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No. 45.

3rd Session, 5th Parliament, 20 Victoria, 1857.

BILL.

An Act to amend the Statutes of this Province respecting Mortgages of Personal Property in Upper Canada and to consolidate the same.

Received and read, first time, Thursday, 5th
March, 1857.

Second reading, Monday, 9th March, 1857.

Mr. SYDNEY SMITH.

An Act to amend the Statutes of this Province respecting Mortgages and Sales of Personal Property in Upper Canada, and to consolidate the same.

WHEREAS it is expedient to amend and consolidate the Law of Upper Canada concerning mortgages and sales of personal property, and to repeal the Statutes now in force on that subject : Therefore Her Majesty, &c., enact as follows :

Preamble

- 5 I. Every Mortgage, or conveyance intended to operate as a Mortgage, of goods and chattels, made in Upper Canada, which shall not be accompanied by an immediate delivery, and an actual and continued change of possession of the things mortgaged, shall be absolutely null and void as against creditors of the Mortgagor, and against subsequent purchasers or Mortgagees in good faith, unless the Mortgage or conveyance, or a true copy thereof, together with an affidavit of a witness thereto, sworn as hereinafter provided, of the due execution of the said Mortgage or conveyance, or of the due execution of the Mortgage or conveyance of which the copy filed purports to be a copy, together with an affidavit of the Mortgagee or his agent properly authorized to take such Mortgage, in writing, a copy of which authority shall be registered therewith (if such Agent be aware of all the circumstances connected therewith), that the Mortgagor therein named is justly and truly indebted to the Mortgagee in the sum mentioned therein, that it was executed in good faith and for the express purpose 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, or preventing the creditors of such Mortgagor from obtaining payment of any claim against him, shall be registered as hereinafter provided within five days from the execution thereof: And every
- 25 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 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 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 shall be registered as hereinafter provided, within from the executing thereof, otherwise such sale shall be absolutely void as against the creditors the bargainor and as against subsequent purchasers or Mortgagees in good faith.

What shall be necessary to the validity of a mortgage of personals in Upper Canada

Affidavit.

Registration.

What shall be necessary to a valid sale of such property.

- 40 II. Any Mortgage of goods and chattels executed in good faith after the passing of this Act, for the purpose of securing any past or future advances

Mortgages of personals may be validly

made as security against future liability, in certain cases.

to be made upon an agreement in writing, entered into between the parties for making such advances, and for the purpose of enabling the Mortgagor to enter into and carry on any business with such advances, the time of repayment of such advances not being longer than one year from the making of such agreement and Mortgage, or for securing the Mortgagee against any endorsement of any bills or promissory notes or any other liability entered into for the Mortgagor, not extending for a longer period than one year from the date of such Mortgage, and in which Mortgage is fully set forth, by way of recital or otherwise, the terms, nature and effect of such agreement, and the amount of liability intended to be created, if accompanied by an affidavit of a witness thereto of the due execution thereof, and an affidavit of the Mortgagee (or if the agreement has been entered into and Mortgage taken by an agent duly authorized in writing to make such agreement and take such Mortgage, if aware of the circumstances connected therewith, then by an affidavit of such agent) that such 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 against the payment of the amount of such his liability for the Mortgagor, and not for the purpose of securing the goods and chattels mentioned therein against the creditors of the Mortgagor, nor to prevent such creditors from recovering any claims which they may have against such Mortgagor, and filed as hereinafter provided, shall be as valid and binding as Mortgages mentioned in the preceding section of this Act.

Affidavit.

Efficient description of the property mortgaged required.

III. 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, otherwise the same, so far as such description thereof or of any part thereof is insufficient, shall be absolutely null and void.

Where the Instrument creating the mortgage may be registered.

IV. The Instrument mentioned in the preceding sections shall be filed in the office of the Clerk of the Municipal Council of the Municipality where the Mortgagor or bargainor therein, if a resident in Upper Canada, shall reside at the time of the execution thereof, and if he be not a resident, then in the office of the Clerk of the Municipal Council of the Municipality where the property so mortgaged or sold shall be, at the time of the execution of such instrument; and such Clerks are hereby required to file all such instruments aforesaid presented to them respectively for that purpose, and to endorse thereon the time of receiving the same in their respective offices, to be kept there for the inspection of all persons interested.

Entry of Instruments filed.

V. The said Clerks 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, in alphabetical order, the names of all the parties to such Instruments, with the numbers endorsed thereon opposite to each name, which entry shall be repeated alphabetically under the name of every party thereto.

