BILLS OF SALE AND OTHER PUZZLES

As previously pointed out in an article in this Journal,[1] the *Bills of Sale and Other Instruments Act of* 1955 makes certain departures from the old law. It is conceded, of course, that some of these departures represent improvements on the prior position. The machinery of registration has been simplified, the consequences of failure to register a bill of sale have been made less drastic, and the provision for the optional registration of assignments of book debts represents a timely reform and one that fills a long felt want. On the whole, however, it seems a not unjust criticism that such advantages as have been gained pertain mainly to the sphere of the machinery of registration and appear to have been gained at the expense of clarity and simplicity in the substantive law. In many aspects, it will be submitted, the Act proceeds in ignorance of or disregard for the prior state of the law and the history of the previous legislation, and the result of the engrafting of cryptically worded legislation can only be to add complication and doubt.

Though the bills of sale legislation affects transfers of chattels generally, its greatest impact undoubtedly is on mortgages and other securities and on hire purchase transactions. It is most important that if alterations are made to the rights of parties to such transactions, then such alterations should be made in a reasonably intelligible fashion and with due regard to the consequences. It is submitted that this 1955 legislation fails in important aspects to keep this important requirement in mind.

It is intended to pass in review successively the general mortgage bill of sale, the stock mortgage and finally the crop and wool liens, and to consider certain provisions of the new Act in relation to them.

The General Security Bill of Sale

This is usually called the "conditional" bill to distinguish it from the so-called "absolute" bill. It is normally represented by the legal mortgage of chattels, a transaction which has been moulded by the joint influences of common law and equity in much the same way as the mortgage of old system land, to which in structure and character it would, apart from the Bills of Sale legislation, bear a very close resemblance.

The legislative pattern introduced by the English Act of 1854 and followed by the Queensland Act of 1891 can be generally

1. 2 U.Q.L.J. 304 (1955).

summarized in manner following. The legally effective instrument of security dealing with chattels qualifies for registration as a bill of sale by virtue of two characteristics.

Firstly, it must be a "bill of sale", that is to say, speaking very roughly, it must be either an assurance (either legal or equitable) of chattels, a declaration of trust of chattels, a charge over chattels, or a licence to seize chattels. The term "chattels" is specially defined as furniture, goods, chattels and other articles capable of complete transfer by delivery, and (when separately assigned or charged) fixtures. The term "bill of sale", therefore, connotes two ideas. It is not enough that the document is an assurance, declaration of trust, charge or licence; the subject matter must be also "chattels" as specifically defined. One important feature of the definition of "chattels" is that the requirement of deliverability must exist as at the date of the execution of the document—*Brantom v. Griffits*[2]—so that assignments of after-acquired property[3] and assignments of growing crops[4] are not given over "chattels" within the meaning of the statutory definition. They qualify as "assurances" but they are not given over "chattels". They are therefore not "bills of sale", or at least they are not registrable "bills of sale".[5]

Secondly, the requirement of registrability applies only to "bills of sale" (as above delimited) whereunder the grantee has a power to seize or take possession of the chattels concerned.[6]

In general the new statute of 1955 conforms to this pattern so far as its general framework is concerned, but special provision is made for after-acquired or "future" chattels, for growing crops and for fixtures. Before dealing with these, however, it is necessary to glance at the obscurities of the key section dealing with the consequences of failure to register a document which answers the description of a registrable bill of sale. It is here that the new Act makes the greatest break with the prior law as the previous rule was that an unregistered bill of sale was totally void as a disposition of the chattels purported to be affected thereby. The new provision, however, is framed most obscurely.

