COLLATERAL LAND MORTGAGES AS SECURITY FOR THE PURCHASE OF CHATTELS:

EFFECT OF SECTIONS 106 and 107 OF THE LAND TITLES ACT

Robert Phillips

I. INTRODUCTION

The purpose of this memorandum is to examine the effect of sections 106 and 107 of The Land Titles Act[1] on the taking of a land mortgage to secure the balance owing for the purchase of goods or chattels.

The present sections were first enacted in 1910 as "An Act respecting charges upon Land contained in Certain Instruments".[2] In their present form they appear as:

Mortgages affected by conditional sales agreements

106. Every mortgage, charge or encumbrance upon land or upon any estate or interest therein

(*a*) contained in, endorsed upon or annexed to a writing or instrument that is written or printed, or partly written and partly printed, or any part thereof, and that is required to be registered in order to preserve the rights of the seller or bailor of goods as against any purchaser or mortgagee of or from the buyer or bailee of the goods in good faith for valuable consideration, or against judgments under *The Conditional Sales Act*, or

(*b*) contained in, endorsed upon or annexed to a written order, contract or agreement for the purchase or delivery of any chattel or chattels,

is null and void to all intents and purposes whatsoever, notwithstanding anything contained in any Act.
[R.S.A. 1955, c. 170, s. 107]

Registration of mortgage

107. (1) No such mortgage, charge or encumbrance, and no caveat founded thereon, or upon any such writing or instrument, shall be registered or filed under this Act.

(2) If any such writing or instrument, by inadvertence, accident or otherwise howsoever, is registered or filed in any Land Titles Office contrary to the provisions of this section, the registration or filing is ineffective and nugatory to all intents and purposes whatsoever, and may be cancelled by a judge of the Supreme Court upon the application of any person interested, and the application may be made by way of originating notice. [R.S.A. 1955, c. 170, s. 108]

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[1] R.S.A. 1970, C. 198.

[2] S.A. 1910(2), C. 5, § 1 and 2; see Appendix I.

Both Manitoba[3] and Saskatchewan[4] have similar provisions which will be discussed more fully later in this report.

II. THE EFFECT OF SECTIONS 106 AND 107

Section 106 does not prevent the taking of a mortgage, charge or encumbrance upon land to secure the purchase or delivery of chattels--it merely requires that the land mortgage be contained in a separate document apart from that containing the purchase or delivery of the goods. The mischief that the legislation was trying to prevent was the concealment of a hidden charge on land contained in an instrument for the purchase or delivery of goods or chattels. In *Smith v. American-Abell Engine and Thresher Co.*,[5] Perdue T.A., dealing with the Manitoba provisions, stated:[6]

> The provision was first introduced by 56 Vict. ch. 17. It was aimed at and framed to suppress a practice which widely prevailed amongst implement dealers of inducing farmers to purchase machinery on credit, taking from them written orders or agreements containing a clause which made the purchase money a charge or lien upon their lands. The intention of the Act was to prevent titles to land from being incumbered by the registration of such documents. It often happened that a farmer, who had paid for his machinery in full, had neglected to obtain a release of the lien. When he next came to deal with the land, the lien formed a cloud upon his title, and it was often difficult and expensive to procure the necessary release, when the manufacturers lived in another province or in a foreign country, or had gone out

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[3] The Lien Notes Act, R.S.M. 1970, C. L 140, § 5 to 9.

[4] The Land Titles Act, R.S.S. 1965, C. 115, S. 126.

[5] (1907) 6 W.L.R. 179 (Man. C.A.) *affirming* (1907) 5 W.L.R. 329.

[6] *Id.* at 181.

