

2. A mortgage by conditional sale and a sale with a condition of repurchase have a very close resemblance. In both cases, there is a right of reconveyance :—

(1) But they are different in the nature of the terms on which the right to reconvey can be exercised vary.

(2) If it is a sale with a condition of repurchase then :—

(i) The right is personal and cannot be transferred.

(ii) The right can be enforced on strict compliance with the terms laid down by the condition of repurchase.

Cases. 10 Cal. 30 ; 6 All. 37 ; 21 Bom. 528.

(3) If it is a mortgage by conditional sale, then—

(i) The right to reconveyance is not personal but is a right in term and can be exercised by the transferee.

(ii) Time will not be treated as of the essence.

3. *What is it that distinguishes sale with a condition of repurchase and mortgage by conditional sale ?*

(1) In a mortgage by conditional sale, the transaction notwithstanding the form, remains a lending and borrowing transaction. The transfer of land, although it is in the form of a sale, in fact it is a transfer by way of security.

(2) In a sale with a condition of repurchase, the transaction is not a lending and borrowing arrangement. It is not a transfer of an interest. It is a transfer of all rights. It is not a transfer by way of security. It is an absolute transfer reserving only a personal right of repurchase.

What is the test for determining whether a transaction is a mortgage ?

(1) No particular words or form of conveyance are necessary to constitute a mortgage. As a general rule, subject to very few exceptions, where a transfer of an estate is *originally* intended as a security for money, it is a mortgage and where it is not so originally intended, it is not a mortgage.

(2) It is not the *name* given to a contract by the parties that determines the nature of the transaction. A document may be held to be a sale although it is called a mortgage by the parties.

(3) It is the jural relation constituted by it, that will determine whether the transaction is a mortgage or not.

2 Bom. 462.

4. *How to find what the intention of the parties was ?*

By finding out how they have treated the money advanced ? If they have treated it as a debt, then it is mortgage. The criteria adopted by the Courts are—

- (i) The existence of a debt
- (ii) The period of repayment, a short period being indicative of a sale and a long period of a mortgage.
- (iii) The continuance of the mortgagor in possession indicates a mortgage.
- (iv) The price below a true value indicates a mortgage.

In applying these tests, the Courts put the onus on the party alleging that an ostensible sale-deed was a mortgage, and in a case of ambiguity, lean to the construction of a mortgage.

5. *Is oral evidence of intention admissible ?*

1. Before the Indian Evidence Act was passed, oral evidence and other instruments were freely admitted to prove this intention. But this practice was condemned by the Privy Council.

2. After the passing of the Indian Evidence Act, the question was governed by Section 92.

3. Section 92 excludes oral evidence to contradict a written document. The Indian Courts, never the less, on the authority of *Lincoln vs. Wright (1859) 4 DeG. & J. 16* admitted evidence of acts and conduct of parties to show, that a deed which purported to be an absolute conveyance was intended to operate as a mortgage.

4. In 1899, the Privy Council definitely ruled in *Balkishen v/s. Legge* = 22 All. 149 = 27 I. A. 58. that the rule in *Lincoln vs. Wright* had no application in India.

5. The result is that, the Courts are definitely limited to the document itself in order to ascertain the intention of the parties.

The question is not what the parties meant, but what is the meaning of the words they used.

Importance of the Proviso.

1. The condition must be embodied in the same document.

Points to be noted.

1. Only means that in determining the question if the condition is contained in another document Court cannot take into consideration in determining intention.

2. But, even if, it was contained in the same document, it is necessarily a mortgage by conditional sale and not a sale with the condition of repurchase.

3. The question of construction still remains.

(iii) Usufructuary Mortgage

1. CHARACTERISTICS.

- (i) Delivery of possession or undertaking to deliver possession.
- (ii) Authority to retain such possession until payment of mortgage-money.
- (iii) Authority to receive the rents and profits and to appropriate the same in lieu of interest or in payment of the mortgage-money.

NOTE.—There is no personal obligation to pay.

(iv) English Mortgage

I. CHARACTERISTICS

- (i) There is a personal obligation to repay by the mortgagor on a certain day.
- (ii) The transfer of the mortgagee is *absolute*.
- (iii) The transfer is subject to the proviso that the mortgagee shall reconvey the property on payment.

II. This closely resembles the conditional mortgage.

Difference.