Section 7 (1) provides that an unregistered "instrument" (a term which comprises bills of sale, stock mortgages, liens upon

2. (1877) 2 C.P.D. 212.
3. *Malick v. Lloyd* (1913) 16 C.L.R. 483; *Akron Tyre Co. v. Kittson* (1951) 82 C.L.R. 477.
4. *Brantom v. Griffits, supra.*
5. Some would apparently regard such transactions as bills of sale because they are assurances, but not registrable bills of sale because not given over "chattels". However, the statutory definition appears, save in one instance, to involve the notion that in order for a document to be a bill of sale at all, it must relate to "chattels".
6. See now s. 6 (2) of the new Act.

crops and liens on wool) shall not have any effect as to the chattels comprised therein or subject thereto against any person other than the grantor and grantee. This provision is made subject to subsection (2), which in effect provides (paragraph (*a*)) that every instrument when registered shall be deemed to be given on the day on which it is executed and shall take force and effect from the time of its execution, and (paragraph (*b*)) that every instrument registered under the Act shall in respect of the chattels comprised therein be entitled in priority as regards the title to or right to the possession of such chattels according to the time of its registration. There is little doubt that as between two documents both of which qualify for registration as bills of sale, the matter of priorities would be determinable, under subsection 2 (*b*), according to the respective dates of registration, but what is to be said of the situation where the contest is between a registrable bill of sale and another transaction which is not a bill of sale, such as an oral sale of chattels or a pledge ? For instance, if *A* gives *B* a mortgage over chattels which is initially unregistered and then sells the chattels to *C*, can *B* after the sale register his mortgage and rely on subsection 2 (*a*) to gain priority over *C* ? Or, supposing that *A* executes a private hire purchase agreement[7] in favour of *B* which is unregistered (but of course good as between *A* and *B*) and then purports to sell the chattels, can *B* by later registration make his rights under the hire purchase agreement binding as against the purchaser ? As paragraph (*a*) is made subject to paragraph (*b*) one would be inclined to suggest that the answer to both the above questions should be in the negative, and this would be a reasonable conclusion. Such an interpretation, however, would appear to give no effect whatever to paragraph (*a*). It would limit that paragraph to the position between grantor and grantee where it would be quite nugatory because in this situation registration is irrelevant and the bill of sale would operate as from date of execution without any assistance from section 7 (2) (*a*).

On the other hand it may well be that paragraph (*a*) is simply intended to reverse the provision in the old Act that for the purposes of any law avoiding assignments as against creditors the date of the registration should be deemed to be the date of the execution of the bill of sale, a section applied by the High Court in *Dixon v. Todd*.[8] This, in fact, looks like the true reason for the provision. It appears to have been the intention of the legislature to confine paragraph (*a*) to cases where the creditors of the grantor of the bill were involved, and to make paragraph (*b*) applicable to all

7. *i.e.* one where the owner is not a person who ordinarily sells or hires under hire purchase agreement chattels of the same class—see *Bills of Sale &c. Act of* 1955 s. 6 (5).
8. (1904) 1 C.L.R. 320.

cases of priorities between the grantee and all persons except creditors. Such a distinction may perhaps be justifiable on the ground that historically the first function of the bills of sale legislation was to protect the creditors, but it cannot be said that it is very clearly made or even that there is any certainty that it was intended to be made.

A most peculiar section deals with the position of after-acquired property. The prior law on this point was that, save in such special circumstances as those of *Akron Tyre Co. v. Kittson*[9] and possibly in the case of "potential property",[10] the assignment of after-acquired chattels has no effect at all as an assignment at common law, but is construed as a contract to assign and as passing an equitable title when the chattels come into existence or are acquired by the grantor. This is the well-known rule of *Holroyd v. Marshall*.[11] The first part of section 21 of the new Act purports to remove any effect from an instrument given by way of security over chattels which the grantor acquires or becomes entitled to after the execution of the instrument. There is then a proviso dealing with the case where the consideration for the assignment is a loan to be expended on the purchase of the chattels. This is then followed by a further proviso which is to the effect that such an instrument (that is, one dealing with after-acquired chattels) "shall have effect" as regards such chattels in particular circumstances which it is not proposed here to consider in detail but which can be briefly summarised as, firstly, where the after-acquired chattels are required in substitution for any chattels comprised in the instrument, secondly, where the after-acquired chattels are brought upon the place where the chattels comprised in the instrument are stated to be situated or at any later time become situated, and lastly, where they are acquired for use or intended use in a business described in the instrument.