> of business. Farmers were often induced to sign such orders or agreements in ignorance of the fact that they were creating liens on their farms. The Act was aimed at suppressing the registration of the documents so as to keep the titles clear. It did not declare the contract created by such a document void as between the original parties to it, but took away from the party in whose favour the lien was created any benefit or protection he might seek to derive from the registration of the document, either by way of establishing his priority, or by fixing other persons with notice of his claim. This purpose clearly appears from secs. 7 and 8 of the Act.[7]

The question arises as to when a mortgage, charge or encumbrance upon land is not "contained in, endorsed upon or annexed to" a contract or agreement for the purchase or delivery of chattels. In *Smith v. American Abell Engine and Thresher Co.*,[8] the owner of realty purchased a threshing machine and engine from the defendants, the purchase price payable by instalments. These payments were received by promissory notes. The owner also gave to the defendants, at the same time, a *separate* document purporting to charge and create a lien upon the land in favour of the defendants for the purchase price, payable in instalments agreeing in amount and time of payment with those specified in the contract of purchase. The defendants filed a caveat in the land titles office against the land, claiming a lien or charge for the above mentioned sum. A copy of the document creating the lien was attached to the caveat. The court held that the lien was valid and not within the provisions of the Manitoba legislation. Perdue, J.A. stated:[9]

. . . . . .

[7] Sections 8 and 9 of the present Act.

[8] *Supra*, n. 5.

[9] *Id.* at 181-182.

We must now consider whether the documents upon which the caveat complained of is founded, falls within the provisions of the Act. This document contains nothing whatever relating to the purchase or delivery of chattels. It simply declares a lien or charge in favour of defendants upon the land in question for $3,700, to be paid as stated, and a provision that if notes should be given they should not be a satisfaction of the lien or charge. Nothing is said in the document as to how the indebtedness of $3,700 arose. It might have been for money advanced so far as anything appears from the writing. But the plaintiff contends that the document was given as part of the transaction between Fox and defendants, whereby he purchased the machinery from them, and that the portion of the agreement creating the lien on the land was put on a separate paper merely for the purpose of evading the Act.

There is no doubt that the statute in question derogates from the general right of all persons to use the registry offices of the province for the purpose of registering documents creating in their favour a claim upon, or interest in, lands in Manitoba. The statute is also retroactive in effect, and interferes with contractual rights. It must, therefore, be construed with some degree of strictness. We must take the ordinary meaning of the words used in sec. 4 and not give to them any ulterior meaning or effect. This section, taken in its obvious meaning, prohibits the registration of agreements for the purchase of chattels. It also prohibits the registration of a caveat founded upon such an agreement. The document creating the lien and referred to in the caveat attacked, contains no reference to any order, contract, or agreement, for the purchase of a chattel or chattels. It is true that the lien was created for the purpose of securing payment of the purchase money due to the vendor under a separate contract for the sale of chattels, but the Act does not forbid this. The contract between Fox and defendants provided for the giving of "notes on approved security." If, then, Fox had executed an ordinary mortgage on his land to secure payment of the notes, could it be held that the statute prohibited the registration of it? If the statute does not apply to a mortgage executed as security for the payments, I cannot see how it applies to a document creating a lien, given to effect exactly the same purpose.

And further:[10]

[10] *Id.* at 182-183.

> Section 5 of the Act makes it the duty of registrars and district registrars to refuse to receive any of the documents the registration of which is forbidden. Unless the document itself shews that it falls within that class, it would be impossible for the officer to safely refuse it. This, in my view, shews convincingly that the legislature intended the provisions in question to apply only to documents shewing on their face, or by something indorsed, or something annexed, that they belonged to the class from which the benefit of registration was to be withheld.
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> I must say that the provisions of the Act are very loosely framed and seem to invite evasion, unless, indeed, the object of the legislature was to prevent the concealment of a charge upon land in an agreement for the purchase of chattels. Where a farmer is called upon to sign a second document, which, in plain and simple language, creates a charge upon his farm to secure payment of chattels he has bought, it may be that the legislature felt that, in such circumstances, it must permit him to exercise his own judgment and common sense, and that its protection should not be extended to such a case.