- (i) In the English Mortgage the sale is absolute while in the mortgage by conditional sale the sale is *ostensible*.

Query. How can it be a mortgage if the sale is absolute? This seems to conflict with the definition of mortgage which is transfer of an interest.

Difference in practice merely means this: that in English Mortgage, the mortgagee is entitled to immediate possession, While in the case of a mortgage by conditional sale, the right to possession depends upon the terms of the mortgage.

(2) In English Mortgage, there is a personal obligation to pay. In a conditional mortgage, there is no such right.

REQUISITES OF A MORTGAGE BY DEPOSIT OF TITLE DEEDS.

I. *Debt.*

1. A debt has been defined as a sum of money due now even though payable in the future, and recoverable by action—(1922) 2 K. B. 599 (617).

NOTE.—As to difference between a debt due by statute and debt due by contract—(1922) 2 K. B. 37. There is no necessity of a promise to pay in order to render the money recoverable when the debt is a statutory debt.

2. The debt may be an existing debt or a future debt. The deposit may be to cover a present as well as future advances—50 I. A. 283; 17 All. 252; 17 All. 252; 25 Cal. 611.

3. The debt may be a general balance that might be due on an account.

2 Mad. 239 P. C.

II. DEPOSIT OF TITLE DEEDS.

(i) Title deeds

1. It has been held in England that it is sufficient if the deeds deposited *bona fide* relate to the property or are *material evidence of title*, and that, it is not necessary that all the deeds should be deposited. (1872) 8 Ch. App. 155.

2. These cases have been followed in India.

59 Cal. 781.

3. But Page *c.f.* in 11 Rang 239 F. B. held that the documents must not only relate to the property but must also be such as to show a *prima facie* or apparent title in the depositor.

4. If the documents show no kind of title, no mortgage is created—Tax receipt—Plan—not documents of title.

5. If the deeds are lost, copies may be deposited.

(ii) If the deeds are already deposited by way of mortgage, they can, by oral agreement, be made a security for further advance. It is not necessary that they should be handed back and redeposited.

17 All. 252.

25 Cal. 611.

III. INTENTION.

1. The intention that the title-deeds shall be the security for the debt is the essence of the transaction.

2. Mere possession is not enough without evidence as to the manner in which the possession originated so that a contract may be inferred.

23 I.A. 106; 38 Bom. 372.

1 Rang. 545.

3. If it is in contemplation of the parties to have a legal mortgage prepared and if the title-deeds are deposited for that purpose *only*, the deposit does not create an equitable mortgage.

4. But although the deposit is for the purpose of the preparations of a legal mortgage, there may also be an intention to give an immediate security, in which case the deposit creates an equitable mortgage.

5. The question is whether mere possession *coupled with debt* does not raise an inference that it is a mortgage? There is a difference of opinion but the better opinion seems to be as between creditor and debtor possession coupled with debt raises a presumption in favour of a mortgage.

IV. TERRITORIAL RESTRICTIONS.

1. This kind of equitable mortgages can be created only in certain towns.

2. The question is, to what does the restriction refer? Does it to the place where the deeds are delivered? or does not refer to the place where the property mortgaged is situated? It is held that the restriction refers to the place where the deeds are delivered and not to the situation of the property mortgaged.

Cases. 14 All. 238.

23 I. A. 106.

It is not necessary for the property to be situated in the towns mentioned.

(vi) Anomalous Mortgages

1. Any mortgage, other than those specified, is called an anomalous mortgage. It is a mortgage which does not fall within any of the other five classes enumerated.

2. Anomalous mortgages take innumerable forms moulded either by custom or the caprice of the creditor—some are combinations of the simple forms—others are customary mortgages prevalent in particular districts, and to these special incidents are attached by local usage.

What is it that distinguishes different kinds of mortgage.

It is the nature of the right transferred which distinguishes the mortgage.

(1) In a simple mortgage, what is transferred is a power of sale which is one of the component rights that make up the aggregate of ownership.

(2) In a usufructuary mortgage, what is transferred is a right of possession and enjoyment of the usufruct.

(3) In a conditional mortgage and in an English mortgage, the right transferred is a right of ownership subject to a condition.

(4) In a simple mortgage and English mortgage, there is a personal obligation to pay.

