyance upon condition, it is properly made by deed, but it may be without deed (*Flory* v. *Denny*, 7 Ex. 581, 21 L. J., Ex. 223). There is no necessity for its being made under seal (*Paterson* 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).

(*d*) "This section, as framed, contemplates two cases, differing in character, and makes separate provision for each.

"These are:

"1. The 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, the time of repayment thereof, not being longer than one year from the making of the agreement, and a Mortgage of goods and chattels for securing the repayment of such advances.

"2. The 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 mortgager, not extending for a longer period than one year from the date of the Mortgage" (per Harrison, C. J., *O'Donohoe* v. *Wilson*, 42 U. C. Q. B. 333). What advances are within the Statute is yet a matter of some doubt, although the weight of opinion seems to be with the view that the Act extends to advances, either in money or in goods. 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, but the value of the goods in money. "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" (per McLean, C. J., *Sutherland* v. *Nixon*, 21 U. C. Q. B. 631). On the other hand both Burns J., and Hagarty J., intimated in "*Sutherland* v. *Nixon*," that the Statute was not confined to mere money advances: In some of the States of the Union the law is definitely settled, allowing no distinction between money and merchandize. Advances in either commodity are within their Statutes. "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 (*Brooks* v. *Lester*, 35 Md. 65; *Carpenter* v. *Blote*, 1 E. D. Smith 491). It will be observed that the words of the section are—"In case of an agreement in writing for future advances," therefore a Mortgage will be invalid, as against creditors thereby defeated, 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 which he has merely talked of making, and has not made when the Mortgage is executed (*Robinson* v. *Patterson*, 18 U. C. Q. B. 55). The purpose in view in making the advances, in order to make the instrument valid, as against unpaid creditors, must be to enable the borrower to enter into and carry on business with such advances (*Risk*

v. *Sleeman*, 21 Gr. 251). In another place is considered the effect of a security upon all the debtor's personal estate to secure a pre-existing debt, with or without a present advance, and with or without a *bona fide* intention, that the business of the mortgagor will be carried on (*ante* p. 15). 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 (*O'Donohoe* v. *Wilson*, 42 U. C. Q. B. 333; *Kough* v. *Price* 27 U. C. C. P. 309). 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 *bonafides* of the transaction (*Strange* v. *Dillon*, 22 U. C. R. 223). The endorsement and liabilities, here referred to, are past or concurrent not future endorsements 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 future endorsements or liabilities to be ascertained, is not within the operation of the Act (*Mathers* v. *Lynch*, 28 U. C. Q. B. 363; *Turner* v. *Mills*, 11 U. C. C. P. 366; *Patterson* v. *Maughan*, 39 U. C. Q. B. 380; *O'Donohoe* v. *Wilson*, 42 U. C. Q. B. 333). At Common Law, such a mortgage was perfectly good and valid, and, it not being now in any way controlled, or affected by the Statute, the parties to such an instrument are not required to comply with the requirements of the Statute as to registration and otherwise (*Baldwin* v. *Benjamin*, 16 U. C. R. 52). The endorsements and liabilities here mentioned must be made or incurred for and in behalf of the mortgagor, in order to bring the instrument within the meaning of the Act. Should the liability be incurred for one person, and security, by way of Mortgage, given by some one else, the Mortgage then, not being within the Act, is not affected by its provision, (*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). "Where a security is good independently of the Statute, it will not be held void, unless the Statute clearly apply to it, and make it void" (per Harrison, C. J., *Paterson* v. *Maughan*, 39 U. C. R. 379). The Statute imperatively requires that the liability, incurred by endorsement 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 endorsed, or any renewals thereof, will fall due within the year, otherwise the Mortgage will be invalid as against creditors or purchasers (*Ontario Bank* v. *Wilcox*, 43 U. C. Q. B. 460; *Kough* v. *Price*, 27 U. C. C. P. 309.) Hence, where, in a Chattel Mortgage to secure the plaintiff, the mortgagee, against certain notes, on which he was an endorser, 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 endorsed 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 endorsed 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 endorse for the accommodation of the mortgagor, it was held that the Mortgage was, on its face, invalid in not shewing that the liability of the mortgagor was limited in duration, to one year as required by Con. Stat. U. C. c. 45, s. 5 (*Kough* v. *Price*, 27 U. C. C. P. 325; *Ont. Bank* v. *Wilcox*, 43 U. C. Q. B. 460). If it be the intention to renew notes, the endorsement of which is secured by Mortgage under this section, then it must so appear by the instrument itself (*Turner* v. *Mills* 11 U. C. C. P. 366). And a Mortgage cannot be re-filed under section 10 *infra*, so as to keep alive the security in favour

of endorsements on renewal notes which do not mature within a year from the date of the Mortgage (*Turner* v. *Mills*, 11 U. C. C. P. 369).

(*e*) The good faith to be considered is that of the person from whom the consideration moves (per Wood V. C., *Holmes* v. *Penny*, 3 K & J. 90; *Thompson* v. *Webster*, 4 Drew 628; Millar's Bills of Sale, 118).

(*f*) The words in the Statute, which require the terms, nature and effect of the agreement, and the amount of the liability intended to be created, to be truly set forth by recital or otherwise "appear to be aimed against a Mortgage to secure an agreement for further advances, and a liability to be created, and not where the Mortgage is designed as an indemnity against an endorsement, or other past concurrent ascertained liability" (per Harrison C. J., *O'Donohoe* v. *Wilson*, 42 U. C. Q. B. 335). But see *Kough* v. *Price*, 27 U. C. C. P. 209).

A Chattel Mortgage will not be supported when given to secure promissory notes invalid under the Stamp Acts. Notes, not properly stamped, taken by a bank are invalid if the bank does not attach double stamps and properly cancel the same when it first receives them. Notes thus invalid will not support a Chattel Mortgage (*Ontario Bank* v. *Wilcox*, 43 U. C. R. 460; see *La Banque Nationale* v. *Sparks*, 27 U. C. C. P. 320).

(*g*) The object, in requiring the Mortgage truly to set forth the amount of the liability intended to be created, is for the purpose of giving the public notice of the encumbrance existing against the property, and enabling them to ascertain the full extent to which the mortgagor has incurred an indebtedness. "Literal exactness in describing the indebtedness is not required but it suffices if the description be correct as far as it goes, and be distinct so as to direct attention to the sources of correct and full information, without danger that the language used will deceive or mislead parties" (Herman on Chattel Mortgages, p. 119, and cases cited). The following American cases, taken from Herman on Chattel Mortgages will be found interesting and of use to the practitioner as defining the exactness with

which the nature and terms of an indebtedness of a mortgagor to a mortgagee, must be described or recited in the instrument; but, it must not be supposed that they establish a rule or guidance for the assistance of a conveyancer in the preparation of Mortgages under our Act:

Sheppard v. *Sheppard*, 6 Conn. 37; *Pittibone* v. *Griswold*, 4 Conn. 158; *Frink* v. *Branch*, 10 Conn. 260; *Kramer* v. *Bunk*, 15 Ohio, 253; *Mich. Insce. 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. *Cowell*, 11 N. H. 251; *Allan* v. *Lathrop*, 43 Ga. 133; *Tulley* v. *Smith*, 24 Conn. 314.

(*h*) As to the affidavits see *ante* s. 1, note (*h*) sec. 2, note (*a*).

(*i*) An agent is empowered to take Mortgages under this section; but

(1) The agreement must be entered into by the agent.

(2) The agent must be authorized in writing to make the agreement and to take the Mortgage.

(3) The agent must be aware of all the circumstances connected therewith and must make the affidavit of *bona fides*.

It will be noticed, that there is nothing in this section expressly requiring the written authority to the agent, or a copy thereof, to be filed with the Mortgage as is made necessary by sections one 1 and 5 *supra*. Nevertheless it is deemed advisable always to register the authority, as if the Mortgage had been taken by the agent under the first section of the Act, for it certainly is within the spirit of the Act that the authority should be registered. This authority may now be a general one to the agent to take and renew all or any Mortgages. The Act so providing however does not come into force until the first of October, 1880 (see post).

(*j*) The affidavit of *bona fides*, whether by an agent or 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 one, meaning "simultaneously," or "along with" (*Grindell* v. *Brendon*, 6 C. B. N. S. 698; 5 Jur. N. S. 1420; 28 L. J. C. P. 333).

(*k*) The affidavit must state:—

(1) That the Mortgage truly sets forth the agreement entered into between the parties thereto.

(2) That it (the Mortgage) truly states the amount of the liability intended to be created by such agreement, and covered by such Mortgage.

(3) That such Mortgage was executed in good faith, and for the express purpose of securing the mortgagee repayment of his advances or (in the event of the Mortgage being as security against endorsements or other liability) that such Mortgage was executed in good faith, and for the express purpose of securing the mortgagee against the payment of the amount of his liability for the mortgagor.

(4) That the Mortgage was not executed for the purpose of securing the goods and chattels mentioned therein, against the creditors of the mortgagor, nor

(5) 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 five requisites, it will be absolutely null and void as against creditors and subsequent purchasers and mortgagees.

"The Legislature expressly requires that in the affidavit the amount of liability intended to be created should be stated" (per Galt, J., *Kough* v. *Price*, 27 U. C. C. P. 318). In that case the Chattel Mortgage was given to secure the mortgagee against his endorsement on certain notes which were set out, and all payable within the year; but the Mortgage recited that it was executed as security, not only against these notes, but also against any note or notes thereafter to be endorsed by the mortgagee, for the mortgagor's accommodation, by way of renewal of the said recited notes, or otherwise; and the proviso was for the payment of the said notes, and all and every other note or notes which might thereafter be endorsed by the mort-

gagee for the mortgagor, by way of renewal of the aforesaid note or otherwise; and the covenant was to pay the said note, and all the future and other promissory notes which the said mortgagee should thereafter endorse for his accommodation. The affidavit of *bona fides*, made by the mortgagee, stated that the Mortgage "was executed in good faith, and for the express purpose of securing me against the payment of the amount of such liability, for the said mortgagor, by reason of the said promissory note there recited, or any future note or notes which I may endorse for the accommodation of the parties of the first part, whether as renewals of the said recited promissory note or otherwise." It was stated that the latter expression could have no reference, except to the future endorsements mentioned in the covenant, and therefore that the affidavit was defective in not stating "the amount of the liability intended to be created by such agreement and covered by such Mortgage" (p. 318). Where an affidavit stated that the Mortgage was made to secure a mortgagee against the payment of "such liability of" instead of "for the mortgagor," by reason of the notes the language was held to be equivalent, and an objection that the liability referred to was that of the mortgagor instead of the mortgagee was overruled (*Mathers* v. *Lynch*, 28 U. C. Q. B. 354). An affidavit will be insufficient which complies in all respects with the requirements of the section but omits the words "against the creditors of the mortgagor" in that part wherein it is necessary to state that the Mortgage was not executed for the purpose of securing the goods and chattels mentioned therein "against the creditors of the mortgagor." And it will make no difference that the omission was unintentional (*Boulton* v. *Smith*, 17 U. C. Q. B. 400, affirmed in appeal, 18 Q. B. 458). 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. (per Harrison, C. J., *O'Donohoe* v.

Wilson, 42 U. C. Q. B. 336). And an affidavit that a Chattel Mortgage, by two mortgagors, was executed in good faith, and not for the purpose of securing the goods and chattels against the creditors of the mortgagors, is sufficient, without adding the words "or either of them" as regards the mortgagors or "any or either of them" as regards the creditors. (*Fraser* v. *Bank of Toronto*, 19 U. C. Q. B. 381; *Bertram* v. *Pendry*, 27 U. C. C. P. 377; *Taylor* v. *Ainslie*, 19 C. P. 78). These words "or either of them" as regards the mortgagors, and "any or either of them" as regards the creditors are implied in the maxim, "*Omne majus continet in se minus: minus in se complectitur.*"

(*l*) It is worth while observing these words carefully. Mortgages, within this section, shall be valid and binding when *registered as hereinafter provided.* Now there is nothing in the Act, subsequent to this section in any way limiting the period within which Mortgages under this section are to be filed. Section 1, (*ante*) limits a period within which Mortgages under that section are to be filed, and section 5, (*ante*) limits a period within which Bills of Sale are to be filed. Unless Mortgages under this section can be said to come within, and to be included in the words, "Every Mortgage or conveyance intended to operate as a Mortgage made in Ontario," found in section one, it is quite clear that the Statute has fixed no period of time, within which Mortgages under this section are to be filed. There is no doubt that the entire Statute must be resorted to, in order to arrive at a conclusion as to what is required; but, it seems to the Author, that the Mortgages, referred to in section one, are so identified by the words contained therein and in section two, relating to the affidavit of *bona fides*, that the Legislature, whatever they may have meant, certainly did not contemplate a reference to Mortgages under section six by the use of the words, "Every Mortgage, or conveyance intended to operate as a Mortgage" &c. Indeed, there can be little doubt of this, because sections one and two of this Act have their origin in 12 Vic., c. 74 and 13 & 14 Vic.,

c. 62; whereas section 6 of this Act was first enacted by a later Statute, namely 20 Vic., c. 3.

Chattel Mortgages to be registered in the office of the County Clerk.

Amended on and after the 1st day of October, 1880.

7. (*a*) The instruments mentioned in the preceding sections (*b*) shall be registered (*c*) in the office of the Clerk of the County Court of the County or Union of Counties *where the mortgagor or bargainor, if a resident in Ontario, resides at the time of the execution thereof, or, if he is not a resident, then 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 (*d*); and such Clerks shall file all such instruments presented to them respectively for that purpose (*e*), and shall endorse thereon the time of receiving the same in their respective offices (*f*), and the same shall be kept there for the inspection of all persons interested therein, or intending, or desiring to acquire any interest in all or any portion of the property covered thereby (*g*). (C. S. U. C., c. 45, s. 7.)

(*a*) This section has been amended by The Mortgages and Sales of Personal Property Amendment Act, 1880; but the amendment does not come into force until the first day of October, 1880: the amendment consists in the striking out of all the words in the above section which appear in italics, see *post*.

(*b*) The instruments are those referred to in s.s. 1, 5 and 6, viz.,

(1.) A Mortgage to secure an existing debt (Sec. 1).

(2.) A Bill of Sale of Goods and Chattels (Sec. 5).

(3.) Mortgages to secure advances (Sec. 6).

(4.) Mortgages to indemnify a mortgagee against liability on his endorsement of promissory notes (Sec. 6).

(5.) Mortgages to indemnify a mortgagee against any other liability by him incurred for the mortgagor (Sec. 6).

(*c*) The word "registered" includes both the filing of the instrument and the entries by the Clerk (Herman on Chattel Mortgages, *p.* 480).

By this section, statutory provision is made whereby creditors, purchasers, mortgagors, and all persons interested in, or desiring to acquire any interest in the mortgaged or sold property

can acquire information regarding that property. "Possession of the mortgaged property being considered as 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 own livelihood, but which is the very means for satisfying the debt for which the property is security" (Herman on Ch. Mortgages p. 154).

The object of the Act, accomplished by a fulfilment of the requirements of this section, 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.

The 13 Eliz., cap. 5, and 27 Eliz., cap. 4, the former relating to creditors only, the latter to purchasers, are not affected in any way by the Chattel Mortgage Acts. Though these Statutes were passed for the "avoiding and abolishing of feigned covinous and fraudulent feoffments, gifts, grants, alienations, etc., as well of lands and tenements as of goods and chattels," it would seem the end proposed by them would be attained just as well by the Common Law, the principles and rules of which * * are so strong against fraud in every shape (*Cadogan* v. *Kennett*, Cowp. 432). It would appear also that the Rev. Stat. O. cap. 118, s. 2, does not alter the Statutes of Eliz. The Ontario Act only differs, in that it extends to preferential assignments, (*Metcalf* v. *Keefer*, 8 Gr. 392, 7 L. J. 270). Whilst these Statutes protect against fraudulent sales and preferences, creditors and

purchasers (*Graham* v. *Furbur*, 14 C. B. 410; 23 L. J. C. B. 51), the Chattel Mortgage Act adds a still further protection against fraud and collusive dealing; such protection only, is it intended to afford, and not to make valid that that which was invalid without a compliance with the Act. 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, subsequent purchasers, or mortgagees in good faith.

Sections 4 and 5 make absolutely *null and void* Mortgages and conveyances, unless registered as required by this section, when there is no change in the possession of the goods mortgaged or sold, that is, however, "when the rights of others than the parties to the instrument are affected" (*Bond* v. *Newburn*, 1 Brock, 316; *Gregg* v. *Sandford*, 24 Ill. 17; *Henderson* v. *Morgan*, 26 Ill. 431; *Ogg* v. *Randolph*, 4 H. & N. 445; *Forest* v. *Tinkman*, 29 Ill. 141).

As between the immediate parties themselves, as has been before explained, the instrument is valid and binding without registration, and that too, though it be tainted with fraud in its very inception.

A conveyance to defeat creditors is good as between the parties themselves and their representatives (2 Sugden V. & P., 8th Am. Ed. 713), 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" (Benjamin on Sales, 1st Am. Ed. 480; *Philpotts* v. *Philpotts*, 10 C. B. 85; 20 L. J. C. P. 11).

Besides, however, as between the immediate parties to the instrument and their personal representatives it is 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 mort gagee or bargainee would be entitled to an action of replevin

or trespass against any such person (*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).

(*d*) The instruments mentioned above are to be filed in the office of the Clerk of the County Court, or Union of Counties as the case may be, where the mortgagor or bargainor resides. If, however, the mortgagor or bargainor should not happen to reside in Ontario at the date of the execution of the Mortgage, then the Mortgage or conveyance, as the case may be, is to be filed or registered in the office of the Clerk of the County Court of the County, or Union of Counties in which are the goods at the date of the execution of the Mortgage. The residence of mortgagor or bargainor, then, decides the place of registry when the mortgagor or bargainor is resident in Ontario, but, when not so resident, then the locality of the goods, at the time of the execution of the instrument, is to decide the place of registry. But the residence of the mortgagor will only decide the place of registry for a short period longer. On and after the first day of October next (1880) the locality of the goods, at the time of the execution of the Bill of Sale or Mortgage, will determine the County or Union of Counties within which the Mortgage or Bill of Sale is to be registered. This is the result of "The Mortgages and Sales of Personal Property Amendment Act, 1880." By this Act the words in the above section printed in italics, are struck out (see *post*). Information can be more speedily acquired, by examining the records in a county wherein a man resides or was residing at the time of registry than could the necessary information be acquired by being compelled to know where goods were at a certain period of time, at which place a search would require to be made. For this reason it is submitted that the amendment made by the latter Act will not be found to be an improvement. In the event of there being more than one mortgagor, of whom, one resides in one County in Ontario, and one in another, the instrument would require to be filed in the office of the Clerk of the County Court in

each of the Counties or Union of Counties in which there were mortgagors or bargainors resident at the date of the execution of the instrument. And also where there are several joint owners, some of whom, at the date of the execution of the instrument, reside in, and others out of Ontario, the mortgage would have to be filed, in the offices of the Clerks of the County Court of the County or Union of Counties as well where the mortgagors resident in Ontario resided, as in the offices of the clerks of the County Court of the County or Union of Counties, where the goods mortgaged or sold, were at the date of the execution of the instrument (*Morill* v. *Sandford*, 49 Me. 566: *Rich* v. *Roberts*, 50 Me. 395), but see *post.* The description in the deed is at best only *prima facie* evidence of the residence of the mortgagor (*Mellish* v. *Van Norman*, 13 U. C. Q. B. 451). *Under no circumstances is the instrument to be filed in the County where the mortgagee resides:* should such be done the Mortgage or conveyance is invalid (*Stowe* v. *Meserve*, 13 N. H. 46). In the case of a corporation being a mortgagor, or bargainor, the instrument is required to be registered in the County wherein is the head or principal office of such corporation (*Wright* v. *Bundy*, 11 Ind. 398). The amendment referred to above must now, however, be borne in mind (see *post*). Registration, in compliance with the Act, is equivalent to change of possession. A Mortgage, or conveyance properly registered, within the period of five days, limited by ss 1 and 2 relates back, operates and takes effect upon, from and after the day and time of its execution (section 3, *supra* et *ante* p. 129).

(*e.*) Upon receipt of any instrument under the Act, presented to him for that purpose, the Clerk shall file the same. 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, or than it is the duty of the Clerk of the Crown to make such enquiry when he issues a capias upon an affidavit swearing to a debt. But a Clerk should not receive and file an instrument or affidavit which

he knows to be untrue in fact, without at least endeavouring "to have that which was wrong made right," for he then would be passively lending himself to a fraud. It is not considered that the proof for registration is indispensable in instruments under this Act, as it is in regard to instruments under the Registry Act (Revised Statutes, Ont., cap. 111). By section 38 of the Registry Act, what is required, as proof for registration, is pointed out, and the witness must be an attesting witness (which, as has been seen, is not necessary in instruments under this Act). Section 44 speaks of the affidavit being for the purpose of registration, and section 55 requires all the instruments to be registered at full length, including every certificate and affidavit, which could not well be done without the affidavit being there to register. But the Chattel Mortgage Act does not seem to have any enactment which vests the Clerk with power to decline to register an instrument not duly proved for registration by a sufficient affidavit of execution. As the Chattel Mortgage Act does not require the instruments to be copied at length with every certificate and affidavit, as is required in the case of transfer of land, it would justify the inference that the Legislature rather intended the affidavit of execution as a check upon the transaction, and to secure good faith between the parties, than as proof for registration for the satisfaction of the Clerk.

