International Secured Transactions: United States & Canada

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Because of Canada's proximity to the United States and the stability of Canada's commercial and political economy, typical international credit risks are of little consequence in commercial transactions between citizens of these two countries. As a result the vast majority of continental commercial transactions are consummated through credit mechanisms such as open account, time and sight drafts, without resort to security devices. Indeed the question arises whether security devices are used in these transactions at all, and if they are, which ones, to what extent, and what are their functions. Four classes of security devices may be encountered in international commercial transactions: the letter of credit, the corporate and personal guarantee, credit insurance, and the chattel security agreement, all of which are of the same generic nature in that they are used to insure the meeting of obligations. However, only one of these devices will be examined in this study—the chattel security agreement—and then only as it is used in loans and sales by citizens of the United States to citizens of Canada. Incidental reference to the other devices will be made initially, but only to establish the role played by chattel security agreements in relevant transactions. This selection has been made partly because the foreign law which governs security agreements is likely to have greater impact on American citizens than foreign law governing the other security devices, and partly because of interesting recent developments in the field relating to

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1. Credit risks which should be evaluated prior to the establishment of a line of credit for international commercial transactions are related to (a) money: the availability of appropriate currency, easily convertible at a fair exchange rate; (b) politics: political stability and the right of investors to retain or dispose of the currency generated by the investment; (c) the duration of credit; and (d) the uses to which the credit will be put. Harrfield, Credit Mechanisms and Security Devices, 3 Inst. on Private Inv. Abroad, 431-34 (1961).


3. Suretyship is properly regarded as a security device. G. Osborne, Secured Transactions 1, 2 (1967).

4. 12 U.S.C. § 635(c) (1961). This form of security has been around for some time in many of the European countries, but was instituted in the United States as recently as 1962 following the organization of the Foreign Credit Insurance Association (hereinafter referred to as FCIA) pursuant to the authorization of Congress. The FCIA cooperates with the Export Import Bank (hereinafter referred to as Eximbank) in providing comprehensive credit insurance. The alleged purpose of the organization is to promote the export of American goods by guaranteeing the payment of an exporter's accounts receivable under various conditions. See S. Surrey & C. Shaw, A Lawyer's Guide to International Business Transactions 350 (1964); Nicholson, The Program of the Foreign Credit Insurance Association as Adequate Export Incentive, 18 Bus. Law. 483 (1963).
the adaptation of Article 9 of the Uniform Commercial Code to the needs of Canadian provinces.

A glance at the extent of American investment in Canada and at statistics revealing the volume of exports to Canadian purchasers will be helpful in assessing the role of chattel security devices. No data has been found which clearly differentiates between the amount of debt and equity capital invested in Canada, and thus the nature of collateral used to secure loans—whether real or personal—is not determinable. However, total American investment, direct and indirect, mostly in mines, oil wells and factories, is over twenty-one billion dollars.\(^5\) In the area of sales, statistics disclose that between 1960 and 1964 the volume of exports to Canada in terms of billions of Canadian dollars was as follows:\(^6\)

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Value</td>
<td>3,689</td>
<td>3,866</td>
<td>4,302</td>
<td>4,447</td>
<td>5,168</td>
</tr>
</tbody>
</table>

A recent survey by *Dun and Bradstreet* indicates that, depending on the type of goods involved, the frequency of use of credit mechanisms in payment for exports to Canada in 1964 ranged as follows:\(^7\)

<table>
<thead>
<tr>
<th>Credit Mechanism</th>
<th>Frequency Range</th>
</tr>
</thead>
<tbody>
<tr>
<td>Letters of credit—cash</td>
<td>0% to 4%</td>
</tr>
<tr>
<td>Sight draft</td>
<td>0% to 11%</td>
</tr>
<tr>
<td>Time draft</td>
<td>0% to 5%</td>
</tr>
<tr>
<td>Open account</td>
<td>86% to 100%</td>
</tr>
</tbody>
</table>

The survey, which is conducted annually, requests no information concerning the use of security devices other than the letter of credit, although it may be assumed that the other three devices are being used to some degree.

To test the validity of this hypothesis, communications with banks, exporters, and attorneys in various parts of the United States and to a lesser extent in Canada, was made by questionnaire, letter and interview. These sources have confirmed what was earlier assumed: that all four of the security devices in one form or another are currently being employed to finance the export of a small percentage of goods sold to Canadian buyers, as well as to secure loans to Canadian borrowers.\(^8\) The over-all dollar value of goods financed or loans made

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8. In June, 1967, questionnaires were sent to fifty manufacturers or wholesalers who export to Canada, and similar questionnaires, *mutatis mutandis*, were sent to fifty of the largest banks in the United States. Fifty-two per cent of the exporters and seventy per cent of the banks responded. No attempt was made to obtain specific percentages on the frequency of use of the various security devices and credit mechanisms, beyond learning that they were in fact being used in United States-Canada commercial transactions; nor was any attempt made to distinguish between types or classifications of commodities exported and variations in practices related thereto.
through relevant devices cannot be derived from the survey, which was not intended to be statistical on this point, but the survey clearly reveals that security devices do play a part in commercial transactions between citizens of the United States and Canada. With this fact established, attention will now be focused on the role of the security agreement in continental transactions.

**FOREIGN LAW**

Certain questions which are of little or no concern in domestic transactions loom rather large when the security agreement is being considered for use in an international transaction. The first question is which law determines the validity of the device, assuming the device is available at all. Before the general adoption of the Uniform Commercial Code the prevailing view in the United States was that the law of the situs of the goods determined the efficacy of a security interest vis-à-vis third parties where the goods had been removed from one jurisdiction to another with the knowledge or consent of the mortgagee or owner, presumably on the unstated theory that creditors of the situs would have no reasonable means of ascertaining the existence of an outstanding security interest perfected in another jurisdiction. This rule has been qualified somewhat by U.C.C. § 9-103, but the effect of the second sentence of subsection (3)—the most relevant to international secured sales transactions—is not too different in effect from the old rule; so that even if the foreign country

<table>
<thead>
<tr>
<th>Corporate and</th>
<th>Letter of credit:</th>
<th>Personal guarantees:</th>
<th>Credit insurance:</th>
<th>Chattel security devices:</th>
<th>Open account:</th>
<th>Sight draft:</th>
<th>Time draft:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sometime:</td>
<td>16%</td>
<td>8%</td>
<td>4%</td>
<td>12%</td>
<td>84%</td>
<td>32%</td>
<td>20%</td>
</tr>
<tr>
<td>Exclusively:</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>36%</td>
<td>0%</td>
<td>0%</td>
</tr>
</tbody>
</table>

**Response from Exporters:**

*Some of the banks make loans secured by chattel security devices as well as by guarantee, so that the percentages represented in (c) and (d) are not necessarily mutually exclusive. Even in the case of unsecured loans a thin margin of security is sometimes taken in the form of a “negative pledge,” i.e., an agreement by the Canadian borrower “not to mortgage, pledge, assign, etc. certain or all property to any other creditor . . . .”*


had a law similar to U.C.C. § 9-103, compliance with the chattel security law of the intended permanent situs would be necessary. It would be surprising therefore, although not impossible, to find that a foreign country would give extra territorial validity to a security interest under these circumstances when foreign states of the secured party's own country would not. Thus it is essential for an American attorney advising an American client to consult the relevant foreign law to determine the availability and the validity of a security interest at the intended permanent situs of the collateral. In this instance the relevant foreign law is the law of Canada. Since no Canadian case appears to have specifically discussed the significance of a secured party's knowledge of or consent to removal of the collateral from the United States to Canada, we can only speculate on its relevance in future decisions. But it is clear that in some provinces an American secured party would be defeated by third parties irrespective of knowledge or consent, so that it might be reasonable to infer that a Canadian court would invalidate the security interest in a case where knowledge of or consent to the removal existed. Where the goods are already in Canada at the time they become subjected to a security interest in favor of an American citizen, whether by sale or by loan, it would seem even more improbable that the security interest would be protected vis-à-vis third parties without having been perfected in accordance with relevant provincial law.

Assuming the international credit risks are favorable, after determining the applicable law and the availability of the security agreement, other important questions must be answered before the security agreement can be considered a reliable security device. For example, how is the security agreement created and perfected? May the secured party realize on the security in the event of default by the debtor? Do foreign tax consequences arise during performance of the agreement or on default? Will use of a security device constitute "doing business" in one of the provinces, and what effect will this have on the validity of the security agreement assuming the foreign corporation has not "qualified"? Many other relevant questions could be raised, but these are sufficient to indicate the nature of the problem.


12. See supra note 1.

SECURED TRANSACTIONS

CANADIAN CHATTEL SECURITY LAW

Except for the section 88 security device available to chartered banks, the floating charge, and Quebec's law, Canada's chattel security law bears a striking resemblance to the law of the United States prior to the advent of the Uniform Commercial Code. Notwithstanding the common heritage of the two countries, however, the apparent similarities frequently lie only on the surface because of fundamental differences arising from the constitutional division of powers, the federal and provincial statutes, judicial decisions, political and economic influences, the development of financing methods, the reception of British law into Canada's matrix in certain instances, as well as many other factors. An American attorney will therefore discover without surprise or regret, but perhaps with some nostalgia, the conspicuous absence of counterparts to such old favorites as Benedict v. Ratner, Moore v. Bay, Corn Exchange National Bank and Trust Co. v. Klauder, United States v. R. F. Ball Construction Co., etc. On the other hand, many of the problems which have engaged the attention of legal commentators in Canada are similar to those encountered in the United States, for example, the effect of recordation or filing on the interests of third parties; the extent to which an assignee finance company is free from the defenses of the buyer; the rights of condi-

14. Bank Act, Can. Rev. Stat. c. 12 (1952), as amended, [1966-67] Can. Stat. c. 87 (1967). Compared to the rest of the Canadian security agreements, the section 88 security agreement is the essence of simplicity and flexibility, within its functional limitations, and was no doubt the envy of American financiers prior to the Uniform Trust Receipts Act, 9C Uniform Laws Ann. 220 (1966), since it provides for a floating specific lien (not to be confused with the floating charge discussed later) and is perfected by notice filing. Even today some American financing executives are of the opinion this device is superior in some respects to the floating lien of the Uniform Commercial Code. Interview with John M. Walbridge, Ass't Vice-Pres., First Nat'l City Bank, New York, June, 1967. For example, there is strong opinion that UCC § 9-108 which provides a state law rule on what constitutes "new value," will be decided by federal law, thereby leaving the floating lien vulnerable in some instances under the Federal Bankruptcy Act, 11 U.S.C. § 96(a)(2) (1964).


17. 284 U.S. 4 (1931).

