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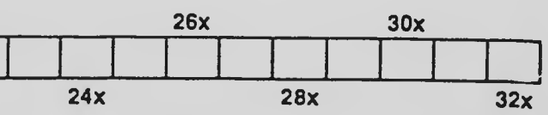

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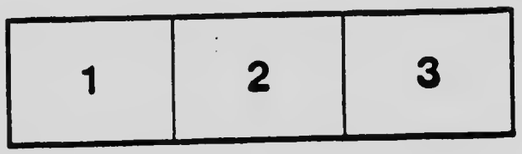

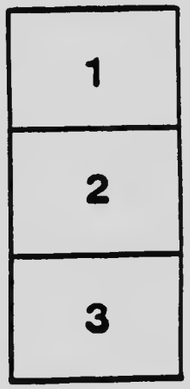

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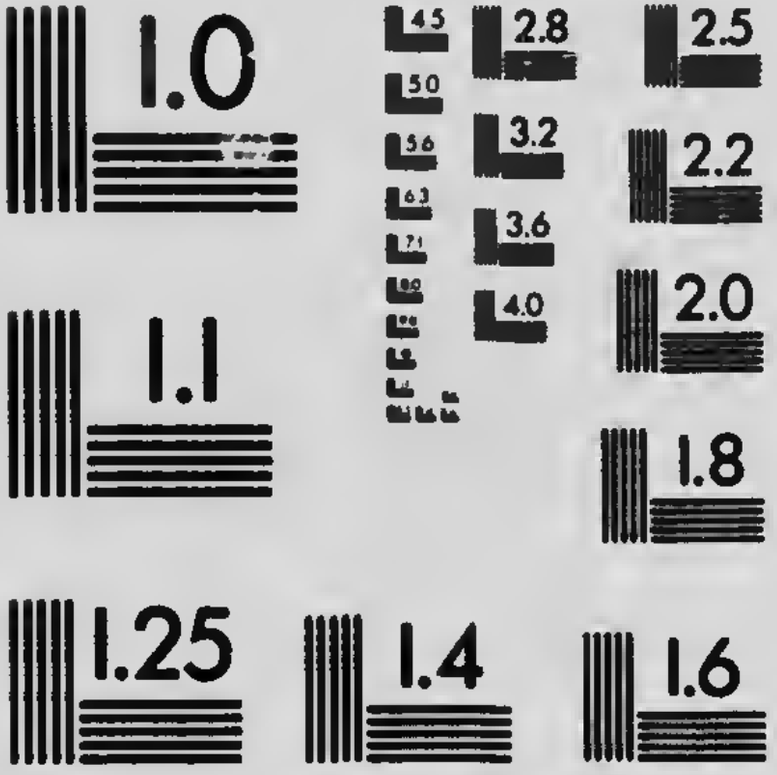

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A TREATISE

ON

POWER OF SALE

UNDER

MORTGAGES OF REALTY

WITH

Appendix of Statutes and Forms

BY

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SECOND EDITION

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POWER OF SALE IN MORTGAGES

CHAPTER I.

INTRODUCTION.

ORIGIN, RECOGNITION AND GROWTH OF POWER.

Early history.

1. The remedy by power of sale has the merit —or disadvantage—of not having its origin lost in the mists of antiquity, but of having sprung from the necessities of modern conveyancing, and of having been more readily and fully recognized and sanctioned by Courts of Equity as those necessities have become more apparent. Unlike the right to foreclose, the right of the mortgagee to personally make sale of the property that secures his debt, was not formerly inherent in the nature of the security, but was a right arising from an express term in the mortgage contract. Nor has it always been considered possible for the mortgagee, even by virtue of such express term, to extinguish by his sale of the lands mortgaged the interest in them of the mortgagor, without his concurrence. For a time a shadow of invalidity was cast over the right by the case of *Croft* v. *Powell*,[1] where a party claiming under a mortgagor was permitted to redeem many years after the exercise of a power of sale. It seems that by lease and release, dated the 16th and 17th of January, 1703, Robert Rouse conveyed certain lands to one Baldwin and his heirs; and, by a de-

Period of doubtful validity.

Croft v. Powell.

[1] Comyn 603.

Sections 1-2.

feasance bearing even date with the release and executed at the same time, it was agreed that if Rouse should repay certain moneys within one year, then Baldwin should reconvey to him; but, that if he failed to pay those moneys within the year, then Baldwin should mortgage or absolutely sell the said lands free from redemption, and, out of the money raised by such mortgage or sale, pay the said moneys and interest and be accountable for the surplus to Rouse and his heirs. Under authority of this clause, Baldwin did convey to one Gabriel Powell and his heirs. But it was resolved by the court "that the estate was redeemable; for the estate conveyed to Baldwin and his heirs being defeasanced by a deed of the same date was in its nature a mortgage to him; and therefore, though the money was not paid within the year, yet the mortgagor might still redeem upon payment of principal and interest, at any time while the estate continued in the hands of Baldwin * * If then Baldwin on non-payment within a year stood a trustee, as is insisted, for Rouse, his vendees coming in with notice of that trust, will stand in the place of Baldwin himself who is acknowledged to be redeemable."

Gradual recognition.

2. From this decision it would appear that powers of sale were in the last century regarded in equity as evasions of the rule "once a mortgage always a mortgage," and as strokes unfairly aimed at the right to redeem, which was not to be cut out except by such established process as an action to foreclose. But, however few friends at court these powers had, the great de-

lay — and perhaps expense — of foreclosure, caused solicitors frequently to hazard the insertion of a power of sale clause in the mortgage deed; as we may infer from the case of *Rex* v. *Parish of Edington;*[2] in which Lord Kenyon, C.J., tells us that "in mortgage deeds there is sometimes introduced a clause that the mortgagee may repay himself by sale of the mortgaged premises without the concurrence of the mortgagor." Then he adds—somewhat vaguely, "but a Court of Equity would I believe control the exercise of that power." Sections 2-3. Rex v. Edington.

3. Now there are two main classes, into which the vast majority of cases concerning power of sale naturally fall: namely, cases where it is sought to establish a right to redeem, and cases where a purchaser objects to the exercise of the power as being insufficient to pass an absolute title. Under one or other of these classes of cases, the validity of sale under such a power was sure sooner or later to come into question, and definitely to be decided for or against. It was perhaps to be expected that, inasmuch as the purchaser must object to its validity before he complete his purchase, while generally the mortgagor may profitably impeach the sale only when he has gathered the means to redeem, so the decision would likelier be given in a case of vendor and purchaser. At any rate it so happened in the eleventh year of this century in the case of *Corder* v. *Morgan,*[3] wherein is set the similar but meagrely reported case of *Clay* v. *Sharpe.*[4] Validity established. Corder v. Morgan.

[2] 1 East 288 (1801).
[3] 18 Ves. 344 (1811).
[4] 18 Ves. 346 (1802).

Section 3.

To state the facts, William Restorick made a mortgage to Corder comprising a clause to the following effect: In case default should be made, by fourteen days after payment required, it should be lawful for the plaintiff and he was thereby expressly required of his own proper authority and without any further authority or direction from the said W. R., his heirs, executors, administrators or assigns, to make sale and dispose of * * * the mortgaged premises * * * either absolutely or conditionally * * * such sale or sales to be either together or in parcels by public auction or private contract. And it was covenanted and agreed that in case of sale W. R. would execute the conveyance; nevertheless it was declared that the joining of the said W. R. in any such sale should not in any wise be deemed essential nor necessary to perfect the title of the purchaser, the same being intended for the further satisfaction of such purchaser. Under this power, Corder sold to Morgan and the dispute arose, could he insist on specific performance as against Morgan without procuring the mortgagor to concur in the sale? The Master of the Rolls granted such specific performance, his opinion being, " that the clause in the mortgage deed relied on for the defendant, empowering the plaintiff to sell, whereby the mortgagor undertook to join in the conveyance, was a mere contract between the mortgagor and the mortgagee; to the benefit of which the defendant, as a purchaser, was not entitled; and there was nothing in the nature of the contract between the plaintiff and his mortgagor, which prevented the latter giving and the former exer-

cising such a power of sale of the premises as that upon which this question arose." Sections 3-6.

4. Thus it happened that powers of sale enabling the mortgagee to sell, without concurrence of the mortgagor, came to be judicially recognized. The same cases are authority for the necessary corollary that even if, in such powers, the mortgagor be under covenant to his mortgagee to give the sale his concurrence (to be testified by joining in the purchase deed), yet that concurrence is so little necessary to the perfecting of title in the purchaser, that he can be compelled to specific performance without it. Concurrence of mortgagor unnecessary.

5. The period of recognition had arrived, but that of doubt had not yet passed away; and it took some time to accustom the older and more conservative lawyers to the intrusion of this new incident of a mortgage. As late as the year 1825, Lord Eldon opened eyes of surprise at a power of sale. "This," he says, "is an extremely strong clause; but perhaps it may be one of the many new improvements in conveyancing which make conveyancing so different from what it was when I was in practice in that part of law * * Upon the whole I must say that this deed seems to me of a very extraordinary kind and that there are clauses in it upon which it would be difficult to induce a Court of Equity to act."[5] Lord Eldon's doubts.

6. Tolerated in Equity so far that their force was admitted in such mortgages as made them express terms, it remained for powers of sale to be sufficiently recognized by the judges in the Spec. perf. of agreements for mortgages with power

[5] *Roberts* v. *Bozon*: see Kent, Commentaries VI., p. 147.

Sections 6-7.

Chancellor's Court, to allow of the specific performance of agreements for mortgages containing stringent sale clauses. The decision or rather conclusion of Sir John Wickson, V.-C., in *Ashton* v. *Corrigan*,[6] is pertinent, and unconsciously expresses in a single paragraph the history of the attitude of the Court of Chancery towards these "improvements in conveyancing." It begins in doubt and uncertainty, and ends in a decree and determination to take the risk. His words are, "I doubt whether a contract to execute a mortgage which the mortgagee may enforce by a sale the day after its execution, is one which the court will specifically perform; and I know of no reported case in which such relief has been given where the right to it has been contested. However, on the authority of the cases cited from Seton on Decrees,[7] I will make the decree." The following year Lord Selborne, in a case where the power of sale was likewise an immediate one, had no doubt of the propriety of making such a decree, unless the defendant was prepared to pay off the advance at once.[8]

Sir J. Wickson's view.

Lord Selborne's decision.

Power formerly not implied.

7. Yet whatever sanction was given in Chancery to powers of sale expressly conferred, the courts were slow in acknowledging their business necessity; and, far from implying their existence when not set forth in the instrument, they refused to introduce them as of course in settling the form of mortgages to be executed under their own decrees. As for example in the Ontario case

Mortgages settled by Court.

[6] L. R. 13 Eq. 76 (1871).

[7] 6th Ed. 2222.

[8] *Hermann* v. *Hodges*, L. R. 16 Eq. 18.

of *McKay* v. *Reed*,[9] where specific perform- Sections 7-8.
ance having been ordered and that the purchaser should execute a mortgage, Spragge, V.-C., expressed his opinion that such mortgage ought *not* to contain any power of sale.

8. In England the prevalence of trusts of real estate with power to mortgage has given many occasions for the recognition of a power of sale as a *sine qua non* of an ordinary mortgage deed. In *Clarke* v. *Royal Panopticon*,[10] Sir R. T. Kindersley, V.-C., saw the following difficulty or even impossibility: "How can a trustee who has not in himself any power to sell—how is it possible that he can give authority to another to sell? The principle is, that a power to mortgage does not comprise a power of sale; and if so, a trustee, with a power to mortgage at his discretion, cannot sell. But if the power to mortgage comprises as an incident a power to sell, then this absurd consequence follows, that the trustee who has no power to sell can delegate that power to another person." But the growing use of the power of sale clause forced the Courts to accept this consequence; although in theory there might be some distinction between a direct power of sale conferred on a trustee himself and the contingent power by him conferred on a mortgagee. For the *Panopticon Case* was not followed either in *Bridges* v. *Longman*,[11] decided some four months later—in which Sir John Romilly thought "such a power is incident to the power to mortgage, unless expressly excluded"—nor in Meaning of power to mortgage.

[9] 1 Chy. Cham. 208, (1864); but see *Selby* v. *Cooling*, 23 Beav. 418.

[10] 3 Jur. N. S. 178 (1857).

[11] 24 Beav. 27.

Sections 8-9.

Includes the giving of mortgages with power of sale.

Cook v. *Dawson*.[12] On the contrary, the propriety of inserting the clause in mortgages of that character is thus affirmed by Malins, V.-C.:[13] "I am of opinion that a power of sale is a necessary incident to a mortgage, and that when a testator says that a sum of money is to be raised by mortgage, he means it to be raised in the way in which money is ordinarily raised by mortgage, and therefore that the mortgage may contain what mortgages in general do contain, namely, a power of sale. I entirely agree with what the Master of the Rolls said in *Cook* v. *Dawson*,[12] that a power to mortgage includes a power to give to a mortgagee all such remedies as are proper to be given to him, so as to mortgage the estate on the best terms, and one of these remedies is a power of sale."

Ontario Statutes implying power.

9. Now these decisions, while ultimately recognizing that the sale clause should be in all mortgages, could have no effect in implying its powers where the four corners of the executed mortgage held no such term. It remained then to amend the law so as to imply a power of sale in every mortgage; and this the Ontario Legislature—led astray by Lord Cramworth [14]—has done in an awkward manner. The gist of our enactments,[15] is (1) that on four months' default (as to principal, or six months' default as to interest), there shall be a power to sell—after certain proceedings laid down in the Act—in any mortgage *not containing an express power of sale;* (2) that, in any mortgage made in pur-

[12] 29 Beav. 123 128.
[13] *Re Chawner's Will*. L. R. 8 Eq. 570 (1869).
[14] Cf. 23 and 24 Vic. c. 145. (Imp.).
[15] 42 Vic. c. 20 (Ont.). Now 10 Edw. VII. c. 51, ss. 18, 29.

suance of the Short Forms Act—and containing a power of sale according to the form therein—the above power of sale may be exercised optionally; or (3) that, where in a mortgage purporting to be made in pursuance of the Short Forms Act, there is a *power of sale without notice,* the mortgagee may exercise the above power of sale as if none other existed. The unremedied case is, where the mortgage does not purport to be made in pursuance of the Short Forms Act, and yet contains a power of sale that for some reason is not safely available; or perhaps where, though the mortgage is made in pursuance of that Act, its sale clause is excluded from the benefit thereof for some other reason than the excision of provision for notice. Sections 9-10.

It is not the practice in Ontario to rely upon these statutory provisions so far as to omit the power of sale from deeds. The limit of default (four to six months), and the length of notice (two months), prolong thrice or four times the time ordinarily allowed before the property is advertised for sale.

10. In England, on the other hand, the Conveyancing Act, 1881,[16] seems in a large measure to have superseded express powers of sale in mortgage deeds;[17] for if desired, the extensive powers conferred by that statute may be modified by provisions in the deed itself. While in Ontario the power conferred by the enactments mentioned seems neither flexible in what is prescribed nor satisfactory in what is left to dis- Imp. Conveyancing Act, 1881, s. 19.

[16] 44 and 45 Vic. c. 41, (Imp.), s. 19.
[17] Blythewood and Jarman, Conveyancing (1890), Vol. iii., 976.

Section 10.

cretion; and the Short Form power, as will afterwards be shewn, is exceedingly liable to destruction on very slight change. It is perhaps to be regretted that the Ontario Legislature has not in this instance adopted the labours of the Imperial Parliament.

CHAPTER II.

NECESSITY FOR POWER; TRUSTEESHIP OF MORTGAGEE.

Practical value of power.

11. The practical value of the power of sale will be manifest at once if we consider for a moment the position of the mortgagee of a property insufficient in value to secure the debt. If he be without power of sale, he may discover the insufficiency of his security by foreclosing and then selling. If he should then bring action for the deficiency, he will be restrained by injunction;[1] for it is a rule that any dealing with the mortgaged property so as to render it impossible to restore the property on full payment, precludes an action on the covenant;[2] a rule, however, which has no application to dealings under power of sale.[3]

Equitable necessity for power.

12. But besides the business necessity of the power, it remains to explain why it is necessary that the legal owner of a property should hold a special authority to part with that property at his need. In other words, we must emphasize the distinction that these powers were and are intended to extinguish a purely equitable interest, but that at common law they were quite unnecessary. This is expressed clearly—though with something of vague contempt for equitable rights—by Richards, C.J., in *Nesbitt* v. *Rice*,[4]

[1] *Perry* v. *Barker*, 8 Ves. 527; see also *Lockhart* v. *Hardy*, 9 Beav. 349.

[2] *Palmer* v. *Hendrie*, 27 Beav. 349.

[3] *Willes* v. *Levett*, 1 DeG. & Sm. 392; see also *Gowland* v. *Garbutt*, 13 Gr. 578.

[4] 14 U. C. C. P. 409 (an ejectment case).

Sections 12-13.

as follows: "If the premises were mortgaged in fee to M. there was no power of sale required to transfer the legal estate to T. nor from him to P. There may have been some equitable interest left in the original mortgagor which would make it desirable to have a power of sale in the mortgage and to be able to exercise it. But as far as the legal rights of the parties are concerned, which we have to deal with, if the legal estate passed by the mortgage, the person holding that estate could undoubtedly convey it."

Trusteeship of Mortgagee

13. Now from this entirely equitable necessity for these powers has arisen that strict application of certain equitable doctrines—chiefly relating to the trusteeship of the mortgagee—which has given a certain undeserved intricacy to this branch of mortgage law. The treatment of a mortgagee as a quasi-trustee for the mortgagor, while it has roughly fulfilled certain ends of justice, has by no means been a wholly felicitous mode of viewing the respective rights of debtor and creditor in a mortgage transaction. Undoubtedly mortgage law has been enriched, if not clarified, by the very numerous decisions under the head of Trust, and the law of mortgage has reacted on its adopted parent: for instance, we find Spragge, C., laying it down in *Re Jarvis* v. *Cook*,[5] that the rule of law which requires a mortgagee selling under a power of sale in his mortgage to observe the terms of such power, is also applicable to sales by a trustee or quasi-trustee acting under a power. But, on the other hand, we shall find very many unsuccessful at-

[5] 29 Gr. 303.

tempts to bring mortgagees within the same liabilities and duties as trustees—attempts arising from too great a reliance on the likeness which equity has chosen to make between them.

14. Still, whatever its advantages or faults, the quasi-trusteeship of the mortgagee was present to the mind of the Court in that early case of *Croft* v. *Powell*,[6] has been so present ever since—although judges have often given but a "grumbling" assent to its influence—and is not yet quite disestablished. It remains then that the extent of the mortgage creditor's trusteeship for his debtor should be defined. Loosely speaking, "he is, *subject to the purpose of satisfying his own debt,* a trustee for the mortgagor."[7] How far the trusteeship is to be subjected to the creditorship and the creditorship to the trusteeship seems largely to be left to judicial discretion in each case according to the circumstances.

Attempted definition of his trusteeship.

15. It may be well, however, in order to a clearer conception of what is meant, and what is not meant by the trusteeship of the mortgagee, to enumerate some few of the numerous distinctions that have been drawn—the effect being sometimes to lay a greater burden on a mortgagee than on a trustee, but more frequently to favor the position of mortgage creditor.

(1) A trust for sale is, generally speaking, enforceable by any *cestui que trust;* but it is clear that a mortgagor could not insist on the exercise of a power of sale, even in those cases where it would be for his advantage.

Not equal rights to both parties to enforce power.

[6] See *supra* § 1.

[7] Cf. Blythewood and Jarman conveyancing (1890), Vol. iii., 689.

Sections 15-16.

Not an express trustee.

(2) A mortgagee is not an express trustee so as to take advantage of statutes for the relief of trustees. For instance, he cannot, or rather should not,[8] take advantage of the right given by the Trustees Relief Act to pay into Court the surplus after sale.[9] Again, the assigns of a simple mortgagee cannot avail themselves of the right that the successors of a trustee have under 1 Geo. V. c. 26, s. 4, to exercise the same powers as their predecessor.[10]

Trustee restrained where mortgagee not.

(3) It is the duty of a trustee to act equally for the interests of all his *cestuis que trustent*, and not to take proceedings without notifying all; so that in the case of a power of sale not requiring notice, an injunction will lie against a trustee who exercises the power without notice to the mortgagor (his *cestui que trust*), whereas the court will not interfere against a simple mortgagee taking such action.[11]

Conflict of interest with duty.

(4) There is a rule—founded on good policy—that a trustee shall not be allowed to place himself in a position where his interest may clash with his duty; but a mortgagee—even where he happens to be also a trustee—is still not restrained from exercising his rights as mortgagee (including the right of sale) in opposition to the interests of the trust.[12]

16. We may quote two more instances from Sir James Wigram, V.C.:[13] "Now, that a

[8] For the practice see *infra* Chap. IX.

[9] *Western Canada Loan Co.* v. *Court*, 25 Gr. 151. But see *Re Kingsland*, 8 P. R. 77.

[10] See *infra* § 49.

[11] *Anon.* 6 Madd. 10.

[12] *Atty.-Gen.* v. *Hardy*, 1 Sim. N. S. 338.

[13] *Dobson* v. *Land*, 14 Jur. 288.

mortgagee is in some sense a trustee for the mortgagor may be admitted, for the person in whom the legal estate is vested, with a beneficial interest in another person, is, in some sense, a trustee for that person. In some sense a mortgagee is in a worse position than a trustee, for a trustee, in an ordinary case, is not liable to a decree for wilful default, unless a special case be proved against him; whereas such a decree is always of course, as against a mortgagee in possession. On the other hand, a trustee can never make a benefit to himself by any dealing with the trust property; but, if a second mortgagee should buy in the first mortgage for half its amount, or even obtain an assignment without consideration, I can have no doubt he would be entitled to charge the mortgagor with the full amount of the first mortgage in addition to his own."

Sections 16-17.

Wilful default.

17. In *Cholmondely* v. *Clinton,*[14] which minimizes the trusteeship as follows: "The ground on which a mortgagee is in any case and for any purpose considered to have a character resembling that of a trustee is the partial and limited right which in equity he is allowed to have in the *whole estate legal and equitable;*"— in this case we find noted these further traits of dissimilarity: "He (the mortgagee) acquires a distinct and independent beneficial interest in the estate; he has always a qualified and limited right, and may eventually acquire an absolute and permanent one to take possession, and he is entitled to enforce his right by adverse suit *in invitum* against the mortgagor; all which can

Ground of trusteeship.

Further distinction.

[14] 2 Jac. & W. 183, 184.

Sections 17-18.

never take place between trustee and *cestui que trust*. They have always an identity and uni[ty] of interest, and are never opposed in contest [to] each other. The late Master of the Rolls observes that in general a trustee is not allowed to deprive his *cestui que trust* of the possession, but a court of equity never interferes to prevent the mortgagee from assuming the possession. In this the contrast between the two characters is strongly marked."

Locus of trusteeship.

18. Such a manifold lack of identity in the two characters should make us pause before we confound the positions of mortgagee and trustee. But we are brought to the brink of perplexity when, descending from general to particular, we seek the *locus* of the trusteeship. It can scarcely be contended that the specialty creditor is a trustee before the commencement of sale proceedings. Moreover, there is some authority for denying that he is a trustee in exercising his sale powers.[15] It is commonly said, however, that he is a trustee of any surplus after sale.[16] But it seems that he does not become a trustee of this surplus until he has actually received it.[17] And yet, when the surplus is in his hands, he is not exactly a trustee thereof. For we learn from *Beatty* v. *O'Connor*,[18] that "the reasons which apply for the protection and encouragement of the volunteer who accepts an honorary trusteeship, out of which he can make no profit, do not require to be extended to the case of a

[15] See *Colson* v. *Williams*, W. N. (1889), 33, Kekewich, J.
[16] *Latch* v. *Furlong*, 12 Gr. 303.
[17] Jones on Mortgages, 5th Ed. § 1940, quoting *Russell* v. *Duflon*, 4 Lans. (N. Y.) 399.
[18] 5 O. R. 747 (Boyd, C.).

mortgagee, who, having made his debt, interest and costs out of the estate, holds possession of a surplus. He is not so much a trustee within the meaning of *Turner* v. *Handcock*,[19] as he is a person who has received money for the use of another, as put by Ferguson, J., in *Boulton* v. *Rowland*,[20] 4 O. R. 720. His position is perhaps succinctly expressed by Jessel, M.R., in *Talbot* v. *Frere*,[21] as that of a bare trustee. It is no hardship to require him to account for the funds in his hands fully, promptly and accurately." Thus the *scintilla* of trusteeship—when we try to locate it—goes out into the nothingness expressed by the words "bare trustee." Sections 18-19.

19. To quote again from that great case of *Cholmondeley* v. *Clinton*:[22] "The position is to be received with considerable qualifications, as will appear by examining what is the true character of a mortgagee, and how he is considered in a Court of Equity. Lord Mansfield, adverting to the comparisons made in respect to mortgages, has, I think, said there is nothing so unlike as a simile and nothing more apt to mislead * * * The relations of vendor and purchaser, of principal and bailiff, of landlord and tenant, of debtor and creditor, trustee and *cestui que trust*, have been applied to the relation of mortgagor and mortgagee, according to their different rights and interests, before or after the condition forfeited, before or after foreclosure, Imputation of trusteeship is figurative.

[19] 20 Ch. D. 303.
[20] Cf. *Johnston* v. *Cobleigh* (U. S.), 25 N. E. 73.
[21] 9 Ch. D. 568, 572.
[22] 2 Jac. & W. 182, Plumer, M. R.

Sections 19-20.

and according as the possession was in the mortgagor or mortgagee. *Quo teneam vultus mutantem protea nodo?* The truth is it is a relation perfectly anomalous and *sui generis*. The names of mortgagor and mortgagee most properly characterize the relation; they are, as Mr. Justice Buller observes in *Birch* v. *Wright*,[23] characters as well-known, and their rights, powers and interests as well settled, as any in the law. It is only in a secondary point of view, and under certain circumstances, and for a particular purpose, that the character of trustee constructively belongs to a mortgagee. No trust is expressed in the contract; it is only raised by implication, in subordination to the main purpose of it, and after that is fully satisfied; its primary character is not fiduciary."

Trusteeship a secondary characteristic.

20. In conclusion, we may observe that the advantage to be had out of this figure of speech which likens a mortgage-creditor to a trustee, has been chiefly in a temporary saving of the labour of inquiring into the true reasons for the decisions it has helped to maintain. It is noticeable that recently the tendency of judges has been to seek other ground than the application of fiduciary restraints; as for instance Lord Justice Lindley,[24] has, in explaining the rule that the mortgagee-vendor may not purchase, tacitly abandoned the latter's trusteeship as a ground of reasoning and built on a new and simple foundation. Moreover, with or without appealing to the laws of trusts, it will be found that we event-

Tendency of Courts.

True principle.

[23] 1 T. R. 383.

[24] *Farrer* v. *Ferrars*, L. R. 40 Chy. D. 409. See Chapter VIII. *infra*.

ually drift into a very plain business-principle, namely that the mortgagee is bound—as "trustee," if we like, or simply as "mortgagee," if we prefer—to deal with the mortgaged property with the care and methods of a prudent owner.[25] Section 20.

[25] *Marriott* v. *Anchor Reversionary Co.*, 7 Jur. N. S. 713, 1531.

CHAPTER III.

CONDITIONS OF EXERCISE OF POWER.

Sections 21-22.

Default.

21. Default in payment of some portion of the moneys secured is the most usual contingency or condition on which the valid exercise of the power of sale is made to depend. While it is not true that default is inherently necessary to possession by the mortgagee, who is entitled to take it at any time unless the right to remain in possession be—as it usually is—expressly reserved to the mortgagor;[1] on the other hand for the valid exercise of the sale power—which is reckoned as a species of foreclosure—there must generally be default. This rule is carried at least thus far, that a notice of sale under the power, but given before default, is void and will not be made good by subsequent default.[2]

Exceptions.

22. There is perhaps a single exception to the necessity of default as a *sine qua non* of good title in a purchaser under power, and that arises in the case of an innocent purchaser protected by a stringent non-enquiry clause.[3] The default, moreover, must be a default in terms of the instrument creating the mortgage. Thus, if there be a particular place designated as the place for payment, the mortgage creditor must be there to receive payment, before he take proceedings as on a default. As says Sheppard in his Touch-

[1] *Mowat* v. *Smith*, 8 U. C. R. 139.

[2] Jones on Mortgages, 5th Ed. 1831.

[3] See *Dicker* v. *Angerstein*, L. R. 3 Ch. D. 602; see Chap. VII. *infra*.

stone:[4] "In cases where a place is set down for the doing of the thing contained in the condition, then it must always be done at that place unless by some agreement made between the parties afterwards, another place be appointed; otherwise the condition is not performed and the parties are not bound to attend in any other place. But in cases where there is no place set down for the doing of the thing contained in the condition, if the thing to be done be a corporal service as to pay money, or any such like thing, the party that is to do it must at his peril seek out for the person to whom it is to be done." Sections 22-23. Acceleration.

23. Now there might be a default as to a portion of the moneys secured; and yet it would be extremely inconvenient to be obliged to sell subject to the moneys still payable, or to sell such portion of the land as would pay off the moneys already accrued and in default, or to be obliged to retain a large amount of the purchase money to cover the sums not yet accrued. So it has come to be the universal practice in mortgages with power of sale to insert also a clause providing that in case of default in payment of any portion of principal or interest the whole sum secured shall become due. While there may be good authority for the statement that such a clause is not in all cases an absolute necessity in order to apply the purchase money on unaccrued principal,[5] yet the right to so apply can scarcely be considered a *prima facie* right in the absence of such clause. This "acceleration" clause has

[4] P. 136, cited with approval by North, J., in *Thorne* v. *City Rice Mills*, L. R. 40 Ch. D. 357.

[5] Jones, 5th Ed. 1938.

Sections 23-24.

been deemed not to be the nature of a penalty but to be a term fixing the limit of credit for the payment of the principal.[6] It is optional with the mortgagee only to put it in force—the debtor not being at liberty, through it, to tender after default the whole amount secured without notice or further interest. But the mortgagee having elected to consider the whole sum as due will be bound by his election;[7] of which election however he need not acquaint the mortgagor by any formal intimation.[8] Where no such clause exists there is some danger in attempting to call in the whole debt by the notice of sale, although the sale would not be impeachable on that account, unless that attempt were made fraudulently, or caused actual injury to the mortgagor.[9]

Continuance of power.

24. A question may occasionally arise, whether the power originally valid has not in some way by the act or neglect of the mortgagee become incapable of exercise. As for instance in *Cruse* v. *Powell*,[10] doubts were raised—and not laid—whether the power was not gone when the mortgagee had sub-mortgaged his estate in the land; in the meantime—the mind of the court not being clear on the question—the purchaser under the power was, as generally happens where the power is not free from doubt,[11] discharged from his agreement. But it is decided that the power,

[6] *Case* v. *Burton*, 19 U. C. R. 540; see also *Tyler* v. *Hinton*, 3 A. R. 53, 7 P. R. 190; *Gemmel* v. *Burn*, 7 P. R. 381, and *Seaton* v. *Twyford*, L. R. 11 Eq. 591.

[7] *Cruso* v. *Bond*, 1 O. R. 384, 9 P. R. 111.

[8] *Princeton* v. *Munson*, 60 Ill. 371.

[9] *Bowers* v. *Heckman* (Minn.), 47 N. W. 792.

[10] 2 Jur. N. S. 536.

[11] *Curling* v. *Shuttleworth*, 6 Bing. 121.

being once invalidly exercised, may again be put into effect.[12] Sections 24-25.

25. More important difficulties are apt to arise under the Statute of Limitations. From 10 Edw. VII. 634, ss. 22, 23, may be deduced the time limit of the mortgagee's right to exercise his power of sale; and that limit, in the absence of his possession, or of intermediate payment or acknowledgment, would be ten years "after a present right to recover" the monies charged on the land had "accrued to some person capable of giving a discharge." A discussion of this matter will be found in the interesting case of *Cameron* v. *Walker*,[13] in which particular case it was decided that the mortgagor was barred by the statute, but the purchaser under power was not; for the statute commences to run against the purchaser under the power of sale when he so acquires his title,[14] and against the mortgagor when he loses possession.[15] But see *Thornton* v. *France*, [1897] 2 Q. B. 143, followed in our own case of *McVity* v. *Trenouth*, 9 O. L. R. 105, affd. 36 S. C. R. 455, rev. on another point, C. R. [1908] A. C. 1, when it was held that the statute does not confer a new right of entry on a mortgagee when at the date of the mortgage a person is in possession in whose favour the statute has already begun to run against the mortgagor. Statute of Limitations.

[12] *Stockpole* v. *Robbins*, 47 Barb. (N. Y.), 212.

[13] 19 O. R. 212.

[14] *Ib.*, quoting *Heath* v. *Pugh*, L. R. 6 Q. B. D. 345, *Baddeley* v. *Massey*, 17 Q. B. 373.

[15] See further in Chap. IX. as to arrears of interest.

Sections 26-27.

26. This may be the proper place to note that the power continues as long as any root or branch of the debt remains; and the payment of principal and interest, without also the costs already incurred, of proceedings to sell, will not suffice to annul the power, for these costs of themselves form a sufficient charge on the land to authorize a sale under the power;[16] although indeed, where the costs are unascertained and the security ample, the court may restrain the proceedings.[17]

Capacity to exercise power.

27. There must, of course, be the usual "capacity" in the party exercising the power, but it is scarcely necessary to add a chapter to this book on the "capacity of parties," which is a thing that has been quite well digested in a great many learned works. It may not be amiss, however, to make a few special observations as to this topic.

The party personally exercising the power ought not to be under disability, as, for instance, infancy;[18] but, seemingly, the provisions of 1 Geo. V. c. 35,[19] are sufficiently liberal to enable an infant, on the application of his guardian or next friend, to make a valid sale and conveyance to the purchaser.

The disability of lunacy presents a similar difficulty. In one English case,[20] the court directed the committee of the lunatic to *sell* but declined to add a direction as to the *conveyance* to the purchaser, leaving the transfer of the legal

[16] *Thompson* v. *Holman*, 28 Gr. 35.

[17] *Jenkins* v. *Jones*, 2 Giff. 99; further see 10 Edw. VII. c. 51, s. 31.

[18] *Burnet* v. *Denniston*, 5 Johns. N. Y. Chy. 35.

[19] Secs. 3, 4 *et seq.*

[20] *Re Harwoods*, L. R. 35 Ch. D. 470.

estate to be dealt with under the Trustee Act, 1850. But our statute 9 Edw. VII. c. 37, makes, to all appearance, a sufficient provision for applications to the Court by the committee of a lunatic mortgagee for authority to convey the lands comprised in his security. Sections 7-28.

28. It is essential also that the proper party, *i.e.*, the person in whom is vested both the legal estate and the power of sale itself, should execute that power. As where there is a joint power vested in two or more mortgagees, all should concur in its execution.[21] There are several intricacies that arise out of the assignment or partial assignment of the mortgage in cases where the power is limited to the mortgagee and his assigns. Thus a merely equitable assignment will not pass the power to the assignee.[22]—An assignment, inoperative in law, leaves the power in the mortgagee.[23] More specifically the mortgagee, as long as the mortgage is retained by him —the assignee, when the mortgage is wholly assigned to him—is the proper party.[24] So the legal holder of the security may exercise it either for himself or for another—as, for instance, it may be exercised by an assignee for the purpose of cancelling the debt.[25] But if the mortgage is not absolutely, or if it is merely partially or collaterally assigned, both mortgagee and assignee should join in the proceedings,[26] and an agent merely authorized to receive a mortgage debt cannot execute the power of sale.[27] Right party to exercise power.

[21] *Wilson* v. *Troup*, 2 Cow. N. Y. 195.
[22] *James*, 34 Beav. 223. *Flower* v. *Pritchard*, 53 Sol. J. 178.
[23] *Hamilton* v. *Lubukee*, 51 Ill. 415.
[24] *Chaces Co.* v. *Goss*, 13 Barb. N. Y. 137.
[25] *Russeman* v. *Wanner*, 58 Md. 92.
[26] *Law* v. *Clay*, 38 Mich. 223.
[27] *Re Dowson & Jenkins' Contract*, [1904] 2 Ch. 219.

CHAPTER IV.

VARIOUS FORMS OF POWER OF SALE AND THEIR CONSTRUCTION.

I.—General Principles.

Section 29.

Strict construction.

29. It will perhaps serve a useful purpose if we preface the discussion of the various powers by a few of the special rules that have been applied to their interpretation.

The leading principle in the construction of these powers is, in the absence of statutory implication, to construe them strictly according to the terms that limit them. This rule proceeds from the veneration with which the Court of Chancery has been wont to regard the equity of redemption, and has been the occasion of many vexatious restraints on the mortgage creditor, resulting in more frequent advantage to the recalcitrant purchaser than to the mortgagor, who most certainly intended to grant a full and free power by that clause which it is the delight of equity to pare down to the quick. It is gratifying to find a judicial opinion tempering the harshness of this rule; thus, in *Waller* v. *Arnold*,[1] it was held, that there should not be exacted such strictness and literal compliance with the terms of the power as to destroy the power itself and render the intended security valueless.

[1] 71 Ill. 350.

Sections 30-31.

30. The power is given for consideration, and is generally under seal; and so is irrevocable. It is not affected by the death of the mortgagor,[2] its exercise being the act of the grantee and not that of the mortgagor.[3] Nor would any lesser accident to, or disability of, the mortgagor be sufficient to revoke it: neither insanity,[4] nor infancy,[5] nor bankruptcy,[6] nor absence with the enemies of the state,[7] nor generally any subsequent act or condition of the grantor. It is quite true, however, that the parties to the power may subsequently agree to put limitations on its exercise, or generally by a subsequent deed may modify or extend it in any manner desired, without thereby destroying it.[8] But the express power of sale given in a mortgage deed will not be taken as impliedly reserved in subsequent instruments which extend or modify the provisions of their predecessor.[9] Further the rights of an innocent purchaser under the power in a registered mortgage will not be affected by an unregistered agreement in derogation of the power.[10]

Generally irrevocable.

But may be modified.

31. We may add a few quasi-grammatical rules:—

Grammatical rules.

(1) An obvious error on the face of the instrument, such as a recital that "the said party

[2] Except in some of the United States (especially where trust deeds are in vogue); see *Wilkins* v. *McGehie* (Georgia), 13 S. E. 84; *Johnson* v. *Johnson* (S. C.), 3 S. E. 606; *Buchanan* v. *Munro*, 22 Texas 537.

[3] Jones, 5th Ed. 1793.

[4] *Encking* v. *Simmons*, 28 Wis. 272; cf. *Provost* v. *Roediger*, 32 N. Y. S. R. 1101.

[5] *Bartlett* v. *Jull*, 28 Gr. 140. Of course the infancy of the original mortgagor might affect the mortgage contract; mortgagor is here used in a general sense.

[6] *Gordon* v. *Ross*, 11 Gr. 124.

[7] Jones, 5th Ed. 1800.

[8] See *Boyd* v. *Petrie*, L. R. 7 Ch. 583.

[9] *Curling* v. *Shuttleworth*, 6 Bing. 121.

[10] *Munson* v. *Easor*, 7 S. W. 108.

Sections 31-32.

of the *first* part " (literally the mortgagor) shall proceed to sell, will be controlled by the intention of the parties—as gathered from the whole instrument—to confer a power of sale on the mortgagee.[11]

(2) The earlier provision controls the subsequent one.[12]

(3) Words superadded in writing prevail over printed words repugnant thereto.[12]

II.—Various Forms.

32. Various expedients have from time to time been devised for the purpose of collecting for the mortgagee the debt due him, by the sale of the property securing it. Clauses vesting the power in the mortgagee himself, and other clauses vesting it in a trustee; and powers of attorney, and apparently absolute conveyances, have all been tried; and the result has shown that what theoretically have been considered the better modes have not always been found of practical utility. It may likewise be, that no formal clause is necessary at all to create a power—that it may, apart from statute, be raised by mere implication.[13] Before we proceed to the discussion of particular forms, it will be interesting to indicate what was formerly the common form in use in England according to the view of the English bench. We gather from the somewhat vague report in *Cockburn* v. *Edwards*,[14] that the Master of the Rolls was of the opinion that the

[11] *Gaines* v. *Allen*, 58 Mo. 537.
[12] *McKay* v. *Howard*, 6 O. R. 135.
[13] *Purdie* v. *Whitney*, 20 Pick. (Mass.), 25.
[14] L. R. 18 Ch. D. 449 (per Jessel, M. R.).

common form was a power requiring before its exercise "six months' notice given, or interest three months in arrear." The common form in England at present may be realized by a glance at the 19th section of the Conveyancing Act, 1881.[15] Sections 33-34.

(1) *Statutory Implied Power.*

33. The power conferred by 10 Edw. VII. c. 51, ss. 18-26, which is not that in common use in Ontario, will be found in full in the Appendix. This power has, in addition to acknowledged defects, some not unmeritorious features. The latter consist chiefly in indicating a proper form of notice,[16] and the proper service thereof.[17] For the executors or administrators of a deceased party entitled to notice are to be served as well as the heirs or devisees. Moreover, notice to an infant is to be served on the guardian, and on the infant also if he be upwards of 14 years.[18] The scope of the Act has been held to embrace an equitable as well as a legal mortgage.[19] As this enactment will be hereafter considered in detail, it is unnecessary to dwell further upon it here.

(2) *Trust Deed.*

34. A power of sale by which the legal estate is vested in a trustee in trust to sell on default, is that form of power which has been looked on by judges with the kindliest eye, for it is the form that seeks to put in practice the theory of

[15] 44 and 45 Vic. c. 41 (Imp.), s. 19.
[16] Sec. 22.
[17] Sec. 20.
[18] Cf. *Bartlett* v. *Jull*, 28 Gr. 140.
[19] In *Re Solomon & Meagher's Contract*, L. R. 40 Ch. D. 508. (Decision on Lord Cranworth's Act, s. 15).

Sections 34-36.

the trusteeship of him who will sell the debtor's land to pay the creditor. Undoubtedly, it is a not impossible method, for it has taken root in Virginia to the exclusion of other forms.[20]

Advantages.

35. Now, even apart from Lord Eldon's view that the "*trust*" in these matters could better be vested in a third (or disinterested) party rather than in the mortgagee,[21] there is still a preference in Equity to have the estate sold by some one who would nurse the mortgagor's interests more tenderly than mortgagees are prone to do. In fact, the courts would prefer—if it were feasible—that the mortgagor should conduct the sale himself.[22] But, as it is not safe in the nature of things to put the security in the debtor's hands that he may sell the estate discharged of incumbrance, so the courts would prefer, as the next fairest plan, that some independent party, bound to look equally to the interests of both, should have the conduct of the sale.

Disadvantages.

36. However, in reality, it is found, on the side of the mortgagor, that the trustee generally proves more expensive than the simple mortgagee, to the mortgaged estate, which is made poorer for the luxury of his independence, and that proceedings in Equity are far commoner for all his intervention. On the side of the trustee himself there is a perilous responsibility—which he may unwittingly take on himself by his interference without formally accepting the

[20] See Jones, 5th Ed. 1761. The Americans have all shades of power; from Virginia, where trust deeds flourish, to Vermont, where neither power clauses nor trusts nor anything corresponding seems to be known.

[21] See *Roberts* v. *Bozon* (1825), cited in Kent's Comm. IV. 147.

[22] See *Woolsey* v. *Colmar*, L. R. 21 Ch. D. 169.

trust,[23]—a liability to be mulcted for any failure in due diligence. If he releases part of the security, or releases a purchaser from his bid, he is called on to make good a breach of trust.[24] He is bound to keep all his *cestuis que trustent* informed of his operations; and his action is often restrainable by injunction, where the mortgagee, with power, would be given free hand.[25] On the side of the mortgagee—he is vexed by the trustee alive or dead. There are qualms that trouble the over-conscientious third party which perhaps will not be quieted except by an action by the mortgagee to enforce the trust. And when death removes or insolvency makes dangerous the depositary of the power, then for the appointment of another there is needed the concurrence of the mortgagor.[26] Moreover, the value of a mortgage remedy depends greatly on its working in with all the concurrent remedies; and by itself, like a stick drawn from a faggot, loses its efficiency. Thus the sale power isolated in a trustee will, in the absence of stipulation, lacks the support of the power of entry on and taking possession of the land that is to be sold. At any rate, the mortgagee-public, having it in their own power to dictate the terms on which they will advance and loan their moneys, have evidently preferred to keep in their own hands a remedy that, whenever the occasion arises, they may, without delay, take advantage of and put in execution.

Section 26.

[23] Jones, 5th Ed. 1780.

[24] *Sherwood* v. *Sarton*, 63 Mo. 78.

[25] *Anon*, 6 Madd. 10. Moreover, he has no power to appoint an agent to sell for him. *Fuller* v. *O'Neill*, 6 S. W. 181.

[26] *Ex p. Orgill*, 2 Dea & Ch. 413.

Sections 37-38.

(3) *Power of Attorney.*

37. Another method, not unlike the trust deed, is to have the mortgagor execute as of even date with the mortgage, a separate power of attorney—generally to a third party—but permissibly to the mortgagee himself. Such a power is effective to cut off the equity of redemption;[27] and being given for consideration is, therefore, irrevocable during the lifetime of the constituent, and under the provisions of our statute, 10 Edw. VII. c. 47, may, by express provision, be made to stand good after its constituent's decease. It is to be noticed also that all proceedings and deeds taken and given by a mortgagee under such a power of attorney are the acts and grants of the mortgagor himself, and not of the mortgagee.[28] This method by power of attorney is so little used in Ontario as a mortgage-remedy, that it is scarcely of interest save as a legal curiosity.

Operation of power of attorney.

(4) *Apparently Absolute Deeds.*

38. There are certain anomalous cases where an apparently absolute conveyance has been given which, however, Equity is pleased to construe into a mortgage and where the grantee—really mortgagee—makes sale of the land conveyed as if actual owner. *Bartels* v. *Benson,*[29] was a complicated case involving similar difficulties. There was an agreement between S. and the defendant, which recited S. as the owner and that he agreed to convey to the defendant. But if the

Bartels v. Benson.

[27] *Balbridge* v. *Walton*, 1 Mo. 520.
[28] *Speer* v. *Hadduck*, 31 Ill. 439.
[29] 21 U. C. R. 143 (an ejectment case).

defendant made default, *then he should immediately cease to have any right to the land;* and S., after giving a month's notice, might sell and, after deducting the amount due, pay to the defendant any surplus. S. sold to the plaintiff, whose deed recited S. as owner in fee. It was held that the conveyance to the plaintiff was open to objection as being executed by S. as owner in fee, while the agreement, though it recited his ownership, conveyed no estate to S. from the defendant, but was at most only a mortgage with power of sale; and that it was difficult to give it even that character. Sections 38-39.

39. Now a mortgage by metamorphosis such as the one just mentioned, presents the hazard that the power of sale stipulated for may be—as in that case—doubted by the court; and yet being in sort an express power, and there being, of course, no mention of the Short Form Act, its weakness is not relieved by the option of the implied statutory power.[30] Of course, to avoid the purchase, the purchaser from an apparently absolute owner must have had some notice—through the terms of the agreement or conveyance or otherwise—that the vendor was in reality a mortgagee.[31] What exactly would be sufficient notice is a matter to be decided for each case, but that there is a limit of vagueness we may know from the decision that a casual conversation in a bar-room fifteen years before the bill to redeem was not good and sufficient notice.[32] Danger of this form.

[30] See sec. 9, *supra*.
[31] Cf. *Peterkin* v. *McFarlane*, 9 A. R. 429.
[32] *Clarke* v. *Little*, 5 Gr. 363.

Section 40.

(5) *Short Form Mortgages.*

Clause 14.

40. The Power of Sale under the Short Form Act, 10 Edw. VII. c. 55 (clause 14 in the Schedule), "Provided that the said mortgagee on default of payment for months may on notice enter on and lease or sell the said lands," is the most commonly in use in Ontario, either in the integrity of the statutory words, or with more or less perilous modifications and exceptions. The apparently simple directions prefixed to the columns of the forms—and constituted a part of the Act itself by section 4—are as follows:

Statutory directions.

"1. Parties who use any of the forms in the first column of this Schedule B, may substitute for the words "mortgagor" or "mortgagee" any name or other designation; and in every such case corresponding substitutions shall be taken to be made in the corresponding forms in the second column.

"2. Such parties may substitute the feminine gender for the masculine, or the plural number for the singular, in any of the forms in the first column; and corresponding changes shall be taken to be made in the corresponding forms in the second column.

"3. Such parties may introduce into, or annex to any of the forms in the first column, any express exceptions from or other express qualifications thereof respectively; and the like exceptions or qualifications shall be taken to be made from or in the corresponding forms in the second column."

A. *Interpretation.*

Section 41.

"One month."

41. It would seem reasonable that on a liberal construction of the second of the above directions, the phrase " one month " might be substituted for "——months," in the condensed clause, for if the plural may be substituted for the singular, it is no great assumption to substitute the singular for the plural. Nevertheless the validity as a short form of a power exercisable on one month's default has more than once been tried in our courts, and cannot now be considered safely established. In *Re Green* v. *Artkin*,[33] where the assignee of a mortgage was selling under power, Mr. Justice Ferguson has held that " the variation of ' month ' for ' months ' is not a material variation. The spirit of the Act is not violated by such an alteration. I therefore think that the vendor can make a good title and the purchaser must accept it." The same difficulty again arose in *Barry* v. *Anderson*,[34] in which Osler and McLennan, JJ.A., seem to have disregarded the point as of no consequence; while on the other hand Mr. Justice Burton laid on it considerable stress, and reached the conclusion that the effect of limiting " the default to one month *instead of two or more months,* as would seem to be necessary if they desire to avail themselves of the Short Form Act," is that the proviso has no operation under the Act, and is therefore personal to the mortgagee. Now, whether it will ever be judicially determined that the " one month " power is outside the statute may be

Barry v. Anderson.

[33] 14 O. R. 697.
[34] 18 A. R. 247.

Sections 41-42.

doubted, and our courts will probably hesitate before they cripple that clause, which is by far the most common expedient in Ontario, and to which our conveyancers are becoming so generally accustomed as often to insert the clause as a matter of habit, in mortgages where no power at all has been stipulated for.

Third direction.

42. The third of the Short Form directions, however, has given the most scope for judicial distinctions. For the judges have been divided—and apparently irreconcilably—according to two opposite theories; while frequently the conveyancer concerning whose handiwork they differ, has by them been complained of as having an utter disregard of the Act in pursuance whereof he has entitled his deed.

The one theory—and seemingly much the more favored one with the courts—is for a very strict alignment of the power, with that to be filled in according to the Act. Our leading case on this point is *Re Gilchrist* v. *Island*,[35] in which the arraigned clause was, "Provided that the said mortgagee on default of payment for two months, *may without giving any notice* enter on and lease or sell the said lands." The train of reasoning which led Mr. Chancellor Boyd to exclude this clause from the benefit of the Act is to this effect:—Resort cannot be had to the exponential clause unless there is found in the instrument the symbolical clause of which the former is the parliamentary equivalent. Now the dispensing with notice was not a mere *exception* from, nor *qualification* of, the short form given

Re Gilchrist and Island.

[35] 11 O. R. 537.

in the Act, but an abolition of one of its most important terms. It is deemed oppressive to be able to sell without notice to the mortgagor, and the form in the statute is so expressed as to require some notice to be given. Sections 42-43.

43. In the next case, *Re British Canadian Loan and I. Co.* v. *Ray*,[36] where the application of the Act was considered in reference to a very similar power to the one in *Re Gilchrist and Island,* the mortgagees had fortunately done their work in such a manner as to make it indifferent whether the power was limited to the actual words used or took the benefit of the extended clause. But a little later, in *Clark* v. *Harvey*,[37] the clause " Provided that the mortgagees on default for one day, may without any notice enter on and lease or sell said lands " was the subject of dispute. At the trial Chief Justice Sir Thomas Galt attempted to distinguish this case from that of *Gilchrist* v. *Island,* on the ground that in the latter the power was exercised by an assignee of the mortgage. But on appeal to the Divisional Court, Mr. Justice Rose took the occasion to dissent—somewhat explicitly—from the reasoning in *Re Gilchrist and Island,* while Mr. Justice Street no less explicitly adhered to the close construction. The theory of the Act adopted by the former was expressed as follows: " Giving the matter may best attention I am unable to distinguish the effect of excepting anything from the proviso and abolishing the thing excepted. If excepted from the clause it is of course no longer there, and therefore is abolished Later cases. Clark v. Harvey.

[36] 16 O. R. 15.
[37] 16 O. R. 159.

Sections 43-44.

so far as that clause is concerned. But, without desiring to enter into any verbal criticisms, I am wholly unable to give effect to the language of the Act above quoted, if one is not at liberty to except from the proviso any requirement therein contained. To except is to exclude; and it seems to me that if the parties agree so to do they are empowered by the Act to exclude or except from the power the provision requiring any notice just as they might 'annex to' the form any such exception." On the other hand the stricter view of the matter is elaborately wrought out in the opinion of Mr. Justice Street, the effect of it being—as far as fairly representable in brief—that as the words in the second column of the schedule *go so far beyond the natural meaning* of those in the first column therefore the latter must be taken to be *symbols,* as if the legislature were to say, $xy =$ (clause 14 see 2nd column); and if the legislature choose to attribute to xy a certain meaning you are not at liberty to leave out y and then attribute to x the meaning of xy.

Mathematical theory.

44. Now, laying aside all memory of those equations where $y =$ unity, and therefore may safely be eliminated, it would have been interesting had the mortgagee's solicitor instead of using the grafted form of power, quoted in *Re Gilchrist and Island,* availed himself of the strict form of the schedule and inserted the word "no" before the word notice. For then it would have been necessary to insist on the equitable reason as to the oppressive abolition of a term in the form, rather than to build on the theory that the symbolical requirements had not been complied

with. Unless indeed we could carry out mathematics a step further into law, and disqualify the clause on the ground that certain fallacious proofs by aid of the zero value are not admissible in algebra; and thus end with some legal theory of indeterminate equations. Sections 44-45.

45. It seems on the whole to be very unsafe to make any change in the interior of the clause—further than to make substitutions for the word "mortgagee," and, if we are to abide by the view of Mr. Justice Street,[38] who instances a few alterations that might be made in some of the short form terms, only very insignificant internal qualifications are admissible by the statutory power. Thus in *Re Colter,* 14 Man. R. 485, the word "calendar," inserted before the word "month," was held permissible. No more does it appear to be at all a matter of course to add to the clause and import into the additions the advantage of the extended form in the second column. In *Barry* v. *Anderson,* above cited,[39] following the modified clause already quoted, were these additions, "And provided also, that in case default be made in payment of either principal or interest for two months after any payment of either falls due, the said power of sale and entry may be acted upon without any notice. And also that any contract of sale made under the said power may be varied or rescinded. And also that the said mortgagees, their heirs, executors, administrators, and assigns, may buy in and resell without being re- Additions to form. Barry v. Anderson.

[38] *Clark* v. *Harvey,* 16 O. R. 159.
[39] *Barry* v. *Anderson,* 18 A. R. 249; see § 41, *supra.*

Sections 45-46.

sponsible for any loss or deficiency on resale." While the majority of the court considered these additions as within the scope of the Act, Mr. Justice Burton dissented and maintained that they must be strictly construed by themselves. On the other hand, the line of reasoning adopted by Mr. Justice Osler is as follows: "This clause (referring to the additions) is to be read just as if the previous clause had been set forth in its extended form, since that clause is, as I hold, in exact compliance with the Act, and is therefore to be construed as if it had been in the form of words in column two of the schedule, the extended form. All the terms of that power, therefore, except as varied by the terms of the second clause, are brought into that clause by relation, and among those terms is the provision that it may be exercised by the heirs, executors, administrators or assigns of the mortgagee. The case appears to me distinguishable from *Re Gilchrist and Island* and *Clark* v. *Harvey,* where the mortgages did not contain the symbolical form given in column one of the schedule, and it therefore became impossible to revert to the exponential form in column two."

Per Burton, J.A.

Per Osler, J.A.

Attempt to find true principle.