The first question then is whether an assignment which would fall within the terms of this second proviso is subject to the registration requirement. It is noticeable that the section refers to "an instrument being a bill of sale. . . ." *Prima facie* a mortgage of after-acquired goods is *not* a bill of sale because it does not deal with "chattels". There may also be some doubt whether it confers a power to seize within the meaning of section 6 (2). However, both the definition of "chattels" and the "power to seize" provision are made subject to any contrary implication arising from the

9. (1951) 82 C.L.R. 477.

10. See Benjamin: *Sale*, 7th ed. p. 145; Millar: *Bills of Sale*, pp. 34-35.

11. (1862) 10 H.L.C. 191, 11 E.R. 999. See also *Tailby v. Official Receiver* (1888) 13 A.C. 523.

context. Here there would seem to be a sufficient contrary context and it is probable, though not very clear, that the assignment would need to be registered to be regarded as good as against third parties.

There is also the further problem as to what kind of title the grantee obtains, that is, whether legal or equitable. It might be argued that as the Act supplies the "effect" then it confers a legal statutory title. On the other hand it may well be that as the Act is merely operating to restore, within narrower limits, the equitable "effect" which previously existed, it is operative merely on the equitable level and that the title conferred is still merely equitable. Support for this is given by the fact that where the Act intends to confer a legal title in the case of dispositions of after-acquired property, *e.g.* under section 27 dealing with after-acquired live stock, it does so in express terms. Obviously, however, it is desirable that such matters should have been made clear.

As regards fixtures, in extending the definition of chattels to fixtures when separately assigned, the legislature has copied some of the worst features of the English Act of 1878. The term "chattels" is made to include fixtures when separately "assigned or charged", and it is stated not to include fixtures ("except trade machinery") when assigned together with a freehold or leasehold interest in any land or building to which they are affixed. The Act later provides that neither fixtures nor growing crops shall be deemed to be separately assigned by reason only that they are assigned by separate words or that power is given to sever them from the land or building if by the same instrument any freehold or leasehold interest in the land or building to which such fixtures are affixed or in the land in which such crops grow is also conveyed or assigned to the same person.[12] On similar English provisions it had been held that the test to decide whether an instrument covering fixtures was a bill of sale was whether the instrument empowered the mortgagee to realise his security on the fixtures apart from his security in the land.[13] The exclusion of "trade machinery" from the statement that fixtures are not included when they are assigned together with an interest in land raised still more awkward complications, and one of the issues in *Re Yates*[14] was whether this exclusion meant that all assignments which in any way affected trade

12. See s. 6 (1) and (3).

13. *Re Yates* (1888) 38 Ch.D. 112, 120, 124. It is doubtful to what extent this differed from the rule previously applied in *Ex parte Daglish* (1873) L.R. 8 Ch. 1072 in situations where there were no such statutory provisions.

14. *Supra.*

machinery were registrable bills of sale.[15] One would have thought that the Queensland legislature would have kept clear of this imbroglio.

Some treatment of fixtures is of course desirable but it is difficult to see why *growing crops* should have been mentioned in this part of the Act at all in view of their later treatment in that part of the Act dealing with "liens upon crops". The definition section[16] states that the term "chattels" does not include "growing crops, when assigned with any interest in the land on which they grow". The implication is that growing crops *may* be "chattels" when separately assigned and hence the subject of a registrable bill of sale if separately assigned, an inference supported by section 6 (3) which as we have seen supplies a negative definition of what is meant by "separately assigned" and expressly refers to growing crops. The same tests to determine "separate assignment" would be applicable as in the case of fixtures, viz. the crops would be separately assigned if dealt with by a separate instrument or dealt with in a mortgage of the land but realisable separately.[17] If this be so, then a mortgage of a growing crop may be a "bill of sale" under Part I and also a "lien upon crops" under Part IV. If the legislature intended merely to establish a principle that a transfer or mortgage of land which bore express reference to growing crops was not a "bill of sale", it could have done so simply by making it clear that such crops were not "chattels". If it was then further intended that the mortgage of land which gave separate power to realise on the crops as chattels should be registrable under the legislation, as is the English position, there could have been some provision in that part of the Act dealing with liens upon crops. The uncritical adoption of some of the definitions in the English Act (which differs from the Queensland Act in not providing any specific security over growing crops) seems open to considerable criticism.