There are three Alberta cases that have considered the provisions presently embodied in sections 106 and 107. In *Nichols and Shepard Co. v. Skedanuk*[11] the defendant and two others agreed to purchase from the plaintiffs a threshing machine and the defendant and one of the others who had land agreed to give mortgages on their land as security for the purchase price. The plaintiff filed caveats claiming an interest under the unregistered mortgages and attached the *separate* mortgage documents. Harvey, C.J. held the mortgages valid and not within the provisions of the Alberta legislation. Quoting from the *Smith* case with approval, he stated:[12]

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[11] (1913) 5 W.W.R. 118 (Alta. S.C. En Banc).

[12] *Id.* at 120-121.

> There is no doubt that the agreement for the purchase of the machinery included the agreement to give the mortgage and the formal documentary agreement executed on May 30th contains a clause to that effect, but it appears to me that it is important to distinguish between the real agreement and the written document evidencing the agreement. It is clear that the statute is confined in its operation to written documents, and when it refers to an agreement it does not mean the real agreement but the written document evidencing it. The mortgage recites the liability created by the notes which are provided by the written agreement and makes the payments coincide with those under the notes, but it does not require resort to be made to the written agreement for any of its terms nor does the written agreement require the mortgage to support it in any way. Each is complete in itself and independent of the other and to my mind that is exactly what the statute intended to accomplish and not what it intended to prohibit. It contains no suggestion that a mortgage on land may not be taken as security for the purchase price of chattels, but what it does say is that that shall not be done as part of the written agreement of sale.
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> It seems to me
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> that all the legislature intended was to prohibit a form of taking security which lent itself very easily to, and I may add was often borrowed for the purpose of, the perpetration of a fraud on a purchaser of machinery. A fraud may, of course, be perpetrated in the case of other forms but there appears to be only one form dealt with in the statute. Interfering as it does with the common law rights of contract, its words should certainly not be given an unusual meaning to extend that interference beyond what appears to be necessary to give effect to the purpose of the act.

In *Barker v. Belzberg*[13] the plaintiff purchased an interest in a partnership from the defendant and agreed to grant a mortgage on certain real property as collateral security. The defendant duly registered the *separate* mortgage document. The plaintiff contended that the provisions of the present sections 106 and 107 rendered the mortgage

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[13] (1951) 4 W.W.R. 304 (Alta. S.C.).

null and void. Egbert J. held the mortgage valid and not within the scope of the legislation for two reasons. First, the sale of the interest in a partnership was not a sale of "goods or chattels". Secondly, even if it was a sale of goods or chattels, the land mortgage was not "contained in, endorsed upon or annexed to" the instrument of sale. He stated:[14]

> However, it seems to me that for another very apparent reason the plaintiff cannot succeed on this branch of his case. In order that a mortgage, charge or encumbrance upon land be null and void by virtue of sec. 103, it must be "contained in, indorsed upon or annexed to a writing or instrument written or printed * * * required to be registered in order to preserve the rights of the seller or bailor of goods as against any purchaser or mortgagee of or from the buyer or bailee of the goods," or it must be "contained in, indorsed upon or annexed to a written order, contract or agreement for the purchase or delivery of any chattel or chattels."
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> The land mortgage of April 1, 1949, is not contained in, endorsed upon, or annexed to any other instrument whatsoever. It is a separate instrument containing nothing but the charge upon the land therein described, and I fail to appreciate by what ingenuity of argument it can be contended that it falls within the purview of secs. 103 and 104 of *The Land Titles Act*. If the agreement of April 1, 1949, were to be considered as an agreement for the purchase or delivery of any chattel or chattels, it might, I suppose, have been argued, with some hope of success, that clause 4 of the agreement whereby the plaintiff agreed to grant a mortgage on the lands in itself created an equitable charge on lands and was accordingly null and void by virtue of sec. 103, but that contention was raised neither by the pleadings nor by counsel's argument, the whole basis of the plaintiff's claim being that the separate land mortgage of April 1 was null and void. Even if the circumstances were such that the covenant contained in the agreement of April 1 could be regarded as null and void by virtue of sec. 103, in my opinion,

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[14] *Id.* at 312-313.