46. Now though it may well be that the inventor of the Short Forms Acts, as well as some later critics of his work,[40] had some theory of equations in his mind, still it is quite probable that our legislators intended a strict adherence to the schedular form as a protection to the party more easily oppressed; and that, as in the "statutory

[40] Including Dart V. & P., 5th Ed. 504. The Short Form Acts were contrived by Lord Brougham in 1845 and 1846.

conditions" in the Insurance Act—they intended any variations from the prescribed form to be clearly notified to the weaker party—in this case the mortgagor.

So that the phrases "express exceptions" and "express qualifications" may be taken to involve the meaning that the intention of the parties, at once to give the benefit of the large powers of the extended form, and also to deviate from that form for the further advantage of the mortgagee, must be very clearly evidenced by the language used. At any rate it is to be hoped that some construction of the Act will at length be agreed upon, which will permit the application of such equitable grounds as the oppressiveness of a power,[41] without finding it necessary to make the rights of the parties to a very common business transaction the sport of an algebraic entertainment.

B. Effects of Exclusion.

47. (1) *Assigns of the mortgagee.*—For the better comprehension of the hardship of being shut out from the Act there is here inserted a short discussion of the rights of assigns of the mortgagee.

One of the earliest strains put upon powers of sale—which all judges have concurred in rigidly construing—was the attempt to exercise them by the assigns of the mortgagee, without special provision in that regard. But it has been repeatedly held that such powers must be expressly reserved to them; otherwise the mere

[41] See *Re Gilchrist and Island*, § 42 *supra*.

Sections 47-49.

transfer of the mortgagee's estate does not of itself carry the power of sale, which, according to the strict construction, is personal to the mortgagee and may be exercised by him, and none other.[42]

Scope of "assigns."

48. Now the use of the word "assigns" in limiting the power of sale is taken to evidence the intention of the parties to couple the power and the security.[43] So great is the scope and capacity of this word "assigns" that under its shelter not only the holder of the security by the usual method of assignment of mortgage, but several other classes of persons, take the benefit of the power. Thus the administrators of an intestate mortgagee or the administrators of an assignee of the mortgage,[44] are sufficient assigns —*i.e.*, assigns by operation of law. Moreover, a devisee, or assign by will, is within the meaning of the word.[45] Likewise it is true that if there be a mortgage to two persons—securing a joint advance, and the power of sale be made to them, their heirs and assigns—one dying, the survivor may act upon the power.[46]

Exceptions.

49. There are, however, two exceptions to the rule that the assign cannot sell in the absence of such provision as mentioned. The first is, if the mortgagor concur in an assignment of mortgage which purports to make over the benefit of the

[42] Blythewood and Jarman, Conveyancing, vol. iii., 690; *Bradford* v. *Belfield*, 2 Sim. 264. (N.B.—The rights of assigns to give receipts will not be taken as equivalent to and including the right to exercise the power of sale).

[43] Lewin on Trusts, 12th Ed., pp. 510, 753, 754.

[44] *Salaway* v. *Strawbridge*, 1 Jur. N. S. 1194.

[45] *Cooke* v. *Crawford*, 13 Sim. 91. But see also *Osborne* v. *Rowlett*, L. R. 13 Chy. D. 774; *Re Morton* v. *Hallett*, L. R. 15 Ch. D. 143.

[46] *Hind* v. *Poole*, 1 K. & J. 383; Lewin on Trusts, 12th Ed. 260.

provisions therein contained.[47] And the second is the case of trustees in whom is vested a mortgage estate. For, though formerly the courts applied the same close construction to their exercise of these powers,[48] yet by statute [49] the powers of new trustees are made co-equal with those of their predecessors in office. A new trustee is to "have the same powers, authorities and discretions, and shall in all respects act as if he had originally been nominated a trustee by the deed, will, or other instrument creating the trust." The position of a trustee-mortgagee under this Act was debated in *Re Gilmour and White.*[50] The facts were, that Robert Gilmour was made trustee of the Crookshank Estate, in Toronto, in place of Stephen Heward and W. G. Schreiber, the former trustees. The power of sale in a mortgage to them, which Gilmour attempted to exercise, was such as not to give the right of sale to the assigns of the mortgagee.[51] But Mr. Justice Proudfoot allowed its exercise on this ground: "There is no question that the original trustees could have sold under the power of sale, and the new trustee steps into their place and may exercise all the powers for realizing the trust property that they had, not as an assign of the estate but as if appointed a trustee by the deed creating the trust."

Sections 49-50

Gilmour v. White.

50. Allowing, therefore, for these exceptions the rule regarding assigns is as stated. Now, the

Applications.

[47] *Young* v. *Roberts*, 15 Beav. 558.
[48] *Townsend* v. *Wilson*, 1 B. & Al. 608.
[49] 1 Geo. V. c. 26, s. 4.
[50] 14 O. R. 694.
[51] Being within the scope of *Re Gilchrist and Island*. See *supra* § 42.

Sections 50-51.

application of it to cases within and without the Short Form Act is (or was) very simple. The form of power-clause in the first column of the Schedule makes no mention of the assigns of the mortgagee, while that in the second column reserves the power to the "mortgagee, his heirs, executors, administrators or assigns." If then the attempt to use the form in the first column be a failure in the eyes of the court, the probable result is, that neither having the benefit of the extended form, nor having taken thought to make the necessary reservation, the conveyancer will have drawn a power not available to the assigns of the mortgagee. This was the kernel of *Re Gilchrist and Island*,[52] where no resort being permitted to the Act, the assignee of the mortgage was shorn of his power—which was construed as personal to the mortgagee. The same right of assignees was at stake in *Barry* v. *Anderson*,[53] when, fortunately for the vendors under power, they were allowed within the sanctuary of the Act. This state of the law has been so far modified by statute as to give the assigns the benefit of 10 Edw. VII. c. 51, and to limit the time for questioning a sale by an assignee to within two years after sale.[54]

51. (2) *Necessity for Entry.*—A less successful attempt to hamper mortgagees in the exercise of such powers as have the misfortune to be outside the benefit of the Act, has been based on the use of the words "enter on and lease or sell the said lands" or similar phrases. The dispute is

[52] See *supra* § 42.
[53] See *supra* § 41, 44.
[54] 51 V. c. 15, ss. 4, 5; 53 V. c. 27, s. 1.

Section 61.

whether entry and possession thus become indispensable to the due exercise of the power. Under the Short Forms Act, the option "whether in or out of possession" is express, while the above phrase—found in the form in the first schedule—is at least ambiguous. The point has more than once been taken, when the strict construction holds, *e.g.*, in *British Canadian* v. *Ray*,[55] where, however, the vendors having made entry before sale, the objection accordingly profited nothing. Mr. Jones, in the third edition of his extensive work, has said: "Under a power in default of payment to enter and take possession of said premises immediately and sell and dispose of the same, a sale cannot be made without a previous entry and taking possession, or at least a demand for possession and a refusal,"[56] But, in the opinion of Chief Justice Sir Thomas Galt, in *Clark* v. *Harvey*,[57] the authority cited for that proposition [58] does not bear it out. Nor does the case of *Clark* v. *Harvey* itself make an end to the matter; for, on appeal to the Divisional Court, the two judges who heard the case took irreconcilable views. Once again, the same question was mooted in *Anderson* v. *Hanna*,[59] where Mr. Justice Robertson, citing a prior decision of his own in the unreported case of *Pottruff* v. *Tweedle*, construed this ambiguous clause as not requiring entry to be made before sale.

B. Canadian v. Ray.

Anderson v. Hanna.

[55] 16 O. R. 15. See § 43 *supra*.

[56] Jones on Mortgages, 3rd Ed. 1782, quoted in *Clark* v. *Harvey* (*infra*). But see 4th Ed. same section; now 5th Ed. 1782.

[57] 16 O. R. 161.

[58] *Roarty* v. *Mitchell*, 7 Gray (Mass.) 243.

[59] 19 O. R. 58. See also *Halpin* v. *Halpin* (Miss.), 8 So. 739; *Tyler* v. *Herring*, 67 Miss. 169.

Sections 52-53.

Attempt to find true principle.

52. On principle, it would seem that, according to the strict construction, it would be proper, or at least consistent, to construe the clause in favor of the necessity of entry, if there be reason to believe that such entry would, in some way, be towards the advantage of the mortgagor; but that, in the absence of any possible advantage to him it would not be proper or reasonable so to construe it, merely to impose a troublesome condition on his creditor. In practice, there is no doubt whatever that the more liberal view is the one that would meet most favor with conveyancers and mortgagees. At any rate, as it appears from the same Mr. Jones,[60] that such entry may be made at the time and for the purpose of the sale, to insist on its performance—which would certainly contribute to swell the costs of the proceedings—would truly be a far-fetched charity towards the mortgagor.

C. Suggestions in drawing powers according to Short Forms Act:—

53. It has been recommended by Mr. E. D. Armour,[61] "that the power should be reserved to the personal representatives of the mortgagee; and that provision should be made for giving notice to the personal representative of the mortgagor, or, if no personal representative shall be appointed within a reasonable time after death of the mortgagor, then, that the power should be exercisable without notice."[62] The not "very

[60] 4th Ed. § 1782. citing *Cranston* v. *Crane*, 97 Mass. 459.

[61] Titles to Real Estate in Ontario, 3rd Ed. ch. XV.

[62] If there be no person in existence to whom under the terms of the power notice should be given, the power cannot be exercised: *Parkinson* v. *Hanbury*, 1 Dr. & Sm. 143; 2 L. R. H. L. 1.

inartificial" reasoning on which he bases the above suggestions will be found on page 400 of his work. Sections 53-54.

54. It is advisable that the form in column one of the schedule be tampered with as little as possible. The better plan is to put it in as entire as the case permits, and then to annex by further clauses the desired modifications. Wherever there is any doubt as to the applicability of the Act to these added clauses, it is proper either specifically to recite the intention of the parties to take advantage of the extended form, or, as is the more elegant mode, to refer back unmistakably to some of the phraseology or terms of that form. An instance of the latter method is such a clause as the following: "Provided further that such notice of sale may be effectually given *either in the manner aforesaid,* or by leaving the same with a grown-up person, etc." There being no mode of service mentioned in the abbreviated form, recourse is, as of necessity, had to its more explicit partner. Avoid internal qualifications.

CHAPTER V.

NOTICE.

(A) Notice Generally.

Section 55.

Not always necessary.

55. A notification to all or any of the parties interested in the equity of redemption, that the power will be acted on—though usually provided for in the instrument, and usually given in any event—is not an essential of every power of sale. Nothing is better established than the law laid down by Mr. Justice Street in *British Canadian v. Ray*,[1] that "a power to sell without any notice after a certain period of default, is as good as one which requires a notice to be given." It is no less certain, however, that such powers are deemed oppressive, and, consequently, find small favor with the courts.[2] This view of the matter has been given stress in some cases where the mortgage was from a client to his solicitor, in which the insertion, without explanation to the client, of such a clause authorizing sale without notice, was adjudged a breach of trust;[3] this, however, was not extended to a case where the mortgage was really an arrangement to give the client time on a debt already due.[4]

B. Canadian v. Ray.

Effect of notice where none required.

56. Where there is no express provision for notice it may happen that the mortgagee may

[1] 16 O. R. 15, and see also *Dominion Trust Co. v. Bower*, 3 W. L. R. 157, where no notice of the sale was given a second mortgagee.

[2] *Re Gilchrist and Island*, 11 O. R. 537; *Miller v. Cook*, L. R. 10 Eq. 647.

[3] *Cockburn v. Edwards*, L. R. 18 Ch. D. 449; *Craddock v. Rogers*, 53 L. J. Ch. 968; 51 L. T. 191.

[4] *Pooley's Trustee v. Whetham*, L. R. 33 Chy. D. 111.

either give a voluntary parol promise not to exercise without notice, or may voluntarily serve a notice for reasons proper to himself. In which case it is to be noted—that the parol promise without consideration will not be binding,[5] nor will the actual serving of notice on some parties prejudice the right to leave others unserved,[6] or otherwise subject the mortgagee to the exigencies of a power with notice.[7] Sections 56-58.

57. Perhaps the least objectionable form of such harsh powers is the alternative one frequently inserted in mortgages, by which a certain term is fixed for default on which sale after notice may be had, and a further or greater period after which the power may be acted on without notice.

58. Cases also arise where a power is to be exercised after notice, but the character of the notice, to whom to be directed, and how or for what time to be given,[8] are in no way indicated. In such cases the mortgagee is allowed to exercise a reasonable discretion, and proceedings taken by him in honest exercise of his judgment will be sustained;[9] for instance the notice may be public, and not necessarily an express personal one to any party interested.[10] But if the power prescribes the nature of the notice and its proper recipient, in that case, not only may such proper Notice left to discretion.

[5] See Jones, 4th Ed. 1825, citing *Randall* v. *Hazelton*, 12 Allen [Mass.] 412.
[6] *British Canadian* v. *Ray*, 16 O. R. 15.
[7] See *Canada Permanent* v. *Teeter*, 19 O. R. 156.
[8] See *Massey* v. *Sladen*, L. R. 14 Ex. 13.
[9] Jones, 5th Ed. 1778.
[10] Ib. 1821.

Sections 58-60.

recipient impeach the sale, where no notice has been given,[11] but also, the fact of his having actual notice of the proceedings will not relieve the mortgagee from the necessity of giving the notice strictly as provided for in the power clause.[12] Conversely, too, if the notice be given strictly as prescribed, it will suffice and none other can be required.[13]

(B) To Whom Given.

Depends on terms of power.

59. The proper recipient of notice, where notice is a condition of the power, will always depend on the terms of the power as limited in the instrument. The parties most commonly designated for notification are perhaps the same as are mentioned in the extended form of the Short Forms Act, namely, the "mortgagor, his heirs or assigns." These words, which, as we shall presently see, offer less of an option than grammar would suggest, make it, as a general rule, incumbent on the mortgagee to notify all and sundry who are, or seem to be, in any wise interested in the equity of redemption,[14] and the question upon whom notice is to be served is to be determined according to the circumstances existing at the time notice is given: *Re Abbott & Medcalf,* 20 O. R. 299; *Re Martin & Merritt,* 3 O. L. R. 284; *Re Muffitt & Mulvihill,* 8 O. W. R. 347.

How ascertained.

60. In practice it is not a difficult matter to ascertain who these parties are. The first active

[11] *Discher* v. *Canada Permanent L. & S. Co.*, 18 O. R 273
[12] *Root* v. *Wheeler*, 12 Abb. (N.Y.), Pr. 294.
[13] *Princeton Loan* v. *Morrison*, 60 Ill. 371; *Reynolds* v. *Hennessy*, 8 Atl. 715.
[14] See *Pearce* v. *Morris*, L. R. 5 Ch. 227; *Tarn* v. *Turner*, 39 Ch. D. 456, and *Stewart* v. *Rowsom*, 22 O. R. 533.

step in sale proceedings is to make certain searches. Besides sending to the treasurer of the municipality wherein the lands lie for a certificate as to arrears of taxes, it is the ordinary course to require from the sheriff of the county where the property is situate, a certificate as to executions against the mortgagor; and, in default of personal search, to require from the registrar of that county a continuation of the abstract from the registration of the mortgage under which sale is being had. The object of ascertaining, with a view to notice, the execution creditors of the mortgagor and the puisne incumbrancers of the estate will more fully appear in the discussion of the various classes to whom notice is due. Sections 60-61.

Particular Classes.—(1) *Mortgagor.*

61. The mortgagor himself, if he still hold the equity of redemption, is the primary party to be bound by notice given. Nor—if the mortgagee would keep his other remedies—is the mortgagor any less entitled to it when he has absolutely conveyed away his estate in the lands. But see *Re Muffitt & Mulvihill,* 8 O. W. R. 347. For if—as every mortgagee intends—the debtor be sued on his personal covenant to pay, that of itself gives him a fresh right to redeem, subject of course to any equities vested in his assigns.[15] Notice, then, being due to the mortgagor, it remains to add that it is not safe to omit notifying any one of several mortgagors. For though, for example, one tenant in common may not be able to redeem Where mortgagor has assigned his equity.

[15] *Kinnaird* v. *Trollope,* L. R. 39, Chy. D. 636.

Sections 61-63.

without the others,[16] yet it is not to those only whose right to redeem is perfect, that notice is to be given, but must further be given to all who have a partial right of redemption.

View of Mr. Jones.

62. While we are still discussing the necessity of notice to the mortgagor, it will not be out of place to refer to the not wholly erroneous view of the meaning and purpose of notice, expressed by Mr. Jones in his book on Mortgages, wherein he says, " The notice of sale required by the power is not for the benefit of the grantor, in the sense of a notice to him of the sale of the land, for if that were the case he could altogether defeat any sale by going to a place where the notice could not reach him; but it is intended rather to notify the community that the sale will take place. The grantor will be presumed to know that he is in default, and that his property is liable to be sold." [17] In this view, the concealed suggestion that notice of the intended sale to those interested—whom Mr. Jones expands into the community—has a value (on the day of auction) beyond that of a mere formal reminder to the debtor that he has not paid,—this hint is the redeeming *suggestio veri* in the opinion quoted.

(2) *Assigns of Mortgagor.*

63. On reference to the case of *Hoole* v. *Smith*,[18] it will be seen that the seeming option of service on the mortgagor " or " his assigns, contains either no alternative, or an alternative that opens backwards only. For, according to the

[16] *Bolton* v. *Salmon*, [1891] 2 Ch. D. 52.
[17] Jones, 5th Ed. 1800.
[18] L. R. 17 Ch. D. 434.

view in that case, it would appear that notice to the assigns alone might be sufficient; but, with or without notice to the original mortgagor, they must be notified. We may now proceed to the enumeration of the various classes of assigns, with citation of cases severally relating thereto. Sections 63-66.

64. *Subsequent Purchaser.*—The most obvious assign is a subsequent purchaser of the equity of redemption, who holds the land, which is the natural fund from which the debt is to be extinguished. It will not be permitted to the mortgagee, even with the consent of the mortgagor, to sap at the interests of the holder of any portion of the equity. Thus, where, without taking advantage of the power, the mortgagee and mortgagor together sold a portion of the land without concurrence of the then present owner of the remainder of it, and the mortgagee covenanted against incumbrances, it was held that the mortgagee, having thereby put it out of his power to reconvey the whole of mortgaged property, could not call on the owner of the remaining portion for payment of the balance of the mortgage money.[19] But a sale, fairly conducted as to notice and otherwise, under power of sale of any portion, would both be valid and not interfere with the mortgagee's right to proceed for any deficiency against the unsold portion of the property.[20] Subsequent purchaser.

65. Where the estate has been divided among a number of purchasers, they must all be notified. Concerning which state of facts the law was thus Severance of equity.

[19] *Gowland* v. *Garbutt*, 13 Gr. 578.
[20] *Ib.* 584, per Mowat, V. C.

Sections 65-66.

formulated by Spragge, V.-C.: "The general rule appears to be that when after mortgages being given, the equity of redemption is severed so that different persons are entitled to redeem in respect of different parcels, these different persons must be made parties." [21]

Hoole v. Smith.

66. *Subsequent Mortgagee.*—The rights of a puisne incumbrancer by second mortgage as an assign of the mortgagor have been so plainly declared by Mr. Justice Fry in *Hoole* v. *Smith*,[22] that to quote his decision will be a sufficient statement of the law in that regard. The facts were, Harrison was the mortgagor, Smith the first mortgagee, Pierson the second mortgagee, and Hoole the assign of the second mortgagee:—"It is plain," said the judge, "that Pierson and Hoole were assigns from Harrison, of whose assignments the defendant Smith had notice. The question in issue is whether he acted lawfully in selling without giving notice to Pierson or Hoole. In my opinion notice to Harrison alone was not enough. Notice ought to have been served either upon Harrison, the first mortgagor, and his assigns, or upon the assigns and not upon Harrison. When I find the word "assigns" used in the power of sale as an alternative for Harrison, it is impossible that I can hold that it was sufficient for the defendant to go on serving Harrison alone, after he had assigned his equity of redemption. The object of the proviso was that any assign might be at liberty to intervene and pay off the mortgage, and no one could be more interested than the second mortgagee in

[21] *Buckley* v. *Wilson*, 8 Gr. 566.
[22] L. R. 17 Ch. D. 434.

this right of intervention; whether Harrison's right to require notice was excluded by his assignment to a second mortgagee is irrelevant to the present case. The plaintiff will have an inquiry for damages against the defendant for exercising the power of sale without notice to him." Sections 66-68.

But where subsequent mortgagees had assigned such mortgages they were held not to be entitled to notice. So, also, where the mortgages had been paid in full: *Fenwick* v. *Whitwam*, 1 O. L. R. 24.

67. *Tenant of Mortgagor.*—Where the mortgagor has leased his estate to a tenant,[23] or allowed him to be in possession under a written agreement for a lease,[24] that tenant has a sufficient interest in the equity to entitle him to notice—unless it be the intention of the mortgagee to sell subject to his term. It has further been held that the right of such a tenant to redeem is absolute and not discretionary with the Court.[25] Tenants and reversioners.

Reversioner.—The same is true of the holder of a reversion after a mortgage for a term of years;[26] even when the term was 1,000 years.[27]

68. *Assignee of Insolvent.*—Formerly, where the mortgagor had turned bankrupt, it was considered that his assignee was a necessary party to foreclosure,[28] but that the bankrupt himself was not.[29] The safe practice now, where an Insolvents.

[22] *Canada Permanent* v. *Macdonell*, 22 Gr. 461.
[23] *Tara* v. *Turner*, L. R. 39 Ch. D. 456.
[24] *Martin* v. *Miles*, 5 O. R. 404, citing *Faulds* v. *Harper*, 2 O. R. 41; *Pearce* v. *Morris*, L. R. 5 Chy. App. 230.
[25] *Waters* v. *Shade*, 2 Gr. 457.
[26] *Chisholm* v. *Sheddon*, 2 Gr. 655.
[27] *Burnhart* v. *Patterson*, 1 O. S. 321.
[28] *Torrance* v. *Winterbottam*, 2 Gr. 487.

Sections 66-69.

assignment has been made for the benefit of creditors, under the Ontario Statute,[30] will be to notify both the insolvent and his assignee. The right of the latter arises as assign, while it would be unsafe, as to the former, to rely upon that unprosperous enactment.

69. *Execution Creditors of Mortgagor.*—How far the judgment creditors of the mortgagor, and which of them, are entitled to notice is considerably canvassed by Mr. Chancellor Boyd in *Re Abbott* v. *Medcalf*:[31] "Assigns," he says, "is applicable to persons taking under another by operation of law; and it may include, I think, the execution creditor of a mortgagor who has placed a writ against lands in the sheriff's hands. By sec. 29 of the "Execution Act," 9 Edw. VII. c. 47, s. 29, the effect of seizure or taking in execution is to affect the interest of the mortgagor at the time the writ was placed in the hands of the sheriff, and it has been held that the operation of an execution against an interest in lands is in effect that of an encumbrance *in invitum*.[32] * * It was not needful to give new notices thereafter to persons putting executions in the sheriff's hands, from time to time, before the actual sale; otherwise the right to sell might be indefinitely postponed by the incoming of execution creditors subsequent to the first notice. The execution creditors take only what the mortgagor can give, and if he has had notice of sale upon default, those putting in executions subsequently stand in his shoes as to such notice, and cannot exact the

Re Abbott v. Medcalf.

What creditors to be notified.

[30] 10 Edw. VII. c. 64.
[31] 20 O. R. 299. See also *Bloor* v. *Bank of Upper Canada*, 2 O. S. 31, and *Glover* v. *Southern Loan Co.*, 1 O. L. R. 59.
[32] *Darling* v. *Wilson*, 16 Gr. 255.

service of any further or other notice. Those having executions in force prior to the giving of the notice, come within the provisions of the Act —those after are not within the meaning of the contract as to notice before selling."

Sections 69-70.

70. I have not been able to find any case where a right to notice has been claimed for, or denied to, the execution creditor of a subsequent purchaser or subsequent mortgagee. Yet, if we are to conclude from certain expressions of Vice-Chancellor Spragge, in *Darling* v. *Wilson*,[33] such a claim might be seriously advanced. The pertinent facts in that case were: a mortgage by a former owner (Martin) to the Trust and Loan Company; sale by John Stewart (subsequent owner) to James his brother with mortgage back; executions against John Stewart by plaintiff; and suit by the Trust and Loan, resulting in sale (through the Court). Now, says the Vice-Chancellor, "the plaintiff was not made a party to the above suit, and he complains of the omission. If made a party it would have been as judgment and execution creditor of John Stewart; and on the ground that his execution against lands attached upon the mortgage by James to John; that John was a mortgagee, and that he as John's execution creditor was a derivative mortgagee *in invitum*, his execution creating a charge upon the mortgage to John; and I think that such was the plaintiff's legal position." From this not over clear case an argument might be built up to support a very inconvenient doctrine in favor of execution creditors of subse-

Execution creditors of subsequent purchaser.

Darling v. Wilson.

[33] 16 Grant. 256.

Sections 70-72.

quent purchasers and mortgagees, also of tenants and what not, as being themselves derivative incumbrancers *in invitum* (and seemingly *ad infinitum*) of recognized "assigns." Probably, however, if it came to a test, the courts would not incline to such an argument but limit this doctrine as to "*in invitum* incumbrancers," to the execution creditors of the mortgagor himself.

(3) *Heirs and Representatives.*

Where mortgagor deceased.

71. *Heirs, Representatives, Devisees.*—Provision is quite commonly made—and always in mortgages with benefit of the Short Forms Act—for notice to the heirs of the mortgagor. The words of the extended form under that Act are "to the said mortgagor *his heirs* or assigns," and despite numerous criticisms that it should be limited to the personal representatives, the words his heirs are still allowed to remain in the statute where they operate in a peculiar manner and to the perplexity of the vendor under power. For, in the Devolution of Estates Act,[34] is the following section: "7. In the case of a person dying after the 1st day of July, 1886, his *personal representative* for the time being shall, in the interpretation of any Statute of this Province, or in the construction of any instrument to which the deceased was a party, or in which he was interested, *be deemed in law, his heirs and assigns*, unless a contrary intention appears." This enactment has given rise to considerable doubt whether it would not be proper, in the case of a deceased person entitled to notice, to notify the

[34] 10 Edw. VII. c. 56.

personal representative, to the exclusion of those who formerly would have been "heirs" if the latter much debated epithet be still allowable. Thus in *Grimshawe* v. *Parks*,[35] it was considered that the heir of a deceased mortgagee of the equity was not a proper party to a foreclosure action—that the proper party was the personal representative. Again in *Baxter* v. *Turnbull*,[36] the personal representative of a deceased partner was held the proper party. On the other hand in *Keen* v. *Codd*,[37] the question was much debated whether under the Devolution of Estates Act the personal representative should be notified to the exclusion of the heirs at law; the Chancellor being of the contrary opinion. It would seem consistent, that as the courts have not seen fit to make so strong an application of the Act as to absorb the "assigns" of the deceased in his personal representative, that they would be equally slow to so absorb his "heirs."[38] Further, it would be exceedingly unsafe—in view of the late Act, which makes the property in the personal representative a very transient affair—to neglect to give notification to the heirs also. There is no doubt, however, that it would not do to neglect to serve the representative himself, for he is at least an assign by operation of law. But where, under the Act, the estate has shifted from the personal representative to the beneficiaries it is sufficient to serve them alone: *Re Martin & Merritt*, 3 O. L. R. 284. That difficulties may arise in connection with the service

Section 71.

54 V. c. 18.

[35] 6 C. L. J. 142.
[36] 2 Gr. 521.
[37] 14 P. R. 182.
[38] See also *Bartlett* v. *Jull*, 28 Gr. 140, for meaning of "or."

Sections 71-73.

of notice when no personal representative has been appointed, has been noticed by Mr. E. D. Armour in his book on Titles.[39]

Devisees.

A devisee of a (testate) mortgagor is in much the same position under the Devolution of Estates Act as the heir of an intestate, but with the difference that he comes under the head of an "assign"—*i.e.*, an assign by will.

Is notice to trustee sufficient.

72. *Cestuis que trustent.*—Where the party, ostensibly the proper recipient of notice, is known by the mortgagee to be a trustee of the property for ascertained persons, both trustee and *cestuis que trustent* should be notified. This is at any rate the case when it is within the knowledge of the mortgagee that there are circumstances that will likely prevent the trustee from the efficient performance of his trust. Thus where the trustee holding a second mortgage, who had become bankrupt, was made a defendant to foreclosure by the prior mortgagee, it was held that he could not represent his *cestuis que trustent*, and that they were necessary parties.[40] On the other hand, as we shall see, there are cases in which the trustee might be passed over and beneficiaries served instead.

(4) *Wives and their Interests.*

Wife a noticee.

73. *Dower.*—The wife of the mortgagor of the *legal estate* has certain rights with which a mortgagee must reckon. If she has not barred or released her dower in favor of the mortgagee, his estate is, of course, subject to her contingent

[39] 3rd Ed. pp. 399-400, quoting *Parkinson* v. *Hanbury*, L. R. 2 H. L. 18; and see *Aylward* v. *Lewis*, [1891] 2 Ch. 87.
[40] *Francis* v. *Harrison*, L. R. 43 Ch. D. 183.

rights. Where, however, as is usually the case, she has barred her dower in the mortgage, she is not entitled to notice where the mortgage is drawn under the Short Forms Act.[41] As to powers in other mortgages it would seem advisable to have the wife of the mortgagor served with notice. In *Monk* v. *Benjamin*,[42] an item of $5.32 in a bill of costs called forth from the bench a distinction—and a refined one at that—between the respective rights to dower of the wives of mortgagors and subsequent purchasers. To quote the words of Mr. Justice Robertson, the distinction is as follows: "The dower of the wife in this case (*i.e.*, wife of subsequent purchaser) is a creature of the Statute (9 Edw. VII. c. 39, s. 5), and it is limited to her husband dying seized; he can defeat the dower in his lifetime by conveying his estate. Mrs. B. is not in the same position as the wife of the mortgagor (if he had one) who was entitled to dower or had an inchoate right thereto, by reason of her husband being seized of an estate of inheritance in fee simple; that was so at common law; after creating the mortgage in which she joined for the purpose of barring her dower both had the right to redeem—the wife because of the 5th section of the Dower Act declaring that no bar of dower contained in any mortgage, etc., shall operate to bar such dower to any greater extent than shall be necessary to give full effect to the right of the mortgagee, etc. Assuming then that the mortgagor and his wife assigned

Section 73.

Monk v. Benjamin.

[41] *Re Martin & Merritt*, 3 O. L. R. 284; *Re Muffitt & Mulvihill*, 8 O. W. R. 347.

[42] 13 P. R. 356.

Sections 73-74.

their equity of redemption to Benjamin, he had a mere equity to which dower did not attach unless he died seized. His equity by this action is now being foreclosed. How can it be said under such circumstances that his wife has any rights? At law the dower attaches in the lifetime of the husband upon the marriage or acquisition of the property, and if the mortgage with power of sale be made afterwards, the dower overrides it; in equity the dower not attaching until the death of the husband, the mortgage has necessarily been made—and is in existence at the time—when the dower attaches, and, therefore, the mortgage overrides the dower."[43]

Deductions therefrom.

74. From the above train of reasoning we may make certain inferences as to the necessity, both of notice to the wife when the mortgage power is to be acted on, and of a bar of dower when the mortgage is being given:

(1) The wife of the original mortgagor of the legal estate must be notified in a sale under a mortgage, wherein—as always should be the case—she has joined to bar dower,[44] except as to mortgages under the Short Forms Act.

(2) The wife of such mortgagor, if he mortgage a second time and to a different person, should join in the mortgage and be given notice of sale; for the bar of dower in the first mortgage operates only for the purposes of that mortgage.

Death of mortgagor before proceedings.

(3) The wife of a subsequent purchaser need not be notified under a mortgage existing at the time of his purchase. But possibly if he died

[43] See also *Smith* v. *Smith*, 3 Gr. 453.

[44] See also *Apsey* v. *McLean*, 14 P. R. 15; *Building & Loan* v. *Carswell*, 8 P. R. 73.

before proceedings taken it would be prudent to give her notice. For he died possessed of a certain estate (as yet not foreclosed in any manner) and she has a right of dower in whatever he died possessed of. Sections 74-75.

(4) A bar of dower in a second mortgage by the wife of the subsequent purchaser, during the existence of the first mortgage, would perhaps not be necessary.[45] But there might afterwards arise complications on a discharge of the prior incumbrance.[46]

(5) *Principal and Surety.*

75. Where the mortgagor stands to a third party in the position of principal or surety in relation to the mortgage debt—both should be notified.[47] This would apparently follow, in the nature of things, from the liability of the creditor to unwittingly release the surety by dealings behind his back. It seems, however, that by proceeding to sell the lands of the principal without notice to the surety, the latter will not necessarily be discharged, but the mortgagee will be liable as between himself and the surety for the full value of the property. Or, as expressed by Chancellor Spragge in *Martin* v. *Hall*,[48] "They (the defendants) do not appear to have denied the right of the surety to have the proceeds credited upon the note. The plaintiffs claim more; their contention is that the land having been sold with- Liability to surety.

[45] See argument in *Canner* v. *Haight*, 6 O. R. 451 (a case where wife of mortgagor not allowed to redeem).

[46] For other cases on subject see *Rowe* v. *Wert*, 7 P. R. 252; *Long* v. *Long*, 17 Gr. 251; *Moffatt* v. *Thompson*, 3 Gr. 111; *Sanderson* v. *Caston*, 1 Gr. 349; *Davidson* v. *Boyes*, 6 P. R. 27.

[47] *Snider* v. *Sheppard*, 12 Gr. 456.

[48] 25 Gr. 471.

Sections 76-77.

out notice to the surety he was entitled to be discharged absolutely. When a security is lost through the negligence of the creditor he is bound simply to make it good."[49]

(6) *Judgment Creditors of Mortgagee.*

76. There might be some authority for a theory that the judgment creditors of the mortgagee himself should be notified.[50] Certainly it has been laid down that where a mortgagee, against whom judgments are registered, exercises a power of sale, his judgment creditors have such an interest in the due exercise of the power that the Court will grant them relief against the mortgagee exercising it to their disadvantage.[51] Nevertheless, while it might be worth while for a purchaser to insist on the production of the mortgage at the time of sale, that he may be sure it is not in the pocket of the sheriff, yet it is quite certain that it is not worth while to admonish a mortgagee-vendor to notify his creditors of where there are funds to attach.

Mortgage should be produced at sale.

(7) *Classes not entitled to Notice.*

77. Such parties as have formerly (or represent those who formerly) had a certain interest in the land or equity, and whose rights and liabilities are both entirely extinguished, need not be notified. For instance, if a mortgagee has assigned the mortgage—unless, at any rate, he be under obligation to make good a deficiency on

[49] See *Jones* v. *Dunbar*, 32 U. C. C. P. 136, for duty of creditor of 2nd mortgagee toward sureties.

[50] *Sanderson* v. *Ince*, 7 Gr. 383, a meagrely reported case, where they were considered necessary parties to a mortgage action.

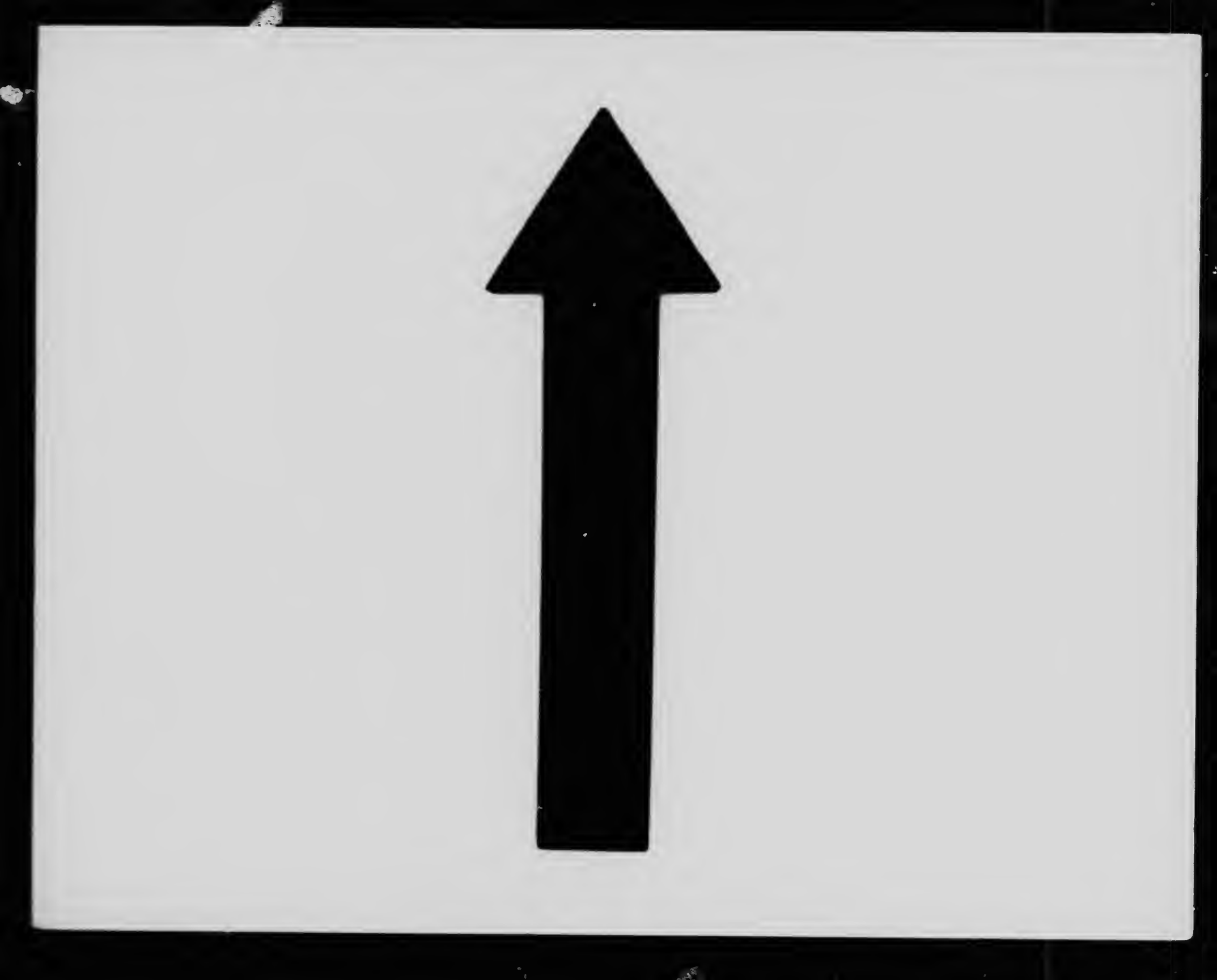
[51] *Commercial Bank* v. *Watson*, 5 C. L. J. 163.

sale [52]—he is not a necessary party.[53] Again, the representative of a deceased tenant for life of the equity has no right to notice [54]—obviously so, because the estate had vanished before he became representative. Nor need notice be given a trustee during minority, where the *cestui que trust* has attained his full age.[55] Sections 77-79.

78. There is also a class of cases where it is optional either to notify the party or to recognize his rights as paramount to the mortgage. For instance, in the case of a tenant of the mortgagor, as above mentioned. A somewhat complicated case of such option is *Long* v. *Long*,[56] where there was first a mortgage, then a devise of half the property to one son and half to the other, charging each with an annuity to his widow. One of the sons died intestate, and his widow paid the mortgage and took an assignment. It was held that if widow number two was willing to make the annuity a first charge on the property the testator's widow could not insist on redeeming the mortgage. Optional cases.

79. Mr. Coote, in his book on Mortgages,[57] has made the following somewhat broad statement: "The notice required by the power of sale need only be given to the mortgagor and those claiming under him, and need not be given to persons who claim paramount to the mortgagor, but at Coote's opinion.

[52] See *Richmond* v. *Evans*, 8 Gr. 508.
[53] *Gooderham* v. *DeGrassi*, 2 Gr. 135.
[54] *Forsythe* v. *Drake*, 1 Gr. 223.
[55] *Ib.*
[56] 17 Grant 251.
[57] 7th Ed. 910, citing *Major* v. *Ward*, 5 Hunt. 598; *Hawkins* v. *Ramsbottom*, 1 Pri. 138.



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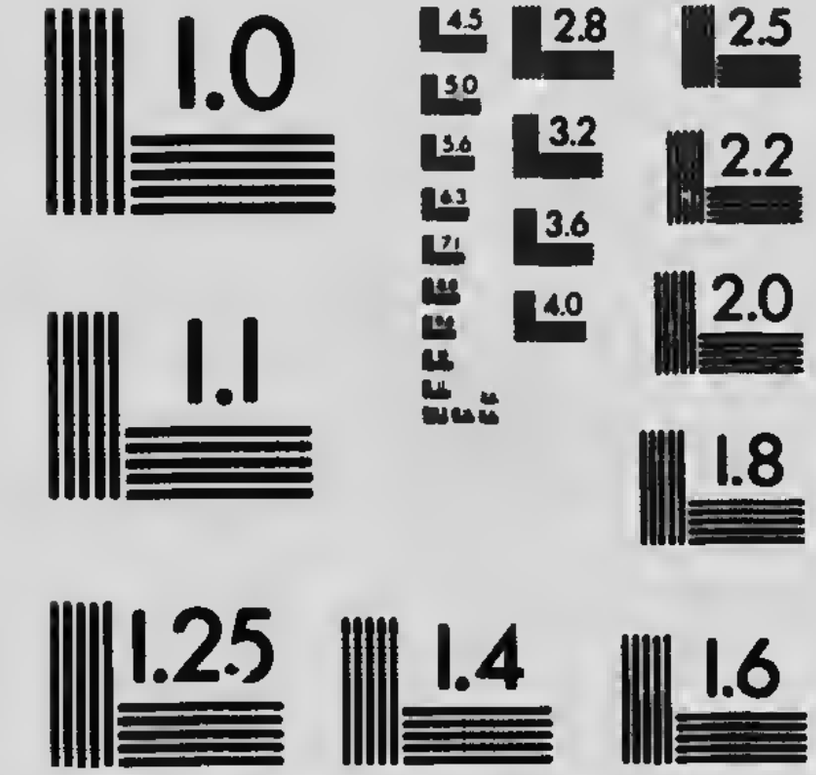

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Sections 79-80.

the same time subject to the mortgage, even though such persons may have a right to redeem and to require an account of the proceeds of sale."[58] Doubtless it is true that if in the exercise of the commonly used powers, the mortgagee notifies the mortgagor (or his heirs) and his assigns, then he will have literally fulfilled the condition on which sale may be had. But it is the more prudent course to act so that those having "a right to redeem and to require an account of the proceeds of sale," shall be bound by some notification of the proceedings to extinguish their right and interest. Accordingly, Mr. Coote's statement may be taken to be true to the extent of whatever distinction there is between technically fulfilling a condition precedent of sale and binding by estoppel the interested parties, as to the sale proceedings.

(C) Form and Contents of Notice.

80. The notice to be given in any particular case must be regular in conformity with the terms of the particular power under which it is given; and must be accurate in what it states and sufficient in the quantity of its information.[59] 10 Edw. VII. c. 51, which enacts the implied power of sale, prescribes a form of notice also for use in connection therewith; which form has the merit of being terse in its terminology, containing merely a demand for payment, a statement of

[58] See also *McComb* v. *Spangler*, 71 Cal. 418.

[59] An inaccurate statement of what is due will not affect the validity of the sale in the absence of fraud; *Sawyer* v. *Bradshaw* (Ill.), 15 West. 147; *Bowman* v. *Ash*, 36 Ill. App. 115; *Huyck* v. *Graham*, 82 Mich. 353. As to necessity of statement of amount of taxes see *Kirkpatrick* v. *Lewis* (Minn.), 48 N. W. 783.

what is due on the mortgage recited, and a declaration of intention to sell under the authority of the Act. The ordinary form of notice in use in Ontario is somewhat longer, containing, besides the demand for payment,[60] and the statement of amount due,[61] a description of the property and some other features. While it seems adapted to nearly any form of power-clause, it is evidently based on the necessities of the Short Form Act, which, in the larger clause, provides for "a written notice * * * of his intention,[62] in that behalf." The words "in that behalf" are compendious for the numerous acts in connection with selling, leasing, and so forth, permitted by the words of the said clause, all of which matter is carefully put into the ordinary form of notice.

Sections 80-81.

Ordinary form of notice.

81. The notice should also, in general, state the parties who, being in fact entitled thereto, are exercising the power, and should purport to be signed by them (*per* their solicitors if necessary, but not as if given by their solicitors for them). In British Columbia it has been held that a notice expressed to be given by the agent of the mortgagee is sufficient: *Lockhart* v. *Yorkshire Guarantee & Securities Corp'n,* 14 B. C. R. 28; 9 W. L. R. 182. It is quite competent but not compulsory[63] to sell under several mortgages at once; or for a first and second mortgagee to join in the same notice and sell concurrently.[64]

Should state vendors.

[60] As to necessity of reciting default, cf. *Bush* v. *Sherman*, 80 Ill. 10; *King* v. *Bronson*, 122 Mass. 122.

[61] As to possible effects of over-claim, see *Hamilton* v. *Lubukee*, Ill. 415.

[62] Intention to act in pursuance of the power should appear in the notice. *Judd* v. *O'Brien*, 21 N. Y. 186.

[63] *Marsh* v. *Morton*, 75 Ill. 621.

[64] *McCarogher* v. *Whieldon*, 34 Beav. 107.

Sections 82-84.

Descriptions.

82. The parcels should be correctly described, should not include more than to them belongs[65]; and where there are distinct lots under distinct mortgages, their descriptions should be separate.[66] The necessity for a detailed description is in some measure taken away by an accurate recital of the mortgage, including its date, when and where registered, in what book, and under what number.[67]

Intention to sell.

83. It is important that the notice should recite an intention to sell. Thus it will not do merely to state that unless payment be made, proceedings will be instituted to obtain possession.[68] Nor according to American authority will the notice be valid if it purport to sell merely the equity of redemption.[69] But as there is some Canadian authority for the statement "that the power of sale is a power to sell and convey the equity of redemption only,"[70] it is probable that such a recital would not invalidate a notice in this Province.[71]

To whom addressed.

84. Unimportant omissions will not break the effect of the notice; as, for instance, in a sale under second mortgage an omission to state what is due on the first mortgage, though also vested in the intending vendor.[72] But the statement of Mr. Jones, in his book on Mortgages, that it is

[65] *Fenner* v. *Tucker*, 6 R. I. 551.

[66] Jones, 5th Ed., 1841; *Marsh* v. *Morton*, supra.

[67] See also *Colgan* v. *McNamara*, 18 Atl. 157, as to the effect of recital of registration where names of both mortgagor and mortgagee omitted. Cf. *Stickney* v. *Evans*, 127 Mass. 202; *Loveland* v. *Clark*, 18 Pac. 544.

[68] *Bartlett* v. *Jull*, 28 Gr. 140.

[69] *Fowle* v. *Merrill*, 10 Allen (Mass.), 350.

[70] Strong, J., in *Kelly* v. *Imperial*, 11 S. C. R. 528.

[71] Cf. *Ashworth* v. *Morrisey*, 9 Ex. 175.

[72] Cf. Jones, 5th Ed. 1856.

unimportant to recite the names of the owners of the equity of redemption, must not be leant on too much as to our law.[73] Our Short Form Act in the extended clause merely says, a 'written notice to the said mortgagor, his heirs or assigns,' which certainly leaves it doubtful whether a notice not purporting to be made to them specifically, would be sufficient. It is advisable, then, sometimes to qualify the terms of the power by such an addition as the following:—"Provided such notice as aforesaid may be effectively given whether or not addressed to any person by name or designation." Sections 84-85.

85. Manifest clerical omissions may be supplied from the context. Thus a notice reciting that "by virtue of the power * * * the said mortgaged premises at public auction for cash to the highest bidder," was not deemed insufficient from the omission of "will be sold" after the word "premises," since the other recitals show that a sale was meant.[74] Where, too, the notice of sale ran: "On the premises" etc. (describing same) will be sold—without categorically stating what will be sold—the notice was nevertheless sufficient as to the subject of sale.[75] Manifest omissions.

And where the notice was unsigned through inadvertence, but the accompanying letter was

[73] See Jones, 5th Ed. 1844: also *Roche* v. *Farnsworth*, 106 Mass. 509.

[74] *Nau* v. *Brunette* (Wis.), 48 N. W. 649.

[75] *Streeter* v. *Ilsley*, 151 Mass. 291.

N.B.—Considerable caution should be used in availing oneself of American authorities as to Power of Sale: partly because they are often marked by excessive refining, partly because they are often interpretations of codified law, or pertain to mortgages of 'homesteads,' and (as regards notice) chiefly because the notice considered in them is quite a different thing from that herein discussed, being as much a public advertisement as a notice of intention to sell.

Sections 85-86.

signed, it was held sufficient: *Lockhart* v. *Yorkshire Guarantee & Securities Corp'n*, 14 B. C. R. 28; 9 W. L. R. 182.

(D) Service of the Notice.

(1) *Generally.*

86. In giving notice there are two chief sources of difficulty, the necessity to give notice to the right person and the necessity to give it in the right way. Cases coming under the first head have been previously treated in this Chapter; it remains then to take up the second source of trouble namely, the proper ways of giving notification. Where the mode of giving notice is not prescribed by the terms of the power, a reasonable discretion will be allowed; but where a specific mode is provided the same must be followed. Thus it may happen that the prescribed way of giving notice is of the least possible value to the parties who are thereby bound, as for instance where the provision was for notice given to S., his heirs, executors, administrators or assigns, or left at his or their usual or last known place of abode, and the notice was accordingly fixed to the door of the said last known place of abode, it was held valid service as against the mortgagor's creditors; although such a notice is clearly of small practical value to persons other than the occupant.[76] On the other hand a mortgagee may seek to improve on the prescription of the written instrument; as in

[76] *Major* v. *Ward*, 5 Hare 598.

Bartlett v. *Jull* [77] where he served the widow and administratrix of the mortgagor—with a notice addressed to her as widow—instead of the party properly entitled, a child of three years. Undoubtedly in this case the mortgagee served the more competent person, but he thereby served a person who had, strictly, " nothing to do with the matter " and the sale was upset.

Sections 86-87.

Rule in Bartlett v. Jull.

In *Fenwick* v. *Whitlam*, 1 O. L. R. 24, service upon an agent who usually acted for the mortgagor who lived abroad was held sufficient where the mortgagor actually received the notice and made no objection thereto.

(2) *Under Short Forms Act.*

87. Leading case, *O'Donohoe* v. *Whitty*, 2 O. R. 430. We cannot do better than quote the words of Chancellor Boyd. " The service is to be made either personally or at his or their usual or last place of residence within this Province." [78] The learned judge [79] held that service could not be made at the residence unless it appeared that the mortgagor was out of the jurisdiction and that the solicitor should have told his clients, as a matter of law, that the service he was about to make would be useless if the mortgagor was still in the Province. But as I read the Act there is an alternative mode permitted. The service may be (1) personal; or, (2) at the mortgagor's usual place of residence within the Province; or, (3) at his last place of residence within the Province. The first and second modes of service

Three modes of service.

[77] 28 Gr. 140.
[78] 10 Edw. VII. c. 55, at p. 437.
[79] Mr. Justice Proudfoot, from whom appeal.

Sections 87-88.

are probably suggested by the practice pursued in serving process in ordinary litigation in the Court of Chancery, in which it is not essential that the service be personal, but it may be validly made by leaving the copy with a grown-up inmate at the defendant's place of abode: Daniell's Ch. Pr. 5th ed. p. 267.

"It cannot be the intention of the Act that service may not be effected at the mortgagor's usual or last place of residence unless he is out of the Province, because that would be to import a restriction into the Statute which is not fairly deducible from its language.

"Provision may well have been intended for the case of a mortgagor leaving home for a wandering life on lake or land in Ontario, where it would be unreasonable to compel the mortgagee to follow, and perhaps waste time and money in a fruitless search. The construction is supported by *Major* v. *Ward*, 5 Ha. 598 [80] and to some extent also by subsequent legislation, whereby service of notice is made merely directory, and the failure to give notice does not invalidate the sale: 42 Vict. c. 20, s. 4."

Posting up.

88. If we are to follow the decision of the Chanceller—and with him that in *Major* v. *Ward*, we are then to conclude that service by leaving the notice with a grown up inmate, or where unoccupied, posting on the door of the mortgagor's last abode, would be good and valid service not only as against the mortgagor himself—for which we have the Chancellor's dictum,

[80] See section 86 *supra*.

but also as against the assigns, judgment creditors and the rest—which is the effect of *Major* v. *Ward*. Yet it would scarcely have been worth while for judges so strongly to insist on the rights of the "assigns" if service on them could be effected in this alarmingly simple manner. It would be more consistent with the interpretation of the option between the mortgagor and his assigns in favor of the latter, likewise to interpret the option "his or their usual or last place of residence" in favor of what is theirs. The absence of either the mortgagor or his assign should not prejudice the other; service should be made on everyone interested, with the option stated of so serving any of them at their respective abodes. Sections 88-90.

89. In practice many solicitors post the notice on the mortgaged premises as a matter of course, and this act of posting up, while it may not be binding on all parties, will at least be effectual against any who should claim as tenants of the mortgagor. Nor is it necessary, for whatever effect the notice may have, that it should remain posted up during the period of notice, provided only it be posted in time.[89a] Usually done in any event.

(3) *Notice by Publication.*

90. A very common, convenient and equitable method of giving notice, stipulated for in mortgages, is by publication for a certain period in a newspaper published in the county where the property is situate. Questions sometimes arise

[89a] *Graham* v. *Fells*, 53 Mass. 307.

Sections 90-91.

in this connection where the publication was stipulated for, say once a week for four successive weeks, and the vendor has clipped the time rather closely by hurriedly bringing on the auction.[81] For instance, according to the terminology of the instrument, it might happen that where the real intention of the parties was to have a month's notice, yet (1) Notice would have to be given by publication once a week during four successive weeks, and then the month to run after the last publication: or what will generally be the reasonable construction, (2) Notice would have to be given as aforesaid with the month to run from the first insertion[82]; or (3) Notice would have to be given as aforesaid, but the first insertion need not be four weeks before the time for sale[83], *e.g.*, the last advertisement might be on the morning of sale.[84]

When time begins to run.

Date of paper.

91. Another difficulty in such cases—when the time allowed for payment before default, or for payment after notice, has been cut too fine, is that the date of the paper is not always the date of publication, and a difference of a day may invalidate proceedings. Thus, where the last day of payment under the mortgage was a Friday, and the advertisement of notice was to be inserted in the Saturday issue, on proof of the

[81] Cases of this sort may arise where an order allowing "further proceedings" has been obtained under 10 Edw. VII. c. 51. Ont.

[82] Cf. *Howard* v. *Fulton* (Tex.), 14 S. W. 1061; *First National Bank* v. *Bell Silver Co.*, 8 Mont. 32; *Bacon* v. *Kennedy*, 56 Mich. 329.

[83] *Dexter* v. *Shepard*, 117 Mass. 480.

[84] *Worley* v. *Naylor*, 6 Minn. 192. For interpretation of "twenty days' notice," see *Washington* v. *Bassett*, 10 Atl. 625; "thirty days' public notice," *Kellogg* v. *Carrico*, 47 Mo. 157; "ten days before sale," *Cushman* v. *Stone*, 69 Ill. 516; *Weld* v. *Rees*, 48 Ill. 428. See also *Taylor* v. *Reid*, 102 Ill. 349; *Jenkins* v. *Pierce*, 98 Ill. 646. A "month" in a mortgage deed means a calendar month, Coote, 5th Ed. 274. Cf. Short Forms Act.

fact that the paper was really published on Friday, the sale was voided.[85] On the other hand, a notice served or published after the date it bears may still be valid provided the sale do not take place until the prescribed period has elapsed.[86] Sections 91-94.

92. As to what paper the notice shall appear in, the instrument being silent, the mortgagee is allowed a reasonable discretion.[87] It seems that no proof of largest [88], or of any circulation is required [89]; nor need the advertisement appear in all the editions published on the day of notice.[90] Where the instrument speaks, its provisions must strictly be followed or the notice will be invalid.[91] What paper.

93. When mistakes have been made by the mortgagee, either in the contents of the advertisement or the dates of its publication or otherwise, such as are likely to invalidate the proceedings, it is not always permissible to cure the defect by postponing the sale or publishing a further notice for another week, the safer practice being to begin the proceedings over again.[92] Beginning over.