According to the Common Pleas (*vide ante* p. 129.) and prior to 26 Vic., cap. 46, s. 1, the endorsement by the Clerk of the time of receiving an instrument under the Act, when filed in proper time, settled the time, from which the instrument took effect, as to creditors, purchasers and mortgagees in good faith, just as it now does in several States of the Union (*Magee* v. *Bentley*, 8 Ohio, 396; *Doe* v. *Bank*, 3 McLean 140; *Carnall* v. *Duval*, 22 Ark., 136; *Brown* v. *Hickman*, 1 Ohio, s. 116; *Fosdick* v. *Barr*, 3 Ohio, s. 471; *Tousley* v. *Tousley*, [illegible] Ohio, s. 78). Now, however, as legislation has settled the conflict between the two courts, as to the period from which an instrument relates and takes effect, when pro-

perly filed under the Act (see *ante* p. 129 et sec. 3 *ante*), the original endorsement 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 endorsement, and from such time the law considers the instrument filed. Any omission, error, or mistake on the part of the Clerk, in making his endorsement, cannot be used to the prejudice of the mortgagee or bargainee (*McLaren* v. *Thompson*, 40 Me. 561; *Mems* v. *Mems*, 35 Ala. 28; *Partridge* v. *Swozzey*, 46 Me. 414). While it was the law that instruments duly filed under the Act had their existence as against creditors, purchasers, and mortgagees, in good faith, only from the time of registration, the same conflict could not arise, as might now take place between two instruments, each dated the same day, and filed within the statutory period. By section 3 *supra* each instrument operates and takes effect from and after the day and time of the execution thereof, the time of execution not being, by the conveyancer, noted, as is the time of registration by the Clerk, conflicting claimants under instruments might be at some loss to ascertain which was first in point of execution. As the court considers the fraction of a day (see *ante* p. 128) the suggestion is offered that in all cases the day and hour of execution should be noted by the conveyancer, who, should occasion require it, could then, with some satisfactory certainty, establish the moment of time from which his instrument takes effect.

(*g*) Any person having or intending to have any interest in the matter is entitled, upon tender to the Clerk of the sum of ten cents, to an inspection of any of the instruments filed in his office in pursuance of this Act.

8. "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 num-

Clerk to enter same.

bers endorsed thereon opposite to each name, and such entry shall be repeated alphabetically under the name of every party thereto" *(a)*,C. S. U. C. c. 45, s. 8.

(*a*) It is very important that the Clerk should carefully follow out the instructions, as to the manner of registration, pointed out by this section. We have seen that negligence, or dereliction of duty on the Clerk's part, will not prejudice a person setting up an instrument, who has done all that the Act requires him to do, in relation to such instrument. But a a compliance with this section furnishes the means by which those desiring information are affected with notice, it would be a disadvantageous position — that of a mortgagee or bargainee claiming as valid an instrument wanting in registration, through some neglect of the Clerk, as against others interested in the property without notice. The section points out one method of registration, and that should be strictly followed, though it is said different offices throughout Ontario adopt different systems. Sec. 7, *ante*, should be read with this section, as also containing instructions for the guidance of the Clerk. 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 in a book kept for the purpose; 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.

In many of the States of the Union a mortgage only takes effect from the time of registration (*White* v. *Denman*, 1 Ohio, s. 110; *Westcott* v. *Gunn*, 4 Duer, 107; *Benedict* v. *Smith*, 10 Page, 126; *Woodruff* v. *Robb*, 19 Ohio, 212; *Folsom* v. *Clemence*, 111 Mass. 273; *Tate* v. *Brittain*, 3 Hawks. 55; *Rich* v. *Roberts*, 48 Me. 584). So that a question, which could not arise under our Act, arises there, viz: as to the effect of a Mortgage delivered to the Registrar (with orders not to record it, until

further notice), as against subsequent mortgagees, purchasers and creditors. As a writ of *Fi. fa*, will lose its priority, as against subsequently received writs, when the former is delivered with instructions to suspend the execution until further orders are given, and in the meantime such other writs are delivered to the Sheriff (*Payne* v. *Drew*, 4 East, 523; *Foster* v. *Smith*, 13 U. C. Q. B. 243; *Castle* v. *Ruttan*, 4 U. C. C. P. 252; *Kerwan* v. *Jennings*, 3 Ir. Ch. R. 48; *Jones* v. *Atherton*, 7 Taunt. 56; *Samuel* v. *Duke et al*,, 6 Dowl. P. C. 536; *Hunt* v. *Hooper*, 1 D. & L. 626; 11 M & W. 664; *Kempland* v. *Macaulay*, Peakes N. P. C. 96; *Pringle* v. *Isaac*, 11 Price, 445), so does a Chattel Mortgage lose its priority when delivered to the Registrar under similar circumstances, and this is so, though the Clerk shall have noted its receipt. But under our Statute, as we have seen, the Mortgage or other instrument, if filed within the proper period, relates back to its date. The instrument, in any event, could only be delayed in its registry for the period of five days. If filed after that time it is void altogether, and if filed before the expiration of the period of five days, though delayed in the hands of the Clerk under the instructions of the mortgagee, it will, perforce of the Statute, relate back, *operate* and take effect from the moment of its execution. (*Ante.* sec. 3.)

How to proceed if goods mortgaged are removed to another county.

9. (*a*) In the event of the permanent removal (*b*) of goods and chattels, mortgaged as aforesaid, from the county or union of counties in which they were at the time of the execution of the Mortgage, to another county or union of counties (*c*), before the payment and discharge of the Mortgage, a certified copy of such Mortgage, under the hand of the Clerk of the County Court in whose office it was first registered, and under the seal of the said Court, and of the affidavits, and documents and instruments relating thereto, filed in such office, shall be filed with the Clerk of the County Court of the county or union of counties to which such goods and chattels are removed (*d*), within two months (*e*) from such removal (*f*), otherwise the said goods and chattels shall be liable to seizure and sale under execution (*g*), and in such case the Mort-

gago shall be null and void, as against subsequent purchasers and Mortgagees in good faith (*h*), for valuable consideration, as if never executed. (*k*) (C. S. U. C. c. 45, s. 9; 40 V. c. 8, s. 29.)

(*a*) 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. In the event of the former occurring, the Mortgage, if valid, will still be a good security, for the *lex loci contractus* "controls the nature, construction and validity of the contract," as contra-distinguished from real property contracts, the law of which is the *lex loci rei sitæ*.

The intention of this section doubtless is, "to protect purchasers in the county to which the goods might be removed, and for that purpose directed a registration there, allowing two months from the time of removal" (*Clarke* v. *Bates*, 21 U. C. C. P. 352).

(*b*.) 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. If the goods are stolen and wrongfully taken out of the possession of the mortgagor, and then removed by any one, other than the mortgagor (except through his agency), the Statute does not apply, as "the subsequent portion of the section points clearly to a removal by the mortgagor." It does not follow that the section will not apply, "so long as the mortgagee is ignorant of the removal" (*Clarke* v. *Bates*, *supra*).

(*c*) This section evidently presumes the case of the original Mortgage being filed in the office of the Clerk of the Court of the County in which the goods were, at the time of the execution of the Mortgage, and does not seem to contemplate the case of the Mortgage being registered in the office of the Clerk of the

Court of the County in which the mortgagor resided, when that County is one different to that, in which the goods were, at the time of the execution of the Mortgage. It has been seen by sec. 7 (*supra p.* 171) that the Mortgage must be registered in the office of the Clerk of the Court of the County in which the mortgagor resides, if he be a resident of Ontario; but that section having been amended by "The Mortgages and Sales of Personal Property Amendment Act, 1880" in this particular, such will continue to be the law only up to the first day of October, 1880. It generally happens that the mortgagor resides in the same County as that in which are the goods, at the date of the execution of the Mortgage; but it might, and frequently does happen otherwise, and, in such an event, when the goods are removed to a County, different to the one in which they were at the execution of the Mortgage, the question might be asked does this section apply? Reading the words strictly, the first part of the section appears to apply to any case in which the goods mortgaged are removed from one County to another; but the words "under the hand of the Clerk of the County Court in whose office it was first registered" refer to registration in the office of the County in which the goods were, and not to the office in the County where the mortgagor resides. The view is ventured, therefore, that this section applies only to the case in which the registration, in the first place, is in the office of the County, where the goods were, at the time of the execution of the mortgage, and not where the mortgagor resides, when his residence is in a County, different to that in which were the goods. If this is not so, then while the Statute necessitates a mortgagee, in the first place, to register his Mortgage, only in the County where the mortgagor resides, at once upon a removal of these goods from the County (in which registration was not required) to a different County, he must see that his Mortgage is registered in such different County into which the goods are removed. In other words, after removal that the Mortgage shall be filed in the County, into which the goods are removed, but that it was unnecessary to file the Mortgage in the County

wherein the goods were before removal, when that county was not the one in which the mortgagor resided. Goods mortgaged, therefore, can apparently be moved about from County to County, so long as the Mortgage was registered in the proper office of the County wherein the mortgagor resided, and that County be not the one, in which were the goods at the time of the execution of the Mortgage. The Act does not cover the case of a permanent removal of the residence of the mortgagor; the goods mortgaged may be in one County, the mortgagor's residence in another; in this latter County the instrument must be registered; but no provision exists requiring registration of the Mortgage in any County a mortgagor may move to. But any doubt on this point, is set at rest by the Act known as "The Mortgages and Sales of Personal Property Amendment Act, 1880," which amends section 7 *ante*. The amendment will, however, not come into force until the 1st of October, 1880; but the effect of it is that from and after that date all instruments under the Act are to be registered within the County in which the goods are at the date of the execution of the Mortgage.

(*d*) A copy of the Mortgage with the Clerk's certificate to that effect, under the Seal of the Court, must be filed in the office of the County to which the goods are removed. 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 , 188 , which was filed in the office of said Court at o'clock , on the day of , 188 , and that* there are no other affidavits, documents, instruments or other papers, filed in the office of said Court relating thereto.* (If the Mortgage has been renewed then substitute for the words between the asterisks the following) the paper writings marked B hereto attached are true

and correct copies of the copy of such said Mortgage filed as aforesaid (with all endorsements thereon) and of all affidavits, statements, documents, and instruments thereto, which said paper writings marked B were filed in the office of the said Court at o'clock on the day of 18 , and that there are no other affidavits, documents, instruments or other papers relating to said Mortgage filed in the said office.

Dated this day of A.D. 188 .

———*C. C. C.*

(1) As, on and after the 1st October, 1880, a copy of the Mortgage need not be filed on renewal of the Mortgage, the certificate can be altered accordingly.

This certificate must be signed by the Clerk, and it must have attached to it the seal of the Court.

Certified copies of all affidavits, documents, and instruments relating thereto must also be filed.

Should the goods not be permanently removed, until after the Mortgage has been renewed, as required by sec. 10 *infra*, 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. By "the Mortgages and Sales of Personal Property Amendment Act, 1880," section 10 *ante* is repealed, on and after the first day of October next, 1880. After this date it will no longer be necessary, when renewing a Mortgage, to file a copy of the original Mortgage; so that in consequence, after that date, certified copies of the statement and affidavit, mentioned in section two of the amending Act (see post) and of the original Mortgage will alone be required to be filed in the County to which the removal takes place.

(*e*) A calendar month, and not a lunar month is meant (Rev. Stat. O. cap. 1, s. 8 sub. s. 15). As to the construction to be put upon the naked expression "month" see *Nudell* v. *Williams*,

15 U. C. C. P. 348. A month may indeed mean lunar or calendar month according to the intention of the contracting parties (1 M. & N. 111; 1 Samuel Rep. 251 nd)). By the common law, a month is twenty-eight days. In ecclesiastical matters it means a "calendar" or "solar" month; see authorities collected in *Simpson* v. *Margitson*, 11 Q. B. 23; 63 E. C. L. R.; and 2 Exch. 110; "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, &c., will be properly filed on the eleventh day of March following (see *ante* p. 127).

(*f*) The time is to be computed from the day upon which the removal is made, if more than one day is occupied in the removal then the time is computed from the last day so occupied.

(*g*) 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 (*Clarke* v. *Bates*, 21 U. C. C. P. 352).

(*h*) Until the passing of 40 Vic. cap. 8, s. 29, Ont., the words "in good faith," did not occur in this section, and the Court refused to import them, as found in sections 4 and 5, into it, after the word mortgagees, and it was therefore held that a purchaser for value, of the goods, though with notice of the Mortgage, was entitled as against the mortgagee (*Morrow* v. *Rourke*, 39 U. C. Q. B. 500).

(*k*) The section does not apply to a sale of goods by instrument under the Act.

Renewal of Mortgages.

Mortgages of chattels must be periodically renewed, or else they cease to be valid.

10. (*a*) Every Mortgage, or copy thereof, filed in pursuance of this Act (*b*), 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 (*c*), after the expiration of one year from the filing thereof (*d*), unless, within thirty days next preceding the ex-

piration of the said term of one year (*e*), a true copy of such Mortgage, together with (*f*) 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 (*g*), is again filed in the office of the Clerk of the said County Court of the county or union of counties wherein such goods are then situate (*h*), with an affidavit of the mortgagee, or of one of several mortgagees, or of the assignee, or one of several assignees, or of the agent of the mortgagee or assignee, or mortgagees or assignees, as the case may be, duly authorized in writing for that purpose (which authority shall be filed therewith) (*k*), stating that such statements are true, and that the said mortgage has not been kept on foot for any fraudulent purpose (*l*). (C. S. U. C. c. 45, s. 10; 40 V. c. 7, Sched. A (135).

(Repealed on and after 1st Oct., 1880. *See post*).

(*a*) This section will stand repealed on and after the first day of October, 1880. By "The Mortgages and Sales of Personal Property Amendment Act, 1880," sec. 2, the following will be substituted therefor:

"Every Mortgage, or copy thereof, filed in pursuance of "this Act, shall cease to be valid as against the creditors of "the persons making the same, and against subsequent pur- "chasers and mortgagees in good faith, for valuable consid- "eration, after the expiration of one year from the filing "thereof, unless within thirty days next preceding the expi- "ration 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 showing the amount still due for principal and interest "thereon, and showing all payments made on account there- "of, is again filed in the office of the Clerk of the County "Court of the county, or union of counties, wherein such "goods and chattels are then situate, with an affidavit of the "mortgagee, or one of several mortgagees, or of the assig- "nee, or one of several assignees, or of the agent 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 shall be filed therewith), that "such statement is true, and that the said Mortgage has not "been kept on foot for any fraudulent purpose." *See post.*)

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 it was given, is satisfied, and also to give creditors information, at the end of the year; as to the state of the debt secured, and whether it is in progress of liquidation" (*Kissock* v. *Jarvis*, 9 U. C. C. P. 156). By virtue of this section, no one now may be misled, by the possession and apparent ownership of the mortgagor. 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 (or after the first day of October, 1880, in accordance with section two of "The Mortgages and Sales of Personal Property Amendment Act. 1880"), then the party, so searching, would not be affected with notice, and would be at liberty to deal with the mortgagor, without any risk of being subject, in his interests, to those of the mortgagee.

(*b*) By every Mortgage, or copy thereof, filed in pursuance of the Act, etc., etc., is meant only such mortgages as, in the first instance, were valid and subsisting securities under the Act. Renewing under this section, will not have the effect of making an invalid Mortgage valid, any more than a compliance with the Act, in the beginning, will make a bad Mortgage good. Refiling a Mortgage, made under section 6, to secure the mortgagee against liability on his endorsements, will be inoperative, when the notes or their renewals, have not matured within a

year from the date of the Mortgage. Renewal will not have the effect of continuing a Mortgage security for renewals, which have not matured within the year (*Turner* v. *Mills*, 11 U. C. C. P. 366; see also *ex parte Stephens*, in *re Stevens*, L. R. 20 Eq. 786). And Gowan, Co. J., is reported as having held that, when the payments in a Mortgage, given under section one, *ante*, extend over a period of one year, from the date of the Mortgage, the Mortgage is void, as contrary to public policy (*O'Neill* v. *Small* and *Sheriff*, 15 Can. Law *Jour.* 114). If this is law, (but with great deference it is questioned), then, renewal of such a Mortgage, will be of no avail in assisting the Mortgage security. The fact of an assignment of a Mortgage under this 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, subsequent purchasers or mortgagees in good faith (*Karet* v. *Kosher*, Meat Supply Association Limited, L. R. 2 Q. B. D. 361). This section does not apply to bills of sale (*Boynton* v. *Boyd*, 12 U. C. C. P. 337). Nor is it necessary, possession having been taken by the mortgagee of the property, mortgaged within the year, that he, the mortgagee, should refile his Mortgage (*Ross* v. *Elliott*, 11 U. C. C. P. 221; *Bates* v. *Wilbur*, 10 Wis. 415). Nor is it necessary to renew the Mortgage under this section when the position of the property and the rights of the parties have been so altered that refiling would be an "idle ceremony" (*Stockam* v. *Allard*, 4 T. & C. 279; *Paine* v. *Mason*, 7 Ohio, S, 198.) But 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 (*McMartin* v. *McDougall*, 10 U. C. Q. B. 398). In the State of New York, the omission to refile a Mortgage will not render it invalid as against a subsequent mortgagee with notice (*Dillingham* v. *Bolt*, 37 N. Y 198), or "as against purchasers or mortgagees intermediate the original filing, and the time prescribed for refiling" (Herman on Ch. Mortgages, p. 192; *Latimer* v.

Wheeler, 30 Barb. 480; *Dillingham* v. *Laduc*, 35 Barb. 38). Under our Statute, it is only against "creditors and subsequent purchasers and mortgagees in good faith for valuable consideration," that the refiling is necessary. But 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 thirtieth day preceding the expiration of the year, and while the Mortgage was still in force, seizes the property in such a manner as to make him a trespasser; the rights of the parties are fixed by the taking, and are to be determined as they are at the beginning of the suit (*Case* v. *Jewett*, 13 Wis. 498; *Newman* v. *Tymeson*, 12 Wis. 448; *Otes* v. *Sill*, 8 Barb. 102). "If a mortgagee has a cause of action, nothing but a release will deprive him of it, and if his Mortgage expires as to creditors and purchasers, one day after his right of action vests in him, he need not renew the Mortgage by refiling, in order to maintain such right" (Herman on Mortgages, p. 340).

(*c*) As to the words creditors and subsequent purchasers, &c., &c., &c (*see ante*). 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 (*Thompson* v. *Vanvechen*, 27 N. Y. 568), and his having notice of the Mortgage does not prevent him availing himself of the objection that the Mortgage has not been refiled (*Edwards* v. *Edwards*, L. R. 2 Ch. D, 291). But a subsequent purchaser or mortgagee could hardly in the words of the Statute be such a purchaser or mortgagee in good faith for value as to entitle him to have the Mortgage "cease to be valid" if he purchased, or became mortgagee, with full notice, during the existence of a prior valid Mortgage, and subject thereto, or before any default on the part of the prior mortgagee to refile (*Rose* v. *Hope, et al*, 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). A purchaser or mortgagee may be such in good faith when becoming such subsequent to a Mortgage, or bill of sale, void *ab*

initio from some defect, but of which Mortgage, notice by registration is duly given (*Moffatt* v. *Coulson* 19 U. C. Q. B. 341). In the case of a subsequent purchaser or mortgagee becoming such during the existence of a prior valid Mortgage, the Mortgage was perfectly good, when the subsequent transactions were had, whilst in the former case, the prior Mortgage would have been invalid from the beginning. But a purchaser after the expiration of the year procures a title paramount to the mortgagee, and this is so, as well in the case of a purchase from the mortgagor as from his vendee, his executor, and in some cases his widow (*Meech* v. *Patchin*, 14 N. Y. 71; *Fox* v. *Burns*, 12 Barb. 677; *Jones* v. *Howell*, 3 Rob. N. Y. 438). It sometimes happens that, by taking a second Mortgage, in lieu of a former one, which he neglects to refile, a mortgagee waives his right, as was the case in *Courtis* v. *Webb*, 25 U. C. Q. B. 576, where E. mortgaged a horse 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 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 (see *McMartin* v. *McDougall*, 10 U. C. R. 399).

(*d*) 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 copy of his Mortgage with the statement, and affidavit, from year to year, having within proper time refiled it according to the Statute, at the expiration of the first year. By "The Mortgages and Sales of Personal Property Amendment Act 1880" it will be necessary, on and after the first of October, 1880, to file on the renewal, only the statement, with an affidavit of the mortgagee. The filing of a copy of the Mortgage is dispensed with after that date (see *post*). There is nothing in this section or other

sections, and the Statute has no preamble, expressly indicating the requirements of a second, third and further renewal, but there can be gathered from the enactments themselves that, "if the object was so desirable, that the Legislature declared the Mortgage should cease to be valid unless such a statement (and affidavit) were filed at the end of the first year, from the creation of the security, it must be more requisite at the end of the second, and increasingly so, at the expiration of every subsequent year, as the presumption of payment, or that the Mortgage was kept on foot for improper purposes, would be stronger at the end of every succeeding year," and a true copy of a copy will be a compliance with the Act in refiling at the end of each succeeding year (*Kissock* v. *Jarvis*, 9 U. C. C. P. 156), section 15, *infra*, and section 5, *post*, of "The Mortgages and Sales of Personal Property Amendment Act, 1880." But there will be no necessity for renewing a Mortgage after the time when the debt, for which it is 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 (Herman on Mortgages, p. 184; see also note *b supra*). Chattel Mortgages, valid and effectual under the provisions of 12 Vic. c. 73, do not require refiling under 20 Vic. c. 3, nor hence under this Statute, their validity can only be questioned on the rules and principles of the Common Law (*Culloden* v. *McDowell*, 17 U. C. C. P. 359; *G. T. R.* v. *Lees*, 9 U. C. C. P. 249).

(*e*) The Statute requires that the re-filing shall take place "within thirty days" next preceding the expiration of the year; where, therefore, a Mortgage of personal property was re-filed with the County Clerk forty-seven days before the expiration of a year from the first filing, it was held insufficient (*Beatty* v. *Fowler*, 10 U. C. Q. B. 382; *National Bank* v. *Sprague*, 20 N. J. Eq. 13). The thirty days is to be reckoned back from a year *from the filing of the Mortgage*, not from the date of the instrument, and the thirty days is to be next preceding

the expiration, not the day of the expiration of the year. The year commences at the hour of the particular day on which the Mortgage is marked as received by the Clerk, and not from the close of the day of filing (*Armstrong* v. *Ausman*, 11 U. C. Q. B. 498). 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. A Mortgage filed with the proper officer at 11.30 a.m. on the first of January, 1879, is re-filed in time, if received by the Clerk at 11.20 a.m. on the first of January, 1880 (*McMartin* v. *McDougall*, 10 U. C. Q. B. 399; *Armstrong* v. *Ausman*, 11 U. C. Q. B. 498; *Pugh* v. *Duke of Leeds*, 2 Cowp. 720; *Re Sheriff of Newcastle*, Drap. K. B. Rep. 503; *Beckman* v. *Jarvis*, 3 U. C. Q. B. 280; *Seaman* v. *Eager*, 16 Ohio, s. 209; *Campbell* v. *Strangeway*, L. R. 3 C. P. D. 105; *Commercial Steamship Company* v. *Boulton* L. R. 10 Q. B. 346).