18. 318 U.S. 434 (1943).


tional vendors of goods later affixed to reality;²² the removal of the collateral from one registration district or province to another;²³ the inadequacy of the law to accommodate inventory financing;²⁴ and the need for a complete revision of the law.²⁵

Four chattel security devices are encountered in international commercial transactions, including corresponding Quebec law. They are the pledge, the chattel mortgage, the conditional sales agreement, and the floating charge. Because of the simplicity and comparatively universal similarity of the pledge, it will not be discussed directly. The pledge is important in international transactions however, and is used, for example, to secure loans to Canadian finance companies secured by a pledge of notes received by the finance companies from Canadian citizens, and to secure loans to Canadian corporations and individuals by a pledge of marketable securities in an American bank’s possession.²⁶

A chattel mortgage may be used in a variety of ways: to secure loans to either corporate or non-corporate borrowers independent of other security devices; to secure loans to corporations in conjunction with a floating or specific charge regulated by the Corporation Securities Registration Acts and/or real property mortgage; or to secure the balance of the purchase prices following an absolute sale with a mortgage back—an alternative to the conditional sales contract. The conditional sales agreement, of course, is used only to secure the balance owing on goods exported to Canada in those instances where the seller determines such security is desirable. With regard to exports it is interesting to note that as a matter of policy FCIA recommends that exporters obtain further protection through the use of a chattel mortgage or conditional sales agreement wherever possible and that in some transactions this form of additional security may be required, particularly where there is some question about a buyer’s financial strength.²⁷ The floating charge is extremely

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²⁷. Mr. Haskell cites an instance of an American exporter, who had been denied credit insurance on a particular transaction involving several hundred thousand dollars of machinery and equipment, who used a chattel mortgage to secure the balance of the price. The Canadian buyer subsequently went into bankruptcy. The exporter’s security interest in the equipment and machinery was protected. Letter from Paul T. Haskell, Vice-Pres., Foreign Credit Ins. Ass’n, to Professor Dellas W. Lee, July 6, 1967. Eximbank’s policy on this point is
important to international corporate financing since it may be used to charge a Canadian Corporation's present and future personal property assets, including accounts receivable, to secure bonds and debentures which in turn are given to American banks as security for loans—something which was not possible in the United States until recently.

Uniform acts governing the chattel mortgage, conditional sales agreement and floating charge have been drafted and recommended by the Conference of Commissioners on Uniformity of Legislation in Canada. These acts have enjoyed varied success among the common law provinces. Quebec has adopted none of them.

**The Chattel Mortgage**

Taking inspiration from the laws of New York, Upper Canada adopted its first chattel mortgage act in 1849, and thereafter similar legislation spread to the other provinces. Today, most of the common law jurisdictions have the Model Bills of Sale Act (hereinafter referred to as the uniform act) as recommended or with slight modifications. British Columbia and Ontario do similar to FCIA's. The need for security in addition to credit insurance is determined "after appraising the credit worthiness of the foreign purchaser. Loans relating to the sale of light aircraft are more likely to be secured than sales involving other United States Products." Letter from B. Jenkins Middleton, Vice-Pres., Program Planning and Information, Eximbank of Washington, D.C., to Professor Dellas W. Lee, July 19, 1967.


30. This organization is the counterpart to the National Conference of Commissioners on Uniform State Laws. The distinction between "model" and "uniform" acts prevailing in the United States apparently has never been made in Canada in view of the fact that the avowed purpose of the Canadian Conference is to promote "uniformity" of legislation in the provinces and that the two terms are used interchangeably. See [1966] Proceedings of the Forty-Eighth Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada, Historical Note, 10. All model acts will be referred to as uniform acts in the text.

31. Compare Mortgages and Sales of Personal Property, [1849] Upper Can. Stat. 2 V.C. 74, §§ 1, 2, with [1833] N.Y. Sess. Laws, ch. 279, § 1; cf. also The Bills of Sale Act, 17 & 18 Vict. c. 36 (1854); and The Bills of Sale Act, 29 & 30 Vict. c. 96 (1865); and the Bills of Sale Act, 41 & 42 Vict. c. 31 (1878); and The Bills of Sale Act (1878) Amendment Act, 45 & 46 Vict. c. 43 (1882). Some courts were aware of the differences in origin between the Canadian and the English acts, see Marthinson v. Patterson, 19 Ont. A.R. 188 (1892); Hunt v. Long, 35 Ont. L.R. 502, 27 D.L.R. 337 (1916). New York did not insert a time period within which registration was required, until 1849.


33. Reference will be made to the uniform act in lieu of citing to specific provincial acts where the law is quite similar.
A chattel mortgage is a contract which conveys legal title\textsuperscript{34} of presently owned collateral to the mortgagee as security for a debt, with possession of property remaining in the mortgagor, who has an equitable right to redeem the property on payment of the debt.\textsuperscript{36} The lien theory which grew up in the United States\textsuperscript{37} has not been recognized in Canada.

It will be noted that all the Canadian statutes regulating chattel mortgages contain the phrase "bill of sale"—for the expected reason that these statutes also regulate sales. Not all sales are governed, however, in that to be subject to the act a sale must be absolute as opposed to conditional with the goods being left in the possession of the vendor, thereby creating circumstances which are potentially deceptive to third parties because of the seller's apparent continued ownership. In such case the purchaser must file the agreement, thereby giving public notice of the transaction. If possession of the goods is transferred to the buyer at the time of sale the transaction falls outside of the act,\textsuperscript{38} but if the true intent of the parties is to create a security interest rather than a sale, compliance is required.\textsuperscript{39} Whether the transaction is one of sale followed by retention of possession or of mortgage, essentially the same principles are applicable and frequently the terms "chattel mortgage" and "bill of sale" are used interchangeably.\textsuperscript{40}

In theory the chattel mortgage may be used to finance a sale as well as to secure a loan or other obligation, but in practice the chattel mortgage is used almost exclusively as a lending device, with the conditional sales contract occupying the sales field. This is somewhat surprising in view of the flexibility of the Canadian chattel mortgage. In many respects it appears to be more suit-
able to inventory financing than the conditional sales contract. For example, use of a chattel mortgage to consummate a sale may arise in two ways: as a mortgage back to the vendor immediately after the execution of a bill of sale, or as a result of the buyer arranging a loan for the purchase price followed by a chattel mortgage to the lender. It may secure future advances, and after-acquired property may stand as collateral, providing such property is capable of adequate description. Unrestricted dominion and control over the proceeds, where the mortgagor is given power of sale, has never been a problem. However, no provision is made for a generalized notice filing system, a continuously perfected security interest which shifts to the proceeds or new stock arising after disposition of the old, nor a clear statement of the relative priorities of conflicting interests in the same collateral.

To be valid, a non-possessory chattel mortgage must be in writing, contain a “sufficient and full description” of the collateral, and the terms of the agreement, including the consideration. It must be signed by the grantor in the presence of a witness and be accompanied by two affidavits, one by the attesting witness identifying the bill of sale and stating the date of execution, the other by the grantee, stating the nature and amount of consideration and that

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45. See Benedict v. Ratner, 268 U.S. 353 (1925); Skilton v. Codington, 185 N.Y. 80, 77 N.E. 790 (1905). With respect to accounts receivable, the debtor's dominion and control over the proceeds has not led to an invalidation of the security agreement but it has had consequences almost as devastating. For example, an assignment of book debts which authorized the debtor to “deal with” the proceeds in the ordinary course of business led to a finding that the agreement was a floating charge and therefore vulnerable to an intervening garnishment debtor. Great Lakes Petroleum Co. v. Border Cities Oil Ltd., [1934] O.R. 244, 2 D.L.R. 743. Fortunately for financiers the Great Lakes case has been distinguished. Robinhood Flour Mills Ltd. v. Fuller Bakeries Ltd., 42 W.W.R. 321, 40 D.L.R. 2d 207 (Man. C.A. 1963). A provision that the debtor will hold the proceeds “in trust” similar to the one in the latter case is found in most assignments of accounts receivable documents used today.
47. Model Bills of Sale Act, § 6(c). It is important to bear in mind that interest rates are regulated by federal legislation and that if an interest rate over 5% is to be upheld, it must always be expressed in terms of the total annual interest rate. Interest Act, Can. Rev. Stat. c. 156, § 4 (1952); Small Loans Act, Can. Rev. Stat. c. 251, § 3 (1952); Buchner, Bonus Mortgages and Unconscionable Transactions, 3 West. Ont. L. Rev. 21 (1964); see also Bergeron, Des ventes dites conditionnelles, 22 Rev. du Bar. 150 (1962).
it is justly due or accruing due and not contrived to defeat the grantor's creditors.  

A chattel mortgage or bill of sale may be perfected either by the secured party taking immediate possession of the goods or by filing the agreement as required by the acts. The rationale for the modes of perfection can be traced to a principle which arose in an agrarian economy at a time when property rights meant everything and commercial enterprise comparatively little—nemo dat quod non habet—one cannot confer on another a better title than he himself has. In any dispute between an owner or mortgagee and another conflicting claimant of goods, with the exception of a narrow area of protection afforded a bona fide purchaser in the ordinary course of business, at common law the owner always prevailed, usually at the expense of a third party who had been deceived by the debtor's apparent ownership of the goods. It was this situation the bills of sale legislation was designed to correct. Otherwise secret liens thus become public and open to the scrutiny of all potential creditors, subsequent purchasers or mortgagees by virtue of mandatory filing, or registration requirements as they are more commonly called. When a purchaser or mortgagee takes possession of the goods at the time of execution, third parties are not subjected to the same potentially misleading circumstances, and accordingly possession is a recognized mode of perfecting a bill of sale. Of course, if the real essence of the transaction is a sale rather than security, and the buyer takes possession of the goods at the time of the sale, nothing further need be done to protect the purchaser since the sale is absolute in nature and falls outside of the act.

Suppose, however, that a filing has not been made and possession has not been taken immediately upon execution, may the mortgagee subsequently perfect the agreement by taking possession? The answer is yes, if possession is

53. Although a distinction was once made to the effect that "filing" referred to the depositing of a chattel mortgage at the public registry and "registration" to the registrar's act of recording and indexing the document for the convenience of subsequent searchers, J. Barron & A. O'Brien, Chattel Mortgages and Bills of Sale 33-34 (3d ed. 1927), the terms will be used interchangeably since this distinction appears to have been lost. The place of registration is usually in the registration district where the chattels are situated at the date of the execution of the bill of sale. Model Bills of Sale Act § 8; The Bills of Sale and Chattel Mortgages Act, Ont. Rev. Stat. c. 34, § 21 (1960). Some provinces provide for central registration, The Chattel Securities Registration Act, Alta. Rev. Stat. c. 23, § 6 (1955) (as amended 1966); Bills of Sale Act, [1961] B.C. Stat. c. 6, § 9; Bills of Sale Act, 1955, Newf. Rev. Stat. 22, § 7 (1952); The Bills of Sale Act, Sask. Rev. Stat. c. 392, § 6 (1965).
taken before creditors, purchasers or other mortgagees intervene.\textsuperscript{54} Even if a mortgage is invalid by virtue of a defect, or failure to file or failure to renew, the mortgagee may be able to perfect or "cure" by taking possession before third parties intervene.\textsuperscript{55} However, there appears to be some difference of opinion\textsuperscript{56} on this latter point.