> if the transaction took the form it took here and a separate mortgage were contemporaneously or subsequently executed by the mortgagor, such mortgage would be valid and enforceable and not affected by the provisions of sec. 103. The plaintiff must accordingly also fail on the second branch of his action.

It is interesting to note that Egbert, J. made no mention of the *Smith* or *Nichols and Shepard* cases. Nor did he mention this earlier Alberta case of *In re The Tax Recovery Act; In re Banque Canadienne Nationale and Waterloo Machinery (Alberta)Ltd.*[15] There the company sold farming machinery to the owner of land and took lien notes for the price. It was alleged that the owner signed a separate document being an agreement to give the company a land mortgage as collateral security to the lien notes. The company registered in the land titles office a caveat founded upon the agreement.

In a brief judgment Matheson, D.C.J. held the mortgage invalid. Without referring to either the *Smith* or *Nichols and Shepard* cases, he stated:[16]

> In my view the alleged agreement was "annexed" to the lien notes within the meaning of sec. 103 of *The Land Titles Act*, RSA, 1942, ch. 205, and consequently null and void. The registration of the caveat is also null and void by virtue of sec. 104.
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> The word "annexed" is capable of a wider meaning than the words "attached" or "affixed," and keeping in mind the purpose and scope of the said sections (as originally enacted by 1910, 2nd sess., ch. 5, *An Act respecting Charges upon Land contained in Certain Instruments*) should receive a liberal interpretation.

Although this decision suggests a broader interpretation of sections 106 and 107, it is quite clear that

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[15] [1947] 1 W.W.R. 910 (Alta. D.C.)

[16] *Id.* at 911.

Egbert, J.'s later decision in *Barker v. Belzberg* restores the more established view that they are to be interpreted narrowly. As Phippen, J.A. said in *Smith:*[17]

> ". . .looking at the Act as a whole, I have no doubt it is directed to the form of the instrument and not to the substance of the contract."

III. MANITOBA PROVISIONS

The Manitoba legislation was first enacted in 1893 and was entitled "An Act prohibiting the registration of Lien Notes, Hire Receipts, and Orders for Chattels in Registry and Land Titles Offices."[18] The present sections 8 and 9 were introduced by way of amendment in 1894.[19]

The legislation is in its present form as The Lien Notes Act, R.S.M. 1970, C. L140, § 5 to 9:

> **Registration of lien notes prohibited.**
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> **5** Notwithstanding anything in any statute of Manitoba, no lien notes, hire receipts, orders for chattels, or documents or instruments containing as a portion thereof, or having annexed thereto or endorses thereon, any order, contract, or agreement, for the purchase or delivery of any chattel, shall be registered in any land titles office, and no caveat shall be registered or filed in any land titles office if it has annexed thereto or endorses thereon, or if it refers to or is founded upon, an instrument or document, or part thereof, registration of which is prohibited by this section.
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> R.S.M., c. 144, s. 5; am.
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> **Registrars to refuse to register.**
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> **6** Every district registrar to whom any such lien note, hire receipt, order for chattels, document, instrument, or caveat, the registration or filing of which is prohibited by this Act, is presented, shall refuse to receive it.
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> R.S.M., c. 144, s. 6.

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[17] (1907) 6 W.L.R. 179 at 185.

[18] 56 Ch. 17.

[19] 57 Ch. 14.

Registration, if effected, to be void.

7 Where, notwithstanding sections 5 and 6, by inadvertence, accident, mistake, or the non-performance of duty, on the part of a district registrar, any such lien note, hire receipt, order for chattels, document, instrument, or caveat, the registration or filing whereof is prohibited by section 5, is registered or filed in any land titles office in Manitoba, the registration or filing is, nevertheless, void.