(*f*) For the meaning of the words "together with," see *ante*, s. 1, foot note (*h*).

(*g*) This Statute requires three things (but see "The Mortgages and Sales of Personal Property Amendment Act, 1880," post).

1st. A true copy of the Mortgage (not necessary on and after 1st of Oct., 1880).

2nd. 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.

3rd. An affidavit, stating that such statements are true, and that the said Mortgage has not been kept on foot for any fraudulent purpose, (*O'Halloran* v. *Sills* 12 U. C. C. P., 465). (See foot note (*l*) *infra*.)

A true and correct copy of the Mortgage must be re-filed, but this will no longer be necessary after the first of October, 1880 (see *post*). Where the original Mortgage had no subscribing witness, and in the copy filed the name of the person who made the affidavit was inserted as a witness, the vari-

ance was held not to be material (*Armstrong* v. *Ausman*, 11 U. C. Q. B. 498). When there is a simple impossibility of deception, or misleading by reason of a slip in the copying, as when the copy filed gave the date of the mortgage on the 13th March, 1877, instead of 1876, it was held immaterial (*Sloan* v. *Maughan*, 3 App. R. 222), and an immaterial variation between a Chattel Mortgage and the copy subsequently filed, does not invalidate the filing. Nor does a mistake in the number of the lot, where the chattels were, nor writing in the copy "Montgomery," for "Mongomery" in the original Mortgage, nor copying "he" for "him," or "they" for "them," or inserting in the copy "his," when it was not in the original, or omitting the word "the" when it was in the original (*Walker* v. *Niles*, 18 Gr. 210; *Armstrong* v. *Ausman*, 11 U. C. Q. B, 498). But any deviation in the copy from the original, which "ascribes to the Mortgage a different legal effect, or operation, or which has the effect of ascribing a different effect to the original, from what the original bears," is such a want of compliance with the Act as will vitiate the re-filing (*Walker* v. *Niles*, 18 Gr. 210), as where the copy was for $600, and the original Mortgage was for $500, the intended copy is of no effect, and the re-filing is void as against creditors (*Ely* v. *Caruley*, 19 N. Y. 496). And the Statute being silent as to whether the affidavit of execution should be copied and re-filed with a copy of the Mortgage, it has been held that it is not necessary that the affidavit of execution should be repeated, or any copy of it filed, on the re-filing of a mortgage (*Beaty* v. *Fowler*, 10 U. C. Q. B., 382). A similar provision to this section is found in an Act of the Legislature of the State of New York, and other States of the Union, and there it has been held that re-filing the original Mortgage with the statement required by the Act is a sufficient compliance with the Statute (*Pain* v. *Mason*, 7 Ohio, S. 198; *Stockham* v. *Allard*, 4 T. & C. 279.)

"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 pre-

cise 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" (Herman on Mortgages, 189; *Theviot* v. *Prince*, 1 Edm. Sel. cas. 219).

The information made necessary must be as to the following particulars:—

(1.) The interest of the mortgagee in the property claimed;
(2.) The amount still due for principal and interest;
(3.) Payments, if any, made on account thereof (*Barber* v. *Maughan*, 42 U. C. Q. B. 137).

This statement cannot be made by the mortgagor, without authority, however accurate, and with utmost good faith (*Newell* v. *Warren*, 44 Barb. 258); but there is nothing to prevent the mortgagor acting as agent for the mortgagee, for the purpose of re-filing the Mortgage. The statement must shew the interest of the mortgagee, in the property claimed, and it must contain a full statement of the amount due for principal and interest (*Reynolds* v. *Williamson*, 25 U. C. C. P. 49). The Statute appears to require something more than a mere account. The statement should refer to the time of filing (*Fraser* v. *Bank of Toronto*, 19 U. C. Q. B. 388). No affidavit is necessary to verify the statement of the mortgagee's interest required by the Act (*Armstrong* v. *Ausman*, 11 U. C. Q. B. 499; *Fitch* v. *Humphreys*, 1 Denio, 168). A statement, filed on renewal of a Mortgage, whilst not affecting the Mortgage, as to the amount claimed between the original parties to the instrument, is yet binding upon the mortgagee, in favour of all those whom it is the design of the Act to protect, and, against them, the mortgagee cannot afterwards claim any greater sum than is contained in the statement (*Beers* v. *Waterbury*, 8 Bosw. 96). It often happens that the statement, standing alone, does not satisfy the Statute; but, when assisted by the affidavit, and read in conjunction with it, the two together contain all that the Statute calls for. It formerly was the law that, however fully the affidavit supplied deficiencies in the statement, the Statute was not complied with, if the

statement itself did not contain the necessary information (*O'Halloran* v. *Sills*, 12 U. C. C. P. 465). "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" (per Draper, C. J., *OHalloran* v. *Sills*, 12 U. C. C. P. 465). The judgment of the Court in *O'Halloran* v. *Sills* was followed in *Saulter* v. *Carruthers* (9 U. C. L. J. 158), and Hagarty, C. J., in *Reynolds* v. *Williamson* (25 U. C. C. P. 49), still recognise *O'Halloran* v. *Sills* as an authority, that assistance could not be had from the affidavit to supply defects in the statement. In *Walker* v. *Niles*, 18 Gr. 210, Mowat, V. C., expressed a different opinion to that of Draper, C. J., and the later decisions have established a rule directly opposed to that laid down in *O'Halloran* v. *Sills.* The rule is now established that the statement and affidavit, when they refer to each other, and are meant to be read together, can be so read, and that if, together, they contain the particulars required by the Statute, the renewal is sufficient (*Barber* v. *Maughan*, 42 U. C. Q. B. 134; *Sloan* v. *Maughan*, 3 App. R. 222). "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 other payments have been made on account, then the intent and spirit of the Statute are satisfied (per Moss, C. J. A. in *Sloan* v. *Maughan*, 3 App. 227; see *Brodrick* 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; *Pickhard* v. *Bretz*, 5 H. & N. 9; *Banbury* v. *White et al.* 2 H. & C. 300; *Hutton* v. *English* 7 E. & B. 94). It has been decided in the United States (and there many of the Legislatures have passed Acts containing provisions similar

to those found in our own Statute), that a statement is sufficient which annexes and refers to another document filed with it, if the two papers, read together in conjunction with the original Mortgage, disclose the interest of the mortgagee intelligibly (*Beers* v. *Waterbury*, 8 Bosw. 396). It probably was this diversity of opinion, which occasioned the Legislature to definitely settle that, on and after the first day of October, 1880, the statement and affidavit shall be *deemed one instrument* so that whether, after that date, they refer to one another or not (*Barber* v. *Maughan*, 42 U C. R. 134; *Sloan* v. *Maughan*, 3 App. R. 222), it will matter not, as the Statute provides against the difficulty heretofore existing (The Mortgages and Sales of Personal Property Amendment Act, 1880, ss. 2, 3, 4 (*post*).

For the form of the statement and affidavit see Appendix.

(*h*) The copy, with the statement and affidavit, must be again filed in the office of the Clerk of the County or Union of Counties wherein such goods and chattels are *then* situate. Now it may happen that the Mortgage was not originally filed in the proper office within the County "wherein the goods were situate," but in a different office, namely, in the office of the County wherein the mortgagor resided at the date of the execution of the Mortgage, under the first part of section 7. Then does this section mean by the words, "wherein such goods and chattels are *then* situate," that the Mortgage must be filed in the office of the County "wherein such goods are *then* situate," irrespective of where it was filed originally; if so, what then do the words "again filed" mean? These latter words certainly indicate that the Mortgage is to be refiled, in the same County as that in which it was originally filed, and yet, if this be done, it may be that it will not be filed in the office within the County "wherein such goods and chattels are *then* situate." However unintelligible the wording of the section may be on this point, there can be no doubt that it is contemplated to refile the Mortgage in the same office as that in which it was originally filed, though it be not the office of the County wherein "the goods and chattels are *then* situate." If the ob-

ject of the Statute was satisfied by first filing the Mortgage within the County wherein the mortgagor resided, at the execution of the Mortgage, and not within the County wherein the goods then happened to be, it is difficult to perceive what object there would be, when the occasion arose for renewing the instrument, than to overlook the question of residence of the mortgagor and refile in a different office to that in which the Mortgage was originally filed. In the State of New York a Mortgage was filed where the mortgagor resided at the time of execution, but before renewal the mortgagor had gone to reside elsewhere, and it was held that a re-filing in the town where the mortgagor resided at the time of execution was insufficient (*Dillingham* v. *Bolt*, 37 N.Y. 198). But, in this respect, as in others, all doubt has been removed by "The Mortgages and Sales of Personal Property Amendment Act, 1880." By that Act (see *post*) there is to be, on and after the first of October, 1880, no question as to where instruments or renewals of instruments are to be filed. That Statute definitely determines the place of registration to be, within the County in which the goods and chattels are situate, when the instrument is executed.

(*k*) Until the passing of 40 Vic. cap. 7, Sched. A (135), provision was only made by Statute, for the affidavit being made by the mortgagee or his agent. But this Statute C. S. U. C. cap. 45, s. 10, was amended by striking out the words "his agent," and substituting therefor the words "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." Now the affidavit can be made by any of the following—

(1) By the mortgagee.
(2) By one of several mortgagees.
(3) By the assignee of the mortgagee.
(4) By any assignee claiming by or through any mortgagee.
(5) By one of several assignees of the mortgagee.
(6) By the agent of the mortgagee or assignee.

(7) By the agent of the mortgagees or assignees.

(8) By any next of kin, executor or administrator of a deceased mortgagee (section 11, *infra*).

(9) By any next of kin, executor, or administrator of any assignee of a mortgagee (section 11, *infra*).

(10) By any next of kin, executor or administrator of any assignee claiming by or through any mortgage (section 11, *infra*).

The 12 Vic. c. 74, sec. 3, did not require the refiling to be accompanied by an affidavit, it simply provided for "a statement exhibiting the interest of the mortgagee in the property thereby claimed by virtue thereof." This Statute was repealed by 20 Vic. cap. 3, which first required this affidavit to be made (*Sloan* v. *Maughan*, 3 App. R. 225).

As under sections one and six, an agent has power to take a Mortgage, so under this section, he has the power to renew one. His authority must be purposely to renew, and the authority must be in writing, and be filed with the renewal Mortgage. It would seem that a fresh authority must be given to an agent each time the Mortgage is renewed; but now, at least, on and after the first day of October, 1880, "An authority for the purpose of taking and renewing a Mortgage or conveyance under the provisions of the Revised Statutes of Ontario, cap. 119, may be a general one to take and renew all or any Mortgages or conveyances to the mortgagee or bargainee" (The Mortgages and Sales of Personal Property Amendment Act, 1880, sec. 6. See *post*). Sections 1 and 6 *ante* expressly condition for the agent taking the Mortgage, after his 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 (see note *l*, *infra*).

The affidavit must vouch:

(1) That the statements are true.

(2) That the Mortgage has not been kept on foot for any fraudulent purpose (see form in the Appendix). It is no

objection that the affidavit made on one day, states the amount due for interest, at what it would be on a future day, the day of refiling. The Act is complied with where no fraud is intended, though the amount due is, by inadvertence, stated at a few shillings too much, or the statement includes a trifling sum, which the mortgagee had no right to charge ; through a mistake of this kind the Court will not hold the object of refiling defeated, and the security lost (*Fraser* v. *Bank of Toronto*, 19 U. C. Q. B. 381). The affidavit must aver that the statements are "true." The substitution of the words "correct," "accounts," "exact," for the word "true," is a fatal objection (*Reynolds* v. *Williamson*, 25 U. C. C. P. 33). There is safety in keeping to the words of the Statute, for though it may be difficult to point out what difference in substance there may be between the meaning of the words, yet the omission, or change of a word, may lack a strict compliance with the Statute. The mere omission of the word "really" in an affidavit made under Revised Statutes, Ont., cap. 131, s. 3, is a well founded objection (*Jackson* v. *Kassell*, 26 U. C. C. P. 344). The addition of the word "correctly" to that of "truly," will not, however, nullify the affidavit (*Barber* v. *Maughan*, 42 U.C.Q.B. 141 ; 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). See also notes (*k*) and (*g*) *supra*. A Notary Public in the Province of Quebec has no authority to take this affidavit (*Reynolds* v. *Williamson*, 25 U.C., C. P. 51). As to who can, see *post* sec. 21. Whosoever does take the affidavit, he must not fail to sign the jurat, for his omission to do so will be fatal to the sufficiency of the refiling (*Nisbet* v. *Cock*, 4 App. R. 200).

Power has lately been given (40 Vic., c. 21 *infra.*, s. 13) whereby Mortgages, registered under the provisions of the Con. Stat. U. C., c. 45, may now be discharged. It is pointed out by section 15 *infra*, that when a Mortgage, renewed under this section, requires to be discharged, the endorsement, or

entry made necessary by the Clerk when filing the certificate of discharge, need only be made on the copy filed at the last renewal, and from and after the first day of October, A. D. 1880, these endorsements or entries need only be made upon the statement and affidavit filed on the last renewal (See *post*).

Affidavit, by whom made.

11. (*a*) The affidavit required by the tenth 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 (*b*) ; 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 filed, at or before the time of such refiling by such assignee, next of kin, executor or administrator of such assignee (*c*). 40 Vic. c. 21, s. 5.

(*a*) This section is new, and is not to be found in any of our former Chattel Mortgage Acts. It was introduced by 40 Vic. cap. 21, s. 5, in amendment of sec. 10, C. S. U. C. cap. 45. It must be read in conjunction with the preceding one, in order to know all by whom the affidavit, required by section ten, can be made.

(*b*) The following are empowered by Statute to make the affidavit :—

(1) The mortgagee (sec. 10).

(2) One of several mortgagees (sec. 10).

(3) The assignee of the mortgagee (sec. 10).

(4) Any assignee claiming by or through any mortgagee (sec. 11).

(5) One of several assignees of the mortgagee (sec. 10).

(6) The agent of the mortgagee or assignee (sec. 10).

(7) The agent of the mortgagees or assignees (sec. 10).

(8) Any next of kin, executor or administrator of any deceased mortgagee (sec. 11).

(9) Any next of kin, executor or administrator of any assignee of a mortgagee (sec. 11).

(10) Any next of kin, executor, or administrator of any assignee, claiming by or through any mortgagee (sec. 11).

(*c*) Should the affidavit be made by—

(1) The assignee of the mortgagee;

(2) Or, by any assignee claiming by or through any mortgagee;

(3) Or, by one of several assignees of the mortgagee;

(4) Or, by the agent of the assignee or assignees;

(5) Or, by any next of kin, &c., of any assignee of the mortgagee;

(6) Or, by any next of kin, &c., &c., of any assignee claiming by or through the mortgagee, then, in addition to all other papers, there must be filed, in the office in which the Mortgage is 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 refiling a Mortgage, in filing his assignment or several assignments or copies thereof (see 40 Vic. cap, 21, sec. 4, section 16 *infra*). The proof, necessary to register the assignment, is an affidavit of execution by a subscribing witness (40 Vic. cap. 21, s. 4, section 16 *infra*). It happens then, that while proof for registry of an assignment of a Mortgage must be by the affidavit of a subscribing witness, for the purpose of registering the Mortgage itself, attestation is not necessary, and the witness who makes the affidavit, need not be a subscribing witness (*Armstrong* v. *Ausman*, 11 U.C. Q. B., 498, *ante* s. 1, note (*h*), p. 132). When the affidavit, necessary by the preceding section, 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.

12(*a*). A copy of such original instrument or of a copy thereof, so filed as aforesaid, 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, shall be received in evidence in all Courts (*a*), but only of the fact that such instruments 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 Clerk made in pursuance of this Act, upon any such instrument or copy, shall be received in evidence, only of the fact stated in such endorsement (*b*). C. S. U. C. c. 45, s. 11.

Clerk's certificate to be evidence of registration.

(*a*) There appear to be two methods, by either of which, registration can be proved :—

First: By a copy of the original Mortgage, or of a copy thereof, including any statements filed, certified by the Clerk under his seal.

Second: By the production of the original endorsement 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 endorsement by the Clerk thereon. The execution of the instrument would still have to be proved by the production of the original, and proof thereof in the ordinary way (see *ante*, section 1, note *f*). The Clerk's certificate or endorsement is conclusive evidence, as between the mortgagee and a creditor seizing the property mortgaged subsequent to the time stated in the certificate, or the original endorsement (*Tracy* v. *Jenks*, 15 Pick. 465; *Ames* v. *Phelps*, 18 Pick, 314; *Head* v. *Goodwin*, 31 Me. 181).

(*b*) See section 1, foot note (*f*).

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 the annexed paper writing marked

A. to be 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————188—, and filed in the office of the said Court at———o'clock ———the————day of———188—.

Dated this———day of———188—.

________________C. C. C.

{Seal} of Office.

Discharge of Mortgages.

Certificates for discharging Chattel Mortgage.

13. (*a*) Where any mortgage of goods and chattels is registered under the provisions of this Act (*b*), such Mortgage may be discharged (*c*) by the filing, in the office in which the same is registered, of a certificate signed by the mortgagee, his executors or administrators (*d*), in the form given in the Schedule hereto, or to the like effect (*e*). (40 Vic. c. 21, s. 1.)

(*a*) This section is new. In none of the prior Chattel Mortgage Acts is provision made for the discharging of Mortgages and filing of the Release, as is herein contained. This privilege or power was first given by 40 Vic. cap. 21, sec. 1. It yet, however, is optional with the parties interested to take advantage of this Act. Until 40 Vic. cap. 21; sec. 1, there was nothing to prevent a mortgagor, or other person so desiring, from obtaining and filing a discharge, except it was that a Clerk could not be compelled to receive and file the instrument releasing the Mortgage. By virtue, however, of this section, the Clerk now, 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 (section 14, *infra*).

(*b*) This section only provides for the discharge of Mortgages subject to the provisions of the Statute. It has been seen, that

if the circumstances connected with the giving and taking of the Mortgage are such, that the affidavit of *bona fides* cannot be properly taken, then that the Mortgage does not require registration under the Statute. To any such Mortgage this section does not apply.

(*c*) It is to be observed how the late legislation provides against the question raised in *Armstrong* v. *Ausman*, *supra*, p. 132, as to attestation. In the affidavit of execution required under sections one, five; and six, attestation by the witness is unnecessary, while under this section and section sixteen, the witness must be a subscribing witness. The following is a form that may be used of a discharge of a Mortgage, as between mortgagor and mortgagee, and a form of an affidavit of execution thereof.

Dominion of Canada :
Province of Ontario.
To the Clerk of the County Court of the County of
(or united Counties of)

I, A. B. of——,——in the County of——, ——, do certify that C. D. has satisfied all money due on, or to grow due on a certain Chattel Mortgage made by ———to me, which Mortgage bears date the————day of ————A. D. —, and was registered (*or, in case the Mortgage has been renewed under section* 10, was re-registered) in the office of the Clerk of the County Court of the County of————(or United Counties of ——) on the——of——A. D.,—— as No.——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.

One witness stating residence and occupation. }

A. B.

(Form of affidavit of execution of the above discharge of Chattel Mortgage).

Ontario.
County of
To Wit: } I, A. B., of the———of——— 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, sealed and executed by———the parties thereto.

2. That the said Certificate was executed at the——— of———in the County of————————

3. That I know the said———— ————————

4. That I am a subscribing witness to the said Certificate.

Sworn before me, at the
——— of ——— in the
County of——this——
day of ——in the year
of our Lord, 18—. } A. B.

A Commissioner for taking affidavits in B. R., &c.

(For forms of discharge of Mortgage, where the Mortgage has been assigned, and the assignee executes the discharge, see Appendix).

It seldom occurs in practice, that a written release is registered or in fact even executed; the debt being the "principal," and the Mortgage security the "adjunct;" when the debt is paid the Mortgage security forthwith ceases to exist (*Jackson* v. *Stackhouse*, 1 Cow. 122; *Crosby* v. *Chase*, 17 Me. 369). A parol release of a Mortgage is good, when supported by a sufficient consideration. And, a simple receipt in full, of the debt, secured by the Mortgage, is a sufficient Release in Equity. 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 (section 10, *supra*). 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, being 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. Until the period arises, up to which the Mortgage is a valid security without refiling, as against creditors, purchasers, and mortgagees in good faith, the law presumes the Mortgage to be still unpaid, but so soon as that period is passed, the legal presumption is that the Mortgage has been paid and satisfied. "There are in many States of the Union penal Statutes, which are not only just, but are necessary to prevent fraud, which give a mortgagor an action to recover damages (the amount of which is fixed by Statute), where a mortgagee fails to discharge or release of record a Mortgage, when it has been paid and the debt satisfied in full." In those States, there should be no presumption in the case of valid Mortgages, for every one is presumed to know the law, and a *bona fide* mortgagee, with knowledge of the penalty for failing to satisfy the record, will in all cases, take prompt means for complying with the law (Herman on Mortgages, pp. 410, 411).

(*d*) 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 16, *infra*).

(*e*) The form given above (see appendix *post*) had better be

adhered to, but there is nothing to prevent the conveyancer adopting any other to the like effect.

Entering Certificate of Discharge.

14. (*a*) The officer with whom the Chattel Mortgage is filed, upon receiving such certificate, duly proved (*b*) by the affidavit of a subscribing (*c*) witness shall (*d*), 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 eight 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 such officer shall affix his name, and he shall also endorse the fact of such discharge upon the instrument discharged, and shall affix his name to such endorsement. 40 V. c. 21, s. 2.

(*a*) This section is new. By sections seven and eight *ante*, the method of registration of the Mortgage is pointed out. By this section is pointed out the method of registering the discharge. The Clerk's duty under this section is to enquire further into the proof for filing, than he does when the Mortgage itself is presented to him for registration. His duty, in both instances, is to see that the Statute has been complied with (*De Forrest* v. *Bunnell*, 15 U. C. Q. B, 370).