(5) In an usufructuary mortgage and mortgage by conditional sale, there is no personal obligation to pay.

What is it that is common to all mortgages.

1. A mortgage is a transfer of an interest in specific immoveable property as security for the repayment of a debt.

2. The existence of a debt is therefore a common characteristic.

3. It is said that this cannot be so because in a conditional mortgage or in an usufructuary mortgage there is no personal covenant to pay.

4. The reply to this is, a debt does not cease to be a debt. The remedy of an action for debt does not exist. The remedies for the recovery of debt may differ without the transaction ceasing to be a transaction for debt.

An ordinary mortgage of land may be viewed in two different aspects :

(1) Regarded as a promise by the debtor to repay the loan, it is a contract creating a personal obligation.

(2) It is also a conveyance, because it passes to the creditor a real right in the property pledged to him.

Out of this double aspect, many questions arise.

Q. I.—By what law the validity of a mortgage of land situated abroad should be governed ?

It is now settled that it is governed by the law of *situs*, and no distinction is recognized between an actual transfer and a mere executory contract.

Q. II.—What is the *situs* of the secured debt—Is the debt to be regarded as situated in the country where the debtor resides, or where the land on which it is secured is situated ?

The Privy Council says “It is idle to say that a debt covered by a security is in the same position with one depending solely on the personal obligation of the debtor”.

III

REQUISITES OF A VALID MORTGAGE

This requires the consideration of the following topics:

- I. Formalities with which a mortgage must be executed.
- II. The proper subject-matters of a mortgage.
- III. The capacity to give and to accept a mortgage.
- IV. Contents of a mortgage-deed.

I FORMALITIES WITH WHICH IT MUST BE EXECUTED

Section 59.—

1. Except in the case of mortgage by a deposit of title-deeds, every mortgage created securing the repayment of Rs. 100 or more as principal money must, under the T. P. Act, be effected by a registered instrument, signed by the mortgagor and attested by at least two witnesses.

2. Where the principal money is less than Rs. 100, a mortgage may be created either by such an instrument or except in the case of simple mortgage by delivery of possession of the mortgaged property.

3. If the principal is above Rs. 100, the transaction of mortgage must be in writing i.e. it must be by a deed and the deed must be :—

- (1) Signed by the mortgagor.
- (2) Attested by at least two witnesses.
- (3) Registered.

4. If it is less than Rs. 100 no writing is necessary. Parol agreement is enough in the case of ;—

- (1) Simple mortgage.
- (2) Conditional mortgage.
- (3) English mortgage.
- (4) Usufructuary mortgage.

Parol agreement plus transfer of possession.

5. We have only to consider mortgages where the principal is above Rs. 100.

(1) § SIGNATURE

General Clauses Act 1897. Section 3 (52).

1. The signature may be made by means of types or by a facsimile. *25 Cal. 911*. Such person having a name stamp used by servant.

2. It may be the mark of an illiterate person.

41 Bom. 384 mark of a dagger.

3. But a literate person cannot sign by making a mark.

Confession not signed the accused was literate. *32 Cal. 550*.

Signature includes a mark in the case of a person unable to write his name.

(2) § ATTESTATION

1. *Attestation*.—To attest means to bear witness to, affirm the truth or genuineness of, to testify, certify. *Attestation* means the verification of the execution of a deed or will by the signature in the presence of witnesses. Attesting witness is a witness who signs in verification.

2. That being so question is, must the attesting witness be present at the execution of the instrument or a mere acknowledgement of execution by the mortgagor to a witness who afterwards subscribes his name is enough to satisfy the requirements of law in respect of attestation?

3. The Privy Council has laid down that the attesting witness ought to be present at the execution of the instrument and a mere acknowledgement will not suffice.

39 I.A. 218; 35 Mad. 607 which overrule the Allahabad and Bombay decisions to the contrary—*27 Bom. 91 and 26 All. 69*.

§ ATTESTATION OF PARDANASHINS.

4. The same rule was applied. The signature of the Pardanashin lady must be in the presence of the witness otherwise he cannot be said to be an attesting witness.

Case Law.

45 I.A. 94.

A mortgage-deed for over Rs. 100 purported to be signed by a Pardanashin lady on behalf of her son, a minor and to be attested by two witnesses. It appeared from the evidence that the lady was behind the parda when the deed was taken to her for signature. The witnesses did not see her sign it, but her son came from behind the parda and told them that it had been signed by his mother ; they thereupon added their signatures as witnesses:—

Held that the deed was not “attested” within the meaning of section 59 of the T. P. Act.