R.S.M., c. 144, s. 7; am.

Prohibited registration void since 11th March, 1893.

8 Every lien note, hire receipt, order for chattels, or document or instrument, the registration of which is or was prohibited by this Act, or by any Act or Acts for which this Act is substituted, is and has been since the eleventh day of March, 1893, and shall continue to be, in so far as it purports or purported to affect land, void as against any person or corporation claiming an interest or estate in lands under a registered instrument.

R.S.M., c. 144, s. 8.

Notice ineffective.

9(1) No notice, past, present or future, actual or constructive, to the person or corporation claiming under such a registered instrument is to prevent the operation of section 8.

Am.

Idem.

9(2) Notice, whether actual or constructive, in such cases shall be void and of no effect whatever.

R.S.M., c. 120, s. 8; am.

However, Manitoba has recently enacted (but not yet proclaimed) legislation repealing the Act:

AN ACT TO AMEND AND REPEAL THE LIEN NOTES ACT.[20]

(Assented to May 25, 1973)

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

Subsec. (2) of sec. 3 amended.

1 Subsection (2) of section 3 of The Lien Notes Act, being chapter L140 of the Revised Statutes, is amended by striking out the words "Farm Implement Act" in the second line thereof and substituting therefor the words "Farm Machinery and Equipment Act".

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[20] S.M. 1973, c. 9.

Secs. 5 to 9 repealed.

2 Sections 5 to 9 of the Act are repealed.

Act repealed.

3 The Lien Notes Act, being chapter L140 of the Revised Statutes, and section 1 are repealed.

Commencement of Act.

4 This Act, except sections 2 and 3, come into force on the day it receives the royal assent and sections 2 and 3 come into force on a day fixed by proclamation.

The Personal Property Security Act[21] (not yet proclaimed) will replace The Lien Notes Act in Manitoba. There is no similar provision prohibiting the registration of a collateral land mortgage in this new legislation.

IV. SASKATCHEWAN PROVISIONS

The Saskatchewan legislation was originally enacted as an amendment to The Land Titles Act[22] in 1909.[23] The present section 126 is embodied in The Land Titles Act:[24]

Mortgage to secure purchase price of chattels

126.—(1) A mortgage or any other instrument affecting land by way of charge, lien or encumbrance given to secure the payment of the whole or part of the purchase price of chattels and executed before the expiration of six months after the delivery to the purchaser of the said chattels or any of them, shall be absolutely null and void, notwithstanding anything in any Act to the contrary.

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[21] S.M. 1973, c. 5.

[22] S.S. 1906, c. 24.

[23] S.S. 1909, c. 20, s. 11.

[24] R.S.S. 1965, c. 115.

(2) Subsection (1) does not apply to instruments given to secure payment of the whole or part of the purchase price of goods, wares or merchandise or fixtures sold or to be sold either to a merchant, contractor or builder in the course of his business or to enable any person to enter into and carry on business as a retail merchant, contractor or builder.

(3) Subsection (1) does not apply to instruments heretofore or hereafter given to secure the whole or a part of the purchase price of the land charged when sold with chattels upon an entire consideration.

(4) Subsection (1) does not apply to an instrument given to secure payment of the whole or part of the purchase price of a prefabricated house, building or structure to be placed or built on the land to be affected by the instrument, or of building materials and fixtures to be used for repairing or building a house, building or structure situated on or to be built on the land to be affected by the instrument.

(5) If by fraud, inadvertence or otherwise, any such mortgage or other instrument or a caveat founded thereon is registered, the registration shall be absolutely null and void. 1960, c. 65, s. 119.

