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No. 33

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3rd Session, 6th Parliament, 23 Victoria, 1860.

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**BILL.**

An Act to provide for the foreclosure of Mortgages, in certain cases, without suit.

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Received and read, first time, Friday, 9th  
March, 1860.

Second Reading, Monday, 12th March, 1860

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Hon. Mr. MOWAT

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QUEBEC

PRINTED BY THOMPSON & CO., ST. URSULE STREET.

An Act to provide for the foreclosure of Mortgages in certain cases without suit.

**W**HEREAS many suits are brought in Upper Canada for the foreclosure of Mortgages, but in very few of such suits is the redemption money paid ; and whereas when payment is not made there results from the suit, no advantage to the Defendant, while much unnecessary delay is occasioned to the Plaintiff, and costs are incurred by one party or both, and sometimes to a large amount ; And whereas it is expedient to establish a simple machinery for foreclosing without suit, leaving it to the parties against whom foreclosure is sought, to institute the necessary suits in the comparatively few instances in which there happens to be a serious contest respecting the right to redeem or respecting the amount due ; And whereas also when Mortgagors, their heirs or assigns, who leave this Province, or have never resided in this Province are guilty of any default, a foreclosure ought not to be thereby delayed for any greater length of time, or the mortgagees put to greater costs, than if such Mortgagors, their heirs or assigns, resided or continued to reside in Canada, and further provision should be made with a view to preventing injustice of that kind as far as practicable :

Therefore Her Majesty, &c., enacts as follows :—

GENERAL ENACTMENTS.

**1.** In case default is made in paying mortgage money, the Mortgagee, his heirs, executors, administrators or assigns, may obtain a foreclosure without suit, in manner and subject to the conditions hereinafter provided.

**2.** There shall be no foreclosure without suit, unless the mortgage and assignments thereof (if any,) is and are registered in the County or one of the Counties in which the land lies, before proceedings for foreclosure under this Act are begun ; and if the mortgage and assignments are registered in one County, but if there is land in more than one, the foreclosure shall not be effectual as to the land in the Counties in which the same are not registered.

**3.** To obtain a foreclosure without suit, a notice of foreclosure to the effect hereinafter directed shall be given to the persons to be foreclosed.

NOTICES OF FORECLOSURE.

**4.** The notice of foreclosure shall name and be addressed to all the persons intended to be foreclosed, except those whose interest in the equity of redemption is under and by virtue of a judgment or an execution or attachment ; and the notice shall be addressed to persons of the latter class, either by name or by general description.

**5.** If there are several persons entitled to redeem, and entitled by the practice in Chancery in case of a suit for foreclosure to have successive days named for redemption by them respectively, they shall have the like right in case of a notice of foreclosure ; and in such case the notice shall name a day for redemption by each accordingly, allow-

Preamble.

Foreclosure without suit.

Conditions.

Notice.

Who shall receive notice.

When several parties are entitled to redeem.

ing to the party entitled to redeem first, not less than \_\_\_\_\_ months after service on him of the notice of foreclosure, and naming for redemption by the party entitled to redeem next in order in case the first party does not redeem, a day at least \_\_\_\_\_ from the day named for the first party to redeem, and a subsequent day, at a like interval, for each, successively, of the remaining parties who may be entitled to redeem successively, save that but one day need be named for all persons whose right to redeem is under and by virtue of judgments, executions, and attachments. 5

Form of notice.

6. The notice of foreclosure may in the form or to the effect following: 10

To [naming the parties, and if any of those interested under judgments, executions, and attachments, (whether they be the original parties, or their representatives, assigns, or others claiming through or under them,) are not named, add to the effect following:] and all [other] persons who have a lien on the property hereafter described, under or by virtue of Judgements, executions, and attachments against any one having an interest in or charge upon the equity of redemption thereof. 15

Whereas default has been made in paying the mortgage held by me [describing the mortgage and the property comprised therein, in any manner that may with reasonable clearness identify the same.] 20

Now I hereby give you notice, under the "Act to provide for the foreclosure of Mortgages in certain cases without suit," that I claim to be due and payable to me on the said mortgage, the sum of \$ \_\_\_\_\_ with interest from \_\_\_\_\_ and, (unless the same should be previously paid to myself,) I appoint the same to be paid by you the said \_\_\_\_\_ to my credit into the [naming an Incorporated or Chartered Bank] at [naming one of its offices in Upper Canada,] on or before the [naming a day not earlier than \_\_\_\_\_ months after the day when all the parties may be expected to be served.] 25