Under this section he must see that the deponent is a subscribing witness. Under sections one, five and six, no such duty is cast upon him, for the Mortgage can be filed without the affidavit of any subscribing witness (*Armstrong* v. *Ausman*, 11 U. C. Q. B., 498; see section 1, *ante*, p. 132.)

(*b*) As to who can administer this affidavit, see section 24 *infra*.

(*c*) See note (*a*) *supra*.

(*d*) The Clerk's duties under this section, are—

(1) To satisfy himself that the execution of the discharge has been perfectly proved for registration.

(2) To number the certificate.

(3) 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* —."

(4) To each such entry to affix his signature.

(5) To endorse the fact of such discharge upon the instrument itself.

(6) To such last instrument to affix his signature.

In case a Mortgage has been renewed, the Clerk is not required to make these endorsements upon the original instrument filed ; it will be sufficient if he make them upon the copy filed on the last renewal, and at the entries of such copy (section 15 *infra*). But as, on and after the first day of October, 1880, it is no longer necessary, on renewing a Mortgage, to file a copy of such Mortgage, provision is made by "The Mortgages and Sales of Personal Property Amendment Act. 1880" (s. 5) for the endorsement, by the Clerk of the fact of the discharge of the Mortgage, on the statement and affidavit filed on the last renewal.

15. (*a*) Where a Mortgage has been renewed under section ten of this Act, the endorsement or entries required by the preceding section to be made, need only be made upon the copy filed on the last renewal, and at the entries of such copy in the said book. 20 V. c. 21, s. 3.

(*a*) This section is repealed from and after the first day of October, 1880, and the following substituted therefor :—

"Where a Mortgage has been renewed under section ten 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 such "statement and affidavit in the said book." "The Mortgages and Sales of Personal Property Amendment Act, 1880," s. 5, see *ante*, sec. 14.

Entry of assignment of Mortgage.

16. (*a*) In case any registered (*b*) Chattel Mortgage has been assigned, such assignment may (*c*), upon proof by the affidavit of a subscribing witness (*d*), be numbered and entered in the alphabetical Chattel Mortgage book, in the same manner as a Chattel Mortgage (*e*), and the proceedings au-

thorized by tho three next preceding sections of this Act may and shall be had, upon a certificate of the assignee (*f*), proved in manner aforesaid (*g*). 40 V. c. 21, s. 4.

(*a*) This section is new.

(*b*) This provision only applies to Chattel Mortgages that have been registered, and not to those instruments, to which the Statute itself does not apply, the validity of which, therefore, in no way depends upon a compliance with the Act.

(*c*) It is to be observed, that it is not compulsory, under this section, that an assignment of Mortgage should be registered. The word "may" is used in the section, and wheresoever it appears throughout the Statute, it shall be construed as permissive (Rev. Stat. Ont. cap. 1, s. 8, sub-sec. 2). 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, though it is optional with an assignee of a Mortgage, whether he register his assignment or not, yet, if he requires to renew the Mortgage under the tenth section of this Act, he must then, either before or at the time of refiling his Mortgage, file the assignment also (section 11 *supra*). The result, however, of registration is to supply the mortgagor with notice (*Reed* v. *Markle*, 10 Paige, 409; *Walcott* v. *Sullivan*, 1 Edw. Ch. 399; *N. Y. Life Insurance Co.* v. *Smith*, 2 Barb. Ch. 82). If the assignee does not register his assignment then he should 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 mortgagor and mortgagee, by which he might be prejudiced (for form of notice see Appendix). The mortgagor, having received the notice, can then no longer deal with the mortgagee concerning the Mortgage; should he do so, however, any payments that he might make, would be fraudulently received by the mortgagee, and void, and of no avail on the part of the mortgagor (*Johnson* v. *Holdsworth*, 4 Dowl, P. C. 63; *Hickey* v. *Burt*, 7 Taunt. 48; *Mountstephen* v. *Brooke*, 1 Chit. 390; *Snell* v. *Newman*, 4 B. & A. 149; *Phillips* v. *Claghett*, 11 M. & W. 84; *Payne* v. *Rogers*,

Doug. 407; *Manning* v. *Cox*, 7 Moore, 617; *Barker* v. *Richardson*. 1 Y. & I. 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; *Cook* v. *Stephen*, 5 Bing. N. C. 688). But should the assignee be the purchaser of a note secured by a Mortgage, then, even without the precaution being taken of giving notice, the assignee cannot be prejudiced by a release given by the assignor to the mortgagor after the transfer of the note (*Dick* v. *Mowry*, 17 Miss. 448; *McCormick* v. *Digby*, 8 Black. 99). Should the note be overdue before the Mortgage is assigned, then the same equities can be set up by the mortgagor against the assignee's claim as he had against the assignor (*Howard* v. *Gresham*, [illegible] Geo. 347; *Nichols* v. *Lee*, 10 Mich. 526). The assignee of a Chattel Mortgage takes it from the assignor, subject to the same equities that exist against it in the hands of the mortgagee. The law, regulating assignments of choses in action, applies to assignments of Chattel Mortgages. 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 it is, that an assignee of the Mortgage will be deprived of the benefit of his transaction, to the extent of any demands of the mortgagor, existing against the assignor, at the date of the assignment, or up to the time when the mortgagor has acquired notice of the assignment of the Mortgage (*Matthews* v. *Walwyn*, 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; *Hanry* v. *Carroll*, 3 Sand. Ch. 301; *Clute* v. *Robinson*, 2 John. 595; *Ord* v. *White*, 3 Beav. 357; *Cole* v. *Middle*, 10 Hare, 186; *Davis* 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), and any equities (arising after the transfer, but of which the assignee had notice at the time of the transfer), the mortgagor

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will be entitled to set up against the assignee as he could have set up against the assignor; but without notice of subsequent equities the assignee will be bound only by those in existence prior to and at the date of the assignment.

(*d*) The introduction of the word "subscribing" before the word witness will here be observed. It is not necessary that the witness to the Mortgage itself should be a subscribing witness (*Armstrong* v. *Ausman*, 11 U. C.Q. B. 498), but the proof required, in order to file an assignment of Mortgage, is the affidavit of execution of a subscribing witness; and the Clerk, before filing an assignment must satisfy himself, that the Statute has been duly complied with in this respect.

(*e*) See sections 7 and 8 *ante*. 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 refiled; 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 *bona fide* purchaser for value without notice, even though the assignment be not registered (*Wilson* v. *Kimball*, 27 N. Y. 300).

(*f*) In addition to the mortgagee or the executors or administrators of the mortgagee (section 13 *supra*), the assignee of a Mortgage has, under this section, the power given him to execute the certificate of discharge of Mortgage.

(*g*) See section 14.

Mortgages and Sales of Chattels in unorganized Districts.

Registration of the Chattel Mortgages in Provisional Judicial Districts.

17. (*a*) When the mortgagor or bargainor named in any instrument subject to the provisions of this Act (*b*) is a resident in a Provisional Judicial District (*c*), or if such mortgagor or bargainor is not at the time of the execution of such instrument a resident in Ontario (*d*), but the personal property (*e*) mortgaged or sold is within a Provisional Judicial District (*f*), then the provisions of this Act shall apply to such instrument with the substitution of "The Clerk of the District Court" (*g*) for "the Clerk of the County Court" (*h*), but this section shall not apply to any portion of a Territorial District which forms part of a Provisional Judicial District (*k*). (40 V. c. 24, s. 14.)

(*a*) This section is new, but has nevertheless been amended by "The Mortgages and Sales of Personal Property Amendment Act, 1880." Prior to 40 Vic. cap. 24, "An Act respecting the Territorial and Judicial Districts of the Province, and the Provisional County of Haliburton," there was no provision for the registration of Bills of Sale and Chattel Mortgages in Provisional Judicial Districts. Section 14 of that Act is here re-enacted, with the substitution of a reference to "this Act" (Rev. Stat. O. cap. 119) instead of to "Con. Stat. U. C., cap. 45."

The only Provisional Judicial District in existence is that of Algoma. It embraces seventy one townships, as well as any remaining territory included within the following limits:—"Commencing on the north shore of the Georgian Bay of Lake Huron at the most westerly mouth of French River; thence due north to the northerly limit of the Province, thence along the said northerly limit of the Province, westerly to the westerly limit thereof; thence along the said westerly limit of the Province southerly to the southerly limit thereof; thence along the said southerly limit of the Province, easterly to a point in Lake Huron opposite the southern extremity of the Great Manitoulin Island; thence easterly and north easterly so as to

include all the islands in Lake Huron not within the settled limits of any county or district, to the place of beginning." "But such portions of the said District of Algoma as are, by The Act respecting the Territorial Districts of Muskoka, Parry Sound and Thunder Bay, included within the limits of the Territorial District of Thunder Bay, shall, for the purposes of the said Act, continue to form part of the said Territorial District of Thunder Bay." (Rev. Stat. O. cap. 5, sec 1, sub-sec. 43.)

(*b*) See sections one, three, five, six, nine, ten, and sixteen. Whenever any instrument shall be executed, which comes within the operation and control of the Statute (*Baldwin* v. *Benjamin*, 16 U. C. Q. B. 52 ; *Mathers* v. *Lynch*, 28 U. C. Q. B. 254, p. 363 ; *Walker* v. *Niles*, 18 Grant, 212), then this section applies to such instrument, provided that the mortgagor or bargainor mentioned therein is, at the time of the execution of the instrument, a resident within a Provisional Judicial District; but this proviso will only affect the instrument up to the first day of October, 1880. *See infra* note (*d*).

(*c*) There being but one Provisional Judicial District in existence, the language of this section, instead of being general, might have specified the district to which alone it could have reference, but the section, no doubt, was framed, so as to include any other Provisional Judicial District which the Lieutenant-Governor may, hereafter from time to time, form and set apart.

(*d*) See section seven, note (*d*). It must be borne in mind that an amendment to this section is made by " The Mortgages and Sales of Personal Property Amendment Act, 1880," similar to that made to section 7 *supra* by the same amending Act, and that from and after the first day of October, 1880, the instruments to which this section applies, must be filed within the Provisional Judicial District in which the goods are, at the time of the execution of the Mortgage or conveyance.

(*e*) In this section, the use of the expression " personal property " is to be observed. In that part of section seven, which corresponds with this portion of this section, the term " property " alone is used, and throughout the rest of the Act the term

'goods and chattels" is employed. The Imperial Act (17 & 18 Vic. cap. 36) makes use of the expression "personal chattels;" but then this expression is subsequently interpreted (sub-s. vii) and given a limited application, so limited in fact, that it has been held not to include anything but that which "at the moment when the Bill of Sale is given and the provisions of the Act are to be applied to it, might be delivered to the Assignee, and are not, but are left in the enjoyment of the assignor" (*Brantom* v. *Griffits*, L. R., 1 C. P. D. 349; 2 C. P. D. (C. A.) 212). Unless the expression "personal property," in this section, is confined in its application to such property only, as is embraced within the meaning of the expression "goods and chattels" in section one, then this section is given a much wider operation than was intended by the Legislature it should possess. Personal property has a very wide application. It covers whatever wants either the duration or immovability attending things real (Whar. Law Lex.) whereas the expression "goods and chattels" as found in this Statute, is restricted in its application to movable goods, such as are wholly personal in their nature and can be delivered from hand to hand (*Frazer* v. *Lazier*, 9 U. C. Q. B. 679). This definition however is not meant to confine the expression "goods and chattels" to such things as can be delivered from hand to hand "at the moment when the Bill of Sale or Mortgage is given and the provisions of the Act are to be applied," but to such things as can be delivered from hand to hand and are "mentioned in the Mortgage, and are in existence, *when the mortgagee insists on his charge* (Re *Thirkell*, *Perrin* v. *Wood*, 21 Gr. at p. 509). It is only to such "goods and chattels" that an instrument under the Act has reference, and any instrument embracing property not within the definition of the expression "goods and chattels" is not within the Statute (*Frazer* v. *Lazier supra*). The "personal property" referred to in this section, is such only as may be mortgaged or sold by an instrument which is "subject to the provisions of this Act," and as the Act applies only to an instrument embracing property witin the meaning of the expression "goods and

chattels" as used in section one it follows that the expression "personal property" in this section has no wider signification. than the expression "goods and chattels" as used in section one.

(*f*) See foot note (*a*) *supra.*

(*g*) The Clerk of the District Court is here substituted for the Clerk of the County Court. See therefore ss. 7, 8.

(*h*) As none of the subsequent sections limit the period within which an instrument (to which the provisions of this Act apply, and which is within this section) must be filed, it appears that the usual period of five days only is allowed for the filing of instruments with the Clerk of the District Court under this section. It, no doubt, was the intention of the Legislature that a further period of time, than five days, should be allowed for the filing of instruments in Provisional Judicial Districts, as a further period of time was granted in respect to instruments under the Act, where the mortgagor resided, or the goods and chattels were within a Territorial or Temporary Judicial District (ss. 18, 19 *infra*). "The Mortgages and Sales of Personal Property Amendment Act, 1880" (which was passed for the purposes of removing doubts known to exist in regard to the proper interpretation to be put upon the Revised Statutes of Ontario cap. 119), now, however, enacts that on and after the first day of October next, 1880, a period of ten days shall be the time within which instruments under this section shall be filed. Until the first day of October, 1880, however, instruments under this section must be filed within the period of five days from the execution thereof (see section 1, note *g*). It is not very clear from this section, whether a copy of an instrument can be registered in place of the instrument itself. Probably it can; but the amendment made by "The Mortgages and Sales of Personal Property Amendment Act, 1880" puts any question at an end by providing that such can be done. This amendment however, is not to be understood as extending the privilege to Bills of Sale any further than it has existed hitherto (see section 5, note (*m*), p. 158).

(*k*) By Rev. Statutes, Ont., cap. 7, sec. 3, it is enacted, that all

that part of the District of Algoma lying west of the meridian of eighty-seven degrees of west longitude shall, for the purposes of that Act, continue to be and form one Territorial District, by the name of the District of Thunder Bay. For certain purposes the District of Thunder Bay continues to remain part of the Provisional Judicial District of Algoma. The latter portion of this section, therefore, was rendered necessary, no doubt, to remove any question as to whether instruments transferring the property in goods and chattels, which, at the time of the execution of the instruments, were within the District of Thunder Bay, should be registered in the office of the Clerk of the District Court of the Provisional Judicial District of Algoma, or in the proper office within the District of Thunder Bay (see section 18, *infra*).

In Territorial Districts.

18. (*a*) If the mortgagor or bargainor named in any such instrument (*b*) is resident in a Territorial District (*c*), or if such bargainor or mortgagor is not at the time of the execution of such instrument a resident in Ontario (*d*), but the personal property (*e*) mortgaged or sold is within a Territorial District (*f*) then the provisions of this Act shall apply to such instrument, with the substitution of the "Clerk of the First Division Court of the District" (*g*) for the "Clerk of the County Court," and with the substitution of "ten days" for "five days" (*h*) as the time within which the instrument, or a copy thereof, shall be registered (*k*). 40 Vic. c. 24, s. 14 (2).

(*a*) This section, like the next preceding one is new, but, nevertheless, has been amended by "The Mortgages and Sales of Personal Property Amendment Act, 1880." Prior to 40 Vic. c. 24, there was no provision for the registration of Bills of Sale and Chattel Mortgages in Territorial Districts. Section 14, paragraph (2) of that Act is here re-enacted. The Amendment made by "The Mortgages and Sales of Personal Property Amendment Act, 1880," is that, on and after the first day of October next, 1880, all the words in the above section down to and inclusive of the word "but," in the fourth line thereof,

shall be struck out, and the word "when" shall be substituted therefor (see *post*), the effect of which amendment is, that from and after that date, if the property mortgaged or sold be, at the time of the execution of the instrument, within a Territorial District, then the instrument conveying the same, is required to be registered in some Territorial District, without regard to the place of residence of the bargainor or mortgagor.

(*b*) See note (*b*) to the next preceding section. Whenever Provisional District is there spoken of read Territorial District in applying it to this section.

(*c*) There are in Ontario three Territorial Districts. They are: (1) Muskoka; (2) Parry Sound; (3) Thunder Bay. The limits of each of these Districts are given in Rev. Stat. Ont. cap. 5, s. 1, sub-secs. 44, 45 and 46 respectively,

(*d*) See section 7, note (*d*). It must be remembered that, on and after the first day of October, 1880, this section stands amended (see note (*a*) *supra* and *post*). By this amendment, the place of residence of a mortgagor or bargainor will no longer decide the county within which instruments under the Act are to be registered. If the property mortgaged or sold is within a Territorial District, then the instrument must be filed with the Clerk of the First Division Court of such District, irrespective of any consideration of the residence of the bargainor or mortgagor.

(*e*) See note (*e*) to the next preceding section.

(*f*) See note (*c*) *supra*.

(*g*) The duties of the Clerk of the First Division Court of District are those of the Clerk of the County Court (see secs. 7 and 8 *ante*, pp. 171 and 177).

(*h*) See foot-note (*g*) sec. 1, p. 127.

(*k*) A copy of a Mortgage may be filed (see sec. 1, *ante*, foot-note *f*) but probably not a copy of a Bill of Sale (*Harris* v. *Com. Bank*, 16 U. C. Q. B. 437; and see sec 5, *ante* foot-note, (*m*), p. 158).

In Temporary Judicial District of Nipissing.

19. (*a*) If the mortgagor or bargainor named in any such instrument (*b*) is resident in the Temporary Judicial District of Nipissing (*c*), or if such bargainor or mortgagor is not at the time of the execution of such instrument a resident in Ontario (*d*), but the personal property (*e*) mortgaged or sold is within the said Temporary Judicial District (*f*), then the provisions of this Act shall apply to such instrument, with the substitution of "the Clerk of the County Court of the County of Renfrew" (*g*), for "the Clerk of the County Court" and with the substitution of "twenty days" for "five days" (*h*) as the time within which the instrument or a copy thereof shall be registered (*k*). 40 V. c. 24, s. 14 (3).

This section, like the two preceding ones, is new; but nevertheless has been amended by "The Mortgages and Sales of Personal Property Amendment Act, 1880." It must, however, be borne in mind that the amendment does not come into force until the first day of October, 1880 (see foot note (*a*) to ss. 17 and 18 *supra*). The amendment, made to this section, by the above Act (see *post*), is to the effect, that, if the property mortgaged, or sold, is within the Temporary Judicial District of Nipissing, then the instrument relating thereto, if within the provisions of this Statute, is to be registered in such Temporary Judicial District irrespective of any consideration, as to the residence of the mortgagor or bargainor.

(*b*) See note (*b*) to section 17 *supra*.

(*c*) The limits of the Temporary Judicial District of Nipissing are given in Rev. Stat. Ont. cap. 5, s. 1. sub-sec. 47.

(*d*) See sec. 7 note (*d*), sec. 17 note (*d*), and sec. 18 note (*d*). These references, it must be borne in mind, when applied to this section, refer to the Temporary Judicial District of Nipissing.

(*e*) See note (*e*) to section 17.

(*f*) See note (*c*) *supra*.

(*g*) See ss. 7 and 8.

(*h*) See note (*g*) to section 1.

(*k*) See note (*k*) to next preceding section.

Instruments executed before July 1, 1877.

20. Every instrument executed before the first day of July, one thousand eight hundred and seventy-seven, and which, had it been executed after said day, would require registration under the preceding provisions, shall be registered on or before the first day of January, one thousand eight hundred and seventy-eight, in the manner required by the provisions of this Act (*a*), and thereafter every such instrument which, under the provisions of this Act, requires renewal shall, unless duly renewed (*b*), become void, in accordance with the provisions of this Act (*c*). 40 V. c. 24, s. 14 (4).

(*a*) This section refers to instruments, within sections 17, 18 and 19, and to no others, and to such of these only as were executed before the 1st July, 1877. It gave a period of six months for the registration, according to the Act, of any instruments executed before the 1st July, 1877, and which, if they had been executed after that day, would have required registration in accordance with sections 17, 18 and 19, *supra.*

(*b*) Such instrument (meaning a Chattel Mortgage only, from the use of the words "which under the provisions of this Act requires renewal") shall became void, unless duly renewed. The renewal must be filed in accordance with such one of the next three preceding sections, as relates to the instrument, within thirty days of the expiration of the period of one year from the filing of the instrument. (See sec. 10, *ante.*)

(*c*) Unless duly renewed, the instrument "shall become void in accordance with the provisions of this Act." This means it shall become void as against creditors of the mortgagor. and subsequent purchasers or mortgagees in good faith, for valuable consideration (see sec. 4, *ante*). This section does not apply to Bills of Sale, but only to Chattel Mortgages (see sec. 10 *ante*).

Saving clause.

21. Nothing in the four preceding sections shall be used to aid in determining whether or not chapter forty-five of the Consolidated Statutes of Upper Canada was, prior to the first day of July, one thousand eight hundred and seventy-seven, in force in any Territorial, Temporary Judicial, or Provisional Judicial District. 40 V. c. 24, s. 14 (5).

FEES.

22. For services under this Act, the Clerks aforesaid shall be entitled to receive the following fees :—

Fees for service.

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 filing certificate of discharge of each instrument and for making all proper entries and endorsements connected therewith, twenty-five cents ;
4. For searching for each paper, ten cents ; and
5. For copies of any document with certificate prepaid, filed under this Act, ten cents for every hundred words. C. S. U. C. c. 45, s. 14 ; 40 V. c. 21, s. 6.

23. (*a*) All the instruments mentioned in this Act (*b*), whether for the Sale or Mortgage of goods and chattels (*c*) shall contain such sufficient and full description (*d*) thereof that the same may be thereby readily and easily known and distinguished. (C.S.U.C. c 45, s. 6.)

The property to be well described.

(*a*) This provision is not contained in our earlier Chattel Mortgage Acts, being first introduced by 20 Vic. cap. 3 : the word "sufficient" being subsequently substituted for the word "efficient" found in that Statute.

(*b*) The instruments here meant are those referred to in sections 1, 5, and 6 ; but an assignment of Mortgage (section 16) should also contain and set out a full and sufficient description of the goods as contained in the Mortgage assigned.

