

mere power and not an absolute trust for sale, and a sale took place after the death of the mortgagor, the surplus proceeds went to the heir, even though the trust of them should have been declared in favour of the personal representatives, *Wright v. Rose*, 2 Sim. & Stu. 323; *Bourne v. Bourne*, 2 Ha. 35. But since that Act, if the sale be made before the land shifts unto the heirs the surplus must go to the personal representative. But if the sale takes place after the land vests in the heirs, the former law will prevail. On a badly drawn mortgage, by inattention to the above, the mortgagee may frequently be misled into payment to the wrong party. Where a sale is had in the lifetime of the mortgagor, the surplus proceeds will go to personal representatives on his death before payment. The general principle is, that the property or its proceeds will, where there is a mere power of sale, go to real or personal representatives, according to the state in which it was on the death of the mortgagor.

The mortgagee, in distributing the surplus purchase-money, is under an obligation to see that it is properly applied, and that collateral securities held by subsequent incumbrancers are saved for those entitled to them, *Glover v. Southern Loan Co.*, 1 O.L.R. 59; so held by the majority of the Court.

The effect of giving notice of exercising the power of sale is to stay all proceedings for the time (if any) mentioned in the notice for payment, even the proceedings under the notice itself, R.S.O. ch. 112, sec. 29. The original statute providing for this declared that no further proceedings "at law or in equity" should be taken, and no suit or action should be brought, the purpose being to prevent the making of unnecessary costs. After the Judicature Act was passed, and the distinction between Courts of law and equity was abolished, the words, "at law or in equity," were dropped out of the Act in the next revision of the statutes. The Act in that condition simply declares that no further proceedings and no action shall be taken, after a notice given, until the expiration of the time mentioned in the notice. Hence it was held that further proceedings for sale under the power itself were included in the enactment, and notice to sell has therefore the effect of staying proceedings to sell, *Smith v. Brown*, 20 O.R. 165; *Lyon v. Ryerson*, 17 P.R. (Ont.) 516. It is not necessary to demand the money in a notice of sale, or to fix or mention any time in the notice for doing anything required to be done, although the amounts claimed for principal, interest and costs, respectively, must be stated in the notice, R.S.O. ch. 112, sec. 28. But if any time is mentioned, it should be forthwith, in order to prevent the notice from operating as a stay. The enactment in question authorizes an application to the Court for leave to bring an action, notwithstanding the stay, and the motion may be made *ex parte*, and is never refused when the desire is to recover possession in anticipation of being obliged to deliver the land to a purchaser. But this section does not apply to proceedings to stay waste or other injury to the mortgaged property. The notice operates as a stay, whether the action is commenced before or after the notice is given, *Perry v. Perry*, 10 P.R. (Ont.) 275; *Lyon v. Ryerson*, 19 P.R. (Ont.) 516.

Where a deed is absolute in form, but is, in reality, a security for money lent, no power of sale is implied in it, and the grantee cannot sell without the concurrence of the *cestui que trust*, *Hetherington v. Sinclair*, 34 O.L.R. 61; 23 D.L.R. 630.