Filing must be effected within thirty days of execution in those provinces having the Uniform Act,\textsuperscript{57} within twenty-one days in British Columbia,\textsuperscript{58} and either five or ten days, depending on the county, in Ontario.\textsuperscript{59} It is apparent that failure to register within the prescribed time will result in the nullity of the mortgage as against certain intervening third parties,\textsuperscript{60} and if the time for registration has passed, it may be necessary to obtain a court order permitting late registration,\textsuperscript{61} which, if permitted at all, will be subject to accrued rights.\textsuperscript{62} However, even in the case of timely registration the rights of the mortgagor as against intervening third parties are not quite so apparent. To reverse the question, what are the rights of creditors, purchasers and mortgagors arising between execution and the time allotted for registration, \textit{i.e.,} will timely registration have a relation back effect? A specific answer is not provided by the acts and a reading of them might lead to the conclusion that in any event the results would not be uniform. For example, in most of the provinces the mortgage "takes effect" only from the time of registration.\textsuperscript{63} British Columbia nullifies the mortgage only "after the expiration of the time limited . . . for registration,"\textsuperscript{64} and Ontario merely requires registration within the time stipulated, "otherwise the sale is absolutely null and void . . . ."\textsuperscript{65} What case law is available


\textsuperscript{56} Matter of Gilbert, [1963] 1 Ont. 455, 37 D.L.R.2d 578; Heaton v. Flood, 29 Ont. 87 (1897); Trusts & Loan Co. v. Wright, 11 Man. 314 (1895); Clarkson v. McMaster & Co., 25 Can. S. Ct. 96 (1895); Young v. Short, 3 Man. 302 (1885); Barker v. Leeson, 1 Ont. 114 (1882).

\textsuperscript{57} Model Bills of Sale Act § 8(1).

\textsuperscript{58} Bills of Sale Act, [1961] B.C. Stat. c. 6, § 10(a).


\textsuperscript{60} The protected class of third parties is either all or certain creditors, subsequent purchasers and mortgagees. Model Bills of Sale Act, §§ 4(1), (2); Bills of Sale Act, [1961] B.C. Stat. c. 6, § 16(1); The Bills of Sale and Chattel Mortgages Act, Ont. Rev. Stat. c. 34, § 8 (1960).

\textsuperscript{61} Model Bills of Sale Act § 21(1); cf. The Bills of Sale Act, Sask. Rev. Stat. c. 392, § 25 (1965) (No court order is required.).

\textsuperscript{62} Model Bills of Sale Act § 22.

\textsuperscript{63} Id. § 4(2).

\textsuperscript{64} Bills of Sale Act, [1961] B.C. Stat. c. 6, § 16(1).


But note that the mortgage "takes effect" upon execution. Id. § 12.
indicates intervening third parties are likely to prevail over the chattel mortgagee in most jurisdictions.\footnote{66}

As was characteristic of chattel mortgage legislation in the United States, Canadian statutes make no comprehensive provision for resolving priority problems where conflicting claims are made to the same collateral. It has been necessary for the courts to reason from a number of terse provisions which reveal little legislative forethought. Where perfection is accomplished through possession, the relative priorities are easily determined since, subject to what has been said regarding delays, possession is generally recognized both in civil and common law to give the highest protection available to the holder. But filing, being a non-possessory method of perfection, by its very nature permits an infinite number of hidden conflicting interests to arise with the possibility that equities might weigh more heavily in favor of some claimant other than the perfected party and, of course, it is possible that more than one party might hold a perfected interest in the same collateral. Only a few of the problems will be suggested here.

The acts simply state that unless a bill of sale is registered as required, it is void "as against a creditor and as against a subsequent purchaser or mortgagee who claims from or under the grantor or mortgagee in good faith, for valuable consideration, and without notice . . . ,\footnote{67} leaving the implication, and it will be seen later, in some instances, only an implication, that timely filing will protect the grantee against third parties mentioned. In resolving any priority problem it is important to have the \textit{nemo dat} principle in mind at the outset since only those persons specifically mentioned are permitted to have the protection of the acts.

Clearly, a perfected chattel mortgage takes priority over a general creditor. But even where the chattel mortgage is unperfected there remains the question of whether the challenging party falls within the contemplated creditor ambit.\footnote{68} The majority of jurisdictions require the creditor to have crystalized his rights by judicial process;\footnote{69} others permit a simple contract creditor to prevail.\footnote{70}

\footnote{66. Consol. Fin. Co. v. Alfke, 31 W.W.R. (n.s.) 497 (Alta. 1960). This is an important case because it is the only one that has construed the phrase "takes effect" found in the uniform act. Model Bills of Sale Act § 4(2). \textit{ Cf.} Matter of Union Accept. Corp., 16 W.W.R. (n.s.) 283, [1955] 4 D.L.R. 822 (Alta.) (\textit{ Quaere:} Whether the result would have been the same if the sale had been in the ordinary course of business?) Ontario has stood quite firmly against relation back. Haight v. McInnis, 11 U.C.C.P. 515 (1862); Fechan v. Bank of Toronto, 10 U.C.C.P. 32 (1860). \textit{But see} Fechan v. Bank of Toronto, 19 U.C.Q.B. 474 (1860). \textit{Compare} the approach taken in the case of conditional sales agreements infra note 127.


\footnote{69. \textit{E.g.}, Bills of Sale Act, [1961] B.C. Stat. c. 6, § 16(1) (1960); Richards & Brown, 96
trustee in bankruptcy is generally permitted to assail the unperfected mortgage on the ground that he represents the creditors and ought to be able to exercise their rights.\textsuperscript{71} There is a division of opinion on whether liquidators come within the protected class.\textsuperscript{72}

Likewise, it would appear almost too clear for discussion that a perfected chattel mortgage is valid as against subsequent mortgagees. There are no equities or commercial necessities which would demand otherwise. Surely it is not too much to expect a lender, whether in or out of the ordinary course of business, to search the filing records before he makes a loan, or to suffer subordination. The same expectation would exist with regard to all other consensual liens, such as a subsequent conditional sale,\textsuperscript{73} a section 88 security interest,\textsuperscript{74} and a floating charge,\textsuperscript{75} which are all of the same generic class even though not regulated by the bills of sales legislation. It is a different matter, of course, if the prior chattel mortgage is not perfected, in which case even a subsequent unperfected bill of sale may prevail.\textsuperscript{76}

Subsequent purchaser cases may be either of two types: those involving a chattel mortgage taken to secure a loan or other obligation, by far the most common, or those where the chattel mortgage has been taken back to secure the balance of the purchase price following an absolute sale. In the former, the mercantile agent provisions of the English Factors Act and/or the Sale of Goods Act\textsuperscript{77} are not applicable, and a subsequent purchaser may not defeat the mortgagee unless the mortgagor had express or implied authority to sell the goods. This may be found, for example, where the mortgagor is a trader or dealer and the mortgage covers stock in trade which is later sold in the ordinary course of business to a bona fide purchaser.\textsuperscript{78}


\textsuperscript{77} 52 & 53 Vict. c. 45, §§ 2(1), 9 (1889), \textit{quoted infra} note 144; 56 & 57 Vict. c. 71, §§ 25(2), (3) (1892), \textit{quoted infra} note 145. References in the text are to the provisions of the English acts unless otherwise indicated.

\textsuperscript{78} Matter of Indus. Accept. Corp. & Serv. Garage, Ltd. & Thomas, [1933] 2 D.L.R.
Where the mortgage has been used to secure the balance of the purchase price, the problem is a little more complex. In this instance it becomes necessary to consider the impact of counterpart legislation to the Factors Act and/or Sale of Goods Act in those provinces which have one or both of the statutes as they relate to the registration philosophy of the bills of sales acts. Is filing notice under these acts, and if so, what is its bearing on the rights of subsequent purchasers? Does it make a difference whether the purchase was “in” or “out” of the ordinary course of business? Since these questions are most frequently encountered in connection with a conditional sales contract they will be dealt with later under that heading. Before leaving the subject a few further observations will be made to lay a foundation for future discussion.

Five jurisdictions have the relevant provisions of both the Factors Act and the Sale of Goods Act, five have the relevant provision of the Sale of Goods Act, but not the Factors Act, and Prince Edward Island has only the Factors Act. The significant provisions are the counterparts to section 9 of the Factors Act and section 25(2) of the Sale of Goods Act. In essence these sections provide that a person who has agreed to buy goods and who has taken possession of them or a document of title with consent of the seller, can transfer to a purchaser, pledgee, or one taking by some other mode of disposition in good faith and without notice, as good a title as if the transferor had been a mercantile agent in possession of the goods or document of title with consent of the owner.

The Sale of Goods Act contains an excluding provision which states as follows:

The provisions of the Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security.

It has been thought that this provision would not exclude the application of the mercantile agent provisions of the Sale of Goods Act to conditional sales, and since an absolute sale followed by a mortgage back is of the same nature,

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79. See text at infra note 143.


there would seem to be no reason for taking a different view in this case. No
doubt the provision was intended to apply to a transaction intended as security
cloaked as a sale, and not to a bona fide sale, whether or not the price is secured
by a mortgage on the goods. There is no similar exclusionary provision in the
Factors Act.