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, and to creditors, purchasers or mortgagees in good faith, an inaccurate or insufficient description will avail nothing if the mortgagee takes possession of the mortgaged

property, because the possession taken by the mortgagee constitutes an identification and appropriation of the property mortgaged (*Howell* v. *McFarlane*, 16 U.C. Q.B. 469; *Call* v. *Gray*, 37 N.H. 428; *Morrow* v. *Reed*, 30 Wis. 81; *Hutchison* v. *Roberts*, 7 U.C.C.P. 475; *Mills* v. *King*, 14 U.C.C.P. 223.)

(*c*) As to what things are capable of being mortgaged (see sec. 1, *ante* p. 158, note *c*.)

(*d*) 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" per Morrison, J. A. (*Holt* v. *Carmichael*, 2 App. R. 644).

What is such a description and a proper interpretation to put upon this section 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, from the description itself, to be able to distinguish the property mortgaged, from other property of a similar kind. The description of the goods and chattels should be such as to enable him to do this, or to identify the property by means of enquiry, which the instrument

itself indicates or directs (*Chapin* v. *Crane*, 40 Me. 561; *Elder* v. *Miller*, 60 Me. 118; *Showegan Bank* v. *Farron*, 46 Me. 239). But it is not necessary that the deed should contain all that is required to enable a person to distinguish the articles of property mortgaged by merely casting his eye upon them (*Holt* v. *Carmichael*, 2 App. R. 639). In detinue it is necessary to ascertain the thing detained in such a manner as that it may be specifically known and recovered: therefore, detinue cannot be brought for money, corn, or the like, for that cannot be known from any other money or corn, unless it be in a bag or sack, for then it may be distinguished and marked (3 Bl. Com. 152). And greater certainty is required in the description of the goods than in the action of trover (2 Sand. 74 c. Co. Lit. 286; *Graham* v. *Gracie*, 13 Q. B. 548). Though the words used in 3 Bl. Com. 152 are "specifically known and recovered," yet a description sufficient in detinue might not be such a full and sufficient description as is made necessary under this section (*Holt* v. *Carmichael*, 2 App. R. 639). The consideration of what description satisfies, in an action of detinue, however, is of assistance in ascertaining whether a mortgagee can claim title to property which has become changed in character since the execution of the Mortgage. If a mortgagee can maintain an action of detinue against a defendant for refusing, upon demand, to give up certain property, then a Mortgage will bind property mortgaged, though the character of the property has become so altered as to prevent identification. Thus, for instance, a Mortgage on saw logs will bind the lumber into which they are sawn, but the mortgagee must prove that such lumber was made out of the identical logs mortgaged (*White* v. *Browne*, 12 U. C. Q. B. 477). Before the passing of 20 Vic. cap. 3, questions would arise in our Courts as to the sufficiency of a description of goods at Common Law. So at Common Law, the schedule of personal property in these words, "all the horses, mares, cows, heifers, calves, sheep, lambs, pigs, waggons, buggy, harness, farming utensils, hay, household furniture, books, and every

other article or thing on or about the south half of lot 24 in the third concession of the township of London," was held to contain a sufficient description (*Balkwell* v. *Beddome*, 16 U. C. Q. B. 203). General words are sometimes all that can be employed in describing property intended to be covered by an instrument under the Act, except 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. 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 Vic. cap. 3, s. 4 (*Harris* v. *Commercial Bank*, 16 U. C. Q. B. 437). Property, such as bonds, bills and accounts, railway stocks and things of that kind, are not required to have that particular description necessary under the Statute in regard to other property (*Harris* v. *Commercial Bank*, 16 U. C. Q. B. 437). An assignment in the form of "all the assignor's personal property and effects whatsoever, and wheresoever," will be insufficient, these words being too indefinite; their use gives no force or meaning to this section whatsoever (*Harris* v. *Commercial Bank*, 16 U. C. Q. B. 444; *Howell* v. *McFarlane*, 16 U. C. Q. B. 469). When the locality of property in a mortgage is clearly and sufficiently defined, then general words describing the goods and chattels mortgaged are usually sufficient. Thus a Mortgage of "all the dry goods, boots and shoes, millinery goods, and gentlemen's furnishing goods, and stock in trade," now in the possession of the mortgagor, and being in the store occupied by him, being store number three, of Smith's Block, on the south side of King street, in the town of——is a good and sufficient description (*Conklin* v. *Shelly*, 28 N. Y. 360; *Gardner* v. *McEwan*, 19 N. Y. 123; *Re Thirkell*, *Perrin* v. *Wood*, 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). 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 mean time, other stock and property were brought upon the premises to replenish that in the shop at the time of the execution of the deed; but in the meantime sold and parted with in the ordinary course of business. It can easily be imagined what difficulty a bailiff would have in distinguishing between different quantities of the same kind of goods, only some of which were covered by a Mortgage, but all of which answered to the description contained therein. Yet it is necessary, in the event of litigation, for the party setting up the Mortgage, to establish the fact that those goods in dispute were in the shop at the time of the execution of the Mortgage (*Ross* v. *Conger*, 14 U. C. Q. B. 525). 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 of that which may be mortgaged, for, unless the deed so provides, and it clearly appears from the deed itself, to be the intention to bring within its operation after acquired property, the deed will not have such effect (*Mason* v. *McDonald*, 25 U C. C. P. 435; *McPherson* v. *Reynolds*, 6 U. C. C. P. 91); and, even though the deed contain a power to seize all goods, chattels, and effects, the power will not be extended to goods not upon the premises at the execution of the deed (*Tapfield* v. *Hillman*, 6 Scott N. R. 967; 6 Man. & Gr. 245; 12 L. J. C. P. 311; *Reeve* v. *Whitmore* 33 L. J. Ch. 63.) This may be done by the Mortgage including, in addition to the stock upon the premises, when executed, any and all stock purchased thereafter by the mortgagor, and which may be in his possession, upon the said premises, during the existence or continuance of the security, or any renewal or renewals thereof (*Re Thirkell, Perrin* v. *Wood*,

21 Gr. 492). At Common Law, an assignment is not good, so far as it professes to convey after acquired property; it can only operate upon such property as is in existence, and which is the grantor's at the time of the assignment, or in which he had some interest, unless however, the grantor ratify the sale of the "after acquired property" by some act, done by him after the property is acquired by him; and an assignee acquires no valid title by such instrument to such property when there is no *novus actus* (*Lunn* v. *Thornton*, 1 C. B. 379). Nothing at Common Law, can be mortgaged but that which is *in esse*; and a man cannot give away that which he hath not, *qui non habet, ille non dat* (*Lunn* v. *Thornton*, 1 C. B. 379; *Short* v. *Ruttan*, 12 U. C. Q. B. 79; *Cummings* v. *Morgan*, 12 U. C. Q. B. 565; *Congreve* v. *Everts*, 10 Exch. 307; *Mogg* v. *Baker*, 3 M. & W. 195; *Gale* v. *Burnell*, 7 Q. B. 850; *Otis* v. *Sill*, 8 Barb. 102; *Yates* v. *Olmsted*, 65 Barb. 43). When, therefore, sales are made in the ordinary course of trade, "the stock is replenished and deficiencies supplied; the stock bought from the proceeds of the mortgaged property is not liable to the mortgagee's claim" (Herman on Mtgs. 91; *Anderson* v. *Howard*, 49 Ga. 313). We have, however, seen (*ante* sec. 1, note (c), pp. 105–116) that an assignment of after-acquired property is good, and "that 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 the Mortgage" (per Blake V.C. *Re Thirkell, Perrin* v. *Wood*, 21 Gr. 509; see *Holroyd* v *Marshall supra*, and other cases cited). 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 (*Wilson* v. *Kerr*, 17 U. C. R. 168). The word stock is a convertible term. It is the capital or property of a merchant, tradesman, or company, invested in any business including merchandize, money and credits (Worcester Dict.), 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, and when the mortgagor is described in the premises of the deed as being of the occupation of merchant, the nature or kind of the stock cannot be ascertained for the word merchant is as convertible as the word stock (*Wilson* v. *Kerr*, 17 U. C. R. 168). 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 that description corresponding with the occupation, of which the grantor is described. Where, for instance, the mortgagor is described as a druggist, and the instrument describes the property simply as "the stock-in-trade of the mortgagor, situate at ——" etc., the Court will assume that the property mortgaged is a stock of drugs, chemicals, and other goods, such as a druggist usually has to sell, and so 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, 85 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, 16 pieces of tweed, it was held that all the goods were sufficiently described, for the last parcel of goods might be taken as described to be in the store (*Mathers* v. *Lynch*, 28 U. C. R. 354), and where schedule D 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 parties' residence (*Fraser* v. *Bank of Toronto*, 19 U. C. Q. B. 381). From the words "Furniture and household stuff," though no locality is mentioned, yet, if all that the description lacks is the locality, the assumption will be, that the description refers to the mortgagor's residence, and all articles in detail, such as "blankets and counterpanes," "household linen," "silver," "glass," "electro and plated ware," "cutlery," "china,"

and "earthenware," may be properly treated as coming within the general terms "furniture and household stuff" (*Wilson* v. *Kerr*, 17 U. C. Q. B. 168; 18 U. C. Q. B. 470; *Kingston* v. *Chapman*, 9 U. C. C. P. 130; *Fraser* v. *Bank of Toronto*, 19 U. C. Q. B. 381; *Powell* v. *Bank of Upper Canada*, 11 U. C. C. P. 303). It must not be understood, as being the law, that, without a description by locality of the property mortgaged, the deed necessarily becomes invalid, as against the parties attacking it. If the goods are themselves described with reasonable clearness, so that their identity is unquestionable, then the description will be good, without any mention of a place where the goods are at the time of the execution of the Mortgage (*Mason* v. *McDonald*, 25 U. C. C. P. 439). 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 (*Mason* v. *McDonald*, 25 U. C. C. P. 439). 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 parlour, one stove," &c., &c., enumerating the articles in different rooms, the description was held sufficient as to the furniture, but insufficient as to the other goods (*Sutherland* v. *Nixon*, 21 U. C. Q. B. 629). On the other hand, it is not difficult to perceive that a careful and minute description of some chattels, such, for instance, as a horse, would facilitate identification, far more easily than an imperfect description of the animal itself, even with its locality given at the date of the execution of the instrument. 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, relying upon its identification, by being described as of a locality, at the execution of the Mortgage, might easily prove unsatisfactory, espe-

cially after a lapse of time and a continual changing about of the property itself. 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 the one intended to be mortgaged, and which was driven, and used in the omnibus, the *falsa demonstratio* as to colour might be rejected (*Fitzgerald* v. *Johnson*, 41 U. C. Q. B. 444). So also, where the Mortgage is of all the staves I have in "M." the same which I purchased from "F," and it appeared that the mortgagor had no staves in M, but close thereto, and purchased from "F;" it was held that the first part of the description might be rejected as false, the remainder being sufficient to pass the property, it being merely a matter of identification (*Pettis* v. *Kellog*, 7 Cush. 456). The early case of *Mills* v. *King* (14 U. C. C. P. 223) seems not to be supported by the later authorities. In that case, Mr. Justice Wilson was of opinion in giving judgment, that "one omnibus," etc., to which no locality was given, passed under the Mortgage, and he came to this conclusion, because such would be a sufficient description in action of detinue (page 243), and so "14,415 feet of prepared moulding" was held sufficient (*Noell* v. *Pell*, 7 U. C. L. J. 422), and, on the authority of *Mills* v. *King*, "one stumping machine" was also held a sufficient description (*Bertram* v. *Pendry*, 27 U. C. C. P. 377). In this case, however, the machine was described by locality, but the evidence showed the description to be incorrect, for when the deed was executed, the machine was not in the locality with which it was described. Now, however, 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 (*Harris* v. *Commercial Bank*, 16 U. C. R. 437, 444). It would be prudent, should such be the case, to state in the instrument that the

number of horses, cows, sheep, or other articles mortgaged, by the deed, are all of the kind that the mortgagor possesses. Because, without anything further, 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 the latest authority (*Holt* v. *Carmichael*, 2 App. R. 639), now settles such a description to be insufficient, that something more than simply the generic term of a chattel or other article is required, either by minutely describing the chattel, or by giving it a locality, or by shewing that the mortgagor has no more of the same kind. Therefore, also, a Mortgage of a horse, describing it as "one sorrel horse," is void for want of sufficient description (*Montgomery* v. *Wright*, 8 Mich. 143), so also is a Mortgage of "three yoke of oxen," because there is nothing whatever to enable one to identify them from others of a similar kind, should the mortgagor have others (*McCord* v. *Cooper*, 30 Ind. 9; *Croswell* v. *Allis*, 25 Conn. 311; *Blakely* v. *Patrick*, 67 N. C. 40). 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, and the whole becomes the property of him whose rights are invaded (Herman on Mortgages, p. 83). But if the property of each is of the same description, then this is not so, when a similar quantity of the articles mortgaged (railway ties for instance) will place the mortgagee in the same position as he was in prior to the intermingling of each other's property. 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, 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 (Herman on Mortgages, p. 84; *Dunning* v. *Stearns*, 9 Barb. 630; *Willard* v. *Rice*, 11 Me. 493; *Adams* v. *Wildes*, 107 Mass. 123; *Frost* v. *Willard*, 9 Barb. 440; *Coldwell* v. *Reeves*, 2 Camp. 575; *Martin* v. *Potter*, 5 M. & W. 352; *Brown* v. *Saxe*, 7 Cow. 95).

From a perusal of the authorities the writer ventures upon the following epitome:—

(1) If the property covered by the instrument is sufficiently described, so as to make identification unquestionable, without mention of locality, then it is not absolutely requisite that locality should be added (*Mason* v. *McDonald*, 25 U. C. C. P. 439).

(2) Where general words are used, or the goods mortgaged are described as of a class, then mention of the correct locality is indispensable (*Fraser* v. *Bank of Toronto*, 19 U. C. R. 381).

(3) It is not sufficient to describe a chattel simply by its generic term. Correct locality must be added, or the chattel must be otherwise identified beyond question (*Holt* v. *Carmichael*, 2 App. R. 639).

(4) A Mortgage can be properly given upon goods not in existence, and which are to be afterwards acquired (*Re Thirkell, Perrin* v. *Wood*, 21 Gr. 492). But the intention of the parties must appear upon the face of the instrument, to bring the after-acquired property within the operation of the Mortgage (*Mason* v. *McDonald*, 25 U. C. C. P. 439).

(5) Where the locus is omitted, the Court will sometimes assume the locality to be that intimated by other parts of the deed (*Matthews* v. *Lynch*, 28 U. C. R. 354).

(6) 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 (*Wilson* v. *Kerr*, 17 U. C. Q. B. 168).

(7) The presumption from the words "Furniture and household stuff" is, that the description refers to the mortgagor's residence (*Fraser* v. *Bank of Toronto*, 19 U. C. R. 381).

(8) Though there may be an error in one of two descriptions of property, the one that is incorrect may be rejected and the

other retained, and the description yet held good (*Fitzgerald* v. *Johnston*, 41 U. C. R. 444).

(9) An owner of land, upon which there are 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 (*Ross* v. *Hope*, 22 U. C. C. P. 482; *Coombs* v. *Beaumont*, 5 B. & Ad. 72; *Boydell* v. *McMichel*, 1 C., M. & R. 177).

(10) A Mortgage on saw logs will bind the lumber into which they are sawn if the mortgagee can prove that such lumber was made out of the logs mortgaged (*White* v. *Browne*, 12 U. C. R. 477).

(11) If goods are referred to as being contained in a schedule, general words in the Mortgage itself will not embrace other goods than those mentioned in the schedule (*Kingston* v. *Chapman*, 9 U. C. C. P. 130; *Wood* v. *Rowcliffe*, 6 Ex. 407, 20 L. J. Ex. 285).

(12) The words "all the assignor's personal property and effects whatsoever and wheresoever," are insufficient (*Harris* v. *Commercial Bank*, 16 U. C. R. 444).

(13) Bonds, bills, notes, accounts, stocks, "*ejusdem generis*" do not require the usual particular description necessary under the Statute (*Harris* v. *Com. Bank supra*).

(13) 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 (*R Thirkell, Perrin* v. *Wood*, 21 Gr., 492).

See the following cases: *Howell* v. *M[illegible]rlane*, 16 U. C. R. 460; *Fleming* v. *McNaughton*, 16 U. C. [illegible]; *Fitzgerald* v. *Johnson*, 41 U. C. R. 440; *Holt* v. *C[illegible]michael*, 2 App. R. 639; *Cort* v. *Sager*, 27 L. J. Exch. 378; *Rose* v. *Hope*. 22, U. C. C. P. 482; *Re Thirkell, Perrin* v. *Wood*, 21 Gr. 495; *Ross* v. *Conger*, 14 U. C. Q. B. 525; *Hewitt* v. *Corbett*, 15 U. C. Q. B. 39; *Walker* v. *Niles*, 18 Gr.; *White* v. *Haight*, 11 Gr. 420; *White*

v. *Brown*, 12 U. C. Q. B. 477; *Balkwell* v. *Beddome*, 16 U. C. R. 203; *Harris* v. *Com. Bank*, 16 U. C. R. 437; *Wilson* v. *Kerr*, 18 U. C. Q. B. 470; *Powell* v. *Bk. of* U. C. 11, U. C. C. P. 303; *Moffatt* v. *Coulson*, 19 U. C. Q. B. 341; *Hiscott* v. *Murray*, 12 U. C. C. P. 315; *Burton* v. *Bellhouse*, 20 U. C. R. 60; *Sutherland* v. *Dixon*, 21 U. C. Q. B. 629; *Mills* v. *King*, 14 U. C. C. P. 223; *Matthers* v. *Lynch*, 28 U. C. Q. B. 354; *Stephenson* v. *Rice*, 24 U. C. C. P. 245; *Dumble* v. *White*, 32 U. C. R. 601; *Archibald* v. *Holden*. 30 U. C. R. 30; *Nattrass* v. *Phair*, 37 U. C. Q. B. 153; *Smith* v. *McLean*, 24 Iowa, 322; *Golden* v. *Cockrill*, 1 Kans. 259; *Croswell* v. *Allis*, 25 Conn. 311; *Blakely* v. *Patrick*, 67 N. C. 40: Herman on Mortgages, *pp*. 73 to 82.

Who to administer the affidavits.

24. (*a*) All affidavits and affirmations required by this Act shall be taken and administered by any Judge or Commissioner for taking affidavits in and for the Courts of Queen's Bench or Common Pleas, or a Justice of the Peace (*b*), and the sum of twenty cents shall be paid for every oath thus administered. C. S. U. C. c. 45, s. 1[illegible].

(*a*) This section is amended by 41 Vic. cap. 8, sec. 12. (See *infra*, p. 236), whereby powers are conferred upon any person whomsoever, in or out of the Province, to take and administer affidavits under this Act, who are authorized to take affidavits in and for the Court of Queen's Bench or Common Pleas for Ontario.

(*b*) The affidavit can be administered—

1. By any Judge in Ontario, appointed to take affidavits in and for the Court of Queen's Bench or Common Pleas.

2. By any Commissioner in Ontario, appointed to take affidavits in and for the Court of Queen's Bench or Common Pleas (see Rev. Stat. Ont., cap. 63, p. 790, cap. 7, s. 11).

3. By any person, out of Ontario, appointed to take affidavits in and for the Court of Queen's Bench or Common Pleas for Ontario (see Rev. Stat. Ont., cap. 62, s. 38, cap. 63, ss. 7, 8, 9).

Under this enactment is included any Commissioner authorized to administer oaths in the Supreme Court of Judicature in England, a Judge of the Supreme Court of Judicature in Eng-

land, or of the Court of Session, or of the Justiciary Court of Scotland, or in the High Court of Chancery, or the Courts of Queen's Bench, Common Pleas or Exchequer in Ireland, or a Judge of any of the County Courts in Great Britain or Ireland, within his County, or any Notary Public, certified under his hand and official seal, or the Mayor or Chief Magistrate of any city, borough or town corporate in Great Britain or Ireland, or in any colony of Her Majesty beyond the limits of Canada, 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 beyond the limits of Canada 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, any Magistrate or Collector certified to have been such under the hand of the Governor of such possession, or, if made in Quebec, a Judge or Prothonotary of the Superior Court or Clerk of the Circuit Court, or any Consul, Vice-Consul or Consular agent of Her Majesty exercising his functions in any foreign place, or a Commissioner authorized by the laws of Ontario to take affidavits in and for any of the Courts of Record in the Province, for the purposes of and in or concerning any cause, matter, or thing, depending, or in any wise concerning any of the proceedings to be had in the said Courts (Rev. Stat. Ont., cap. 62, s. 38).

4. By a Justice of the Peace or a Magistrate.

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 (Rev. Stat. Ont., cap. 1, s. 8 (22).

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 (Rev. Stat. Ont. cap 1, s. 8 (17).

Prior to 34 Vic. cap. 14, s. 4, it was held that all affidavits under this Act were useless if made before the Mayor of a foreign town (*De Forrest* v. *Bunnell*, 15 U. C. Q. B. 370).

It will be observed that Rev. Stat. Ont., cap. 62, s. 38 (p. 232), 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 (*Reynolds* v. *Williamson*, 25 U. C. C. P. 49) that an affidavit of *bona fides* under this Act was insufficient, as a Notary Public in Quebec had no power to administer it.