And you the said \_\_\_\_\_ will further take notice that under the "Act to provide for the foreclosure of mortgages in certain cases without suit," if the amount due is not paid by the time above appointed, you the said \_\_\_\_\_ shall, without any suit or further notice, stand forever barred and foreclosed of all interest and equity of redemption in, to or out of the property comprised in the said mortgage. 30

Then add, if there is any party entitled to a further day, to the following effect. And in case of such default by the said \_\_\_\_\_ I do hereby appoint the said money to be paid by you the said \_\_\_\_\_ [naming the party or parties entitled next to redeem] to my credit on or before the [naming a day at least \_\_\_\_\_ from the day named for the first party to redeem.] And if you the said \_\_\_\_\_ do not pay the amount on or before the said \_\_\_\_\_ you also shall, without any suit or further notice, stand forever barred and foreclosed of all interest and equity of redemption in, to or out of the property comprised in the said mortgage, [and so on, if there are more than two persons or classes of persons entitled to separate days to pay.] 35 40 45

Take notice also, that if [any of] you dispute my right to foreclose you under this notice, or if you dispute the amount I claim to be due on the mortgage, you are required by the said Act to take immediate steps in that behalf, in such Court as you may be advised, or you will lose all benefit of your defence. 50

Dated this \_\_\_\_\_

#### SERVICE OF THE NOTICE OF FORECLOSURE.

Service to be personal. Exception.

7. The notice of foreclosure may be served in Upper Canada or elsewhere, and shall be served personally except in the case of a corporation or an infant, or of persons whose right to redeem is under or by vir- 55

tue of a judgement, or an execution, or attachment, or unless, in other cases, an order for dispensing with personal service is obtained under this Act.

- 5 **8.** In case a party to be served is a Corporation, the service shall be made in the same manner either as a Writ of summons at Law or as a Bill in Chancery is now served on a Corporation. Service on a Corporation.
- 10 **9.** In case a party to be served, is an infant whose father is living, or who has a guardian duly appointed by his father or by a court of competent authority in Upper Canada, both the infant and the father or guardian shall be served; and if the father of the infant is dead, and the infant has no such guardian as above mentioned, the infant shall not be liable to be foreclosed under this Act. Where an infant is a party
- 15 **10.** In case any of the parties to be served avoid service of the notice or for some other reason are not found to be served therewith, an order for substitutional service may be obtained *ex parte*, from any Judge of the Court of Chancery, or if the party is shewn to reside within the jurisdiction of any County Court, then from a Judge of such County Court. If parties avoid service. Judge's order.
- 20 **11.** Such order shall be made on an affidavit or a deposition, entitled in the matter of this Act, and shewing to the satisfaction of the Judge that the party applying is entitled to proceed under this Act against the party to be served, also what the value of the property is, and what amount is due on the security thereof, and shewing likewise any other facts which may be necessary to satisfy the Judge of the propriety of making the order. Affidavit for Judge's order.
- 25 **12.** The service ordered may be by delivering or mailing the notice and order at such place, or to such person, and in such manner generally, as the Judge thinks best, or by publishing the same in such newspaper or newspapers, and for such number of times (once or oftener,) as the Judge directs, or by both methods conjointly; and in case of publishing oftener than once, or in more newspapers than one, the time of the last publication under the order shall be the time when the service on the party shall be deemed complete; and the notice may be modified to suit the circumstances. Service under Judge's order.
- 30 **13.** It shall be deemed, for the purposes of this Act, the duty of every one not residing or being in Upper Canada, but having or claiming to have any interest in the equity of redemption of lands in Upper Canada, to appoint or have appointed, an Attorney or Agent in Upper Canada, in respect of such land, and to give notice of such appointment to all concerned. Persons not residing in U. C. to have agents there for purposes of this Act.
- 40 **14.** In case any of the parties named in the notice to be served, reside out of Upper Canada, the service shall be ordered to be made on their Agent, Attorney, or Solicitor in Upper Canada, if such there be. Service on agents, &c.
- 45 **15.** If the parties have neglected to appoint or make known, an Agent, Attorney, or Solicitor who may be served, the service may be ordered to be by publication of the notice and order in the "Canada Gazette" and in some local paper in Upper Canada, unless the estate to be redeemed appears to the Judge to be worth considerably more to the Mortgagee than the amount payable by the party to be served for the redemption thereof; but if worth considerably more, the Judge may order such other service or publication as seems just. Service by publication.
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Parties whose interest is under judgment, execution, &c.

**16.** In case parties to be served, are persons whose interest in the equity of redemption, is under or by virtue of a judgement, or an execution, or attachment, and, if any of them are individually named in the notice of foreclosure, these shall be served as in other cases; (2) and if any such parties are not individually named in the notice of foreclosure, they may be either served in the same manner, or by inserting a copy of the notice for        weeks, in the "Canada Gazette," and in a newspaper of the County where any part of the mortgaged property lies; and the time of the last publication under this section, shall be the time when the service shall be deemed to be complete.