Remedies of the mortgagee are determined largely by the terms of the
agreement and the common law, although there is a considerable body of
regulatory legislation relative to seizure and sale.85 If the agreement permits,
the mortgagee may take possession of the goods whenever he deems himself
insecure, notwithstanding the fact that there has not yet been a default. More-
over, he may demand payment of the entire balance, again, if the agreement so
provides.86 In the absence of such a provision the mortgagee may not take
possession until the mortgagor is in default, which may occur on failure to pay,
removal of goods from the registration district without the mortgagee’s consent,
bankruptcy of the mortgagor, attachment of the goods by third parties, etc.
Upon default the mortgagee may then, providing the agreement permits, enter
the debtor’s premises and peaceably seize the goods and sell them either by
private or public auction.87 In exercising this remedy the mortgagee must comply
with any laws governing seizure,88 and the subsequent sale must be executed
in a reasonable and prudent manner.89 Deficiency actions may be permitted.90
An action on the covenant for the debt is an alternative remedy which may be
exercised only if the mortgagee is able to return the goods upon payment of the
debt.91 Foreclosure is always another alternative remedy, but because it is
slow and requires court action it is seldom sought.92

THE CONDITIONAL SALE

The Uniform Conditional Sales Act was promulgated by the Conference of
Commissioners on Uniformity of Legislation in Canada in 1922, following
which the act received various amendments and underwent revisions in 1947
and again in 1955. The uniform act has been adopted, as recommended or with
slight modifications, by New Brunswick, the North West Territories, Nova
Scotia, Prince Edward Island, and the Yukon Territory.93 British Columbia

86. Meincke v. City Dairy, Ltd. (No. 2), 40 Man. 465, [1932] 2 W.W.R. 398; Westa-
89. J. & W. Inv., Ltd. v. Black, 38 D.L.R.2d 251, 41 W.W.R. 577 (B.C. 1963); Bay
90. Severn v. Clarke, 30 U.C.C.P. 363 (1879); contra Silk Hat Restaurant, Ltd. v.
37 U.C.Q.B. 308, aff’d, 40 U.C.Q.B. 274 (1875).
Rennick v. Bender, 18 Sask. 34, [1924] 1 D.L.R. 739.
adopted the act in 1922 but later repealed it. However, British Columbia, Saskatchewan, and Newfoundland have many provisions patterned after the uniform act.\textsuperscript{94} Ontario's act is somewhat different, but Manitoba's act is a vast departure from the usual scheme of conditional sales legislation.\textsuperscript{95} 

Notwithstanding the comparatively poor reception given to the uniform act, all the common law provinces provide for the creation of a valid conditional sale wherein the seller retains title to the goods sold, with possession being delivered to the buyer who ultimately may acquire title by paying the price or performing some other condition.\textsuperscript{96} If the buyer fails to perform according to the terms of the contract the seller may "repossess" the goods and in some provinces exercise further rights against the buyer, as will be discussed later. The development of an independent but related form of security device, the hire purchase agreement, prevalent in England where the courts still fail to look through form to substance,\textsuperscript{97} has been restrained in Canada by virtue of the fact that under the uniform act,\textsuperscript{98} as well as most of the other acts,\textsuperscript{99} a conditional sale includes a hire purchase agreement by definition. Although both devices are thereby authorized, identical functional limitations, formal requisites, and methods of perfection, lead to the conclusion that the difference between the two devices in Canada is primarily academic.

The observation made earlier that although the chattel mortgage could be used, and in several respects is more flexible, the conditional sales contract is the device commonly employed to finance inventory and retail sales. The financing of hard goods at the inventory level is very similar to the methods sometimes followed in the United States during its trust receipt and conditional sales era.\textsuperscript{100} However, there is only one section in the acts which suggests that the draftsmen thought the conditional sales agreement would be used in this manner and this is the so-called "traders" provision, the counterpart to section 9 of the American Uniform Conditional Sales Act, which permits a buyer in the ordinary course of trade to cut off the inventory financier's interest under certain conditions.\textsuperscript{101} Similar to the chattel mortgage acts, no provision is made for notice

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\textsuperscript{98} Model Conditional Sales Act § 2(f).


\textsuperscript{100} Kripke, \textit{Inventory Financing of Hard Goods}, 74 Banking L.J. 1013, 1016-17 (1957). 

\textsuperscript{101} Model Conditional Sales Act § 9.
filing or a continuously perfected security interest in proceeds derived from disposition of the collateral. In contrast to the chattel mortgage acts no provision is made for after acquired property and future advance clauses. The Uniform Trust Receipts Act came to the rescue of inventory financing in the United States, but nothing of a comparable nature has been developed in Canada, outside of the validation of certain types of financing available to chartered banks.

Although the provinces are unanimous only in their requirement that the agreement must be in writing and signed by the buyer, there is substantial agreement in regard to other formal requisites. Most of the provinces require a description by which the goods may be “readily and easily known and distinguished,” and in some provinces the serial number of automobiles is required, although Saskatchewan requires the serial number of all goods that have one. Ontario merely requires a statement “describing the goods sold or lent for hire.” A statement of the “amount of the purchase price remaining unpaid and the terms and conditions of payment” are required by all provinces having the uniform act as well as by Alberta and Saskatchewan. British Columbia requires only that the unpaid balance of the purchase price or the terms and conditions of the hiring be set forth. Ontario has a more comprehensive requirement—that the “terms and conditions of the sale” must be set forth. The uniform act and the acts of two other provinces stipulate that the time of execution must be “prior to, at the time of or within 10 days after delivery,” while Alberta merely requires registration to be within thirty days of delivery. Ontario also stipulates no time for execution but requires registration to be within ten days thereof. Affidavits of bona fides by sellers are no longer required except in conjunction with renewal statements in those provinces which require renewal, and in the case of goods to be affixed to land in some

102. Brown & Murray, Ltd. v. North Star Oil, Ltd., 33 W.W.R. 49 (Man. 1960) (An attempt to include future goods under a conditional sale agreement was held to be in the nature of a secret lien and invalid for want of compliance with the Bills of Sale Act).
103. For an account of the unsuccessful attempts to institute the use of unregistered trust receipts in Canada see, Mandell, Trust Receipt Financing, 19 U. Toronto Fac. L. Rev. 127 (1961).
provinces. However, Saskatchewan, following the discard of its affidavit requirement, inserted a provision nullifying conditional sales agreements as against creditors and subsequent purchasers of the buyer. In the event parties inadvertently fail to comply with the formal requisites, or if other errors or omissions arise, they may be corrected by court order subject to accrued rights, and in all provinces except Alberta and Ontario complaining parties must show they have been actually misled by the irregularity. As was often the case in the United States, the courts have been extremely conservative in dealing with these requirements, thereby manifesting tacit hostility to secured creditors.

Registration or filing is the most widely used system for perfecting a conditional sale. However, in the case of manufactured goods, several provinces have perpetuated a novel method which contemplates little more than marking the goods with the seller's name. Taking possession is not generally considered a method of perfecting a conditional sale and some provinces specifically provide that taking possession will not validate an unregistered conditional sale as against third parties whose rights have arisen during the interim. The implication remains, however, that taking possession would protect the seller against parties whose rights arise thereafter. In Ontario perfection is possible by attachment, in effect, in the case of “household furniture other than pianos, organs and other musical instruments. . .”

Typically the acts provide that where a sale has been made reserving title to the goods in the seller with possession delivered to the buyer, the agreement or a true copy must be filed or registered in a particular place within a specified time. Thirty days from execution in the most common period permitted for registration. British Columbia allows twenty-one days and Ontario ten days. As noted earlier, most of the provinces permit execution to take place

124. Ont. Rev. Stat. c. 61, § 2(1)(b) (1960). It would appear that since Ontario's time runs from execution as opposed to delivery, the time could be postponed indefinitely,
up to ten days after delivery, thereby implying that the vendor will be protected against intervening third parties during this period. Add to this the twenty-one days in British Columbia and the thirty days in most of the other provinces allowed for registration and we have the unusually long period of thirty-one to forty days during which a valid secret lien may be in existence. 125

This raises the question whether the time allowed for registration is a true grace period with a relation back effect of the type encountered in some of the United States or merely an expression of policy that in no event will a conditional vendor be protected against third parties unless the agreement is filed within the specified time, leaving open the question whether intervening third parties may prevail notwithstanding timely filing. Does it make a difference if the registration is late, or if the third party intervenes after the time for filing but before registration is effected? Since some of the provinces have legislation modeled after the English Factors Act and the Sale of Goods Act, any discussion of these questions with regard to the rights of purchasers will be qualified by those acts to the extent they are applicable and also by the rules of estoppel and agency. They will be discussed later in connection with the subject of priorities.

Although the acts imply that timely registration will protect vendors against intervening third parties, considerable doubt has been expressed on this point. 127 This is somewhat surprising in view of the fact that before the conditional sales acts were adopted the common law passionately protected the owner's rights under the nemo dat rule. Superimpose on this a conditional sales statute which only purports to protect the rights of certain third parties unless a conditional sales agreement is registered within a specified time and the inescapable conclusion is, irrespective of its commercial desirability, that timely

thereby validating a perpetual secret lien. Reading Ontario's provision in id. §§ 2(1)(a), (b) conjunctively, as it should be read, would lead to the conclusion (Alta. Rev. Stat. c. 54, § 3(1) (1955) looks similar in this respect) that the conditional sales agreement is invalid as against any of the intervening third parties mentioned unless the agreement is executed prior to their intervention and then, providing registration is within 10 days following execution (30 days from delivery in Alberta) the vendor would prevail. So far as Ontario is concerned, this still does not set any mandatory time within which execution must be accomplished, but as a practical matter the fear of intervening third parties arising prior to execution but after change of possession would no doubt be sufficient motivation to compel execution before or shortly after delivery in most instances. Thus the difference in wording between the acts on this point would be of little significance in practice.

125. The third parties generally described are subsequent purchasers or mortgagees in good faith and for valuable consideration, and creditors of the buyer. Model Conditional Sales Act § 3; Ont. Rev. Stat. c. 61, § 2(1) (1950). Alberta: Alta. Rev. Stat. c. 54, § 3 (1955), and British Columbia: B.C. Rev. Stat. c. 70, § 15 (1960) require the creditors to have risen to the level of judgment or execution creditors or, in the case of British Columbia, to be represented by a trustee in bankruptcy.


127. Indus. Accept. Corp. v. Munro, [1950] Ont. W.N. 220, [1950] 3 D.L.R. 80. "Subsequent purchaser" was construed to include any purchaser, not just those arising after the expiration of the period prescribed for timely filing. Although filing was not within the ten day period as required, the reasons given for the decision indicate timely filing would have made no difference.
registration will preserve to the conditional vendor his common law rights against these parties, except to the extent to which they are nullified by the provisions of the same or other statutes or judicial decisions. Accordingly, a comparatively recent Alberta case held that timely registration will protect the conditional vendor against an intervening purchaser.

The uniform act permits an extension of time for registration where failure to file is due to inadvertance, but this is "subject to the rights of other persons accrued by reason of the omission." Surely, only rights arising after the date for timely registration could be said to have arisen "by reason of the omission" to register in time, meaning that third parties arising before the expiration of the registration period would not prevail over the conditional vendor. British Columbia and Saskatchewan make no express or implied distinction between the rights of third parties arising before and after the period for timely registration so that the vendor's rights would be preserved under the nemo dat rule. Ontario expressly provides that the vendor's interests will be valid as against third parties "only from the actual date of registration." In all provinces except Alberta and Ontario, however, intervening third parties will prevail against the conditional vendor unless they were actually misled by the late registration.