Care of the removal of the mortgaged property provided for.

VI. In the event of the permanent removal of goods and chattels mortgaged as aforesaid from the said municipality in which they may be at the time of the execution of such mortgage, to another Municipality before the payment and discharge of such mortgage, a certified copy of such mortgage under the hand of the said Clerk of the Municipality in whose

office it was first registered, and under the seal of the said Municipality, and of the affidavits and documents and instruments relating thereto and filed in such office, shall be filed with the Clerk of the Municipality to which such goods and chattels are removed, within one month from such removal, otherwise the said goods and chattels shall be liable to seizure and sale under Execution, and in such case, such mortgage shall be null and void as against subsequent purchasers and mortgagees for value consideration as if never executed.

VII. 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, 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, and a full statement of the amount still due for principal and interest thereon and of all payments made on account thereof, shall be again filed in the office of the Clerk of the said Municipality wherein such goods and chattels are then situate, with an affidavit of the mortgagee or his agent duly authorized in writing for that purpose, which authority shall be filed therewith; stating that such statements are true and that the said Mortgage has not been kept on foot for any fraudulent purpose.

Privilege to cease after a certain period unless certain requirements are complied with and statements filed.

VIII. A copy of such original instrument 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 under the seal of the Municipality, shall be received in evidence, but only of the fact that such instrument or copy and statement was 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 such instrument or copy, shall be received in evidence only of the fact stated in such endorsement.

Effect of certificate of mortgage.

IX. 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, intituled, '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.'*"

Act not to apply to mortgages of vessels under 8 Vict. c. b.

X. It shall and may be lawful for the creditors of any Mortgagor of any goods and chattels, who shall have obtained or may hereafter obtain Judgment in any Court in Upper Canada, to obtain from the Clerk of such Court, in the same manner as certificates are now obtained to be registered against Lands and Tenements, a certificate under the seal of such Court, setting forth the amount for which such Judgment was obtained, including the costs thereon, and it shall be lawful for such creditor to register the same with the Clerk in whose office such Mortgage has been or is last registered, upon payment of the fees hereinafter provided.

Judgment creditors of mortgagor may obtain and register certificates.

Effect of registration of such certificates as mortgages of the same property.

XI. Upon registry of such certificates in the manner provided by the last preceding section of this Act, the creditor registering the same shall from thenceforth become a mortgagee of the goods and chattels mentioned in the Mortgage so registered as aforesaid, and shall take priority according to the time from which such registry is made, and next after the last previously registered Mortgage or Judgment, and shall be entitled to redeem the prior Mortgage Judgment, or securities, or compel a sale of the property mortgaged, or so much thereof as may be necessary to satisfy the amount secured thereby, by suit in any Court of competent jurisdiction in Upper Canada.

Judgment creditors of mortgages may pay or cause to be paid, the prior mortgage, and then seize and sell so much of the mortgaged property as may be necessary to pay themselves.

XII. Any person having a Judgment or Execution against the goods and chattels of any person or persons who may have executed a Mortgage of goods and chattels, which Mortgage has been or may be registered in manner hereinbefore provided, may direct the Sheriff to whom such Execution is directed, to seize upon such or so much of the said goods and chattels as may be thought sufficient to satisfy such Mortgage and Execution, and may thereupon apply to the Court or a Judge of the Court out of which such Execution has been issued, upon an affidavit entitled in the Court and cause, out of which and wherein such Execution was issued, setting forth the fact of his being such Execution creditor, and of the Registry of such Judgment, of such seizure, and that he believes the property mortgaged is of sufficient value to pay the amount of the money secured by such Mortgage and the whole or a considerable portion of the amount of such Judgment, and that he is willing to discharge the amount of such Mortgage and is apprehensive that he will otherwise lose his debt or a portion thereof, for a Rule or Summons calling upon the parties to the said Mortgage to shew cause why such creditor should not be allowed to pay off such Mortgage or such amount as may be found due thereon, and proceed to the sale of such goods and chattels or sufficient to pay and satisfy his said Mortgage and Execution and expenses, and requiring such parties to produce at the time and place mentioned therein, a statement under oath of the true amount due upon such Mortgage, and stating that in default thereof, the said Court or Judge will proceed to make an order to set aside such Mortgage and the Registry thereof, which Rule or Summons may be served upon the parties personally, or by leaving a copy thereof at the place of abode of the parties to whom it is directed, or if such Mortgage was or is taken by an agent, then at his place of abode, and shall be made returnable at such time as such Court or Judge may name therein, but not less than eight days after the service thereof.