94. We may here observe that an assignment of the mortgage during advertisement or notice will not pass the benefit of the advertisement or Assignment during proceedings.

[85] *Pratt* v. *Tucern*, 21 Minn. 142.
[86] *Metters* v. *Brown*, 9 Jur. N. S. 958.
[87] See Jones, 5th Ed. 1835; *Ingle* v. *Cuthbertson*, 43 Iowa 265.
[88] *Kellogg* v. *Carrico*, 47 Mo. 157; where it was a law and advertising journal of limited circulation. Cf. also *Stevenson* v. *Hano*, 148 Mass. 616; *Hull* v. *King*, 38 Minn. 349.
[89] *St. Joseph Mfg. Co.* v. *Daggett*, 84 Ill. 556.
[90] *Everson* v. *Johnson*, 22 Hun, (N.Y.), 115.
[91] *Thornbury* v. *Jones*, 36 Mo. 514; where notice should have been published in two counties, and was published in but one, the sale was upset.
[92] See Jones, 5th Ed. 1832, 1851.

Sections 94-96.

notice to the assignee, as such proceedings taken in the name of the assignor are proceedings by a party who has ceased to be concerned in the property.[93] Where also the mortgagee is dead, the proceedings taken in his name are void and not to be cured by evidence that they have really been carried on by another.[94]

(4) *Service on Persons under Incapacity or Disability.*

Terms of power to be complied with.

95. In *Bartlett* v. *Jull* [95], we have a statement by Chancellor Spragge of the law as to service of notice on persons not of full capacity. "I find no case," he says, "in which it has been held, or in which it has been contended, that where, by the terms of the contract, notice is required to be given, notice will be dispensed with because the person to whom it is to be given is not of capacity to understand it. * * * It does not follow from the heir in this case being so young [96], that the placing of a proper notice in his hands directed to him as heir-at-law would necessarily have been an idle form. It might have drawn the attention of the child's mother, who was, I apprehend, his guardian in socage, to his rights and to her duties in that relation; but whether practically useful or not, it was a something without the doing of which the mortgagee had not the power to sell.[97] The safer rule is to

[93] *Niles* v. *Ransford*, 1 Mich. 338.

[94] *Welsh* v. *Cooley* (Minn.), 46 N. W. 908; *Bausmann* v. *Keeley*, 38 Minn. 197.

[95] 28 Gr. 140.

[96] 3 years old.

[97] See also *Tacey* v. *Lawrence*, 18 Jur. 590, where notice was held good when served on infant and guardian, and *Re Martin & Merritt*, 3 O. L. R. at p. 290.

serve both the infant and his guardian, or the lunatic [98] and his committee, where the guardian or committee is in existence and ascertainable. In the case of a lunatic confined in a public asylum the "inspector of prisons and asylums," while committee for certain purposes, is by R. S. O. 1897, c. 317, s. 55, not committee for the purpose of service in "any action or other proceeding." Sections 95-96.

(5) *Notice under 10 Edw. VII., c. 51, s. 20.*

96. Under the provisions of this Statute, notice is to be given "to any subsequent incumbrancer and to the person entitled to the property subject to the charge and to such incumbrance," "either personally or at *his* usual or last place of residence in this Province." This leaves no doubt as to notice being due to the "assigns" of the mortgagor. But the adjective 'his' would seemingly refer to the person entitled to the property; and therefore leaves the same dubious law as to the efficacy of posting up on the mortgagor's residence notice that shall be good as against "his assigns." The absurd conditions imposed by the state of law illustrated in *Bartlett* v. *Jull* [99] are modified by two provisions; one for service on the executors and administrators of the deceased as well as on his infant heirs or devisees, and the other for service of notice to an infant heir on his guardian, and on himself if over the age of 12 years. Service under statutory implied power

[98] That it is not essential we learn from *Robertson* v. *Lockie*, 15 Sim. 285; *Mellersh* v. *Keen*, 27 Beav. 236.

[99] *Supra.*

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(E) Notice Concurrent with Default.

Where allowed.

97. While there can be no doubt that notice of sale given before the beginning of default is of no effect, inasmuch as the mortgagee is attempting to use a power which is not available until the happening of a contingency that has not yet arisen; on the other hand it is not settled how far in every case it is possible or impossible to the mortgagee to give a notice after the beginning of default which shall run concurrently with a portion of the time during which, according to the power-clause, default continuing, authorizes sale. In *Grant* v. *Canada Life* [100] the power of sale ran as follows:—"Provided that the mortgagees on default of payment for three months may enter on and lease or sell the said lands without notice; and the mortgagees covenant with the mortgagors that no sale or lease of the said lands shall be made or granted by them until such time as one month's notice in writing shall have been given to the mortgagors." Besides deciding that in any event the purchaser took a good title, the court held that a notice served at any time after default was sufficient, and the mortgagees were not bound to wait until default had been made for three months to give such notice; in other words the notice and default might be concurrent. The plaintiff was heard bitterly to lament:—"In that case the stipulation in the instrument only served as a pitfall to the unwary." [101]

[100] 29 Gr. 256 (Proudfoot, J.).

[101] Cf. also the similar case, *Selwyn* v. *Garfit*, L. R. 38 Ch. D. 283, and *Barker* v. *Illingworth*, [1903] 2 Ch. 20.

98. Where, however, the stipulation is simply for one month's default and one month's notice, it appears that the two may not run concurrently.[102] Moreover, under the Short Form Act the extended form is explicit enough in this regard. (1) If the mortgagor "shall make default;" (2) "and———calendar months shall have thereafter elapsed" without payment; (3) *then "it shall and may be lawful"* to the mortgagee after giving notice such and such a time previous to the sale, to exercise his power. In other words before the mortgagee can lawfully take steps—notice among them—under the power, there must have been default and default must have continued during the entire period mentioned in the abbreviated form. Sections 98-99. Where not allowed.

(F) Effect of Notice.

(1) *Acceleration and Tender.*

99. The first effect of notice requiring payment of all moneys secured by the mortgage, is that it operates as an irrevocable decision by the mortgagee to accelerate the payment of the principal. In Ontario this effect arises from a specific enactment, viz:—10 Edw. VII., c. 51, s. 29. By this provision the party giving such notice "shall accept and receive payment for the same (*i.e.*, all moneys secured) if made as required by the terms of such notice or demand;" provision being further made for the taxation of costs where disputed. Apart from this enactment, the law of England, which we Option to accelerate. Effect of tender.

[102] *Gibbons* v. *McDougall*, 26 Grant 214 (Blake, V. C.).

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would naturally follow, is to the effect that a tender of payment may be made at any time before sale; and if it be of the proper amount and sufficiently formal, the mortgagee must stop proceedings, otherwise the sale may be set aside or even restrained [103]; and in any event interest will cease to run, and the costs of proceedings, subsequent to the tender, will be against the mortgagee.[104] But the tender should be formal and the money tendered should be kept ready for payment.[105] The tender also must be made reasonably under all the circumstances, thus a tender at the Toronto office of the mortgagees at 10 a.m. on the day of a sale to take place in Kincardine was held insufficient where the mortgagees were unable to prevent in time a sale being made: *Gentles* v. *Canada Permanent and Western Canada Mortgage Corp'n*, 32 O. R. 428. A different rule as to the effect of tender seems to prevail in Massachusetts, where tender made after default will not defeat the right to sale.[106] That the acceleration of the principal is absolute may be deduced from the decision in *Re Alcock*, *Prescott* v. *Phipps*,[107] where a six months' notice for payment after default had been given by the mortgagor and accepted by the mortgagee, and yet—sale proceedings once begun to realize the debt—it was held that the mortgagee must do with his principal and in-

Re Alcock.

[103] *Whitworth* v. *Rhodes*, 20 L. J. N. S. 105.

[104] *Williams* v. *Sorrell*, 4 Ves. 389.

[105] Tender should be formal, not a constructive one, *e.g.*, a summons to stay proceedings is not a good tender. Cf. *Kinnaird* v. *Trollope*, L. R. 42 Ch. D. 610.

[106] Jones, 5th Ed., 1798; *Cranston* v. *Crane*, 97 Mass. 459.

[107] L. R. 23 Ch. D. 376.

terest to date of tender, instead of interest up to the date fixed by the six months' notice. Sections 99-102.

(2) *Right to Reconveyance and Assignment.*

100. Any party interested in the equity of redemption, and tendering the amount due, has a right to a discharge or reconveyance of the property incumbered, and that too where his interest is but a partial one; in which latter case it is the duty of the mortgagee to reconvey to him, but in the conveyance to reserve the equities of the other parties interested.[108] Formerly this right to a reconveyance was not supplemented by a right to have an assignment of the mortgage security and debt.[109] But by statute the mortgagor has an indefeasible right to such assignment; except in cases where the mortgagee has been in possession.[110] Right to assignment.

(3) *Effect on the Right of Consolidation.*

101. The giving of notice under one mortgage does not affect the mortgagee's right to consolidate, although the mortgagor tender the amount claimed in the notice,—the doctrine of election having no application.[111]

(G) Waiver of Notice.

102. Undoubtedly it is open to prove that the mortgagor has waived notice, as against himself, Mortgagor may waive as against himself.

[108] *Pierce* v. *Morris*, L. R. 8 Eq. 217, 5 Ch. 227.
[109] See *Thompson* v. *McCarthy*, 13 L. J. N. S. 226.
[110] 10 Edw. VII. c. 51, s. 3. ss. 3, Ont.
[111] *Griffith* v. *Pound*, L. R. 45 Ch. D. 553.

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either formally, or even by acquiescence, as by permitting the sale, of which he had knowledge, to proceed without his objection.[112] He may, as against himself, waive irregularities and ratify the proceedings, by paying a sum towards the deficiency after sale, and accepting a receipt so crediting it[113]; or by abandonment of the premises and neglect to assert his claim after receiving notice of possession by the purchaser.[114] But where, not attending the sale, he had no knowledge of the irregularities, he will not be presumed to have waived the same.[115] And, however potent to waive notice as against himself, he can have no right so to do as against those who are in the position of his "assigns"[116]; nor can the occupant of the premises waive as against the owner.[117] It is equally allowable to show that the mortgagee has himself waived the default on which he acts, or the notice he has given; in which case he would have to wait until a new default had occurred or new notice had run.[118]

But not as against his assigns.

[112] Jones, 5th Ed. 1799.
[113] *Zable* v. *Masonic Sav. Bank* (Ky.), 16 S. W. 588.
[114] *Jettison* v. *Halloran* (Minn.), 46 N. W. 332.
[115] *Meriwether* v. *Craig*, 118 Ind. 301.
[116] *Selwyn* v. *Garfit*, L. R. 38 Ch. D. 283; see also *Forster* v. *Elvert*, L. R. 15 Q. B. 155.
[117] *Casey* v. *McIntyre* (Minn.), 48 N. W. 402.
[118] *Tonning* v. *White*, 3 H. L. C. 168.

CHAPTER VI.

MANAGEMENT AND CONDUCT OF SALE.

Duty of mortgagee.

103. The duty of the mortgagee in connection with the management and conduct of the mortgage sale has been set forth in a multitude of cases; and if wealth of diction and scope of illustration could guide him to such duty's performance, then surely no mortgage-creditor could go wrong. Not only has he been called a trustee for the mortgagor—so often that the metaphor became dangerous—but frequently also he has been more particularly described as a trustee for the mortgagor subject to his own claim upon the property. More specifically still, he has been a trustee for the mortgagor of any surplus that may remain after sale.[1]

Not a "dry trustee."

104. Now, after the attempt in a previous Chapter to shew the scant profit of imputing trusteeship in the analysis of a mortgagee's duties, it remains to state those duties, with as little assistance as may be from this fiction of an implied or constructive trust. Sir Richard Kindersley's version of those duties, quoted in our own valuable case of *Richmond* v. *Evans*,[2] is that a mortgagee is "not a dry trustee; he has his rights, he has a beneficial interest, and that interest is the realizing of his security; in other words, getting paid his mortgage money, interest and any costs he may incur. That is his right,

[1] See *Latch* v. *Furlong*, 12 *Grant* 303, citing *Jenkins* v. *Jones*, 2 Giff. 108; *Matthie* v. *Edwards*, 2 Coll. 465.

[2] 8 Grant 508.

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but this Court will not allow him to exercise that right without a due consideration of the interest of the mortgagor; and undoubtedly the interest of the mortgagor which the mortgagee, in my opinion, is bound to attend to, requires that the sale shall take place as beneficially to the mortgagor as if the mortgagor himself were selling the property."[3] The same Canadian case quotes from Lord Eldon something that—being built entirely on the law of trusts—goes beyond the actual duty of the mortgagee, namely, that he is "bound to bring the estate to the hammer under every possible advantage to his *cestui que trust.*"[4]

In more recent cases it has been held that a mortgagee is not a trustee of the power of sale for the mortgagor, and if he exercises the power of sale strictly and fairly without collusion and bona fide for the purpose of securing repayment of the mortgage moneys, the mortgagor has no right of action, even though the sale may have been most disadvantageous and a greater price obtained by a postponement thereof: [1897] A. C. 180. See also *Kennedy* v. *Barnard,* 17 O. W. R. 889. And in the leading case of *Kennedy* v. *De Trafford,* [1897] A. C. 180, the sole test was declared in the House of Lords to be one of good faith, Lord Herschel saying: "I am myself disposed to think that if a mortgagee in exercising his power of sale exercises it in good faith, without any intention of dealing unfairly by his mortgagor, it would be very difficult indeed, if

[3] *Faulkner* v. *Equitable Reversionary Interest Society,* 4 Jur. N. S. 1214.

[4] *Downes* v. *Grazebrook,* 3 Mer. 205.

not impossible, to establish that he had been guilty of any breach of duty towards the mortgagor. Sections 104-106.

105. The authorities, nevertheless, will go at least this far, that the vendor under power of sale is bound to make *reasonable exertions* to bring the estate to the hammer as beneficially as may be to the mortgagor.[5] As simple mortgagee, we may say of him that he must act with due regard to the interests of the mortgagor and to the value of the land;[6] must act with the care and energy of a prudent owner;[7] and so must take all reasonable means to prevent a sacrifice.[8] Or, with Vice-Chancellor Knight Bruce, we may say, "A mortgagee having a power of sale cannot, as between himself and the mortgagor, exercise it in a manner merely arbitrary, but is bound to exercise some discretion so as not to throw away the property, but to act in a proper and business-like manner, with a view to obtain as large a price as fairly and reasonably, with due diligence and attention, can, under the circumstances, be obtained."[9] It will now be proper to enumerate some of the acts and exertions that go to constitute the business-like attentions of the mortgagee towards the subject of sale. Should act as prudent owner.

(A) Auctioneer.[10]

106. It frequently happens that the property to be sold is situate in so remote a place as to Place of sale.

[5] *Latch* v. *Furlong*, quoted *supra*.
[6] *Latch* v. *Furlong*, quoted *supra*.
[7] *Ib.*
[8] *Marriott* v. *Anchor Reversionary Co.*, 7 Jur. N. S. 155, 713.
[9] *Matthie* v. *Edwards*, 10 Jur. 351, 11 Jur. 761.
[10] It seems that while a mortgagee may leave the sale entirely in the hands of his auctioneer, a trustee (under that form of security) must be personally present at the sale. Jones, 4th ed. 1861-2.

Sections 106-107

make it an inappropriate auction ground.[11] Now, unless it be intended to hold the sale on the mortgage premises, it will be necessary, as one of the earliest steps, after notice given, to retain a licensed auctioneer. For usually the sale will be held at his auction rooms, or other conspicuous place selected by him;[12] and these particulars must first be settled before sale can usefully be advertised, 10 Edw. VII., c. 51, s. 21, which relates to auctions, defines auctioneer as meaning "any person selling by public auction." It is not, however, to be supposed, that it is permitted to everybody to act as auctioneer, the licensing of which class is generally provided for by by-law under the Municipal Act.[13]

Duties of auctioneer.

107. It is hardly necessary to spin out at length the duties and authority of the auctioneer, further than to notice a few peculiarities of his position in a sale of this sort.[14] It seems he may act as agent of both vendor and purchaser to sign a memorandum of the sale.[15] But the better practice is to append a short memorandum to the conditions of sale, and have the purchaser sign the same. Great care should be exercised by the auctioneer in the statements which he makes at the time of auction; for if they be relied on by the purchaser, the vendor must either give the purchaser their benefit if they can be made good; or at any rate it does not lie in

[11] *Richmond* v. *Evans*, 8 Gr. 508.

[12] *E.g.* a tavern. In many of the United States, mortgage sales are held at the Court House door.

[13] 10 Edw. VII. c. 19, s. 583 (2).

[14] As to purchase by auctioneer, see *Welch* v. *Coley*, 82 Ala. 363.

[15] Benjamin on Sale, 5th ed., p. 280; cf. *Cook* v. *Hilliard*, 9 Fed. Rep. 4.

his mouth—the statements being untrue—to ask the courts to force the property upon the purchaser.[16] Furthermore, in case the sale be broken for such cause, the mortgagee will be liable for any loss to either the mortgagor or any subsequent incumbrancer.[17] Nor should the auctioneer insert in the particulars of sale representations that are not true; or rather he should not be allowed either to become the vehicle of necessary information, which the bidder may choose to deny having heard, or to meddle with the advertisements, particulars or conditions, or to make any statements not warranted by the same; except, of course, by way of "commendation" of the property sold, in which he is allowed some latitude, so as to make the bidding more brisk. For if the auctioneer had to abstain from superlatives there would be few sales by auction, and there is no harm in warm and enthusiastic praises in a general way, so long as the purchaser does not pin his faith to them to his detriment.

Sections 107-108.

Should not tamper with conditions.

108. As to an auctioneer's charges, they should be reasonable in the light of the circumstances under which the sale is held. A safe rule for the mortgagee is to cut them as close as possible to those allowed him in a sale by the court, for there is always some danger of a taxing officer casting them in that mould.[18] It is a common usage in Ontario for auctioneers to put up with a half fee where no sale results;

Charges.

[16] See *Montgomery* v. *Ford*, 5 Gr. 210.
[17] See *Tomlin* v. *Luce*, L. R. 43 Chy. Div. 191.
[18] See *Walford* v. *Walford*, [1889] W. N. 23.

Sections 108-110.

say five or ten dollars in ordinary cases, in lieu of ten or twenty charged when the hammer falls.

Where mortgagee an auctioneer.

Where the mortgagee himself is by trade an auctioneer, there is less than no advantage to him in conducting the sale with his own voice, as he will not be allowed profit costs in the matter, either directly or even by employing his partners to conduct it.[19] He should, therefore, avail himself of the services of another in his profession, though upon what terms of understanding need not appear.

After the sale it is usual, and indeed very necessary, that the auctioneer should make a declaration, or at least give a formal certificate, setting forth the facts in connection therewith.

(B) Advertisement.

(1) *In Newspaper.*

Not compulsory.

109. Theoretically speaking, the mortgagee-vendor is not bound to advertise the sale of the property except that be stipulated in the instrument.[20] But—still theoretically speaking—he may do so in the exercise of his discretion, and his expenses both in inserting the advertisement and by way of law fees to solicitor or counsel for settling its form will be allowed him.[21]

But very usual.

110. Indeed in practice it is exceedingly unsafe to omit advertising, which is taken to be one of the exertions which a mortgagee, acting in good faith, should put forth towards the realizing

[19] *Mathison* v. *Clark*, 18 Jur. 1020.
[20] See *Stickney* v. *Evans*, 127 Mass. 202; also *Davy* v. *Durant*, 1 D. & G. & J. 535, as to private sale.
[21] *Marsh* v. *Morton*, 75 Ill. 621.

of a good price for the land he is selling."[32] "He himself admits in his cross-examination that he never advertised the property,"—such is one of the chief grounds for suspecting the propriety of a sale, set aside by Mr. Vice-Chancellor Mowat.[33] In *Richmond* v. *Evans*,[34] we find the following uncompromising statement on this question:—"It is the ordinary course before a sale by auction to give every publicity to it by advertisement in the newspapers and by handbills; I should almost have said it is the invariable practice. I think the sale in question is the only exception that has ever come under my notice. It is the course of this Court and practice of everyone who desires to get the best price that can be gotten for the property to be sold. It was hardly necessary to shew evidence, what, however, has been shewn in this case, that persons would have attended the sale as bidders if they had heard of the intended sale." Sections 110-111.

111. As to the contents of the advertisement, little said will suffice. It is not usual, where notice has been previously given, to name the mortgagee-vendors; indeed in the case of loan companies this is very seldom done, lest the prominence of their names in the unpleasing sequel to a loan unrepaid might lessen the temptation to become their borrowers. Neither is it necessary to publish the property under a full registry-office description; it is sufficient if it identifies the property with that conveyed in the mortgage and described in the notice. Contents.

[32] See *Thompson* v. *Holman*, 28 Grant, 35.
[33] *Latch* v. *Furlong*, 12 Grant, 303.
[34] 8 Grant, 508.

Sections 111-112.

Instead of long technical descriptions that may fatigue the public, it is found the better plan to enumerate the improvements and advantages of the subject of auction. Moreover, it is not the custom to state the terms of sale, or even that it is subject to a reserved bid; the more economical method, being to put as little as may be in the advertisement that will not tend to the allurement of bidders. It is well, however, to fence oneself in against all attempts to hold stiffly to the advertisement as being a formal contract; and so to add a reservation such as: "For further particulars and conditions of sale, apply to, etc."

Time and place of sale.

112. The time—that is year, day of the month and week, and hour of the day,[25] and the place specifically, should be carefully and consistently set forth in the publication and adhered to on the day of auction.[26] Blunders such as pinning a wrong week-day to the day of the month, or proclaiming the sale for a Sunday,[27] or appointing it for a place that turns out unavailable for the purpose,[28]—such blunders may sometimes be repaired by a postponement (for say a week) correctly advertised; or where advertisement was stipulated in the instrument, perhaps much

[25] See *Meier* v. *Meier*, (Mo.) 16 S. W. 223.

[26] See *Richards* v. *Finnigan*, 45 Minn. 208. Where a difference of 15 minutes was held fatal; the Americans being rather more strict than our judges would be unless damage were proved.

[27] *Sayles* v. *Smith*, 12 Wend. (N.Y.) 57; sale on a holiday may be valid. *Stewart* v. *Brown*, (Mo.) 16 S. W. 389.

[28] It is a very common American practice to provide that the sale shall take place "at the door of the Court House," a custom that has been blessed with a teeming fecundity of judicial decisions. For instance, the late cases of *Howard* v. *Fulton*, (Tex.) 14 S. W. 1061; *Johnson* v. *Cooke*, 37 Minn. 530; *Davis* v. *Hess*, (Mo.) 15 S. W. 324; *Stewart* v. *Brown*, (Mo.) 16 S. W. 389.

better by beginning the publication over.[19] In any case the test of a fatal blunder in the advertisement is,—according as the sale is future or past,—will, or did it deceive anyone.[20]

What interval between advertisement and sale.

113. Objection has sometimes been taken to a sale because, so it was alleged, it was proceeded with after too great an interval from notice or advertisement. Now it may be observed, that it is not the temper of the courts to be too exacting about lapse of time after notice given. In one case a six months' notice was given in July, 1853, and a valid sale held in May, 1857.[21] But an advertisement must—in the nature of things—not be allowed to cool before sale takes place; otherwise the object of advertising is frustrated, and a useless expense has been loaded on the estate. What would be the extreme limit after which the memory of the public would be taken to have lost hold of the coming sale has not been fixed, and would, in each case, depend on the nature of the property and the public to whom the particular advertisement appeals. It has been held that the sale need not be within a week after the last insertion;[22] but in ordinary cases it would not be prudent in a vendor, or fair to his mortgagor, to allow more than a fortnight or three weeks to elapse from such last publication.

114. Many of the observations already made concerning the publication of notice are applicable to this matter also, both as to the choice

[19] See Jones 1931; also *Wolff* v. *Ward*, 16 S. W. 161.
[20] *Bacon* v. *Northwestern*, 131 U. S. 258.
[21] *Metters* v. *Brown*, 9 Jur. N. S. 958.
[22] *Atkinson* v. *Duffy*, 16 Minn. 45.

Sections 114-115.

of papers, their issues, circulation and the rest, and as to the necessity of care in not cutting too closely any stipulated period of time. It is usual to prove the fact of publication by a declaration of the solicitor or other person who attended to the same.

Declaration.

(2) *Posters or Handbills.*

115. Another method of advertising—which, likewise, is sanctioned by the practice of the Court in these matters, (by which practice it is always safe to be guided),—is by the distribution and posting up of handbills and posters.[33] These are usually affixed to the premises to be sold, and to the dead walls of the town or locality where the sale is to be held. How many of them, is a matter of discretion; a hundred of them is ample; but it seems seventy-five or even fifty will not be thought too few.[34] Frequently, also, it will happen that the good to arise from posters in the town wherein lie the premises, would be very inconsiderable in the way of attracting bidders—for instance, where an expensive factory property is being offered, or a property quite out of the ordinary line of requirements of those who would be likely to see the posters where they are affixed. In such case the money, that would be spent for placard and bill-poster, had better be spent in judicious advertising in papers that will more likely bring a return on the day of auction. It is usual to take and preserve evidence of the posting of bills, in the form of a declaration by the bill poster.

How many posters.

Declaration by bill-poster.

[33] *Thompson* v. *Holman*, 28 Grant 35.
[34] *Chilton* v. *Brooks*, (Md.) 16 Atl. 273.

(3) *Notice of Sale to Interested Parties.*

116. Where there are subsequent incumbrancers and execution creditors, even though there be no provision for notice in the mortgage instrument, and apart from the necessity or non-necessity of notice of *intention* to sell, it is still debatable whether the mortgagee-vendor has done his proper duty in the direction of realizing a fair price, when he has not given to such interested parties, in some form or other, notice of the *time* and *place* of auction, so as to enable them to bid if so disposed. Doubtless the act of advertising will raise a strong presumption of such parties being sufficiently informed, yet it is the custom of many solicitors to make doubly sure by mailing to all interested parties (and sometimes by registered post) copies of the advertisement or posters.[35] And this method of attracting attention to the sale may have the further virtue of estopping the parties who are thus notified, from springing to their feet after the sale and objecting to advertisements and other proceedings that they had sanctioned by acquiescence.[36]

Estoppel by notice of auction.

(C) Conditions of Sale: Sale by Lots, etc.

(1) *Depreciatory Conditions.*

117. It is hardly requisite here to add a whole chapter on the subject of conditions of sale,

[35] See recent case of *Ritchie* v. *Judd*, (Ill.) 27 N. E. 682, for discussion of failure to give personal notice to the mortgagor, of a sale on published notice.

[36] *Ferrand* v. *Clay*, 1 Jur. 265.

Sections 117-118.

which is a branch of law that has been very fully treated in a great many works on Real Property and Conveyancing. It is proper, however, to advert to a long time infirm, and now, to all purposes, dead application of trust law to the duties of a mortgagee-vendor. It was commonly said that too stringent or "depreciatory" conditions of sale, being calculated to lessen the price, were good ground of objection to the validity of a sale. The courts exhibited considerable caution in the application of this doctrine, and required a strong case before they would interfere. Thus where the power provided for the sale "together, or in lots, and subject to such special or other conditions of sale as the mortgagee should think fit;" and there was a condition of sale, that the title was to begin in 1840, (the sale being in 1855), and that all recitals in instruments 15 years old were to be taken as proved, and that the purchaser was not to require evidence as to the identity of the parcels—in this case, in view of the facts, the court declined to say that the conditions were more stringent than the state of title demanded.[37]

Depreciatory conditions.

Rescission clause.

118. It is now our common, almost matter of course, condition that in case of any objection which the vendors shall be unable or unwilling to remove, the vendors shall be at liberty to rescind the sale and return the deposit without interest, notwithstanding any steps taken to clear up the objections. It was this clause in the conditions that brought forth from the bench

[37] *Kershaw* v. *Kalow*, 1 Jur. N. S. 974; see also *Matthie* v. *Edwards*, 11 Jur. 504 and 761.

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certain considerations of the scope of that doctrine of depreciatory conditions, that may properly be quoted here without apology for their length;—

Vice-Chancellor Kindesley's judgment.

"Now it is said that that condition is depreciatory—that its tendency is to operate in two ways. First of all, its tendency is to diminish the number of persons who will be willing to bid; and secondly, even to those persons who do come and are willing to bid, it will be an inducement not to give so high a price as they would if such a condition were not imposed. Now that is the way in which the condition is said to be depreciatory. * * It does not follow that certain conditions, the effect of which would be that you realize the utmost at the sale are therefore always necessarily the best for the mortgagor; for the conditions may be such that, after selling for what is a good price, you may incur immense expense, and after all fail in enforcing that contract, which would be to the detriment of the mortgagor or the person interested in the sale. * * It (the condition in question) is a very ordinary, reasonable, wise, cautious, and a prudent clause for an absolute owner to introduce when he is selling." * * It is an improper condition "if it tends to the detriment of the mortgagor, as it would tend to the detriment of an absolute owner; but, if it would be prudent in an absolute owner, it is not imprudent as regards a mortgagor. * * If you consider for a moment every condition which tends to put any fetter upon a purchaser which he would not be subject to without it is a depreciatory

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condition. * * But admitting that its tendency, giving due meaning to the word 'tendency,' is to deter purchasers, and that its tendency is to deter individuals from bidding so high as they would—admitting that it is not so depreciatory as to be improper, provided it is, upon the whole, a prudent, wise and proper thing—when an absolute owner is selling, it is therefore prudent and proper with respect to the sale of the property of these mortgagees."[38]

Rescission clause not absolute.

119. Let us note, in passing, that this clause as to rescission does not give so absolute an option to the vendor, as its face would warrant. It is necessary that he should give the purchaser the right to waive his objections.[39] Nor is it open to the vendor, in the face of insuperable objections, which he knowing yet does not disclose, to put the purchaser to trouble and expense—and when found out by those objections, then by the aid of a rescission clause, to pick the lock of his agreement.[40]

54 V. c. 19, s. 8.

120. Attention may profitably be drawn to the provisions of the recent Act, 54 Vict. c. 19, s. 8. By that Act no sale by a trustee—which is made to include a trustee by construction or implication[41]—shall be impeached, on the ground that the conditions "were unnecessarily depreciatory, unless it also appears that the consideration for the sale was thereby rendered

[38] *Falkner* v. *Equitable*, 4 Jur. N. S. 1214. Sir R. T. Kindersley, V.C.: but see *Dance* v. *Goldringham*, L. R. 8 Ch. App. 902.

[39] See *Re Jackson* v. *Oakshott*, L. R. 14 Ch. D. 851.

[40] See *Bowman* v. *Hyland*, L. R. 8 Ch. D. 588; *Nelthorpe* v. *Holgate*, 1 Coll. 203.

[41] Sec. 2. The principal provisions of the Ontario Statute are taken from the (Imp.) *Trustee Act, 1888*, 51 & 52 Vict. c. 59.

inadequate," or after conveyance executed, rendered inoperative as against the purchaser (who himself is debarred this pet objection), unless collusion appears. Now, as it was only through the door of trusteeship that this vexation came upon the mortgagee, it is perhaps only fair that by that egress it should likewise depart. For the rest, the duty and right of the mortgagee in this regard is still best expressed as above stated, to the effect that whatever conditions would be availed of by a prudent owner, of these also a mortgagee is entitled to the use and benefit. Sections 120-121.

(2) *Sale by Lots.*

121. Whether the property had better be put up in its entirety,[42] or offered in separate lots, is, under ordinary mortgages, matter of discretion in each case.[43] As the sale of a portion under power is no release of the remainder from the mortgage.[44] it is open to the mortgagee to sell the land by distinct parcels, either all at one auction, or some now and others again, until the debt be extinguished. Possibly even it might be a ground for complaint, cutting to the root of the sale, that a property was improvidently, or against the spirit of the power,[45] put up in the aggregate, which, if sold in lots, might have brought handsome prices.[46] Thus a mortgagee Sale by lots.

[42] Mortgagee may advertise whole property for sale even where it is likely a portion would suffice; *Cleaver* v. *Matthews* (Va.), 3 S. E. 439.

[43] Cf. *Loveland* v. *Clark*, 18 Pac. 544.

[44] *Gowland* v. *Garbutt*, 13 Grant, 578.

[45] *Hull* v. *King*, 38 Minn. 349.

[46] See *Richmond* v. *Evans*, 8 Grant, 508. But see *Adams* v. *Scott*, 7 W. R. 217; see also, for late cases in American law, *Stockmeyer* v. *Tobin*, 11 Sup. Ct. Rep. (U.S.) 504; *Larkin* v. *Bronty*, 39 N. Y. S. R. 879; *Harris* v. *Creveling*, (Mich.) 45 N. W. 85; *Holmes* v. *Turner's Falls L. Co.*, 150 Mass. 535; *Bogarth* v. *Largent*, 128 Ill. 95.

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who under a power of sale without previous enquiry of any kind, put up for sale by auction and sold in one parcel a farm and two shops in a village nearly three-quarters of a mile away, not in any way used together, was held liable for the difference between the amount realized and the amount which would have been realized had the farm and shops been sold separately: *Aldrich* v. *Canada Permanent Loan & Savings Co.*, 27 O. R. 548, affd. 24 A. R. 193. But see *Wilson* v. *Taylor*, 23 O. W. R. 359.

Or in lump.

122. On the other hand, it would be imprudent to sub-divide property where the severance of portions would materially injure the rest.[47] Nor is it necessary or wise to auction undivided interests where the whole might be conveyed. although to so convey would require the joint exercise of distinct powers of sale given by different instruments.[48] There is, however, no fixed rule in England or Ontario for or against "lump" sales.[49] A mortgagee of timbered lands cannot sell the timber separate from the land: *Stewart* v. *Rowson*, 22 O. R. 533, nor can a mortgagee of a factory property sell the machinery apart from the factory: *Re Yates*, 38 Ch. D. 112; but a mortgagee can himself cut timber and sell it: *Brethour* v. *Brook*, 23 O. R. 658; 21 A. R. 144.

[47] *E.g.*, a railway property: *Wilson* v. *Atlantic & R. A. Line*, 2 Woods, 447.

[48] *Hiatt* v. *Hillman*, 19 W. R. 694.

[49] Cf. *Adams* v. *Scott*, 7 W. R. 217. For contrary practice followed in some American Courts, see *Rowley* v. *Brown*, 1 Birn. (Pa.) 61.

Section 123.

(D) Terms of Payment.

(1) *Deposit.*

Deposit of 10 per cent.

123. One of the most ordinary precautions taken at a mortgage sale is to require a purchaser to make deposit at the time of sale of a percentage of his successful bid. The commonly named deposit is ten per cent.; the same being that provided for in the standing conditions under which sales by the Court are held.[50] That there is no arbitrary rule in this matter may be drawn from the decision in Farrer v. Lacy,[51] wherein are discussed the object of deposit, what amount may be fixed and whether, once fixed, it may be altered. The decision is as follows:—"The mortgagee selling under his power of sale had power to fix what sum he liked as being a reasonable deposit. He did fix ten per cent., which no doubt is a large sum when the purchase money is large. The deposit is intended to be a guarantee for the purchase being in good faith, and that the sale is intended to go on, and is likely to go on and be concluded. If he had fixed a smaller sum, say five per cent., for property of this character, nobody could have said that the mortgagee had gone outside his power or acted improperly. Having fixed ten per cent., the question is, why was it reduced? * * In other words, the object of reducing the deposit was that a person that could not otherwise have bought might be induced to bid, and

[50] C. R. p. 193, Form 43, condition 4.
[51] L. R. 25 Chy. D. 641.

Sections 123-124.

possibly buy the property. That seems to me to have been perfectly reasonable and proper on his part."

Cheque for deposit.

124. Whether it is proper for the auctioneer or other agent for the vendor to take a cheque for the deposit instead of cash [52] was also much discussed in the same case: "The auctioneer received instead of £1,000 in cash a cheque for the amount from a person whom he did not know; [53] and that cheque not being paid, the sale became abortive, and there was no fund to provide for the costs so incurred. * * By the evidence it is shown to be the universal practice, not of owners in fee only, but of everybody selling houses or land, invariably to receive the deposit by means of a cheque. There are obvious reasons why it might be very inconvenient to adopt any other course." This case was appealed, and from the judgments approving the previously quoted opinions, we may with profit quote several passages that throw further light on these questions of deposit. "Moreover," says Lord Justice Baggallay,[54] "I am not prepared to say that a mortgagee-vendor is bound to require a deposit at all from a bidder; for it is open to him to sell by private contract, in which case no deposit is, as a general rule, required. No doubt, the custom, which has almost the force of a rule, is to take a deposit on sales by uction, but it is an equally prevalent custom to take a

[52] Cash sale provided in power, and announcement at auction that only gold, silver and legal tender would be received; see *Lallance* v. *Fisher*, 2 S. E. 775.

[53] See *Ib.* as to impossibility of obtaining references (at time of auction) as to the purchaser's agent.

[54] *Ib.* L. R. 31 Ch. D. 42.

cheque for the amount." From Lord Justice Bowen we have the following. It is "a well-known proposition of law—that an agent, for the purpose of receiving money, has not an unlimited authority to receive payment in any mode which he may choose, but is ordinarily deemed to be intrusted with a power to receive it in money only;[55] in other words, that an agent being authorized to receive a bird in hand, is not authorized to receive a bird in the bush. But that proposition of law has nothing on earth to do with this case, the only question to be considered being whether what the plaintiff Farrer did was reasonable in the case of a person who was acting in interests other than his own." Sections 124-126.

125. To the objection that the taking of a cheque, which was subsequently dishonored, rendered the sale abortive, Lord Justice Fry, in the same case, replied, with something of casuistry, that this was not true. "The only thing it did was to conceal for one day the fact that the sale was abortive." In this latter connection, it may be noted that the effects of a dishonored bill or cheque, in the direction of stopping proceedings, were considered in *Wood* v. *Murton*,[56] and found to be: 1st, that the giving of the bill suspends the remedy by sale and the running of the notice; and, 2nd, that both revive when the bill is dishonored. Effect of dishonor.

126. Not uncommonly, the deposit is, by the conditions of sale, made payable to the vendor's Deposit with solicitor

[55] Cf. *Horsey* v. *Hough*, 38 Md. 130, which proves that a sale for cash does not necessarily mean cash "on the nail."

[56] 47 L. J., Q. B. D. 191.

Sections 126-127.

solicitor, a practice that argues some confidence in the solicitor, who, in rare cases, has abused it and absconded. A complex case of this was *Barrow* v. *White*,[57] where, in a sale by a second mortgagee, a solicitor had so absconded; and it was vainly attempted to make accountable the first mortgagee, who had joined in the sale, conveyance, and receipts for purchase money.

(2) *Credit.*

When credit may be given.

127. Mr. Jones, in his book on Mortgages, has, in effect, stated the law on the subject of giving credit to be that, where credit is not expressly authorized by the instrument, it is not permissible for the mortgagee-vendor to give a term of credit for a greater sum than the amount due him. But where the power of sale provides for a discretion,—cash or credit,—that discretion he must use fairly, but may sell on credit wholly, if in good faith and for the benefit of all concerned.[58] This is in the main a correct and reasonable statement of the law. Undoubtedly the absence of express mention, in the power, of sale on credit will not so hobble the discretion of the vendor that he cannot leave a portion of the purchase money outstanding on mortgage.[59] But if the sum for which the land is sold is greater than the sum secured by the mortgage under which he sells, he is liable to pay in money the surplus to the owner of the equity of redemption, or other entitled party.[60]

[57] 2 John & H. 580.
[58] Jones 5th ed. 1868-1872; *Markey* v. *Langley*, 92 N. S. 142.
[59] See *Thurlow* v. *Mackeson*, 4 L. R., Q. B. 97; see also *Bettys* v. *Maynard*, 49 L. J. 389.
[60] *Bailey* v. *Ætna Ins. Co.*, 10 Allen 286.

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Limit of discretion.

128. By good fortune Mr. Jones' statement can be applied to Ontario law without much modification. Chancellor Boyd has indicated the scope of the vendor's discretion in these terms:—"The cases cited [61] shew that the mortgagee can sell on time under a statutory power of sale without the mortgagor's consent, provided he credits the price as cash. The reason is that he can deal as he pleases about giving time on his own debt and if as to any surplus he accounts forthwith to the mortgagor and pays him cash, that removes any objection on the part of the latter, that the sale should have been a cash sale. If the mortgagor consents to a sale on these terms he is precluded from claiming the surplus in cash." * * Without a distinct bargain with the mortgagor the mortgagee "cannot cash such a security and charge the mortgagor with the expenses and discount.[62] It should be remembered also, in such cases as these, that, where the transaction is yet incomplete, the mortgagees are chargeable only with what they have actually received from the purchaser;[63] and mere delay in closing does not come to be giving of credit.[64] And in general it may roughly be put that the payment of the purchase money is business between the purchaser and mortgagee, and is no concern of the mortgagor so long as he obtains the credit and benefit of the amount bid.[65]

[61] *Davey* v. *Durrant*, 1 DeG. & J. 553; *Thurlow* v. *Mackeson*, see *supra*.

[62] *Beatty* v. *O'Connor*, 5 O. R. 731.

[63] *Bank of Upper Canada* v. *Wallace*, 16 Gr. 280.

[64] *Strother* v. *Law*, 54 Ill. 413.

[65] *Mewburn* v. *Bass*, 82 Ala. 622.

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(E) Postponement.

Not obligatory to postpone.

129. There is no compulsion upon the mortgagee to postpone or adjourn the sale for the sake of a possible increase in the amount bid, the rule being that if, in exercising the power he has acted *bona fide* and taken reasonable precautions to obtain a proper price, the mortgagor has no redress even although more might have been obtained for the property if the sale had been postponed.[66] Of course the want of bidders, or a highest bid very much below the true value[67] may render a sale at the time advertised an impossibility or impropriety; but then it is a matter of discretion under the ordinary form of power, whether he shall adjourn the sale or sell by private contract. Nevertheless, a sale may be adjourned more than once if in the reasonable discretion of the mortgagee it seems fit to do so.[68] Where it is adjourned, the time and place to which adjourned should be announced on the spot and advertised. The advertisement while not necessarily so minute as the previous ones,[69] should be accurate, and keep to the date and place announced at the time of the postponement.[70]

But vendor may do so.

(F) Fairness of Sale.

Onus on mortgagee.

130. The onus of supporting the sale as a *bona fide* exercise of the power is, of course—as

[66] *Cholmondeley* v. *Clinton*, 2 Jac. & W. 1 and 182; *Warner* v. *Jacob*, L. R. 20 Ch. D. 220.

[67] *Thompson* v. *Holman*, 28 Grant 35; Cf. *Clark* v. *Simmons*, 150 Mass. 357, where only one bidder; contra, *Stevenson* v. *Hano*, 148 Mass. 616, where several bids.

[68] *Richards* v. *Holmes*, 18 How (N.Y.) 143.

[69] *Dexter* v. *Shepard*, 117 Mass. 480.

[70] *Miller* v. *Hull*, 4 Dea. (N. Y.) 104; Jones 3rd ed. 1874.

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stated in a great many cases—on the vendor as against both mortgagor and purchaser, and on the purchaser as against the mortgagor. There are certain acts and combinations, both between the vendor and others, and between third persons, which, more or less, go to the fairness of the sale, and should, therefore, be briefly mentioned here. Some of these acts, such as bidding by puffers at a sale without reserve, are dealt with in the Act respecting the Law and Transfer of Property.[71] In the same Act is included a definition of a sale without reserve, and a direction as to how to make the necessary reservation.

Arrangements to clear the field of bidders.

131. Interference with the obtainment of the highest possible price may proceed from either the vendor or the purchaser. It does not seem that arrangements by the *purchaser* to clear the field for himself are always ground for impeaching the sale. "It is settled law," according to Chancellor Spragge,[72] "that an agreement between two persons, both of whom are desirous of purchasing the same estate, that one shall abstain from bidding (receiving therefor a valuable consideration), and leaving the field open to the other, is a lawful agreement, and the agreed consideration may be enforced."

Acts of the purchaser

132. Yet there may be other and less innocent acts of the purchaser having a bearing on the fairness of the sale. Thus, a bidder may attend the sale, and by allowing would-be purchasers there present to believe that his intention is to

[71] 1 Geo. V. c. 25, ss. 47 to 50.
[72] *Campion* v. *Brackenridge*, 28 Gr. 201.

Sections 132-133.

purchase for the benefit of the mortgagor's family, so get the property for himself or for others than the family. It seems, however, that if it was not through him, or through any wrong or act of his, that bidders were thus misled into a charitable supposition, the validity of his purchase would not thereby be impaired.[73] Another and more objectionable case, is where the purchaser, having promised to make an advance to the mortgagor or some one acting for him, in order to buy in the property, failed him at the last, and subsequently purchased for himself. In such a case, Vice-Chancellor Spragge thought that there was "room to contend that there was design in all this; that the whole was a scheme to obtain the land for himself at an undervalue, in which case there would be the element of fraudulent intent."[74] Besides, if the purchaser does not content himself with tacit appeals to the generosity of rival bidders, but makes plaint of his losses and so forth, he will not, on the sale's being impeached, be allowed to keep his purchase.[75]

Acts of the mortgagee.

133. A secret arrangement by the mortgagee to prevent competition at the sale, whether with the object of having the property bought for himself, or for the advantage of a party to the arrangement, is manifestly a ground for impeaching the sale.[76] For it is the duty of the mortgagee to do all acts in connection with the

[73] *Brown* v. *Fisher*, 9 Gr. 423.

[74] *Campion* v. *Brackenridge*, 28 Gr. 201 ; but see *Ruttan* v. *Leviconte*, 2 Chy. Cham. 108.

[75] *Fenner* v. *Tucker*, 6 R. I. 551; cf. Benjamin on Sale, 5th ed. p. 464.

[76] *Thompson* v. *Heywood*, 129 Mass. 401. See also *Smith* v. *Hunt*, 2 O. L. R. 134; 4 O. L. R. 65.

sale with the view of obtaining the best price under the circumstances. But an agreement that a third person shall bid a certain amount, without binding the hammer at that figure, and leaving the sale open, will not invalidate the sale, even if the third person looked over the mortgagee's shoulder and supervised the notice of sale.[77] Moreover, if a third person, in no way cognizant of the scheme and having no reason to suspect the *bona fides* of the proceedings—the same being apparently regular—should intervene, and have the premises knocked down at a smallish figure, probably by analogy to Brown v. Fisher, cited above, the sale would stand; and the mortgagor would be remitted to his remedy against the vendor. Sections 133-135.

134. It is not to be supposed, however, that every avenue of profit is shut to the mortgagee by the responsibility of his position. It has been legally sanctioned in him, to buy in at a discount a second mortgagee's security, without obliging him to share with the latter his knowledge of the prospect of a successful sale[78]—a line of conduct that would hardly be favored in one who could be fairly deemed a trustee for those interested in the equity of redemption. Buying in second mortgagee.

(G) Sale by Private Contract.

135. The commonly used forms of power speak for a sale by public auction or private Option of public auction or private contract.

[77] *Ritchie* v. *Judd*, (Ill.) 27 N. E. 682; cf. *Santa Marina* v. *Connolly*, (Cal.) 21 Pac. 1093.

[78] *Dolman* v. *Nokes*, 22 Beav. 402.

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contract.[79] To this effect are the words of the larger clause in the Short Form Act, which are "by public auction or private contract, or partly by public auction and partly by private contract as to him shall seem meet." Now, let it be remarked concerning that word "or" lying between "public auction" and "private contract," that this is one of those rare cases where judicial intelligence has interpreted from "or" a simple alternative. For in *Davey* v. *Durrant*,[80] where a power was so limited, Lord Justice Turner thus postulated: "To hold that the mortgagee was bound in the first instance to put up the property for sale by auction would be to limit and cut down the power given by the deed, which expressly authorizes a sale by public auction or private contract; and certainly I am not prepared to hold that a mortgagee is not justified in accepting a fair offer for the purchase of the mortgaged property until he has advertised the property for sale."[81] To go a step farther, it was decided in *Major* v. *Ward*,[82] that a contract for sale of the property, although made before the expiration of the notice, was not therefore invalid. But presumably in Ontario our statutory embargo on further proceedings while notice runs, would threaten the validity of such a contract, which is effectively a very strong "proceeding."[83] At any rate such

Contract before expiry of notice.

[79] Where only public auction is prescribed there cannot be sale by private contract; *Brovard* v. *Dumaresque*, 3 Moore, P. C. 457; and *vice versa*.

[80] 1 DeG. & J. 560.

[81] See also *Mowry* v. *Sanborn*, 68 N. Y. 153; *Rose* v. *Page*, (Mich.) 46 N. W. 227.

[82] 5 Hare 598.

[83] 10 Edw. VII. c. 51. s. 28.

contract should be made dependent on the continuance of default and were better post-dated after the time for expiration of notice.

Reasons for holding auction.

136. However good the decision stands in *Davey* v. *Durrant*—and it has commonly been followed—yet it is none the less unsafe to sell by private contract before auction attempted, than it was before that cause was heard. For the burden of proving the sale a fair exercise of power demands visible evidences of exertions to obtain a good price.[84] Now there can be no more conspicuous evidence of exertion than the newspaper advertisements, the posters on the dead walls, and the declaration of the auctioneer. When the efforts so evidenced have failed in eliciting bids, then the subsequent private sale will naturally be presumed the fairest thing under the circumstances. But a private sale—being a transfer without check on the parties—while theoretically, perhaps, not to be set aside for less inadequacy of purchase money than is a public one, will yet, in practice, be found more difficult to maintain. Very probably too, while the case above quoted may have lost nothing in the fifty-five years since its decision, on the other hand the custom that seems to require abortive auction before private sale may in the meantime have taken on something of the force of a law, and is not to be deviated from, unless in those exceptional circumstances where the property is manifestly not a subject for auction.

136[a]. In *Smith* v. *Spears*, 22 O. R. 286. it was held that instead of selling the property the

[84] *Latch* v. *Furlong*, 12 Grant 303.

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mortgagee might exchange the same for other property. This decision can very well be questioned, for such a mode of procedure would deprive the mortgagor of an accounting, if desired, and to the balance of the proceeds of sale, if any. The case is at variance with a Manitoba decision: *Winters* v. *McKinistry*, 22 C. L. T. 213.

(H) Price: Inadequacy.

Inadequacy some ground of suspicion.

137. The principle is well established and need scarcely be reiterated that it is the duty of the mortgagee to at least try for the best price under the circumstances.[85] So, as the result is often taken as the measure of the actual performance, an inadequate price often reflects a shadow on a sale. Nor need the inadequacy proceed from what for distinction's sake has been called "actual" fraud; it may be due to a culpable ignorance of the value of the subject of sale,[86] or to a general carelessness for other interests than one's own.[87] Taking fraud in a wide sense as including these latter faults, as well as corruption, or collusion with the purchaser,[88] we may then say that under-value without fraud is no ground for relief.[89] And speaking generally, if a mortgagee selling acts in good faith and in compliance with the terms of the power the sale cannot be impeached: *Kennedy* v. *De Trafford*, [1897] A. C. 180; *Huson* v. *Hadding-*

[85] See for instance, *Orme* v. *Wright*, 3 Jur. 19.
[86] *Wolf* v. *Vanderzie*, 20 L. J. N. S. 353.
[87] See *Latch* v. *Furlong*, 12 Gr. 203.
[88] *Warner* v. *Jacob*, L. R. 20 Chy. D. 221.
[89] *Bettyes* v. *Maynard*, 49 L. J. 389: *Hood* v. *Adams*, 128 Mass. 207; *Bailor* v. *Daly*, 7 Mackey 175; *Borman* v. *Ash*, 36 Ill. App. 115; *Garitee* v. *Popplein* (Md.) 20 Atl. 1070; *Clark* v. *Simmons*, 150 Mass. 317. Nor will sale be set aside on a guaranty of an advance in price: *Harris* v. *Gemmel*, 9 S. W. 376.

ton Island Quarry Co., C. R. [1911] A. C. 338. On the other hand, the price may be so grossly inadequate as to amount to evidence of fraud, *i.e.*, the sale may be at a "fraudulent undervalue;" there may be a "gross undervalue such as shews either actual and intentional fraud or gross negligence constituting in the view of equity a fraud on the mortgagor."[90] Sections 137-138. Fraudulent undervalue.

138. Indeed an inadequate price obtained by a mortgagee on sale of the mortgaged property, taken in conjunction with the other circumstances of the case, is often strong evidence of negligence or breach of duty on his part. This subject has received very careful consideration in *Latch* v. *Furlong*,[91] where the defendant being of the view that "all he wanted was to get the money due him and he would let the property go," was not sorry to accept the offer of one Joy, the first that was made him and which he acted on without troubling himself to advertise the property,[92] or give notice of sale. The price thus received about covered the amount due him, but was far below the value of the premises. Mr. Vice-Chancellor Mowat in a very elaborate judgment avoided the purchase—on the ground that, being under obligation *to act as a prudent owner would* and *prevent a sacrifice* of the property, the defendant had acted improperly. The learned judge did not, however, depend entirely Inadequacy plus other circumstances.

[90] *Davey* v. *Durrant*, 1 DeG. & J. 535; *Latch* v. *Furlong*, *supra*: *Crawford* v. *Meldrum*, 3 U. C. App. 3; *Oliver* v. *Court*, 8 Pri. 165; *Thompson* v. *Holman*, 28 Gr. 35; *King* v. *Bronson*, 122 Mass. 122. For amounts held not such a gross inadequacy; see *Stoffel* v. *Schoeder*, 62 Mo. 147; *Lallance* v. *Fisher*, 2 S. E. 775, (where sale for half value).

[91] 12 Gr. 303.

[92] Case cited, *Marriott* v. *Anchor Reversionary Co.*, 7 Jur. N. S. 155.

Section 128.

on the inadequacy of price. "Had the mortgagee used any exertions or in the absence of such exertions had there been any contrariety in the evidence as to the fairness of the price, I might have found reason to hesitate before avoiding the purchase." On the whole we may say with Vice-Chancellor Spragge:—"The great undervalue *especially when taken in connection with the place and manner of conducting the sale* are matters to be considered."[93]

[93] *Spain* v *Watt*, 16 Gr. 260; cf. *Fowler* v. *Taylor*, 19 Wash. L. Rep. 131 (inadequacy plus unsuitability of hour).

CHAPTER VII.

PURCHASER AND CONVEYANCE.

(A) Title of Purchaser.

Section 139.

When does title vest?

139. It seems to be supported by authority that, whatever rights the hammer of the auctioneer and the agreement at the time of sale may give the purchaser against the vendor himself, yet the auction alone does not vest the estate in the purchaser, nor, perhaps, does the title pass until the execution and delivery of the deed of conveyance.[1] But this law is doubtful enough,[2] and can be relied on only this far, that the power is but incompletely exercised until the purchaser has his deed; whereupon he becomes entitled to possession,[3] and the mortgagor, if still seized, becomes his tenant at sufferance.[4] In a recent Manitoba case it was held that the power was validly exercised by the entering into of agreements for sale and conveyances were unnecessary: *Campbell* v. *Imperial Loan Co.*, 18 Man. R. 144; 8 W. L. R. 502. The title is—as far as the mortgage goes—a very absolute one, the instruments creating and effecting the power being, as it were, drawn together into one indenture, so that the title is freed from all incum-

[1] See *Tripp* v. *Ide*, 3 R. I. 51.

[2] See *Mewburn* v. *Bass*, 82 Ala. 622: *Durden* v. *Whetstone*, (Ala.) 9 So. 176, (where it was held that the equity was cut off by sale, before conveyance executed).

[3] *Lydster* v. *Powell*, 101 Mass. 77.

[4] *Kinsley* v. *Ames*, 2 (Met.) Rep. 29. For remedy of purchaser where mortgagor collects rents after sale, see *Hatch* v. *Sykes*, 64 Mass. 307.

Sections 139-141.

brances since the creation of the power,[5] and carries all rights and easements then appurtenant when the power was given, *e.g.*, a right to light over an unmortgaged portion of the property.[6] This is perhaps to be taken with an exception, namely, that a solicitor's lien on the title deeds will still attach after the property has passed from his client by sale under power.[7]

Lord Cranworth's Act.