Several provinces exempt certain sellers of manufactured goods from registering a conditional sale agreement where the name of the seller is plainly affixed to the goods and the seller maintains an office in the province at which further information regarding ownership of the goods may be obtained. Alberta

128. Commercial Fin. Corp. v. Stratford, 47 Ont. L.R. 392 (1920). The court indicates that filing puts the conditional vendor in the same position he would have been in if the Act had not been passed. See also Commercial Equip. Rentals, Ltd. v. Can. Fairbanks-Morse Co., 42 W.W.R. 177 (Alta. 1963).

129. Klimove v. GMAC, 14 W.W.R. 463, 2 D.L.R. 215 (Alta. 1955). This case was distinguished in a case involving a chattel mortgage on the ground that under the Act the mortgage did not "take effect" until registration, and that no similar phrase was in the Conditional Sales Act. Consol. Fin. Co. v. Alfke, 31 W.W.R. (n.s.) 497 (Alta. 1960). The Klimove case does not specifically indicate whether the vendee was a dealer or trader, but the fact that the second buyer searched the registry of liens and encumbrances before buying indicates that he probably was not. In this event the sale would not have been in the ordinary course of business. Quaere: Whether the result would have been the same if the sale had been in the ordinary course of business? Whether the "sale" in Indus. Accept. Corp. v. Munro, [1950] Ont. 130, [1950] 1 D.L.R. 817, [1950] Ont. W.N. 79, was in the ordinary course of the seller's business is equivocal, but it was said that the "purchase" was in the ordinary course of business, if such a distinction is possible. Id. at 131, [1950] 1 D.L.R. at 818, [1950] Ont. W.N. at 79. That Munro did involve a "sale" in the ordinary course of business would appear to be the only rational basis for reconciling the decision with the rest of the law.


and Ontario allow this method of perfection for any seller of manufactured goods. Manufacturers and wholesalers may mark the goods under Saskatchewan law, but the transactions in which this is authorized are restricted to manufactured goods sold "to a buyer for resale who sells such goods in the ordinary course of his business." Most of the provinces make this system of perfection optional to registration. However, Manitoba not only has no optional registration, but, as noted earlier, has no system of registration whatever. Since none of the provinces requires anything more than the name and address of the party claiming an interest, it is not necessary for the inscription to say that the party is the owner or to give other information, this method of perfection come perilously close to validating a secret lien.

In sorting out the relative priorities between conditional vendors and subsequent purchasers it is necessary to deal with several statutes which, because their true intent has been misunderstood, have caused this area of the law to become unduly complex. In view of the inclination of legislatures to play "follow the leader" in adopting legislation, the statutes will be dealt with in the order they were adopted by the first few provinces on the hypothesis that these provinces—above all others ultimately to adopt the relevant statutes—would have considered their purpose and effect on existing law, and that this approach might permit a rational reconciliation of relevant provisions. The general order of adoption by most of the jurisdictions was: Conditional Sales Acts, Factors and/or Sale of Goods Acts, and then a "traders" section was added to most of the Conditional Sales Acts.

See text at supra note 79.


138. The rationale which follows would also be applicable to the rights of purchasers of goods encumbered by a chattel mortgage taken back to secure the balance of the price, as mentioned earlier. See text at supra note 79.


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As always, the discussion must begin with the common law *nemo dat* principle under which an owner's interest in goods could not be impaired without his authority or consent except by sales in market overt.\(^{140}\) Accordingly, an owner who sold goods and transferred possession to the buyer, reserving title to himself until payment, would prevail over third parties who had subsequently purchased the goods, even without notice of the owner's interest and notwithstanding the fact that no reasonable and speedy means existed by which a purchaser might discover the owner's outstanding interest. To correct this inequity, or at least to give subsequent purchasers and other named third parties, some means of self-protection, conditional sales acts were adopted in most of the provinces, requiring conditional vendors to file their agreements or suffer the consequences of invalidity as against various third parties.\(^{141}\) Thus a failure to file would deprive the owner of his common law rights against subsequent purchasers and, at least at this stage of development, filing would preserve these rights even against a purchaser in the ordinary course of business, except to the extent that he obtained protection at common law, which might be thought to be null following the enactment of filing statutes.\(^{142}\)

England, having no filing requirements for conditional sales contracts, had developed a series of Factors Acts, later embodied in the Sale of Goods Act, to cure the same problem filing had been designed to rectify in Canada. Upon adoption of counterparts to these acts by Canadian provinces the question arose: Does filing constitute notice to all, some, or none of the subsequent purchasers?\(^{143}\)

If filing were found to constitute notice to all purchasers it would mean in effect that the legislature had adopted the relevant provisions of the Factors Act and/or Sale of Goods Act for nothing. On the other hand, if filing failed to constitute notice, even purchasers out of the ordinary course of business would prevail over conditional vendors notwithstanding timely filing. In provinces where Conditional Sales Acts preceded the Sale of Goods Act it could hardly be expected that the draftsmen of the Conditional Sales Acts would have furnished an answer to this specific question. However, an examination of the English provisions which were adopted almost verbatim by most of the provinces will give insight to the problem. Section 9 of the Factors Act provides:

> Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, or under any agreement...

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141. Contemporary statutes render a conditional seller's interest void "as against a creditor, and as against a subsequent purchaser or mortgagee claiming from or under the buyer in good faith, for valuable consideration, without notice, ... ." Model Conditional Sales Act § 3, Newf. Rev. Stat. bill 62, § 3 (1952); Ont. Rev. Stat. c. 61, § 2(1) (1960); Sask. Rev. Stat. c. 393, § 3(1) (1965).


143. For similar questions relative to the use of a chattel mortgage to secure the price see text at supra note 79.
for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.¹⁴⁴

Section 25(2) of the Sale of Goods Act¹⁴⁵ is identical to section 9 of the Factors Act except that it omits the phrase "or under an agreement for sale, pledge or other disposition thereof," which is of no significance to the point under discussion. To determine the effect of a sale by a mercantile agent section 2(1) of the Factors Act must be examined:

Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if authorized by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same. [Emphasis added.]

Section 25(3) of the Sale of Goods Act states:

In this section the term "mercantile agent" has the same meaning as in the Factors Act.

Thus, under the English Acts it was only when a mercantile agent was "acting in the ordinary course of business . . ." that a subsequent purchaser could even hope to cut off the rights of a conditional vendor, assuming there had been legislation in England similar to the Conditional Sales Acts in force in the provinces. It will be observed that by section 9 of the Factors Act certain persons other than mercantile agents are, in effect, deemed to be mercantile agents or to have similar powers in certain circumstances. But it is submitted that it was never intended that such persons be able to cut off the owner's rights to goods except where they too sold or acted "in the ordinary course of business . . ." The English courts themselves have overlooked this qualification.¹⁴⁶ Any other view would lead to the distinction that purchasers from a mercantile agent out of the ordinary course of business would be denied the cut-off protection of the act while such purchasers from a "non-mercantile agent" would not. Why should purchases from non-mercantile agents be favored above those buying from a mercantile agent? Surely there is no valid basis for

¹⁴⁴ 52 & 53 Vict. c. 45 (1889).
¹⁴⁵ 56 & 57 Vict. c. 71 (1893).
¹⁴⁶ Lee v. Butler, [1893] 2 Q.B. 318. Although it is admitted that there might have been some point to this decision since England did not have a filing system to protect buyers out of the ordinary course of trade, an argument based on the qualification mentioned above was not made, and the court did not consider the question whether parliament had intended to go so far in enacting the Factors Act.
such a distinction and it is unlikely Parliament thought that there was. If the distinction were eliminated a determination that filing under a Conditional Sales Act does not constitute notice under relevant provisions of the Factors Act and Sale of Goods Act would result in the conclusion that only purchasers in the ordinary course of business would prevail over the conditional vendor who had properly filed. This is eminently realistic since purchasers out of the ordinary course of business can be expected to search before buying under today’s conditions.\textsuperscript{147}

Alberta, New Brunswick, and probably other provinces have varied the definition of mercantile agent as follows:

“mercantile agent” means a mercantile agent having, \textit{in the customary course of his business} as such agent, authority either to sell goods or to consign goods for the purpose of sale or to buy goods or to raise money on the security of goods.\textsuperscript{148}

It will be noted that the italicized words differ slightly from those found in the English acts, but the difference would not appear to require a construction of the Canadian acts contrary to the English acts on the point under discussion.

In the only two pertinent cases found, the relevant principles here discussed are dictum. In the first, the court did not place any significance on the fact that the sale was in the ordinary course of business, but simply on the view that the doctrine of constructive notice would not deprive the buyer of the “cut-off” protection of the Sale of Goods Act.\textsuperscript{149} However, it is interesting to note that the sale was in fact in the ordinary course of business and there may be some doubt whether the judge would have ruled the same way if it had not been.\textsuperscript{150} In the second case, the sale was also in the ordinary course of business but Sloan J. A., for the majority, stated, “Filing of a conditional sale agreement may be [by reason of section 2 of the Conditional Sales Act] constructive notice to subsequent purchasers or mortgagees claiming from the buyer . . . .”\textsuperscript{151} In this case a subsequent purchaser would have been out of the ordinary course since the conditional vendee was not a dealer. While it cannot be agreed that subsequent mortgagees ought to be included in the same category, it is significant that whereas Sloan J. A. was not willing to apply the doctrine of constructive notice to a sale in the ordinary course, he would have

\begin{itemize}
\item \textsuperscript{147} Whether a sale is in the ordinary course of business is, of course, a question of fact. Nourse v. Can. Canners, Ltd., [1935] Ont. 361; [1935] 2 D.L.R. 121. Sales out of the ordinary course of business generally would include second hand sales, sales by one dealer to another where this is not usually done, sales by merchants of other than those things usually sold by the business, such as a piece of the establishment’s equipment. \textit{Cf.} UCC \S 9-307(1).
\item \textsuperscript{148} Alta. Rev. Stat. c. 106, \S 2(1)(c) (1955). (Emphasis added.)
\item \textsuperscript{149} Commercial Credit Co. of Can. v. Fulton Bros., 55 N.S. 208, 65 D.L.R. 699 (1922); \textit{aff’d on other grounds}, [1923] A.C. 798, [1923] 3 D.L.R. 611.
\item \textsuperscript{150} An examination of the cases generally reveals that a fairly good case can be made for the view that the doctrine of constructive notice ought to be ignored only when transactions are made in the ordinary course of business, or in “commercial transactions” as they are sometimes called. Waynacht v. McGinty, 12 B.L.R. 116 (1912); Joseph v. Lyons, L.R. 15 Q.B.D. 280 (1884).
\item \textsuperscript{151} Vowles v. Island Fin., Ltd., 55 B.C. 362, 367, [1940] 4 D.L.R. 357, 360.
\end{itemize}
been willing to do so to a sale out of the ordinary course of business. This, it is submitted, is the correct view.152

Most of the provinces presently have a traders provision which appears to permit approximately what the Factors and Sale of Goods Acts were intended to accomplish, specifically, that a purchaser in the ordinary course of business would prevail over a conditional seller even though his interest is perfected by filing. Perhaps the traders provision was instituted to clarify the confusion that might otherwise arise from a misconstruction of the relevant provisions of the Factors Acts and the Sale of Goods Acts. In any event, as a condition to its applicability, the seller’s consent to the sale of the goods in the ordinary course of trade is usually required,153 although in Ontario it is not.154 The provisions do not require a "bona fide" purchaser so that presumably a buyer in the ordinary course would prevail over the conditional vendor even though he had notice of a recorded interest, at least so long as he did not have knowledge of any specific restriction on the conditional vendee’s right to sell the goods.