15. In this case it was held that the answer was in the negative. The instrument was not a registrable bill of sale unless the mortgagee was empowered to realise his security in the fixtures separately from his security in the land. Thus the ordinary test of "separate assignment" was held to be applicable to trade machinery no less than to other sorts of fixtures. The Queensland Act, however, differs from the English one in certain material aspects so far as the treatment of trade machinery is concerned and resembles more the South Australian enactment. It is, therefore, by no means certain that the decision in *Re Yates* would be applicable here.

16. Section 6.

17. This is made clear in the English Act where growing crops are linked with fixtures in the definition paragraph; in Queensland the matter is left open to conjecture.

Stock Mortgages

Separate treatment of these now seems quite unnecessary. It is well known that the first legislation on this topic in New South Wales, which was later embodied in the *Mercantile Act* (1867) of this State, antedated the bills of sale legislation and was based on a different object, viz. the desire to protect the mortgagee from the operation, in the event of the bankruptcy of the mortgagor, of the "possession order or disposition" provisions of the State insolvency legislation. Later the Bills of Sale legislation, which would apply to live stock in their character as "chattels", removed any real need for separate provision and the only effect of the separate registration under the Mercantile Act was to remove the necessity of registration under the Bills of Sale Act of 1891 which would otherwise exist. Now that there is only one system of registration, it seems quite meaningless to retain the notion of a separate security over stock and to provide that "live stock" are not "chattels" within the general section (s. 6), but are "chattels" (!) for particular purposes under section 25. In any event the reference to "possession order or disposition" in section 25 is quite obsolete in view of the fact that the matter is now regulated by section 91 of the Federal *Bankruptcy Act* which gives adequate protection to the mortgagee under a registered instrument.

Crop and Wool Liens

It is, however, in relation to the securities over growing crops and wool that the Act deserves most destructive criticism as here it seems totally to ignore the prior history of the matter.

There is no doubt that at common law crops could be assigned whilst still growing and if they were *fructus industriales* (as they usually are) a sale of them was regarded as one of goods. In fact, the disposition could be of crops not then planted on the basis of their being potential property.[18] There seems to be no reason why such a dealing could not be by way of security.[19] Probably the disposition would need to be by deed to the same extent as any assignment of chattels without delivery of possession would require a deed.

It appeared to be the position, however, that no common law or equitable disposition of crops would bind persons taking interests in the land, such as a mortgagee of the land or a purchaser of the land, until the crops had been severed and reduced to possession.[20] This subject is, however, very obscure and devoid of authority.

18. *Grantham v. Hawley* (1615) Hob. 132, 80 E.R. 281.

19. *Petch v. Tutin* (1846) 15 M. & W. 110, 153 E.R. 782.

20. See Coppel: *Bills of Sale*, pp. 214, 216. It appears also to be the implicit assumption upon which the Australian crop lien legislation is based.

The early authorities seem to establish that an assignment of growing crops can confer a legal title, and it seems somewhat strange to regard the possibility of the acquisition of a legal title which would not bind third parties. The truth is that it is not possible to treat growing crops conclusively as personalty for all purposes. They are chattels for some purposes, but part of the realty for others.

The position as to growing wool is still more obscure because to give security over wool before the wool was shorn would not have occurred to the English common lawyer, but there is little doubt that such a disposition whether by sale or security would at least have been operative on the basis of contract between the parties.