140. Several questions have arisen as to the extent of the title that may be conveyed under Lord Cranworth's Act.[8] It seems that where the security is a deed of equitable mortgage, there is power in the equitable mortgagees to convey the dry outstanding legal estate.[9] Likewise, under a mortgage of leaseholds by underlease, there is power to sell the whole of the original term.[10]

Specific performance.

When the purchaser is recalcitrant and refuses to complete the purchase, an action by the mortgagee will—as with other vendors—lie for specific performance.[11]

(B) Conveyance.

To whom conveyance made.

141. The conveyance may ordinarily be made to the purchaser or whom he directs. Thus, in the Short Form Act, the power is "to convey and assure the same when so sold unto the purchaser or purchasers thereof, his heirs and

[5] *Doolittle* v. *Lewis*, 7 Johns. (N. Y.) Ch. 45.
[6] *Bull's Petition*, 10 Atl. 484. *Born* v. *Turner*, [1900] 2 Ch. 211.
[7] *Gill* v. *Gamble*, 2 Chy. Cham. 135.
[8] See 42 Vict. c. 20, (Ont.), or 10 Edw. VII. c. 51, part II. (repealed in England).
[9] *Re Soloman & Meagher's Contract*, L. R. 40 Ch. D. 508.
[10] Lord Cranworth's Act, sec. 15; *Hiatt* v. *Hillman*, 19 W. R. 694.
[11] See *Phelps* v. *Prothero*, 17 L. J. N. S. 404.

assigns, or as he, she or they, shall direct and appoint." Without assuming responsibility for this grammatical construction, it may be said that the power is wide enough to cover any appointee or assign of the purchaser. In the event of the purchaser dying in the interval between sale and completion, the deed might be made to his personal representative, as representing his "heirs and assigns," *i.e.*, to his executor [12] or administrator. If, however, the completion were delayed beyond one year from death, in that case, doubtless, it might be contended that , would vest the right to the conveyance in the devisee or heir of the deceased. Sections 141-142.

142. As to the contents of the conveyance under power, more or less than what an ordinary deed should contain, the first requisite of the former is that the intention to sell under power should be manifested in the words of the instrument.[13] This is usually effected by recitals, as to which it is sometimes by the terms of the power provided that the deed shall be evidence thereof; for otherwise it is not,[14] or, at most, *prima facie* evidence thereof.[15] Attempts have from time to time been made to make the absence or insufficiency [16] of such declarations of intention to use the power a ground for voiding the sale. As in our own case of *Bartels* v. *Benson*,[17] Contents.

[12] See *Lewis* v. *Wells*, 50 Ala. 198.
[13] *Pease* v. *Pilot*, 49 Mo. 124.
[14] *Jones*, 5th ed. 1895; *Vail* v. *Jacobs*, 62 Mo. 13.
[15] *Ingle* v. *Jones*, 43 Iowa, 286; see also 10 Edw. VII. c. 58, s. 2 (A. B. C. & D.)
[16] As to immateriality of misrecital where no recital required, see *Irish* v. *Antioch*, 126 Ill. 474.
[17] 21 U. C. R. 143.

Sections 142-143.

when the court, having first, by dint of interpretation, construed an apparently absolute sale into a sale under mortgage, thereupon found fault with the conveyance as being executed by the vendor as owner in fee. A finer point was raised—though not successfully—in an American case, where, in a mortgage to partners, the surviving partner, being also administrator of his deceased fellow, executed the power of sale, but in the conveyance omitted to describe himself as administrator. The omission being made ground of action, was held not to invalidate the sale.[18] It seems, moreover, that facts that should be recited in the conveyance may be proved *aliunde*.[19] If we are to be guided by our Canadian case of *Kelly* v. *Imperial*,[20] which has the authority of the Supreme Court, (Strong, J., dissenting), a deed following an irregular foreclosure, and merely reciting it, may be a sufficient exercise of power of sale.

Concurrence of mortgagor.

143. It was, as has been shown, at the earliest sanctioning of powers of sale also established that the concurrence or signature of the mortgagor to the conveyance was neither necessary, nor exigible by the purchaser.[21] But the fact of the mortgagor joining in the conveyance does not make it a conveyance of the equity of redemption.[22] or prevent it in any way from being a conveyance under power. It was found

[18] *Look* v. *Kenney*, 128 Mass. 284.
[19] *Allen* v. *De Groodt*, 16 S. W. 494.
[20] 11 S. C. R. 516.
[21] See Chapter I. *supra*.
[22] Always saving the opinion of Mr. Justice Strong in *Kelly* v. *Imperial*, cited above.

necessary, recently, to emphasize this in a case[23] where the agreement being for a conveyance under power, it was contended, unsuccessfully, that the joining of the mortgagor—to obviate certain defects of title—was really giving the purchaser what he had not contracted for, and therefore broke the agreement. On the other hand, where the mortgagee cannot give title, the purchaser is not bound to keep the matter open until the mortgagee has secured the concurrence of a third person.[24] Sections 143-145.

144. The case of a lunatic vendor under power gave some trouble in the English case, *In re Harwood*,[25] the court, while directing the committee to sell, yet refusing to make a direction as to the conveyance, and leaving the transfer of the legal estate to be dealt with under the Trustee Act, 1850. But probably, in Ontario, the provisions of 9 Edw. VII., c. 37,[26] when complied with, would make the conveyance by the committee sufficient and valid. Lunatic vendor.

145. *Re Parker and Beech's Contract*[27] is a rather complicated case, involving the right of the purchaser to demand separate receipts where several sets of mortgagees join in a sale and execution of the power—such right on the part of the purchaser being therein regarded by the court as non-existent. Right to separate receipts.

[23] *Re Thompson and Holt's Contract*, L. R. 44 Ch. D. 492.
[24] *Forrer* v. *Nash*, 35 Beav. 167.
[25] L. R. 35 Ch. D. 470.
[26] Secs. 11 to 16.
[27] W. N. 1887, 27.

(C) Irregularities.

(1) *Generally.*

Sections 146-147.

How far irregularities affect purchaser.

146. Apart from any special clause for the protection of the purchaser, the court will hesitate—he being innocent—before setting aside sale under power on account of irregularities, not amounting to fraud, in the notice, or other proceedings. While the matter is still warm and the purchaser may readily be put in *statu quo,* doubtless the right of the mortgagor to have a regular exercise of the power is paramount to the right of the purchaser to have a good bargain. But, when the purchaser has entered into possession and expended moneys on improvements, the court will not—fraud being absent—set aside the sale.[28] When, however, the purchaser is cognizant of any irregularity, he cannot blink it and afterwards claim the indulgence of the court. Thus, in *Locking* v. *Halsted,*[29] where a solicitor took a mortgage from his client for $200 of which only $30 was due at the date of the mortgage, and went ahead to sell, and the plaintiff being the purchaser, objected to the right to sell—the court held that the plaintiff, having become aware of the vexatious user of the power, was justified in refusing to complete the purchase, and was entitled to recover back the deposit paid by him.

(2) *Non-Inquiry Clause.*

147. It is a frequent precaution to insert in the mortgage deed a proviso relieving the pur-

[28] See *Metters* v. *Brown,* 9 Jur. N. S. 958. But see also Chapter X. *infra.*

[29] 16 O. R. 159.

chaser under power from all necessity for inquiry into the validity of the proceedings. In the absence of such a term, the mortgagee must prove the validity, and prove it by some better evidence than his own unsupported declaration.[30] The discussion of such provisos may well be introduced by an analysis of one which we may find in the judgment of Jessel, Master of the Rolls, in *Dicker* v. *Angerstein*.[31] Section 147.

Dicker v. Angerstein.

"Now comes the important part: 'Provided also, and it is hereby agreed and declared that upon any sale purporting to be made in pursuance of the aforesaid power,'—that is, not a sale made, but a sale which purports to be made, and therefore the parties were contemplating that that which purported to be a sale in pursuance of the power might not be a sale at all—that is, that the power would not be really exercisable—' in that behalf the purchaser or purchasers shall not be bound to see and inquire whether either of the cases mentioned in the clause or provision lastly hereinbefore contained has happened, or as to the necessity or expediency of the stipulations subject to which such sale shall have been made or otherwise as to the propriety or expediency of such sale, and notwithstanding any impropriety or irregularity whatsoever in any such sale '—the term 'such sale' being a sale purporting to be made, whether really made under the power or not—' the same shall, as far as regards the safety and protection of the purchaser or purchasers, be deemed to be within the

[30] *Hobson* v. *Bell*, 3 Jur. N. S. 190.

[31] L. R. 3 Chy. D. 502. Fol. in *Campbell* v. *Imperial Loan Co.*, 18 Man. R. 144; 8 W. L. R. 502.

Sections 147-148.

aforesaid power in that behalf,'—that is although it is not within, it is to be deemed within it,—' and be valid and effectual accordingly, and the remedy of the said W. J. N. Angerstein '—that is the mortgagor—' his heirs or assigns in respect of any breach of the clause or provision lastly hereinbefore contained, or of any impropriety or irregularity whatsoever in any sale shall be in damages only.'

" That which cuts down the exercise of the power of sale in the case of no money being due is the implication which is attached by Courts of Equity to all mortgages of those being intended as security for money only; when the money is paid off, of course, the security is at an end, and no power given ancillary to the security can be any longer exercised.

" Where we find provisions which rebut that implication as between the purchaser and the mortgagor, as we do here, there is no occasion to resort to any such doctrine, because the obvious meaning of the whole transaction is that the purchaser is to be safe, if a *bona fide* one, without making any inquiry. If the mortgagor loses his estate through the misconduct of the mortgagee in selling when he has not the right to sell, his only remedy would be against him personally for damages."

Two classes of such clauses.

148. There are two classes of such protection clauses: (1) Where a sale being proper the purchaser is relieved from inquiry into the regularity of the proceedings; (2) Where in addition, he is relieved from inquiry into the propriety of holding a sale at all, or into the existence of

Sections 148-150.

default. The clause quoted by Jessel is of the stronger sort. Where the protection of the clause only extends as far as the first named class, then the purchaser must satisfy himself that default has breathed life into the power,[32] but under the latter class no inquiry need be made or default exist.

Remedy of mortgagor.

149. The remedy of the mortgagor under either sort of clause, where for instance, the stipulated notice has not been duly given, is by action for damages against the mortgagee, the court having no jurisdiction to restrain him from selling without giving the required notice.[33] There is also this further remedy, namely that the mortgagor may attend the auction and bind the purchaser with notice.[34]

Effect of knowledge.

150. The protection of such clauses goes, indeed, no further than to cover a *bona fide* purchaser. Generally speaking, either where the purchaser, by actual notice or information, knew of irregularities in the proceedings, or informalities; or where, on the face of the instrument, there is required some condition before sale that he must have known could not have been fulfilled, *e.g.* the efflux of three months' default, which time had not passed since the period for payment,[35] in either case, the purchaser could not take benefit of the right of non-inquiry. "If the purchaser knew as a fact that those things which ought to be done had not been done, she

[32] See *Ford* v. *Heeley*, 3 Jur. N. S. 1116.
[33] *Prichard* v. *Wilson*, 10 Jur. N. S. 330. See further, Chap. X.
[34] *Jenkins* v. *Jones*, 6 Jur. N. S. 391.
[35] *Selwyn* v. *Garfit*, L. R. 28 Chy. D. 283.

Sections 150-151.

cannot be allowed to say that the sale was regular; she cannot be allowed to say that the sale was properly made in exercise of the power, if she knew that the three months, which were required, had not passed.'"[36] Thus, too, actual knowledge that proper notice has not been given will bind the purchaser; and not only may the sale be set aside, but perhaps even the *mala fide* purchaser be brought to an account of his possession,[37] and a purchaser is not precluded from shewing defects in the exercise of the power of sale and from refusing to complete where such defects are fatal to the exercise of the power: *Life Interest and Reversionary Securities Corporation* v. *Hand-in-Hand Fire and Life Ins. Society,* [1898] 2 Ch. 230; *Re Martin & Merritt,* 3 O. L. R. 284.

151. *Jenkins* v. *Jones*[38] is a case on this subject. There the mortgagee, after the tender of his debt, having sold under power to a purchaser aware of the struggle to redeem, the court set the sale aside, declaring that a purchaser who buys with knowledge of circumstances sufficient as against a mortgagee to invalidate the sale, becomes a party to the transaction, and is not protected by the proviso that the purchaser need make no inquiry.[39] The terms of the mortgage may go yet a step further in providing that express knowledge will not affect the sale, but that the sole remedy will be by damages; for

[36] *Ib.* See also re *Martin and Merritt*, 3 O. L. R. 284.
[37] *Parkinson* v. *Hanbury*, 1 DeG. & Sm., 143.
[38] 6 Jur. N. S. 391.
[39] See *Thomas* v. *Davie*, 9 W. R. 831, for effect of right of tenant being known to purchaser.

such a provision is strictly within the contractual rights of the parties.[40]

(3) *Solicitor for both Parties.*

Solicitor for both parties.

152. Reference may here be made to a circumstance which, as often as it arises, not only may be a source of irregularities or unfairness in the sale, but is also likely enough to affect the purchaser with notice of any irregularities that may exist. This circumstance is the fact of one solicitor acting both for the mortgagee-vendor and for the purchaser. "Solicitors thus acting place themselves in a situation of great embarrassment, and such a state of circumstances requires strict investigation; for while, on the one hand, as acting for the mortgagee, the solicitor's duty was to obtain the best price; on the other, as acting for the purchaser, he would try to get the property at the least price."[41] Similarly, too, there may be complications where the same real estate broker acts for two parties. As in *Ritchie* v. *Judd,*[42] the mortgage security was in the hands of the broker for collection, and the mortgagor also placed the property in his hands for private sale; failing which sale, the broker sold under power, and was held not incompetent thereto from the sale being any breach of trust.

(D) Purchase by Particular Persons.

(1) *Charities.*

Sale to a charity.

153. There has not been displayed any great or peculiar leaning on the part of the courts in

[40] See *Prichard* v. *Wilson*, 10 Jur. N. S. 330; *Grant* v. *Canada Life*, 25 Gr. 256.

[41] *Jones* v. *Matthie*, 11 Jur. 504.

[42] (Ill.) 29 N. E. 682.

Sections 153-154.

favor of a charity as a purchaser under power of sale. Thus, the generosity of the mortgagee in agreeing to sell a site to a charity at a valuation, and to give the price to the charity, was no more appreciated than as a reason for declaring it an invalid sale under power.[43] The doctrine that a man should be just before he is generous applies with unabated force to this sort of proceeding.

(2) *Second Mortgagees.*

Sale to a second mortgagee.

154. There is no rule in equity precluding a second mortgagee, or other puisne incumbrancer, from purchasing at a sale under power held by the first mortgagee; nor from acquiring by such purchase no less absolute a title, as against the mortgagor, than would a stranger.[44] Nor is he in any worse position than a stranger as to getting the property at an undervalue; nor again will it matter if his own mortgage be in the form of a trust for sale, or if he himself be in actual possession when the sale is held.[45] *Parkinson* v. *Hanbury*,[46] is either not to be taken as an exception, for there the second mortgagee was not simply a mortgagee, but the equity had been conveyed to him on trust for sale on default in payment of his debt; or if it does conflict with the later case above cited,[45] as to a trust deed being material, it must be taken to be hereby overruled.

[43] *Davy* v. *Durrant*, 1 DeG. & J. 535.

[44] *Shaw* v. *Bunny*, 11 Jur. N. S. 99; see *Harron* v. *Yemon*, 3 O. R. 133.

[45] *Kirkwood* v. *Thompson*, 2 DeG. J. & S. 613.

[46] 2 DeG. J. & S. 450; 23 W. R. 331.

Section 155.

Watkins v McKellar

155. The following vigorous declaration on this question is to be found in *Watkins* v. *McKellar*[47]: "The proposition that the defendants, being mortgagees, were incapable of acquiring an absolute interest in the property in question, proceeds, I suppose, upon this that a mortgagee is a trustee for the mortgagor, and incapable, therefore, of dealing with the estate for his own benefit. That a mortgagee is a trustee for his mortgagor in some sense of that word, cannot be denied; but that he is not a trustee in the sense implied in the argument, is equally clear. Had it been true that mortgagor and mortgagee stand to each other in the relation of trustee and *cestui que trust,* then all dealings between the mortgagor and mortgagee in relation to the equity of redemption must have been regulated by the rules applicable to dealings between trustee and *cestui que trust;* and upon the same assumption every purchase of an incumbrance affecting the estate made by the mortgagee must have been held to be a purchase for the benefit of the mortgagor. But the falsity of both conclusions is apparent. And if it be true, as I apprehend it is, that a mortgagee is allowed to deal for the equity of redemption as a stranger; and if it be clear, as it no doubt is, that a mortgagee who gets in an incumbrance affecting the mortgage estate, is entitled to receive the full amount due upon such incumbrance, no matter how advantageous the terms upon which he may have acquired it, then I know of no principle upon which to hold a *puisne* incumbrancer incapacitated from purchasing

[47] 7 Grant, 584.

Sections 155-156.

the estate upon a sale by a prior mortgagee, under a power in his deed."[48] *Brown* v. *Woodhouse*,[49] is a very strong case in the same direction. Here the second mortgagee, who purchased, had, it was contended, been himself paid off, and had in his hands sufficient moneys belonging to the mortgagor to have paid off the first incumbrancer, although they were not entrusted to him specially for that purpose. Nevertheless, he took an irredeemable interest by his purchase.

Brown v. Woodhouse.

(3) *The Mortgagor.*

Sale to the mortgagor.

156. Neither the mortgagor nor any assign of his can, by purchasing under a power of sale in a first mortgage, cut out a second mortgage. Thus, in *Box* v. *Bridgman*,[50] S. Mortgaged to G., and sold the equity (in a portion) to B., taking a mortgage back, which he assigned to the plaintiff. G. sold under power, and B. purchased; but in the opinion of the court his purchase did not cut out the mortgage to S., but inured to the benefit of the holder thereof. The 72nd section of the Registry Act, 10 Edw. VII., c. 60, s. 72, which abolished tacking as between registered instruments, would have the effect of extending this principle from the mortgagor to his assigns by subsequent mortgage, if it did not already so apply. It is indifferent whether the purchase be taken in the name of the mortgagor or a trustee for him, or whether it pass through a stranger,[51] the effect will be unaltered.[52]

[48] Citing *Dobson* v. *Land*, 8 Hare, 216.
[49] 14 Grant, 682.
[50] 6 P. R. 234.
[51] See *Trust & Loan Co.* v. *Ruttan*, 1 S. C. R. 564, 584; cf. *Otter* v. *Vaux*, 2 K. & J. 650.
[52] *See Bell* v. *Sutherland Bldg. Soc.*, L. R. 24 Ch. D. 618.

Section 157.

Bidding by the mortgagor.

157. Bidding by the mortgagor is construable not as an acquiescence by him in the sale proceedings, but as evidencing an attempt by him to redeem. This was the view taken in *Jenkins* v. *Jones*,[53]: "The purchaser, however, had another ground of defence. He said that the plaintiff, immediately after the sale, served a notice which admitted it; nay more—that the plaintiff himself was bidding at the sale * * and therefore, that he [the purchaser] had reason to suppose that the attempt to redeem was given up. What was the effect of the plaintiff bidding at the sale? Why, that he was redeeming; because every bidding the plaintiff made at the sale would have been a redemption if it had been the last bidding. He, as purchaser, would have been getting back his own estate, subject to nothing but the payment of the debt, and perhaps of the mortgagee's costs. But supposing he did bid for the property, as to which there was a conflict of evidence, that seemed to him [the court] not to relieve the defendant's case in the least, because it shewed that the plaintiff was still struggling to get possession of his pledged estate."

If after notice by the mortgagee to both of two co-owners that he is prepared to sell for the amount of principal, interest and costs, no objection is taken, he may so sell though the purchaser be one of the co-owners, and such co-owner is entitled to buy without liability to the other: *Kennedy* v. *De Trafford*, [1897] A. C. 180.

[53] 6 Jur. N. S. 395.

CHAPTER VIII.

PURCHASE BY MORTGAGEE.

Sections 158-159.

Mortgagee may not purchase.

158. It is the rule, outside of some of the United States,[1] that a mortgagee may not purchase at his own sale [2]—a rule that has, in some instances, been deduced from the fiduciary position he was held to occupy. A simpler and better explanation of, and reason for this rule was given by Lord Justice Lindley in *Farrar* v. *Farrars,*[3] where he says:—" A sale by a person to himself is no sale at all,[4] and a power of sale does not authorize the donee of the power to take the property subject to it at a price fixed by himself, even although such price be the full value of the property. Such a transaction is not an exercise of the power, and the interposition of a trustee, although it gets over the difficulty, so far as form is concerned, does not affect the substance of the transaction."

Acquiescence by mortgagor.

159. Where, however, the mortgagor is privy to the sale, assents to it and to the acquisition of title by the mortgagee, and concurs in that result after it is reached, there being no suspicion of fraudulent practice, the sale will stand,[5]

[1] See *Howards* v. *Davis,* 6 Ten. 174; Bigelow on Fraud (1888), p. 349; and (by statute) purchase by mortgagees is permitted in some others of the U. S.; Jones 5th ed., 1882; cf. *Mainwaring* v. *Jennison,* 61 Mich. 117.

[2] *Spain* v. *Watt,* 16 *Grant,* 260; see also *Fauld* v. *Harper,* 22 C. L. J. 162; 1 Geo. V. c. 25, s. 50.

[3] L. R. 40 Chy. D. 409.

[4] Cf. *Simpson* v. *Simpson,* 12 S. E. 417. *Henderson* v. *Astwood,* [1894] A. C. 150.

[5] *Medsker* v. *Swaney,* 45 Mo. 273. See also *Nutt* v. *Easton,* 1899, 1 Ch. 873, affd. 1900, 1 Ch. 29.

—consistently, too, with the true reason of the rule as given above, though scarcely so with a fiduciary relation, if it existed between the parties. Sections 159-161

160. This rule as to selling in-and-in is not a merely technical or formal one, and it not to be eluded by colorable re-arrangements by the mortgagee. "It is perfectly well settled," says his lordship, in the same case of *Farrar* v. *Farrars*, "that a mortgagee with a power of sale cannot sell to himself either alone or with others, nor to a trustee for himself;[6] nor to any one employed by him to conduct the sale."[7] So where the secretary of a building society had acted in the sale by them under a mortgage, the sale to him was upset without proof of undervalue.[8] Neither is one in a position to purchase who, outside of sale proceedings, has been an agent in relation to the mortgage, for instance, a person who has acted as the medium through which the moneys have been advanced and interest collected.[9] Scope of rule.

161. But to solicitors and attorneys having charge of the sale proceedings, whether the purchase be for self or client-mortgagee, the rule has most strictly and confidently been applied. A solicitor or attorney so connected with the property cannot purchase for either himself or Solicitors and attorneys.

[6] *Citing Downes* v. *Grazebrook*, 3 Mer. 200; *Robertson* v. *Norris*, 1 Giff. 21.

[7] Citing *Whitcomb* v. *Ninchin*, 5 Madd. 91; *Martinson* v. *Clowes*, L. R. 21 Ch. D. 857.

[8] *Martinson* v. *Clowes*, cited above. See for a similar case *Hodson* v. *Deans* 1903, 2 Ch. 647.

[9] See *Orme* v. *Wright*, 3 Jur. 19.

Section 161.

his employer; nor can his clerk purchase as a man of straw for either his principal or the vendor, or again for himself.[10] Moreover, it is not because the auction may be damped by the presence of the vendor's solicitor bidding at the sale that the rule is applied to him. For, in one case, where he was not known in the auction room to be such solicitor, the sale was yet voided by Chancellor Spragge. "His duty," said the Chancellor, "was to fix the time and place and terms of sale and to give publicity to it, to appoint the auctioneer, and so to conduct it in all respects as to obtain the highest price for the land: his interest is so to do all this that he may obtain it at the lowest price. The rule I take to be, and it is the only safe rule that where there is or may be a conflict of duty with interest, it is against good policy that a party should be allowed to act, and that if he does act and obtains a benefit from it, the law will not allow him to hold that benefit."[11]

But a sale made to the solicitor of the mortgagee who has acted for him in connection with the mortgage, but not in connection with the sale, cannot be impeached by the mortgagor: *Nutt* v. *Easton,* [1899] 1 Ch. 873, affd. [1900] 1 Ch. 29. And where one of two mortgagor tenants in common of certain lands had been collecting the rents thereof and turning them over to the mortgagee it was held that he did not thereby constitute himself an agent of the mortgagee, as he was acting in his own interests and there was

[10] *Ellis* v. *Delabough*, 15 *Grant*. 181. [Set aside, though after sale mortgagor accepted lease of property.]

[11] *Howard* v. *Harding*, 18 Gr. 181.

nothing therefore to prevent him buying in the property at the sale thereof under the power of sale contained in the mortgage: *Kennedy* v. *De Trafford,* [1897] A. C. 180. Sections 161-163.

162. But though a mortgagee may not sell to himself, that rule is not extended to a sale by him to a corporation of which he is a member. In *Farrar* v. *Farrars,*[12] a solicitor, one of the mortgagees, and acting for them all, sold to a company "more or less promoted by himself in which he had a substantial interest as a shareholder and whose solicitor he was." All of which, while considered as enough to cast the onus of proving the sale a fair one on the company, yet Lord Justice Lindley did not deem sufficient to void the sale. "A sale," said his lordship, "by a person to a corporation of which he is a member, is not, either in form or in substance, a sale by a person to himself. To hold that it is, would be to ignore the principle which lies at the root of the legal idea of a corporate body, and that idea is that the corporate body is distinct from the persons composing it. A sale by a member of the corporation to the corporation itself is, in every sense, a sale valid in equity as well as at law." Sale to one's company.

163. Some authority exists for the statement that while a sale by a solicitor to himself, through a third person, is invalid, yet if third persons do purchase and, being unable to back their bid, allow the mortgagee to stand in their shoes, then he will not be deemed to have purchased at his own sale and his title will be abso- Mortgagee stepping into shoes of third party.

[12] L. R. 40 Chy. D. 409.

Sections 163-164.

lute.[13] Nor apparently will it matter that no deeds have passed to those third persons, nor possession of the premises, and that they have paid no part of the purchase money,—objections under the Statute of Frauds being not available to the mortgagor.[14] This view of matters is quite in accord with that taken in many of the American courts, which are much less severe towards a mortgagee-purchaser than those of England or Ontario, where the judges would be very slow to admit the validity of such dealings, or to permit the mortgagee to tunnel his way through a third party into the ownership of the property.

Position of mortgagee purchaser.

164. It has been observed that there are three remedies open to the mortgagor where the mortgagee has sold to himself: "he may be compelled

"1stly. To reconvey the estate, supposing he has not resold it; or,

"2ndly. To let it be put up for sale, and to reconvey to another purchaser, if a better can be found; but if not, to keep it; or,

"3rdly. If he has resold it at a profit, to account for such profit."[15]

A sale to a nominee of the mortgagee, even though no element of fraud enters into the same, is of necessity of no effect. The power of sale is not exhausted thereby, and a subsequent sale to a bona fide purchaser for value is valid, even though the latter has notice of the prior inoperative sale: *Henderson* v. *Astwood,* [1894] A. C. 150.

[13] *Durden* v. *Whetstone,* (Ala.) 9 So. 176.
[14] *Durden* v. *Whetstone,* (Ala.) 9 So. 176.
[15] Dart. V. & P. 7th ed. 51.

Section 166.

Effect of leave to bid.

165. It is usual to state it as an exception, that the mortgagee may himself bid if he obtains the permission of the court. But this, it seems, will not protect him unless the sale is conducted in a fair and open manner. A very interesting case of this is *Ricker* v. *Ricker*,[21] in which the mortgagee was also a trustee of the equity of redemption. Here Vice-Chancellor Spragge made this ruling: "I may as well state here what I conceive to be the law applying to this case, and how the conduct of a party in the position of this plaintiff is to be regarded. Allowing him to bid at the sale was allowing him to place himself in a position where his interest was or might be to some extent, in conflict with his duty; but it did not sink his character of a trustee under the will into that of a prospective purchaser, so that what would have been a breach of trust if he had not been allowed to bid, was divested of that character because he was allowed to bid. It must be assumed that he was allowed to bid to protect his own interests as a mortgagee and as devisee; but if he used that permission to prejudice the interest of his *cestui que trust* in order to benefit himself, it was an abuse of the permission granted to him. * * * The lease to Anderson, the request to him not to bid at the sale, with the promise to sell to him again, and his own purchase should all be looked at together; and not looked at with a view to placing upon his conduct the best construction it will bear, but with a careful scrutiny to see whether what has resulted in benefit to himself was not done with that intent, in disregard of

[21] 7 A. R. 282.

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the interest of the infant, and so in breach of duty."[22] Now, though in this case the mortgagee happened also to be an express trustee, yet it is reasonable that, when he is simply mortgagee, his conduct, *qua* mortgagee, should be measured by the same principle; the difference between the cases being that, where the mortgagee is also a trustee, leave to bid will certainly not be granted if the *cestuis que trustent* object.[23] In short, permission may be granted to a mortgagee to bid at his own sale where, in the opinion of the court, it is necessary to protect his own interests;[24] but there will be close scrutiny of his conduct to find whether he has not benefited himself in disregard of the interests of the mortgagor.

Meaning of mortgagee's bid.

166. Great precaution should be taken by the mortgagee when bidding (by leave), lest his bid be misinterpreted. For there is considerable danger that he will be understood as bidding over and above the amount of his security—in other words, that he is to pay the amount of his bid as a surplus, and consider the mortgage as satisfied. This is by analogy to section 24 of "The Execution Act,"[25] wherein it is provided that, if the mortgagee become the purchaser under writ of execution of the equity of redemption, he shall give to the mortgagor a release of his mortgage debt.[26]

Limit to rule against mortgagee.

167. Some limit has been found necessary to the harshness of the court's disapproval of a

[22] Quoting *Talbot* v. *Minnett*, 6 Ir. Eq. 83.
[23] *Tennant* v. *Trenchard*, L. R. 4 Ch. 537.
[24] Cf. *Ex p. Davis*, 3 Dec. & Ch. 504.
[25] 9 Edw. VII. c. 47. See 1 Geo. V. c. 17, s. 34.
[26] Cf. *Woodruff* v. *Mills*, 20 U. C. R. 51.

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mortgagee-purchaser. This has been set by Vice-Chancellor Mowat, in *McLaren* v. *Fraser*[27]: "The court," says his lordship, "may take from the purchaser the estate which he bought and decline to interfere actively on his behalf, and obtain back for him the money which he had paid away; but I cannot suppose that it is the duty of the court, at the instance of either a co-defendant or a plaintiff, while it takes away the land, to interfere actively, at the same moment, in the same suit, to enforce the price for the benefit of the parties whose estate is restored to them."

Form of deed to himself.

168. In those cases where sale to himself is permitted, there is no objection to the mortgagee making the conveyance to himself,[28] the capacity in which he grants being different to that in which he takes.[29]

Purchase from sheriff.

169. With such cases as those above mentioned of purchase by the mortgagee at his own sale, must not be confounded certain others to be found in our reports, wherein the mortgagee having purchased the lands from the sheriff—who purported to sell them under a common law writ against lands—it was held that the mortgagor might still redeem.[30] As an equity of redemption is now subject to execution by the ordinary writ of *fieri facias,* these cases have lost their significance.[31]

[27] 17 Grant, 553.

[28] *Hall* v. *Bliss*, 118 Mass. 554; 1 Geo. V. c. 25, s. 36.

[29] Just as not a few of our Ontario titles to land take root in patents by Peter Russell, administrator of the Province, to Peter Russell, gentleman.

[30] See *Simpson* v. *Smyth*, 1 E. & A. 9; *Walton* v. *Bernard*, 2 Gr. 344; *Aitchison* v. *Coombs*, 6 Gr. 643.

[31] 9 Edw. VII. c. 47, s. 29.

CHAPTER IX.

Proceeds and Surplus.

(A) Application of Proceeds.

Sections 170-171.

Statutory directions as to application.

170. The mode and direction in which the proceeds of sale shall be applied are usually provided in the instrument creating the power. Thus the Short Form Act provides voluminously for this order of application: 1st, towards payment of expenses of and incidental to executing the power; 2nd, payment of principal and interest secured; and as to the balance, 3rd, "pay the surplus, if any, to the said mortgagor, his executors, administrators, or assigns, or as he shall direct or appoint." The power implied by 10 Edw. VII., c. 51, part. II. s. 22, for the application of the proceeds: 1st, in payment of the expenses of sale or attempted sale; 2nd, in discharge of interest and costs due in respect of the mortgage; 3rd, in discharge of the principal; 4th, as to the residue, that it shall go to the subsequent incumbrancers, according to their priorities; 5th, that the balance shall go to the owner of the equity, his heirs, etc.

Principles of application of proceeds.

171. Apart from the statutory modes above referred to, there are principles that control the application of the proceeds, which principles slightly vary, according as it is, or is not, permitted or intended to take advantage of an acceleration of the principal.

Section 171.

1st. Where such an acceleration clause exists, and has been brought into actual exercise by the demand of the mortgagee for payment of the whole sum, an application should be made of the money to the principal sum as well as to other portions of the debt.

2nd. Where the clause exists, but the option to enforce it has not yet been exercised, and the whole property has been sold to satisfy one instalment of the debt before the maturity of the others, there is still the option to apply the proceeds towards the whole principal.[1]

3rd. Where no such clause exists, or the mortgagee persists in not acting on it, and the whole property has been sold as aforesaid, there is authority for the statement that the mortgagee may hold the balance after satisfying what is already due, subject to the same lien as he held on the property, and that the mortgagor has no claim on such balance.[2] But the rule in *Thompson* v. *Hudson*[3] will qualify this statement somewhat, being to the following effect, that, after payment of interest and costs, the mortgagee should either pay the balance to the mortgagor or apply it in reduction of the principal due on the mortgage; and that, in taking an account against the mortgagee who has retained such balance, a rest must be made at the time he received the proceeds of sale. In other words, having the ready money in his hands, he cannot

Rule in Thompson v. Hudson.

[1] *Heath* v. *Hall*, 60 Ill. 344.
[2] Jones, 5th ed. 1937.
[3] L. R. 10 Eq. 497; although the decision referred only to a partial sale, yet the principle is equally applicable where the whole property has been sold.

Sections 171-173.

go on charging interest on the debt. And, at any rate, where the property being incapable of division without injury is sold upon the first default, yielding a sufficient sum to satisfy the whole debt, it may independently of express power of acceleration be so applied at once.[4]

4th. Where it is merely intended to satisfy the instalments already in default, a portion of the property may be sold; and if the proceeds are not sufficient, still further portions may be sold. But, if the proceeds are more than sufficient, the balance or surplus will be governed by the principle in *Thompson* v. *Hudson,* and should be applied towards the reduction of the principal.

172. Generally speaking then, a power to accelerate is in reality implied in the free exercise of the power of sale; and frequently also circumstances beget a corresponding duty to exercise the option of putting that power of acceleration in force. Where a portion only of the lands has been sold, and the debt is covered by the proceeds, it is the duty of the mortgagee to reconvey the remainder to, and at the expense of, the person entitled thereto.[5]

(B) Interest.

What arrears of interest.

173. The question has been raised more times than were necessary for its decision, whether the mortgagee could retain out of the proceeds of sale more than six years' arrears of interest on the debt secured. The root of the objection is

[4] Jones, *ib.*

[5] Cf. Short Form Act. 10 Edw. VII. c. 55, clause 14 in Schedule.

found in the 18th section of the Real Property Limitations Act,[6] which declares that no arrears of interest "shall be recovered by any distress or action but within six years next after the same has become due." Both the English and Upper Canadian courts have refused to regard this enactment as governing the rights of the mortgagee in this matter. Thus, in *Re Marshfield,*[7] the judge was unable to agree that a suit by the mortgagor to recover the surplus money was an action by which arrears of interest were sought to be recovered. The same view has been taken in our own case of *Ford* v. *Allan,*[8]—in other words, the mortgagee is sheltered by the maxim—*melior est conditio defendentis. In Howern* v. *Bradburn,*[9] more than six years' arrears were allowed to avoid circuity of action, in accordance with the spirit of the Administration of Justice Act.[10] In *Allan* v. *McTavish,*[11] both of our Statutes of Limitations,[12] are discussed in reference to this topic; "the construction of the two Acts taken together as regards rent or interest being that no more than six years' arrears of rent or interest in respect of any sum charged upon or payable out of land or rent should be recovered by any distress, action or suit, other than and except in actions of

Section 173.

Allan v. McTavish.

[6] 10 Edw. VII. c. 34 s. 18; cf. 3 & 4 Will. IV. c. 27. (Imp.) s. 42.

[7] L. R. 34 Ch. D. 721, approving *Edmunds* v. *Waugh*, L. R. 1 Eq. 418; see also *Re Solater's Trust*, L. R. 11 Ch. D. 227.

[8] 15 Grant. 565.

[9] 22 Gr. 96; followed in *Macdonald* v. *Macdonald*, 11 O. R. 187.

[10] 36 Vict. c. 8, (Ont.).

[11] 2 A. R. 278, followed in *Macdonald* v. *Macdonald*, above; *McDonald* v. *Eliott*, 12 O. R. 98; *McCullough* v. *Sykes*, 11 P. R. 337; See *Sutton* v. *Sutton*, L. R. 22 Ch. D. 511, and *Fearnside* v. *Flint*, L. R. 27, 22 Ch. D. 579, for English law.

[12] 10 Edw. VII. c. 34, s. 18; 10 Edw. VII. c. 34, s. 49; R. S. O. 1887, c. 60, s. 1.

Sections 173-175.

covenant, or debt upon specialty, in which case the limitation was governed by the other statute and fixed at twenty years." The result of all this is, that in Ontario twenty years' interest seems retainable out of the proceeds as against the mortgagor. Whether, however, inasmuch as the right to so retain for arrears beyond the six years, or at any rate beyond the ten years, is strictly a right on the mortgagee's specialty, and not growing out of or aided by his lien on the land, or whether he would have priority over a second mortgagee, (also a specialty creditor), for the extra arrears, does not yet seem settled. For it is questionable if the mortgagee can, by paying himself out of the proceeds, give himself priority over other creditors as to debts that his lien on the land does not cover with its security.[13]

(C) Expenses (other than "Costs.")

174. From the proceeds of sale the mortgagee is allowed reasonable expenses incurred, not only specially in connection with the sale proceedings, but also generally in relation to the mortgage debt or security,[14] and whether incurred for the recovery of the debt,[15] or for the preservation of the property.[16] Certain of these allowed expenses will be discussed later on in the Chapter on Costs; other expenses may now profitably be considered here.

(1) *Just Allowances.*

What are just allowances.

175. In an action—as for redemption—where the mortgagee is brought to account, it is usual

[13] *Cf. Talbot v. Frere*, 9 L. R. Ch. D. 568.
[14] See *Sclater v. Cottam*, 3 Jur. N. S. 630.
[15] *Ellison v. Wright*, 3 Russ. 458.
[16] *Re Leslie*, L. R. 23 Ch. D. 552.

to credit him with what are known as "just allowances."[17] The extent and nature of these will depend on the scope of the power given by the mortgage deed. The words of the Short Form Act are sufficiently numerous on this head: "The costs and charges of preparing for and making sales, leases, and conveyances, as aforesaid, and all other costs and charges, damages and expenses, which the said mortgagee, his heirs, executors, administrators, or assigns shall bear, sustain, or be put to for taxes, rent, insurance and repairs, and all other costs and charges which may be incurred in and about the execution of any of the trusts in him hereby reposed," —these costs are the first charge on the proceeds.

Expenses that have been allowed.

176. Of the allowances that from time to time have, with more or less success, been claimed as just, we may enumerate some.

(1) The costs and expenses of taking possession of the mortgaged property have been allowed.

(2) So also those of advertising for sale.[18]

(3) Insurance premiums: these are usually specially provided for in the instrument—as in the Short Form clause above quoted. In the absence of such express contract it is not a matter of course to add them to the security[19]—the right to do so being especially doubtful as against subsequent incumbrancers.[20] The onus

[17] Cf. C. R. 57 (3).

[18] *Wilkes* v. *Saunion*, L. R. 7 Ch. D. 188.

[19] *Dobson* v. *Land*, 8 Hare, 216, 14 Jur. 288; *Bellamy* v. *Brickenden*, 2 John & H. 137. But see *Scolefield* v. *Lockwood*, 9 Jur. N. S. 738.

[20] *Brooke* v. *Stone*, 34 L. J. Ch. 251.

Section 176.

then will be on the mortgagee to prove the necessity of effecting insurance, unless the nature of the property be itself evidence thereof.[21]

(4) Repairs:—To be allowed, as of course, these must be "necessary repairs" as distinguished from permanent improvements, sometimes called "substantial repairs."[22]

(5) Rents and fines paid by a mortgagee of leasehold have been allowed.[23]

(6) Costs of taking out administration, where necessary towards realizing the mortgage debt would be allowed: at any rate, it has been held that the mortgagor himself, having paid them, could not take them out of the fund in the mortgagee's hands.[24]

Commission.

(7) Commission to a real estate agent on a sale or lease of the property through him is a proper item to be allowed in a mortgagee's account.[25]

(8) Receiver or bailiff to collect rents: "A mortgagee cannot be paid as a receiver, nor can he generally and universally, when he takes possession, appoint a receiver. But, if the value of the estate be such that great time and trouble must be sacrificed in the receipt of the rents, he may appoint a receiver."[26] These principles "have never been disputed. A mortgagee in

[21] As in *Wilkes* v. *Saunion*, *supra*, where the property was, however, not realty but a ship.

[22] *Tipton Green Coll. Co.* v. *Tipton Moat Coll. Co.*, L. R. 7 Ch. D. 195. See *infra*, paragraphs 177 *et seq.*

[23] *Hamilton* v. *Denny*, 1 Ball & B. 202.

[24] See *Saunders* v. *Dunman*, L. R. 7 Ch. D. 825.

[25] *Wells* v. *Trust & Loan Co.*, 9 O. R. 170.

[26] *Davis* v. *Dendy*, 3 Madd. 170 (Leach V.-C.).

possession, if the nature, situation and circumstances of the property make it a reasonable thing, will be allowed something in respect of the expenses of the person appointed to collect the rents; but in order to justify an allowance of that kind the mortgagee must show special circumstances.'' [27]

(2) *Lasting Improvements.*

177. (1) ***By First Mortgagee.***—It has sometimes been roughly stated that no allowance will be made to the mortgagee for valuable and lasting improvements made by him on the property.[28] But this is by no means an accurate statement of the law. More strictly speaking, such improvements are not allowed as of course, but must, even when of a proper nature, be alleged and proved.[29] How far, and what manner of such improvements are to be allowed, has been dissected out by the court in *Shepard* v. *Jones*.[30] The following is the view therein propounded by Jessel, M.R.: " It is a suit brought by the mortgagor for an account from the mortgagee, who has exercised his power of sale, of the application of the proceeds of that sale and a claim for the balance. If it should turn out that the mortgagee has done something to the property at his own expense which increased its saleable value, I think it is plain, on ordinary principles of justice, that that increase should not go into the pocket of the mortgagor without his paying the

Jessel, M.R., in Shepard v. Jones.

[27] *Stanes* v. *Banks*, 9 Jur. N. S. at p. 1050.
[28] *Murphy* v. *Meade*, 1 Jones. 620.
[29] *Tipton Green* v. *Tipton Moat*. L. R. 7 Chy. D. 195, Jessel. M. R.
[30] L. R. 21 Ch. D. 477.

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sum of money which caused the increase. It distinguishes it from the ordinary case of improvements. The increase may have been an increase which did not come under that denomination, but which increased the selling price. It seems to me that wherever there is a case of that kind, where the mortgagee can prove that the selling price was increased by reason of the outlay, then, to the extent to which that selling price has been so increased, the mortgagor cannot get the benefit of it without paying for the outlay. Of course, the mortgagor could not be made to pay more than the increase; but to that extent, it seems to me, in ordinary justice, the mortgagee is entitled to say, 'You shall not get that increased benefit caused by my outlay without paying for that outlay.' * * * The mortgagee cannot be deprived of that benefit because he did not tell the mortgagor of it [*i.e.*, the improvement]. If, on the other hand, it is an unreasonable one, and produces no advantage, I do not see why the mortgagor should be charged with it because the mortgagee gives him notice of it. He could not prevent it, the mortgagee being in possession." This is, of course, apart from any express contract or any "acquiescence" on the part of the mortgagor.

Conditions of inquiry as to improvements.

178. In the same case, we have a more particular statement by Lord Justice Brett, the effect whereof is: that to justify enquiry as to alleged expenditure upon the property there must be some *prima facie* evidence (1) of expenditure, (2) which has been spent on an improvement, (3) which is a lasting improvement,

(4) and the expenditure for which was a reasonable expenditure. His lordship found that such a work as deepening a well fulfilled these conditions. Sections 178-180.

179. By Lord Justice Cotton,[31] we have limits assigned within which allowance for improvements is confinable. "Undoubtedly a mortgagee has no right as against a mortgagor to improve the mortgagor out of his property. A mortgagor must not be prevented from redeeming by the mortgagee when in possession throwing a great burden upon him." In any event the inquiry is, as to the costs thereof, at the risk of the mortgagee. Limit to improvements.

180. (2) *By Second Mortgagee.*—While we are on the subject of improvements, we may add that, however much or little right a first mortgagee has to "improve" anybody—mortgagor or assign—out of the property, there is in no case a reciprocal right on the part of a second mortgagee to repair the first mortgagee out of his security. "A second mortgagee," says Mr. Justice Fry,[32] "who enters into possession, and does work by way of improvement on the mortgaged land which may result in its protection and the improvement of its value, is not entitled, as against the first mortgagee, to any charge in respect of the money so expended by him. If that were so, we should have, in almost every case of a second mortgagee in possession, an inquiry whether any sum of money laid out in Second mortgagee cannot improve as against first.

[31] *Ib.* 482.
[32] *Landowners* v. *Ashford*, L. R. 16 Ch. D. 433.

Sections 180-182.

permanent improvements by the second mortgagee was not to be deemed salvage. It is admitted that no such case can be produced, and I am not going to make a precedent which I think would be highly inconvenient."[33]

(3) *Profit Charges.*

Not allowed for trouble.

181. There will be no allowance made to a mortgagee for doing in person what, had any other person been employed by him to do it, would have been a proper act in relation to the security, and one for which reasonable charges would have been allowed. Thus he cannot both personally perform and charge for the duties of a receiver or bailiff in collecting the rents.[34] Nor can he, being one of a firm of auctioneers, both employ his firm and pay them their commission.[35] Nor can a mortgagee be allowed a commission for himself except by agreement.[36]

Can mortgagee stipulate for profit charges?

182. Indeed, it is doubtful how far, by express agreement, the mortgagee can, in any instance, secure such advantages to himself. It has been held that a commission for a loan will, in the absence of ignorance, surprise, or oppression, when actually paid, be good as between mortgagor and mortgagee.[37] But, on the other hand, it has been strenuously asserted that, notwithstanding such an agreement, the

[33] As to improvements by lessee, see *Point Breeze Ferry Co.* v. *Bragaw*, (N. J.) 20 Atl. 967.

[34] *Bonithon* v. *Hockmore*, 1 Vern. 316; and see *Carew* v. *Johnston*, 2 Sch. & Lef. 301; *Longstaff* v. *Fenwick*, 10 Ves. 401; *Trunleston* v. *Hamill*, 1 Ball & B. 377.

[35] *Mathison* v. *Clarke*, 18 Jur. 1020.

[36] *Leith* v. *Irvine*, 1 Myl. & R. 277.

[37] *Potter* v. *Edwards*, 26 L. J. Ch. 48; see also *Sayers* v. *Whitfield*, 1 Knapp. 133.

court will not allow a mortgagee more than his principal and interest,[38] that he cannot, under colour of a mortgage, obtain a distinct collateral advantage—a rule which is not dependent, according to Lord Romilly, on the existence of usury laws, but rather on the tenderness of the courts towards the equity of redemption.[39] So, if this be the correct view, all stipulations are void that provide on behalf of a mortgagee for fees and charges for his trouble in personal management.[40] The rule—to whatever extent it goes—equally applies to one who is a member of a firm and employs the same.[41] This matter will again be touched upon in the Chapter on Costs, under the head of solicitor-mortgagees. Sections 182-183.

(D) Rights of Subsequent Incumbrancers.

183. Incidentally throughout this book have been canvassed the rights both of the mortgagor and his various assigns. It is purposed for convenience' sake partly, and also because it is in relation to the proceeds and surplus that he is entitled to have himself reckoned with—here to enumerate some of the peculiarities of the position of a second mortgagee or puisne incumbrancer. That he has a certain claim[42] on that portion or sediment of the proceeds, which becomes the "surplus," is unquestionable, although the technical nature of his claim—

[38] *French* v. *Baron*, 2 Atk. 120.
[39] *Broad* v. *Selfe*, 9 Jur. N. S. 885.
[40] *Comyns* v. *Comyns*, 5 Ir. Eq. 583; *Eyre* v. *Hughes*, L. R. 2 Ch. D. 148.
[41] *Barrett* v. *Hartley*, L. R. 2 Eq. 789; *Nicholson* v. *Tuten*, 3 Kay & J. 159.
[42] His claims are mainly in Equity. See *Maughan* v. *Sharpe*, 10 Jur. N. S. 989, (holding that that is no remedy at law by second mortgagee against first).

Sections 183-184.

whether it be a purely money demand or what, has not been made clear.[42] And where the first mortgagee has improperly retained a surplus in his hands, he will be ordered to pay simple interest thereon unless there are circumstances which would render such an order unjust. The fact that the second mortgagee has been guilty of laches in enforcing his claim is not in itself such a circumstance as would deprive him of interest: *Eley* v. *Read*, 76 L. T. 39.

(1) *Right to Fair Dealing.*

Sale by first mortgagee and mortgagor.

184. The second mortgagee is not to be manoeuvred out of his claim by arrangements between the prior incumbrancer and the mortgagor; as for instance through a sale by the two of them with the object of shutting him out. This is well expressed by Lord Justice Cotton: "Where the first mortgagee, as owner of the property and having control over it, turns the land into money—for the owner of the equity of redemption cannot, without the concurrence of the first mortgagee himself turn the land into money—if he, the mortgagee, does so with knowledge that the money is not going to be applied in a proper manner, he is, in my opinion, as liable for the money as if he had received it under an express obligation to give it to that person properly entitled to it. It is conceded that if he exercises his power of sale as mortgagee, whether under the terms of the mortgage deed or by statute, he is answerable for the money he

[42] See *quaere* in *Green* v. *Hamilton Provident*, 31 U. C. C. P. 574.

Sections 184-186.

) eceives if he pays it to the wrong person, that is to say if he passes over the second mortgagee and pays it to the mortgagor who has no right to receive it."[44] Moreover, the suggestion has been judicially made (but the point was not determined) that, while the release for a nominal consideration of portions of the security of the prior mortgagee would not release the other portions in favor of the mortgagor, or give priority in respect to them to a subsequent incumbrancer, still the first mortgagee may be responsible to the second for the fair value of the parcels conveyed.[45]

Buying in second mortgage.

185. On the other hand, there is no law to prevent the first mortgagee buying up the second at a discount, without disclosing to him the knowledge he has of the probability of a profitable sale.[46] Nor, further, can the second mortgagee exercise a right to consolidate as against a prior incumbrancer selling under power.[47]

Selling subject to first mortgage.

186. Where there was a trust to a second mortgagee to sell, and out of the proceeds to pay the first and second mortgages and pay the balance to the mortgagor, a sale by him subject to the first mortgage was held valid.[48]

(2) *Right to Account.*

Account at instance of second mortgagee.

187. It is clear law that the account to be taken as against the first mortgagee at the

[44] *West London Commercial Bank* v. *Reliance P. Bldg. Soc.*, L. R. 29 Ch. D. 961: see also *Fuller* v. *Langum*, 37 Minn. 74.
[45] *Trust & Loan Co.* v. *Boulton*, 18 Gr. 234; but see *Boone* v. *Clarke*, (Ill.) 21 N. E. 850.
[46] *Dolman* v. *Nokes*, 22 Beav. 402.
[47] See *Merritt* v. *Stephenson*, 6 Gr. 567.
[48] *Manser* v. *Dix*, 3 Jur. N. S. 252.

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instance of the second mortgagee must be taken, in all respects, as though the mortgagor himself were taking it; and that if the mortgagor would have had an equity to exclude any item in the account, that is an equity which can be asserted by the second mortgagee.[49]

Liability of first to second mortgagee for mistakes.

188. Also the mortgagee-vendor is liable to a subsequent incumbrancer for loss caused by his own mistakes or those of his agent. Thus in *Tomlin* v. *Luce*[50] the mortgagee's auctioneer inserted in the particulars of sale a statement as to the condition of the roads on the property; which statement turned out to be incorrect, and the purchaser declined to complete without compensation. Compensation was allowed and the sale was completed. It was held on appeal: firstly, that the first mortgagees were answerable for any loss which was occasioned by the blunder made by their auctioneer at the sale. But, secondly, the amount of compensation given was not to be treated as a sum which, but for their wilful default, they might have received; rather the measure of damages would be according to the value of the misstatement, which would depend upon what would have been given by a purchaser for the property if that misstatement had not been made.

Wilful default.

189. Here it will be proper to state the doctrine of "wilful default," that so materially affects the liabilities of the first mortgagee during sale proceedings. As stated by Jessel,

[49] *Mainland* v. *Upjohn*, L. R. 41 Ch. D. 126; *Melbourne Banking Co.* v. *Brougham*, L. R. 7 App. C. 307.

[50] L. R. 43 Ch. D. 191.

Sections 189-191.

Master of the Rolls,[51] the law stands thus: "Every mortgagee who sells and receives the purchase money is liable for wilful default if he does not receive what he might have received by due diligence. * * It appears to me, therefore, both on principle and authority, that the proper form of account against a mortgagee in possession who has sold is an account of the proceeds of sale received by him, or by his order, or for his use, 'or which without his wilful default might have been so received.'" It does not seem, however, that in taking the account, it is proper to cast on the mortgagee the burden of proving that he made the most of the mortgaged property whilst in possession; in short, wilful default must be proved.[52]

Priorities among puisne incumbrancers.

190. As among themselves subsequent incumbrancers must form a *queue* in the order of their priorities; and when the mortgagee shows inclination to give some claimants an undue advantage, the money may be ordered to be paid into court, and a receiver will be appointed of the proceeds of the property remaining unsold.[53]

(3) *Judgment Creditors.*

Garnishment.

191. The necessity of recognizing the interest of his execution-creditors in the mortgagor's equity has already been dealt with. It remains to add a short note on their rights in regard to the proceeds of sale. Cases shew that the mortgagee-vendor may be restrained by injunction,

[51] *Major* v. *Murray*, 8 Ch. D. 426.
[52] *Metcalf* v. *Campion*, 1 Moll. 238.
[53] Coote, 7th ed. 1160.

Sections 191-193.

at the suit of such creditors, from paying over the surplus of proceeds to the mortgagor, or otherwise applying it in disregard of their rights.[54] It is not so clear how far a garnishee order will affect the surplus; but it seems that the judgment creditors of a puisne incumbrancer, by garnishing the mortgagee-vendor, can, and by garnishing the mortgagor cannot, successfully bind what surplus the vendor holds by time of service.[55]

(E) Surplus.

Mortgagee has no right to surplus.

192. The word "surplus" is sufficiently self-explicit not to need definition, although some writers on mortgage law[56] have not much disturbed themselves to keep its meaning and use apart from those of "proceeds of sale." To the surplus proper the mortgagee has no right. There are cases, it is true, where the title of the mortgagor is extinguished by the possession of the mortgagee. But in such cases the sale should not purport to be under power—there is no proper sale under power, and no surplus.[57] Where the extinction or release of the equity of redemption is incomplete or invalid, the mortgagee must account for the surplus of the proceeds.[58]

Or of retainer.

193. He has not even a right of retainer out of it for payment of debts due to him outside of

[54] *Robinson* v. *Hedger*, 14 Jur. 784; *Thornton* v. *Finch*, 4 Giff. 515.

[55] *Chatterton* v. *Watney*, L. R. 16 Ch. D. 278, 17 Ch. D. 259; see *Wiggin* v. *Heywood*, 118 Mass. 514.