42 I.A. 163

A mortgage-deed purported to be executed by two pardanashin ladies. It appeared from the evidence of two of the attesting witnesses that they saw the hand of each executant when she signed the deed, and that although they could not see the faces of the executants, they heard them speak and recognized their voices:—

Held that the deed was duly attested in accordance with the T. P. Act.

5. The Law is now changed and attestation on acknowledgement of his signature by the executant is good—See Definition *Attested* in section 3, T. P. Act as amended in 1926.

(3) § REGISTERED

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(Earlier portion not found—ed.) to operate immediately, it is not necessary that there should be a formal delivery or even that the document should go out of the possession of the party who executes it.

illus.—Exton vs. Scott. (1833) 6 Simons 31.

A certain person having received moneys belonging to another without any communication with him executed in his favour

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a mortgage for the amount. The mortgagor retained the deed in his custody for several years and then died an insolvent. After his death the document was discovered in a chest containing his title-deed. It was contended that there was no binding mortgage, because there had been no delivery of the deed. But the contention is overruled, on the ground that there was no evidence to show that the deed was not intended to operate from the moment of its execution.

6. There seems to be an idea that if the deed is delivered to the other party, it must have immediate operation and *cannot* in point of law be delayed in its operation. But it is now established that evidence is admissible to show the character in which the deed is delivered to a person though he is himself a party taking under it and not a stranger. (1897) 2 Ch. 608.

7. Where an instrument is to come into operation, not immediately, but only upon the performance of some condition, it is known as an escrow which simply means a scrawl, or writing, that is not to take effect till a condition precedent is performed.

8. Mere execution is not enough. There must be intention to give it immediate effect. Delivery means an intention to give immediate effect. That intention is independent of the process of delivery or non-delivery.

9. Where a document intended to be executed by one or some only and others refuse to complete it the question whether it is binding on those who have executed it, is one of the intention of the parties to be gathered from the facts of each.

§ MATERIAL ALTERATION IN A DEED—EFFECT OF

1. A material alteration in a deed made *without* the consent of the mortgagor and with the privity and knowledge of the person who relies upon it, would altogether destroy the efficacy of the deed.

2. If blanks are left to be filled up with merely formal matters the mortgagee may fill them up without imperilling his rights. (1905) 2 Ch. 455.

3. The question what constitutes a material alteration within the meaning of the rule has given rise to some difference of opinion.

10 C. W. N. 788 (of Mukerji J.)

Any change in an instrument which causes it to speak a different language in legal effect from that which it originally spoke, which changes the legal identity or character of the instrument either in its terms or the relation of the parties to it, is a material change, or technically, *an alteration*, and such a change will invalidate the instrument against all parties not consenting to the change.

An addition of a party to a contract constitutes a material alteration.

§ IMPORTANCE OF THE THREE FORMALITIES

1. The absence of any of three formalities is fatal to the validity of the transaction. The word is *only*.

2. Not only the formalities must exist but they must be valid, i. e., in accordance with law.

3. Not only must there be signature but the signature must be valid.

4. Not only must there be attestation but the attestation must be valid. If attestation is invalid, the deed cannot operate as a mortgage—e.g. attestation without the presence or acknowledgement by the executor.

5. Not only must there be registration but the registration must be valid. Thus

(i) If the property is so incorrectly described that it cannot be identified—*18 Cal. 556*

4.B.

(ii) When the deed is registered in a circle in which the property is not situate.

29 Cal 654.

(iii) Where the deed is not presented for registration by the proper person the mortgage is invalid.

58 I. A. 58

Two other questions have to be considered in connection with the subject-matter of Formalities.

1 IS EXECUTION OF THE DEED ENOUGH TO GIVE EFFECT TO THE MORTGAGE ?

1. It is hardly necessary to state that the mere execution of a deed is not enough if it is not intended to operate as a binding agreement.

2. This is expressed in English Law by the formula that a deed must be delivered.

3. This may not be clear unless one understands what meant by 'delivered'. There is nothing mysterious about the delivery of a deed which does not represent any technical process, but only indicates that the instrument is to come into immediate operation.