The crop and wool lien legislation of New South Wales, Victoria and Queensland was enacted with the object of giving protection to the mortgagee of the crop against interests in the land (or sheep) which it is assumed by the legislation would otherwise be paramount. This it did by creating a special statutory security called a lien over crops (and a lien over wool) which, subject to registration, gave a legal title to the crop and also gave protection against later purchases and encumbrances of the land (or sheep). The forms of these instruments were specifically provided by Parliament. It is stressed that the legislature discarded altogether the shadowy common law form of security; the "preferable liens" owed their validity and effect entirely to statute. The *Mercantile Act* prescribed certain forms for such liens and their efficacy depended entirely on compliance with those forms and on registration under the Act. The lien given in form provided by the Act but without the statutory efficacy given by the Act would at most constitute an equitable charge.[21]

Not all States followed this model. For instance, the Western Australian Act refers to a "bill of sale of wool" and a "bill of sale over crops". The Tasmanian Act refers to a bill of sale of wool and appears to contemplate also a bill of sale over crops. The South Australian Act refers to crops as one type of property over which a bill of sale may be given. These instruments appear to draw their efficacy from common law.[22] Another Tasmanian Act,

21. *London & Australian Agency Co. v. Duff* (1868) 5 W.W. & a'B. (E) 19.

22. There appears to have been, however, a good deal of confusion in the minds of the legislatures. Thus the Western Australian Act (the *Bills of Sale Act* 1899) provides that a bill of sale of wool may be in the Form in the 4th Schedule, but the scheduled form is expressed to grant a "preferable lien". See too the *Bills of Sale Act* 1900 (Tas.) Eighth Schedule. On the other hand, the scheduled form for a bill of sale over crops under the W.A. Act, the use of which is of course merely optional, provides for the grantor to "hereby sell and assign all that the crops now actually sown . . . to hold the said crops as security. . . ." The form of special statutory mortgage of crops and of wool in Tasmania is a formal indenture.

however, creates a statutory "mortgage" over crops and one over wool.

The new Queensland Act repeals the Mercantile Act. So far as securities over growing crops are concerned, it provides that an instrument by way of security may be granted over any crops of the grantor then sown or growing or to be sown or grown within twelve months. Such instrument must state the nature of the crop and describe the lands upon which the crops are sown or to be sown. Upon registration of the instrument the grantee is entitled to the whole of the crops described.

The fundamental design of the crop lien provisions in the legislation of 1867 was the affording of protection against persons other than the lienor and the measure of such protection is a matter of great importance.

The protective provisions both in the 1867 and the present Act are of two types. There are those designed to give the lienee's title protection against subsequent purchasers and encumbrancers of the land and there are those which purport to regulate the right of the lienee to realise upon the crop as against those persons who have interests in the land at the time of the granting of the lien.

As regards the first type, it has always been clear that the protection existed in favour only of the registered lienee, but the question was whether the protection operated only as from registration or, subject to registration, vested as from date of execution. In *Attorney-General v. Hill & Halls Ltd.*[23] the High Court was of the view that the protection was operative as from date of execution, but subject to defeasance if there was no registration as required by the Act. These remarks were made in reference to a New South Wales statute similar in phraseology to the previous provision of the Mercantile Act. The provision in the new Queensland Act (section 32 (2)), with its reference to a lien upon crops "being registered"—phraseology which is somewhat different from that in the 1867 Act—does appear to suggest that registration is the operative date, a conclusion which is strengthened by the fact that no time is prescribed within which registration is to be effected. The matter, however, is then rendered doubtful by the provisions of section 7, notably sub-section (2), which applies to crop liens in virtue of their being "instruments" under the Act. On the whole, however, the intent of the legislature appears to be reasonably clear here, viz. to make time of registration the effective date. The same cannot be said with regard to what we have designated as the second type of protective provision.

