

tained in the mortgage is fatal to the validity of any sale thereunder.

S. H. Bradford, K.C., for plaintiff.

T. P. Galt, K.C., for defendant Bradley.

G. H. Watson, K.C., for defendant Eckhardt.

ANNOTATION ON THE ABOVE CASE FROM D.L.R.

Clause 14, of the Statutory form of Mortgages (R.S.O. 1914, ch. 117) conferring the power of sale and providing for application of moneys is one which varies much from the modern approved forms.* It conflicts apparently as regards right to possession with clauses 7 and 17. It does not extend to breach of covenants as do those clauses. The power is given to the personal, as well as the real, representatives, although by the Devolution of Estates Act, R.S.O. c. 119, s. 7, it is enacted that in the interpretation of any Act, or any instrument to which a deceased person was a party, his personal representatives, while the estate remains in them, shall be deemed his heirs, unless a contrary intention appears. And though the administrator might sell under the power while the estate is vested in him, yet if it should shift into the heirs, the administrator might still sell. It should not, however, be dependent on notice, but the provision as to notice should be by a covenant by the mortgagee that notice shall be given; and the purchaser should be expressly relieved from any necessity as to seeing that notice was given. There is no power to the mortgagee to buy in an auction and re-sell without being responsible for loss or deficiency on re-sale; or to rescind or vary any contract of sale that may have been entered into; or to sell under special conditions of sale (though the latter may be permissible when the conditions are not of a depreciatory character). The application of insurance moneys is provided for. The surplus of sale moneys is to be held in trust to pay to the mortgagor. There is no clause relieving a purchaser from seeing that default was made, or notice given, or otherwise as to the validity of the sale; the importance and benefit of which to the mortgagee, and even to the mortgagor, will be presently alluded to. The provision that the giving of the power of sale shall not prejudice the right to foreclose is unnecessary, as it is an independent contractual right.

For the transfer of the legal estate of the mortgagee at law no power of sale is requisite, and the assignee or vendee will take subject to such rights as may be subsisting in the mortgagor, or those who claim under him, of possession, redemption, or otherwise; in other words, the mortgagee may always assign the mortgage debt and convey the land; and thus a sale and conveyance of the estate by the mortgagee to a vendee, though made professedly as in exercise of a power of sale in the mortgage, is valid to pass the legal estate of the mortgagee, even though no power of sale existed, or were improperly exercised, and when the mortgagor's right to possession is gone, the vendee can maintain ejectment; he occupies, in fact, the position of assignee of the mortgage, see *Nesbitt v. Rice*, 14 C.P. 409. The chief object of the power is to enable the mortgagee or other party claiming through him to sell