4. Shephard in his *Touchstone* speaks of *delivery* as one of the requisites of a good deed and adds that it is a question of fact for the jury.

CASE LAW

I. SUIT AGAINST SECRETARY OF STATE

(1906) 1 K. B. 613; 5 Luc. 157; 37 Mad. 55.

II. POSITION OF THE CROWN

1920 A.C. 508; 1932 A.C. 28; 1929 A.C. 285; 8 App. cases 767; 8 M.I.A. 500; 1903 App. cases 501.

III. PARAMOUNTCY

(1792) 2 Ves. 60; 13 M. P. C. C. 22; (1906) 1 K. B. 613.

British India = Section 3(17) General Clauses Act, 1897.
Whole of British India = includes the Scheduled Districts.
52 Mad. 1.

Any newly acquired territory becomes an annexation part of British *India*—*Onsley vs. Plowden* (1856—59) 1 Bom. 145.

But it retains its laws until altered by the Crown or Legislature. 19 Bom. 680 (686) following 1 M. I. A. 175/271.

Acts such as Stamp Act passed by the Indian Legislature have been extended to many places which though outside British India are under British Administration (e. g. Bangalore, Hyderabad assigned districts: Baroda cantonment: Mount Abu, etc.) by

notifications under Sections 4 and 5 of the Foreign Jurisdiction and Extradition Act, 1879, and the Indian (Foreign Jurisdiction) Order in Council, 1902.

§ CAPACITY TO GIVE OR TAKE A MORTGAGE

1. A mortgage is a *transfer of property* and also a contract. It must therefore satisfy the requirements as to capacity laid down for a valid transfer of property and for a valid contract.

§ REQUIREMENTS AS TO CAPACITY FOR A VALID TRANSFER OF PROPERTY

1. Transfer of property means an act by which a living person conveys property to one or more other living persons or to himself or to himself and one or more other living persons—Section 5.

2. A mortgage being an act of transfer of property, the parties to an act must be living persons.

3. When it is said that both persons must be living it is obvious that the intention is to make two distinctions :—

(i) Between a transfer *inter vivos* and a will.

(ii) Between a transfer and the creation of an interest (Sections 13, 14, 16 and 20).

4. A will operates from the *death* of the testator. A mortgage therefore cannot be created by a will. It must be created *inter vivos*. A will does not operate as a transaction between two living persons.

5. A mortgage is a transfer of an interest. Sections 13, 14, 16—20 permit that an interest may be created in favour of a person not in existence at the date of transfer. But a mortgage is not the creation of an interest, but it is the *transfer* of an interest.

§ Living.

1. What is the meaning of the word *Living* ? Does it mean one who has not suffered natural death or does it mean that a person has not suffered civil death ? There may be no natural death although there may be civil death.

Illus.

Sannyasi—Buddhist.

Where a person enters into a religious order renouncing all worldly affairs, his action is tantamount to civil death.

Illus.

Sannyasi—*Mulla p. 113.*

Buddhist Monk—7. *Rang. 677.I. B.*

2. A person who is civilly dead is not dead for the purpose of the T. P. Act.

3. *Living* as defined in explanation 3 to Section 299, I. P. C. would indicate that some part of its body must have been brought forth. But under the Hindu Law a son conceived is equal to son born—*Mulla p. 319.* A person may be living for the purpose of the Hindu Law and may not be for the purpose of T. P. Act.

*16 Mad. 76; 37 All 162; 58 Mad. 886.**

4. Another case of a person in a like position is that of a convict. A convict under the English Law, since he cannot enter into a contract or dispose of property, has no power to lend or borrow money on mortgage; but the administrator of a convict may mortgage any part of the convict's property.

A convict is defined in Section 6 of the Forfeiture Act *33 and 34 Vict. Ch. 23, 1870*: to mean any person against whom judgment of death, or of penal servitude, shall have been pronounced or recorded by any Court of competent jurisdiction in England, Wales or Ireland upon any charge of treason or felony.

5. What about the position of a convict in India.

* (Page left blank in the Ms—ed.)

* Even under English Law a child *en ventre* son mere is deemed to be a living person. Cases referred to in 58 *Mad. 886.*

(1903) 2 Ch. 411

(1909) 1 K. B. 178

(1907) 2 K. B. 422

(1926) 96 L.I.K.B. 250.