23. (1923) 32 C.L.R. 112 at 128.

Under this second type of provision, which appears in the new Act in section 32 (1) and (3), the adverse interests affected would appear to comprise those of a landlord, a mortgagee of the land and an unpaid vendor of the land, on the assumption that these interests exist as at the date of the creation of the lien. Here the position remains most nebulous. The lienee in the case where the land is held on a tenancy or subject to an existing mortgage has the right of selling the crop on condition of making certain payments to the landlord or mortgagee of rent or interest respectively. But what of the position where it is one of these persons who takes the initiative, for instance a mortgagee who goes into possession and proposes to sell the crop? Has the lienee any protection? In *Graham v. Carlson*[24] the lienor was a tenant. The landlord obtained judgment for rent and a receiver was appointed who harvested and sold the crop. The proceeds were paid into Court and it was held by E. A. Douglas J. that the lienee was entitled to the proceeds up to the amount of the sum advanced by him. It has been commented that the result of this is that if the landlord allows his tenant's default to continue so that the lienee harvests, he may by virtue of express provision in the Act claim twelve months arrears of rent from the latter, but if he himself takes positive steps to recover the money due to him the lienee is entitled to complete priority over him.[25]

If this decision is a correct one, then it may possibly be altered by certain new provisions in the Act of 1955, the effects of which are completely obscure. Section 32 (1) provides that no lien upon crops "shall prejudicially affect the rights of any landlord or mortgagee . . . unless and so far as the landlord has consented in writing to such an instrument". This may mean that a landlord or a mortgagee may be debarred from asserting a paramount title over the title of the lienee, but only in the case where he has given the consent referred to. On the other hand, it may be that *Graham v. Carlson* is wrong, that the prior mortgagee or landlord in such cases is never obliged to recognise a prior title in the lienee, that the only right of the lienee in such circumstances is the right to harvest, carry away and sell, and that the effect of the new statutory provision relates to that right and in effect makes its existence conditional on the giving of the consent referred to. A further interpretation would regard the consent as establishing both rights of the lienee, viz. the active right to harvest and sell and the passive right to be protected against the exercise of harvesting and selling rights by the landlord or mortgagee.

24. [1933] Q.W.N. 14.

25. *Coppel, op. cit.* p. 215. The learned author apparently concludes that the moral to be drawn is *dormientibus non vigilantibus lex subveniat.*

Probably the most patent defect of the provisions here, however, is the practical fact that the legislature has not deigned to state the form of what is called a "lien upon crops". It appears to have forgotten that what was provided for by the Mercantile Act was essentially something which owed its full force, as a legal security in any event, to the statute. By repealing the Mercantile Act it repealed the statutory form of security thereby provided. The legislature has now purported to give special statutory efficacy to something of which the only certain things we know are that it is to be given over a growing or potentially growing crop and must refer to the crop and the land. Nothing of enlightenment is provided by the use of the word "lien". The most primary use of the word is to indicate a common law security dependent upon factual possession and created by implication of law, for instance a lien upon goods for work done on them, but the word is also applied to equitable securities such as the equitable lien for unpaid purchase money and to special statutory creations, such as the workman's lien under the Contractors and Workmen's Lien Acts.

Two views are possible. One is that the section constitutes a reference to such securities as apart from statute altogether were possible over growing crops, and that accordingly the instrument is subject to such formalities and restrictions as existed at common law or equity. What such formalities were, however, is wrapped in obscurity. Did common law require a deed? Did it require the use of words of conveyance or of assignment? If it did require the use of a deed, then could one, in the absence of a deed but in the presence of valuable consideration, infer an equitable assignment? It is clear that equitable interests in this species of property may arise by virtue of express or implied contract. Under the prior legislation an unregistered crop lien (in the form provided by the statute) was held to constitute an equitable charge.[26]

The other view would be that the legislature intended to make its lien quite formless. Provided it was writing and purported to affect the crop in the manner set out, then any document which evinced an intent to give a mortgage or a charge or a lien would be enough. This is probably what the legislature intended, but why should it have been left merely to implication?