A person who prepares the assignment may administer an affidavit under this Act as Commissioner (*Noell* v. *Pell*, 7 U. C. L. J., 322, Ch. Cham., Draper). But in England the law is different, and the witness to a bill of sale executed there cannot make the affidavit of execution before his partner (*Vernon* v. *Cooke*, Weekly Notes, July 5th, 1879). 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* (4 App. R. 200), it was decided that a Chattel Mortgage was invalid as against a subsequent execution creditor, on account of the signature of the commissioner to the affidavit of *bona fides* being omitted, even though it was so omitted through inadvertence, and although it was satisfactorily proved that the oath was in fact administered. No excuse is needed for giving in full the judgment delivered by the learned Chief Justice of the Court of Appeal in that case: "The question presented upon this appeal is, whether the appellant's Chattel Mortgage is valid against a subsequent execution creditor. The only objection to its sufficiency is, that the affidavit of *bona fides* has not the name of the Justice of the Peace before whom it was sworn subscribed to the jurat. It is incontestibly proved that the oath was in fact administered and that the defect arose from simple inadvertence. Both the learned counsel displayed much research in collecting the cases which seemed to illustrate the point in dispute, there being no reported decision directly applicable. The learned Judge in the Court below seemed to be of opinion that perjury could not be assigned upon the document, and that this furnished a strong argument against its sufficiency. In support of this view, the respondent referred to the observa-

tion of Lord Justice James in *Ex parte* Hayman 7 Ch. Ap. p. 488, while the appellant relied upon the undoubting assent given by Alderson, B., in *Bill* v. *Bayment*, 8 M. & W. 317, to the proposition that perjury may equally be assigned upon the affidavit although the signature to the jurat is omitted. The latter opinion is confirmed by the judgment of the Court of Common Pleas in *Regina* v. *Atkinson*, 17 U. C. C. P. 295. But we do not consider this to be an adequate or satisfactory test. 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 his oath to its character. Still further, it has required this oath to be recorded in the form of an affidavit, which must be sworn before one of certain named officers, and must then be filed along with the Mortgage. This was obviously for the purpose of enabling creditors to satisfy themselves not merely of the existence of claims against the goods of their debtor, but of the existence of a statement made under the sanction of an oath and in compliance with the terms of the statute. To the attainment of this end, it seems indispensable that it should appear that the affidavit was sworn before some officer having authority to administer the oath. It never could have been intended that the creditor should be left at his peril to assure himself by extrinsic evidence of the presence or absence of this requisite. A paper purporting to be an affidavit, but not authenticated as sworn, is quite consistent with the supposition that at the last moment the mortgagee had shrunk from swearing to the necessary statement. We have not overlooked the class of cases in which defects in affidavits have been held immaterial, because the object of giving notice

had been secured by the actual placing of the instrument on record, although in strictness it should not have been received by the officer. But these decisions depend upon a different principle, which is not applicable here. There, the policy of the Act was simply to give to all persons interested notice of the existence of a certain instrument affecting property. Here, as we have already indicated, the creditor is entitled to more. The information to him that there is a Chattel Mortgage executed by his debtor falls far short of that to which he is entitled by the Act. We cannot hold that such information is given, when he finds with the Mortgage a paper which does not appear to have been sworn before any recognized authority, or sworn at all.

"It is quite true that the Courts have uniformly manifested a great reluctance to destroy an honest security on account of a slip or omission. We may regret that our decision defeats the appellant's just claim, but we feel that to support it would be to open wide the door to a palpable and dangerous mode of evading the salutary provisions 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."

Act not to apply to Mortgages of vessels duly registered.

25. (*a*) This Act does not apply to Mortgages of vessels (*b*) registered under the provisions of any Act in that behalf (*c*). C. S. U. C. c. 45, s. 15.

(*a*) Throughout all the statutes relating to Mortgages and sales of personal property, there has been a provision excepting

therefrom Mortgages of vessels (12 Vic. cap. 74, s. 6; 20 Vic. cap. 3, s. 10; Con. Stat. U. C. cap. 45, s. 15).

(*b*) This section has a much wider application than is implied by the mere words it contains. Whatever is on board a vessel, and is indispensably necessary for the traffic and business in which the vessel is engaged, constitutes a part of the vessel herself, and falls within the spirit and intent of the exception made by this section to the 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, &c., passed all the furniture, glass, crockery, beds, bedding, plate, &c., &c., as part of the vessel, and that the Mortgage being of a registered vessel was exempt from registry under the Chattel Mortgage Act (*Patton* v. *Foy*, 9 U. C. C. P. 512; see *Gale* v. *Lawrie*, 5 B. & C. 156).

(*c*) See Con. Stat. Can., cap. 41; 36 Vic. cap. 128, D. 1874.

AN ACT

TO PROVIDE FOR

CERTAIN AMENDMENTS OF THE LAW.

(41 *Vic. chap.* 8, *On*

Revd. Stat. cap. 119 amended.

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

12. The Revised Statute respecting Mortgages and Sales of Personal Property, chapter one hundred and nineteen, is hereby amended by inserting the following after section six of the said Acts.

(a) 6 *a*. The affidavit of *bona fides* required by the two preceding sections may be made by one of two or more bargainees or mortgagees; and no sale or mortgage heretofore made shall be invalidated by reason of such affidavit being made by one only of several bargainees or mortgagees.

Affidavit of *bona fides* may be made by one of two or more bargainees or mortgagees.

(*a*) See Rev. Stat. O., cap. 119, sec. 5, *ante* p. 155, note (*h*), and sec. 6, *ante* p. 167, note (*h*).

By 40 Vic. cap. 7, sched. A (134), a similar amendment as this, is made to sec. 1 of the Revd. Stat. of Ont., cap. 119. It does not appear that, even prior to this legislation, there was any doubt, as to whether or not the affidavit of *bona fides* was sufficient, when made by one of several bargainees or mortgagees. "The affidavit is only required for the purpose of affording information as to grounds upon which the claim to the goods is made, and one affidavit embracing the requisites of the statute affords that information, as well as affidavits of twenty bargainees, if there were so many, would do. If the instrument were rendered unquestionable upon the requisite affidavit being made, then no doubt it would be proper to exact an affidavit from every bargainee named; but that is not so, and the language of the recital clearly shews that the Legislature only contemplated an affidavit to be made, and the latter words designate by whom it is to be done. In complying with the requisites of the statute as to the person, it may be done, we think, by one of several as well as by all, and that the Legislature never intended to impose upon all the necessity to do so; and we are by no means compelled to put a construction upon the Act so as to require all the mortgagees or bargainees to join in making an affidavit, or that several affidavits should be made, if more bargainees than one, in order to the due and effectual registration of the instrument" (per Burns, J., *Heward* v. *Mitchell*, 11 U. C. Q. B. 625; see also *McLeod* v. *Fortune*, 19 U. C. Q. B. 100). In one case, it was contended that, although the statute permitted one of several mortgagees to make the affidavit, the spirit of the Act required that it should be so construed as to limit it to the case of joint mortgagees, who

were connected in business, either of whom would be aware of all the circumstances connected with the mortgage. But it was held that this contention was untenable, and that there was no reason why the Court should assume that one of two joint mortgagees, even when not connected in business, should not be capable of taking the affidavit with a full knowledge of all the circumstances (*Severn* v. *Clarke*, 30 U. C. C. P. 363; *McLeod* v. *Fortune*, 19 U. C. R. 100). And by this amendment the affidavit of *bona fides* required by sections 5 and 6 *ante* pp. 151 and 160 may now be made by one of several bargainees or mortgagees, there being no distinction made, as to the debts secured being in their origin joint or several (*Severn* v. *Clarke*, *supra*).

Revd.Stat. O., c. 119, s. 24, amended.

(2) (*a*) The said statute respecting Mortgages or Sales of Personal Property is further amended by striking out the words "for taking" in the second and third lines of section twenty-four, and substituting the words "or other person in or out of the Province, authorized to take" (*b*).

(*a*) See *ante* sec. 24, notes (*a*) and (*b*) at p. 231.
(*b*) See Revd. Stat. Ont., cap. 63, ss. 7, 8 and 9.

Amendments to be deemed in force on 1st January, 1878.

(3) The said amendments to the said statute respecting Mortgages and Sales of Personal Property shall be deemed to have been in force on and from the first day of January last.

AN ACT

TO AMEND THE REVISED STATUTE RESPECTING

MORTGAGES AND SALES

OF PERSONAL PROPERTY.

"The Mortgages and Sales of Personal Property Amendment Act, 1880."

(*43 Vict. chap.* 15, *Ont.*)

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

R. S. O. c. 119, s. 7, amended.

1. Section seven of the Revised Statute, chapter one hundred and nineteen, respecting Mortgages and Sales of Personal Property, is hereby amended by striking out the words: "*Where the mortgagor or bargainor, if a resident in Ontario, resides at the time of the execution thereof, or if he is not a resident, then in the office of the Clerk of the County Court of the County or union of Counties,*" in the third, fourth, fifth and sixth lines of the said section (*a*).

(*a*) See *ante*, R. S. O. cap. 119, sec. 7, notes (*a*) and (*d*), p. 171.

Sec. 10, repealed.

2. Section ten of the said Revised Statute is hereby repealed, and the following substituted therefor :—

Statement to be filed yearly or Mortgage invalidated as against creditors.

10. (*a*) Every Mortgage, or copy thereof filed in pursuance of this Act (*b*), shall cease to be valid as against the creditors of the persons making the same, and against subsequent purchasers and mortgagees in good faith for valuable consideration (*c*), after the expiration of one year from the filing thereof (*d*), unless within thirty days next preceding the expiration of the said term of one year (*e*), a statement exhibiting the interest of the mortgagee, his executors, adminis-

trators, or other assigns (*f*), in the property claimed by virtue thereof, and shewing the amount still due for principal and interest thereon, and shewing all payments made on account thereof (*g*), is again filed in the office of the Clerk of the County Court of the County, or union of Counties wherein such goods and chattels are then situate (*h*), with an affidavit of the mortgagee, or one of the 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), duly authorized in writing for that purpose (a copy of which authority shall be filed therewith) (*k*), that such statement is true, and that the said mortgage has not being kept on foot for any fraudulent purpose (*l*).

(*a*) See R. S. O. cap. 119, s. 10, *ante* notes (*a*) and (*g*) p. 184.
(*b*) See *ante* R. S. O. cap. 119, s. 10, note (*b*) p. 186.
(*c*) See *ante* R. S. O. cap. 119, s. 10, note (*c*) p. 188.
(*d*) See *ante* R. S. O. cap. 119, s. 10, note (*d*) p. 189.
(*e*) See *ante* R. S. O. cap. 119, s. 10, note (*e*) p. 190.

(*f*) It will here be observed how this section differs from the section in the Rev. Stat. of Ont., cap. 119, which it repeals. First, on and after the first day of October, 1880, there will no longer be any necessity to file a copy of the Mortgage which it is desired to renew; and secondly, words are expressly introduced extending the provisions of the statute to the executors, administrators, or other assigns of the mortgagee.

(*g*) See R. S. O. cap. 119, s. 10, *ante* notes (*g*) and (*l*) p. 191 and 197.
(*h*) See R. S. O. cap. 119, s. 10, *ante* note (*h*) p. 195.
(*k*) See R. S. O. cap. 119, s. 10, *ante* note (*k*) p. 196.
(*l*) See R. S. O. cap. 119, s. 10, ante note (*l*) p. 197.

Form of statement and affidavit.

3. The statement and affidavit mentioned in the next preceding paragraph may be in the form given in the schedule to this Act, or to the like effect.

Mode of filing and entering affidavit and statement.

4. The said statement and affidavit shall be deemed one instrument (*a*), and be filed and entered in like manner as the instruments mentioned in the said Revised Statute are, by

section eight thereof (*b*), required to be filed and entered, and the like fees shall be payable for filing and entering such instrument (*c*).

(*a*) See R. S. O. cap. 119, s. 10, note (*g*) p. 191 *ante*.
(*b*) See *ante* p. 177.
(*c*) See *ante* sec. 22, p. 219.

Section 15, R. S. O. cap. 119, repealed.

5. Section fifteen of the said Revised Statute is hereby repealed, and the following substituted therefor:—

(15). Where a Mortgage has been renewed under section ten 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 such statement and affidavit in said book (*a*).

(*a*) This provision was necessary, in consequence of section 10 of this Act, doing away with the necessity of filing upon renewal of a Mortgage, a copy of such Mortgage. By section 10 of Revd. Stat. Ont. cap. 119, it is made necessary to file a copy of the Mortgage when renewing the same; and by sec. 15 of Rev. Stat. Ont., cap. 119, the endorsements made necessary by Revd. Stat. Ont. cap. 119, sec. 14, are to be made on such copy. On and after the first day of October, 1880, a copy of the Mortgage need not be filed upon renewal thereof, so that this section provides for the endorsements being made upon the statement and affidavit, which by this Act are necessary to be filed. Section 4 of this Act provides that the statement and affidavit shall be deemed one instrument, so that the endorsements need not be made, both on the statement and on the affidavit; if made on one, it will be sufficient.

An authority to take or renew Mortgages may be a general one.

16. (*a*) An authority for the purpose of taking or renewing a Mortgage or conveyance, under the provisions of the said Revised Statute, may be a general one to take and renew all or any Mortgages or conveyances to the mortgagee or bargainee (*b*).

(*a*) See R. S. O. cap. 119, s. 1, note (*l*) *ante*, p. 135, s. 5, note (*k*) *ante* p. 155, s. 6, note (*i*), *ante*, p. 167.

(*b*) It appears from this section that an authority to an agent to take a Mortgage without more, 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," &c. But a general authority to take and renew Mortgages or conveyances under the Act, will be sufficient without the authority identifying any particular Mortgages or conveyances. Of course the authorities are required to be in writing. It is to be regretted that the Legislature in this Act did not positively enact that the authority mentioned in the Rev. Stat. Ont. cap. 119, s. 6, was required to be filed as in the case of authorities to an agent under ss. 1 and 5 of that Statute. There appears to be nothing requiring the filing under sec. 6 of the agent's authority, except the spirit and policy of the Statute.

R. S. O. cap. 119, s. 17, amended.

7. Section seventeen of the said Revised Statute is hereby amended, by striking out all the words in the said section, down to and inclusive of the word "but," where it occurs in the fifth line thereof, and substituting therefor the word "when," and by adding thereto after the words "County Court," in the ninth line thereof, the words following: "and with the substitution of ten days for five days, as the time within which the instrument or a copy thereof shall be registered" (*a*).

(*a*) See Rev. Stat. Ont., cap. 119, s. 17, and foot notes *ante*.

R. S. O. cap. 119, s. 18, amended.

8. Section eighteen of the said Revised Statute is hereby amended, by striking out all the words in the said section, down to and inclusive of the word "but" in the fourth line thereof, and substituting therefor the word "when" (*a*)

(*a*) See Rev. Stat. Ont., cap. 119, s. 18, and foot notes *ante*.

R. S. O. cap. 119, s. 19, amended.

9. Section nineteen of the said Revised Statute is hereby amended, by striking out all the words in the said section, down to and inclusive of the word "but" in the fourth line thereof, and substituting therefor the word "when" (*a*).

(*a*) See Rev. Stat. Ont., cap. 119, s. 19, and foot notes *ante*.

10. This Act shall not come into force until the first day of October next, and may be cited as "The Mortgages and Sales of Personal Property Amendment Act, 1880."

Time Act to come in force. Mode of citation.

SCHEDULE

(Referred to in Section Three).

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 the ——— 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—, 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 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 :—

1880.

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*].

C. D.

County of ——— } I, ———, of the ——— of ———,
To wit. } 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—. }

AN ACT

TO AMEND THE

LAW OF PROPERTY IN ONTARIO.

(*Rev. Stat. Ont. cap.* 95.)

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

Recital of ss. 1 and 2 of 13 Eliz. c. 5, that conveyances, judgments, &c., to hinder or defraud creditors be void.

Sec. 13. Whereas by the first and second clauses of the Act passed in the thirteenth year of the reign of Her Majesty Queen Elizabeth, it is enacted as follows :

"For the avoiding and abolishing of feigned, cov- "inous and fraudulent feoffments, gifts, grants,

"alienations, conveyances, bonds, suits, judgments
"and executions more commonly used and practised
"in these days than hath been seen or heard of
"heretofore, which feoffments, gifts, grants, aliena-
"tions, conveyances, bonds, suits, judgments and exe-
"cutions have been and are devised or contrived of
"malice, fraud, covin, collusion or guile, to the end,
"purpose and intent to delay, hinder and defraud
"creditors and others of their just and lawful ac-
"tions, suits, debts, accounts, damages, penalties,
"forfeitures, heriots, mortuaries and reliefs, not only
"to the let or hindrance of the due course and exe-
"cution of law and justice, but also to the overthrow
"of all true and plain dealing, bargain and chevi-
"sance between man and man, without the which no
"commonwealth or civil society can be maintained
"or continued; all and every feoffment, gift, grant,
"alienation, bargain and conveyance of land, tene-
"ments, hereditaments, goods and chattels, or of any
"of them, or of any lease, rent, common or other
"profit or charge out of the same lands, tenements,
"hereditaments, goods and chattels, or any of them,
"by writing or otherwise, and all and every bond,
"writ, judgment and execution, at any time had or
"made since the beginning of the Queen's Majesty's
"reign, that now is or at any time hereafter to be
"had or made to or for any intent or purpose before
"declared or expressed, shall be from thenceforth
"deemed and taken only as against that person or
"persons, his or their heirs, successors, executors,
"administrators and assigns, and every of them,
"whose actions, suits, debts, accounts, damages, penal-
"ties, forfeitures, heriots, mortuaries and reliefs, by
"such guileful, covinous or fraudulent devices and
"practices as is aforesaid, are or shall or might be
"in any ways disturbed, hindered, delayed or de-

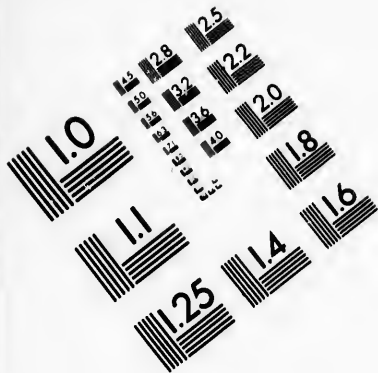
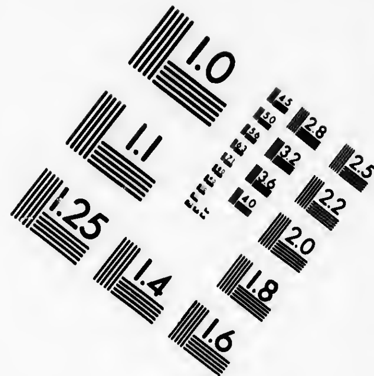

IMAGE EVALUATION
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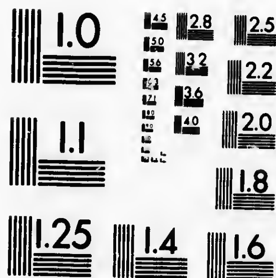
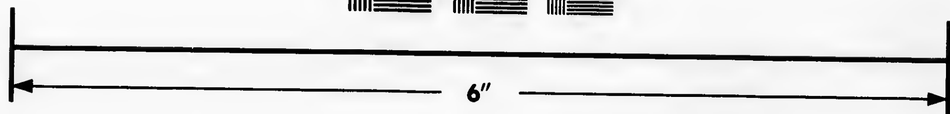

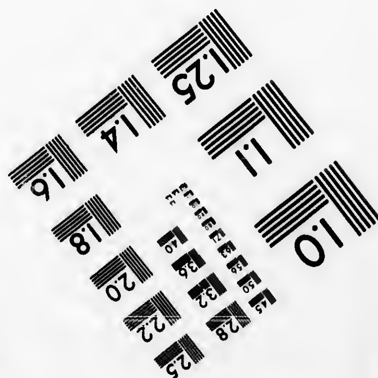

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"frauded, to be clearly and utterly void, frustrate "and of none effect, any pretence, colour, feigned "consideration, expressing of use or any other mat-"ter or thing to the contrary notwithstanding."

And whereas it is also by the sixth clause of the said Act provided and enacted as follows:—

Recital of s. 6, 13 Eliz. c. 5, that that Act should not extend to any interest conveyed for good consideration, *bona fide*, without notice of fraud.

"This Act or anything herein contained shall not "extend to any estate or interest in lands, tene-"ments, hereditaments, leases, rents, commons, profits, "goods or chattels had, made, conveyed or assured, "or hereafter to be had, made, conveyed or assured, "which estate or interest is or shall be upon good "consideration and *bona fide* lawfully conveyed "or assured to any person or persons, or bodies "politic or corporate, not having at the time of such "conveyance or assurance to them made any man-"ner of notice or knowledge of such covin, fraud or "collusion as is aforesaid, anything before mentioned "to the contrary thereof notwithstanding."

And whereas there are doubts as to the true construction of the said Act, and it is expedient to declare the true construction of the same;

Therefore it is enacted as follows:—

Valuable consideration and intent to pass the interest shall not alone prevent the application of ss. 1, 2, unless on acquisition *bona fide* without notice of fraud.

1. The first and second clauses of the said Act apply to all instruments executed to the end, purpose and intent in the said clauses set forth, notwithstanding that the same may be executed upon a valuable consideration, and with the intention, as between the parties to the same, of actually transferring to and for the benefit of the transferee, the interest expressed to be thereby transferred, unless the same is protected under the sixth clause of the said Act by reason of *bona fides* and want of notice

or knowledge on the part of the purchaser (35 Vic. cap. 11, s. 1).

Existing instruments not affected.

2. This section shall not apply to any instrument executed before the second day of March one thousand eight hundred and seventy-two (35 Vic. cap. 11, s. 2).

AN ACT

RESPECTING THE

FRAUDULENT PREFERENCE OF CREDITORS,

BY PERSONS IN INSOLVENT CIRCUMSTANCES.

(*Rev. Stat. Ont., cap.* 118.)

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

Assignments, transfers, &c. made by insolvents to defeat creditors or to give preference shall be void.

Sec. 2. In case any person, being at the time in insolvent circumstances, or unable to pay his debts in full, or knowing himself to be on the eve of insolvency, makes or causes to be made any gift, conveyance, assignment or transfer of any of his goods, chattels or effects, or delivers or makes over, or causes to be delivered or made over any bills, bonds, notes or other securities or property, with intent to defeat or delay the creditors of such person, or with intent to give one or more of the creditors of such person a preference over his other creditors; or over any one or more of such creditors, every such gift, conveyance, assignment, transfer or delivery shall be null and void as against the creditors of such person; but nothing herein contained shall invalidate or make void any deed of assign-

ment made and executed by any debtor for the purpose of paying and satisfying rateably and proportionably, and without preference or priority, all the creditors of such debtor their just debts; and nothing herein contained shall invalidate or make void any *bona fide* sale of goods in the ordinary course of trade or calling to innocent purchasers (C. S. U. C. cap. 26, s. 18).

AN ACT

RESPECTING

WRITS OF EXECUTION.

(*Rev. Stat. Ont. cap.* 66.)

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

Interest of a mortgagor in goods mortgaged.