Contra. *10 Lah. 713.*

§ PERSON

1. The word “person” according to the General Clauses Act includes any company or association or body of individuals whether incorporated or not.

2. That the word person includes a “juristic person” such as a corporation was a long established view. But it is now made clear by a special proviso which was added to Section 5 of the T. P. Act in 1929.

3. A corporation, which has power to acquire and hold land has also impliedly power to mortgage it for purposes of carrying out the object for which it was created. The powers of statutory corporations are generally speaking regulated by the act of incorporation, but where borrowing is necessary for the purposes of the corporation, it is not forbidden by the T. P. Act because it is a “person”.

4. By Hindu Law an *Idol* is recognized as a juristic person capable of holding property.

31 I. A. 203.

But the possession and management of the property of the *idol* are vested in the *Sebait*. But as the ownership belonged to the idol and as the idol is a juristic person and therefore a living person, it can be a party to the mortgage.

§ REQUIREMENTS AS TO CAPACITY FOR CONTRACT

1. This is dealt with in Section 7. Two things are necessary under Section 7.

(i) Person must be competent to contract,

(ii) Person must be entitled to transferable property or authorized to dispose of transferable property.

(i) § COMPETENT TO CONTRACT

1. Section 4 says that the Chapters and Sections of the T. P. Act which relate to contracts shall be taken as part of the Indian Contract Act.

2. Competency to contract must therefore mean competency in accordance with the Contract Act.

Section 11, Every person is competent to contract who is of the age of majority according to the law to which he is subject, and

who is of sound mind and is not disqualified from contracting by any law to which he is subject.

3. Disqualification of an Insolvent.

A word may be said as to the capacity of an Insolvent to deal with any property subsequently acquired by him. Now it is settled Law that an insolvent, who has not received his final discharge, cannot create a mortgage on immoveable property acquired by him. *17 Mad. 21* (But See *8 Cal. 556*).

§ ENTITLED

1. The question is whether *entitled* means entitled as a full owner or as a limited owner.

2. That a full owner has the capacity to mortgage is obvious. The question is whether a limited owner has the capacity to mortgage?

3. Person holding property on trust for sale without express power to mortgage.

It may be laid down generally that a trust for sale containing a direction for absolute conversion does not authorize a mortgage.

4. *Partner*—can mortgage partnership property to secure partnership debt.

5. An executor or administrator under the Indian Succession Act is competent to transfer.

6. Hindu widow, a Member of a joint family and the Karta of a joint family, the Trustees of Hindu Religious Endowments.

7. The last two having their *power* and *necessity*.

§ TRANSFERABLE PROPERTY

1. The person whether he is a full owner or limited owner, the subject-matter must be transferable property.

2. What is transferable property?

(i) Section 6 says—Property of any kind may be transferred, except as otherwise provided by this Act or by any other law. Every kind of property is transferable unless its transfer is prohibited by Law.

(ii) The exceptions fall under two heads

(a) Merely personal rights cannot be transferred.

(b) An interest in property restricted in its enjoyment to the owner personally cannot be transferred.

3. This shows that there may be a mortgage of moveable property. The T.P. Act does not deal with it because the contract deals with it as a pledge. It does not prohibit.

§ THE CONTENTS OF A MORTGAGE-DEED

It is desirable that the mortgage-deed should specify certain particulars.

1. The debt or engagement, which is the subject-matter of the security, should be specified in the deed, otherwise the mortgagor may substitute one debt for another.

2. The time for the payment or performance must be specified in the deed. A stipulation that whole will be payable on payment of instalment

3. The deed should also contain a covenant to pay because there are various kinds of mortgages in which no debt is implied.

4. The property which is given in mortgage should be sufficiently described. It is true, extrinsic evidence is always admissible for the purpose of identifying any property, where the description is either indefinite or even actually misleading.

Q.—Whether a mortgage can be created on a person's property, if such property is not specifically described? Whether a general mortgage is valid?

Q.—Whether a general pledge of all the property that the debtor then has, without any further distinction, can create a mortgage under our Law.

1. Distinction must be made between an instrument which contains sufficiently apt words to create a security and the one in which the debtor merely agrees that, if the money is not repaid, the obligee would be at liberty to recover the debt from the whole of the debtor's property.