Alberta and Manitoba do not have a traders section and they have excluded the application of the mercantile agent provisions of the Factors Act and Sale of Goods Act to transactions complying with the Conditional Sales Act. In Alberta the rights of purchasers from conditional vendees are governed by the common law qualified by the impact of the filing system, while in Manitoba the filing system, which does not exist, need not be considered. Prince Edward Island does have a traders section155 but the problem is simplified because application of the Factors Act to conditional sales transactions is also excluded. Thus buyers in the ordinary course of business would take priority over a conditional seller's perfected interest.

Since the Factors Act and Sale of Goods Act are not relevant except where goods have been “delivered” to a transferee, the rights of subsequent chattel mortgagees would remain as they were prior to the enactment of these statutes. This, as will be recalled, qualifies the nemo dat rule to the extent that unfiled interests are void. Filed interests, on the other hand, preserve to the conditional seller the rights he held at common law as against subsequent chattel mortgagees and, one would expect, as against all other consensual liens of the same generic nature. Even if it could be conceded that purchasers out of the ordinary course of business should not be expected to search before buying, it could not be


conceded that lenders ought not to be expected to search before making a secured loan.

Creditors are also not within the protected class mentioned in the Factors Act and the Sale of Goods Act. Accordingly, a filed conditional sales contract gives the seller priority over creditors in most provinces whether arising before or after execution, but in Ontario not even filing is necessary to preserve to the seller his common law rights, except where the goods have been delivered to a dealer for resale in the ordinary course of business. Alberta and British Columbia protect only those creditors whose rights have been crystalized under, e.g., a writ of execution or who are represented by the appointment of e.g., a trustee in bankruptcy.

Basically two courses of action are open to the conditional vendor upon default of the terms of the contract by the purchaser. They are an action for the purchase price and repossession of the goods. These rights are alternative. If the seller elects to sue for the price, obtains judgment and then levies on the same goods that were sold under the conditional sale agreement, two provinces restrict the seller's right of recovery to the amount realized on the resale of these goods. On the other hand, if the seller elects to repossess the goods he will be barred from suing for the price except to the extent that a deficiency action is for the price and then only in those provinces where action for the deficiency is permitted, and the agreement has provided for the right.

Not all jurisdictions have repossession procedures in their conditional sales acts. Those that do generally draw some distinction depending on the nature of the goods. For example, most of the provinces have special provisions regulating goods affixed to land. Saskatchewan gives special treatment to house-trailers; and British Columbia has special provisions governing the repossession of motor vehicles.

Under the general provisions governing repossession the seller is usually

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156. Model Conditional Sales Act. § 3.

SECURED TRANSACTIONS

required to retain the goods for a specified period—anywhere from fourteen
days to one month—during which time the buyer may redeem the goods on
payment of the balance of the price plus the cost of repossession.\textsuperscript{165} If the buyer
fails to redeem within the time allowed the vendor may resell the goods, usually
privately or at public auction.\textsuperscript{166} If the seller intends to look to the buyer for
any deficiency, in those jurisdictions where it is permitted, he is generally re-
quired to deliver a notice with appropriate contents to the buyer usually five to
seven days before the sale which, of course, may not be held before the expiration
of the redemption period.\textsuperscript{167} In the event a surplus is realized it must be paid
to the buyer.\textsuperscript{168}

To some extent a third remedy in the nature of foreclosure exists in some
jurisdictions. For example, in Alberta a judge may order that the goods seized
be delivered to the vendor in full or part satisfaction of all claims.\textsuperscript{169} In British
Columbia if a motor vehicle is to be resold by public auction the seller may
enter a reserve price and if it is not met the vehicle may be withdrawn from
the bidding. Following a demand for payment of this sum and the expiration of
seven days without receipt of payment, the buyer's interest in the motor vehicle
is absolutely determined. The seller becomes the owner and the buyer is relieved
of the obligation to pay the balance of the purchase price.\textsuperscript{170}

Ontario's Personal Property Security Act, 1967

Even a cursory examination of the relevant chattel security law of Canada
would not be adequate without adverting to Ontario's Personal Property Security
Act, 1967. This Act, as earlier observed, corresponds roughly to Article 9 of the
Uniform Commercial Code. Early drafts originated in a committee organized by
the Ontario Commercial Law Section of the Canadian Bar Association in 1960,
chaired by Mr. Fred M. Catzman. Because of its singular importance, the
work was later taken under the aegis of the Attorney General, and after further
development and various amendments in the committee stage, Bill 88, as the

\textsuperscript{165} The Seizures Act, Alta. Rev. Stat. c. 307, §§ 28-30 (1955) (fourteen days); B.C.
(twenty days); Newf. Rev. Stat. bill 67, § 2 (1952) (as amended 1962) (one month); Ont.
twenty days). The Model Act has no provisions for general repossession.

c. 70, § 14(2) (1960); Newf. Rev. Stat. bill 62, § 12(2) (1952); Sask. Rev. Stat. c. 393,
§ 16(2) (1965).

\textsuperscript{167} B.C. Rev. Stat. c. 70, § 14(3) (1960) (five days); Ont. Rev. Stat. c. 61, § 9(4)
(1960); Sask. Rev. Stat. c. 393, § 16 (1965) (five to seven days depending on whether
it is served personally or by mail). Alberta requires a five-day notice to be served even
though deficiency actions are not allowed, and services may be personal or by mail. Alta.
bill 62, § 12(3) (1952).


most recent version is known, was passed and received Royal asset on June 15, 1967.\textsuperscript{171}

Similar to Article 9 the Act permits the creation of a "security agreement" which is designed to supersede the traditional chattel mortgage, conditional sale, equipment trust, floating charge (to the extent that it is not regulated by The Corporation Securities Registration Act), assignments of book debts not intended as security, pledge, trust deed, trust receipt, and "an assignment, lease or consignment intended as security."\textsuperscript{172} The bill of sale, as distinguished from the chattel mortgage, is not within the definition of a security agreement, and thus it is not regulated by the new Act, but rather by the Bills of Sale Act, 1967 (Bill 93), almost identical to relevant provisions of the old act except that some modernization in terminology has taken place. Royal assent put into effect sections 41 to 43, 45, 70 and 71, dealing primarily with the implementation of a central filing system for security interests which will ultimately be governed by the new act, the establishment of an assurance fund, and permission to the Lieutenant Governor in Council to make regulations regarding the implementation and administration of matters which will fall under the Act. The remaining provisions, the major body of the new law, will not come into force until a day named by the Lieutenant Governor.\textsuperscript{173}

In view of the time that must elapse before the major provisions of the Act will become operational no direct attempt will be made to compare it with Article 9 except to say that it is similar. While a critical examination of a few of its aspects and the policies governing its development would seem to be in order, although this is not the place for an exhaustive analysis. Thus the following comments will be only representative in character.

Besides the advent of Ontario's Act symbolizing a needless compromise in the over-all development of Canada's commercial law, it is deserving of criticism on its own merits. In the first place it takes too narrow an approach by excluding the absolute assignment and sale of contract rights, chattel paper,\textsuperscript{174} and all floating charges falling within The Corporation Securities Registration Act.\textsuperscript{175}

The Act is also inherently objectionable in that it is highly inconsistent in style. Sometimes terminology of Article 9 is replaced by wording derived from prevailing Canadian law;\textsuperscript{176} other times the wording of Article 9 is relied upon


\textsuperscript{173} Bill 88, § 72 and explanatory note. A three year transition period governing registration will commence January 1, 1969, and the rest of the provisions of the Act will become fully effective on January 1, 1972. Richard E. Priddle, Ass't Inspector of Legal Offices, Memo to All County & District Court Clerks Province of Ontario, July 17th, 1967.

\textsuperscript{174} Negative Implication, bill 88, § 2(b).

\textsuperscript{175} Id. § 3.

SECURED TRANSACTIONS

heavily. But in the majority of instances changes are made in phraseology seemingly for no other reason than to be different. As a simple illustration of this compare section 26(3):

Beyond the period of ten days referred to in subsection 1 or 2, a security interest under this section becomes subject to the provisions of this Act for perfecting a security interest.

with section 9-304(6) of the Uniform Commercial Code:

After the twenty-one day period in subsection (4) and (5) perfection depends upon compliance with applicable provisions of this Article.

It will be observed that the Ontario version requires half again as many words to express the same idea, presumably, contained in Article 9. This does not happen often, but very seldom does the Act delete seemingly “excess verbiage” without also deleting some ideas. The over-all result is a potpourri of North American chattel security law, vastly inferior to Article 9 and to what an unpretentious effort on the part of the draftsmen might have achieved. This is not to suggest that Article 9 is without its weaknesses. Indeed the Personal Property Security Act has some features which are an improvement over Article 9. For example, section 5(1) of the Personal Property Security Act integrates the content of U.C.C. § 9-103(1) and (2) into a single subsection, thereby eliminating one of the choice of law rules. That is, there seems to be no good reason why accounts and contract rights deserve a different treatment than general intangibles and certain ambulatory collateral. The Ontario Act adopts the “chief place of business of a debtor” as the appropriate connecting factor in both instances.

The title page contains the label “An Act to reform and make uniform the Law regarding Security Interests in Personal Property and Fixtures.” One might ask, uniform to what? Certainly not with the law of other provinces since they do not have such an act, nor were any of the provinces invited to participate in its development. If it was to be uniform with the law of the United States why did the draftsmen needlessly depart from the format of Article 9? Obviously some changes in form and substance are necessary to accommodate the differences between the two systems, but if international uniformity is desirable, and surely it is, why make changes that are not necessary, i.e., those that are not based upon considered, sound policy? Mr. Catzman explains the approach taken is based on the necessity of converting the “readable prose” of Article 9 into the “traditionally . . . terse, concise and precise terms” of Ontario legislative style so that the conservative Ontario legislature would more readily adopt it. Although the Act is more concise than Article 9, the “tradition” is

§ 88(4)(a) (1967); “caution” is an innovation derived from Ontario’s Conditional Sales Act, Ont. Rev. Stat. c. 61, § 12 (1960), by which notice may be given to certain parties. “Holding” is another innovation. See Bill 88, §§ 48, 28, 34.