This legislation is broader in application than either the Alberta or Manitoba provisions in that it declares any collateral land mortgage or charge to secure the purchase price of chattels null and void if executed within six months of delivery--not merely a land mortgage or charge contained in, endorsed upon or annexed to the instrument of purchase. A collateral mortgage executed after the expiry of six months from the date of delivery would be valid. The result of this legislation is to achieve the same effect as the Alberta and Manitoba legislation--namely, the requirement of a *separate* document containing the land mortgage. The only difference is that in Saskatchewan the land mortgage cannot be executed until the expiry of six months from the date of delivery whereas in Alberta and Manitoba the separate land mortgage can be executed simultaneously with the purchase instrument.

Subsections (2) to (4) provide for exceptions to the operation of the general rule.

V. GENERAL CONSIDERATIONS

A. Repeal of Sections 106 and 107

Sections 106 and 107 do not prevent the taking of a land mortgage as collateral security for the purchase price of chattels, they simply prohibit the mention of such a fact in the land mortgage. The intention of these sections is to prevent the concealment of a hidden charge upon land contained in a contract for the purchase or delivery of chattels and was enacted originally to protect farmers who were purchasing machinery or instalment contracts. It is arguable that these sections have now outlived their purpose and that in these more modern and sophisticated times the requirements of a separate document containing the land mortgage or charge is unduly burdensome.[25]

On the other hand, it is arguable that the principle of the sections is beneficial and that the instalment purchaser of any chattels should be protected from the possibility of such hidden charges. In view of the absence of such provisions in all but Saskatchewan and Manitoba (and their eventual repeal in Manitoba), however, such protection can be considered unwarranted. This is especially so when the more basic forms of protection provided by the common law are still available to the instalment purchaser: e.g.

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[25] I would make reference to a letter dated March 20, 1975, outlining some of the comments concerning the said sections; see Appendix II.

the defences of fraud, deceit, misrepresentation and *non est factum*.[26]

B. Retention of the Principle of Sections 106 and 107.

If the protection afforded by sections 106 and 107 is to be retained and the requirement of a separate instrument containing the land mortgage or charge maintained, the inclusion of a six month waiting period before execution (as is found in Saskatchewan) seems an unwarranted additional burden on the seller wishing to obtain security from the purchaser. In addition, the exceptions embodied in subsections (2) to (4) of the Saskatchewan legislation are commendable. The sale of chattels to a merchant, builder or contractor in the course of his business is a common commercial practice and the availability of security for the seller is a paramount consideration in entering into the agreement. Such a necessary transaction should not be hampered by this type of restrictive legislation--nor should the increasingly common practice of selling pre-fabricated buildings. Finally, the seller of chattels with land upon an entire consideration should not be required to take a separate land mortgage for security on the purchase price of the chattels.

VI. CONCLUSION

It is the author's opinion that the principle of

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[26] A discussion of these defences is beyond the scope of this report; the statement is merely illustrative and not intended to be definitive or conclusive.

sections 106 and 107 have outlined their purpose and should not be retained. As our economy becomes increasingly credit-oriented, security by way of a land mortgage will become more prevalent. The restrictions imposed by such legislation are unduly burdensome when weighed against the supposed protection they offer. As a result they act as a hindrance to the facilitation of commercial transactions and should therefore be repealed.

APPENDIX I.

Legislative History of Sections 106 and 107

First enacted in 1910 as "An Act Respecting Charges upon Land contained in Certain Instruments" S.A. 1910(2), c.5, § 1 and 2.

1910
(SECOND SESSION)

CHAPTER 5.

An Act respecting Charges upon Land contained in Certain Instruments.

(*Assented to December* 5, 1910.)

HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Alberta, enacts as follows:

1. From and after the coming into force of this Act, every mortgage, charge or encumbrance upon land or upon any estate or interest therein contained in, endorsed upon or annexed to a writing, or instrument written or printed, or partly written and partly printed, or any part thereof, which said writing or instrument is required to be registered in order to preserve the rights of the seller or bailor of goods as against any purchaser or mortgagee of or from the buyer or bailee of such goods in good faith for valuable consideration, or against judgments under the Ordinance respecting *Hire Receipts and Conditional Sales of Goods*, or contained in, endorsed upon or annexed to a written order, contract or agreement for the purchase or delivery of any chattel or chattels shall be null and void to all intents and purposes whatsoever, notwithstanding anything contained in *The Land Titles Act* or in any other Act or Ordinance.