[56] *E. g.* Mr. Jones.

[57] *Chapman* v. *Corpe*, 41 L. T. N. S. 22.

[58] *Rushbrook* v. *Lawrence*, L. R. 5 Ch. 3.

his specialty, so as to give him a priority over the other creditors;[59] although, as against the mortgagor, he might—to avoid circuity of action—be allowed to pay himself. If he persist in holding the surplus, not only may the person entitled thereto force him to disgorge, but he is liable to pay interest on it,[60] although, if under pressure of adverse claims and at the request of a puisne incumbrancer he retains it, interest will not run against him.[61]

Sections 193-194.

Interest on surplus.

194. Payment over of the surplus is usually made on advice of solicitor. That such advice is not always the best, we learn from *Rew* v. *Lane*,[62] where the mortgagee, having, on such advice, paid over to the mortgagor—a debtor of the solicitor—and being considerably damnified by such payment, was held entitled to an action against his interested counsellor. A curious application of the liability of the mortgagee to account for the surplus has likewise been made as against a solicitor. For the latter having acted for both vendor and purchaser, and having the surplus funds in his hands, it was, nevertheless, held that he must, as agent in a fiduciary character, pay them over to the mortgagee; who, of course, had no personal right thereto, but was strictly accountable for the same to the mortgagor, in this case deceased, without kith, kin or claimant.[63]

Payment on advice of solicitor.

[59] *Talbot* v. *Frere*, L. R. 9 Ch. D. 568.

[60] *Charles* v. *Jones*, L. R. 35 Ch. D. 544; *Smith* v. *Pilkington*, 1 DeG. F. & J. 120.

[61] *Mathison* v. *Clarke*, 25 L. J. Ch. 29.

[62] 3 Jur. N. S. 125.

[63] *Re Bell*, L. R. 34 Ch. D. 462, citing *Burdick* v. *Garrick*, L. R. 5 Ch. 233.

Sections 195-196.

To whom surplus payable.

195. The proper recipient of the surplus is usually designated in the deed of mortgage, or is implied by statute. Thus, the Short Form Act says, pay to "the said mortgagor, his executors, administrators or assigns, or as he shall direct and appoint." The second part of chapter 10, Edw. VII., c. 51, more lucidly provides for—what in any case is the proper application—payment of the residue to the subsequent incumbrancers according to their priorities.[64] In our country such incumbrancers are those disclosed by the preliminary searches of the vendor under power, and, of course, any others who may notify and prove their claims to him.[65]

When to owner of equity.

195a. Failing subsequent incumbrancers known to him, the mortgagee may pay over the surplus to the person entitled to the property, subject to the charge under which sale was had.[66] Payment may have to be made to the mortgagor—to a subsequent purchaser—or to an assignee in insolvency,[67] as the case may be. Where the party entitled has died, payment, in Ontario, would be made to his personal representative.[68] In any event, in the absence of notice to the contrary, the mortgagee is entitled to pay over the surplus to the apparent owner of the equity of redemption.[69]

Payment into court.

196. Where there are claims, the mortgagee may require proof thereof; and should the same

[64] 10 Edw. VII. c. 51, s. 22, and see *infra* paragraph 196 for the usual practice.

[65] Cf. Jones, 5th ed., 1929, 1930.

[66] Cf. R. S. O. 1 Geo. V. c. 25, s. 50.

[67] *Calloway* v. *Peoples*, 54 Ga. 441.

[68] The English rule would seem the same in *Re Grange, Chadwick* v. *Grange* [1907] 2 Ch. 20.

[69] *Harper* v. *Culvert*, 5 O. R. 152.

be refused, or not be sufficiently convincing to make payment safe, it is the practice in Ontario to pay the money into court. This practice seems convenient rather than authenticated by decisions. In *Re Kingsland,*[70] *trustees* who were also mortgagees, having required and not gotten what the court deemed reasonable proof, were held entitled to pay into court under the Imperial Trustee Relief Act.[71] On the other hand, it was thought, in *Western Canada* v. *Court,*[72] that a mortgage was not such an express trust as to come within the meaning of the Trustee Relief Act, so as to enable the mortgagee to pay the surplus into court under that Act; and that his proper course was by interpleader.[73] Sections 196-198.

197. It was decided in *Biggs* v. *Freehold Loan and Savings Company,* 26 A. R. 232, that where a sale is effected under the Short Forms Act, the mortgagee becomes an express trustee of the proceeds of the sale, and the mortgagor is entitled to bring an action against him for an account, notwithstanding the expiration of six years from the time of sale, the Trustee Act not applying. Up to the date of this decision the surplus moneys were looked upon as moneys had and received to the use of another and not trust moneys: *Vide Boulton* v. *Rolwand,* 4 O. R. 720. Statute of Limitations applied to surplus.

(F) Dower in Surplus.

198. *Pratt* v. *Bunnell*[74]: As Mr. Justice Street has here been at some pains in dissecting Meaning of Dower Acts.

[70] 8 P. R. 77.
[71] 10 & 11 Vict. c. 96; see R. S. O. 1897, c. 51, s. 28.
[72] 25 Gr. 151; cf. *Bleeker* v. *Graham,* 2 Edw. (N. Y.) 647.
[73] But see article by A. H. Marsh, Q.C., in C. L. T. Vol. V. p. 63.
[74] 21 O. R. 1, citing a considerable number of adverse decisions.

Section 100.

the law concerning the interest taken in the proceeds or surplus by the wife of the mortgagor, it will be useful to give a portion of his decision. The learned judge, after quoting and analysing the 9 Edw. VII., c. 39, sec. 10, says: "The meaning of this section may, perhaps, most readily be appreciated by a practical illustration. Suppose a farm of one hundred acres, worth $10 an acre, to be subject to a mortgage from a husband, upon which is due for principal, interest, and costs, $800, and that his wife has joined to bar her dower:

"If the mortgagee forecloses the mortgage, the wife loses her dower absolutely, and has no recourse against any one for it.

"If the mortgagee sells eighty acres, and thus satisfies his mortgage, the wife loses her dower in the eighty acres; the remaining twenty acres is reconveyed to her husband, and she has her dower in it; but dower in twenty acres, not one hundred acres.

"If the mortgagee sells the whole one hundred acres, his mortgage money is paid in full, and he has a surplus of $200; this is the case provided for specially by the 10th section. That section directs that, in such a case, the widow shall be entitled to dower in this surplus—not in the whole value of the land to be paid out of this surplus—to the same extent as she would have been entitled to dower in the land from which the surplus was derived, if it had not been sold.

"To apply this to the case I have put, the widow is entitled to dower in the $200 surplus to the same extent as she would have been entitled

to dower in the twenty acres from which the surplus was derived, if it had not been sold. Section 198.

* * * * *

"I am of opinion, for the reasons I have given, that one-third of any surplus arising from the sale of the mortgaged premises here should be paid into court to the credit of this cause, and should remain there during the joint lives of Mr. and Mrs. B. (mortgagor and wife), to secure her dower, the interest meantime being paid out to the defendant G. (assignee in insolvency), in trust for B.'s creditors, and that after the death of B., in case his wife survives, the interest should be paid to her during her life, subject to which the principal should be declared the property of G. in trust for the creditors." [75] Mode of application of surplus.

[75] See also Jones, 5th ed. 1913, for different effects of death of husband, (1) before sale, and (2) after sale, but before distribution of surplus; it appearing that, in the former case, she takes, and not in the latter; citing *Chaffee* v. *Franklin*, 11 R. I. 578.

CHAPTER X.

REMEDIES OF OWNER OF EQUITY.

(A) Injunction.[1]

Section 199.

Injunction not a matter of course.

199. It is very far from being a matter of course to obtain an injunction against the mortgagee's proceeding to sell. So long as it is not quite clear that he is acting *male fide* or fraudulently,[2] or outside the scope of the power,[3] the court has no jurisdiction to restrain him from its exercise.[4] Where, on the other hand, it is distinctly made out that he is attempting to pervert the power from its legitimate purpose and to use it for the oppression of the mortgagor, he will be enjoined its use;[5] but it is not sufficient to show that the exercise of some other remedy of the mortgagee would be more beneficial to the party complaining.[6] The distinctions are to be noted that a much stronger case is required to restrain a mortgagee than a trustee,[7] and a much stronger case to restrain proceedings to sell than to set aside the sale.[8]

Insufficient grounds for injunction.

200. *Insufficient Grounds.*—To show the strength of case required, there may here be

[1] For forms of decrees of injunction in such cases see Seton, 4th ed. Vol. I., 287; 5th ed. Vol. I., 621.

[2] It is only where the mortgagee is guilty of some fraud in the execution of the power that he can actually execute it, and at the same time violate his duty. *Reynolds* v. *Hennessey*, 8 Atl. 715.

[3] *Holland* v. *Citizens*. (U. S.) 19 Atl. 694.

[4] *Jenkins* v. *Jones*, 2 Giff. 99; *Harding* v. *Pingey*, 10 Jur. N. S. 872.

[5] *Davey* v. *Durrant*, 1 DeG. & J. 535.

[6] *Beddell* v. *McClellan*, 11 How. 172.

[7] Anon., 6 Madd. 10.

[8] Jones, 4th ed. 1801.

enumerated some of the circumstances that have not been considered of sufficient moment to secure an injunction. Section 200.

(1) Scarcity of money,[9] business depression, and bad weather,[10] though these certainly go to the price at the auction, are no grounds for enjoining the sale.

(2) The insolvency of the trustee—where the mortgage is in the form of a trust deed—will not, in the absence of danger shewn of misapplication of funds, be of itself sufficient;[11] but the court may, according to the American practice, associate a referee or master with him to insure a fair sale,[12] or take security from him.[13]

(3) It is not enough that the vendor purports to sell more than he validly can under the power—thereby clouding the title of that which he has no right to sell; for the mortgagee cannot actually sell more than belongs to him.[14]

(4) Lack of notice of intention to sell—when notice should be given—is not, *per se*, good material for injunction; for it is open to the mortgagor to afterwards set aside the sale, which is thus, in the absence of non-inquiry clause, at the risk of the purchaser.[15] But where the mortgagee assumed certain trusts as receiver, which were to be terminable upon notice, he was restrained from sale until he should give notice;[16]

[9] *Muller* v. *Bayley*, 211 Gratt. (Va.) 521.
[10] *Caperton* v. *Landcraft*, 3 W. Va. 540.
[11] *Tooke* v. *Newman*, 75 Ill. 215.
[12] *Van Bergen* v. *Demarest*, 4 Johns (N. Y.) 37.
[13] *Terry* v. *Fitzgerald*, 32 Gratt. (Va.) 843.
[14] *Armstrong* v. *Sanford*, 7 Minn. 49.
[15] *Pritchard* v. *Wilson*, 10 Jur. N. S. 330; but see *Gibbons* v. *McDougall*, 26 Gr. 214.
[16] *Gill* v. *Newton*, 12 Jur. N. S. 220.

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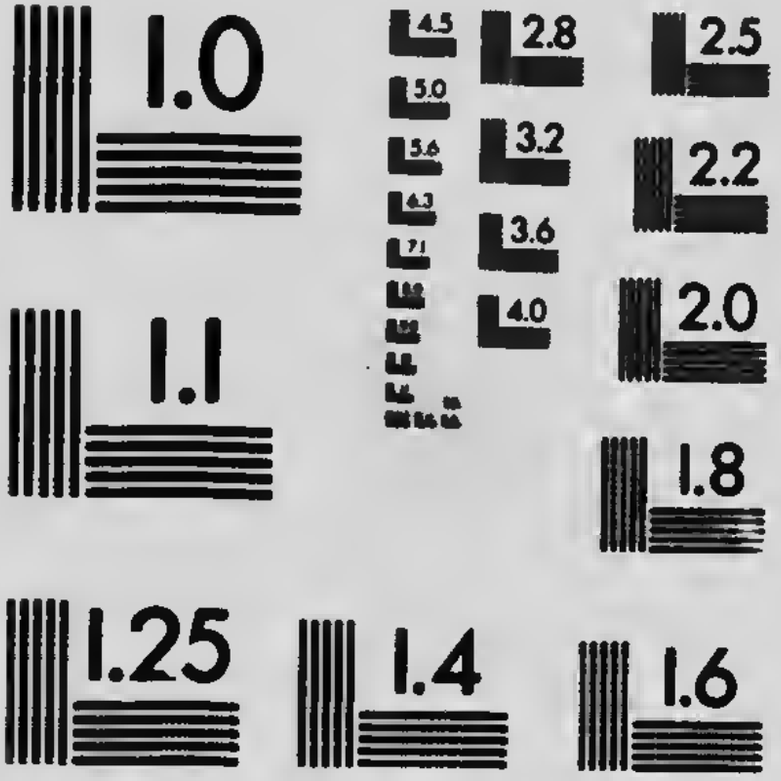

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Sections 200-202.

the distinction being, that in the latter case the power was suspended and in abeyance until notice; while ordinarily the power is perfectly operative although notice may be essential to the subsequent validity of the sale.

(5) The sale will not be stopped to permit a set-off by the mortgagor.[17]

Sale by first mortgagee at request of mortgagor.

201. A second mortgagee has no redress by injunction against a prior incumbrancer selling at the request of the mortgagor, who from the complicated state of the subsequent title cannot himself sell the property, and invites the first mortgagee to do so. For it has been said that "a man taking merely that which belongs to him, by means of the security which he has contracted for, does not act improperly in so doing, merely because one principal reason for his calling in the money is a wish to benefit another person." The case, however, might be different if it were part of the arrangement that the mortgage-debt should be again lent to the purchaser.[18]

Injury must be irreparable.

202. Generally speaking, an injunction will not be granted unless it be shown that the injury likely to be sustained by the parties complaining will be irreparable;[19] and will not be granted where the conduct of the plaintiff is tinged with unfairness.[20] It is not sufficient, either, to merely assert that the sale will materially embarrass the plaintiff or that he does not owe the money; but he must show how he will be embar-

[17] *Frieze* v. *Chapin*, 2 R. I. 429.

[18] Dart. V. & P. 7th ed. 83; cf. *Woodward* v. *Jewell*, 11 Sup. Ct. Rep. (U. S.) 784; *Taylor* v. *Von Schrœder* (Mo.) 16 S. W. 675.

[19] *Kershaw* v. *Kalow*, 1 Jur. N. S. 974.

[20] *Ferrand* v. *Clay*, 1 Jur. 265.

rassed,[21] and how it is he does not owe the money.[22] Sections 202-203.

203. *Good Grounds*:—(1) It seems that where a mortgage is void from its inception, from fraud, which is alleged and proved, an injunction will lie.[23] But application for the same must be by the mortgagor himself, although the holder of the mortgage took with knowledge of the fraud and at a discount. And however allowable it may be to enjoin the exercise of a mortgage that is void *ab initio*, there is no right to an injunction staying sale until an alleged error in a valid mortgage shall be corrected.[24] Good grounds for injunction.

(2) Unconscionable conduct on the part of the mortgagee may sometimes be good ground for a restraining order. As where the mortgagee is improperly attempting to collect a penalty under colour of the mortgage;[25] or where he acted as solicitor to the mortgagor, and the latter went on his advice;[26] or where he is attempting to use the power of sale in the mortgage for some quite collateral purpose,[27] or as a fulcrum to get an advantage on another mortgage,—he will be restrained because the scope of the power in the first mortgage only includes the realizing of the debt thereby secured.[28]

[21] *Montgomery* v. *McEwen*, 9 Minn. 103.
[22] *Vaughan* v. *Marable*, 64 Ala. 60.
[23] *Southampton Boat Co.* v. *Muntz*, 12 W. R. 330.
[24] Jones, 5th ed. 1807, 1811, see also 1813.
[25] *Bidwell* v. *Whitney*, 4 Minn. 76.
[26] *McLeod* v. *Jones*, L. R. 24 Ch. D. 289.
[27] *Robertson* v. *Norris*, 4 Jur. N. S. 155, 443. But not where such purpose is merely incidental, *Holland* v. *Citizens*, 9 Atl. 654.
[28] *Whitworth* v. *Rhodes*, 20 L. J. N. S. 105.

Sections 203-204.

(3) The best ground for injunction is payment or tender of payment [29] of the whole debt due.[30] It is not enough to have paid or tendered principal alone,[31] or principal and interest without costs,[32] or for the counsel moving for injunction to undertake to make tender.[33]

(4) Where special circumstances are alleged and proved which make an injunction necessary to the ends of justice, it will lie.[34]

(5) It will also lie against "further proceedings" if taken in contravention of 10 Edw. VII., c. 51, s. 28.[35]

When to be applied for.

204. The injunction should be bespoken, if at all, before the completion of purchase, that the rights of a purchaser may not intervene.[36] It is most commonly in suits to redeem that they are applied for, but it is doubtful whether the pendency of a redemption action is alone sufficient ground for restraining sale.[37] On the other hand, after tender of payment refused, a suit to redeem would, it seems, be proper material for an application for injunction until the suit could be heard;[38] but a mere offer, without actual tender, is as nothing.[39] Again, where the sum due is not ascertained, and there is a dispute as

[29] *Sloan* v. *Coolbaugh*, 10 Iowa 31; *quære*, is tender sufficient when other conditions are broken? *Roberts* v. *Loyola*, (Md.) 21 Atl. 684.

[30] *Green* v. *Engleman*, 37 Mich. 460.

[31] *Powell* v. *Hopkins*, 38 Ind. 1.

[32] See *supra*, Chap. III.

[33] *Paynter* v. *Carew*, 18 Jur. 417.

[34] *Ex p rte Fell*, 29 W. R. 881.

[35] *Smith* v. *Brown*, 20 O. R. 165.

[36] *Boulter* v. *Mutual Loan*, [1869] W. N. 80.

[37] *Adams* v. *Scott*, 7 W. R. 213; see, however, *Rhodes* v. *Buckland*, 16 Beav. 212, and *Commercial Bank* v. *Bank of Upper Canada*, 1 Chy. Cham. 64.

[38] Jones, 5th ed. 1797.

[39] *Matthie* v. *Edwards*, 11 Jur. 761.

to the equities of the parties, or as to the existence of a breach of a condition of the mortgage, an injunction may lie until these matters are settled.[40]

Conditions of granting injunction.

205. The courts, moreover, take a convenient precaution against vexatious restraints on the mortgagee's use of his remedy by sale. Thus, in *Jones* v. *Matthie,*[41] we find it stated: "If the power is exercised for fraudulent purposes, this court will interfere, and, as in other cases, *if the party actually deposits in court the amount due, it will not allow the power to be exercised at all.*" The general rule as to this deposit, is that the sale will be restrained only on payment into court by the mortgagor of the amount *which the mortgagee swears to be due him;* which rule does not apply where the court can see from the terms of the deed that this amount cannot be due on the security.[42] Nor does this rule apply where the relation of client and solicitor exists between the parties, in which condition the court will look at the circumstances of the case and make such order as will save the mortgagor from oppression, without injuring the security of the mortgagee. *McLeod* v. *Jones* [43] was such a case, and an injunction was therein granted, conditioned on the plaintiff paying in such sum of money as the court considered would cover the amount actually advanced.

Interlocutory.

206. The injunction, where the court thinks fit, may be interlocutory in its nature. Thus, in

[40] *More* v. *Calkins,* (Cal.) 24 P. 729; *O'Brien* v. *Oswald* (Minn.) 47 N. W. 316.
[41] *Jones* v. *Matthie,* 11 Jur. 504.
[42] *Hickson* v. *Darlow,* L. R. 23 Ch. D. 690.
[43] L. R. 24 Ch. D. 289.

Sections 206-207.

Merest v. *Murray*,[44] it was granted until the defendant should put in an answer. In *Rhodes* v. *Buckland*,[45] it was, in view of the facts, granted to restrain the mortgagee from selling and parting with the legal estate and title deeds pending a suit to redeem. In the latter case, Lord Romilly thus expressed himself: "I am of opinion that, under the circumstances of the case, the principle of protection of the property pending litigation ought to be applied, so as to induce me to restrain any dealing with the legal estate until I can determine the right. It is obvious that, if this be allowed (*i.e.*, the conduct to be enjoined), any first mortgagee, by collusion with the mortgagor * * * might wholly defeat the rights and title of any puisne incumbrancer. I cannot, therefore, in this state of the case, refuse to protect the property until I see to whom it belongs."

Ex parte.

207. Such an injunction may even be granted *ex parte*, as in our own case of *Commercial Bank* v. *Bank of Upper Canada*,[46] where, pending an appeal from the Court of Chancery, the mortgagee was restrained from sale on an *ex parte* motion, but with liberty to move at any time to dissolve the injunction.[47] Where an injunction has been wrongfully obtained the mortgagee will have a right to relief for the damages and costs sustained by him through such injunction.[48]

[44] 14 L. J. N. S. 321.
[45] 16 Beav. 212.
[46] 1 Chy. Cham. 64.
[47] For effect of collusive abandonment of injunction, see *Mapps* v. *Sharpe*, 32 Ill. 13.
[48] *Aldrich* v. *Reynolds*, 1 Barb. (N. Y.) Ch. 37.

(B) Actions to Redeem, Set Aside Sale, and for Account.

Sections 208-209.

Actions to redeem, etc.

208. The standard remedies of the owner of the equity are, before sale, an action to redeem; after sale, an action to set aside and for redemption; and along with these, in either case, their necessary handmaid, the right to an account. Where a sale has been had, and is being impeached, there is no presumption in favor of everything being done properly, but the purchaser or those claiming under him must (in the absence of non-inquiry clause) show a due exercise of the power.[49] The degree of misconduct that will serve to upset a sale has been put into an epigram by Mr. Bigelow in his book on Fraud, as follows: A sale under power will be set aside upon *proof of the slightest fraud* or unfair conduct, but not, as sometimes stated,[50] upon the *slightest proof of fraud* or unfair conduct.[51]

Grounds for setting aside sale.

209. Anything that would be ground for an injunction before sale may be sufficient subsequently to set aside a sale; while many irregularities that would not be material on which to apply for a restraining order will here suffice. Thus neglect to give notice, or even irregularities in its contents and mode of service may invalidate the sale.[52] This is especially the case where the purchaser was aware of the irregularities; for otherwise, though generally he is bound to inquire, yet the courts are unwilling, on the

[49] *Bartlett* v. *Jull*, 28 Gr. 140.
[50] Citing *Longwith* v. *Butler*, 3 Gilm. 42.
[51] Ed. of 1888, p. 349.
[52] Cf. *Drinan* v. *Nichols*, 115 Mass. 353.

Sections 209-210.

ground of technical defects in the proceedings, to take his bargain from a bona fide purchaser.

Right to redeem, is it absolute?

210. In general, as regards dealings between the mortgagor and mortgagee, the right of the former to redeem is a very pronounced and decided right, and one that he cannot be deprived of, by such dealings, unless carried on in a full spirit of fairness without undue pressure, influence, or concealment.[53] But it is much more difficult to state the law where an innocent purchaser has intervened. It is, indeed, a moot point whether the courts have, in any instance, a discretionary power to allow or disallow anyone to redeem when strictly entitled so to do. On this matter the judges were evenly divided in our case of *Simpson* v. *Smith*,[54] and the doubt has not ceased to abide with us, unless it be that Mr. Chancellor Boyd has driven it forth by his decision in *Martin* v. *Miles*,[55] wherein he says: "Now an equity of redemption is an estate in the land, and in all cases where the right to redeem has not been barred by the Statute of Limitations, it exists as a right and an estate over which the Court has no discretionary power. The law of England is that which by legislation has been adopted in this province, touching the limitation of the right to redeem. One will search the English books in vain to find anything upholding the view that the court exercises discretionary power in granting redemption to a person interested in the equity of redemption."[56]

[53] *Ingalls* v. *McLaurin*, 11 O. R. 380.
[54] 1 E. & A. 9.
[55] 5 O. R. 404.
[56] Citing *Pearce* v. *Morris*, L. R. 5 Ch. App. 230; *Faulds* v. *Harper*, 2 O. R. 411.

Discretion as to redemption after sale

211. Now, whether an equity of redemption is in effect merely the court's opinion that it is equitable in the particular case to permit redemption; or whether its being an estate in the land makes it something outside of the discretion of the court, as would seem to be the effect of the above decision; or whether that decision is not meant to apply to cases where the rights of a purchaser have intervened—this is matter of fine theory for the main part; and the practice has been to exercise a discretion, in Ontario,—either by limiting the right to redeem by conditions favorable to the *bona fide* purchaser or by altogether remitting the mortgagor to some other remedy. Thus, in *Carroll* v. *Robertson*,[57] it was appointed as a condition of relief against the purchaser, the sale being irregular, that he should be allowed for all improvements made under the belief that he was absolute owner as far as they enhanced the value of the property—he being, at any rate, in a better position as regards improvements than a mortgagee as to improvements made by him *qua* mortgagee.[58] By statute, a person making lasting improvements on land under the belief that the land is his own is entitled to a lien upon the same to the extent of the amount by which the value of the land is thereby enhanced, or, in the discretion of the court, may be allowed to retain the land, making compensation to the true owner.[59]

Refusal to set aside where *bona fide* purchaser.

212. *Dufresne* v. *Dufresne*,[60] is a case where the land was, by collusion between the mortgagee, the wife of a demented mortgagor, and

[57] 15 Grant 173.
[58] See *Metters* v. *Brown*, 9 Jur. N. S. 958.
[59] 1 Geo. V. c. 25, s. 33.
[60] 11 O. R. 773; cf. *Encking* v. *Simmons*, 28 Wis. 272.

Sections 213-214.

her sister, conveyed to that sister at a gross undervalue; but it being subsequently sold to a *bona fide* purchaser for value without notice, the court, being moved by a friend of the lunatic, declined to set aside the sale, but directed an account of the proceeds against the wife.

Action for damages for irregular sale.

213. There seems to be little question that an action for damages will lie for unreasonable exercise of,[61] or wrongful and irregular [62] proceedings under power of sale,[63] and a mortgagee is chargeable with the full value of the mortgaged property sold, if from want of due care and diligence it has been sold at an undervalue: *National Bank of Australasia* v. *United Hand-in-Hand, etc., Co.*, 4 A. C. 391. Moreover, an action of account may be maintained against a mortgagee who, under colour of sale proceedings, extorts disproportionate costs before he will consent to stay the sale.[64]

Effect of invalid sale.

214. In all cases where a sale is invalid through irregularity, it operates nevertheless to the extent of the purchase money, as an assignment of the mortgage and all the mortgagee's rights,[65] whether to the moneys secured,[66] or to the time (if any) run under the Statute of Limitations,[67] or generally of any other rights, interests, or remedies.

[61] *Massey* v. *Sladen*, L. R. 4 Exc. 23; *Moore* v. *Shelley*, 8 App. C. 285.

[62] On a mere irregularity, without *mala fides*, an action in tort will not lie; cf. *Rose* v. *Page*, (Mich.) 46 N. W. 227.

[63] See *Edmonds* v. *Hamilton Provident*, 19 O. R. 677 (reversed 18 A. R. 347; *Hoole* v. *Smith*, L. R. 17 Ch. D. 434: as to damages for sale without notice C. L. T. vol. V. p. 7 (article by A. H. Marsh, Q. C.).

[64] *Close* v. *Phipps*, 7 Man. & Gr. 586; *Fraser* v. *Pendlebury*, 10 W. R. 104.

[65] *Reynolds* v. *Hennessy*, 8 Atl. 715; *Baldwin* v. *Howell*, 15 Atl. 236.

[66] *Burns* v. *Thayer*, 115 Mass. 89.

[67] *Bright* v. *Murray*, 1 O. R. 172.

CHAPTER XI.

Costs.

Sections 215-216.

General rule.

215. It is a general rule that the mortgagee is entitled to add to his security—and, therefore, to deduct from the proceeds of his sale—all expenses properly incurred by him in relation to the mortgage debt, or the premises that secure it. Certain of these expenses have already been considered in the chapter on the Proceeds of Sale, but certain others—commonly known as "costs"—may here profitably be discussed; being disbursements by the vendor for such acts as a mortgagee selling under power, or otherwise asserting his rights, usually performs through his solicitor.

Nature of right to add costs to security.

216. The exact nature of this right to expenses is admirably set forth in *Re Sneyd.*[1] "No doubt," said Lord Justice Cotton, in that case, "No doubt, if the debtor, in his character of mortgagor, claimed to redeem the mortgage, the court would not grant him that which originally was an indulgence, a departure from the strict tenor of his legal right, without imposing upon him the condition of paying the mortgagee, not only the debt which he had contracted to pay by his covenant, but any expenses which had been properly incurred by the mortgagee in her position as such. But that is an entirely different thing from saying that an action of debt could be maintained by the mortgagee against the mortgagor for those expenses. It is said

[1] Or *ex parte Fewings*, L. R. 25 Ch. D. 338.

Sections 216-217.

that the mortgagee's right in a redemption action is founded on an implied contract by the mortgagor to pay these costs, but I am of opinion there is no such contract, but as a condition of redemption that a Court of Equity imposes on the mortgagor the terms of paying all costs properly incurred by the mortgagee for the purpose of protecting the estate or himself as mortgagee."

Costs of sale proceedings.

217. (1) *Costs of Sale Proceedings.*—Expenses reasonably incurred in exercising the power, as for advertising the sale, for solicitor's charges in preparing the various steps of the proceedings,[2] and for counsel fees advising on those steps[3]—these costs are usually made a first charge on the proceeds, even before the principal and interest.[4] While it is true that the mortgagee or his solicitor will not be entitled to charge for improper or futile proceedings in connection with the sale, as by serving notice in such a manner as not to bind the parties entitled thereto; yet where there is such reasonable doubt of the invalidity of the proceeding as to make it a matter of discretion whether or not it shall be taken — in such case the solicitor will not be deprived of his costs.[5]

(2) *Costs of Abortive Sale.*—The mortgagee may either, where the action is to redeem, add the costs of an abortive sale to his debt, or, after sale, may deduct the same from the proceeds in hand.[6]

[2] *Marsh* v. *Morton*, 75 Ill. 621.
[3] *Allen* v. *Robbins*, 7 R. I. 33.
[4] Cf. Short Form Act and 10 Edw. VII. c. 51, s. 22.
[5] *O'Donohue* v. *Whitty*, 2 O. R. 424 (per Boyd, C.)
[6] See *Farrer* v. *Lacy & Co.*, L. R. 31 Ch. D. 42; also *Corcellis* v. *Patman*, 4 Eq. 156.

218. (3) *Preparation of Mortgage, etc.*—Certain costs preliminary to the mortgage may or may not be allowed, according to the apparent understanding between the parties. Thus, as to the preparation of the mortgage deed, if the mortgagee be at the expense of paying a solicitor to prepare it, he will generally be allowed those costs,[7] as well as for the fees of counsel to whom the solicitor may submit the deed.[8] Where, however, a mortgagee, being also a solicitor, acted for the mortgagor in preparing the mortgage, he was not allowed to add the costs into his security, they being deemed mortgagor's and not mortgagee's costs.[9]

219. Again, to add to the security the costs of the investigation of title prior to a loan, is by no means a matter of course. For while, if the borrower purports to be offering as security an estate in fee simple, or other certain estate, it is doubtless within the right of the intending mortgagee to prove that title by investigation; yet, if the agreement is merely to mortgage his estate and interest in the property, then such investigation must be at the risk and cost of the mortgagee.[10] Well-advised lenders do not burden their security with such preliminary expenses, but rather deduct from the first advance of money the costs both of searching and clearing up the title, and of preparing and registering the mortgage. Moreover, it is common with Loan Companies in Ontario, either to require a

[7] *National* v. *Games*, L. R. 31 Ch. D. 592.
[8] *Nicholson* v. *Joyes*, 22 L. J. Ch. 833.
[9] *Gregg* v. *Slater*, 22 Beav. 314.
[10] *National* v. *Games*, L. R. 31 Ch. D. 592.

Sections 219-220.

deposit to cover these expenses, or to have in the forms of application for loan a condition providing for deducting the same from the first advance.

Cost of legal correspondence.

220. (4) *Costs in relation to the Debt.*—Where, to collect the debt from the mortgagor, proceedings are taken, the costs of these are to be allowed. "If a proceeding is taken to enforce the contract against the mortgagor, those costs, if properly incurred, come within the rule, being costs properly incurred in attempting to enforce the rights given by the mortgage contract. The costs of the correspondence with the mortgagor stand on the same footing."[10] Nor need such costs pertain particularly to the premises charged; for instance the costs of correspondence with a surety who had given a promissory note for part of the debt, have been allowed—being expenses incurred not, it is true, in relation to the mortgage security, yet in relation to the mortgage debt.[11] Again, where expenses were incurred in trying to disencumber lands held under collateral mortgage, they were added to the main security.[12] As also would be the costs of a mortgagee having himself appointed administrator to the mortgagor's estate, where he was the principal creditor.[13] For the governing rule, as expressed in Ellison v. Wright,[14] is that the mortgagee is entitled to be allowed in account against the mortgagor, all

[11] *National* v. *Games*, L. R. 31 Ch. D. 592.
[12] *Wells* v. *Trust & Loan Co.*, 9 O. R. 170.
[13] *Ramsden* v. *Langley*, 2 Vern. 536.
[14] 3 Russ. 458.

expenses properly incurred for the recovery of the mortgage money.

Resisting action at request of mortgagor.

221. (5) *Costs in relation to the Property or Security.*—All reasonable expenditure for proceedings taken to protect the security may fairly be added to that security. Thus, where the mortgagor's solicitor had—unknown to the mortgagee—a lien on the deeds of his client, the mortgagee, being forced to pay the costs of resisting that lien, was held entitled to add them to his security.[15] Where, also, the mortgagee resisted an action, at the instance of the mortgagor, he was allowed costs, as against the mortgagor's puisne incumbrancers.[16]

222. (6) *Costs of Successful Litigation.*—Where litigation is entered on by the mortgagee, and results in a gain to the property or security, he is allowed the costs of such litigation, although he may have gone to great expense in the matter; as was held in one case where heavy charges were incurred in defending the estate against an alleged entail.[17] Successful appeals from adverse decisions entitle the mortgagee to add to his security the costs of the litigation.[18]

No costs unless litigation succeeds.

223. (7) *Costs of Unsuccessful Litigation.*—The rule, as acted upon in our case of *Wells* v. *Trust & Loan Co.*,[19] is that a 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

[15] *Pelly* v. *Wathan*, 7 Hare 351.
[16] *Barry* v. *Stawell*, 1 Dr. & War. 618.
[17] *Ramsden* v. *Langley*, 2 Vern. 536.
[18] *Addison* v. *Cox*, L. R. 8 Ch. 76; *Henry* v. *Ryan*, 1 Knapp, 388.
[19] 9 O. R. 170.

Sections 223-224.

of the mortgagor. Where, however—as we may infer from the same case—the litigation has resulted in a partial benefit to the estate, and the beneficial proceedings can be separated from the rest, the costs of the former will be allowed. This rule as to unsuccessful litigation finds a frequent application in cases where, after a sale held under power, an action for specific performance has failed against the purchaser.[20]

(8) *Costs unnecessarily onerous.*—Even where the proceedings are in themselves of a proper nature, they must not be conducted in an unnecessarily expensive manner, as, for instance, by executing several powers of attorney where one would do.[21]

If balance in favor of mortgagee, costs to him.

224. (9) *Costs in Action to Redeem.*—"The general rule is that a mortgagor coming to redeem pays costs when, upon taking accounts, a balance is found in favor of the mortgagee."[22] Or, as enunciated in *Loftus* v. *Swift*,[23] "A mortgagee is always considered as entitled to costs, unless there be something of positive misconduct." Merely extending his claim beyond what the court finally decides that he is entitled to, is no ground for refusing him his costs.[24] This rule has been drawn to a fine wire in *Little* v. *Brunker*,[22] where the mortgagee claimed $905.00, was allowed $1.32, and yet was held entitled to the benefit of the rule.

[20] *Peers* v. *Cecley*, 15 Beav. 208.
[21] *Goodhue* v. *Carter*, 1 Chy. Cham. 13.
[22] *Little* v. *Brunker*, 28 Gr. 191.
[23] Sch. & Lef. 642. See also *Gammon* v. *Stone*, 1 Ves. 339.
[24] See also *Norton* v. *Cooper*, 5 DeG. M. & G. 728; *Kinnaird* v. *Trollope*, L. R. 42 Ch. D. 610; *Re Watts*, L. R. 22 Ch. D. 5.

When against him.

225. "It is only in a rare case that costs ought to be given against a mortgagee who brings forward a case which is fairly open to argument."[25] But "he shall not onerate his pledge with costs which he occasions by an unjust defence."[26] He may be deprived of, or even compelled to pay costs occasioned by his unsuccessfully or improperly resisting the right of the opposite party to redeem.[27] Thus, in the old case of *Baker* v. *Wind*,[28] costs were given against the mortgagee by Lord Hardwicke, who remarked: "This is the strongest case that ever came before me, for the decreeing a redemption, where that redemption was controverted; and also to make the mortgagee, who opposed it, not only lose but pay costs; there being such a series of transactions in which it was constantly admitted to be redeemable, as it clearly was."

Tender or payment.

226. So where there was a tender, with an appropriation of money for purposes of tender, and the same was refused, costs were given against the mortgagee.[29] And, generally, any improper or fraudulent conduct of the mortgagee, when overpaid, is sufficient to cast him in costs.[30] The rule is still so far in favor of the mortgagee that the Court of Appeal in England has been held to have no jurisdiction to entertain an appeal against an order allowing costs to a

[25] Stirling, J., in *Bird* v. *Wenn*, L. R. 33 Ch. D. 219.
[26] *Mocatta* v. *Murgatroyd*, 1 P. W. 395. See also *Trecothick's Case*, 2 Ves. & B. 181.
[27] *Lennaird* v. *Trollope*, supra. See also *Tomlinson* v. *Gregg*, 15 W. R. 51.
[28] 1 Ves. (Sen.) 160, (1748).
[29] See *Detillin* v. *Gale*, 7 Ves. 583.
[30] *Archdeacon* v. *Bowes*, McClel. 149; *Morony* v. *O'Dea*, 1 Ball & B. 109; *Snagg* v. *Frizell*, 3 J. & L. 353; *Powell* v. *Trotter*, 1 Dr. & Sm. 388.

Sections 226-228.

mortgagee, notwithstanding charges of misconduct. But an appeal does lie if the mortgagee has been deprived of his costs on the ground of misconduct.[31]

227. (10) *Costs in Action for Account after Sale.—Boulton* v. *Rowland,* which seems to be law in Ontario, is to the effect that where the mortgagee sold under power, and the mortgagor afterwards brought action against him for account and payment over of the surplus, and on taking the account a balance was found due the mortgagor, he was entitled to his full costs of suit as against the mortgagee. "The case seems to be the case of the defendant having received money to the use of the plaintiff, and being sued for that money."[32] Where the balance is found to be against the mortgagor, of course the rule would be in favor of the mortgagee, as above stated; so the onus of costs will sway with the balance of account.

Costs not allowed where fraud improperly alleged.

228. (11) *Costs where Unfounded Allegations of Fraud.*—Frequently the fault appears in proceedings for setting aside a sale and for redemption, that strong declamatory allegations of fraud and misconduct are made and not proved against the mortgagee. Of this practice Chancellor Spragge has observed: "It is a great impropriety to put charges of this kind upon the records of the court, unless there is really something tangible in the way of evidence to support

[31] *Charles* v. *Jones*, L. R. 33 Ch. D. 80.

[32] 4 O. R. 720.

[33] *Ib.* Proudfoot, J., followed by Boyd, C., in *Beatty* v. *O'Connor*, 5 O. R. 747.

them."[34] More serious still is the consequence that the courts tax the plaintiffs for this luxury of Billingsgate by refusing them their costs, though otherwise well entitled to the same,[35] or even mulct them the costs of the injured mortgagee.[36] Sections 228-229.

229. (12) *Costs of a Solicitor-Mortgagee.*— Where the mortgagee is himself a solicitor, it is in his power to save the mortgagor a great part of the costs of the proceedings by himself acting in the sale. For while he himself will be recouped expenses which he has incurred, he will not be remunerated for his personal trouble; he will be allowed out-of-pocket disbursements, but not profit costs. This rule was acted upon by Mr. Justice Stirling, in *Stone* v. *Lickorish*.[37] His Lordship quoted portions of the judgments in *Re Wallis*,[38] which was a case of solicitor-mortgagee, and we may adopt his quotations. "Lord Esher says: 'I think it is consistent with every principle of justice that a man should not be entitled to charge for costs and expenses when he has not incurred any.' Lord Justice Fry says: 'So far as I am aware, no case is to be found in which a mortgagee has been allowed to charge against the mortgagor, as part of his costs, charges and expenses properly incurred, remuneration for work done No profit costs.

[34] *Thompson* v. *Holman*, 28 Gr. 35.

[35] *Beatty* v. *O'Connor*, 5 O. R. 747; *Latch* v. *Furlong*, 12 Grant. 303; *Richmond* v. *Evans*, 8 Grant. 508.

[36] *Cowdry* v. *Day*, 5 Jur. N. S. 1200.

[37] L. R. 1891, 2 Chy. Div. 363, approving *Re Wallis*, 25 Q. B. D. 176; *Sclater* v. *Cottam*, 3 Jur. N. S. 630.

[38] 25 Q. B. D. 176, approving *Sclater* v. *Cottam*.

Sections 229-230.

or labour undertaken by himself personally.[39] On the contrary, the Court has often said 'Though you may recover, as part of your costs, charges and expenses, payments which you have made for work done in relation to the mortgage debt or the mortgage security, yet, if you choose to do the work yourself, you cannot charge for it.' Lord Justice Lopes says: 'What are the ordinary terms of redemption of a mortgage? Those terms are, the payment by the mortgagor of principal, interest and costs—that is 'costs' in the ordinary sense of the word, and not remuneration for services rendered by the mortgagee himself.'"

230. The rule is a general one, comprising—in the absence of special contract between the mortgagor and mortgagee—all services in relation to the mortgage, and "is not limited to solicitors, but extends to any mortgagee who is capable of giving, and who does give his own personal services in relation to the mortgage debt or security."[40] This law is derived from *Sclater* v. *Cottam*,[41] which lays down two sound principles: "One principle is that the mortgagee is entitled, as between him and the mortgagor, to have taken into account, on a suit to redeem him, any costs which he has incurred in protecting his title to the mortgaged property Another principle is that the mortgagee, though he may be entitled to certain expenses properly incurred in relation to the mortgaged property. as the expenses of employing a collector, cannot

Principles in Sclater v. Cottam.

[39] See, however, *Re Donaldson*, L. R. 27 Ch. D. 544.
[40] *Ib.* 25 Q. B. 180.
[41] 3 Jur. N. S. 630.

himself charge for his own trouble. For instance—he may employ a collector; but if he himself takes the trouble of doing it, although it would not be a greater burthen to allow him the remuneration, the principle is that he shall not be allowed it in his accounts." In *Field* v. *Hopkins*,[42] where one of the mortgagees was a solicitor, and the other an auctioneer, Mr. Justice Kay not only disallowed the solicitor profit costs for the making of the mortgage deed, but also cancelled a fee to the auctioneer as valuator; and even went so far as to declare that the five guinea fee taken by the auctioneer, "which he could not possibly have claimed without a special contract, *could not be the subject of a valid contract*"—on the principle in *Jennings* v. *Ward*,[43] that "a man shall not have interest for his money, and a collateral advantage besides for the loan of it, or clog the redemption with any by-agreement." Such, then, is the rule as to the costs of a solicitor-mortgagee, and it is therefore the practice, probably wisdom, of such as are not of a mind to lighten by personal exertions the burdens of their mortgage debtor, rather to perform professional services through another solicitor.

Sections 230-231.

Can mortgagee stipulate for profit costs?

231. (13) *Taxation.*—The 40th section of 2 Geo. V. c. 28, provides for the same right in a "person not being chargeable as the principal party"—who has to pay or has paid the costs of the solicitor—to tax those costs as the principal had. Nor does payment preclude such taxation,

Third party section.

[42] L. R. 44 Ch. D. 530. See also *Re Alberts*, L. R. 43 Ch. D. 52.
[43] 2 Vern. 520.

Sections 231-232.

if the application to tax be within one year, and there be special circumstances to warrant same. Under this section (40th), in *Re Crerar* v. *Muir*,[44] the Master in Chambers decided that when a first mortgagee sells under the power of sale contained in his mortgage, a subsequent mortgagee is entitled to an order to tax the first mortgagee's costs of exercising the power of sale, such costs to be taxed as between solicitor and client. The same right extends not merely to a second mortgagee, but to any other "assign" of the mortgagor as, for instance, a trustee in insolvency.[45]

Re McDonald.

232. A fuller explanation of this law as to taxation is to be found in *Re McDonald & Co.*,[46] where, the first mortgagees having sold, and paid their solicitor's bill, a subsequent incumbrancer obtained from the referee, on motion, an order for the taxation of the mortgagee's costs. Mr. Justice Proudfoot[47] took this view: "Under the third party section,[48] if the mortgagee have precluded himself from taxing the bill, the mortgagor, who is to stand simply in his place, cannot do it. And the section does not authorize a taxation as against the mortgagee. If he has paid to the solicitor more than he ought to have done, the only remedy the mortgagor has is by his bill for an account. The special circumstances referred to in the statute,[49] which would

[44] 8 P. R. 56.
[45] Cf. *Re Allingham*, L. R. 32 Ch. D. 36.
[46] 8 P. R. 88.
[47] Commenting on *Re Jessop*, 32 Beav. 106; *Re Baker*, 32 Beav. 526; *Re Massey*, 34 Beav. 463.
[48] Now 40, as above.
[49] Now s. 2 Geo. V. c. 28, s. 40, ss. 2.

induce the court to order taxations after payment, have been held to be pressure and overcharges amounting to fraud.[50] This case was shortly afterwards approved by the court in *Re Cronyn, Kew & Betts*, attorneys.[51] Sections 232-234.

233. Section 11 of 42 Vict., c. 20 (now 10 Edw. VII. c. 51, s. 29, s.-s. 4), which is not expressly, or, at any rate, clearly limited to the powers conferred by that Act, confers a right to a taxation of the mortgagee's costs, without any order at the instance of any party interested; and was held to apply to mortgages made before as well as after said Act.[52] There is no appeal from such taxation: *Re Vanluven and Walker*, 19 P. R. 216. Taxation under chap. 51.

234. The delivery, pursuant to an order under s. 40, s.-s. 3 of the Solicitors' Act, to an applicant, of the bill of costs of a sale under power, while regarded as for the purposes of a reference to taxation, does not necessarily mean that the applicant has the right to tax the bill. An order for such taxation should be obtained on motion; in *Re Moffatt*, a Solicitor,[53] which is a case bearing on these questions, a *præcipe* order for taxation was set aside as there were two points in dispute, viz., whether payment as such had been made by the mortgagees to the solicitor, and whether the mortgagees had precluded themselves from the right to tax the bill. Effect of delivery of bill.

[50] Citing a case of *Morgan* v. *Davy*; and distinguishing *Re Glass*, 2 P. R. 138.

[51] 8 P. R. 372.

[52] *Ferguson* v. *English & Scottish I. Co.*, 8 P. R. 404.

[53] 12 P. R. 240.

Sections 235-236.

Scale of taxation.

235. Questions may frequently arise as to the scale on which costs in mortgage proceedings should be taxed. The case of *Morton* v. *Hamilton Provident and Loan Society*[54] bears on this. After sale under power, the mortgagees claimed $182.61, but, on account being taken, $20.07 was found due to the mortgagor. It was held that, laying aside the question of the whole amount of the mortgage money ($6,705), the amount involved was $202.68, and therefore the case was not within Rule 515 O. J. A.,[55] and the costs were properly taxed on the higher scale. Before leaving this case we may add the rest of the decision: the claim of a mortgagor against a mortgagee for an account in such a case is not a legal one, as for a money demand, but a proper subject for equitable relief.

Nature of right to tax.

236. The right of taxation extends to the detail of the costs of proceedings where such costs are allowed, and is not to be confounded with the right before mentioned of the mortgagor or his assigns to exclude items — entire groups of costs included—from the mortgagee's account.

[54] 10 P. R. 636; 11 P. R. 82.
[55] Now Con. Rule 1219.

CHAPTER XII.

RELATION TO OTHER REMEDIES.

Section 237.

Remedies concurrent.

237. Legally speaking, the proper exercise of the power of sale in nowise hinders the mortgagee from pursuing his other lawful remedies to enforce his debt, nor does the pursuit of those other remedies technically impede the exercise of the power of sale. All the remedies afforded by the mortgage contract are concurrent,[1] or, as Mr. Jones has called them, cumulative remedies.[2] Thus, in *Beatty* v. *O'Connor*,[3] the mortgagees, besides sale proceedings, had taken and succeeded in an action on the covenant, and an action of ejectment, and what is of equal importance, were held entitled to all three sets of costs, those of the two actions being given to them by the judgments they had obtained, and those of exercising the power of sale under the statutory form of mortgage as a matter of contract.[4] Sometimes, moreover, as in the Short Form Act, the other remedies of the mortgagee are expressly, if unnecessarily,[5] reserved in the clause creating the power.

[1] *Re Kilday*, [1888] W. N. 94.
[2] Jones, 5th ed. 1773.
[3] 5 O. R. 731.
[4] The right of the mortgagee to costs, "resting substantially upon contract, can only be lost or curtailed by such inequitable conduct on the part of the mortgagee as may amount to a violation or culpable neglect of his duty under the contract." *Cotterell* v. *Stratton*, L. R. 8 Ch. at 302, *per* Selborne, L.C., reversing the judgment of Malins, V.C. *Cotterell* v. *Stratton* was followed by Jessel, M.R., in *Turner* v. *Hancock*, 20 Ch. D., 303 (1882), and by Stirling, J., in *Kinnaird* v. *Trollope*, 42 Ch. D. 610 (1889). As to the effect of 10 Edw. VII. c. 51, see *infra*, paragraphs 242 *et seq.*
[5] It is even doubtful whether it is possible to exclude the right to foreclose, thereby ousting the jurisdiction of the Court. See *Guaranty Trust Co.* v. *Green Cove Co.*, (U. S.) 11 Sup. Ct. Rep. 312.

Sections 237-238.

But a mortgagee who has exercised the power of sale in a mortgage and sold the land for sufficient to pay the mortgage and costs to purchasers who are able but unwilling to carry out their purchase, cannot, without sufficient reason, treat the sale as a nullity and fall back upon his action on the covenant: *Patterson* v. *Tanner*, 22 O. R. 364.

Power of sale and foreclosure.

238. *Foreclosure.*—Sale under power has sometimes been termed a species of foreclosure; and, while the right to sale in nowise legally conflicts with the right to foreclose, yet a complete sale of the property leaves nothing to foreclose. There may, however, be a sale of part of the premises, and foreclosure of the rest.[6] Where foreclosure has already been had, a deed reciting the power may have the unintended effect of opening the foreclosure.[7] From our case of *Kelly* v. *Imperial*,[8] it would almost seem as if a bad foreclosure could be turned by subsequent deed into a valid sale under power. For in that case there was first a foreclosure, and then a deed reciting the foreclosure. On which state of facts our Supreme Court not very unanimously decided that even if the decree of foreclosure had been improperly obtained, and consequently void, yet the sale and conveyance to the purchaser were a sufficient execution of the power of sale. As the power in question was a

Kelly v. Imperial.

[6] *Killrain* v. *Killrain*, W. N., (1888), 224.

[7] *Watson* v. *Marston*, 4 DeG. M. & G. 230. For effects of recitals of power in sale after title by adverse possession, see *Re Alison*, L. R. 11 Chy. D. 284, and the reason (?) therein given of the difficulty of proving that there has been no acknowledgment; as if the half-acknowledgment by such recital would help matters.

[8] 11 S. C. R. 516.

Sections 238-240.

special one, exercisable without notice, it is unlikely that this decision will be extended; so that, generally speaking, the rights of sale under power and foreclosure, while undoubtedly concurrent, must likewise be taken to be mutually independent and inconvertible.

Foreclosure not governed by conditions of power.

239. Moreover, the conditions precedent to the exercise of the sale-power are by no means to be transferred to foreclosure. For instance, in *Lamb* v. *McCormack*,[9] where the mortgagee, with power of sale, covenanted "that no sale or notice of sale should be made or given, or any means taken to obtain possession of the mortgaged premises without three months' notice to the mortgagor demanding payment," it was held, nevertheless, that such notice was unnecessary before filing a bill for foreclosure.

Power of sale and action on covenant.

240. *Action on Covenant.*—A mortgagee may first obtain personal judgment for the debt, and then, if still unpaid, pursue his remedy by sale;[10] or, as is very commonly the case, first sell and then bring an action on the covenant for any deficiency. To maintain such an action the exercise must be a proper one. Thus, a sale, followed by an immediate retransfer to the mortgagee,[11] or, in general, any but a *bona fide* exercise of the power would be good ground of defence to such action. Moreover, to maintain an action on the covenant, the sale must be a sale under power; for, according to Chancellor Van-

[9] 6 Gr. 240.

[10] *Re Kilday*, [1888] W. N. 94; see *Beatty* v. *O'Connor*, 5 O. R. 731; *Rudge* v. *Ricking*, L. R. 8 C. P. 358.

[11] *Pegg* v. *Hobson*, 14 O. R. 272.

Sections 240-241.

koughnet, " the underlying principle of all seems to be that, if the mortgagee parts with the estate (otherwise than under power of sale, or the like), so that it cannot be restored to the mortgagor, or be held in security for him, or for his benefit, the latter is discharged from personal liability." [12] The fact of the assignee of the equity of redemption having concurred in the sale will not limit the application of this rule.[13] As has been before mentioned, the costs of a sale abortive or successful, or generally of proceedings taken in relation to the property, are not usually comprised in the personal covenant in the mortgage; and hence the wisdom of making the costs the first charge on the proceeds of sale.

In *Lyon* v. *Ryerson*, 17 P. R. 516, it was held that an unauthorized service of a notice of exercising the power of sale, though subsequently withdrawn, had had the effect of extending the time for payment so that the mortgagee could not get speedy judgment in an action upon the covenant in the mortgage until the time mentioned in such notice, viz., thirty days, had elapsed.

Power of sale after other remedies.

241. *Other Remedies.*—The mortgagee may, after ejectment,[14] or after entry and taking of the profits,[15] or after a demise on trust to a receiver,[16] or after proceedings by way of garnishment,[17] still pursue his remedy of sale; the only

[12] *Burnside* v. *Galt*, 16 Gr. 417.
[13] *Beatty* v. *O'Connor*, 5 O. R. 731.
[14] *Montague* v. *Dawes*, 12 Allen Mass. 397.
[15] *King* v. *Heenan*, 3 DeG. M. & G. 890.
[16] *Benjamin* v. *Loughborough*, 31 Ark. 210.
[17] *Smith* v. *Brown*, 20 O. R. 165.

limitation—apart from statute—is that he shall not be paid twice.

10 Edw. VII., c. 51 s. 28.

242. *Statutory Restrictions.*—Some restraint has been laid on the building up of triple sets of costs by the enactment of a clause, as to multiplicity of proceedings, in 10 Edw. VII., c. 51, s. 28. The object of this enactment is to make the period mentioned in the notice of exercising the power to be a breathing spell during which the debtor may raise the sum mentioned in the notice without being harassed by further assaults of the creditor. To this end it has been provided that "no further proceedings" shall be taken within that period without the permission of a judge. Under this section it was held that an advertisement of sale was a proceeding, and an injunction was accordingly granted for its restraint.[18] In *Perry* v. *Perry*,[19] a writ in an action on the covenant, and a notice of sale were served on the same day, and it was held that the object of the statute is to prevent all other proceedings while the notice of sale is running, and it is not necessary under the statute, to fulfil the very words of it, that one of the acts should be prior to the other; and accordingly service of the writ was set aside with costs.

Exception where notice not essential.

243. Where, however, notice is not an essential to the exercise of the power, the giving of notice will not be a bar to further proceedings; in other words, the Act does not apply. As expressed in one case, "The Act upon which the

[18] 10 P. R. 275.

[19] Galt, C.J., in *Canada Permanent Bldg. Soc.* v. *Teeter*, 19 O. R. 156.