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All parties to be served, but non-service on some not to vitiate proceeding as to those served.

**17.** All the persons to whom the notice of foreclosure is addressed shall be served in manner provided by the preceding sections of this Act; but if those to whom the notice is addressed do not comprehend all who are interested in the equity of redemption, and who would be necessary parties to a Bill of foreclosure; this shall not vitiate the notice, nor prevent the foreclosure of those to whom it is addressed.

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#### EFFECT OF CHANGE OF PARTIES.

Death of parties.

**18.** The death of any person giving a notice under this Act, shall not invalidate the notice, but the monies shall be paid or tendered at the place and in the manner named in the notice, or in default, there shall be a foreclosure, as if the death had not occurred.

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Death of father or guardian of infant.

**19.** In case any person notified to redeem, or in case the father or guardian of an infant notified to redeem, dies before the day of payment under the notice arrives, default in paying according to the notice shall not be effectual to foreclose the estate or interest of such infant or other person, but shall have the same effect in regard to other persons served as if the death had not occurred.

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Registry of service.

**20.** After the notice is served, the same, on affidavit of such service, may be registered in the Registry Office of each or any County in which the property lies.

Transfer of claim of party giving notice.

**21.** In case after the registration of the notice, a transfer, either total or partial, is made, or a charge or lien is created or obtained in any way of or on the interest of any person giving the notice, or of any person to whom the notice is addressed, the same shall not affect the validity of the notice, so far as relates to the property in any County in which the notice is registered; and the foreclosure shall take place on default as in other cases, without any further notice or proceeding.

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#### EFFECT OF SUBSEQUENT PAYMENTS.

Effect of subsequent payments or receipts on account.

**22.** Partial payments or receipts on account of the mortgage, whether by way of rent or otherwise, after the date of the notice, shall not prevent foreclosure in case of default in paying at the time appointed by the notice; but if the Judge's certificate of foreclosure under the subsequent provisions of this Act is obtained, or if the foreclosure is otherwise insisted upon, any money so paid or received after the date of the notice, except for the rents and profits of the premises, may be recovered from the party who received the same, and shall be a charge on the property till paid, except as against purchasers for value without notice.

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#### FURTHER TIME TO PAY.

Judge may allow further time.

**23.** Any Judge of the Court of Chancery, or any Judge of the County Court of the County in which the land or part thereof lies, may,

on a summary application made on affidavit, and notice to the parties interested in the mortgage, grant further time for paying the money, in such cases and on such terms as the Court of Chancery grants further time after the Master has made his Report fixing the time of payment.

#### EFFECT OF DEFAULT.

- 5 **24.** In case of default in making payment pursuant to the notice, or pursuant to an order of the Judge granting further time for paying, or to the last order for that purpose where more than one has been granted, the party or each party guilty of the default shall, from the time of his default, stand, *ipso facto*, foreclosed of all interest and equity of redemption, of, in, or to the mortgaged premises, as if a final order had been made to that effect in a suit for foreclosure between the parties to the notice. But in case the estate or interest of any one served is paramount to the mortgage of the party giving the notice, such person shall not stand foreclosed, notwithstanding the default.

Default of payment, &c. to operate foreclosure.

Exception as to titles paramount to the mortgage.

#### EVIDENCE OF THE FORECLOSURE.

- 15 **25.** In case the holder of the mortgage desires to preserve evidence of the foreclosure, he may apply for a certificate thereof to any Judge of the Court of Chancery, or to a Judge of the County Court of any County in which the Mortgage and Assignments [if any] are registered.
- 20 **26.** This application shall be supported by affidavits or depositions to satisfy the Judge ;
1. That the Mortgage and Assignments were registered before the date of the notice ;
  2. That the notice of foreclosure was duly served according to the requirements of this Act, on the party against whom the certificate of foreclosure is desired ;
  - 25 3. As to whether the time for payment was enlarged by one or more orders of a Judge or by consent ; and if so, that the time last granted has expired ;
  - 30 4. That the mortgage money was not paid by or on behalf of the party referred to ; and was not tendered at the place designated in the notice for payment within the time specified by the notice in that behalf, and that the party applying is entitled to the certificate of foreclosure.

Certificate of foreclosure and registration thereof.

Application for certificate. Conditions.

- 35 **27.** The application for this certificate shall be made, and the certificate granted, *ex parte*, unless the Judge sees special reason in the case before him, for requiring notice to be given to any party concerned in the equity of redemption, before granting the certificate, and in such case the certificate shall not be granted till the notice is given.

May be *ex parte*. Exception.