2. No such mortgage, charge or encumbrance, nor any caveat founded thereon, or upon any such writing or instrument, shall hereafter be registered or filed under *The Land Titles Act*, and in the event of any such writing or instrument by inadvertence, accident or otherwise, howsoever, being registered or filed in any land titles office contrary to the provisions of this Act, such registration or filing shall be ineffective and nugatory to all intents and purposes whatsoever, and may be cancelled by a judge of the Supreme Court upon the application of any person interested, which application may be made by way of originating summons.

R.S.A. 1922, c. 136:

CHAPTER 136.

An Act respecting Charges upon Land contained in Certain Instruments.

HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Alberta, enacts as follows:

Short Title.

1. This Act may be cited as "*The Instalment Purchasers Protection Act.*" Short title

General Provisions.

2. After the fourth day of December, one thousand nine hundred and ten, every mortgage, charge or incumbrance upon land or upon any estate or interest therein contained in, indorsed upon or annexed to a writing, or instrument written or printed, or partly written and partly printed, or any part thereof, which said writing or instrument is required to be registered in order to preserve the rights of the seller or bailor of goods as against any purchaser or mortgagee of or from the buyer or bailee of such goods in good faith for valuable consideration, or against judgments under *The Conditional Sales Act*, or contained in, indorsed upon or annexed to a written order, contract or agreement for the purchase or delivery of any chattel or chattels shall be null and void to all intents and purposes whatsoever, notwithstanding anything contained in any Act. [1910(2), c. 5, s. 1.] Avoidance of mortgages of land, etc., contained, etc., in conditional sale agreements

3. No such mortgage, charge or incumbrance, and no caveat founded thereon, or upon any such writing or instrument, shall hereafter be registered or filed under *The Land Titles Act*, and in the event of any such writing or instrument by inadvertence, accident or otherwise howsoever, being registered or filed in any Land Titles Office contrary to the provisions hereof, such registration or filing shall be ineffective and nugatory to all intents and purposes whatsoever, and may be cancelled by a judge of the Supreme Court upon the application of any person interested, which application may be made by way of originating notice. [1910(2), c. 5, s. 2.] Registration forbidden

Effect of accidental registration

Consolidated in The Land Titles Act, R.S.A. 1942, c. 205, § 103, 104.

103. After the fourth day of December, one thousand nine hundred and ten, every mortgage, charge or incumbrance upon land or upon any estate or interest therein contained in, indorsed upon or annexed to a writing, or instrument written or printed, or partly written and partly printed, or any part thereof, which writing or instrument is required to be registered in order to preserve the rights of the seller or bailor of goods as against any purchaser or mortgagee of or from the buyer or bailee of the goods in good faith for valuable consideration, or against judgments under *The Conditional Sales Act*; or contained in, indorsed upon or annexed to a written order, contract or agreement for the purchase or delivery of any chattel or chattels shall be null and void to all intents and purposes whatsoever, notwithstanding anything contained in any Act. [R.S.A. 1922, c. 136, s. 2.]

Mortgages as affected by conditional sales agreements

104. No such mortgage, charge or incumbrance, and no caveat founded thereon, or upon any such writing or instrument, shall hereafter be registered or filed under this Act,

and in the event of any such writing or instrument by inadvertence, accident or otherwise howsoever, being registered or filed in any Land Titles Office contrary to the provisions hereof, the registration or filing shall be ineffective and nugatory to all intents and purposes whatsoever, and may be cancelled by a judge of the Supreme Court upon the application of any person interested, which application may be made by way of originating notice. [R.S.A. 1922, c. 136, s. 3.]