Proceedings for that purpose.

Further proceedings for the said purpose.

XIII. Upon the return day mentioned in such Rule or Summons it shall be lawful for such Court or Judge, upon proof by affidavit of the due service of such summons, to proceed to hear the parties and determine the amount due upon such Mortgage, in case the parties attend, and to make an order that upon payment by the Judgment creditor of the amount thus found due upon such Mortgage with the costs of the Mortgagee to be settled by such Court or Judge, to the Clerk of the Court out of which such Execution may have been issued, to be paid over to the Mortgagee when demanded, and thereupon the Sheriff or other officer having the Execution, upon receiving the said Rule or Order and the receipt of such Clerk of the amount mentioned in such Rule or Order having been deposited with him, which such Clerk is hereby required to give to such Execution creditor upon payment of such amount, shall and may proceed

to the sale of so much of the said goods and chattels as may be necessary in the first place to repay such execution creditor the amount so deposited by him as aforesaid and interest thereon from the time the same has been deposited, and then to satisfy and discharge the amount of the said Execution and expenses allowed by Law for making such seizure and sale.

XIV. Upon the return day mentioned in such Rule and Summons it shall be lawful for such Court or Judge, in case the parties named therein and to whom it was directed do not appear to answer thereto, or appearing, do not give satisfactory evidence of the amount due upon such Mortgage, upon proof by affidavit of the due service of such Summons in manner hereinbefore provided, to make with respect to the amount to be deposited by such Execution for the satisfaction of such Mortgage or as to the discharge or setting aside of such Mortgage, a Rule or Order directing the registry of such Mortgage without any deposit of money or otherwise to be entirely set aside, and upon a copy of such order entirely setting aside such Registry being furnished to the Clerk with whom such Mortgage is filed, he shall endorse upon the back of such Mortgage the words, "Registry set aside by Judge's Order, dated 18 ,," inserting the date of such Order, and shall also attach such copy of Order to such Mortgage or copy of Mortgage for the inspection of all parties interested, and thereupon the Registry of such Mortgage and shall be set aside and be from thenceforth null and void and as if it never had been made.

Former mortgage may be set aside by the Judge in certain cases.

Former mortgage to be void thereafter.

XV. Neither the Sheriff or officer having the execution of such process, nor the Judgment creditor or other party acting in execution of such process, shall be liable to any action or suit at Law or Equity for the seizure and sale of so much of the said goods and chattels as may be necessary to satisfy the amounts mentioned in the preceding section of this Act or any part thereof, after the making of such Rule or Order; and in any action in respect thereof the parties hereinbefore named may plead the general issue, and give this Act and the special matter in evidence under such plea, as a complete and entire defence to such action, any law, usage, or custom to the contrary notwithstanding.

Indemnity to Sheriff, &c., acting under this Act.

XVI. 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 threepence*; for searching for each paper, *sixpence*; for filing Certificate of Judgment, *one shilling*; for filing copy of Judge's Order or Rule setting aside Registry or Mortgage, *one shilling*; and for copies of any Document with Certificate prepared, filed under this Act, *sixpence*, for every hundred words.

Fees for services under this Act.

XVII. All affidavits and affirmations required by this Act shall be taken and administered by any Judge or Commissioner of the Courts of Queen's Bench or Common Pleas, or Registrar or Deputy Registrar, or Master or Master Extraordinary in Chancery, or Justice of the Peace in Upper Canada, and the sum of *one shilling*, shall be paid for each and every oath thus administered.

Fees on affidavits.

XVIII. The Act passed in the twelfth year of Her Majesty's Reign, chapter 74, intituled, "*An Act requiring Mortgages of Personal Property, to be filed in Upper Canada*," and the Act passed in the Session held in the 13th and 14th years of Her Majesty's Reign, chapter 62, intituled,

Acts 12 V. c. 74. and 13, 14 V., c. 62. repealed.

“ *An Act to amend the Act requiring Mortgage of Personal Property in Upper Canada to be filed,*” shall be and the same are hereby repealed; but all Mortgages and sales registered under the provisions of the said Acts shall be held and taken to be as valid and binding as if said Acts had not been hereby repealed. 5

Extent of Act. XIX. This Act shall apply to Upper Canada only.