177. See e.g., Bill 88, §§ 35–38.
largely mythical and the more relaxed style of Article 9 would be consistent with other Ontario legislation. He goes on to indicate that various American authorities in the field attended a critical study seminar of an earlier draft at Osgoode Hall in 1964, the implication apparently being that these experts gave some sort of sanction or assent to the product. But considering the fact that the draft did not even contain a notice filing provision at that time—the very heart of a modern inventory financing law—one suspects that the acquiescence, if any, was evoked more by the desire of good neighbors to avoid the appearance of a DeGaulle in Montreal than a conviction that the draft was even close to a model act. In fairness to Mr. Catzman, however, it must be said that several of the desirable objectives sought by his committee were rejected by the Law Reform Commission, and this body has made several undesirable innovations of its own. In any event, Canadian lawyers and judges of the future will undoubtedly look to American commentary and cases relative to Article 9 for guidance in construing their own Act, only to be faced with the thorny question of whether the verbal changes were intended to effect a change in substance or only in form.

Moreover the Act reveals signs of poor organization, unnecessary repetition, and inconsistency in policy.

Notwithstanding the obviously great amount of work and thought that has gone into the Ontario Act, unfortunately it cannot be recommended as being worthy of acceptance by the other provinces.

The Floating Charge

The floating charge arose in England under a series of decisions in the latter part of the nineteenth century, and is peculiar to the British Commonwealth. The device was subjected to statutory regulation in England by the

179. *Id.* at 210-11.

180. E.g., Under Bill 88, part III: Perfection of Interest, no mention is made of priorities—a unique and highly significant feature; rather, the first section thereunder relates to attachment, an element of perfection to be sure, followed immediately by *id.* § 22. *Cf.* UCC § 9-301 dealing with priorities. Bill 88, § 23 then returns to perfection. Other major priority provisions are not mentioned until *id.* § 30. Although the order is approximately that of UCC Art. 9, the arrangement could be improved.

181. *Cf.* Bill 88, § 28(1), with *id.* § 24(f), and *id.* § 35(1)(b). *Id.* §§ 28(2)(a), (b) are also repetitions. Subsec. (b) is only a variation of (a), i.e., the greater, "holding on behalf of" would include the lesser, "issuing a document of title in the name of." In turn, § 28(2)(b) is already covered by § 24(b). Thus § 28(2)(b) makes reference to bailee only to repeat in more narrow terms what was already established in § 24(b), but without indicating the time when perfection in this instance is established—the only good reason for singling out a bailee for special treatment and the only reason Article 9 does so (see UCC § 9-305). Section 28(2)(c) is a repeat of § 25(1)(b). Instances could be multiplied. But this is to be expected. When a parent act is well drafted unnecessary repetition in a sibling act is almost inevitable under a policy of change for the sake of change.

182. *Cf id.* § 36(3) which permits named parties to take priority over a secured party's interest in fixtures if they acquire their interest "without actual notice," whereas the same parties may prevail in the case of accessions provided they are "without notice." *Id.* § 37(2).

It is submitted that in this era there is no justification for the requirement of actual notice to subsequent third parties before the secured party's interest will be protected.

Companies Act,\textsuperscript{184} and similar provisions were incorporated into Canada's Dominion Companies Act of 1917.\textsuperscript{185} Little provincial legislation existed until the development of the uniform Corporation Securities Registration Act in 1931, but now all jurisdictions except the North West Territories have acts regulating the floating charge. Four of the provinces and the Yukon have adopted the uniform act,\textsuperscript{186} and Alberta, British Columbia, and Manitoba have acts similar to the provisions of the English Companies Act, 1948.\textsuperscript{187} In most jurisdictions only charges (specific or floating) which are contained in a trust deed, in bonds or debentures as well as in a trust deed, or in bonds and debentures separate from a trust deed, are regulated by the Corporation Securities Registration Acts and related acts.\textsuperscript{188} Thus corporate chattel mortgages not contained in such documents are regulated by the Bills of Sales Acts.

The floating charge is equitable in nature and derives its name from the fact that it contemplates a mere general charge on specified present and future corporate assets which are expected to be changing in the ordinary course of business.\textsuperscript{189} It is distinguishable from the American floating lien which in contrast is "legal" and "specific."\textsuperscript{190} The floating charge remains inchoate or "uncrystalized" until the secured party takes steps to enforce his security interest or unless the business ceases to be a going concern.\textsuperscript{191} Until either of these events occurs, the debtor may deal freely with the collateral by way of sale, mortgage or other disposition and even execution and garnishment creditors can subject the assets to process without hindrance of the floating charge.\textsuperscript{192}

\begin{thebibliography}{99}
\bibitem{184} Companies Act, 63 & 64 Vict. c. 48, § 14 (1900).
\bibitem{188} Model Conditional Sales Act § 3. The acts in Alberta, British Columbia, Manitoba, and Newfoundland regulate all corporate floating charges whether or not they secure bonds or debentures.
\bibitem{189} Matter of Yorkshire Woolcombers Association, [1903] Ch. 284, 295.
\bibitem{190} See Coogan & Bok, \textit{The Impact of Article 9 of The Uniform Commercial Code on The Corporate Indenture}, 69 Yale L.J. 203, 204, 233 (1959) for an interesting discussion of the legality and feasibility of including in an American corporate indenture, by virtue of the development of UCC art. 9, collateral which is normally taken as security only in short-term financing. Collateral of this nature has been the subject of the Canadian and English floating charge for about a hundred years—a testimony of the usefulness of the device notwithstanding its disadvantages.
\bibitem{192} Kare v. North West Packers, Ltd., 63 Man. 16, [1955] 2 D.L.R. 407, 14 W.W.R. (n.s.) 251; Evans v. Rival Granite Quarries, Ltd., [1910] 2 K.B. 979. It will be recalled, however, that a corporation is free to create a specific as well as a floating charge.

115
This device is used almost exclusively as an instrument for long-term corporate financing, although some have suggested that it has been used for means other than raising capital directly. Although collateral that may be the subject of a floating charge is usually limited to personal property, including book debts, it is in some instances extended to real property, while excluding some forms of personal property in others. Typically the floating charge is used in conjunction with a real estate mortgage embodied in a trust deed for the purpose of including the balance of a corporation's personal property assets, or a certain class thereof, as security for bonds or debentures to be issued by the borrower.

Certainly its name suggests, and some of its characteristics make it appear, that the floating charge might be ideal for inventory financing. However, the fact that the secured party has merely an equitable right until the charge crystallizes by the happening of an appropriate event would seem to be a lethal defect in the floating charge as an inventory financing device, since creditors and transferees out of the ordinary course of business, assuming they are bona fide, could prevail over the secured party. Close policing would minimize these risks but would require an increase in the cost with the result that it would probably be impractical.

Although it is permissible to create a floating charge by appropriate wording in the body of "bonds, debenture stock or any series of bonds or debentures," the common practice in Canada is to include the charge in a trust deed. No special form of wording or minimum standard of description of the collateral is stipulated, but an illustration of a description in a trust deed which was found sufficient to cover all the corporation's personal property is "the undertaking and all their property and assets, both present and future . . . to the intent that this debenture shall be a floating security on the said undertaking and property." Where real property is to be included, additional language charging the property by way of legal mortgage would be required. Only when the charge is not secured by a separate instrument, i.e., by a trust deed, is the consideration specifically required to be set out in an affidavit of the mortgagor.
to satisfy a filing requirement. However, as a matter of practice the actual consideration would generally appear in the trust deed.

Prior to 1927 it was generally thought that a floating charge regulated by provincial legislation was not required to be registered since it was not considered to be within the definition of a mortgage in the Bills of Sale and Chattel Mortgages Act, and the little provincial legislation that did permit registration did not affix a penalty for failure to file. England, however, did require registration at this time, and similar requirements were inserted in the Dominion Companies Act in 1917. Then in 1927 the Supreme Court of Canada held that a floating charge contained in a trust deed executed by an Ontario corporation was void for want of registration pursuant to the Bills of Sale and Chattel Mortgages Act. Undoubtedly this decision precipitated the development of the uniform act promulgated by the Conference on Uniform Legislation in 1931, and the subsequent adoption by the provinces of the same or similar legislation.

All jurisdictions having legislation provide for central filing of the instrument with the registrar of companies or a similar entity within a specified time on pain of invalidity as against third parties. Where real property is the subject of a floating charge, registration in the relevant land registry office is also required. The time for registration varies from ten to sixty days from execution of the charge within the province and up to ninety days in the case of Alberta if the execution takes place outside the province. In several instances the floating charge is expressly stated to “take effect” as against third parties only from the time of registration. In the event of failure to file in time, a court order may be obtained for an extension of time if the failure was due to inadvertance, but the right to file is subject to the accrued rights of persons who have actually been misled as a result of the late filing.

Failure to file in time invalidates the floating charge as against “creditors of the mortgagor or assignor, and as against subsequent purchasers or mortgagees from or under the mortgagor or assignor, in good faith, for valuable consideration...”

204. Companies Act, 63 & 64 Vict. c. 48, § 14(1)(d) (1900).
211. Model Conditional Sales Act §§ 8, 9.
Like the chattel mortgage and conditional sales legislation, the acts do not expressly state the consequences of timely filing, but it is implied that due compliance with the registration requirement would validate the charge as to the named third parties. However, this implication must be qualified considerably in the case of a floating charge as opposed to a specific charge, which as noted earlier, the acts also govern, since the debtor may deal freely with the collateral and third parties may acquire prior rights in it until the secured party's rights have crystalized. Thus a more complete statement is that timely filing gives a secured party whose rights have crystalized, priority over third parties whose rights arise thereafter.\textsuperscript{213}

The parties are free to stipulate the conditions which will constitute default, thereby giving the secured party the right to enforce his security. In addition, enforcement may be had if the debtor ceases to carry on business\textsuperscript{214} or if the security is placed in jeopardy.\textsuperscript{215}

The scope and mode of enforcement are analogous to the remedies available to a mortgagee who is entitled either to foreclose on the mortgage or to sue on the covenant. If the charge is embodied in the debenture, debenture holders may have foreclosure.\textsuperscript{216} Where the charge is contained in a collateral trust deed, however, earlier cases have thrown some doubt on the availability of this remedy, perhaps because legal title remains in the debtor until crystallization,\textsuperscript{217} but a comparatively recent case has allowed foreclosure.\textsuperscript{218} In any event there is general agreement that the secured party may enforce by sale.

