

E. D. Armour, K.C., and R. U. McPherson, for the appellant.

J. D. Montgomery, for executors.

STREET, J.—The rule is that as soon as the mortgage money is fully paid, it is the duty of the mortgagee to restore the estate, and if by his dealing with the property, otherwise than with the consent of the mortgagor, he has put it out of his power to restore the estate, he cannot recover in an action upon the covenant: *Palmer v. Hendrie*, 27 Beav. 349; *Perry v. Barber*, 13 Ves. 198; *Gowland v. Garbutt*, 13 Gr. 578; *Munson v. Hauss*, 22 Gr. 279; but in such action the mortgagor may redeem: *Kinnaird v. Trollope*, 39 Ch. D. 636.

Reading the release clause with the description, the proper construction is that the mortgagee must release on payment of \$71 a foot on Queen street, the whole depth of the part released to the north limit of block A. The power of sale has not been exercised and therefore the mortgagee must be ready to restore on redemption the land covered by the mortgage, except any portion properly released. This she cannot do, for she has assented to the creation of a right of way over block A which cannot be restored except subject to that right. It is contended that the grant of the right of way does not affect in reality any part of block A excepting the part immediately to the north of lot one, the piece released, because there is no sufficient description of the purpose for which it is granted, no *ex quo* nor *ad quem*. It is not necessary to here determine the limits of the right. The grant of it was made by persons owning not only block A, but portions of land adjoining it on the south, and the grant will be taken most strongly against the grantors. The mortgagee has no right to encumber the mortgagor's rights even by the creation of a cloud to remove which an expensive law suit may be necessary. It would have been quite different had the right of way been limited to the portion of block A immediately north of the portion of lot one released. It was in the granting of the right of way over the whole of block or lot A that the mortgagee exceeded his authority. Formerly the mortgagee could have recovered at law, but would have been restrained in equity until in a position to reconvey: *Perry v. Barber*, supra; *Munson v. Hauss*, supra; *Forster v. Ivey*, 32 O. R. 175. The appellant asks leave to put in a release of the offending grant so far as it purports to give the right of way over any part of lot A, but that in rear of the 40 feet released, and the proper order to make is to dismiss the appeal with costs, but with a declaration that if within twenty days from the date of the