Boyd, C.] [Oct. 22.

WELLS v. TRUST AND LOAN COMPANY.

Mortgagor and Mortgagee—Accounting—Surplus after sale under mortgage—Reasonable expenditure.

Appeal from report of the Master-in-Ordinary.

Mortgagees of lands in Ontario, held a collateral mortgage on lands in Kansas.

Default occurring they sold the lands in Ontario, employing W., a land agent, to effect the sale; W. acted also under a power-of-attorney from the mortgagor, who had agreed to a commission being allowed to him for selling.

Held, on action for an account brought by an execution creditor, who obtained his execution after the power-of-attorney had been given to W., and after the said agreement as to commission, that the payment of the commission was a proper item to allow the mortgagees in their account.

After the mortgage on the Kansas lands had been executed, the mortgagees discovered that the lands comprised in it had been sold for taxes and that there were also several executions against them, and they incurred expenses in staying the executions, and setting aside the tax sale. The mortgagor had approved of these proceedings being taken.

Held, that these expenses ought also to be allowed to the mortgagees in their accounts, for whatever bound the mortgagor, in taking the accounts, bound the plaintiff to the same extent. The plaintiff had no lien on the Kansas lands; his equity was to have the accounts taken as to these lands in order to marshall the defendants' securities for his benefit.

The mortgagees further incurred expenses in prosecuting unsuccessful litigation arising out of a seizure made by them under the power of distraint in their mortgage. The mortgagor did not sanction this litigation, (see *Trust and Loan Company* v. *Lawreson*, 45 U. C. R. 178, 6 A. R. 286).

Held, that this expenditure could not be allowed. The general rule is that the mortgagee is not allowed to add to his mortgage debt the costs of unsuccessful proceedings at law instituted by himself and not undertaken with the approval of the mortgagor.

Boyd, C.] [Nov. 26.

YOST v. ADAMS.

Will—Direction to pay debts—Executor's power to sell lands not devised—R. S. O. ch. 107, sec. 19.

Appeal from the Master's report.

A testator by his will directed his executors to pay his debts, etc., and then proceeded: "The residue of my estate and property which shall not be required for the payment of debts, I give and devise and dispose of as follows." Certain lands were not mentioned.

Held, that, nevertheless, the executors could give a good title to them to a purchaser, for the above words clearly imported an intention that the debts should be paid first out of the estate and property of the testator. This created a charge of the debts upon his lands, and the mere failure of the testator to enumerate all his lands in the subsequent part of the will, by which there was an intestacy as to the part in question in this action, did not detract from the conclusion that all the lands were so charged. The direction that his debts should be paid by his executors, conferred an implied power of sale upon them for the purpose of paying the debts out of the proceeds.

Held, also, that apart from the above, R. S. O. ch. 107, sec. 19, covered the case. The testator had not indeed within the meaning of that section devised the real estate charged in such terms as that his whole estate and interest therein had become expressly vested in any trustee, but he had devised it to such an extent as to create a charge thereon, which the Act in effect transmutes into a trust, and thereupon clothes the executor with power to fully execute that trust by conveying the whole estate of the testator.

Moss, Q.C., for the appeal.

H. J. Scott, Q.C., contra.