Sections 243-244.

statement of defence is based was passed after the execution of these mortgages; but as there is no clause limiting its application to mortgages subsequently executed, it is applicable to the present case, if there is any condition or proviso contained in these mortgages pursuant to which 'any demand or notice requiring payment, or declaring an intention to proceed under and exercise the power of sale, has been made.' Upon referring to the mortgages it will be found there is no such proviso."[20] Hence the statute, though retrospective as to the date of the instruments to which it shall apply, is inapplicable to such as make no provision for notice.

Insolvency of mortgagor.

244. *Subsequent Proceedings of the Mortgagor.*—As a rule, the mortgagee's right to exercise his power of sale will be hardly at all affected by the subsequent acts and proceedings of the mortgagor. Thus, where a mortgagor became bankrupt, the mortgagee was not compelled to go in under the act, but might proceed to sell under his power.[21] Much less, then, would he be concerned by assignments for the benefit of creditors under the incoercitive Ontario statute. But however little damnified he may be by the subsequent dealings of the mortgagor, yet it seems the mortgagee has still the right to apply to the court to remove a subsequent fraudulent conveyance which interferes, or may interfere, with the realization of his claim.[22]

[20] *Gordon* v. *Ross*, 11 Gr. 124.
[21] *Parr* v. *Montgomery*, 27 Gr. 521.
[22] See *Jones* v. *Mathie*, 11 Jur. 504.

Section 245.

245. *Conclusion.*—To some it may seem that the mortgage-creditor is too heavily armed with remedies that may be turned to the oppression of the mortgagor; and to such may be commended what Lord Chancellor Cottenham has so aptly said concerning the power of sale: "Such a power as this may no doubt be used for purposes of oppression, but when conferred, it must be remembered that it is so by a bargain between one party and the other, and it is for the party who borrows to consider whether he is not giving too large a power to him with whom he is dealing."

APPENDIX A.

STATUTES AND PORTIONS OF STATUTES

Pertaining to the Subject of this Work

APPENDIX A.

STATUTES AND PORTIONS OF STATUTES PERTAINING TO THE SUBJECT OF THIS WORK.

[246] 9 EDW. VII. c. 37, s. 26.

Power to vest land or release contingent right of lunatic trustee or mortgagee. Imp. Act, 53 Vic., c. 5, s. 135.

26. (1) Where a lunatic is solely or jointly seized or possessed of any land upon trust or by way of mortgage, the Court may by order vest such land in such person or persons for such estate and in such manner as the Court directs. (See R. S. O. c. 336, s. 6.)

(2) Where a lunatic is solely or jointly entitled to a contingent right in any land upon trust or by way of mortgage the Court may by order release such land from the contingent right and dispose of the same to such person as the Court shall direct. (See R. S. O. c. 336, s. 7.)

(3) An order made under sub-sections 1 and 2 shall have the same effect as if the trustee or mortgagee had been sane and had executed a deed conveying the land for the estate named in the order, or releasing or disposing of the contingent right.

(4) Where an order may be made under this section, the Court may, if it is more convenient, appoint a person to convey the land or release the contingent interest, and a conveyance or release by such person in conformity with the order shall have the same effect as an order under sub-sections 1 and 2. (See R. S. O. c. 336, s. 13.)

1 GEORGE V., c. 25.

AN ACT RESPECTING THE LAW AND TRANSFER OF PROPERTY.

Assented to 24th March, 1911.

SHORT TITLE, s. 1.
INTERPRETATION, s. 2.
CORPOREAL TENEMENTS TO LIE IN GRANT AS WELL AS LIVERY, s. 3.
FEOFFMENTS TO BE BY DEED AND INNOCENT, s. 4.
WORDS OF LIMITATION UNNECESSARY, s. 5.
RECEIPT IN DEED SUFFICIENT, s. 6.
RECEIPT TO BE EVIDENCE FOR SUBSEQUENT PURCHASER, s. 7.
RIGHTS OF PURCHASER AS TO EXECUTION OF DEED, s. 8.
PARTITION, EXCHANGE, ETC., TO BE BY DEED, ss. 9, 12.
CONTINGENT INTERESTS, ETC., MAY BE DISPOSED OF BY DEED, s. 10.
WORDS "GRANT" AND "EXCHANGE;" EFFECT OF, s. 11.
GRANTEES, ETC., TO TAKE AS TENANTS IN COMMON AND NOT AS JOINT TENANTS, s. 13.
LAND ACQUIRED BY POSSESSION BY TWO OR MORE PERSONS, s. 14.
CONVEYANCE TO INCLUDE WHOLE ESTATE OF GRANTOR, s. 15.
DEEDS OF BARGAIN AND SALE, BY CORPORATIONS, s. 16.
PROVISION FOR SALES FREE FROM INCUMBRANCES, s. 17.
IMPLIED COVENANTS, s. 18.
COVENANTS TO BIND HEIRS, s. 19.
POWERS, MODE OF EXECUTION, ETC., ss. 20-22.
ILLUSORY APPOINTMENTS, s. 23.
TENANCY BY CURTESY, s. 24.
WASTE, ss. 25-28.
RENT CHARGES, EFFECT OF PARTIAL RELEASE, s. 29.
SCINTILLA JURIS NO LONGER NECESSARY, s. 30.
CONTINGENT REMAINDER NOT TO BE DEFEATED BY FORFEITURE, SURRENDER OR MERGER OF PRECEDING ESTATE, ss. 31-32.
IMPROVEMENTS MADE UNDER MISTAKE OF TITLE, s. 33.
PURCHASES OF REVERSIONS, s. 34.
PURCHASER FOR VALUE WITHOUT NOTICE, s. 35.
CONVEYANCE BY A PERSON TO HIMSELF OR TO HIS WIFE, ETC., s. 36.
RIGHTS OF POSTHUMOUS CHILDREN, s. 37.
PRODUCTION BY CESTUIS QUE VIE AND TENANTS FOR LIFE, ss. 38-44.
ASSIGNMENTS OF CHOSES IN ACTION, s. 45.

DEBENTURES OF CORPORATIONS, s. 46.
AUCTIONS OF ESTATES, ss. 47-50.
FRAUDS IN SALES AND MORTGAGES, s. 51.
EFFECT OF ORDERS OF COURT, s. 52.
REPEAL, s. 53.

HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. This Act may cited as *The Conveyancing and Law of Property Act. New.* Short title.

2. In this Act, Interpretation.

(*a*) "Conveyance" shall include assignment, appointment, lease, settlement, and other assurance, made by deed, on a sale, mortgage, demise, or settlement of any property or on any other dealing with or for any property; and "convey" shall have a meaning corresponding with that of conveyance; Conveyance. Imp. Act 44-45 V., c. 41, s. 2. Convey.

(*b*) "Land" shall include messuages, tenements, hereditaments, whether corporeal or incorporeal, and any undivided share in land; Land.

(*c*) "Mortgage" shall include any charge on property for securing money or money's worth; Mortgage

(*d*) "Mortgage money" shall mean money or money's worth secured by a mortgage; Mortgage money.

Mortgagee.

(*e*) "Mortgagee" shall include any person from time to time deriving title under the original mortgagee.

Mortgagor.

(*f*) "Mortgagor" shall include any person from time to time deriving title under the original mortgagor or entitled to redeem a mortgage according to his estate, interest or right in the mortgaged property;

Property.

(*g*) "Property" shall include real and personal property, and any debt, and anything in action, and any other right or interest;

Puffer.

(*h*) "Puffer" shall mean a person appointed to bid on the part of the seller;

Purchaser.

(*i*) "Purchaser" shall include a lessee, a mortgagee, and an intending purchaser, lessee or mortgagee, or other person, who, for valuable consideration, takes or deals for any property: and "purchase" shall have a corresponding meaning with that of purchaser; but "sale" shall mean only a sale properly so called. R. S. O. 1897, c. 119, s. 1. *Amended.*

Purchase.

Sale.

LAND TO LIE IN GRANT AS WELL AS LIVERY.

Corporeal tenements, etc., deemed to lie in grant, etc.

3. All corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, lie in grant as well as in livery. R. S. O. 1897, c. 119, s. 2.

FEOFFMENT TO BE BY DEED ONLY.

4. A feoffment otherwise than by deed shall be void, and no feoffment shall have any tortious operation. R. S. O. 1897, c. 119, s. 3. Feoffments unless by deed to be void.

WORDS OF LIMITATION.

5.—(1) In a conveyance it shall not be necessary in the limitation of an estate in fee simple to use the word heirs; or in the limitation of an estate in tail to use the words heirs of the body; or in the limitation of an estate in tail male or in tail female, to use the words heirs male of the body, or heirs female of the body. Words of limitation unnecessary. Imp. Act, sec. 51.

(2) For the purpose of such limitation it shall be sufficient in a conveyance to use the words in fee simple, in tail, in tail male, or in tail female, according to the limitation intended, or to use any other words sufficiently indicating the limitation intended.

(3) Where no words of limitation are used, the conveyance shall pass all the estate, right, title, interest, claim and demand, which the conveying parties have, in, to, or on the property conveyed, or expressed or intended so to be, or which they have power to convey in, to, or on the same. A conveyance without words of limitation passes all the estate, etc. Imp. Act, sec. 63.

(4) Subsection 3 shall apply only if and as far as a contrary intention does not appear from the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained.

(5) This section shall apply only to conveyances made after the 1st day of July, 1886. R. S. O. 1897, c. 119, s. 4.

PROVISIONS AS TO CONVEYANCES.

Receipts in deed sufficient. Imp. Act, sec. 54.

6. A receipt for consideration money or securities in the body of a conveyance shall be a sufficient discharge to the person paying or delivering the same, without any further receipt being indorsed on the conveyance. R. S. O. 1897, c. 119, s. 5. *Amended.*

Receipt in deed or indorsed evidence for subsequent purchaser. Imp. Act, sec. 55.

7. A receipt for consideration money or other consideration in the body of a conveyance or indorsed thereon shall, in favour of a subsequent purchaser, not having notice that the money or other consideration thereby acknowledged to be received was not in fact paid or given, wholly or in part, be sufficient evidence of the payment or giving of the whole amount thereof. *New.* See R. S. O. 1897, c. 119, s. 5.

Rights of purchaser as to execution of purchase deed. Imp. Act, sec. 8.

8. On a sale the purchaser shall not be entitled to require that the conveyance to him be executed in his presence, or that of his solicitor, but shall be entitled to have, at his own cost, the execution of the conveyance attested by some person appointed by him, who may, if he thinks fit, be his solicitor. R. S. O. 1897, c. 119, s. 6.

Partition or exchange of land, etc., unless by deed to be void.

9. A partition and an exchange of land and a lease of land required by law to be in writing, an assignment of a chattel interest in land, and a surrender in writing of land not being an interest which might by law have been created without writing, shall be void at law, unless made by deed. R. S. O. 1897, c. 119, s. 7.

Contingent interests, etc.,

10. A contingent, an executory, and a future interest, and a possibility coupled with an in-

terest in land, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent, into or upon land, may be disposed of by deed; but no such disposition shall by force only of this Act defeat or enlarge an estate tail. R. S. O. 1897, c. 119, s. 8.

Interest in land may be disposed of by deed.

11. An exchange or a partition of any tenements or hereditaments shall not imply any condition in law, and the word "give" or the word "grant" in a conveyance shall not imply any covenant in law, except so far as the word "give" or the word "grant" may by force of any Act in force in Ontario imply a covenant. *New.* (*See* R. S. O. 1897, c. 119, s. 9.)

Exchange or partition not to imply any condition or "give" or "grant" any covenant. Imp. Act 8 and 9 V., c. 106, s. 4, *part.*

12. The next preceding three sections shall not extend to any deed, act or thing executed or done, or to any estate, right or interest created before the 1st day of January, 1850. R. S. O. 1897, c. 119, s. 10.

Preceding three sections not to extend to deeds, etc., executed before 1st January, 1850.

13.—(1) Where by any letters patent, assurance or will, made and executed after the first day of July, 1834, land has been or is granted, conveyed or devised to two or more persons other than executors or trustees in fee simple, or for any less estate, it shall be considered that such persons took or take as tenants in common, and not as joint tenants, unless an intention sufficiently appears on the face of such letters patent, assurance or will, that they are to take as joint tenants. R. S. O. 1897, c. 119, s. 11.

Grantees, devisees, etc., to take as tenants in common unless it appears they are to take as joint tenants.

(2) This section shall apply notwithstanding that one of such persons is the wife of another of them. *New.*

Land acquired by possession by two or more persons to be held in common tenancy.

14. Where hereafter two or more persons acquire land by length of possession they shall be considered to hold as tenants in common and not as joint tenants. *New.*

Conveyance to include all houses, etc., and the reversion, and all the estate, etc.

15.—(1) Every conveyance of land, unless an exception is specially made therein, shall include all houses, out-houses, edifices, barns, stables, yards, gardens, orchards, commons, trees, woods, underwoods, mounds, fences, hedges, ditches, ways, waters, water-courses, lights, liberties, privileges, easements, profits, commodities, emoluments, hereditaments and appurtenances whatsoever, to such land belonging or in anywise appertaining, or with the same demised, held, used, occupied and enjoyed or taken or known as part or parcel thereof; and if the same purports to convey an estate in fee simple, also the reversion or reversions, remainder and remainders, yearly and other rents, issues and profits of the same land and of every part and parcel thereof, and all the estate, right, title, interest, inheritance, use, trust, property, profit, possession, claim and demand whatsoever, of the grantor, into, out of, or upon the same land, and every part and parcel thereof, with their and every of their appurtenances.

(2) Except as to conveyances under former Acts relating to short forms of conveyances, this section shall apply only conveyances made after the first day of July, 188[illegible]. R. S. O. 1897, c. 119, s. 12.

16. Any corporation capable of taking and conveying land in Ontario, shall be deemed to have been and to be capable of taking and conveying land by deed of bargain and sale, in like manner as any person in his natural capacity, subject to any general limitations or restrictions and to any special provisions as to holding or conveying land which may be applicable to such corporation. R. S. O. 1897, c. 119, s. 13. Corporations aggregate may convey by bargain and sale.

PROVIDING FOR INCUMBRANCES ON SALES.

17.—(1) Where land subject to an incumbrance, whether immediately payable or not, is sold by any Court or out of Court, the High Court or the Court in which the sale takes place may, on the application of any party to the sale, direct or allow payment into Court, in the case of an annual sum charged on the land, or of a capital sum charged on a determinable interest in the land, of such amount as, when invested in securities approved by the Court, the Court considers will be sufficient by means of the income thereof to keep down or otherwise provide for that charge; and in any other case of capital money charged on the land, of an amount sufficient to meet the incumbrance and any interest due thereon; but in either case there shall also be paid into Court such additional amount as the Court considers will be sufficient to meet the contingency of further costs, expenses, and interest, and any other contingency except depreciation of investments, not exceeding one-tenth of the original amount to be paid in, unless the Court for special reasons thinks fit to require a larger additional amount. Provision for sales free from incumbrances. Imp. Act, 44-45 V., c. 41, s. 5.

(2) The Court may, thereupon, either after or without notice to the incumbrancer, declare the land to be freed from the incumbrance, may make any order for conveyance, or vesting order, proper for giving effect to the sale, and may give directions for the retention and investment of the money in Court.

(3) After notice served on the persons interested in or entitled to the money or fund in Court, the Court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof. R. S. O. 1897, c. 119, s. 15. *Amended.*

(4) Payment of money into Court shall effectually exonerate therefrom the person making the payment.

Regulations respecting payments into court and applications. Imp. Act, sec. 69.

(5) The application shall be made in chambers, and on notice.

(6) On an application by a purchaser, notice shall be served in the first instance on the vendor.

(7) On an application by a vendor, notice shall be served in the first instance on the purchaser.

(8) On any application, notice shall be served on such persons as the Court thinks fit.

(9) The Court may make such order as it deems just respecting the costs, charges or expenses of any of the parties to the application. R. S. O. 1897, c. 119, s. 16.

IMPLIED COVENANTS.

Covenants to be implied. Imp. Act, 44-45 V. c. 41, s. 7.

18.—(1) In a conveyance made on or after the 1st day of July, 1886, there shall, in the cases in this section mentioned, be deemed to be included, and there shall in those cases be implied, covenants to the effect in this section stated, by the person or by each person who conveys, as far as regards the subject-matter or share thereof expressed to be conveyed by him, with the person, if one, to whom the conveyance is made, or with the persons jointly, if more than one, to whom the conveyance is made as joint tenants, or with each of the persons, if more than one, to whom the conveyance is made as tenants in common:

On conveyance for value by beneficial owner. Imp. Act, sec. 7.

(*a*) In a conveyance for valuable consideration, other than a mortgage, the following covenants by the person who conveys, and is expressed to convey, as beneficial owner, namely, covenants for,

(I) Right to convey;

(II) Quiet enjoyment;

(III) Freedom from incumbrances; and

(IV) Further assurance;

according to the forms of covenants for such purposes set forth in Schedule B to *The Short Forms of Conveyances Act,* and therein numbered 2, 3, 4 and 5, subject to the provisions of that Act; 10 Edw. VII., c. 53.

On conveyance of leaseholds for value, by beneficial owner.

(*b*) In a conveyance of leasehold land for valuable consideration, other than a mortgage, the following further cove-

nant by the person who conveys and is expressed to convey as beneficial owner:

Validity of lease.

That, notwithstanding anything by the person who so conveys, made, done, executed, or omitted, or knowingly suffered, the lease or grant creating the term of estate for which the land is conveyed is, at the time of conveyance, a good, valid, and effectual lease or grant of the property conveyed, and is in full force, unforfeited, unsurrendered, and in nowise become void or voidable, and that, notwithstanding anything as aforesaid, all the rents reserved by and all the covenants, conditions and agreements contained in the lease or grant, and on the part of the lessee or grantee, and the person deriving title under him to be paid, observed, and performed, have been paid, observed and performed, up to the time of conveyance;

On conveyance by trustee, etc. Imp. Act, sec. 7.

(*c*) In a conveyance, the following covenant by every person who conveys, and is expressed to convey, as trustee or mortgagee, or as personal representative of a deceased person, or as committee of a lunatic, or under an order of the Court, which covenant shall be deemed to extend to every such person's own acts only, namely;

Against incumbrances.

That the person so conveying has not executed, or done, or knowingly suf-

fered, or been party or privy to, any deed, act, matter or thing, whereby, or by means whereof the subject-matter of the conveyance, or any part thereof is or may be impeached, charged, affected, or incumbered in title, estate or otherwise, or whereby or by means whereof the person who so conveys is in anywise hindered from conveying such subject-matter or any part thereof, in the manner in which it is expressed to be conveyed;

On settlement for further assurance, limited.

(*d*) In a conveyance by way of settlement, the following covenants by a person who conveys and is expressed to convey as settlor, namely;

That a person so conveying, and every person deriving title under him by deed or act or operation of law in his lifetime subsequent to that conveyance, or by testamentary disposition or devolution in law on his death, will from time to time, and at all times, after the date of that conveyance, at the request and cost of any person deriving title thereunder, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of the conveyance to the persons to whom the conveyance is made, and those deriving title under them, subject as, if so expressed, and in the manner in which the conveyance is

expressed to be made, as by them or any of them shall be reasonably required.

On conveyance by direction of beneficial owner.

(2) Where in a conveyance it is expressed that by direction of a person expressed to direct as beneficial owner another person conveys, the person giving the direction, whether or not he conveys and is expressed to convey, as beneficial owner, shall be deemed to convey, and to be expressed to convey as beneficial owner the subject-matter so conveyed by his direction; and the covenants on his part mentioned in clause (*a*) of sub-section 1 shall be implied accordingly.

Enforcing covenants.

(3) The benefit of a covenant so implied shall be annexed and incident to and shall go with the estate or interest of the implied covenantee, and shall be capable of being enforced by every person in whom that estate or interest is for the whole or any part thereof from time to time vested.

Variation of covenants.

(4) A covenant so implied may be varied or extended and as so varied or extended shall, as far as may be, operate in the like manner, and with all the like incidents, effects and consequences, as if such variations or extensions were directed in this section to be implied. R. S. O. 1897, c. 119, s. 17. *Amended.*

(*As to implied covenants in the case of mortgages see The Mortgages Act*, 10 Edw. VII., c. 51.)

Covenants to bind heirs, etc. Imp. Act. 44 45 V., c. 41, sec. 58.

19.—(1) A covenant relating to land of inheritance or to land held for the life of another shall be deemed to be made with the covenantee his heirs and assigns, and shall have effect as if heirs and assigns were expressed.

(2) A covenant relating to land not of inheritance or to land not held for the life of another shall be deemed to be made with the covenantee, his executors, administrators and assigns, and shall have effect as if executors, administrators and assigns were expressed. *New.*

POWERS.

Mode of executing powers. Imp. Act, 22-23 V., c. 35, s. 12.

20.—(1) A deed executed in the presence of, and attested by two or more witnesses in the manner in which deeds are ordinarily executed and attested, shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by deed or by any instrument in writing, not testamentary, notwithstanding that it is especially required that a deed or instrument in writing, made in exercise of such power, shall be executed or attested with some additional or other form of execution or attestation or solemnity.

(2) This section shall not operate to defeat any direction in the deed or instrument creating the power that the consent of any particular person shall be necessary to a valid execution, or that any act shall be performed in order to give validity to any appointment, having no relation to the mode of executing and attesting the deed or instrument.

(3) Nothing in this section shall prevent the donee of a power from executing it conformably to the power. R. S. O. 1897, c. 119, s. 18.

Person to whom a power is given may release or

21.—(1) A person to whom a power, whether coupled with an interest or not, is given may by deed disclaim or release or contract not to exer-

contract not to exercise same. Imp. Act, 44-45 V., c. 41, s. 52.

cise the power. R. S. O. 1897, c. 119, s. 19. *Amended.*

Disclaimer of power, 45-46 V., c. 39, s. 6 (2).

(2) A person disclaiming shall not afterwards be capable of exercising or joining in the exercise of the power, and on such disclaimer the power may be exercised by the other or others or the survivor or survivors of the others of the persons to whom the power is given unless the contrary is expressed in the instrument creating the power. *New.*

Sale under power not to be avoided by reason of mistaken payment to tenant for life. Imp. Act 22-23 V. c. 35, s. 13.

22. Where, under a power of sale, a sale in good faith is made of an estate, with the timber thereon, or with any articles attached thereto, and the tenant for life, or any other party to the transaction, is by mistake allowed to receive for his own benefit a part of the purchase money or value of the timber or article, the High Court, upon an action brought, or upon application made in a summary way, may declare that upon payment by the purchaser or the claimant under him of the full value of the timber or article at the time of the sale, with such interest thereon as the Court directs, and the settlement of the principal moneys and interest under the direction of the Court, upon such persons as in the opinion of the Court are entitled thereto, the sale ought to be established; and upon payment and settlement being made accordingly, the Court may declare the sale valid, and thereupon the legal estate shall vest and go in like manner as if the power had been duly executed, and the costs of the application, as between solicitor and client, shall be paid by the purchaser or the claimant under him. R. S. O. 1897, c. 119, s. 20.

ILLUSORY APPOINTMENTS.

Certain appointments not to be impeached as illusory.

23.—(1) No appointment made in exercise of any power or authority to appoint any property, real or personal, amongst several objects, shall be invalid, or impeached, on the ground that an unsubstantial, illusory or nominal share only is thereby appointed to, or left unappointed to devolve upon any one or more of the objects of such power or upon the ground that any object of such power has been altogether excluded; but every such appointment shall be valid, and effectual, notwithstanding that any one, or more, of the objects shall not thereunder, or in default of such appointment, take more than an unsubstantial, illusory, or take no share thereof or nominal share of the property subject to such power.

Imp. Act, 11 Geo. IV. and 1 Wm. IV., c. 46, ss. 1, 2 and 3, 37 and 38 V., c. 37, s. 1.

Limitation of operation of section.

(2) Nothing in this section shall prejudice or affect any provision, in any deed, will, or other instrument, creating any such power, which declares the amount of the share or shares from which no object of the power shall be excluded or that some one or more object or objects of the power shall not be excluded or give any validity, force or effect to any appointment, other than such appointment would have had if a substantial share of the property affected by the power had been thereby appointed to, or left unappointed to devolve upon, any object of such power. R. S. O. 1897, c. 330, ss. 31, 32 and 33; and c. 51, s. 57 (4).

TENANCY BY THE CURTESY.

Tenancy by the curtesy. Imp. Rev. Stat., 1870, p. 129.

24. Where a husband has issue born alive and capable of inheriting any land to which his wife is entitled in fee simple, or fee tail, if the husband survive his wife, whether such issue live or not, the husband shall (subject to the provisions of *The Married Women's Property Act*) be entitled to an estate for his natural life in such land as may not have been disposed of by her deed or will; but if he has no such issue by his wife he shall not be entitled to any further or other estate or interest in such land in the event of surviving his wife, except such as may be devised to him by her will, or such as he may become entitled to under *The Devolution of Estates Act*. R. S. O. 1897, c. 330, s. 5.

10 Edw. VII., c. 56.

WASTE.

Waste by tenants by curtesy, dowress, etc. 6 Edw. I., (St. Gloucester), c. 5.

25. A tenant by the curtesy, a dowress, a tenant for life, or for years, and the guardian of the estate of an infant, shall be impeachable for waste, and liable in damages to the person injured. R. S. O. 1897, c. 330, s. 21.

Waste by tenant for life without impeachment of waste.

26. An estate for life without impeachment of waste shall not confer or be deemed to have conferred upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate. R. S. O. 1897, s. 51, s. 58 (2).

Waste between joint ten.

27. Tenants in common, and joint tenants, shall be liable to their co-tenants for waste, or,

in the event of a partition, the part wasted may be assigned to the tenant committing such waste, at the value thereof to be estimated as if no such waste had been committed. R. S. O. 1897, c. 330, s. 22.

ants and tenants in common. 13 Edw. I. (St. of Westminster, Sec.) c. 22.

28. Lessees making or suffering waste on the demised premises without license of the lessors, shall be liable for the full damage so occasioned. R. S. O. 1897, c. 330, s. 23.

Waste by lessees. 52 Hen. III. (St. of Marlbridge), c. 23.

(For other remedies see The Judicature Act, s. 58 (9)).

RELEASE OF PART OF LAND FROM RENT CHARGE.

29. The release from a rent-charge of part of the land charged therewith shall not extinguish the whole rent-charge, but shall operate only to bar the right to recover any part of it out of the land released, without prejudice to the rights of all persons interested in the land remaining unreleased and not concurring in or confirming the release. R. S. O. 1897, c. 119, s. 27.

Release of part of land subject to rent-charge not to be an extinguishment of the charge on the rest, etc. Imp. Act, 22-23 V. c. 35, s. 10.

FUTURE AND CONTINGENT USES.

30. Where by any deed, will or other instrument, any land is limited to uses, all uses thereunder, whether expressed or implied by law, and whether immediate or future, or contingent or executory, or to be declared under any power therein contained, shall take effect when and as they arise by force of and by relation to the estate and seisin originally vested in the person seised to the uses; and the continued existence in him or elsewhere of any seisin to uses or *scintilla juris,* shall not be necessary for the support of, or to give effect to, future or contingent

Limitation to uses, shall take effect as they arise without continued seisin or *scintilla juris* in the persons originally seised. Imp. Act, 23-24 V. c. 38, s. 7.

or executory uses; nor shall any such seisin to uses or *scintilla juris* be deemed to be suspended, or to remain or to subsist in him or elsewhere. R. S. O. 1897, c. 119, s. 28.

CONTINGENT REMAINDERS.

Certain contingent remainders not to be defeated by forfeiture, surrender or merger of preceding estate.

31. Every contingent remainder shall be capable of taking effect, notwithstanding the determination by forfeiture, surrender or merger, of any preceding estate of freehold. R. S. O. 1897, c. 119, s. 29. *Amended.*

MERGER.

No merger of estate by operation of law. 44 V. c. 5.

32. There shall not be any merger by operation of law only of an estate, the beneficial interest in which, prior to *The Ontario Judicature Act,* 1881, would not have been deemed merged or extinguished in equity. R. S. O. 1897, c. 51, s. 58 (3).

IMPROVEMENTS UNDER MISTAKE OF TITLE.

Persons improving lands to have a lien on lands.

33. Where a person makes lasting improvements on land under the belief that the land is his own, he or his assigns shall be entitled to a lien upon the same to the extent of the amount by which the value of the land is enhanced by such improvements; or shall be entitled or may be required, to retain the land if the Court is of opinion or requires that this should be done, according as may, under all circumstances of the case be most just, making compensation for the land, if retained, as the Court may direct. R. S. O. 1897, c. 119, ss. 30, 31, 32.

PURCHASES OF REVERSIONS.

34. No purchase made in good faith, and without fraud, of any reversionary interest in property, shall be opened or set aside on the ground of undervalue. R. S. O. 1897, c. 119, s. 35.

Purchases of reversions not affected by undervalue.

PURCHASER FOR VALUE WITHOUT NOTICE.

35. It shall not be necessary, in order to maintain the defence of a purchase for value without notice, to prove payment of the mortgage money or purchase money, or any part thereof. R. S. O. 1897, c. 119, s. 36.

Proof of payment of purchase money unnecessary.

ASSIGNMENT TO ASSIGNOR AND ANOTHER OR TO ASSIGNOR'S WIFE.

36. Any property may be conveyed by a person to himself jointly with another person, by the like means by which it might be conveyed by him to another person, and may in like manner be conveyed or assigned by a husband to his wife, or by a wife to her husband alone or jointly with another person. R. S. O. 1897, c. 119, s. 37.

Assignment of property to wife or self and others. Imp. Act, s. 50.

RIGHTS OF POSTHUMOUS CHILDREN.

37. Where any estate is, by any marriage or other settlement, limited in remainder to, or to the use of, the first or other son or sons of the body of any person lawfully begotten, with any remainder over to, or to the use of, any other person or in remainder to, or to the use of, a daughter lawfully begotten, with any remainder to any other person, any son or daughter of such

Posthumous children to take estate as if born in their father's lifetime. Imp. Act, 10 W. 3, c. 22.

person lawfully begotten, or to be begotten, that shall be born after the decease of his or her father, shall, by virtue of such settlement, take such estate so limited to the first and other son or daughter, in the same manner as if born in the lifetime of his or her father, although there may be no estate limited to trustees, after the decease of the father, to preserve the contingent remainder to such after born son, or daughter, until he or she come *in esse,* or is born, to take the same. R. S. O. 1897, c. 330, s. 10.

PRODUCTION OF CESTUIS QUI VIE, AND TENANTS. FOR LIFE.

Cestuis que vie remaining out of Province for seven years together, and no proof of their lives, to be accounted dead. 18 and 19 Car. 2, c. 11, s. 1.

38. If any person, for whose life an estate is granted, remains out of Ontario, or absents himself therein for the space of seven years together, so that it cannot be ascertained whether he is alive or dead, and no sufficient proof is made of the life of such person in any action commenced for recovery of such estate by the lessor or reversioner, the person upon whose life such estate depended shall be accounted as naturally dead, and in every action brought for the recovery of the estate by the lessor or reversioner, his heirs, or assigns, judgment shall be given accordingly. R. S. O. 1897, c. 330, s. 14. *Amended.*

If the supposed dead man proved to be alive, then the title is revested. 18 and 19 Car. 2, c. 11, s. 4.

39. If any person is evicted out of any land by virtue of section 38, and if afterwards the person, upon whose life such estate depends, returns to Ontario, or in any action to be brought for recovery of the same, is shown to be living, or to have been living at the time of the eviction, the tenant or lessee who was ousted, his

executors, administrators or assigns, may re-enter, repossess, have, hold, and enjoy, the land in his former estate, for and during the life, or so long a term as the person, upon whose life the estate depends shall be living; and also shall, upon action to be brought by him against the lessor, reversioner, or tenant in possession, or other person, who, since the time of the eviction, received the profits of the land, recover for damages the full profits thereof, with lawful interest for, and from, the time that he was ousted, and kept or held out of the land by such lessor, reversioner, tenant in possession, or other person, whether the person upon whose life such estate depends is living or dead at the time of bringing of the action. R. S. O. 1897, c. 330, s. 15. *Amended.*

Action for *mesne* profits with interest.

40.—(1) The High Court may, on the application of any person who has any claim or demand in, or to, any remainder, reversion, or expectancy, in, or to, any estate in land, after the death of any person within age, married woman, or any other person whomsoever, upon affidavit made by the person so claiming such estate of his title, and that he has cause to believe that such minor, married woman, or other person, is dead, and that his, or her, death is concealed by the guardian, trustee, husband, or any other person, which application may be made once a year if the person aggrieved shall think fit, order that such guardian, trustee, husband, or other person concealing, or suspected to conceal, such person, do, at such time and place as the Court shall direct, on personal or other due

Order for production of person at instance of reversioner, etc.

service of such order, produce and show to such person and persons, not exceeding two, as shall in such order be named by the party prosecuting such order such minor, married woman, or other person.

Order for production of person before commissioner.

(2) If such guardian, trustee, husband, or such other person refuses or neglects to produce or show such minor, married woman, or such other person, on whose life any such estate depends, according to the directions of the order, the Court is hereby authorized and required to order such guardian, trustee, husband, or other person, to produce such minor, married woman, or other person concealed, in the Court, or otherwise before commissioners to be appointed by the Court, at such time and place as the Court shall direct, two of which commissioners shall be nominated by the party prosecuting such order, at his costs and charges.

Failure to produce. Person not produced to be taken to be dead. 6 Anne, c. 72 (or c. 18 in Ruffhead's Ed.), s. 1.

(3) If such guardian, trustee, husband, or other person, refuses or neglects to produce such minor, married woman, or other person so concealed, in Court, or before such commissioners, whereof return shall be made by such commissioners, and filed in the Central office, in either, or any, of such cases, such minor, married woman, or other person, shall be taken to be dead, and it shall be lawful for any person claiming any right, title, or interest, in remainder or reversion, or otherwise after the death of such minor, married woman or other person, to enter upon such land as if such minor, married woman, or other person were actually dead. R. S. O. 1897, c. 330, s. 16. *Amended.*

41. If it appears to the Court by affidavit that such minor, married woman, or other person, is, or lately was, at some certain place out of Ontario in the affidavit to be mentioned, the party prosecuting such order, at his costs and charges, may send over one or both of the persons appointed by the order to view such minor, married woman, or other person, and if such guardian, trustee, husband, or other person, concealing, or suspected to conceal, such person, refuses or neglects to produce, or procure to be produced to such person or persons a personal view of such minor, married woman, or other person, then such person or persons shall make a true return of such refusal or neglect to the Court, which shall be filed in the Central office, and thereupon such minor, married woman, or other person, shall be taken to be dead, and any person claiming any right, title, or interest, in remainder, reversion, or otherwise, after the death of such minor, married woman, or other person, may enter upon such land as if such minor, married woman, or other person were actually dead. R. S. O. 1897, c. 330, s. 17. *Amended.*

Where person required to be produced is out of Ontario

6 Anne, c. 72 (or c. 18 in Ruffhead's Ed.), s. 2.

42. If it shall afterwards appear upon proof in any action to be brought that such minor, married woman, or other person was alive at the time such order was made, such minor, married woman, guardian, or trustee, or other person, having any estate or interest determinable upon such life, may re-enter upon the land, and may maintain an action against those who, since the order, received the profits thereof, or their

When it appears that person required to be produced was alive.

executors, or administrators, and recover full damages for the profits of the same received from the time that such minor, married woman, or other person, having any estate or interest determinable upon such life, was ousted of the possession of such land. R. S. O. 1897, c. 330, s. 18. *Amended.*

6 Anne, c. 72 (or c. 18 in Ruffhead's Ed.), s. 3.

Where it appears that guardian, etc., cannot produce person who is alive.

43. If any such guardian, trustee, husband, or other person, holding or having any estate or interest determinable upon the life of any other person, shall show, to the satisfaction of the Court, that he has used his utmost endeavour to procure such minor, married woman, or other person, on whose life such estate or interest depends, to appear in Court, or elsewhere according to the order, and that he cannot procure or compel such appearance, and that such minor, married woman, or other person, is living, or was living at the time such return was made and filed, the Court may order that such person may continue in the possession of such estate, and receive the rents and profits thereof, during the infancy of such minor, and the life of any other person, on whose life such estate or interest next depends, as fully as he might have done if this, and the three next preceding sections had not been passed. R. S. O. 1897, c. 330, s. 19. *Amended.*

6 Anne, c. 72 (or c. 18 in Ruffhead's Ed.), s. 4.

Guardians, trustees, etc., holding over without consent of remainderman, etc., deemed trespassers.

44. Every person having an estate or interest in land, determinable upon any life, and the guardian or trustee for a minor having such an estate, who, after the determination of such particular estate or interest, without the express consent of the person who is next and imme-

diately entitled upon and after the determination of such particular estate or interest, holds over and continues in possession of any land, shall be deemed a trespasser, and every person entitled to any such land, upon and after the determination of such particular estate or interest, may recover in damages against every such person so holding over, the full value of the profits received during such wrongful possession. R. S. O. 1897, c. 330, s. 20.

6 Anne, c. 72 (or c. 18 in Ruff-head's Ed.), s. 5.

Damages.

ASSIGNMENTS OF CHOSES IN ACTION.

45.—(1) Any absolute assignment, made on or after the 31st day of December, 1897, by writing under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action of which express notice in writing shall have been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee if this section had been enacted, to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor. R. S. O. 1897, c. 51, s. 58 (5).

Assignment of debt and choses in action.

(2) In case of an assignment of a debt or other chose in action, if the debtor, trustee or other person liable in respect of the debt or chose in action shall have had notice that such

Where several claimants under assignment.

assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he thinks fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he thinks fit, pay the same into the High Court under and in conformity with the provisions of law for the relief of trustees. R. S. O. 1897, c. 51, s. 58 (6).

DEBENTURES OF CORPORATIONS TRANSFERABLE.

Bonds and debentures of corporations.

46.—(1) The bonds or debentures of a corporation made payable to bearer, or to any person named therein or bearer, may be transferred by delivery, and if payable to any person or order, after general endorsation thereof by such person, shall be transferable by delivery.

Holder may maintain action.

(2) Any such transfer shall vest the property in the bond or debenture in the holder thereof and enable him to maintain an action thereon in his own name. R. S. O. 1897, c. 119, s. 38. *Amended.*

AUCTIONS OF ESTATES.

When sale shall be deemed without reserve.

47. Unless in the particulars or conditions of sale by auction of any land it is stated that such land will be sold subject to a reserved price, or to a right of the seller to bid, the sale shall be deemed to be without reserve. R. S. O. 1897, c. 119, s. 22.

Seller not to bid at unreserved sales.

48. Upon any sale of land by auction, without reserve, it shall not be lawful for a seller or

for a puffer to bid at such sale, or for the auctioneer to take, knowingly, any bidding from the seller or from a puffer. R. S. O. 1897, c. 119, s. 23.

At reserved sales the seller may bid.

49. Upon any sale of land by auction, subject to a right for the seller to bid, it shall be lawful for the seller or any one puffer to bid at such auction in such manner as the seller may think proper. R. S. O. 1897, c. 119, s. 24.

Seller not authorized to purchase.

50. Nothing in the next preceding three sections shall authorize any seller to become the purchaser at the sale. R. S. O. 1897, c. 119, s. 25.

FRAUDS IN SALES OR MORTGAGES OF PROPERTY.

Liability of vendor or mortgagor for fraudulent concealment of deeds, etc., or falsifying pedigree. Imp. Acts 22-23 V. c. 35, s. 24, and 23-24 V. c. 38, s. 8.

51. If any seller or mortgagor of property or his solicitor or agent conceals any settlement, deed, will or other instrument material to the title, or any incumbrance, from the purchaser or mortgagee, or falsifies any pedigree upon which the title depends or may depend, in order to induce him to accept the title offered or produced to him, with intent to defraud such seller, mortgagor, solicitor or agent, irrespective of any criminal liability he may thereby incur, shall be liable at the suit of the purchaser or mortgagee, or those claiming under him, for any loss sustained by them or either or any of them, in consequence of the settlement, deed, will or other instrument or incumbrance so concealed, or of any claim made by any person under such pedigree, whose right was so concealed by the falsification of such pedigree; and in the case of land in estimating such damages where the property

is recovered from such purchaser or mortgagee, or from those claiming under him, regard shall be had to any expenditure by them, or either or any of them, in improvements on the land. R. S. O. 1897, c. 119, s. 39.

EFFECT OF ORDERS OF COURT.

Order of Court not invalidated as against purchaser for want of jurisdiction, etc.

52. An order of the Court under any statutory or other jurisdiction shall not, as against a purchaser, whether with or without notice, be invalidated on the ground of want of jurisdiction, or of want of any concurrence, consent, notice or service. R. S. O. 1897, c. 51, s. 58 (11).

Repeal.

Repeal.

53. Chapter 119 of the Revised Statutes, 1897 (except sections 14 and 34), and clause 4 of section 57, and clauses 2, 3, 5, 6 and 11 of section 58 of chapter 51, and sections 5, 10, 14, 15, 16, 17 to 23 and 31 to 33 of chapter 330 of the said Revised Statutes are repealed.

10 EDWARD VII. CHAPTER 51.

AN ACT RESPECTING MORTGAGES OF REAL ESTATE.

Assented to 19th March, 1910.

SHORT TITLE, s. 1.

INTERPRETATION, s. 2.

PART I, ss. 3-17.

RIGHTS AND OBLIGATIONS OF MORTGAGORS AND MORTGAGEES.

OBLIGATION TO TRANSFER MORTGAGE, s. 3.

INSPECTION OF TITLE DEEDS, s. 4.

APPLICATION OF INSURANCE MONEY, s. 5.

IMPLIED COVENANTS, ss. 6-7.

RELEASE OF EQUITY OF REDEMPTION WITHOUT MERGER, s. 8.

ASSIGNMENT BY EXECUTORS, s. 9.

RECEIPTS OF MORTGAGEE OR SURVIVOR OF TWO OR MORE MORTGAGEES, ETC., TO BE EFFECTUAL DISCHARGES, s. 10.

DEFENCE OF PURCHASE FOR VALUE WITHOUT NOTICE, s. 11.

RIGHT OF MORTGAGEE TO DISTRAIN LIMITED, ss. 12, 13.

PAYMENT AFTER DEFAULT WITHOUT NOTICE, ss. 14, 17.

PART II., ss. 18-26.

STATUTORY POWERS.

POWER OF SALE AND POWER TO INSURE IMPLIED, s. 18.

SALES UNDER STATUTORY POWER, ss. 19-25.

WHEN MORTGAGE CONTAINS POWER IN SHORT FORM, s. 26.

PART III., ss. 27-29.

GENERAL PROVISIONS AS TO POWER OF SALE.

RESTRICTION AS TO PROCEEDINGS ON MORTGAGES, s. 28.

PAYMENT IN TERMS OF NOTICE TO BE ACCEPTED, s. 29.

COSTS AND TAXATION, s. 29 (3-4.)

REPEAL, s. 30.

COMMENCEMENT OF ACT, s. 31.

HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. This Act may be cited as "*The Mortgages Act.*" Short title.

Interpretation.

2. In this Act,

"Conveyance."

(*a*) "Conveyance" shall include assignment, appointment, lease, settlement, and other assurance and covenant to surrender made by deed on a sale, mortgage, demise or settlement of any property or on any other dealing with or for any property; and "convey" shall have a meaning corresponding with that of conveyance.

"Convey."

"Incumbrance."

(*b*) "Incumbrance" shall include a mortgage in fee, or for a less estate, a trust for securing money, a lien, and a charge of a portion, annuity or other capital or annual sum; and "incumbrances" shall have a meaning corresponding with that of incumbrance, and shall include every person entitled to the benefit of an incumbrance, or to require payment or discharge thereof.

"Incumbrancer."

"Land."

(*c*) "Land" shall include tenements and hereditaments, corporeal or incorporeal, houses and other buildings, and also an undivided share in land.

"Mortgage."

"Mortgage money."

"Mortgagor."

(*d*) "Mortgage" shall include any charge on any property for securing money or money's worth; "mortgage money" shall mean money or money's worth, secured by a mortgage; "mortgagor" shall include any person deriving title under the original mortgagor, or entitled to redeem a mortgage, according to his estate, interest, or right in the

mortgaged property; and "mortgagee" shall include any person deriving title under the original mortgagee. R. S. O. 1897, c. 121, s. 1. "Mortgagee."

PART I.

RIGHTS AND OBLIGATIONS OF MORTGAGORS AND MORTGAGEES.

3.—(1) Notwithstanding any stipulation to the contrary, where a mortgagor is entitled to redeem, he may require the mortgagee, instead of giving a certificate of payment or reconveying, and on the terms on which he would be bound to re-convey, to assign the mortgage debt and convey the mortgage property to any third person, as the mortgagor directs; and the mortgagee shall be bound to assign and convey accordingly. Obligation on mortgagee to transfer instead of reconveying. Imp. Act, 44 and 45, V. c. 41, s. 15.

(2) The right of the mortgagor to require an assignment shall belong to and be capable of being enforced by each incumbrancer, or by the mortgagor, notwithstanding any intermediate incumbrance; but a requisition of an incumbrancer shall prevail over that of the mortgagor, and as between incumbrancers a requisition of a prior incumbrancer shall prevail over that of a subsequent incumbrancer. Imp. Act, 45 and 46, V. c. 39, s. 12.

(3) This section shall not apply if the mortgagee is or has been in possession. R. S. O. 1897, c. 121, s. 2.

Power for mortgagor to inspect title deeds. Imp. Act, 44 and 45 V. c. 41, s. 16.

4. Notwithstanding any stipulation to the contrary, a mortgagor, as long as his right to redeem subsists, shall be entitled, at reasonable times, on his request, and at his own cost and on payment of the mortgagee's costs and expenses in that behalf, to inspect and make copies or abstracts of or extracts from the documents of title relating to the mortgaged property in the custody or power of the mortgagee. R. S. O. 1897, c. 121, s. 3.

Insurance money. Imp. Act, s. 23.

5.—(1) All money payable to a mortgagor on an insurance of the mortgaged property, including effects, whether affixed to the freehold or not, being or forming part thereof, shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received.

(2) Without prejudice to any obligation to the contrary imposed by law or by special contract, a mortgagee may require that all money received on an insurance of the mortgaged property be applied in or towards the discharge of the money due under his mortgage. R. S. O. 1897, c. 121, s. 4.

Covenants to be implied. Imp. Act, s. 7.

6. There shall, in the several cases in this section mentioned, be deemed to be included, and there shall in those several cases be implied, covenants to the effect in this section stated, by the person or by each person who conveys, as far as regards the subject-matter or share thereof expressed to be conveyed by him with the person, if one, to whom the conveyance is made, or with the persons jointly, if more than one, to whom the conveyance is made as joint

tenants, or with each of the persons, if more than one, to whom the conveyance is made as tenants in common, that is to say:—

(*a*) In a conveyance by way of mortgage, the following covenants by the person who conveys, and is expressed to convey as beneficial owner, namely, covenants, On mortgage, by beneficial owner.

(I) For payment of the mortgage money and interest, and observance in other respects of the proviso in the mortgage;

(II) For good title;

(III) For right to convey;

(IV) That, on default, the mortgagee shall have quiet possession of the land; free from all incumbrances;

(V) That the mortgagor will execute such further assurances of the said lands as may be requisite; and

(VI) That the mortgagor has done no act to incumber the land mortgaged;

according to the forms of covenants for such purposes set forth in Schedule B to *The Short forms of Mortgages Act,* subject to the provisions of that Act. 10 Edw. VII., c. 55.

(*b*) In a conveyance by way of mortgage of leasehold property, the following further covenants by the person who conveys and is expressed to convey, as beneficial owner, namely, On mortgage of leaseholds, by beneficial owner.

Validity of lease.

(I) That the lease or grant creating the term or estate for which the land is held is, at the time of conveyance, a good, valid, and effectual lease or grant of the land conveyed, and is in full force, unforfeited, and unsurrendered, and in nowise become void, or voidable, and that all the rents reserved by, and all the covenants, conditions and agreements contained in the lease or grant and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed and performed, have been paid, observed and performed, up to the time of conveyance; and also

Payment of rent and performance of covenants.

(II) That the person so conveying, or the persons deriving title under him, will at all times, as long as any money remains on the security of the conveyance, pay, observe and perform, or cause to be paid, observed and performed, all the rents reserved by, and all the covenants, conditions and agreements contained in the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him, to be paid, observed and performed, and will keep the person to whom the conveyance is made and those deriving title under him, indemnified against all actions, proceedings, costs, charges, damages,

claims and demands, if any, to be incurred or sustained by him or them by reason of the non-payment of such rent, or the non-observance or non-performance of such covenants, conditions and agreements, or any of them. R. S. O. 1897, c. 121, s. 5.

Implied covenants in mortgages are joint and several. Imp. Act, s. 28.

7. In a mortgage, where more persons than one are expressed to convey as mortgagors, or to join as covenantors, the implied covenants on their part shall be deemed to be joint and several covenants by them; and where there are more mortgagees than one, the implied covenant with them shall be deemed to be a covenant with them jointly, unless the amount secured is expressed to be secured to them in shares or distinct sums; in which latter case the implied covenant with them shall be deemed to be a covenant with each severally in respect of the share or distinct sum secured to him. R. S. O. 1897, c. 121, s. 6.

Mortgagee of freehold property, etc., may receive a release, etc., without merger of debt.

8.—(1) A mortgagee of freehold or leasehold property, may take and receive from the mortgagor a release of the equity of redemption in such property, or may purchase the same under any judgment or decree or execution without thereby merging the mortgage debt as against any subsequent mortgagee or person having a charge on the same property. R. S. O. 1897, c. 121, s. 8.

Where mortgagee acquires equity of redemption, subsequent

(2) Where a prior mortgagee so acquires the equity of redemption of the mortgagor, no subsequent mortgagee shall be entitled to foreclose or sell such property without redeeming or

mortgagee not entitled to foreclose or sell property without redeeming, etc.

selling, subject to the rights of such prior mortgagee, in the same manner as if such prior mortgagee had not acquired the equity of redemption. R. S. O. 1897, c. 121, s. 9.

Priority under registry laws not to be affected.

(3) This section shall not affect any priority or claim any mortgagee may have under the registry laws. R. S. O. 1897, c. 121, s. 10.

Executors of mortgagee may assign, etc.

9. Where a person entitled to any freehold land by way of mortgage has died, and his executor or administrator has become entitled to the money secured by the mortgage, or has assented to a bequest thereof. or has assigned the mortgage debt, such executor or administrator, if the mortgage money was paid to the testator or intestate in his lifetime, or on payment of the principal money and interest due on the mortgage, or on receipt of the consideration money for the assignment, may convey, assign, release or discharge the mortgage debt and the mortgagee's estate in the land; and such executor or administrator shall have the same power as to any part of the land on payment of some part of the mortgage debt, or on any arrangement for exonerating the whole, or any part of the mortgaged land, without payment of money; and such conveyance, assignment, release or discharge shall be as effectual as if the same had been made by the persons having the mortgagee's estate. R. S. O. 1897, c. 121, s. 11.

(As to mortgages on joint account, see Mercantile Law Amendment Act, 10 Edw. VII., c. 63, s. 4.)

Receipts of surviving mortgagee, etc.,

10. The payment in good faith of any money to and the receipt thereof by the survivor or sur-

vivors of two or more mortgagees, or the executors or administrators of such survivor, or their or his assigns, shall effectually discharge the person paying the same from seeing to the application or being answerable for the misapplication thereof, unless the contrary is expressly declared by the instrument creating the security. R. S. O. 1897, c. 121, s. 14.

to be effectual discharges.

11. The purchaser in good faith of a mortgage may to the extent of the mortgage, and except as against the mortgagor, set up the defence of purchase for value without notice in the same manner as a purchaser of the mortgaged property might do. R. S. O. 1897, c. 121, s. 33.

Purchaser of mortgage may set up defence of purchase for value without notice.

12. The right of a mortgagee to distrain for interest in arrear upon a mortgage made after the 25th day of March, 1886, shall be limited to the goods and chattels of the mortgagor, and to such of them as are not exempt from seizure under execution. R. S. O. 1897, c. 121, s. 15.

Right of mortgagee to distrain limited.

13.—(1) As against creditors of a mortgagor or person in possession of mortgaged premises under a mortgagor, the right, if any, to distrain upon the mortgaged premises for arrears of interest or for rent, in the nature of or in lieu of interest under the provisions of any mortgage executed after the 23rd day of April, 1887, shall be restricted to one year's arrears of such interest or rent.

Mortgagee's right of distress limited to one year's interest or rent.

(2) This restriction shall not apply unless some one of such creditors shall be an execution creditor, or unless there shall be an assignee for

the general benefit of such creditors appointed before lawful sale of the goods and chattels distrained, nor unless the officer executing such writ of execution, or such assignee shall, by notice in writing to be given to the person distraining, or his attorney, bailiff, or agent, before such lawful sale, claims the benefit of such restriction.

(3) When such notice is given, the distrainor shall relinquish to the officer or assignee the goods and chattels so distrained, upon receiving one year's arrears of such interest or rent and his reasonable costs of distress, or if such arrears and costs shall not be paid or tendered he shall sell only so much of the goods and chattels distrained as shall be necessary to satisfy one year's arrears of such interest or rent and the reasonable costs of distress and sale, and shall thereupon relinquish any residue of them, and pay any residue of moneys, proceeds thereof so distrained, to such officer or assignee.

Reimbursement of officer or assignee

(4) An officer executing an execution, or an assignee who pays any money to relieve goods and chattels from distress under this section, shall be entitled to reimburse himself therefor out of the proceeds of the sale thereof.

Notice of sale.

(5) The goods and chattels distrained shall not be sold except after such public notice as is now required to be given by a landlord who sells goods and chattels distrained for rent. R. S. O. 1897, c. 121, s. 16.

Payment of principal after default.

14.—(1) In the case of mortgages made after the 1st day of July, 1888, and before the 12th day of June, 1903, unless it is otherwise

expressly provided in the mortgage or otherwise with respect to notice or the payment of interest in lieu of notice, the mortgagor may pay the whole principal money if overdue or any instalment thereof which has become payable according to the terms and conditions of the mortgage without previous notice to the mortgagee and without the payment of any interest in lieu of such notice.

(2) Principal money or any instalment thereof shall not be deemed to be overdue or payable within the meaning of this section where it has become payable only by reason of default in payment of part of the principal or interest. *See* R. S. O. 1897, c. 121, s. 17 (1); 3 Edw. VII. c. 11, s. 2.

Mortgagor in default to be entitled to redeem on giving three months' notice, or on paying three months' interest in lieu of notice.

15. (1) Notwithstanding any agreement to the contrary, where default has been made in the payment of any principal money secured by a mortgage of freehold or leasehold property made on or after the 12th day of June, 1903, the mortgagor or person entitled to make such payment, may at any time upon payment of three months' interest on the principal money so in arrear, pay the same, or he may give the mortgagee at least three months' notice, in writing, of his intention to make such payment at a time named in the notice, and in the event of his making such payment on the day so named he shall be entitled to make the same without any further payment of interest except to the date of payment.

(2) If the mortgagor or person entitled to make such payment fails to make the same at the time mentioned in the notice he shall there-

after be entitled to make such payment only on paying the principal money so in arrear and interest thereon to the date of payment together with three months' interest in advance.

(3) Nothing in this section shall affect or limit the right of the mortgagee to recover by action or otherwise the principal money so in arrear after default has been made. 3 Edw. VII. c. 11, s. 1.

Mortgages may be redeemed at expiration of five years from date thereof.

16.—(1) Where any principal money or interest secured by a mortgage of freehold or leasehold property, made after the 1st day of July, 1903, is not, under the terms of the mortgage, payable till a time more than five years after the date of the mortgage, then if, at any time after the expiration of such five years, any person liable to pay or entitled to redeem tenders or pays to the person entitled to receive the money the amount due for principal money and interest to the time of such tender or payment, together with three months' further interest in lieu of notice, no further interest shall be chargeable, payable or recoverable at any time thereafter on the principal money or interest due under the mortgage.

Rev. Stat. c. 205.

(2) Nothing in this section shall affect the provisions of section 25 of *The Loan Corporations Act,* or shall apply to any mortgage given by a joint stock company or other corporation nor to any debenture issued by any such company or corporation for the payment of which security has been given on freehold or leasehold property. 3 Edw. VII. c. 11, s. 3; *see* R. S. C. 1906, c. 120, s. 10, *part.*

Paying off mortgage when provision made for a lower rate for punctual payment.