The interest of a mortgagor in goods mortgaged may be sold in execution,

Section 27. On any writ, precept or warrant of execution against goods and chattels, the sheriff or other officer to whom the same is directed may seize and sell the interest or equity of redemption in any goods or chattels, including leasehold interests in any lands, of the party against whom the writ has issued, and such sale shall convey whatever interest the mortgagor had in such goods and chattels at the time of the seizure (C. S. U. C. cap. 22, s. 260; C. S. U. C. cap. 45, s. 13; 40 Vic. cap. 7, Sched. A. (101).

Money and Securities.

Sheriff may seize money and securities for money.

Section 28. The sheriff or other officer having the execution of any writ of *fieri facias* against goods sued out of either of the Superior Courts of Common Law, or out of any County Court, or of any precept made in pursuance thereof, shall seize any money or bank notes (including any surplus of a former execution against the debtor) and any cheques, bills of exchange, promissory notes, bonds, mortgages, specialties or other securities for money, belonging to the person against whose effects the writ of *fieri facias* has issued, and shall pay or deliver to the party who sued out the execution, any money or bank notes so seized, or a sufficient part thereof, and shall hold any such cheques, bills of exchange, promissory notes, bonds, specialties or other securities for money, as a security or securities for the amount by the writ and endorsement thereon directed to be levied, or so much thereof as has not been otherwise levied or raised, and such sheriff or other officer may sue in his own name for the recovery of the sums secured thereby, when the time of payment thereof has arrived (C. S. U. C., cap. 22, s. 261).

Money seized to be paid over to party taking out the execution.

Payment thereon to the sheriff to be valid.

29. The payment to such sheriff or other officer by the party liable on any such cheque, bill of exchange, promissory note, bond, specialty or other security, with or without suit, or the recovery and levying execution against the party so liable, shall discharge him to the extent of such payment or of such recovery and levy in execution (as the case may be), from his liability on any such cheque, bill of exchange, promissory note, bond, specialty or other security (C. S. U. C., cap. 22, s. 262).

AN ACT

RESPECTING

THE TRANSFER OF REAL PROPERTY.

(*Rev. Stat. Ont., cap.* 98.)

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

Frauds on Sales and Mortgages.

Punishment of vendor or mortgagor for fraudulent concealment of deeds, etc., or falsifying pedigree. Imp. Acts, 22-23 V. c. 35, s. 24; and 23-24 V. c. 38, s. 8.

Section 18. If any seller or mortgagor of land, or of any chattels, real or personal, or *choses in action*, conveyed or assigned to a purchaser or mortgagee, or the solicitor or agent of any such seller or mortgagor, conceals any settlement, deed, will or other instrument material to the title, or any incumbrance, from the purchaser or the mortgagee, or falsifies any pedigree upon which the title depends or may depend, in order to induce him to accept the title offered or produced to him, with intent in any of such cases to defraud, shall, in addition to any criminal liability he may thereby incur, be liable to an action for damages at the suit of the purchaser or mortgagee, or those claiming under the purchaser or mortgagee, for any loss sustained by them or either or any of them, in consequence of the settlement, deed, will or other instrument or incumbrance so concealed, or of any claim made by any person under such pedigree, but whose right was concealed by the falsification of such pedigree; and in estimating such damages where the estate is recovered from such

purchaser or mortgagee, or from those claiming under the purchaser or mortgagee, regard shall be had to any expenditure by them, or either or any of them, in improvements on the land. 29 Vict. c. 28, s. 20.

AN ACT

TO AMEND THE

LAW OF PROPERTY AND TRUSTS

IN UPPER CANADA.

(29 *Vict. cap.* 28. *D.*)

HER MAJESTY, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows ;—

Frauds on Sales and Mortgages.

Punishment of vendor or mortgagor for fraudulent concealment of deeds, etc., or falsifying pedigree. Imp. Acts, 22-23 V. c. 35, s. 24; and 23-24 V. c. 38, s. 8.

Section 20. Any seller or mortgagor of land, or of any chattels, real or personal, or *choses in action*, conveyed or assigned to a purchaser or mortgagee, or the solicitor or agent of any such seller or mortgagor, who shall, after the passing of this Act, conceal any settlement, deed, will or other instrument material to the title, or any incumbrance, from the purchaser or mortgagee, or falsify any pedigree upon which the title does or may depend, in order to induce him to accept the title offered or produced to him, with intent in any of such cases to defraud, shall be guilty of a misdemeanor, or being found guilty, shall be liable, at the discretion of the Court, to suffer such punishment, by fine, or by imprisonment

for any time not exceeding two years, with or without hard labour, or by both, as the Court shall award, and shall also be liable to an action for damages at the suit of the purchaser or mortgagee or those claiming under the purchaser or mortgagee, for any loss sustained by them or either or any of them, in consequence of the settlement, deed, will or other instrument or incumbrance so concealed, or of any claim made by any person under such pedigree, but whose right was concealed by the falsification of such pedigree; and in estimating such damages where the estate shall be recovered from such purchaser or mortgagee, or from those claiming under the purchaser or mortgagee, regard shall be had to any expenditure by them, or either or any of them, in improvements on the land; but no prosecution for any offence included in this section, against any seller or mortgagor, or any solicitor or agent, shall be commenced without the sanction of Her Majesty's Attorney-General for Upper Canada, or in case that office be vacant, of Her Majesty's Solicitor-General for Upper Canada; and no such sanction shall be given without such previous notice of the application for leave to prosecute, to the person intended to be prosecuted, as the Attorney-General or the Solicitor-General (as the case may be) shall direct; and no prosecution for concealment shall be sustained unless a written demand of an abstract of title was served by or on behalf of the purchaser or mortgagee before the completion of the purchase or mortgage.

Consent of Crown law officer to prosecution required.

APPENDIX OF FORMS.

I.

Form of Chattel Mortgage, under the Revised Statutes Ontario, chap. 119, *sec.* 1.

(*See page ante* 100.)

THIS INDENTURE, made (in duplicate) the ________ day of ________ one thousand eight hundred and ________ 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;

Witnesseth, that the mortgagor for, and in consideration of ________ dollars of lawful money of Canada to him in hand, well and truly paid by the mortgagee at or before the sealing and delivery of these Presents (the receipt whereof is hereby acknowledged) hath granted, bargained, sold and assigned, and, by these Presents, doth grant, bargain, sell and assign, unto the said 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, (*Here insert a full and accurate description of each article intended to be mortgaged.*) all which said goods, chattels, personal property and effects are now in the possession of the said mortgagor, and are now situate, lying and being on, upon, and about (*Here describe accurately the lot, half lot, parcel of ground or premises upon which are the goods, &c., at the date of the execution of the instrument.*)

To Hold All and Singular the said goods, chattels, personal property and effects unto the mortgagee, his executors, admin-

istrators 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 centum per annum in 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:

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 mentioned, 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 __________ 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 in case the said mortgagor, shall suffer, allow or permit a judgment to be obtained against him for a debt in any court of law or equity, or shall suffer, allow or permit any taxes, rates, duties or assessments whatsoever, for which he now is, or hereafter, during the currency of these Presents, may be assessed, to remain unpaid and unsatisfied for a period of seven days after demand lawfully made therefor, by the proper officer in that behalf, or in case the said 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 these Presents, six days at least before the same shall become due, or in case default shall be made in the performance of any of the covenants by the mortgagor in these Presents contained : Then, and in such case, 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 to enter into and upon any lands and 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 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;

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 with interest thereon, as aforesaid, 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 hereby, in manner aforesaid, 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 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

sum or sums of money, with interest thereon at the rate aforesaid, as may then be remaining due, as well also as all costs and expenses as may have been incurred by the mortgagee in and about such seizure and sale;

And the mortgagor doth put the mortgagee in the full possession of said goods and chattels, by delivering to him these Presents in the name of all the said goods and chattels at the sealing and delivery hereof;

And the mortgagor further covenants with the mortgagee, in manner aforesaid, 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 office (authorized to transact business in Canada) in the sum of not less than ________________ dollars, and will pay all premiums and moneys necessary for that purpose, three days at least before the same become due, and will on demand assign and deliver over to the said mortgagee, his executors and administrators, the policy or policies of insurance and receipts thereto appertaining;

Provided, that if on default of payment of said premiums or sums of money by the mortgagor, in manner and at the times aforesaid, the mortgagee, his executors or administrators, may pay the same, and such sum of money shall be added to the debt hereby secured (and shall bear interest at the same rate from the day of such payment) and shall be repayable with the principal sum hereby secured.

In witness whereof, the parties to these Presents have hereunto set their hands and seals.

Signed, Sealed and Delivered,
in the presence of
(*having been first read over and explained*). } ________________ [L.S.]

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II.

Form of an Affidavit of Bona Fides to Accompany above Mortgage, under Revd. Stat. Ont., chap. 119, ss. 1 and 2.

(See ante pages 100 and 137.)

ONTARIO,
County of ______
TO WIT:

I, C. D., of the ______ of ______ in the County of ______, ______, the mortgagee in the foregoing Bill of Sale by way of mortgage named, make oath and say:

That A. B., the mortgagor in the foregoing Bill of Sale by way of mortgage named, is justly and truly indebted to me, this deponent C. D., the mortgagee therein named, in the sum of ______ dollars mentioned therein; that the said Bill of Sale by way of mortgage, was executed in good faith, and for the express purpose of securing the payment of the money so justly due, or accruing due, as aforesaid, and not for the purpose of protecting the goods and chattels mentioned in the said Bill of Sale by way of mortgage against the creditors of the said A. B., the mortgagor therein named, or of preventing the creditors of such mortgagor from obtaining payment of any claim against him, the said A. B.

Sworn before me, at the ______
of ______, in the County
of ______ this ______ day
of ______ in the year of our
Lord 188__.

C. D.

X. Y.,
A Commissioner, &c., &c.

III.

Form of an Affidavit of the Due Execution of a Chattel Mortgage, under the Revd. Stat. Ont., chap. 119, sec. 1.

(*See ante page* 100.)

ONTARIO,
County of ______ } I, G. H., of the ______ of
TO WIT: } ______ in the County of ______, (*here insert occupation of the deponent*), make oath and say:

That I was personally present, and did see the within Bill of Sale by way of mortgage, duly signed, sealed and executed by A. B., one of the parties thereto, and that the name G. H., set and subscribed, as a witness to the execution thereof, is of the proper handwriting of me, this deponent, and that the same was executed at the ______ of ______, in the said County of ______.

Sworn before me, at the ______ of ______ in the County of ______ this ______ day of ______ in the year of our Lord 188__. } G. H.

X. Y.,
A Commissioner, &c., &c.

IV.

Form of an Affidavit of Bona Fides, to be Made by an Agent of the Mortgagee, under Revd. Stat. Ont., chap. 119, sec. 1 (ante page 100), when Taking a Mortgage in Form 1.

ONTARIO,
County of ______ } I, E. F., of the ______ of
TO WIT: } ______ in the County of ______, ______, make oath, and say:

(1) I am the properly authorized agent of C. D., the mortgagee in the foregoing Bill of Sale, by way of mortgage named, for the purposes of the said Bill of Sale, by way of mortgage, and I am aware of all the circumstances connected therewith.

(2) I have been properly authorized in writing, to take such said Bill of Sale by way of mortgage, and the paper-writing, marked "A," attached to the said Bill of Sale, by way of mortgage, is a true copy of my authority to take such mortgage.

(3) That A. B., the mortgagor in the foregoing 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) That the said Bill of Sale, by way of mortgage, was executed in good faith, and for the express purpose of securing the payment of the money so justly due, or accruing due, as aforesaid, and not for the purpose of protecting the goods and chattels mentioned in the said Bill of Sale, by way of mortgage, against the creditors of the said A. B., the mortgagor therein named, or of preventing the creditors of such mortgagor from obtaining payment of any claim against him, the said A. B.

Sworn before me, at the__________
of__________, in the County
of__________this__________day
of__________, A. D. 188__.

E. F.

X. Y.,
A Commissioner, &c., &c.

V.

Form of Authority to an Agent to take a Mortgage under Revd. Stat. Ont., chap. 119, *sec.* 1.

(*Ante page* 100.)

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 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______, one thousand eight hundred and eighty______.

Signed, Sealed and Delivered, in the presence of. } C. D. [L.S.]

VI.

Form of an Assignment of Chattel Mortgage (*see Revd. Stat. Ont., chap.* 119, *secs.* 1, 5 & 16.

(*Ante pages* 100, 151 *and* 207.)

THIS INDENTURE made the______day of______ one thousand eight hundred and______, Between A. B. of the______ of______ in the County of______, ______

(hereinafter called the "assignor") of the First Part, and C. D. of the ________ of ________, in the County of ________, ________ (hereinafter called the "assignee"), of the Second Part.

Whereas, by a certain Chattel Mortgage dated on 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 (*the name of the mortgagor in full*) did grant and mortgage the goods and chattels therein mentioned unto the said 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 to be assigned.*)

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. 188__.

And whereas, for the consideration hereinafter mentioned, it is intended to assign, transfer, and set over the said in part recited mortgage to the said assignee, together with all moneys due, or to become due thereon; and, to also grant the goods and chattels therein contained and hereinafter set out to the said assignee, and these Presents are intended to carry out such intention;

Witnesseth in consideration of ________ dollars of lawful money of Canada, now paid by the said assignee to the said assignor (the receipt whereof is hereby acknowledged), the said assignor doth hereby assign and set over unto the said 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 said mortgage; and the said assignor doth hereby grant, bargain, sell and assign unto the said assignee, his heirs and assigns, all and singular the said goods and chattels therein and hereinafter more particularly mentioned and described, that is to say, ______________

(*Here set out a list of the chattels as contained in the mortgage intended to be assigned.*)

And all the right, title, interest, property, claim and demand whatsoever, both at law and in equity, or otherwise, howsoever, of him the said 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 said assignee, his executors, administrators and assigns absolutely; subject to the proviso for redemption contained in the said mortgage;

And the said assignor for himself, his executors and administrators doth hereby covenant with the said assignee, his executors, administrators and assigns, that the said sum of ______________ dollars, and interest thereon, at the rate aforesaid, from the __________ day of __________, 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 said ______________; and that he, his executors, and administrators, and assigns will 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 said parties have hereunto set their hands and seals.

Signed, Sealed and Delivered, in the presence of } A. B. [L.S.] C. D. [L.S.]

VII.

Form of Affidavit of Bona Fides to be made by an Assignee of a Chattel Mortgage when the Assignment is in the Form No. VI.

ONTARIO, County of______ TO WIT: } I, C. D., of the__________ of __________in the County of______, ______, the assignee in the within 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 within assignment, 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 assignor therein named.

Sworn before me at the______ of________, in the County of______ this______ day of_______, in the year of our Lord 188__. } C. D.

A Commissioner, &c.

VIII.

Form of Affidavit of Execution of an Assignment of Chattel Mortgage.

ONTARIO,
County of______
TO WIT:

I, (*name in full of witness*), of the ______ of ______ in the County of______, ______ make oath and say:

That I was personally present and did see the foregoing assignment of Chattel Mortgage duly signed, sealed and executed by A. B. and C. D., the parties thereto; and that I, this deponent, am a subscribing witness to the same; and 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, and that the same was executed at the ______ of ______ in the County of ______.

Sworn before me, at the ______
of ______ in the County
of ______ this ______ day
of ______ in the year of our
Lord 188__.

A Commissioner, &c.

IX.

Form of a Bill of Sale, under Revd. Stat. Ont., chap. 119, sec. 5.

(*See ante page* 151.)

THIS INDENTURE, made the ______ day of ______ in the year of our Lord one thousand eight hundred and eighty______, 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;

Whereas, the said bargainor is possessed of the goods, chattels and personal effects, hereinafter set forth, described and enumerated, and hath contracted and agreed with the said bargainee, for the absolute sale to him of the same, for the sum of ______ dollars, and these Presents are intended to carry out such contract and agreement;

Now this Indenture witnesseth, that in pursuance of the said agreement, and in consideration of the sum of ______ dollars, of lawful money of Canada, now paid by the said bargainee to the said bargainor, at or before the sealing and delivery of these Presents (the receipt whereof is hereby by him acknowledged), he, the said bargainor, hath bargained, sold, assigned, transferred and set over, and by these Presents doth bargain, sell, assign, transfer and set over unto the said bargainee, his executors, administrators and assigns, all those, the said goods, chattels and personal effects, hereinafter described, that is to say, (*here insert a particular description of the goods intended to be sold*) all 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, &c., are at the time of the execution of the instrument*);

And all the right, title, interest, property, claim and demand whatsoever, both at law and in equity, or otherwise howsoever, of him the said 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 said bargainee, his executors, administrators and assigns, to and for his and their sole and only use for ever:

And the said bargainor doth hereby for himself, his heirs,

executors and administrators, covenant, promise and agree with the said bargainee, his executors and administrators in manner following, that is to say: That he the said 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 said bargainor now has in himself good right to assign the same unto the said bargainee, his executors, administrators and assigns, in manner aforesaid, and according to the true intent and meaning of these presents:

And that the said bargainor, 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 said 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 said bargainor), effectually indemnified from and against all former and other bargains, sales, gifts, grants, titles, charges and encumbrances whatsoever;

And moreover, that he the said 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 said bargainee, his executors, administrators or assigns, but at the cost and charges of the said 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 said bargainee, his executors, administrators or assigns, in manner aforesaid, and according to the true intent and meaning of these presents,

as by the said bargainee, his executors, administrators or assigns, or his or their counsel in the law, shall be reasonably advised or required.

In witness whereof, the said parties to these Presents have hereunto set their hands and seals the day and year first above written.

Signed, Sealed, and Delivered in the presence of } A.B. [L S.]

X.

Form of Affidavit of Bona Fides to be made by the Bargainee, and to accompany a Bill of Sale (Form IX. *ante) under Revd. Stat. Ont. chap.* 119, *sec.* 5.

(*See page* 151.)

ONTARIO, County of______ TO WIT: } I, C. D., of the______ of ______, in the County of______, ______, the bargainee in the foregoing Bill of Sale 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 conveyance, and is not for the purpose of holding or enabling me, this deponent, to hold the goods mentioned therein against the creditors of the said bargainor.

Sworn before me at the______ of______, in the County of______ this______ day of______, in the year of our Lord 188_. } C. D.

A Commissioner, &c.

XI.

Form of an Affidavit of Execution to be made by a Witness to a Bill of Sale (see Form IX. ante), and to accompany same under Revd. Stat Ont. chap. 119, sec. 5.

(*See page* 151.)

ONTARIO,
County of________ } I, ____________ of the ____________
TO WIT: } of ____________, in the County of ____________, ____________,
make oath and say:

That I was personally present, and did see the within Bill of Sale duly signed, sealed and executed by (*name of parties who execute the conveyance*), the parties thereto: And that I, this deponent, am a subscribing witness to the same: and that the name (*signature of witness*), set and subscribed as a witness to the execution thereof, is of the proper handwriting of me, this deponent: And that the same was executed at the ____________ of ____________, in the County of____________.

Sworn before me at the____________
of____________, in the County
of________ this________ day
of____________, in the year of our
Lord 188__.

A Commissioner, &c.

XII.

Form of an Affidavit of Bona Fides, to be made by an Agent of a Bargainee, under Revd. Stat. Ont., chap. 119, *sec.* 5 *(ante p.* 151*), when taking a Conveyance in the Form* IX.

ONTARIO, County of________ TO WIT: } I, ________ of the ________ of ________ in the County of ________, ________ make oath, and say:

(1) I am the duly authorized agent of ________, the the bargainee in the foregoing Bill of Sale named, for the purposes of the said Bill of Sale, and I am aware of all the circumstances connected therewith;

(2) I am duly authorized in writing to take such said conveyance or Bill of Sale, and a true copy of such authority is attached to such conveyance or Bill of Sale, and is marked with the letter A.

(3) That the sale therein made is *bona fide*, and for good consideration, namely, in consideration of the sum of ________ dollars, as set forth in the said conveyance, and is not for the purpose of holding, or enabling the said bargainee to hold, the goods mentioned therein against the creditors of the said bargainor.

Sworn before me, at the ________ of ________, in the County of ________ this ________ day of ________, A.D. 188__.

A Commissioner, &c.

XIII.

Form of an Authority to an Agent, to take a Bill of Sale under Revd. Stat. Ont., chap. 119, sec. 5 (ante p. 151).

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 ———, one thousand eight hundred and eighty———.

Signed, sealed, and delivered in presence of } C. D. [L.S.]

XIV.

Form of a Chattel Mortgage, under Revised Statutes, Ont. Chap. 119, sec. 6, to secure Future Advances.

(*See ante p.* 160.)

THIS INDENTURE made (in duplicate) the______ __day of ________, one thousand eight hundred and________ 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 said mortgagor has applied to the said 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 said 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 said 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 said 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 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 covenant of the mortgagee in these presents contained and of the sum of one

dollar, 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, personal 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, personal 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 said 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 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 said mortgagee 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; 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 and chattels and property unto the mortgagee, his executors, administrators and assigns against him, the mortgagor, his executors and administrators, and against all 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 said mortgagor, his executors or administrators, or

some or one of them, will well and truly pay, or cause to be paid, unto the said mortgagee, his executors, administrators or assigns, the said sum of ________________ dollars, 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 ______________ 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 in case the said mortgagor shall suffer, allow or permit a judgment to be obtained against him for a debt in any Court of Law or Equity, or shall suffer, allow or permit any taxes, rates, duties or assessments whatsoever for which he now is, or hereafter, during the currency of these Presents, may be assessed, to remain unpaid or unsatisfied for a period of seven days after demand made therefor by the proper officer in that behalf, or in case the mortgagor shall fail in paying his rent arising out of the premises upon which the said goods now are or hereafter may be during the continuance of these Presents six days at least before the same becomes due, or in case default shall be made in the performance of any of the covenants by the mortgagor in these Presents contained, then and in such case 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, to enter into and upon any lands and tenements, house 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 as may then be due by virtue of these Presents, 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 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;

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 with interest thereon as aforesaid 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 hereby further covenant, promise and agree in manner aforesaid, to and with the mortgagee, his executors, administrators and assigns, that in case the sum of money realized under any such salo as above mentioned shall not be sufficient to pay the whole amount due at the time of such sale, that 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 sum or sums of money with interest thereon as may then be remaining due; as well also as all costs and expenses as may have been incurred by the mortgagee in and about such seizure and sale; and the mortgagor doth put the mortgagee in the full possession of said goods and chattels by delivering to him these Presents in the name of all the said goods and chattels at the sealing and delivery hereof;

And the mortgagor further covenants with the mortgagee that he will, during the continuance of this mortgage, and any and every renewal thereof, insure the chattels and property hereinbefore mentioned, against loss or damage by fire, in some insurance office (authorized to transact business in Canada) in the sum of not less than ____________________ dollars, and will pay all premiums and moneys necessary for that purpose, three days at least before the same become due and will, on demand, assign and deliver over to the said mortgagee, his executors and administrators, the policy or policies of insurance and receipts thereto appertaining: Provided, that if on default of payment of said premiums or sums of money by the mortgagor in manner at the times aforesaid, the mortgagee, his executors or administrators, may pay the same, and such sums of money shall be added to the debt hereby secured (and shall bear interest at the same rate from the day of such payment) and shall be repayable with the principal sum hereby secured. And in consideration of the execution of these Presents the said mortgagee covenants for himself, his executors, administrators and

assigns, with the mortgagor, his executors, administrators or assigns, that he, the mortgagee, his executors, administrators or assigns, will faithfully advance the said sum of ________ dollars to the said mortgagor in manner and at the times hereinbefore specified.