- 40 **28.** The Judge's certificate shall be annexed to the affidavits, depositions, and other proceedings had before him in the matter, and may be in the following form :—

Form of certificate.

- I hereby certify that [*naming the holder of the mortgage*] has shewn to my satisfaction that [*stating seriatim the several matters mentioned in the 26th section of this Act,*] and I do therefore further certify and
- 45 declare that the said doth now stand absolutely barred and foreclosed of, and from all equity of redemption of, in, and to the mortgaged premises, under the "Act to provide for the foreclosure of Mortgages in certain cases without suit."

Registration  
of certificate.

**29.** On filing these papers with the Registrar of the County in which the land lies, or partly lies, the Registrar shall register the certificate, and shall certify on the back of the mortgage, or by a separate instrument, whenever or as often as requested, to the following effect:—

Registrar's  
certificate.

I certify that it appears by the certificate of \_\_\_\_\_, one of the Judges of \_\_\_\_\_, that under the "Act to provide for the foreclosure of Mortgages in certain cases without suit," \_\_\_\_\_ stands barred and foreclosed of and from all equity of redemption of, in, and to the mortgaged premises within mentioned, [*or hereinafter described, adding in the latter case, the description either as contained in the mortgage, or by referring to the mortgage, or in any other way that sufficiently identifies the property referred to.*]

To be evi-  
dence of fore-  
closure.

**30.** This certificate shall, unless and until the foreclosure is set aside by a Bill or other proceeding instituted for that express purpose, be sufficient evidence of the foreclosure.

#### RULES OF PRACTICE.

Powers of  
Judges, &c.

**31.** On application to a Judge under this Act, he shall have the same powers to summon witnesses and to compel them to attend, and give evidence as in other civil cases in the Court of which he is a Judge; and the 22nd section of the Act respecting the Court of Chancery, [chapter 12 of the Consolidated Statutes for Upper Canada,] so far as the same relates to the orders of a single Judge, shall apply to orders made by a Chancery Judge under this Act; and the 69th section of the Act respecting County Courts [chapter 15 of the Consolidated Statutes for Upper Canada,] shall apply to orders made by a County Court Judge under this Act.

Technical ir-  
regularities  
not to vitiate  
proceedings.

**32.** No notice, affidavit, order, certificate, or other proceeding under this Act, shall be invalid by reason of any technical irregularity, or any mistake not affecting the substantial justice of the proceeding.

As to mis-  
takes in notice

**33.** In case the notice happens, through mistake, to name too early a day for payment, or happens, through mistake, not to name in proper order the successive parties to redeem [where there are such parties] or happens not to name the proper intervals for the successive parties to redeem, or happens to be so erroneous in some other respect, that the same is not valid under the preceding section, it shall be deemed the duty of the party affected thereby to object thereto in writing forthwith; and if he does not do so within \_\_\_\_\_ after being served with the notice, he shall be deemed to have waived any such objection.

Notices to  
and services  
on party giv-  
ing that of  
foreclosure.

**34.** In case a party served with notice of foreclosure has occasion to serve the party giving the same, his heirs, executors, administrators or assigns, with any notice on his part in reference thereto, or to serve a bill or other proceeding in respect of the same matter, such notice on his part or such bill or other proceeding, may be served either [1] personally or [2] by service at the residence of the party to be so served, on a grown up person there dwelling, or [3] by delivering the same at the banking office at which the money is to be paid, to the Cashier, Manager, or one of the Clerks.

#### SUITS FOR FORECLOSURE.

Bill contest-  
ing right of  
foreclosure  
may be filed

**35.** Notwithstanding notice of foreclosure, any party served therewith, or any one claiming under him, may file a bill for the purpose of contesting the claim to foreclose, or of reducing the amount claimed

in the notice of foreclosure, or of taking the accounts between the parties, or of redeeming generally without alleging any special ground; but such bill shall not be filed after during a certain time.  
 5 from the service of the notice on the party by whom the bill is filed, unless the Court, on a special application, made with notice to the opposite party, gives leave to file the bill at a later period; and in any such suit no further time shall be granted for paying the mortgage money, except on special grounds.

MISCELLANEOUS PROVISIONS.

10 **36.** This Act shall be so construed and carried out as, on the one hand, to prevent any of the provisions thereof from being perverted to purposes of injustice; and, on the other hand, to facilitate and make effectual foreclosures under the same, and to prevent, as far as possible, suits for foreclosure from being necessary or from being brought, except where there is a contest as to the right to redeem, or as to the amount due, or where there is some other special ground for bringing a  
 15 suit.

How this Act shall be construed and carried out.

**37.** This Act applies to Upper Canada only.

Act limited to U. Canada.