

Mathers, C.J.]

WALLACE v. SMART.

[Jan. 8.

Registered judgment, realizing on—Land held by deed from judgment debtor absolute in form, but only as security—Rights of purchaser from apparent owner—Power of sale—Notice—Costs.

Action for sale of the interest of the defendant Smart, in the lands in question to realize the amount of the plaintiff's registered judgment. Smart had, before the registration of the judgment, conveyed the land, subject to a prior mortgage by a title absolute in form to the defendant Hinch, but only as security for a debt. Two days before the registration of the plaintiff's *lis pendens* in this action, Hinch had assumed to sell the lands to the defendant Bonter, who paid a deposit of \$55; but, before anything else was done towards completing his purchase, Bonter had full knowledge of the action.

Held, 1. That the interest of Smart was "land" within the meaning of the Judgments Act, R.S.M. 1902, c. 91, and could be sold to realize the amount of the plaintiff's judgment. *McCabe v. Thompson*, 6 Gr. 175, and *Fitz Gibbon v. Duggan*, 11 Gr. 188, distinguished.

2. Hinch was a mortgagee without power of sale unless to a purchaser without notice. *Pearson v. Benson*, 28 Beav. 598, followed.

3. Plaintiff's rights were not affected by the attempted sale to Bonter, except to the extent of the money Bonter paid before the registration of the *lis pendens*.

4. Plaintiff was entitled to redeem Hinch, or sell subject to his claim at his (plaintiff's) option.

5. A judgment creditor, like any other subsequent incumbrancer, has the right to bring an action to sell the equity of redemption held by his judgment debtor without making the mortgagee a party; and, when a prior mortgagee holds by a title absolute in form, he may be made a party defendant without an offer to redeem: *Moore v. Hobson*, 14 Gr. 703.

The defendant Hinch, in his pleading denied that Smart had any interest in the land and claimed to be himself the absolute owner.

Held, that he should be charged with all the increased costs occasioned by such denial, and by his sale to Bonter and by the adding of Bonter as a party, but should have his general costs otherwise; to be taxed and added to his claim, that the defendant Bonter's costs of suit, together with the \$55 he had paid, should be paid out of the proceeds of the sale in preference to