17.—(1) Where in a mortgage falling due after the 20th day of April, 1907, provision is made that if interest is paid promptly it will be accepted at a lower rate than that provided in such mortgage, and interest at such lower rate has been paid according to such condition up to the time when all the principal money has become payable, any person liable to pay or entitled to redeem shall be entitled to pay the principal money and interest on the same at such lower rate at any time after the time for payment of the principal money on giving three months' notice of his intention to make such payment or on paying three months' interest at such lower rate in lieu of notice. 7 Edw. VII. c. 27, s. 1.

Mortgagor failing to pay according to notice.

(2) If the mortgagor, or person entitled to make such payment, fails to make the same at the time mentioned in such notice, he shall thereafter be entitled to make such payment only on paying the principal and interest at the lower rate to the date of payment, together with three months' interest in advance. 7 Edw. VII. c. 27, s. 2.

PART II.

STATUTORY POWERS.

Powers incident to mortgages after default for certain time.

18. Where any principal money is secured by mortgage of land executed after the 11th day of March, 1879, the mortgagee shall at any time after the expiration of four months from the time when the principal money shall have become payable, according to the terms of the mortgage, or after any interest on the principal

money shall have been in arrear for six months, or after any omission to pay any premium on any insurance which, by the terms of the mortgage, ought to be paid by the mortgagor, have the following powers, to the like extent as if they had been in terms conferred by the mortgage, but not further, namely:

Power of sale.

(*a*) A power to sell, or concur with any other person in selling, the whole or any part of the mortgaged property by public auction or private contract, subject to any reasonable conditions he may think fit to make, and to buy in at an auction and to rescind or vary contracts for sale, and to re-sell the land, from time to time, in like manner without being answerable for any loss occasioned thereby.

Power to insure.

(*b*) A power to insure and keep insured against loss or damage by fire any building or any effects or property of an insurable nature, whether affixed to the freehold or not, being or forming part of the mortgaged property, and the premiums paid for any such insurance shall be a charge on the mortgaged property, in addition to the mortgage money and with the same priority and with interest at the same rate as the mortgage money. R. S. O. 1897, c. 121, s. 18; 44-45 Vict. (Imp.), c. 41, s. 19 (2).

Receipts for purchase

19. A receipt for purchase money given by the person exercising the power of sale by the

next preceding section conferred, shall be a sufficient discharge to the purchaser, who shall not be bound to see to the application of the purchase money. R. S. O. 1897, c. 121, s. 19. money sufficient discharges.

20.—(1) No sale under the power conferred by section 18 shall be made until after two months' notice in writing, Form 1, has been given to every subsequent incumbrancer, and to the mortgagor, either personally or at his usual or last place of residence in Ontario. Notice before sale.

(2) The notice may be given at any time after any default in making a payment provided for by the mortgage.

(3) In case of the death of the person entitled subject to the mortgage, and of his interest passing to an infant, the notice shall be given to his personal representative as well as to the infant.

(4) The notice to the infant shall be served upon his guardian, and if he has no guardian upon the Official Guardian and in every case upon the infant himself, if over the age of twelve years. R. S. O. 1897, c. 121, s. 20.

21. Where a conveyance has been made in professed exercise of the power of sale conferred by section 18, the title of the purchaser shall not be liable to be impeached on the ground that no case had arisen to authorize the exercise of such power, or that such power had been improperly or irregularly exercised, or that such notice has not been given; but any person damnified by an unauthorized, improper, or irregular exercise of the power, shall have his remedy against the Improper sale not to defeat title of purchaser. 44 and 45 Vic. Imp., c. 41, s. 21 (2).

person exercising the power. R. S. O. 1897, c. 121, s. 21.

(As to registration of notice, see Registry Act, 10 Edw. VII., c. 60, s. 58.)

Application of purchase money.

22. The money arising from the sale shall be applied by the person receiving the same as follows:

Firstly, in payment of all the expenses incident to the sale or incurred in any attempted sale;

Secondly, in discharge of all interest and costs then due in respect of the mortgage under which the sale was made;

Thirdly, in discharge of all the principal money then due in respect of such mortgage; and

Fourthly, in payment of the amounts due to the subsequent incumbrancers according to their priorities,

and the residue shall be paid to the mortgagor. R. S. O. 1897, c. 121, s. 25.

Conveyance to the purchaser.

23. The person exercising the power of sale shall have power to convey or assign to and vest in the purchaser the property sold, for all the estate and interest therein of the mortgagor and of which he had power to dispose. R. S. O. 1897, c. 121, s. 26.

Owner of charge may call for title deeds and conveyance of legal estate.

24. At any time after the power of sale shall have become exercisable, the person entitled to exercise the same shall be entitled to demand and recover from the mortgagor all deeds and documents in his possession or power relating to the mortgaged property, or to the title thereto, which he would have been entitled to demand

and recover if the property had been conveyed, appointed, surrendered, or assigned to and was then vested in him for all the estate and interest of the mortgagor and of which he had power to dispose; and where the legal estate is outstanding in a trustee, the mortgagee, or any purchaser from him, shall be entitled to call for a conveyance of the legal estate to the same extent as the mortgagor could have called for such a conveyance if the mortgage had not been made. R. S. O. 1897, c. 121, s. 27.

Provisions as to sale, etc., not to apply in certain cases.

25. So much of this Part as confers a power to sell shall not apply in the case of a mortgage which contains a power of sale except as in section 26 provided; and so much as confers a power to insure shall not apply in the case of a mortgage which contains a power to insure; nor shall any of the provisions of this Part apply to a mortgage which contains a declaration that this Part shall not apply thereto. R. S. O. 1897, c. 121, s. 28.

Power of sale. 10 Edw. VII., c. 55.

26.—(1) Where a mortgage made in pursuance of *The Short Forms of Mortgages Act* contains a power of sale in the Form No. 14, in Column One of Schedule B to that Act, the mortgagee may, in exercising the power, in lieu of taking the proceedings provided for by such form Column Two, take proceedings under and have the benefit of the provisions of this Part, except that such power shall not be exercisable until after at least four months' default and at least two months' notice, or such longer periods as may by the power contained in such mortgage be fixed therefor, and this Part shall apply to a sale made under such power.

Mortgagee having power of sale may proceed under this Part.

When mortgage provides for sale without notice. 10 Edw. VII., c. 55.

(2) Where a mortgage purporting to be made in pursuance of *The Short Forms of Mortgages Act* contains a power of sale which provides for a sale without notice, the mortgagee may take proceedings to sell under and have the benefit of the provisions of this Part as fully and effectually as if the mortgage had not contained a power of sale.

(3) Sub-section 2 shall apply to all mortgages whether heretofore or hereafter made. R. S. O. 1897, c. 121, s. 29.

PART III.

GENERAL PROVISIONS AS TO POWER OF SALE.

Notice of sale shall state amounts claimed.

27. A notice of exercising a power of sale shall state the amounts claimed to be due for principal, interest and costs respectively. *New.*

When demand of payment made or notice of intention to exercise power of sale given, no other proceedings to be taken until expiration of time named in notice or demand, without order of a judge.

28.—(1) Where. pursuant to any condition or proviso contained in a mortgage, there has been made or given a demand or notice either requiring payment of the money secured by such mortgage, or any part thereof, or declaring an intention to proceed under and exercise the power of sale therein contained, no further proceeding and no action either to enforce such mortgage, or with respect to any clause, covenant or provision therein contained, or to the mortgaged property or any part thereof, shall, until after the lapse of the time at or after which, according to such demand or notice, payment of the money is to be made, or the power of sale is to be exercised or proceeded under, be com-

menced or taken unless and until an order permitting the same has been obtained from a Judge of the County or District Court of the County or District in which the mortgaged property or any part thereof is situate, or from a Judge of the High Court.

Proof on which order may be granted.

(2) The order may be obtained *ex parte*, upon such proof as satisfies the Judge that it is reasonable and equitable that the proposed action or proceeding should be permitted.

This section not to apply to proceedings to stay waste, etc.

(3) This section shall not apply to proceedings to stay waste or any injury to the mortgaged property. R. S. O. 1897, c. 121, s. 51.

(As to costs of order see Judicature (Mortgage) Enforcement Act, 9 Edw. VII., c. 46.)

Payment to be accepted if made in terms of notice.

29.—(1) Where such demand or notice requires payment of all money secured by or under a mortgage, the person making such demand or giving such notice shall be bound to accept and receive payment of the same if made as required by the terms of such demand or notice.

Payment or tender of costs.

(2) If there is a dispute as to the costs payable by the person by or on whose behalf such payment is either made or tendered such costs shall, on three clear days' notice to such person by the person claiming the same, be taxed and ascertained by the Clerk of the County or District Court, or by the Local Master of the county or district in which the mortgaged property or any part thereof is situate.

(3) If within ten days after the costs have been so taxed and ascertained, payment of such money and costs is duly made or tendered to the person entitled thereto, or to his solicitor or

agent, the same shall be deemed a compliance with such demand or notice. R. S. O. 1897, c. 121, s. 32.

Taxation of costs.

(4) A mortgagee's costs of and incidental to the exercise of a power of sale, whether under this Part or otherwise may, without an order, be taxed by one of the taxing officers of the Supreme Court at Toronto or by a local master, having jurisdiction in the county or district in which the mortgaged property or any part of it is situate, at the instance of any person interested. R. S. O. 1897, c. 121, s. 30.

Repeal.

30. Chapter 121 of the Revised Statutes of Ontario, 1897, except section 34, and all amendments to the said chapter are repealed.

Commencement of Act.

31. This Act shall come into force and take effect on, from and after the 1st day of September, 1910.

FORM I.

NOTICE OF SALE UNDER MORTGAGE.

I hereby require you on or before the day of 19 , (*a day not less than two calendar months from the service of the notice, and not less than six months after the default*), to pay off the principal money and interest secured by a certain mortgage dated the day of 19 , and expressed to be made between (*here state parties and describe mortgaged property*), which mortgage was registered on the day of 19 (*and if the mortgage has been assigned add;* and has since become the property of the undersigned). And

I hereby give you notice that the amounts due on the said mortgage for principal, interest, and costs respectively, are as follows: (*set the same forth*).

And unless the principal money, interest and costs are paid on or before the said day of 19 , I shall sell the property comprised in the said mortgage under the authority of *The Mortgages Act*.

Dated the day of 19 .

R. S. O. 1897, c. 121, s. 22.

10 EDWARD VII., CHAPTER 55.

AN ACT RESPECTING SHORT FORMS OF MORTGAGES.

Assented to 19th March, 1910.

HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

Short title.

1. This Act may be cited as "*The Short Forms of Mortgages Act.*"

Interpretation.

2. In this Act,

"Land."

(*a*) "Land" shall include freehold tenements and hereditaments, whether corporeal or incorporeal, and any undivided part or share therein;

Party."

(*b*) "Party" and "Parties" shall include a body politic or corporate as well as an individual. R. S. O. 1897, c. 126, s. 1.

Where words of column one of Schedule B are employed, the mortgage to have the same effect as if the words in column two were inserted.

3.—(1) Where a mortgage of land, made according to the form set forth in Schedule A, or any other mortgage of land expressed to be made in pursuance of this Act, or referring thereto, contains any of the forms of words contained in Column One of Schedule B, and distinguished by any number therein, such mortgage shall have the same effect as if it contained the form of words in Column Two of Schedule B, distinguished by the same number as is annexed to the form of words used in such mortgage; but it shall not be necessary in any such mortgage

to insert any such number. R. S. O. 1897, c. 126, s. 2.

(2) Where a blank occurs in any of the forms in Column Two, such form shall be read as if it were filled in with the words which supply the place of the blank in the corresponding form in Column One. *New.*

Parties may substitute names or designations.

4.—(1) Parties who use any of the forms in the first column of Schedule B may substitute for the words "Mortgagor" or "Mortgagee," any name or other designation; and in every such case corresponding substitutions shall be taken to be made in the corresponding forms in the second column.

And feminine for masculine gender or plural for singular.

(2) Such parties may substitute the feminine gender for the masculine, or the plural number for the singular, in any of the forms in the first column; and corresponding changes shall be taken to be made in the corresponding forms in the second column.

And may introduce exceptions or qualifications.

(3) Such parties may introduce into or annex to any of the forms in the first column any express exceptions from or other express qualifications thereof respectively; and the like exceptions or qualifications shall be taken to be made from or in the corresponding forms in the second column. R. S. O. 1897, c. 126, Schedule B, part.

Mortgages not taking effect under this Act, how far valid.

5. Any such mortgage or part of such mortgage which fails to take effect by virtue of this Act shall nevertheless be as effectual to bind the parties thereto, as if this Act had not been passed. R. S. O. 1897, c. 126, s. 3.

Repeal.

6. Chapter 126 of The Revised Statutes, 1897, and all amendments thereto are repealed.

Commencement of Act.

7. This Act shall come into force and take effect on, from and after the 1st day of September, 1910.

[*See also Cap.* 119, *sec.* 12.]

SCHEDULE A.

Form of Mortgage.

This Indenture, made the day of , one thousand nine hundred and , in pursuance of *The Short Forms of Mortgages Act*, between (*here insert the names of parties and recitals, if any*). Witnesseth, that in consideration of of lawful money of Canada, now paid by the said mortgagee to the said mortgagor, the receipt whereof is hereby acknowledged, the said mortgagor doth grant and mortgage unto the said mortgagee, his heirs, executors, administrators and assigns for ever, all (*parcels*).

(*Here insert provisoes, covenants or other provisions.*)

In witness whereof the said parties hereto have hereunto set their hands and seals.

R. S. O. 1897, c. 126, Sched. A.

SCHEDULE B.

COLUMN ONE.	COLUMN TWO.
1. And the said wife of the said mortgagor hereby bars her dower in the said lands.	1. And the said wife of the said mortgagor for and in consideration of the sum of one dollar of lawful money of Canada, to her in hand paid by the said mortgagee at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted and released, and by these presents doth grant and release unto the said mortgagee, his heirs, executors, administrators, and assigns, all her dower, and right and title which, in the event of her surviving her said husband, she might or would have to dower, in, to, or out of the lands and premises hereby conveyed or intended so to be.
2. Provided this mortgage to be void on payment of of lawful money of Canada, with interest at per cent., as follows: and taxes and performance of statute labour.	2. Provided always, and these presents are upon this express condition, that if the said mortgagor, his heirs, executors, administrators or assigns, or any of them, do and shall well and truly pay or cause to be paid unto the said mortgagee, his executors, administrators or assigns, the just and full sum of of lawful money of Canada, with interest thereon, at the rate of per cent. per annum, on the days and times, and in manner following—that is to say , without any deduction, defalcation or abatement out of the same for or in respect of any taxes, rates, levies, charges, rents, assessments, statute labour or other impositions whatsoever already rated, charged, assessed or imposed, or hereafter to be rated, charged, assessed or imposed by authority of Parliament or of the Legislature, or otherwise howsoever, on the said lands and tenements, hereditaments and premises, with the appurtenances, or on the said mortgagee, his heirs, executors, administrators or assigns, in re-

COLUMN ONE.	COLUMN TWO.
	spect of the said premises, or of the said money or interest, or any other matter or thing relating to these presents, and until such default as aforesaid shall and will well and truly pay, do and perform or cause or procure to be paid, done and performed, all matters and things in this proviso hereinbefore set forth, then these presents and everything in the same contained shall be absolutely null and void.
3. The said mortgagor covenants with the said mortgagee.	3. And the said mortgagor doth hereby, for himself, his heirs, executors and administrators, covenant, promise and agree to and with the said mortgagee, his heirs, executors, administrators and assigns, in manner following, that is to say:
4. That the mortgagor will pay the mortgage money and interest and observe the above proviso.	4. That the said mortgagor, his heirs, executors, administrators or some or one of them shall and will well and truly pay or cause to be paid unto the said mortgagee, his heirs, executors, administrators or assigns, the said sum of money in the above proviso mentioned, with interest for the same as aforesaid, at the days and times and in the manner above limited for payment thereof, and shall and will in everything well, faithfully and truly do, observe, perform, fulfil and keep all and singular the provisions, agreements and stipulations in the said above proviso particularly set forth, according to the true intent and meaning of these presents, and of the said above proviso.
5. That the mortgagor has a good title in fee simple to the said lands.	5. And also, that the said mortgagor, at the time of the sealing and delivery hereof, is, and stands solely, rightfully and lawfully seised of a good, sure, perfect, absolute and indefeasible estate of inheritance, in fee simple, of and in the lands, tenements, hereditaments and all and singular other the premises hereinbefore described, with their and every of their appurtenances, and of and in every part and parcel thereof, without any manner of trusts,

COLUMN ONE.	COLUMN TWO.
	reservations, limitations, provisoes or conditions, except those contained in the original grant thereof from the Crown or any other matter or thing to alter, charge, change, incumber or defeat the same.
6. And that he has the right to convey the said lands to the said mortgagee.	6. And also, that the said mortgagor now hath in himself good right, full power and lawful and absolute authority to convey the said lands, tenements, hereditaments, and all and singular other the premises hereby conveyed or hereinbefore mentioned or intended so to be, with their and every of their appurtenances unto the said mortgagee, his heirs, executors, administrators and assigns, in manner aforesaid, and according to the true intent and meaning of these presents.
7. And that on default the mortgagee shall have quiet possession of the said lands.	7. And also, that from and after default shall happen to be made of or in the payment of the said sum of money, in the said above proviso mentioned, or the interest thereof, or any part thereof, or of or in the doing, observing, performing, fulfilling or keeping of some one or more of the provisions, agreements or stipulations in the said above proviso particularly set forth, contrary to the true intent and meaning of these presents, and of the said proviso, then, and in every such case, it shall and may be lawful to and for the said mortgagee, his heirs, executors, administrators and assigns, peaceably and quietly to enter into, have, hold, use, occupy, possess and enjoy the aforesaid lands, tenements, hereditaments and premises hereby conveyed or mentioned or intended so to be, with their appurtenances, without the let, suit, hindrance, interruption or denial of him the said mortgagor, his heirs, executors, administrators or assigns, or any other person or persons whomsoever.
8. Free from all incumbrances.	8. And that free and clear and freely and clearly acquitted, exonerated and discharged of and from all arrears of taxes and assessments whatsoever due or pay-

COLUMN ONE.

COLUMN TWO.

able upon or in respect of the said lands, tenements, hereditaments and premises or any part thereof, and of and from all former conveyances, mortgages, rights, annuities, debts, executions and recognizances, and of and from all manner of other charges or incumbrances whatsoever.

9. And that the said mortgagor will execute such further assurances of the said land as may be requisite.

9. And also, that from and after default shall happen to be made of or in the payment of the said sum of money in the said proviso mentioned, or the interest thereof, or any part of such money or interest or of or in the doing, observing, performing, fulfilling or keeping of some one or more of the provisions, agreements or stipulations in the said above proviso particularly set forth, contrary to the true intent and meaning of these presents and of the said proviso, then and in every such case the said mortgagor, his heirs, executors, administrators and assigns, and all and every other person or persons whosoever having, or lawfully claiming, or who shall or may have or lawfully claim any estate, right, title, interest or trust of, in, to or out of the lands, tenements, hereditaments and premises hereby conveyed or mentioned or intended so to be, with the appurtenances or any part thereof, by, from, under or in trust for him the said mortgagor, his heirs, executors, administrators or assigns, shall and will, from time to time, and at all times thereafter, at the proper costs and charges of the said mortgagee, his heirs, executors, administrators and assigns, make, do, suffer and execute, or cause or procure to be made, done, suffered and executed, all and every such further and other reasonable act or acts, deed or deeds, devices, conveyances, and assurances in the law for the further, better and more perfectly and absolutely conveying and assuring the said lands, tenements, hereditaments and premises, with the appurtenances, unto the said mortgagee, his heirs,

COLUMN ONE.	COLUMN TWO.
	executors, administrators and assigns, as by the said mortgagee, his heirs, executors, administrators or assigns or his or their counsel learned in the law, shall or may be lawfully and reasonably devised, advised or required, but so as no person who shall be required to make or execute such assurances shall be compelled, for the making or executing thereof, to go or travel from his usual place of abode.
10. And that the said mortgagor will produce the title deeds enumerated hereunder, and allow copies to be made at the expense of the mortgagee.	10. And also, that the said mortgagor, his heirs, executors, administrators and assigns shall and will, unless prevented by fire or other inevitable accident, from time to time, and at all times hereafter, at the request and proper costs and charges in the law of the said mortgagee, his heirs, executors, administrators or assigns, at any trial or hearing in any action, or otherwise as occasion shall require, produce all, every or any deed, instrument or writing hereunder written for the manifestation, defence and support of the estate, title and possession of the said mortgagee, his heirs, executors, administrators and assigns, of, in, to or out of the said lands, tenements, hereditaments and premises hereby conveyed or mentioned or intended so to be, and at the like request, costs and charges shall and will make and deliver, or cause or procure to be made and delivered, unto the said mortgagee, his heirs, executors, administrators and assigns, true and attested or other copies or abstracts of the same deeds, instruments and writings respectively, or any of them, and shall and will permit and suffer such copies and abstracts to be examined and compared with the said original deeds by the said mortgagee, his heirs, executors, administrators and assigns.
11. And that the said mortgagor has done	11. And also that the said mortgagor hath not at any time heretofore made, done, committed, executed or wilfully or knowingly suffered any act, deed, matter

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no act to incumber the said lands.	or thing whatsoever whereby or by means whereof the said lands, tenements, hereditaments and premises hereby conveyed or mentioned or intended so to be, or any part or parcel thereof, are, is or shall or may be in any wise impeached, charged, affected or incumbered in title, estate or otherwise howsoever.
12. And that the said mortgagor will insure the buildings on the said lands to the amount of not less than of lawful money of Canada.	12. And also that the said mortgagor or his heirs, executors, administrators or assigns, shall and will forthwith insure, unless already insured, and during the continuance of this security keep insured against loss or damage by fire, in such proportions upon each building as may be required by the said mortgagee, his heirs, executors, administrators or assigns, the messuages and buildings erected on the said lands, tenements, hereditaments and premises hereby conveyed or mentioned, or intended so to be, in the sum of of lawful money of Canada, at the least, in some insurance office to be approved of by the said mortgagee, his heirs, executors, administrators or assigns, and pay all premiums and sums of money necessary for such purpose, as the same shall become due, and will on demand assign, transfer and deliver over unto the said mortgagee, his heirs, executors, administrators or assigns, the policy or policies of insurance, receipt or receipts thereto appertaining; and if the said mortgagee, his heirs, executors, administrators or assigns, shall pay any premiums or sums of money for insurance of the said premises or any part thereof, the amount of such payment shall be added to the debt hereby secured, and shall bear interest at the same rate from the time of such payments, and shall be payable at the time appointed for the then next ensuing payment of interest on the said debt.
13. And the said mortgagor	13. And the said mortgagor hath released, remised and for ever quitted claim, and by these presents doth release, remise,

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doth release to the said mortgagee all his claims upon the said lands subject to the said proviso.

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and for ever quit claim unto the said mortgagee, his heirs, executors, administrators and assigns, all and all manner of right, title, interest, claim and demand whatsoever, of, unto and out of the said lands, tenements, hereditaments and premises hereby conveyed or mentioned, or intended so to be, and every part and parcel thereof, so as that neither the said mortgagor, his heirs, executors, administrators or assigns, shall or may at any time hereafter have, claim, pretend to, challenge or demand the said lands, tenements, hereditaments and premises, or any part thereof, in any manner howsoever, subject always to the said above proviso: but the said mortgagee, his heirs, executors, administrators or assigns, and the said lands, tenements, hereditaments and premises, subject as aforesaid, shall from henceforth for ever hereafter be exonerated and discharged of and from all claims and demands whatsoever which the said mortgagor, his heirs or assigns, might or could have upon the said mortgagee, his heirs, executors, administrators or assigns, in respect of the said lands, tenements, hereditaments and premises, or upon the said lands, tenements, hereditaments and premises.

14. Provided, that the said mortgagee on default of payment for may on notice enter on and lease or sell the said lands.

14. Provided always, and it is hereby declared and agreed by and between the parties to these presents, that if the said mortgagor, his heirs, executors or administrators, shall make default in any payment of the said money or interest or any part of either of the same, according to the true intent and meaning of these presents, and of the proviso in that behalf hereinbefore contained, and shall have thereafter elapsed without such payment being made (of which default, as also of the continuance of the said principal money and interest, or some part thereof, on this security, the production of these presents shall be conclusive evidence), it shall and may be lawful to and for the

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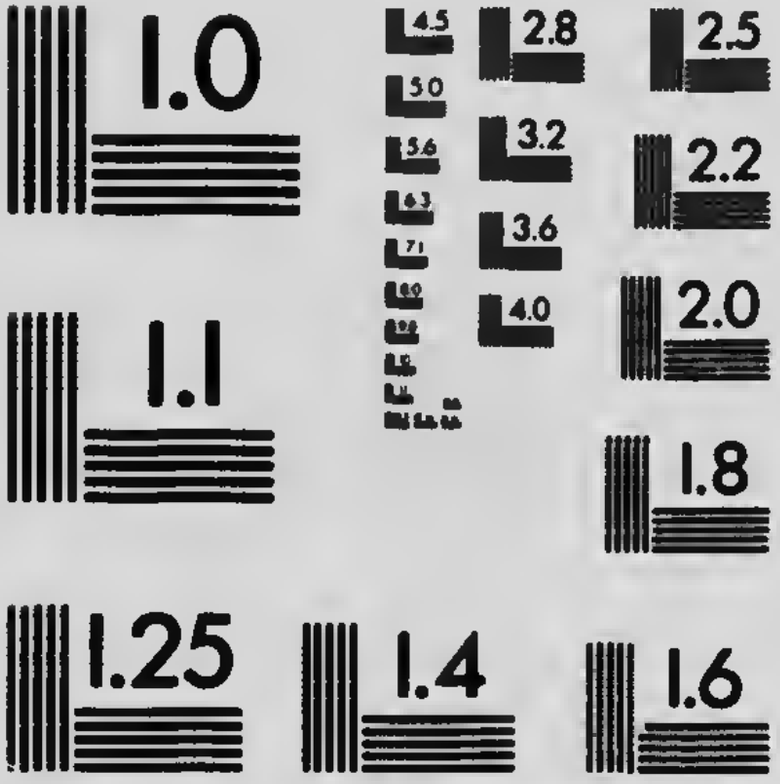

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said mortgagee, his heirs, executors, administrators or assigns, after giving written notice to the said mortgagor, his heirs, executors, administrators or assigns, of his or their intention in that behalf either personally or at his or their usual or last place of residence within this Province not less than previous, without any further consent or concurrence of the said mortgagor, his heirs, executors, administrators or assigns, to enter into possession of the said lands, tenements, hereditaments and premises hereby conveyed, or mentioned or intended so to be, and to receive and take the rents, issues and profits thereof, and whether in or out of possession of the same, to make any lease or leases thereof, or of any part thereof as he or they shall think fit, and also to sell and absolutely dispose of the said lands, tenements, hereditaments and premises hereby conveyed or mentioned, or intended so to be, or any part or parts thereof, with the appurtenances, by public auction or private contract, or partly by public auction and partly by private contract, as to him or them shall seem meet, and to convey and assure the same when so sold unto the purchaser or purchasers thereof, his or their heirs or assigns, or as he or they shall direct and appoint, and to execute and do all such assurances, acts, matters and things as may be found necessary for the purposes aforesaid, and the said mortgagee, his heirs. executors, administrators or assigns shall not be responsible for any loss which may arise by reason of any such leasing or sale as aforesaid, unless the same shall happen by reason of his or their wilful neglect or default; and it is hereby further agreed between the parties to these presents, that, until such sale or sales shall be made as aforesaid, the said mortgagee, his heirs, executors, administrators, or assigns shall and will stand and be possessed of and interested in the rents and profits

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of the said lands, tenements, hereditaments and premises, in case he or they shall take possession of the same on any default as aforesaid, and after such sale or sales shall stand and be possesser of and interested in the moneys to arise and be produced by such sale or sales, or which shall be received by the mortgagee, his heirs, executors, administrators or assigns, by reason of any insurance upon the said premises or any part thereof, upon trust in the first place to pay and satisfy the costs and charges of preparing for and making sales, leases and conveyances as aforesaid, and all other costs and charges, damages and expenses which the said mortgagee, his heirs, executors, administrators or assigns, shall bear, sustain, or be put to for taxes, rent, insurances and repairs, and all other costs and charges which may be incurred in and about the execution of any of the trusts in him or them hereby reposed, and in the next place to pay and satisfy the principal sum of money and interest hereby secured or mentioned, or intended so to be, or so much thereof as shall remain due and unsatisfied up to and inclusive of the day whereon the said principal sum shall be paid and satisfied; and after full payment and satisfaction of all such sums of money and interest as aforesaid, upon this further trust that the said mortgagee, his heirs, executors, administrators or assigns, do and shall pay the surplus, if any, to the said mortgagor, his heirs, executors, administrators or assigns, or as he or they shall direct and appoint, and shall also, in such event, at the request, costs and charges in the law of the said mortgagor, his heirs, executors, administrators or assigns, convey and assure unto the said mortgagor, his heirs, executors, administrators or assigns, or to such person or persons as he or they shall direct and appoint, all such parts of the said lands, tenements, heredi-

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	taments and premises as shall remain unsold for the purposes aforesaid, freed and absolutely discharged of and from all estate, lien, charge and incumbrance whatsoever by the said mortgagee, his heirs, executors, administrators or assigns, in the meantime, but so as no person who shall be required to make or execute any such assurances, shall be compelled for the making thereof to go or travel from his usual place of abode: Provided always, and it is hereby further declared and agreed by and between the parties to these presents, that notwithstanding the power of sale and other the powers and provisions contained in these presents, the said mortgagee, his heirs, executors, administrators or assigns, shall have and be entitled to his right of foreclosure of the equity of redemption of the said mortgagor, his heirs, executors, administrators and assigns in the said lands, tenements, hereditaments and premises as fully and effectually as he or they might have exercised and enjoyed the same in case the power of sale, and the other former provisoes and trusts incident thereto, had not been herein contained.
15. Provided that the mortgagee may distrain for arrears of interest.	15. And it is further covenanted, declared and agreed by and between the parties to these presents, that if the said mortgagor, his heirs, executors or administrators, shall make default in payment of any part of the said interest at any of the days or times hereinbefore limited for the payment thereof, it shall and may be lawful for the said mortgagee, his heirs, executors, administrators or assigns, to distrain therefor upon the said lands, tenements, hereditaments and premises, or any part thereof, and, by distress warrant, to recover by way of rent reserved, as in the case of a demise, of the said lands, tenements, hereditaments and premises, so much of such interest as shall, from time to time, be, or remain in arrear and un-

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	paid, together with all costs, charges and expenses attending such levy or distress, as in like cases of distress for rent.
16. Provided that in default of the payment of the interest hereby secured, the principal hereby secured shall become payable.	16. Provided always, and it is hereby further expressly declared and agreed by and between the parties to these presents, that if any default shall at any time happen to be made of or in the payment of the interest money hereby secured or mentioned, or intended so to be, or any part thereof, then and in such case the principal money hereby secured or mentioned, or intended so to be, and every part thereof, shall forthwith become due and payable in like manner and with the like consequences and effects, to all intents and purposes whatsoever, as if the time herein mentioned for payment of such principal money had fully come and expired, but that in such case the said mortgagor, his heirs, executors, administrators or assigns, shall on payment of all arrears under these presents, with lawful costs and charges in that behalf, at any time before any judgment in the premises recovered, or within such time as, by the practice of the High Court, relief therein could be obtained, be relieved from the consequences of non-payment of so much of the money secured by these presents, or mentioned, or intended so to be, as may not then have become payable by reason of lapse of time.
17. Provided that until default of payment the mortgagor shall have quiet possession of the said lands.	17. And provided also, and it is hereby further expressly declared and agreed by and between the parties to these presents, that until default shall happen to be made of or in the payment of the said sum of money hereby secured or mentioned, or intended so to be, or the interest thereof, or any part of either of the same, or the doing, observing, performing, fulfilling or keeping some one or more of the provisions, agreements or stipulations herein

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set forth, contrary to the true intent and meaning of these presents, it shall and may be lawful to and for the said mortgagor, his heirs, executors, administrators and assigns, peaceably and quietly to have, hold, use, occupy, possess and enjoy the said lands, tenements, hereditaments and premises hereby conveyed or mentioned, or intended so to be, with their and every of their appurtenances, and receive and take the rents, issues and profits thereof to his and their own use and benefit, without let, suit, hindrance, interruption, or denial of or by the said mortgagee, his heirs, executors, administrators or assigns, or of or by any other person or persons whomsoever lawfully claiming, or who shall or may lawfully claim by, from, under or in trust for him, her, them or any or either of them.

R. S. O. 1897, c. 126, Schedule B.

10 EDWARD VII., CAP. 34.

AN ACT RESPECTING THE LIMITATION OF ACTIONS

Arrears of Rent, and Interest.

(See supra, paragraph section 173.)

No arrears of rent or interest to be recovered for more than six years. *Idem*, s. 42.

18. (1) No arrears of rent, or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, whether it is or is not charged upon land, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, or action, but within six years next after the same respectively has become due, or next after any acknowledgment in writing of the same has been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent. R. S. O. 1897, c. 133, s. 17.

(2) This section shall not apply to an action for redemption brought by a mortgagor or any person claiming under him. *New.*

Exception in favor of subsequent mortgagee when a prior mortgagee has been in possession. *Idem*, s. 42.

19. Where any prior mortgagee or other incumbrancer has been in possession of any land, or in the receipt of the profits thereof, within one year next before an action is brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action the arrears of interest which have become due dur-

ing the whole time that such prior mortgagee or incumbrancer was in such possession or receipt, although such time may have exceeded such term of six years. R. S. O. 1897, c. 133, s. 18.

Mortgages and Charges on Land.

(See supra, paragraph section 25.)

Mortgagor to be barred at end of ten years from the time when the mortgagee took possession, or from the last written acknowledgment Imp. Acts, 3-4 W. IV. c. 27, s. 28 and 37-38 V. c. 57. s. 7.

20. Where a mortgagee has obtained the possession or receipt of the profits of any land or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring any action to redeem the mortgage, but within ten years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment in writing of the title of the mortgagor, or of his right to redemption has been given to the mortgagor or to some person claiming his estate, or to the agent of such mortgagor or person, signed by the mortgagee, or the person claiming through him, and in such case no such action shall be brought, but within ten years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given. R. S. O. 1897, c. 133, s. 19.

Mortgagee may enter or sue within ten years from last payment. Imp. Act, 7 W. IV., and 1 V. c. 28.

23. Any person entitled to or claiming under a mortgage of land, may make an entry or bring an action to recover such land, at any time within ten years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than ten years have elapsed since the time at which the right to

make such entry or bring such action first accrued. R. S. O. 1897, c. 133, s. 22.

Money charged upon land and legacies to be deemed satisfied at the end of ten years if no interest paid or acknowledgment given in writing in the meantime.

24. (1) No action shall be brought to recover out of any land or rent any sum of money secured by any mortgage or lien, or otherwise charged upon or payable out of such land or rent, or to recover any legacy, whether it is or is not charged upon land, but within ten years next after a present right to receive the same accrued to some person capable of giving a discharge for, or release of the same, unless in the meantime some part of the principal money, or some interest thereon, has been paid, or some acknowledgment in writing of the right thereto signed by the person by whom the same is payable, or his agent, has been given to the person entitled thereto or his agent; and in such case no action shall be brought but within ten years after such payment or acknowledgment, or the last of such payments or acknowledgments if more than one was made or given. R. S. O. 1897, c. 133, s. 23; 5 Edw. VII. c. 13, s. 10.

Imp. Acts, 3-4 W. IV c. 27, s. 40, and 37-38 V. c. 57, s. 8.

Execution against land to be a lien so long as in force.

(2) Notwithstanding the provisions of subsection 1, a lien or charge created by the placing of an execution or other process against the lands in the hands of the sheriff or other officer to whom it is directed shall remain in force so long as such execution or other process remains in the hands of such sheriff or officer for execution and is kept alive by renewal or otherwise. 5 Edw. VII., c. 13, s. 10.

(See, as to payment to mortgagee by person not interested, *Trust and Loan Co.* v. *Stevenson* (1892), 21 O. R. 571.)

REGISTRY ACT, 10 EDWARD VII., CAP. 60.

(Amended by 1 Geo. V., cap. 17, s. 31, s.-s. 2.)

Effect of registration of discharge of mortgage.

66*a*. Every certificate of payment or discharge of a mortgage or of the conditions therein or of the lands or any part thereof by the mortgagee, his executors, administrators or assigns at any time given and whether before or after the time limited by the mortgage for payment or performance, if in conformity with this Act, shall, when registered, be a discharge of the mortgage or of the lands in such certificate described, as the case may be, and shall be as valid and effectual in law as a release of the mortgage or of such lands and as a conveyance to the mortgagor, his heirs or assigns of the original estate of the mortgagor therein.

70. (2) This section shall not extend to a lease for a term not exceeding seven years, where the actual possession goes along with the lease; but it shall extend to every lease for a longer term than seven years. R. S. O. 1897, c. 136, s. 39.

LAND TITLES ACT, 1 GEO. V., CAP. 28.

Trustees and Mortgagees.

Trustees, etc., may sell by medium of registry, or may be themselves registered. Imp. 38-39 V. c. 87, s. 68.

7. (1) Any person holding land on trust for sale, and any trustee, mortgagee, or other person having a power of selling land, may authorize the purchaser to make an application to be registered as owner with any title with which an owner is authorized to be registered, and may consent to the performance of the contract being conditional on his being so registered; or any of such persons, except a mortgagee, may himself apply to be registered as such owner with the consent of the persons (if any) whose consent is required to the exercise by the applicant of his trust or power of sale.

(2) A mortgagee having a power of selling land, may apply to have the mortgagor or other person owning the equity of redemption registered as owner with any such title.

(3) The amount of all costs, charges, and expenses properly incurred by such person, in or about the application, shall be ascertained and declared by the proper Master of Titles, and shall be deemed to be costs, charges, and expenses properly incurred by such person in the execution of his trust or in pursuance of his power; and he may retain or reimburse the same to himself out of any money coming to him under the trust or power, and he shall not be liable to any account in respect thereof. R. S. O. 1897, c. 138, s. 8.

TRANSFER AND CHARGE OF REGISTERED LAND.

Charge of Registered Land.

Creation of charges and delivery of certificate of charge. Imp. Act, 38-39 V. c. 87, s. 22.

30. (1) Every registered owner may in the prescribed manner charge the land with the payment at an appointed time of any principal sum of money either with or without interest, or as security for any other purpose, and with or without a power of sale. R. S. O. 1897, c. 138, s. 33 (1).

Charge, how completed.

(2) The charge shall be completed by the proper Master of Titles entering on the register the person in whose favour the charge is made as the owner of the charge, stating the amount of the principal sum which the charge secures, with the rate of interest and the periods of payment, or the other purpose for which the charge is given.

(3) Where the charge contains a power of sale, that fact shall be stated, but the particulars need not be set out in the register, nor shall it be necessary to set forth incidental matters which may be expressly charged, such as costs of inspection, or of abortive attempts to sell and the like. 3 Edw. VII., c. 12, s. 3.

(4) The charge, when registered, shall confer upon the chargee a charge upon the interest of the chargor as appearing in the register subject to the incumbrances and qualifications to which such interest is subject, but free from any unregistered interests in the land. *New.*

(5) The Master shall also, if required, deliver to the owner of the charge, a certificate of

charge in the prescribed form. R. S. O. 1897, c. 138, s. 33 (3).

(6) The provisions of section 73 of *The Registry Act* shall apply to the charge as if it was a registered mortgage. *New.* 10 Edw. VII., c. 60

31. (1) Where a registered charge is created, there shall be implied on the part of the registered owner at the time of the creation of the charge, his heirs, executors and administrators, unless there is an entry on the register negativing the implication, covenants with the registered owner for the time being of the charge: Implied covenant to pay charges. Imp. 38-39 V. c. 87 s. 23.

(*a*) To pay the principal sum charged, and interest, if any, thereon, at the appointed time and rate; and all taxes, rates, charges, rents, statute labour or other impositions theretofore or thereafter imposed or charged on the land, and that in case of default all payments made by the owner of the charge may be added to the principal sum and bear interest;

(*b*) If the principal sum or any part thereof is unpaid at the appointed time, to pay interest half yearly at the appointed rate on so much of the principal sum as for the time being remains unpaid.

(2) Where a charge, whether or not under seal, is expressed to be made in pursuance of *The Short Forms of Mortgages Act,* or refers thereto, and contains any form of words contained in clauses numbered 1, 2, 3, 7, 8, 12, 14, 15 or 16, of Column One, of Schedule B. to that Act, whether expressed in the first or third per- Provision where charge expressed to be made under 10 Edw. VII. c. 55.

son, such words shall have the same meaning and effect as the words under the corresponding number in Column Two in that schedule; and the provisions of that Act shall apply to the charge. R. S. O. 1897, c. 138, s. 34.

Remedy of owner of charge with a power of sale. Imp. 38-39 V. c. 87, s. 27.

35. Subject to any entry to the contrary on the register, the registered owner of a registered charge with a power of sale, in accordance with the terms of the power, may sell and transfer the interest in the land, which is the subject of the charge, or any part thereof, in the same manner as if he were the registered owner of the land to the extent of such interest therein. R. S. O. 1897, c. 138, s. 38.

9 EDW. VII., CAP. 39.

AN ACT RESPECTING DOWER.

Dower out of equitable estates.

4. Where a husband dies beneficially entitled to any land for an interest which does not entitle his widow to dower at common law, and such interest, whether wholly equitable or partly legal and partly equitable, is, or is equal to an estate of inheritance in possession (other than an estate in joint tenancy), his widow shall be entitled to dower out of such land. R. S. O. 1897, c. 164, s. 2.

Dower where husband had a right of entry.

5. Where a husband has been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same if he had recovered possession thereof, she shall be entitled to dower out of the same although her husband did not recover possession thereof; but such dower shall be sued for or obtained within the period during which such right of entry or action might be enforced. R. S. O. 1897, c. 164, s. 3.

Dower not recoverable out of land in state of nature when alienated.

6. Dower shall not be recoverable out of any separate and distinct lot, tract, or parcel of land, which, at the time of alienation by the husband or at the time of his death, if he died seized thereof, was in a state of nature, and unimproved by clearing, fencing or otherwise for the purposes of cultivation or occupation; but this shall not restrict or diminish the right to have woodland assigned to the dowress under section 28, from which it shall be lawful for her to take firewood necessary for her own use, and timber

for fencing the other portions of the same lot, tract or parcel assigned to her. R. S. O. 1897, c. 164, s. 4.

Dower in land patented as Mining Land.

7. No dower shall be recoverable out of any land which has been heretofore or shall be hereafter granted by the Crown as mining land in case such land is on or after the 31st day of December, 1897, granted or conveyed to the husband of the person claiming dower, and he does not die entitled thereto. R. S. O. 1897, c. 164, s. 5.

Lands dedicated for streets not subject to dower.

8. Lands dedicated by the owner thereof for a street or public highway shall not be subject to any claim for dower by the wife of the person by whom the same was dedicated. 3 Edw. VII., c. 19, s. 602.

Dower forfeited by elopement with adulterer.

9. Where a wife willingly leaves her husband and goes away, and continues with her adulterer, she shall be barred forever of her action to demand her dower that she ought to have of her husband's lands, unless her husband willingly and without coercion be reconciled to her, and suffer her to dwell with him; in which case she shall be restored to her action. 13 Edw. 1. (St. of Westminster 2nd), c. 34; R. S. O. 1897, c. 330, s. 9.

(As to women having jointures, see Stat. of Uses, R. S. O. c. 331, ss. 5, 6 and 7.)

Effect of bar of dower in mortgages

10. (1) No bar of dower contained in any mortgage or other instrument intended to have the effect of a mortgage or other security upon land shall operate to bar such dower to any

greater extent than shall be necessary to give full effect to the rights of the mortgagee or grantee under such instrument.

Wife entitled to dower in surplus of purchase money arising from sale under mortgage.

(2) Where land comprised in such mortgage or other instrument is sold under any power of sale contained therein or under any legal process the wife of the mortgagor or grantor who shall have so barred her dower in such land shall be entitled to dower in any surplus of the purchase money arising from such sale which may remain after satisfaction of the claim of the mortgagee or grantee, to the same extent as she would have been entitled to dower in the land from which such surplus purchase money shall be derived had the same not been sold, and, except where the mortgage or other instrument is for the purchase money of the land, the amount to which she is entitled shall be calculated on the basis of the amount realized from the sale of the land, and not upon the amount realized from the sale over and above the amount of the mortgage only. R. S. O. 1897, c. 164, ss. 7 and 8 (1).

[As to right to dower under The Land Titles Act where land acquired subject to a charge, or where owner after charging land marries, see R. S. O. c. 138, s. 50.]

Payment of money into Court.

11. (1) A mortgagee or other person holding any money out of which a married woman shall be dowable under the next preceding section may pay the same into the High Court to the credit of such married woman and the other persons interested therein.

Order for securing right of dower.

(2) The High Court or a Judge thereof may, on a summary application, make such order as may be deemed just for securing the right of

dower of a married woman, in any money out of which she shall be dowable. R. S. O. 1897, c. 164, s. 9.

Widow's election.

12. A widow shall not be entitled to take her interest in money under section 10, and in addition thereto a share of the money as personal estate. R. S. O. 1897, c. 164, s. 10.

1 GEORGE V., CAP. 35.

AN ACT RESPECTING INFANTS.

INFANTS' REAL ESTATE.

A sale of the estate of infants may be authorised

5. (1) Where an infant is seised, possessed of or entitled to any real estate in fee or for a term of years, or otherwise, and the High Court is of opinion that a sale, lease or other disposition of the same, or of a part thereof, is necessary or proper for the maintenance or education of the infant or that for any cause his interest requires or will be substantially promoted by such disposition, the Court may order the sale, or the letting for a term of years, or other disposition of such real estate, or any part thereof, to be made under the direction of the Court or of one of its officers, or by the guardian of the infant, or by a person appointed for the purpose, in such manner and with such restrictions as may be deemed expedient, and may order the infant to convey the estate.

No sale contrary to a devise, etc.

(2) No sale, lease, or other disposition shall be made contrary to the provisions of a will or conveyance by which the estate has been devised or granted to the infant or for his use. R. S. O. 1897, c. 168, s. 3.

The application to be by next friend or guardian.

6. The application shall be in the name of the infant by his next friend, or guardian; but shall not be made without the consent of the infant if he is of the age of fourteen years or upwards unless the Court otherwise directs or allows. R. S. O. 1897, c. 168, s. 4.

When a substitute may be appointed to convey.

7. Where it is deemed convenient, the Court may direct some other person in the place of the infant to convey the estate. R. S. O. 1897, c. 168, s. 5.

Deeds executed in behalf of infants to be valid.

8. Every such conveyance, whether executed by the infant or by a person appointed to execute the same in his place, shall be as effectual as if the infant had executed the same, and had been of the age of twenty-one years at the time. R. S. O. 1897, c. 168, s. 6.

The Court to direct the application of proceeds.

9. The money arising from such sale, lease or other disposition shall be laid out, applied and disposed of in such manner as the Court directs. R. S. O. 1897, c. 168, s. 7.

Quality of surplus moneys upon sale of real estate.

10. On any sale or other disposition so made the money raised, or the surplus thereof, shall be of the same nature and character as the estate sold or disposed of; and the heirs, next of kin, or other representatives of the infant, shall have the like interest in any surplus which may remain at the decease of the infant as they would have had in the estate sold or disposed of if no such sale or other disposition had been made. R. S. O. 1897, c. 168, s. 8.

Consent to assignment of lease by infant.

11. Where an infant is seised of the reversion of land subject to a lease, and such lease contains a covenant not to assign or sublet without leave, the guardian of such infant may with the approbation of the Judge of the Surrogate Court of the County or District in which the land, or any part of it, is situate, consent to any assignment or transfer of such leasehold interest, in the same

manner and with the like effect as if the consent were given by a lessor under no such disability. R. S. O. 1897, c. 170, s. 12, *amended.*

In cases of dower a composition may be made.

12. If any real estate of an infant is subject to dower, and the person entitled to dower consents in writing to accept in lieu of dower a gross sum which the Court deems reasonable or the permanent investment of a reasonable sum in such manner that the interest thereof be made payable to the person entitled to dower during her life, the Court may direct the payment of such sum in gross out of the purchase money to the person entitled to dower, as upon the principles applicable to life annuities may be deemed a reasonable satisfaction for such dower; or may direct the payment to the person entitled to dower of an annual sum or of the income or interest to be derived from the purchase money, or any part thereof, as may seem just, and for that purpose may make such order for the investment or other disposition of the purchase money, or any part thereof, as may be necessary. R. S. O. 1897, c. 168, s. 9.

(As to conveyance by infants where land is sold by direction of the Court for payment of debts of ancestor, see The Trustee Act, s. 62.)

1 GEORGE V., CAP 26.

AN ACT RESPECTING TRUSTEES AND EXECUTORS AND THE ADMINISTRATION OF ESTATES.

HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

Short title.

1. This Act may be cited as *The Trustee Act*. R. S. O. 1897, c. 129, s. 1.

Interpretation.

2. In this Act,—

Assign.

(*a*) "Assign" shall mean and include the execution and performance by a person of every necessary or suitable deed or act for assigning, surrendering, or otherwise transferring land of which such person is possessed, either for the whole estate of the person so possessed, or for any less estate; and "assignment" shall have a corresponding meaning.

Assignment.

Contingent right.

(*b*) "Contingent right" as applied to land, shall mean and include a contingent and executory interest, and a possibility coupled with an interest, whether the object of the gift or limitation of such interest or possibility is, or is not, ascertained; also a right of entry, whether immediate or future, vested or contingent.

Convey. Conveyance.

(*c*) "Convey" applied to any person, shall mean and include the execution and delivery by such person of every necessary or suitable assurance for conveying or disposing to another land whereof such person is seized, or wherein he is entitled to a contingent right, either for his whole estate, or for any less estate, together with

the performance of all formalities required by law to the validity of such conveyance; and "conveyance" shall have a corresponding meaning.

(*d*) "Devisee" shall include the heir of a devisee, and the devisee of an heir, and any person who may claim right by devolution of title of a similar description. R. S. O. 1897, c. 336, s. 2, part. *Amended.* Devisee. Imp. Act, 56-57 Vict. c. 53, s. 50, part.

(*e*) "Instrument" shall include a deed, a will and a written document and an Act of the Legislature, but not a judgment or order of a court. (*New.*) *See* R. S. O. 1897, c. 129, s. 27. Instrument. R.S.O. 1897 c. 129, s. 27.

(*f*) "Land" shall include messuages, and all other hereditaments, whether corporeal or incorporeal, chattels and other personal property transmissible to heirs, money to be laid out in the purchase of land, and any share of the same hereditaments and properties, or any of them, and any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs and any possibility, right or title of entry or action, and any other interest capable of being inherited, whether the same estates, possibilities, rights, titles and interests, or any of them, are in possession, reversion, remainder or contingency. Land. 10 Edw. VII. c. 57, s. 2.

(*g*) "Lunatic" shall mean any person who has been declared a lunatic. R. S. O. 1897, c. 336, s. 2. Lunatic.

(*h*) "Mortgage" shall be applicable to every estate, interest, or property, in land or personal estate, which is merely a security for money; and "mortgagee" shall have a corresponding meaning and shall include every person Mortgage. Mortgagee. Imp. Act, s. 13-14. Vict. c. 60, s. 2 and 56-57 Vict. c. 53, s. 50.

deriving title under the original mortgagee. R. S. O. 1897, c. 336, s. 2.

Person of unsound mind.

(*i*) "Person of unsound mind" shall mean any person, not an infant, who, not having been declared a lunatic, is incapable, from infirmity of mind, to manage his own affairs.

Personal estate. 10 Edw. VII. c. 57, s. 2

(*j*) "Personal Estate" shall include leasehold estates and other chattels real, and also money, shares of Government and other funds, securities for money (not being real estate), debts, choses in action, rights, credits, goods, and all other property, except real estate, which by law devolves upon the executor or administrator, and any share or interest therein.

Personal representative.

(*k*) "Personal Representative" shall mean and include an executor, an administrator, and an administrator with the will annexed. *New.*

Possessed.

(*l*) "Possessed" shall be applicable to any vested estate less than a life estate, legal or equitable, in possession or in expectancy, in any land.

Securities.

(*m*) "Securities" shall include stocks, funds and shares.

Seized.

(*n*) "Seized" shall be applicable to any vested interest for life, or of a greater description, and shall extend to estates, legal and equitable, in possession, or in futurity, in any land.

Stock.

(*o*) "Stock" shall include fully paid up shares, and any fund, annuity, or security transferable in books kept by any incorporated bank, company or society, or by instruments of transfer, either alone or accompanied by other formalities, and any share or interest therein.

(*p*) "Transfer," in relation to stock, shall include the performance and execution of every deed, power of attorney, act or thing, on the part of the transferor, to effect and complete the title in the transferee. Transfer.

(*q*) "Trust" shall not mean the duties incident to an estate conveyed by way of mortgage; but, with this exception, shall include implied and constructive trusts and cases where the trustee has some beneficial estate or interest in the subject of the trust, and shall extend to, and include, the duties incident to the office of personal representative of a deceased person; and "trustee" shall have a corresponding meaning and shall include a trustee however appointed and several joint trustees. Trust. Trustee.

(*r*) "Will" shall include a testame ., and a codicil, and an appointment by will, or by writing in the nature of a will in exercise of a power, and also a disposition by will and testament, or devise of the custody and tuition of any child, by virtue of *The Infants' Act,* and any other testamentary disposition. R. S. O. 1897, c. 336, s. 2, *amended.* Will. 1 Geo. V., c. 35.

RETIREMENT OF TRUSTEES.

3.—(1) Where there are more than two trustees, if one of them by deed declares that he is desirous of being discharged from the trust, and if his co-trustees and such other person, if any, as is empowered to appoint trustees, consent by deed to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust pro- Retirement of trustees. Imp. Act, 56-57 Vict. c. 53, s. 11.

perty, then the trustee desirous of being discharged shall be deemed to have retired from the trust, and shall, by the deed, be discharged therefrom under this Act, without any new trustee being appointed in his place.

(2) Any assurance or thing requisite for vesting the trust property in the continuing trustees alone shall be executed or done.

(3) This section shall not apply to executors or administrators.

APPOINTMENT OF NEW TRUSTEES.

Power of appointing new trustees. Imp. Act, 56-57 Vict. c. 53, s. 10.

4.—(1) Where a trustee either original or substituted dies or remains out of Ontario for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, the person nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may by writing appoint another person or other persons to be a trustee or trustees in the place of the trustee dying, remaining out of Ontario, desiring to be discharged, refusing or being unfit or incapable. R. S. O. 1897, c. 129, s. 4, *amended.*

Power of the Court to appoint new trustees.

(2) Whenever it is expedient to appoint a new trustee, or new trustees, and it is found inexpedient, difficult, or impracticable so to do

without the assistance of the Court, the High Court may make an order for the appointment of a new trustee, or new trustees, either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee: and in particular, and without prejudice to the generality of the foregoing provision, the Court may make an order for the appointment of a new trustee in substitution for a trustee who is convicted of an indictable offence, or is bankrupt or insolvent. R. S. O. 1897, c. 336, s. 21 (1). Imp. Act, 56-57 Vict. c. 53, s. 25.

(3) An order under sub-section 2 and any consequential vesting order or conveyance shall not operate whether or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under a power for that purpose contained in an instrument would have operated. R. S. O. 1897, c. 336, s. 21 (2).

(4) Nothing in this section shall give power to appoint a personal representative. R. S. O. 1897, c. 336, s. 21 (3).

(5) On the appointment of a new trustee for the whole or any part of trust property: Imp. Act, 56-57 Vict. c. 53, s. 10.