In witness whereof, the parties to these presents have hereunto set their hands and seals.

Signed, Sealed and Delivered in the presence of } A. B. [L.S.]
C. D. [L.S.]

XV.

Form of Affidavit of Bona Fides to be made by a Mortgagee under a Mortgage (see Form XIV.) *securing Future Advances under Revd. Stat. Ont. chap.* 119, *sec.* 6.

(*See ante, p.* 160.)

County of ________ TO WIT: } I, C. D., of the ________ of ________ in the ________ of ________, ________, the mortgagee in the foregoing Bill of Sale by way of mortgage named, make oath and say: That the foregoing mortgage truly sets forth the agreement entered into between myself and A. B. therein named, and truly states the extent of the liability intended to be created by such agreement, and covered by the foregoing mortgage;

That the foregoing mortgage is executed in good faith, and for the express purpose of securing me the said mortgagee in the repayment of the said advances which I have agreed to make to the said mortgagor, as in said mortgage set out;

That the foregoing mortgage is not executed for the purpose of securing the goods and chattels mentioned in the Schedule

attached hereto, marked "A," against the creditors of the said A. B., nor to prevent such creditors from recovering any claim which they may have against the said A. B.

Sworn before me at the ________ of ________, in the County of ________ this ________ day of ________ in the year of our Lord 188__. } C. D.

A Commissioner, &c.

XVI.

Form of a Chattel Mortgage securing a Mortgagee against his liability as endorser for a Mortgagor under Revd. Stat. Ont. chap. 119, *sec.* 6.

(*Ante, page* 160).

THIS INDENTURE made the ________ day of ________ in the year of our Lord one thousand eight hundred and eighty ________ 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 said mortgagee at the request of the mortgagor and for his accommodation has endorsed the promissory note of the said 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 set out an exact copy of the note or notes.*)

And whereas in consideration thereof the said mortgagor has

agreed to enter into these Presents for the purpose of indemnifying and saving harmless the said mortgagee, of and from the payment of the said recited note, or any part thereof, or any notes hereafter to be endorsed by the said mortgagee for the accommodation of the said mortgagor, by way of renewal of the said recited note (so that, however, any such renewal shall not extend the time for payment of said recited note or the liability of the said mortgagee beyond the period of one year from the date hereof, nor increase the amount of said liability beyond the amount of said 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 said mortgagor for and in consideration of the premises, and of the sum of one dollar of lawful money of Canada, to him in hand well and truly paid by the said mortgagee, at or before the sealing and delivery of these presents, (the receipt whereof is hereby acknowledged); doth grant, bargain, sell, and assign unto the said 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 goods and chattels 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 said mortgagee, his executors, administrators, and assigns, to the only proper use and behoof of the said mortgagee, his executors, administrators and assigns forever; Provided always, and these Presents are upon this condition, that if the said mortgagor, his executors or administrators, do and shall well and truly pay, or cause to be paid the said note so as aforesaid endorsed by the said mortgagee at maturity, 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 all and every other note which may hereafter be endorsed by the said mortgagee for the accommodation of the said 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 said mortgagee beyond one year from the date hereof, and all interest in respect thereof and indemnify and save harmless the said mortgagee, his heirs, executors, and administrators, from all loss, costs, charges, damages, or expenses, in respect of the said recited note or renewals, 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 in anywise notwithstanding; and the said 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 by these Presents unto the said mortgagee, his executors, administrators, and assigns, against him the said mortgagor, his executors, and administrators, and against all and every other person and persons whomsoever.;

And the said mortgagor doth hereby for himself, his executors and administrators, covenant, promise and agree, to and with the said mortgagee, his executors, administrators and assigns, that he the said 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 all future and other notes which the said mortgagee shall hereafter endorse for the accommodation of the said mortgagor as aforesaid, and all interest and incidental expenses to accrue thereon, and will well and truly indemnify and save harmless the said 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 such renewals as in the said proviso mentioned, or the interest thereon, or any part thereof, or otherwise, as aforesaid, or in case the said mortgagor shall attempt to sell or dispose of, or in any way part with the posses-

sion of the said goods and chattels, or any of them, or remove the same, or any part thereof, out of the County of ———, without the consent of the said mortgagee, his executors, administrators, or assigns, to such sale, removal or disposal thereof first had and obtained in writing; or in case said mortgagor shall not pay the taxes on said premises, or on said goods, within seven days after the same has been lawfully demanded, or shall not pay his rent for said premises six days at least before the same becomes due, then, and in any of such cases, it shall and may be lawful for the said 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, 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 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 said 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 or 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 due on the said recited note or any future renewals thereof, as aforesaid; and all such expenses as may have been incurred by the said mortgagee, his executors, administrators, or assigns, in consequence of the default, neglect or failure of the said mortgagor, his executors, administrators, or assigns, in payment of the said recited note, or any renewals 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 said mortgagor, his executors, adminis-

trators, or assigns, all such surplus as may remain after such sale, and after payment of all such sum and sums of money and interest thereon as he, the said mortgagee, shall be called upon to pay, by reason of endorsing the said promissory note, in the said recital and proviso mentioned or any future notes to be endorsed by the said mortgagee for the said mortgagor, as aforesaid, at the time of such seizure, and after payment of the costs, charges and expenses involved by such seizure and sale, or otherwise, as aforesaid: Provided always, nevertheless, that it shall not be incumbent on the said mortgagee, his executors, administrators and 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 renewals thereof, as aforesaid, it shall and may be lawful for the said 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 said mortgagor, his executors, administrators or assigns, or any of them, or any other person or persons whomsoever; and the said mortgagor doth hereby for himself, his heirs, executors and administrators, further covenant, promise and agree to and with the said 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 said mortgagor, his executors or administrators shall and will forthwith pay, or cause to be paid unto the said mortgagee, his executors, administrators and 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 renewals thereof; And the said mortgagor doth put the said mortgagee in full possession of the said goods and chattels by delivering to him these Presents in the name of all the said goods and chattels at the sealing and delivery hereof:

And the said mortgagor covenants with the said mortgagee that he will, during the continuance of this mortgage, and any

and every renewal thereof, insure the chattels hereinbefore mentioned against loss or damage by fire in some insurance office (authorized to transact business in Canada) in the sum of not less than ______ dollars, and will pay all premiums and moneys necessary for that purpose three days at least before the same become due: and will on demand assign and deliver over to the said mortgagee, his executors and administrators, the policy or policies of insurance and receipts thereto appertaining; provided, that if on default of payment of said premiums or sums of money by the said mortgagor, the said mortgagee, his executors or administrators, shall pay the same; then such sums of money shall be added to the debt hereby secured, and shall bear interest at the same rate from the day of such payment, and shall be repayable with the sum hereby secured.

In witness whereof, the parties to these presents have hereunto set their hands and seals, the day and year first above written.

Signed, Sealed and Delivered }
in presence of } A. B. [L.S.]

XVII.

Form of an Affidavit of Bona Fides to be made by the Mortgagee of a Mortgage in the Form XVI, see R. S. O., chap. 119, *sec.* 6, (*ante p.* 160).

ONTARIO, } I, C. D., of the ______ of
County of ______ } ______ in the County
TO WIT: } of ______, ______

the mortgagee in the foregoing Bill of Sale, by way of mortgage named, make oath and say that the above mortgage truly sets

forth the agreement entered into between me, C. D., and the said mortgagor therein named, and truly states the extent of the liability intended to be created by such agreement, and covered by such mortgage, and that the same was executed in good faith and for the express purpose of securing me, the said mortgagee therein named, against my endorsement of the said promissory note for ______ dollars for the said mortgagor, or any renewals of the said recited promissory note as therein set out, 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 mortgagor, nor to prevent such cretors from recovering any claims which they may have against such said mortgagor.

Sworn before me, at the ______
of ______, in the County
of ______ this ______ day
of ______, A.D. 18__.

C. D.

A Commissioner, &c.

XVIII.

Form of an Affidavit of Bona Fides, to be made by an Agent of a Mortgagee of a Mortgage (see Form XVI.) taken to Secure a Mortgagee against Liability under his Endorsement (R. S. O. chap. 119, s. 6).

(*See page ante* 160.)

ONTARIO,
County of ______.
TO WIT:

I, E. F., of the ______ of ______ in the County of ______, ______ make oath, and say:

(1) The agreement set forth in the foregoing Bill of Sale, by way of mortgage, was entered into, and the said mortgage was

taken by me, for, and on behalf, of C. D., the said mortgagee therein named, and I am the duly authorized agent, in writing, of the said C. D., to make such agreement and to take such mortgage, and I am aware of all the circumstances in connection therewith;

(2) The paper writing attached to said mortgage, marked "A," is a true copy of my authority to make such agreement, and to take such said mortgage;

(3) That such mortgage truly sets forth the agreement entered into between C. D., the mortgagee therein named, and the said mortgagor therein named, and truly states the extent of the liability intended to be created by such agreement and covered by such mortgage, and that the same was executed in good faith and for the express purpose of securing the said mortgagee therein named against his endorsement of the promissory note for __________ dollars for the said mortgagor, or any renewals of the said recited promissory note, as therein set out 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__.

E. F.

A Commissioner, &c.

XIX.

Form of an Affidavit of Bona Fides to be made by an Agent of a Mortgagee of a Mortgage taken to secure the repayment of future advances, see Form of Mortgage XIV *under R. S. O. chap.* 119, *s.* 6, (*ante p.* 160).

ONTARIO,
County of ________
TO WIT:
} I, E. F., of the _____ of _____ in the County of ______, ______, make oath, and say:

(1) The agreement set forth in the foregoing Bill of Sale by way of mortgage was entered into, and the said mortgage was taken by me for and on behalf of C. D., the said mortgagee therein named, and I am the duly authorized agent in writing of the said C. D. to make such agreement and to take such mortgage and I am aware of all the circumstances in connection therewith.

(2) The paper writing attached to said mortgage marked "B" is a true copy of my authority to make such agreement and to take such said mortgage.

(3) That such mortgage truly sets forth the agreement entered into between C. D., the mortgagee therein named, and the said mortgagor therein named, and truly states the extent of the liability intended to be created by such agreement and covered by such mortgage. That the foregoing mortgage is executed in good faith and for the express purpose of securing the said mortgagee in the repayment of his advances which he has agreed to make as in said mortgage set out, and not for the purpose of securing the goods and chattels mentioned in the schedule attached hereto marked A. against the creditors of the said A. B. nor to prevent such creditors from recovering any claim which they may have against the said mortgagor A. B.

Sworn before me, at the _____
of ________, in the County
of ______ this ______ day
of ________, A. D. 18__.
} E. F.

A Commissioner, &c.

XX.

Form of Renewal under Revised Stat. O. chap. 119, s. 10 (ante p. 184), of a mortgage given under Rev. Stat. O. chap. 119, s. 1 (ante p. 100).

STATEMENT B.

The interest of C. D. of the __________ of __________ in the County of __________, __________ the mortgagee in the goods and chattels of which the annexed paper writing marked "A" is a true copy made by A. B., the mortgagor therein named, to me the said C. D. the mortgagee therein named, and dated the __________ day of __________ one thousand eight hundred and __________ is as follows:

The said mortgage was made by the said mortgagor to the said mortgagee to secure the due payment of __________ dollars payable with interest at the rate of __________ per cent. per annum, in manner following (*here set out the mode and time of payment*) which said mortgage has not been assigned by me.

The amount still due and payable for principal and interest is the sum of __________ dollars according to the following particulars: (*here set out the account in full for principal and interest, and shewing all payments made on account thereof*).

C. D.

XXI.

Form of an Affidavit of a Mortgagee under Revd. Stat. Ont. chap. 119, s. 10 (ante p. 184) on renewal of a Mortgage taken under R. S. O. chap. 119, s. 1 (ante p. 100) to accompany the above statement (Form XX).

County of __________ } I, C. D., of the __________ of __________
TO WIT: } in the County of __________, __________, make oath, and say:

(1) I am the mortgagee mentioned in the Chattel Mortgage, of which the annexed paper writing, marked A, is a true copy.

(2) That the said Chattel Mortgage has not been, nor is it kept on foot for any fraudulent purpose.

(3) That the foregoing statements marked "B" are true.

Sworn before me at the ______ of ______ in the County of ______ this ______ day of ______ A. D., 18__.	C. D.

A Commissioner, &c.

XXII.

Form of an Affidavit of an Agent of a Mortgagee under R. S. O. chap. 119, *sec.* 10 (*ante p.* 184) *on renewal of a Mortgage taken under R. S. O. chap.* 119, *sec.* 1 (*ante p.* 100) *to accompany the foregoing statement,* "*Form* XX."

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 in writing, of C. D., the mortgagee mentioned in the Chattel Mortgage of which the annexed paper writing marked "A" is a true copy, for the purposes of renewing the said Chattel Mortgage, and the paper writing marked "C" attached hereto and filed herewith is my authority therefor, and I am aware of all the circumstances in connection with said mortgage and the renewing thereof.

2. The said Chattel Mortgage has not been, nor is it kept on foot for any fraudulent purpose.

3. The foregoing statements marked "B" are true.

Sworn before me at
the ________ of ________
in the County of ________
this ________ day of ________
in the year of our Lord, 188 .
} E. F.

A Commissioner, &c.

XXIII.

Form of Renewal under R. S. O., chap. 119, sec. 10 (ante p. 184) of a Mortgage given under R. S. O. chap 119, sec. 6 (anet p. 160) to secure repayment of future advances (see Form XIV.)

Statement B.

The Interest of C. D. of the ________ of ________ in the County of ________ , ________, the mortgagee in the goods and chattels described in the Chattel Mortgage, of which the annexed paper writing marked "A" is a true copy made by A. B., the mortgagor therein named, to me the said C. D., the mortgagee therein named, and dated the ________ day of ________ one thousand eight hundred and ________ is as follows:

The said mortgage was made by the said mortgagor to the said mortgagee to secure the repayment of future advances to the amount of ________ dollars agreed, on the day of the date of said mortgage, to be made by me, the said C. D., to the said mortgagor, in manner as in said mortgage set out, and which sum of ________ dollars since then has been advanced by me to the said mortgagor A. B. in the manner hereinafter appearing.

The said mortgage has not been assigned by me.

The amount now due and payable to me from the mortgagor

for principal is the full sum aforesaid of ________ dollars, and for interest the sum of ________ dollars, in all the sum of ________ dollars, according to the following particulars:

DR.

Jan. 30, 1880	—To advance made this day on security of said mortgage.........	$
Feb. 28, 1880	—To advance made this day on security of said mortgage.........	$
Mar. 30, 1880	—To advance made this day on security of said mortgage.........	$
	To total advances	$
	To interest on 1st advance from date thereof to date hereof at ________ p. c.	$
	To interest on 2nd advance from date thereof to date hereof, at ________ p. c.	$
	To interest on 3rd advance from date thereof to date hereof, at ________ p. c.	$
	Total amount due for principal and interest......................	$

Dated this ________ day of ________ A.D. 1880.

C. D.

N.B.—*If any payments have been made on account thereof, the statement can be altered accordingly. The affidavit accompanying this statement can be in the Form XXII. ante.*

XXIV.

Form of Renewal, under R. S. O., chap. 119, *s.* 10 (*ante page* 184), *of a Mortgage given under R. S. O., chap.* 119, *s.* 6 (*ante page* 160), *to Secure a Mortgagee against his Liability on his Endorsements for a Mortgagor* (*see Form* XVI.).

STATEMENT B.

The Interest of C. D., of the__________of__________, in the County of__________, __________, the mortgagee in the goods and chattels described in the Chattel Mortgage, of which the annexed paper writing, marked "A," is a true copy made by A. B., the mortgagor therein named to me, the said C. D., the mortgagee therein named, and dated the__________ day of__________, one thousand eight hundred and__________, is as follows:—

The said mortgage was made by the said mortgagor to me, the said mortgagee, to secure me against the payment of the amount of my liability for the mortgagor as his endorser on a promissory note for the sum of__________ dollars, which is fully set out and recited in said mortgage, and on any renewals of said note, as in said Mortgage set out.

The said mortgage has not been assigned by me.

The amount now due and payable to me from the said mortgagor for principal is the full amount of the said note and interest, to wit, the sum of__________dollars, which note and interest I paid for the mortgagor on the__________ day of__________last past, and for interest since then, the sum of__________dollars, in all the sum of __________dollars, according to the following particulars:

DR.

July 1, 1880—To paid this day the full amount of the said promissory note, endorsed by me for the mortgagor.... $

To interest paid by me on said note .... $
To interest due me since this date .... $

Total amount due me at this date .... $

Dated this __________ day of __________, A. D. 1880.

C. D.

N. B.—*If any payments have been made on account thereof by the mortgagor, the same can be credited accordingly. The affidavit, accompanying this statement, may be in Form* XXII., *ante.*

XXV.

Form of Statement on Renewal of Mortgages, under 43 *Vict. chap.* 15 (*see ante pages* 139 *and* 140).

STATEMENT.

Statement exhibiting the interest of C. D., 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 __________ Count__________ 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 mortgagee by virtue of an assignment

thereof from the said C. D., to him, dated the ________ day of ________, 18__.

No payments (or the following payments, and no other) have been made on account of the said mortgage:

1880, Jan'y 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.)		

XXVI.

Form of an Affidavit to accompany the foregoing Statement on renewal under 43 Vict. chap. 15.

County of ________ } I, C. D., of the ________ of ________ in
TO WIT: } the County of ________, ________ the
mortgagee in the chattel mortgage mentioned in foregoing (or annexed) statement (or asssignee 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 . } C. D.

A Commissioner, &c.

XXVII.

Form of authority to an Agent to renew a Mortgage under Revised Stat. Ont, chap. 119, *sec.* 10 (*see p.* 184).

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______ which said mortgage bears date the______day of______ A.D., 188—, and was filed in the office of the Clerk of the County Court of the County of__________on the______day of __________, A.D. 188—, 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__________in the year of our Lord 188—.

Signed, sealed and delivered (in presence of) } C. D.

XXVIII.

Form of an Authority to take and renew Mortgages under 43 Vict., chap. 15 (ante pp. 240, 241).

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 Bills of Sale by way of Chattel Mortgage necessary to be taken and 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 thereof.

In witness thereof I have hereunto set my hand and seal, this day of in the year of our Lord 18 .

Signed, sealed, and delivered in the presence of } C. D.

N. B.—The above authority may be changed so as to provide for the case of a conveyance under the Act.

XXIX.

Form of Discharge of Chattel Mortgage under R. S. O. *chap.* 119. *sec.* 13. [*see ante, p.* ——).

DOMINION OF CANADA, } To the Clerk of the County Court
PROVINCE OF ONTARIO, } of the______ County of______

I, C.D. of the______ of______, in the County of______, ______, do 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 to me, which mortgage bears date the______ day of______. A. D. 18 ., and was registered (or in case the mortgage has been renewed under section ten, 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 Chattel Mortgage has not been assigned by me (*or if it has been assigned, here mention the day and date of registration of each assignment thereof, and the names of the parties.*)

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

______
______*Residence* } C. D.
______*Occupation* }

XXX.

Form of an Affidavit of Execution of a Discharge of Chattel Mortgage.

County of ______ } I, E. F., 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 ______ in the year of our Lord 18__. } E. F.

A Commissioner, &c.

XXXI.

Form of Discharge of a Mortgage by an Assignee of the Mortgage. (*See p.* 204).

DOMINION OF CANADA, } To the Clerk of the County
PROVINCE OF ONTARIO. } Court of the County of ______

I, L. M. of the ______ of ______ in the County of ______, ______ do hereby certify that A. B. of the ______ of

__________ in the County of __________, do certify that ________ has satisfied all money due on, or to grow due on a certain Chattel Mortgage made by him, the said A. B., to one E. F., of __________, __________ which mortgage bears date the __________ of __________, A.D., 188— and was registered in the office of the Clerk of the County Court of the County of ______ on the ____ day of ______ A.D., 188— as No. ________ and which said mortgage was by assignment thereof, bearing date the ________ day of ________ A.D., 188—, duly assigned by the said E. F. 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. 188— 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., 188—.

Witness

__________ Residence.

__________ Occupation.

L. M.

XXXII.

Form of a Notice to a Mortgagor by an Assignee of a Mortgage, of the latter having become the Purchaser of the Mortgage.

To

Mr. ____________________

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 ____________ of the ____________ of ____________ in the County of ____________, ____________ whereby you secured to the said ____________ 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. 188—, 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 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., 188—.

Witness } C. D.

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ERRATA.

Page 40,	line 22nd,	for	"grant,"	read	"have."
" 44,	" 33rd,	"	"they,"	"	"he."
" 88,	" 9th,	"	"no redemise,"	read	"a redemise."
" 88,	" 30th,	"	"mortgagor,"	"	"mortgagee."
" 125,	" 10th,	"	"mortgagor,"	"	"mortgagee."

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