The application of section 7 to the crop lien seems definitely to establish that priorities between two crop liens are determined by date of registration, thus reversing the actual decision in *Attorney-General v. Hill & Halls Ltd.*[27] It, however, makes complicated the question of the time at which the lienee derives protection against

26. ***White** v. Colonial Bank* (1871) 2 V.R. (E) 96.
27. ***Supra***, n. 23.

adverse interests in the land. Moreover, the position of the lienee as against other dealings with the crop *qua* chattel, for instance when the lienor harvests and sells the crop to a purchaser, may be somewhat obscure. Presumably here, however, the lien instrument would be treated just as if it were a bill of sale.

There is another point. The earlier legislation purported not merely to pass the title in the crop to the lienee; it also vested him constructively with possession, and it was said by the Privy Council[28] that the effect of the Act was that a pledge of wool could be given without a delivery of possession. In the same case they held as a result of this construction that the lienee could maintain trover of the wool. These provisions regarding possession are omitted from the new Queensland Act and it is doubtful whether the legislature has realised the implications of that omission. The term "lien" becomes more and more a misnomer.

What has been urged against the crop lien provisions on the score of incompleteness and obscurity also applies, though in somewhat lesser degree, to those sections dealing with the lien on wool. Here, too, no guide is given as to the form of the security. The Act, however, makes the position somewhat clearer as to the position of third parties possessing interests in the sheep. It provides that a wool lien, if given in a situation where sheep are already mortgaged, requires the consent in writing of the mortgagee of the sheep, and failure to obtain this consent means that the lien is a nullity.[29] However, the provisions in relation to the position where the consent of the mortgagee is in fact obtained are as obscure as the crop lien provisions. Does the Act merely mean that the lienee, in case of default, can shear the sheep and carry away the wool, or does it go further and mean that the sheep mortgagee holds a title subject to the rights of the lienee in all respects so that if he shears the sheep and sells the wool he must hold the proceeds for the lienee ?

One last matter concerns the question of growing crops. It has been seen that on one possible interpretation of the provisions in the general part of the Act an instrument which dealt only with crops or one which dealt with both land and crops in such a way as to entitle the mortgagee to realise separately on the crop would be a registrable bill of sale. It would also be in many cases a lien upon crops. There is also, however, a more serious possibility which arises from the slovenly manner in which the "lien upon crops" is characterised under the Act. By virtue of the loose description of "lien" in Part IV, it is possible to argue that any

28. *Ayers v. South Australian Banking Co.* (1871) L.R. 3 P.C. 548.
29. *Bills of Sale and Other Instruments Act of* 1955, s. 29.

mortgage of land upon which crops were growing would, by virtue of the rule that a mortgage or conveyance of land includes growing crops without express mention,[30] be a "lien upon crops" within the meaning of section 31. All that is necessary is that such a security be "granted over" crops of the type described therein. If this suggestion be correct then the result would be that the mortgage, unless registered under the Act, would be valid as regards the crops only *inter partes*. The fact that the document did not describe the crops within the meaning of the second paragraph of section 31 would not be a reason for holding that it was not an "instrument" under the Act, but rather one for holding that it was an "instrument" which had not complied with the Act and defective on that score even if registered. The consequences would be somewhat Gilbertian. It may well be that a Court would not accept this argument but would conclude that the legislature envisaged some special instrument dealing with crops as such, but the mere possibility that it could reasonably be advanced is a reminder of the dangers of loose legislative draftsmanship.

It seems a matter for regret that a statute which has undoubtedly improved the mechanical aspects of bills of sale registration appears to have been conceived in a spirit of disregard for the effect on the substantive law.

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30. *West v. Moore* (1807) 8 East. 339; 103 E.R. 372. See also *Brantom v. Griffits* (1877) 2 C.P.D. 212.

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