As a concomitant of enforcement a receiver or a receiver and manager must be appointed either by the bondholders or the trustee, as dictated by the terms of the deed, or by the court. The consequences flowing from appointment under a power are different from those under appointment by the court.\textsuperscript{219}

Bondholders are the proper parties to initiate enforcement of the security\textsuperscript{220} unless the deed has limited this right to the trustee,\textsuperscript{221} which is usually the case. It is therefore apparent that the deed must always be examined to resolve this

\begin{footnotes}
\item[214] Hodson v. Tea Co., 14 Ch. D. 859 (1880).
\item[216] Sadler v. Worley, [1894] 2 Ch. 170.
\item[220] Perron v. L'Eclaireur & Nadeau, 57 Que. K.B. 445 (1933); Shaughnessy v. Imperial Trust Co., 3 N.B. Eq. 5 (1904).
\item[221] Levis County Ry. Co. v. Fontaine, 13 Que. K.B. 523 (1904).
\end{footnotes}
SECURED TRANSACTIONS

as well as a host of other questions which pertain to the proper administration of this form of security.

QUEBEC LAW

A glance at relevant Quebec law will complete the study of Canadian chattel security law most likely to have a bearing on international transactions between citizens of the United States and Canada. Until recently there was very little legislative sanction of non-possessory personal property security devices in Quebec, outside of the agricultural pledge and the corporate mortgage of “movables” or personal property to secure bonds and debentures. Currently, transactions approximating those consummated under the conditional sales contract and the chattel mortgage are permitted under Quebec law, although they are restricted by considerably greater functional limitations than exist in the common law jurisdictions. Except in the area covered by the section 88 security device available to chartered banks—a breath-takingly modern and streamlined device—compared to Quebec’s chattel security law—a constant struggle has been waged by commercial entities, financiers, and jurists to adapt an archaic chattel security law, central to which is the pledge concept, to the economic and financing needs of the twentieth century, especially those which have arisen since World War II.

In 1914 legislation was enacted which empowered certain corporations to hypothec, mortgage or pledge their movable and immovable property, present or future, by trust deed as security for bonds or debentures without the necessity of transferring physical possession of the collateral to the trustee. Accordingly the device may be used to secure the balance owing on sales, paid for in bonds, as well as to secure loans against bonds. The security interest is specific, similar to the type encountered in the United States, in contrast with the floating charge which remains inchoate until crystallized. However, the secured party’s interest is somewhat comparable to a floating charge in the sense that it is relegated to a comparatively low privilege.

In the field of non-corporate lending, commercial inconvenience led to the development of various conventions which usually take the form of a “sale” or “lease” of the goods with a right of redemption in the borrower upon payment of the “price.” This is accomplished either in a single document of sale, or in one document of sale followed by another document in the nature of an installment sales agreement back to the “seller.” No publicity for the benefit of third parties is afforded since registration is not required. Such transactions are valid

226. See supra note 190.
between the parties, and while a few judges have shown a disposition to validate them as against third parties, the prevailing view is that third parties take priority over the "vendor" or "lessor." However, fear of invalidation has not prevented these devices from flourishing, and the prediction has been made that they will receive judicial approval in the near future, although it has been thought that there is "no good reason why the law should be amended to permit lenders in the personal loan field to obtain security upon movable property without transfer of possession."

Presumably in response to at least part of the needs in this area, the Civil Code was amended in 1962 to permit the creation of a "commercial pledge"—Quebec's nearest equivalent to the chattel mortgage. This permits "a person carrying on a commercial business" to secure a loan "which he contracts" by way of a non-possessor pledge of his "machinery and equipment," which will preserve the lender's rights against third parties. Registration is required. Unfortunately the device is far too inflexible to satisfy several major needs for a valid non-possessor pledge. As was indicated, its use is limited to "a person carrying on a business" so that personal loans are excluded; it may not be used to secure other than loans "which he contracts"—suretyship transactions would be excluded; and since the collateral is restricted to "machinery and equipment" with no mention of "present or future goods," inventory financing would be out of the question.

In 1947 Quebec added provisions to the Civil Code to regulate installment sales of what might be described generally as consumer goods not exceeding the price of $800. This law contains considerably more consumer protection than the typical conditional sales act, and its application is limited to retail sales. The agreement must be in writing and comply substantially with the format prescribed in the schedule, on penalty of being treated as a "sale with a term," which is comparable to an absolute sale. Nevertheless the law is quite similar to

231. Le Dain, supra note 224 at 112.
232. QCC arts. 1979(e)-1979(k).
233. Id. art. 1979(e); Comtois, Une Nouvelle Legislation; Le Nantissement Commercial, 9 McGill L.J. 261, 267 (1963).
234. Id. art. 1979(e).
236. QCC arts. 1561(a)-1561(j). Agricultural "things," equipment, books, artificial limbs, and motor vehicles are expressly excluded. Id. art. 1561(j). For provisions regulating sales, see generally id. arts. 1472-1561. Of particular interest are id. arts. 1497, 1539, 1541, 1543, 1546.
237. The initial payment must be at least 15% of the total price; the balance must be paid in equal monthly installments; rebates of finance charges must be made for early payment of the balance—which is always permitted; a statement of the differential between the cash and time price is required; finance charges are fixed; and the print must be at least six point type. Id. arts. 1561(b), (c), (d), (e).
238. Id. art. 1461(j).
239. Id. art. 1461(j).
SECURED TRANSACTIONS

conditional sales law in the sense that the vendor retains "ownership" of the goods until the buyer has paid the price. On default of payment the seller may either sue for the price or "revendicate" (repossess) the goods. In the latter case the seller has no right to the balance of the price nor is the buyer entitled to the return of the money already paid.

Although the Civil Code makes no provision for filing the agreement, the vendor has the right to revendicate the goods ahead of the claims of the buyer's creditors and he is given a high-ranking priority or "privilege." However, this right is subject to defeat by a purchaser or pledgee who become such pursuant to "a commercial matter," or subsequent to the goods being lost or stolen if the purchaser or pledgee takes the goods in good faith "in a fair or market, or at a public sale (or pledge) or from a trader... dealing in similar article(s)...." It is true that "lost or stolen" have been construed to include even a wrongful sale or pledge by the buyer, in which case the vendor would be permitted to recover the things from the purchaser or pledgee. But this would be of little comfort to vendors in most cases since they must reimburse the subsequent purchaser or pledgee the amount he has paid as a condition precedent to revendication. This would seem to be only fair, however, since no means of self-protection in the nature of a filing system is available to the subsequent purchaser or pledgee.

CONCLUSION

Perhaps a comment ought to be made in summary concerning the relative merits of one device to another. Assuming it has been determined that a chattel security device is desirable in a given international transaction, there remains the question of which one ought to be used. Of course the choice depends largely on the nature of the transaction, but since large continental transactions frequently involve both loans and sales, the evaluation ought to begin with the charge governed by the Corporate Securities Registration Acts and corresponding Quebec law because of its highly flexible nature. In the common law jurisdictions, as well as Quebec, the device may be used to finance the sale of goods as well as to secure a loan. Moreover, in the common law jurisdictions either a specific or floating charge is available and the choice between them would depend on the intensity of security desired. In Quebec, by virtue of its rank among the various privileges, the corporate hypothec of movables lies somewhere between a specific and floating charge. The charge should also be considered in every instance where only a large corporate loan is contemplated.

240. Id. art. 1561(a).
241. Id. art. 1561(f).
242. Le Dain, supra note 224, at 112.
244. Id. arts. 1487, 1488, 1489, 1966(a).
245. Le Dain, supra note 224, at 83; see also Mayrand, Le nantissement de la chose d'autrui, 3 Rev. du Bar, 313, 316-17 (1943).
246. QCC art. 1489.
However, where only a sale is involved or only a small loan, the cost and inconvenience of drafting a trust deed and other documents required by this device may be too expensive to justify its use. The conditional sales agreement and chattel mortgage would then be considered. Of course, only the chattel mortgage is available to secure a loan, but either a chattel mortgage or a conditional sales contract may be used to secure the price in the case of a sale. In the latter instance, the necessity of an absolute bill of sale to precede the chattel mortgage, as well as the affidavit requirements, would probably result in a choice of the conditional sales contract.

In conclusion, the Canadian provinces are as urgently in need of a revision of their chattel security law as were the states of the United States prior to the Uniform Commercial Code. Indeed, it suggests the need for modernizing and rewriting the entire body of Canadian commercial law. Why should Canada settle for anything less? Of course such an undertaking would be monumental, as evidenced by the resources of talent and money required for the production of the Uniform Commercial Code. But in view of the importance of a modern, functional system of commercial law to a potentially great trading nation, one which is destined to rise to gigantic proportions in the century ahead, surely the investment would be worthwhile.

If this objective is beyond the vision of those who are in a position to initiate such an undertaking, then admittedly revision ought to begin where the need is greatest, namely, with secured transactions—but not with the expectation that this will lead to the development of a comprehensive commercial code, as some have suggested. On the contrary, it seems likely that the perfecting of a mere segment of the whole body, particularly one which is so demonstrably in need of revision, will tend to destroy the impetus that would otherwise accompany a movement to develop a comprehensive code—the penalty for wanting too little too soon.

It appears unfortunate that Ontario has played a prima donna role in a movement which so clearly demands the joint participation of all provinces. Even if the rest of the provinces ultimately adopt Ontario's Personal Property Security Act, the creation of a comprehensive code, assuming one is ultimately developed, born of the approach and policies underlying the development of the Ontario act would, ex hypothesi, be an inferior product. On the other hand, if the Ontario act is rejected, there arises the possibility of each province developing a version of its own, thereby destroying any reasonable possibility of a uniform commercial code for Canada in this century. In any event, it would seem desirable that a firm stand for the drafting of a uniform act, independent

248. In this regard it is interesting to note that the piece-meal development of Quebec's chattel security law is highly reminiscent of the approach taken by the common law provinces so that Quebec's need for an integrated law is just as acute as in the rest of Canada. It is submitted that Article 9 would answer this need and that it would fit into the scheme of Quebec's civil law system as gracefully as in the common law jurisdictions, given the few changes in form and substance required for adaptation.
of Ontario's Act, be taken by the Canadian Bar Association or some comparable organization.

Not only does the foregoing indicate the need for a uniform interprovincial law in the chattel security field, it also suggests the desirability of uniformity in the entire field of commercial law of Canada and the United States. Even in the area of secured transactions it is obvious that the chance of error and misunderstanding in the use of chattel security devices in continental transactions would be reduced to a minimum by a uniform law, especially an integrated law. Moreover, uniformity would probably result in an increased use of chattel security devices in such transactions. Certainly uniformity would remove the hesitation that now exists by virtue of the mysteries inherent in the foreign law. By the same token the advantages that would flow from uniformity to attorneys and commercial entities in the United States would be mutually available to corresponding parties in Canada.