Registration forbidden

The Land Titles Act, R.S.A. 1955 c. 170 § 107, 108:

Mortgages affected by conditional sales agreements

107. Every mortgage, charge or encumbrance upon land or upon any estate or interest therein

(*a*) contained in, endorsed upon or annexed to a writing or instrument that is written or printed, or partly written and partly printed, or any part thereof, and that is required to be registered in order to preserve the rights of the seller or bailor of goods as against any purchaser or mortgagee of or from the buyer or bailee of the goods in good faith for valuable consideration, or against judgments under *The Conditional Sales Act*, or

(*b*) contained in, endorsed upon or annexed to a written order, contract or agreement for the purchase or delivery of any chattel or chattels,

is null and void to all intents and purposes whatsoever, notwithstanding anything contained in any Act.
[R.S.A. 1942, c. 205, s. 103.]

Registration of mortgage

108. (1) No such mortgage, charge or encumbrance, and no caveat founded thereon, or upon any such writing or instrument, shall be registered or filed under this Act.

(2) If any such writing or instrument, by inadvertence, accident or otherwise howsoever, is registered or filed in any Land Titles Office contrary to the provisions of this section, the registration or filing is ineffective and nugatory to all intents and purposes whatsoever, and may be cancelled by a judge of the Supreme Court upon the application of any person interested, and the application may be made by way of originating notice. [R.S.A. 1942, c. 205, s. 104.]

APPENDIX II.

March 20, 1975.

The Institute of Law Research and Reform,
102 Law Centre,
The University of Alberta,
Edmonton, Alberta.

Attention: Mr. W. H. Hurlburt, Q.C.

Dear Bill:

I have your letter of March 13th and set out hereafter in point form my comments:

1. While I would not agree with it, I could understand it if the Legislature were to say that one should be prohibited from taking a Land Mortgage as collateral security for a Chattel Mortgage or Conditional Sale Contract. However that is not what is done by the legislation in question.

2. The legislation in question does not prohibit the taking of a land mortgage as collateral security but simply prohibits the mention of such fact in the Land Mortgage. This seems to me to be absurd.

3. I can quite understand the Legislature not permitting the registration of a Chattel Mortgage or a Conditional Sale Contract as such in the Land Titles Office (though this is permitted in some jurisdictions) but I cannot see any valid objection to referring to a Chattel Mortgage or Conditional Sale Contract in a Land Mortgage which is collateral to it or the attaching of such documents as a schedule to the Land Mortgage. It seems to me that the proper way to draw a Land Mortgage as collateral to a Conditional Sale Contract is to refer in the Land Mortgage to such Contract and to attach a copy thereto as a schedule but this is prohibited by the legislation in question.

4. I, of course, do not know why the Legislature passed the legiation in question but Thom's explanation is that the farmer might forget to have the Land Mortgage discharged from the Land Titles Office after he had paid for the implement. Surely this is not a valid reason. I believe the simplest farmer knows enough to be able to do this.

5. The legislation in question is a trap because it is inconsistent with the general scheme of the law. It is not something that even an experienced lawyer could expect to find in the law.

6. It makes no sense for the law to permit the giving of a Land Mortgage as collateral

security to a Conditional Sale Contract and yet prohibit the mention of that fact in the Land Mortgage.

7. The case that I have involves the sale of pre-fab buildings that will become attached to the real estate. Now the Conditional Sale Act preserves the chattel nature of the buildings but we wish to have a mortgage on the land as collateral. As indicated above, in some jurisdictions it is possible to file a Conditional Sales Contract so as to warn the purchaser of the land that there is something attached to it which would ordinarily be considered part of the land but which is subject to a Conditional Sales Contract. I think it would be a good idea to have something like this in the Province of Alberta so that when a man buys a house for instance he could be warned by searching the title to the house that the furnace for example is subject to a Conditional Sales Contract.

Yours truly,

J. L. CHAPMAN.