(*a*) The number of trustees may be increased; and

(*b*) A separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property, notwithstanding that no new trustees or trustee are or is to be appointed for other parts of the trust

property, and any existing trustee may be appointed or remain one of such separate set of trustees; or, if only one trustee was originally appointed, then one separate trustee may be so appointed for the first mentioned part; and

(*c*) It shall not be obligatory to appoint more than one new trustee where only one trustee was originally appointed, or to fill up the original number of trustees where more than two trustees were originally appointed; but, except where only one trustee was originally appointed, a trustee shall not be discharged under this section from his trust unless there will be at least two trustees to perform the trust; and

(*d*) Any assurance or thing requisite for vesting the trust property, or any part thereof, in the person who is the trustee, or jointly in the persons who are the trustees, shall be executed or done.

(6) Every new trustee so appointed, as well before as after all the trust property becomes by law, or by assurance, or otherwise, vested in him, shall have the same powers, authorities and discretions, and may in all respects act as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

(7) The provisions of this section relative to a trustee who is dead shall include the case of a person nominated trustee in a will but dying before the testator, and those relative to a con-

tinuing trustee shall include a refusing or retiring trustee, if willing to act in the execution of the provisions of this section.

(8) This section is subject to the provisions of section 2 of the Act passed in the 8th year of the reign of His late Majesty King Edward the Seventh, Chaptered 43, intituled *An Act to amend The Ontario Companies Act. New.*

Sales by trustees not impeachable on certain grounds. Imp. Act, 51-52 Vict. c. 59, s. 3.

20.—(1) No sale made by a trustee after the 4th day of May, 1891, shall be impeached by any beneficiary upon the ground that any of the conditions subject to which the sale was made, were unnecessarily depreciatory, unless it also appears that the consideration for the sale was thereby rendered inadequate.

(2) No such sale shall after the execution of the conveyance be impeached as against the purchaser upon the ground that any of the conditions subject to which the sale was made were unnecessarily depreciatory, unless it appears that the purchaser was acting in collusion with the trustee at the time when the contract for the sale was made.

(3) No purchaser, upon any such sale, shall make any objection against the title upon this ground. R. S. O. 1897, c. 129, s. 29, *amended.*

Receipts.

Receipts of trustees to be effectual discharges

25. The payment of any money to and the receipt thereof by any person to whom the same is payable upon any trust, or for any limited purpose, and such payment to and receipt by the survivor or survivors of two or more mort-

gagees or holders or the executors or administrators of such survivor or their or his assigns, shall effectually discharge the person paying the same from seeing to the application or being answerable for the misapplication thereof. R. S. O. 1897, c. 129, s. 9, *amended*. (See also 10 Edw. VII., c. 51, s. 10.)

Trustee lending more than authorized amount. Imp. Act, 51-52 Vict. c. 59, s. 5.

31. Where a trustee has improperly advanced money on a mortgage security which would at the time of the investment have been a proper investment in all respects for a less sum than was actually advanced, the security shall be deemed an authorized investment for such less sum, and the trustee shall only be liable to make good the sum advanced in excess thereof with interest. R. S. O. 1897, c. 130, s. 9 (1). 9 Edw. VII., c. 59, s. 8.

Application of secs. 30 and 31.

32. Sections 30 and 31 shall apply to transfers of existing securities as well as to new securities, and to investments made as well before as on and after the 4th day of May, 1891, unless some action or other proceeding was pending with reference thereto at that date. R. S. O. 1897, c. 130, s. 8 (2); 9 Edw. VII. c. 59, s. 9.

Execution of Powers.

Direction to sell, etc., may be exercised by executor when no other person is appointed to exercise same.

43. Where there is in a will a direction, express or implied, to sell, dispose of, appoint, mortgage, incumber or lease any land, and no person is by the will or otherwise by the testator appointed to execute and carry the same into effect, the executor, if any, named in such will may execute and carry into effect every such di-

rection in respect of such land, and any estate or interest therein, in the same manner, and with the same effect, as if he had been appointed by the testator for that purpose. R. S. O. 1897, c. 129, s. 21. *Amended.*

Administrator with will annexed may exercise powers of sale given to the executor. Or when no one named in the will to execute powers of sale. etc.

44. Where from any cause a Court of competent jurisdiction has committed to a person, who has given security to the satisfaction of such Court for his dealing with such land and its proceeds, letters of administration with a will annexed which contains an express or implied power to sell, dispose of, appoint, mortgage, incumber or lease any land, whether such power is conferred on an executor named in the will or the testator, has not by the will or otherwise appointed a person to execute it, the administrator may exercise the power in respect of such land in the same manner and with the same effect as if he had been appointed by the testator for that purpose. R. S. O. 1897, c. 129, ss. 22 and 23.

Contract of Deceased.

Executors etc., may convey in pursuance of a contract for sale made by deceased.

45. Where any person has entered into a contract in writing for the sale and conveyance of land, and such person has died intestate, or without providing by will for the conveyance of such land to the person entitled or to become entitled to such conveyance, if the deceased would be bound, were he alive, to execute a conveyance, his personal representative shall make and give to the person entitled to the same a good and sufficient conveyance of such land, of such nature as the deceased, if living, would be liable to give, but without covenants, except as against

the acts of the grantor; and the conveyance shall be as valid and effectual as if the deceased were alive at the time of the making thereof, and had executed the same, but shall not have any further validity or effect. R. S. O. 1897, c. 129, s. 24.

Devises in Trust.

10 Edw. VII. c. 56.

Devisee in trust may raise money by sale or mortgage to satisfy charges, notwithstanding want of express power in the will. Imp. Act, 22-23 V. c. 35, s. 14.

46. (1) Subject to the provisions of *The Devolution of Estates Act,* where by any will coming into operation after the 18th day of September, 1865, a testator charges his land, or any specific part thereof, with the payment of his debts or with the payment of any legacy or other specific sum of money, and devises the land so charged to a trustee for the whole of his estate or interest therein, and does not make any express provision for the raising of such debt, legacy or sum of money out of such land, the devisee in trust, notwithstanding any trusts actually declared by the testator, may raise such debt, legacy or money by a sale and absolute disposition, by public auction or private contract, of such land or any part thereof, or by a mortgage of the same, or partly by one mode and partly by the other, and in any mortgage so executed may agree to such rate of interest and such period of repayment as he may thing proper. R. S. O. 1897, c. 129, s. 16. *Amended.*

Power given by sub-sec. 1 extended to survivors, devisees, etc. Imp. Act. 22-23 V. c. 35, s. 15.

(2) The powers conferred by this section shall extend to every person in whom the land devised is for the time being vested by survivorship, descent or devise, and to any person appointed under any power in the will or by the High Court to succeed to the trusteeship vested

in such devisee in trust. R. S. O. 1897, c. 129, s. 17. *Amended.*

(3) If a testator who creates such a charge does not devise the land so charged in such terms that his whole estate and interest therein become vested in a trustee, the executor for the time being named in the will, if any, shall have the like power of raising money as is hereinbefore conferred upon the devisee in trust; and such power shall from time to time devolve upon and become vested in the person in whom the executorship is for the time being vested.

Executor to have power of raising money, where there is no sufficient devise. Imp. Act, 22-23 V. c. 35, s. 16.

(4) Any sale or mortgage under this section shall operate only on the estate and interest of the testator. R. S. O. 1897, c. 129, s. 18. *Amended.*

(5) Purchasers or mortgagees shall not be bound to inquire whether the powers conferred by this section, or any of them, have been duly and correctly exercised by the person acting in virtue thereof. R. S. O. 1897, c. 129, s. 19. *Amended.*

Purchasers etc., not bound to inquire as to exercise of powers. Imp. Act, 22-23 V. c. 35, s. 17.

(6) This section shall not extend to a devise to any person in fee or in tail, or for the testator's whole estate and interest charged with debts or legacies, or affect the power of any such devisee to sell or mortgage. R. S. O. 1897, c. 129, s. 20. *Amended.*

Section not to affect certain sales nor to extend to devises in fee or in tail. Imp. Act, 22-23 V. c. 35, s. 18.

47. Every personal representative, as respects the additional powers vested in him by this Act, and any money or assets by him received in consequence of the exercise of such powers, shall be subject to all the liabilities, and com-

Duties and liabilities of an executor and administrator acting under the powers in this Act

pellable to discharge all the duties which, as respects the acts to be done by him under such powers, would have been imposed upon a person appointed by the testator, or would have been imposed by law upon any person appointed by law, or by any Court of competent jurisdiction to execute such power. R. S. O. 1897, c. 129, s. 25. *Amended.*

Powers given by this Act to two or more to survive.

48. Where there are several personal representatives, and one or more of them die, the powers conferred upon them by this Act shall vest in the survivor or survivors. R. S. O. 1897, c. 129, s. 26.

2 GEORGE V., CAP. 28.

AN ACT RESPECTING SOLICITORS.

SOLICITOR'S COSTS.

Solicitors to deliver their bill one month before bringing action for costs.

34. (1) No action shall be brought for the business done by a Solicitor as such, until one month after a bill thereof, subscribed with the proper hand of such Solicitor, his executor, administrator or assignee, or, in the case of a partnership, by one of the partners, either with his own name, or with the name of such partnership, has been delivered to the person to be charged therewith, or sent by the post to, or left for him at his counting-house, office of business, dwelling-house, or last known place of abode, or has been enclosed in or accompanied by a letter subscribed in like manner, referring to such bill. R. S. O. 1897, c. 174, s. 34.

Not necessary in first instance in action on bill to prove contents of bill delivered.

(2) In proving a compliance with this Act it shall not be necessary in the first instance to prove the contents of the bill delivered, sent or left, but it shall be sufficient to prove that a bill of fees, charges or disbursements subscribed as required by sub-section 1, or enclosed in or accompanied by such letter, was so delivered, sent or left; but the other party may shew that the bill so delivered, sent or left, was not such a bill as constituted a compliance with this Act. R. S. O. 1897, c. 174, s. 43.

Order for taxation on præcipe.

35. Where the retainer of the solicitor is not disputed and there are no special circumstances, an order may be obtained on *præcipe* from the

proper officer in the county in which the solicitor resides:—

(*a*) By the client, for the delivery and taxation of the solicitor's bill;

(*b*) By the client, for the taxation of a bill already delivered, within one month from its delivery;

(*c*) By the solicitor, for the taxation of a bill already delivered, at any time after the expiration of one month from its delivery, provided no order for its taxation has been previously made. *New.* (*See* Con. Rule 1184.)

No reference to be made on application of party chargeable after verdict or after 12 months from delivery of bill.

36. (1) No such reference shall be directed upon an application made by the party chargeable with such bill after a verdict or judgment has been obtained, or after twelve months from the time such bill was delivered, sent or left as aforesaid, except under special circumstances, to be proved to the satisfaction of the Court or Judge to whom the application for the reference is made. R. S. O. 1897, c. 174, s. 37.

Special directions.

(2) Where the reference is made under subsection 1, the Court or Judge, in making the same, may give any special directions relative to the costs of the reference. R. S. O. 1897, c. 174, s. 41.

If either party does not attend officer may tax bill *ex parte*.

37. In case either party to a reference, having due notice, refuses or neglects to attend the taxation, the officer to whom the reference is made may tax the bill *ex parte*. R. S. O. 1897, c. 174, s. 38.

38.—(1) When a client or other person obtains an order for the delivery and taxation of a Solicitor's bill of fees, charges and disbursements, or a copy thereof, the bill shall be delivered within fourteen days from the service of the order: Delivery of bill and reference to taxation.

(*a*) The bill delivered shall stand referred to the proper officer for taxation, and on the reference the Solicitor shall give credit for, and an account shall be taken of all sums of money by him received from or on account of the client, and the Solicitor shall refund what, if anything, he may on such taxation appear to have been overpaid;

(*b*) The costs of the reference shall, unless otherwise directed, be in the discretion of the officer, subject to appeal, and shall be taxed by him when and as allowed;

( ) The Solicitor shall not commence or prosecute any action in respect to the matters referred pending the reference without leave of the Court or a Judge;

(*d*) The amount certified to be due shall be paid forthwith after confirmation of the certificate by filing, as in the case of a Master's report, by the party liable to pay the same;

(*e*) Upon payment by the client or other person of what if anything may appear to be due to the Solicitor, or if nothing is found to be due to the Solicitor the Solicitor, if required, shall deliver to the

client or other person, or as he may direct, all deeds, books, papers and writings in the said Solicitor's possession, custody or power, belonging to the client;

(*f*) The order shall be read as if it contained the above particulars, and shall not set forth the same, but may contain any variation therefrom and any other directions which the Court or Judge shall see fit to make. *New.* (Con. Rule 1185.)

Order presumed to contain clauses a to e.

(2) An order for reference of a Solicitor's bill for taxation shall be presumed to contain the clauses *a* to *e* of sub-section 1, whether obtained on *praecipe* or otherwise, and by the Solicitor, client or other person liable to pay the bill. *New.* (Con. Rule 1186.)

Reference to be to local taxing officer.

(3) The reference for taxation shall, unless otherwise ordered, be to the proper taxing officer for the county in which the Solicitor resides. *New.* (*See* Con. Rule 1187.)

Judge may allow actions for costs within the month if departure from Ontario apprehended.

39. A Judge of the High Court or of a County or District Court, on proof to his satisfaction that there is probable cause for believing that the party chargeable is about to depart from Ontario, may authorize a Solicitor to commence an action for the recovery of his fees, charges or disbursements against the party chargeable therewith, although one month has not expired since the delivery of a bill. R. S. O. 1897, c. 174, s. 44.

Where a party not being the

40.—(1) Where any person not being chargeable as the principal party is liable to pay or has

paid any bill either to the Solicitor, his assignee, or personal representative, or to the principal party entitled thereto, the person so liable to pay or paying, his assignee or personal representative, may apply to the court or a judge for an order referring to taxation as the party chargeable therewith might himself have done, and the same proceedings shall be had thereupon, as if the application had been made by the party so chargeable. R. S. O. 1897, c. 174, s. 45.

Principal pays a bill of costs a taxation may be allowed

(2) If such application is made where under the provisions hereinbefore contained, a reference is not authorized to be made except under special circumstances, the Court or Judge to whom the application is made may take into consideration any additional special circumstances applicable to the person making it, although such circumstances might not be applicable to the party chargeable with the bill, if he was the party making the application. R. S. O. 1897, c. 174, s. 46.

What special circumstances may be considered in such case.

(3) For the purpose of such reference the Court or Judge may order the Solicitor, his assignee or representative, to deliver to the party making the application a copy of the bill upon payment of the costs of the copy. R. S. O. 1897, c. 174, s. 47.

Court or Judge may order the delivery of a copy of the bill.

(4) When a person other than the client applies for taxation of a bill delivered or for the delivery of a copy thereof for the purpose of taxation, and it appears that, by reason of the conduct of the client, the applicant is precluded from taxing the same, but is nevertheless entitled to an account from the client, it shall not be

Taxation at instance of third person.

necessary for the applicant to bring an action for an account, but the Court or a Judge may, in a summary manner, refer a bill already delivered or order delivery of a copy of the bill, and refer the same for taxation, as between the applicant and the client, and may add such parties not already notified as may be necessary.

Application of sec. 38.

(5) The provisions of section 38, so far as they are applicable, shall apply to such taxation. *New.* (*See* Con. Rule 1188.)

When a bill may be re-taxed.

41. No bill previously taxed shall be again referred, unless under the special circumstances of the case the Court or Judge to whom the application is made thinks fit to direct a re-taxation thereof. R. S. O. 1897, c. 174, s. 48.

Payment not to preclude taxation if applied for within a year.

42. The payment of any bill shall not preclude the Court or Judge to whom the application is made from referring it for taxation upon such terms and subject to such directions as to the Court or Judge may seem just, if the application is made within twelve months after payment, and if the special circumstances of the case in the opinion of the Court or Judge appear to require the taxation. R. S. O. 1897, c. 174, s. 49.

A taxing officer may require the assistance of the officer of any other Court.

43. Where a bill is referred for taxation, the officer to whom the reference is made may request the proper officer of any other Court to assist him in taxing any part of such bill, and the officer, so requested, shall thereupon tax the same, and shall have the same powers, and may receive the same fees in respect thereof, as upon a reference to him by the Court of which he is an officer, and he shall return the bill, with his

opinion thereon, to the officer who so requests him to tax the same. R. S. O. 1897, c. 174, s. 50.

Skill, etc., and not length, to be considered in taxation of certain deeds.

44. In the absence of any general rule and so far as any such general rules do not apply, the taxing officer in taxing a bill for preparing and executing any instrument, shall consider not the length but the skill and labour employed and responsibility incurred in the preparation thereof. R. S. O. 1897, c. 174, s. 55.

How applications against solicitors to be entitled.

45. Every application to refer a bill for taxation, or for the delivery of a bill, or for the delivering up of deeds, documents and papers, shall be made *In the matter of (the Solicitor)*; and upon the taxation of any such bill, the certificate of the officer by whom the bill is taxed, unless set aside or varied, shall be final and conclusive as to the amount thereof, and payment of the amount certified to be due and directed to be paid may be enforced according to the practice of the Court in which the reference was made. R. S. O. 1897, c. 174, s. 51.

JUDGES MAY MAKE RULES.

Judges of Supreme Court to make rules, etc. Rev. Stat. c. 51.

46. The Judges of the Supreme Court may, from time to time in accordance with the provisions of *The Judicature Act*, make General Rules or Regulations other than rules relating to the admission and enrolment of Solicitors, for carrying out the provisions of this Act. R. S. O. 1897, c. 174, s. 52 (1). *Amended.*

Principles of remuneration. Imp. Act, 44-45; V. c. 44, s. 4.

47. Such Rules may include Rules respecting business by Solicitors connected with sales, purchases, leases, mortgages, settlements and

other matters of conveyancing, and may, as regards the mode of remuneration, prescribe that it shall be according to a scale of rates of commission or percentage, varying or not in different classes of business; or by a gross sum; or by a fixed sum for each document prepared or perused, without regard to length; or in any other mode, or partly in one mode and partly in another, or others; and may, as regards the amount of the remuneration, regulate the same with reference to all or any of the following among other considerations:—

(*a*) The position of the party for whom the Solicitor is concerned in any business, that is, whether as vendor or as purchaser, lessor or lessee, mortgagor or mortgagee, and the like;

(*b*) The place, district, and circumstances at or in which the business or part thereof is transacted;

(*c*) The amount of the capital money or of the rent to which the business relates;

(*d*) The skill, labour and responsibility involved therein on the part of the Solicitor; and

(*e*) The number and importance of the documents prepared or perused, without regard to length. R. S. O. 1897, c. 174, s. 52 (2), 53 (1).

AGREEMENTS BETWEEN SOLICITORS AND CLIENTS.

Interpretation.

48. In this section and sections 50 to 66:

"Client."

(*a*) "Client" shall include any person who as a principal or on behalf of another per-

son retains or employs or is about to retain or employ a Solicitor and a person who is or may be liable to pay the bill of a Solicitor for any services, fees, costs, charges or disbursements;

(*b*) "Services" shall include fees, costs, charges and disbursements. 9 Edw. VII. c. 28, s. 23. "Services."

49.—(1) Subject to the provisions of sections 50 to 66, a Solicitor may make an agreement in writing with his client respecting the amount and manner of payment for the whole or a part of any past or future services in respect of business done or to be done by such Solicitor, either by a gross sum or by commission or percentage, or by salary or otherwise, and either at the same rate or at a greater or less rate than that at which he would otherwise be entitled to be remunerated. In this sub-section the expressions "commission" and "percentage" apply only to non-contentious business and to conveyancing. Agreements between solicitors and clients as to compensation.

(2) This section shall apply to and include any business to which section 47 relates, whether or not any general rule under section 46 is in operation. 9 Edw. VII. c. 28, s. 24. Application of section.

50. Where the agreement is made in respect of business done or to be done in any Court, except a Division Court, the amount payable under the agreement shall not be received by the Solicitor until the agreement has been examined and allowed by a taxing officer of a Court having power to enforce the agreement. 9 Edw. VII. c. 28, s. 25. Approval of agreement by taxing officer.

Opinion of Court or Judge on agreement.

51. Where it appears to the taxing officer that the agreement is not fair and reasonable, he may require the opinion of a Court or a Judge to be taken thereon. 9 Edw. VII., c. 28, s. 26.

Rejection of agreement by Court or Judge.

52. The Court or Judge may either reduce the amount payable under the agreement or order it to be cancelled and the costs, fees, charges and disbursements in respect of the business done to be taxed in the same manner as if the agreement had not been made. 9 Edw. VII., c. 28, s. 27.

Agreement not to affect costs as between party and party.

53. Such an agreement shall not affect the amount, or any right or remedy for the recovery, of any costs, recoverable from the client by any other person, or payable to the client by any other person, and any such other person may require any costs payable or recoverable by him to or from the client to be taxed in the ordinary manner, unless such person has otherwise agreed; but the client who has entered into the agreement shall not be entitled to recover from any other person under any order for the payment of any costs which are the subject of the agreement, more than the amount payable by the client to his own Solicitor under the agreement. 9 Edw. VII., c. 28, s. 28.

Claims for additional remuneration excluded.

54. Such an agreement shall exclude any further claim of the Solicitor beyond the terms of the agreement in respect of services in relation to the conduct and completion of the business in respect of which it is made, except such as are expressly excepted by the agreement. 9 Edw. VII., c. 28, s. 29.

Agreements relieving solicitor from liability for negligence void.

55. A provision in any such agreement that the Solicitor shall not be liable for negligence or that he shall be relieved from any responsibility to which he would otherwise be subject as such Solicitor shall be wholly void. 9 Edw. VII., c. 28, s. 30.

Determination of disputes under the agreement.

56. No action shall be brought upon any such agreement, but every question respecting the validity or effect of it may be examined and determined, and it may be enforced or set aside without action on the application of any person who is a party to the agreement or who is or is alleged to be liable to pay or who is or claims to be entitled to be paid the costs, fees, charges or disbursements in respect of which the agreement is made, by the Court not being a Division Court, in which the business or any part of it was done, or a Judge thereof, or if the business was not done in any Court by the High Court Division or a Judge thereof. 9 Edw. VII., c. 28, s. 31.

Enforcement of agreements.

57. Upon any such application if it shall appear to the Court or Judge that the agreement is in all respects fair and reasonable between the parties, it may be enforced by such Court or Judge by order in such manner and subject to such conditions as to the costs of the application as such Court or Judge may think fit, but if the terms of the agreement shall not be deemed by the Court or Judge to be fair and reasonable, the agreement may be declared void, and the Court or Judge may order it to be delivered up to be cancelled and may direct the costs, fees,

charges and disbursements incurred or chargeable in respect of the matters included therein to be taxed in the ordinary manner. 9 Edw. VII., c. 28, s. 32.

Order of Court for reopening of agreement.

58. Where the amount agreed for under any such agreement has been paid by or on behalf of the client or by any person chargeable with or entitled to pay the same, the High Court Division or a Judge thereof may upon the application of the person who has paid such amount within twelve months after the payment thereof, if it appears to such Court or Judge that the special circumstances of the case require the agreement to be re-opened, re-open the same and order the costs, fees, charges and disbursements to be taxed and may also order the whole or any part of the amount received by the Solicitor to be repaid by him on such terms and conditions as to the Court or Judge may seem just. 9 Edw. VII., c. 28, s. 33.

Agreements made by client who is guardian, trustee or committee, to be approved by taxing officer.

59. Where any such agreement is made by the client in the capacity of guardian or of trustee under a deed or will or of committee of any person whose estate or property will be chargeable with the amount or any part of the amount payable under the agreement, the agreement shall before payment be laid before the Senior Taxing Officer at Toronto, who shall examine it and may disallow any part of it or may require the direction of the Court or a Judge to be made thereon. 9 Edw. VII., c. 28, s. 34.

Client paying without

60. If the client pays the whole or any part of such amount without the previous allowance

of such officer or the direction of the Court or a Judge, he shall be liable to account to the person whose estate or property is charged with the amount paid or any part of it for the amount so charged, and the Solicitor who accepts such payment may be ordered by the Court or Judge to refund the amount recei ed by him. 9 Edw. VII., c. 28, s. 35. approval to be liable to estate.

61. Nothing in sections 49 to 66 shall give validity to a purchase by a Solicitor of the interest or any part of the interest of his client in any action or other contentious proceeding to be brought or maintained or give validity to an agreement by which a Solicitor retained or employed to prosecute any action or proceeding stipulates for payment only in the event of success in such action or proceeding or where the amount to be paid to him is a percentage of the amount or value of the property recovered or preserved or otherwise determinable by such amount or value or dependent upon the result of the action or proceeding. 9 Edw. VII., c. 28, s. 36. Solicitors not to purchase any interest in litigation or to make payment dependent upon success.

62. A Solicitor may accept from his client and a client may give to his Solicitor security for the amount to become due to the Solicitor for business to be transacted by him and for interest thereon, but so that the interest is not to commence until the amount due is ascertained by agreement or by taxation. 9 Edw. VII., c. 28, s. 37. Security may be given to solicitor for costs.

63. A Solicitor may charge interest at the rate of five per centum per annum on his dis- Interest on disbursements and costs.

bursements and costs, whether by scale or otherwise, from the expiration of one month from demand from the client, and where the same are payable by an infant or out of a fund presently available the demand may be made on the parent or guardian or the trustee or other person liable. 9 Edw. VII., c. 28, s. 38.

Where solicitor dies or becomes incapable of acting after agreement.

64. Where a Solicitor has made such an agreement and anything has been done by him under it and before the agreement has been completely performed by him, such Solicitor dies or becomes incapable to act, an application may be made to any Court which would have jurisdiction to examine and enforce the agreement by any person who is a party thereto, and such Court may thereupon enforce or set aside the agreement so far as the same may have been acted upon as if such death or incapacity had not happened, and if it deems the agreement to be in all respects fair and reasonable may order the amount in respect of the past performance of it to be ascertained by taxation; and the taxing officer, in ascertaining such amount, shall have regard, so far as may be, to the terms of the agreement, and payment of the amount found to be due may be ordered in the same manner as if the agreement had been completely performed by the Solicitor. 9 Edw. VII., c. 28, s. 39.

Changing solicitor after making agreement.

65. If after any such agreement has been made the client shall change his Solicitor before the conclusion of the business to which the agreement relates, which he shall be at liberty

to do notwithstanding the agreement, the Solicitor party to the agreement shall be deemed to have become incapable to act under it within the meaning of the next preceding section, and upon any order being made for taxation of the amount due him in respect to the past performance of the agreement, the Court shall direct the taxing officer to have regard to the circumstances under which such change of Solicitor took place, and upon the taxation the Solicitor shall not be deemed to be entitled to the full amount of the remuneration agreed to be paid to him, unless it shall appear that there has been no default, negligence, improper delay or other conduct on his part affording reasonable ground to the client for such change of Solicitor. 9 Edw. VII., c. 28, s. 40.

Bills under agreement not to be liable to taxation.

66. Except as otherwise provided in sections 49 to 65, a bill of a Solicitor for the amount due under any such agreement shall not be subject to any taxation or to any provision of law respecting the signing and delivery of a bill of a Solicitor. 9 Edw. VII., c. 28, s. 41.

SOLICITORS AS MORTGAGEES, TRUSTEES, ETC.

Definition of mortgage.

67. In sections 68 to 70 the expression "mortgage" includes any charge on any property for securing money or money's worth. *New.*

Charges, etc., where mortgage is made with solicitor.

68.—(1) Any Solicitor to whom, either alone or jointly with any other person, a mortgage is made, or the firm of which such Solicitor is a member, shall be entitled to receive for all business transacted and acts done by such Solicitor

or firm in negotiating the loan, deducing and investigating the title to the property and preparing and completing the mortgage, all such usual professional charges and remuneration as he or they would have been entitled to receive if such mortgage had been made to a person not a Solicitor, and such person had retained and employed such Solicitor or firm to transact such business and do such acts; and such charges and remuneration shall accordingly be recoverable from the mortgagor.

Imp. Act 58, 59 Vic. c. 25.

Application of section.

(2) This section applies only to mortgages made after the commencement of this Act. *New.*

Right of solicitor with whom mortgage is made to recover costs, etc.

69.—(1) Any Solicitor to or in whom, either alone or jointly with any other person, any mortgage is made or is vested by transfer or transmission, or the firm of which such Solicitor is a member, shall be entitled to receive and recover from the person on whose behalf the same is done or to charge against the security for all business transacted and acts done by such Solicitor or firm subsequent and in relation to such mortgage or to the security thereby created or the property therein comprised, all such usual professional charges and remuneration as he or they would have been entitled to receive if such mortgage had been made to and had remained vested in a person not a Solicitor, and such person had retained and employed such Solicitor or firm to transact such business and do such acts, and accordingly no such mortgage shall be redeemed except upon payment of such charges and remuneration.

Imp. Act, 58-59 V. c. 25.

(2) This section applies to mortgages made and business transacted and acts done either before or after the commencement of this Act. *New.* Application of section.

70. A Solicitor who is a director of a trust company or of any other company, or the firm of which such Solicitor is a member, shall be entitled to receive for all business transacted or acts done by such Solicitor or firm for such company in relation to or in connection with any matter in which the company acts as trustee, guardian, personal representative or agent, all such usual professional fees and remuneration as he or they would be entitled to receive if such Solicitor had not been a director of such company, and such company had retained and employed such Solicitor or firm to transact such business and do such acts, and such charges and remuneration shall accordingly be recoverable from such company and may be charged by them as a disbursement in the matter of such trusteeship, guardianship, administration or agency. *New.* Solicitor-director, right to charge for services to trust estate. Bath v. Standard Land Co., Ltd. [1911 (C.A.), 1 ch. 618.

RIGHT TO TAX COSTS OF SALARIED SOLICITOR.

71. Where the remuneration of a Solicitor or Counsel employed by a corporation is wholly or partly paid by salary, the corporation employing such Solicitor or Counsel shall notwithstanding have the right to recover and collect lawful costs in all actions and proceedings in the same manner as if the Solicitor or counsel were not receiving a salary, where the costs are by the terms of his employment payable to the Solici- Collection of costs where solicitor or counsel paid a salary.

tor or Counsel as part of his remuneration in addition to his salary. 7 Edw. VII., c. 23, s. 13.

SOLICITORS AS OFFICERS OF COURT.

Act not to affect practice as to admission.

72. Nothing in this Act shall interfere with the jurisdiction over Solicitors as officers of Court. R. S. O. 1897, c. 174, s. 56.

REPEAL.

Repeal. Rev. Stat. c. 174; 7 Edw. VII. c. 23, s. 13; 9 Edw. VII., c. 48, ss. 23-41; Con. Rules 1184-1188.

73. Chapter 174 of the Revised Statutes of Ontario, 1897, section 13 of the Act passed in the 7th year of the reign of His late Majesty King Edward the Seventh, chaptered 23, sections 23 to 41 of the Act passed in the 9th year of the said reign, chaptered 28, and Rules 1184 to 1188 of the Consolidated Rules of Practice are repealed.

APPENDIX B.

FORMS.

[For list of forms see CONTENTS *supra*.]

Section 267.

POWER OF SALE CLAUSES: ADDITIONS TO SHORT FORM.

[267]

The following is a neat clause sometimes inserted in mortgages in this Province — where registrars are paid per folio—and which has the advantage of implicating the second column of Schedule B to the Short Forms Act:

"PROVIDED further that such notice of sale may be effectually given, either in the manner aforesaid, (or by leaving the same with a grown up person on the said lands or any of them, if occupied, or by placing the same on some portion thereof if unoccupied) or by publishing the same for four successive weeks in some newspaper published in the county in which the mortgaged premises lie, and shall be sufficient whether or not addressed to any person or persons by name or designation, and notwithstanding any person or persons to be affected thereby may be unborn, unascertained, or under disability, and no purchaser shall be bound to inquire into the legality or regularity of any sale under the said power, nor shall any

Modes of giving notice.

Sections 267-269.

irregularity or want of notice invalidate any such sale."

Non-inquiry clause.

This form may be shortened by inserting in the bracket the words " or being left at or upon some part of the premises hereby conveyed."

[268] *A stronger non-inquiry clause is;*

Strong non-inquiry clause.

" PROVIDED ALSO that no purchaser at any sale purporting to be made in pursuance of the aforesaid power shall be bound or concerned to see or inquire whether any such default has been made or continues, or whether any such notice has been given as aforesaid, or as to the necessity or expediency of the stipulations subject to which such sale shall have been made, or otherwise as to the propriety of such sale or regularity of its proceedings, or be affected by notice that no such default has been made or continues, or notice given as aforesaid, or that the sale is otherwise unnecessary, improper or irregular; and notwithstanding any impropriety or irregularity, or notice thereof to such purchaser the sale as regards such purchaser shall be deemed to be within the aforesaid power and be valid accordingly."

Remedy of mortgagor.

There may be added: " AND the remedy (if any) of the mortgagor, in respect of any impropriety or irregularity whatsoever in any such sale, shall be in damages only."

Conditions and rescission.

[269.] " PROVIDED THAT, in addition to the powers and discretions provided by the said Short Forms Act (*or* said Act respecting Short Forms of Mortgages) and still in pur-

suance thereof, such sale as aforesaid may be subject to any stipulations as to title or evidence, or commencement of title or otherwise which the mortgagees shall deem proper; with full power to buy in, or rescind or vary any contract for sale and to resell without being responsible for any loss occasioned thereby."

[270.] Insert after Short Form with one month's default and one month's notice:

Alternative power with or without notice.

"PROVIDED FURTHER that on two months' default as aforesaid, the said mortgagee, his executors, administrators or assigns may, without any notice whatsoever, exercise the powers conferred by clause 14, Schedule B of 10 Edw. VII. c. 55."

Power without notice in case of insolvency (for insertion in building mortgage, etc.)

[271.] "PROVIDED ALSO that if the said mortgagor shall become insolvent or enter into any composition with his creditors, then and in such case the mortgagee's power of sale under or by virtue of these presents shall forthwith and without the necessity for any notice or demand for payment whatsoever, and still with the benefit of clause 14, Schedule B of 10 Edw. VII. c. 55, become exercisable.

Exclusion of power of sale.

[272.] "PROVIDED ALSO, and it is hereby declared, that no power of sale of the premises hereby demised, or any part thereof shall be exercisable in respect of, or applied to this security under or by virtue of 10 Edw. VII. c. 51, Part II., or of any other statute, or otherwise howsoever."

Sections 273-274a.

Reservation to assigns of mortgagee.

[273.] "PROVIDED ALWAYS, and it is expressly understood and agreed, that the power of sale herein conferred, and all the provisions therein contained shall be exercisable and available by the said mortgagee, his executors, administrators and assigns."

Stipulation for profit costs.

[274.] If one of the mortgagees is a solicitor, as is often the case where trust money is lent on mortgage, the following clause may be added:—

"PROVIDED ALWAYS and it is hereby agreed that the fact of the said mortgagee, or of any other person for the time being entitled to the benefit of this security being a solicitor, shall not prevent him from advising and transacting business in relation hereto or to the premises hereby conveyed, and from being entitled to charge the said mortgagor, his heirs, executors, administrators and assigns, for such services the usual and accustomed costs and charges as between solicitor and client, and that until payment all moneys, which shall become due in respect of such services as aforesaid, with interest thereon as from the time when the same shall respectively have become due, shall be a charge upon the premises in like manner as the said principal and interest hereby secured." (Bythewood & Jarman (1886), Vol. III., p. 1001.)

Express covenant as to expenses of mortagee.

[274a.] AND THE SAID MORTGAGOR covenants with the said mortgagee that he, the said mortgagor, his heirs, executors, or administrators will, on demand, reimburse the said

mortgagee, his executors, administrators or assigns, all expenses under the powers, or any of the powers herein contained, together with interest at the rate aforesaid on all moneys so expended, and that such expenses, together with said interest, shall constitute a charge on the premises hereby conveyed, such charge to be enforceable by the same means and in the same manner, as in the case of the principal and interest hereby secured.

Mortgage of leasehold.

[274b.] PROVIDED, that the said mortgagee, on demand of payment for months, may on notice enter on and lease or sell the said lands; and it is hereby agreed and declared that this power of sale shall have the meaning ascribed to it by clause fourteen in Schedule B to the Act respecting Short Forms of Mortgages. [*Where the mortgage is by sub-demise add;* And it is hereby also declared that after any sale made under the aforesaid power, the said mortgagor, his executors, administrators and assigns shall stand possessed of the premises sold for the last day of the term granted by the hereinbefore recited indenture of lease, in trust for the purchaser, his executors, administrators and assigns, and to be assigned and disposed of as he or they may direct.]

After sale last day of term to be held in trust for purchaser.

[275.] NOTICE OF SALE: COMMON FORM.

TO (*names of parties entitled*). I (*or we*) (*name of mortgagee or person exercising*), of the of in the county of , hereby give you notice that demand payment

Section 275.

of the sum of (*state amount*) and interest thereon at the rate of per centum per annum from the day of one thou-

Recital of mortgage.

sand eight hundred and ninety , due to the said (*name of mortgagee*), upon a certain Indenture of Mortgage executed by (*name of mortgagor*) and wife, to (*name of mortgagee*), and dated the day of , one thousand eight hundred and ninety , and which mortgage was registered in the registry office for the county of the day of 189 , for securing payment of (*state amount*) and interest thereon, as therein mentioned, on the following property, namely, all that (*insert description as in mortgage*). And take notice, that unless payment of the said mortgage money and interest, costs and expenses be made within [*one calendar month*] from the time of your being served herewith, the said (*name of mortgagee*) will proceed, with or without any consent or concurrence on your part, and without any further notice to you to enter into possession of the said premises, and to receive and take the rents and profits thereof; and whether in or out of possession of the same, to make any lease or leases of the same, as the said (*name of mortgagee*) shall see fit; AND TO SELL AND ABSOLUTELY DISPOSE of the said lands and premises, either by auction or private sale, or partly by auction and partly by private sale, as the said (*name of mortgagee*) may deem proper, either for cash or upon such terms of credit as (*name of mortgagee*) may think proper, and to convey and assure the same.

when so sold, unto the purchaser thereof, as shall direct or appoint. Sections 275-276.

Dated at this day of A.D. 19 .

(*Name of mortgagee*),

per (*name and address of solicitor*),

Solicitor for Mortgagee.

[276.] NOTICE FOR PUBLICATION IN NEWSPAPER.

MORTGAGE SALE.

TO (*names of parties entitled*), I (*or we*) (*name of mortgagee or person exercising*), of (*description of mortgagee*) hereby give you notice that demand payment of the sum of (*state amount*) and interest thereon at the rate of per centum per annum from the day of 19 , due to (*name of mortgagee*), upon a certain mortgage by (*name of mortgagor*) and his wife, to (*name of mortgagee*) dated (*day of month*), 19 , and registered in the registry office for the county of (*day of month*), 19 , in book , for as No. . Recital of mortgage.

The lands included in the above mortgage are (*insert short description*).

AND TAKE NOTICE that unless payment of the said mortgage money and interest and costs be made within (*one month*) from the first publication hereof (*name of mortgagee*) will proceed, with or without any consent or concurrence on your part, and without any further

Sections 276-277a.

notice to you, to enter into possession of the said premises (*and so forth, as in preceding form*).

ORDER ALLOWING "FURTHER PROCEEDINGS" UNDER [277.] 10 Edw. VII. c. 51, ss. 27, 28.

In the matter of a mortgage purporting to be made between (*describing the parties thereto as in the mortgage*), and bearing date on the day of 19 .

(*Name of Judge*). IN CHAMBERS.

Upon application of the solicitor for (*name of mortgagee*), and upon hearing read the affi-

Order.

davit of it is ordered that the said (*name of mortgagee*) be at liberty to advertise for sale the lands and premises included in the said mortgage [concurrently with the period of notice of sale as provided in the said mortgage] *or* [at the time of serving, by advertisement, notice of sale as provided in the said mortgage].

Costs.

And it is further ordered that the mortgagee be allowed the costs of this application.

Dated at , this day of 19 .

(*Signature of Judge*)

[277a.] INDORSEMENT OF SERVICE OF NOTICE.

Indorsement by person serving notice.

SERVED A TRUE COPY of this notice on personally, at on the day of 19 .

Or, SERVED A TRUE COPY of this notice on , by delivering to, and leaving the same

with , at his residence, situate at ; [*or* by delivering to, and leaving the same with , at his last residence within this Province, being ; *or* by posting the same up on the door of his last residence within this Province, being ,] on day, the day of 19 . Sections 277a-278.

(Signed)
(*Address, etc.*)

[277b.] ACKNOWLEDGMENT OF NOTICE.

RECEIVED this day of 19 , a duplicate of the within notice. *Or* Admission of service.

I ACKNOWLEDGE to have received notice of sale by (*name of mortgagee*), of the premises therein described, and hereby admit service thereof, this day of 19 .

(Signed)

[278.] FORM OF ADVERTISEMENT.

MORTGAGE SALE.

UNDER and by virtue of the powers contained in a certain mortgage which will be produced at the time of sale, there will be offered for sale by PUBLIC AUCTION, by (*name of auctioneer*), at (*name of particular place as well as of town*), on day, the day of 19 , at the hour of o'clock in the noon, the following property (*short*

Sections 278-279.

description by lots and streets). On the property are (*enumerate improvements*).

Enumeration of improvements.

For terms and conditions of sale apply to
(*Name and address of solicitor.*)
Dated 19 .

[279.] DECLARATION OF SERVICE OF NOTICE.

IN THE MATTER of a certain mortgage made by (*name of mortgagor*) to (*name of mortgagee*), bearing date the day of 19 , and of sale proceedings thereunder.

Mode of service

I, of the of in the county of

DO SOLEMNLY DECLARE that

1. I did on the day of one thousand eight hundred and , [personally] serve with a true copy of the Notice of Exercising Power of Sale hereunto annexed, by delivering such copy to, and leaving the same with him [*or, as the case may be,* with a grown up person residing on the premises mentioned in same.]

And I make this solemn declaration conscientiously believing the same to be true, and by virtue of the "*Act respecting extra-judicial Oaths.*"

Declared before me, at the
of
in the county of
this day of 19
A commissioner, etc.

[280.] DECLARATION OF POSTING UP NOTICE. Sections 280-282.

1. I DID, on the day of 19 , take a true copy of the annexed Notice of Exercising Power of Sale to the premises mentioned in the same, being on street; (*or, as the case may be*) in the of , and did post the said copy in a conspicuous position on the door of the building on the said premises. Where posted.

[281.]

DECLARATION OF INSERTION OF ADVERTISEMENT.

1. I HAVE SEARCHED the fyles of the (*name of paper*), a paper published in the county of and find that the [notice of Exercising Power of Sale], *or* [Advertisement of Mortgage Sale or Auction Sale], a copy of which is hereto annexed, marked " A," was duly inserted in the issues of the (*name of paper*), of the dates following, that is to say (*give dates*). Recital of search.

[282.]

DECLARATION OF NOTIFYING INTERESTED PERSONS.

1. I DID, on the day of 19 mail [by registered letter], at the post-office a true copy of the annexed notice of auction, *or,* the annexed newspaper advertisement, *or,* the annexed poster, to each of the following persons, at the addresses following their respective names (*set out names and addresses*). Method of giving notice.

Sections 283-284.

[283.] DECLARATION OF BILL POSTER.

Places where posted.

1. I DID, on the day of 19 post [*or cause to be posted*], in the V of G—in the C of B the of , one hundred (*or whatever number*) advertising posters, advertising the property comprised in the above mortgage, for sale by public auction under the powers contained in the said mortgage.

2. That such posters were placed by me in conspicuous places where they could be displayed to the best advantage.

[284.] DECLARATION OF AUCTIONEER.

1. I DID, at the time and place set out in the advertisement hereunto annexed, marked "A," and subject to conditions of sale hereunto annexed, marked "B," offer for sale by public auction the lands and premises described in the said advertisement and the above mortgage.

2. The result of such sale is as follows:

No bids.

(*a*) That there were no bids for the said property, and accordingly I was unable to sell the same; *or,*

Bid less than reserve bid.

(*b*) That the highest sum bid for the said property was , which was less than the reserved bid fixed by the vendors in accordance with the said conditions of sale, and accordingly I was unable to sell the said property; *or,*

Successful sale.

(*c*) Is as appears from the signed contract hereunto annexed, marked "C."

3. That the sum set forth in the said contract was the highest sum bid for the said land, and that (*name of purchaser*), whose name is subscribed to the said contract, was declared by me to be the highest bidder for, and became the purchaser of the said land, at the price of $, being the price in the said contract mentioned. Sections 284-285a.

4. That the said sale was conducted by me in a fair, open and proper manner, and according to the best of my skill and judgment.

[285.] DECLARATION AS TO DEFAULT.

1. I AM (*set out capacity*), and have a personal knowledge of the matters in connection with this mortgage. Capacity of declarant.

2. That the instalment of (*interest, or principal, or whatever it is*), due on the day of 19 , under a certain mortgage, made by to , bearing date the day of 19 (*and now held by so and so*), has not been paid up to [this date].

[285a.]

AGREEMENT BY MORTGAGEE TO POSTPONE SALE UNDER POWER.

THIS AGREEMENT, made in duplicate the day of A.D. 19 between hereinafter called the party of the first part. and , hereinafter called the party of the second part.

Section 285a.

Recital of sale proceedings.

Whereas , by Indenture of Mortgage, dated the day of A.D. 19 , and registered in the registry office for the county of , on the day of A.D. 19 , did mortgage unto , the lands and premises therein described, for the sum of dollars.

And whereas the said party of the first part is now owner of the said mortgage, and the said party of the second part is now owner of the equity of redemption in the said mortgaged premises.

And whereas by virtue of a power of sale contained in said mortgage the said party of the first part, after giving due notice of sale under the power, has now, at the request of the said party of the second part, consented to postpone such sale for the period of , for the purpose of enabling him, the said party of the second part, to obtain the money for paying off the said mortgage, on his entering into the stipulations hereinafter contained: NOW THIS AGREEMENT WITNESSETH that, in consideration of the premises and of the agreement by the party of the second part hereinafter contained, he, the said party of the first part hereby agrees, with the said party of the second part that he will not, for the space of from the date hereof, sell, or proceed to offer for sale, under such power, the said mortgaged premises, but will permit the said party of the second part to enjoy the same during such period of extension.

Time during which extended.

Section 288a.

The said party of the second part, in consideration of such forbearance, hereby agrees that, in case of default of payment of the principal or interest of said mortgage at the expiration of such extended time of payment, he will not in any way hinder or attempt to prevent the sale of the said premises by the said mortgagee, under the power of sale contained in said mortgage. And the said party of the second part hereby further agrees that such sale may be held without any further notice to him, the said party of the second part, his heirs or assigns, hereby waiving any irregularities in the aforementioned notice already given. And the said party of the second part further agrees that, upon request, he will execute a good and sufficient conveyance of the mortgaged premises to the said mortgagee, his heirs or assigns, or to such person or persons as he or they may direct; and that he will make such conveyance without a previous sale in confirmation thereof; and in the event of such sale under said power, or in the event of a conveyance in pursuance of this agreement, he will deliver up peaceable possession of the said premises to the purchaser at such sale, or to the grantee under such conveyance.

Agreement to execute conveyance.

And the said party of the second part further agrees that, during the period of extension hereby allowed, he will not do or suffer any act to be done which may injure the said premises, but will keep the same in all respects in good repair and condition.

IN WITNESS, etc.

Section 285b.

[285b.]

AGREEMENT FOR EXTENSION OF MORTGAGE.

Recital of mortgage.

MEMORANDUM OF AGREEMENT made in duplicate this day of A.D. 19 , Between (*name and description of mortgagee*) of the first part and (*name and description of mortgagor*) of the second part and wife of the said party of the second part, of the third part. Whereas the said party of the second part by Indenture dated the day of 19 , mortgaged certain lands and premises, therein mentioned, to the said party of the first part to secure repayment of dollars and interest thereon, at the rate of per cent. per annum, payable at the times and in the manner therein set forth; and the said party of the third part did join therein for the purpose of barring her Dower.

And whereas there is now owing to the said party of the first part in respect of the said Indenture, the sum of Dollars. And whereas the said party of the second part is desirous of extending the time for payment of the said principal sum, and the said party of the first part has consented thereto, on his waiving all privileges for prepayment contained in the said mortgage and subject to conditions herein.

New redemption clause.

NOW IT IS HEREBY AGREED that the following redemption clause shall be substituted for that contained in said mortgage, which will be construed and read as follows: Provided the

Section 265b.

said mortgage to be void on payment of dollars, as follows: (*Insert proviso agreed upon*) together with interest upon all unpaid principal (both before and after maturity and default) at the rate of per cent. per annum, payable yearly, on the day of , in each and every year, until the said principal sum shall be fully paid and satisfied. The first of said instalments of principal and interest to become payable on the day of 19 , and such interest to be computed from the day of , 19 .

In all other respects the said mortgage shall continue in force as written. The said party of the second part covenants with the said party of the first part that he will pay the said principal sum and interest on the days and times above stated, and in default of payment of any instalment of interest, the same shall become principal and bear interest at the rate aforesaid.

The said party of the first part consents to such extension on the terms and conditions above stated, in so far as he may do so without infringing on or in any way affecting the interests of other parties in the said mortgaged premises, and the said party of the first part reserves to himself all his rights and remedies against any surety or security he may have for payment of said debt or right he may have against any third person or persons upon his original security.

Saving as to sureties.

IN WITNESS, etc.

Sections 285c-286.

[285c.]

ASSENT OF SUBSEQUENT MORTGAGEE INDORSED UPON EXTENSION OF FIRST MORTGAGE.

WHEREAS I, (*name, etc.*) am the holder of a second mortgage upon the premises herein described or referred to, in consideration of the sum of one dollar to me paid, and of the within written agreement for extension I do hereby assent to the same, and do agree not to tender payment of the mortgage therein mentioned until after the expiration of the extended time of payment agreed upon by the within written extension.

Agreement not to prepay.

Dated this day of 19 .

[Signed]

[286.] CONDITIONS OF SALE.

Standing Conditions of Sale by the Court (Form No. 43, Appendix to C. R.)

1. No person shall advance less than $10 at any bidding under $500, nor less than $20 at any bidding over $500, and no person shall retract his bidding.

2. The highest bidder shall be the purchaser; and if any dispute arise as to the last or highest bidder, the property shall be put up at a former bidding.

3. The parties to the action, under the exception of the vendor, (*and naming any parties, trustees, agents, or others in a fiduciary situation*), shall be at liberty to bid.

Sections 286-287.

4. The purchaser shall, at the time of sale, pay down a deposit, in proportion of $10 for every $100 of the purchase money, to the vendor, or his solicitor; and shall pay the remainder of the purchase money on the day of next; and upon such payment, the purchaser shall be entitled to the conveyance and to be let into possession; the purchaser at the time of sale to sign an agreement for the completion of the purchase.

5. The purchaser shall have the conveyance prepared at his own expense and tender the same for execution.

6. If the purchaser fails to comply with the conditions aforesaid, or any of them, the deposit and all other payments made thereon, shall be forfeited, and the premises may be re-sold; and the deficiency, if any, by such re-sale, together with all charges attending the same, or occasioned by the defaulter, are to be made good by the defaulter.

The following conditions are for a sale in one lot, but may easily be adapted to a sale in several:

[287.]

General Conditions (selected from the Standard Works on the Subject).

Highest bidder to be the purchaser.

(1) The highest bidder shall be the purchaser, and if any dispute shall arise respecting any bidding, the property shall be put up again

Section 287.

for sale at the last undisputed bidding (*or the auctioneer may determine the dispute*).*

Reserve price.

(2) There will be a reserve price, and the vendor reserves the right of bidding by himself or his agent up to such reserve price.

Minimum advance in bidding.

(3) No person shall advance at any bidding less than $, (or the sum which shall be fixed by the auctioneer at the time of the sale), and no bidding shall be retracted.

Purchaser to sign agreement.

(4) The purchaser shall, immediately after the sale, pay to the auctioneer (or to Mr. ——, the vendor's solicitor) a deposit of 10 per cent. on the amount of the purchase money, and sign the subjoined agreement.

Completion of purchase (where a cash sale).

(5) The purchaser shall, on or before the day of , pay the remainder of the purchase money, at the office of Mr. ——, the vendor's solicitor [or of the said Mr. ——], No. Street ; and the purchase shall be then and there completed, and if from any cause whatever the purchase shall not be completed on that day, the purchaser shall pay to the vendor interest at the rate of six per cent. per annum on the remainder of the purchase money

*As to competency to bid or to purchase, see *supra*, Chapter VIII. Besides the cases there cited, may be noted Wallbridge v. Trust & Loan Co. There an action was brought to set aside a sale of land under the power of sale in the mortgage by the defendant Company to a co-defendant P., who was at the time a clerk in the office of the Company's solicitor, and a subsequent sale by the defendant P. to another. The first sale was in 1880, and this action was not brought till 1888. Falconbridge, J., dismissed the action. On appeal, held by the Divisional Court (Galt, C.J., Rose, J., Dec. 20, 1890), that there was no evidence that the Company could have obtained a better price for the land than they did obtain, and that the plaintiff had besides excluded himself by his conduct and laches.

from that day until the completion of the purchase; Sections 287-287a.

(5a) The purchaser shall, on or before the day of 19 pay the remainder of the purchase money over and above the sum of $ at the office of Mr. ——, the vendor's solicitor; and shall give a mortgage for the said sum of $ bearing interest at the rate of per cent. per annum, payable (half-yearly) as follows:—[Insert terms of payment]. The above-mentioned mortgage to be drawn by the vendor's solicitor [*add in the case of a company,* " who is to use the company's special form "]. Or where a portion is to be left on mortgage.

(6) The possession or receipt of the rents and profits of the property shall be retained, and all rates, taxes and out-goings in respect thereof shall be paid and discharged by the vendor up to the said day of 19 , and as from that date the possession or receipt of the rents and profits shall be taken, and the outgoings shall be paid and discharged by the purchaser, and, if necessary, such rents, profits, rates, taxes and outgoings shall, for the purposes of this condition, be apportioned as between the vendor and purchaser. Possession, etc.

[287a.] (7) The purchaser shall search the title at his own expense, and the vendor shall not be required to furnish any abstract or produce any deeds, declarations or other evidences of title except those in his possession. Search of title.

(8) The purchaser shall make in writing his objections and requisitions (if any) in respect to Time for objections.

Section 237a.

the title, and send the same to Mr. (*name of solicitor*), within ten days from the day of sale; and all objections and requirements which shall not be so made and sent within the time specified shall be deemed to have been waived, and for this purpose time shall be of the essence of the contract.

Power to rescind.

(9) In case the purchaser shall make any objection or requisition (as to title or otherwise) which the vendor shall, from any cause or on any grounds whatever, be unwilling or unable to answer or comply with, and shall not withdraw the same after being required so to do, the vendor may, by notice in writing (notwithstanding any attempt to answer or comply with such objection or requisition, or any previous or pending negotiation or litigation), at any time rescind the sale. In that case, the purchaser shall be entitled only to a return of the deposit money without interest, costs or compensation, or other payment whatsoever, in full satisfaction of all claims and demands, and he shall thereupon return all documents in his possession belonging to the vendor.

Errors in descriptions, etc.

(10) The admeasurements and descriptions of the property, as given in the particulars, are believed, and shall be assumed by the purchaser to be correct; but if any mis-statement, error or omission shall be found in the particulars or conditions, the same shall not annul the sale, nor entitle the purchaser to be relieved from the purchase; nor shall any compensation be allowed to either the vendor or purchaser in respect thereof.

Sections 287a-288.

(11) The deed of conveyance shall be prepared by the vendor's solicitor at the expense of the purchaser and shall contain only the statutory covenant against incumbrances. Conveyance.

(12) If the purchaser shall neglect or fail to comply with any of the above conditions his deposit money shall be forfeited to the vendor, who may, with or without notice, and without tendering a conveyance to the defaulter at the present sale, resell the property, either by public auction or private contract, at such time and place, and subject to such conditions, and in such manner generally as the vendor shall think fit; and if such resale shall be by auction, the property may be bought in, and the deficiency of price (if any) which shall happen at any such resale, and the expenses of and incident to the present sale, or such resale, or any unsuccessful attempt to sell, shall forthwith respectively be made good by the defaulter, and be recoverable by the vendor as liquidated damages. On default of purchaser vendor may resell.

[288.] MEMORANDUM. At the sale by auction, made this day, of the property comprised in the above particulars (*name and description of purchaser*), was the highest bidder for, and was declared the purchaser of the said property, at the price of $; and the said has paid to , as agent for and on behalf of (*name of vendor*), the sum of $, by way of deposit, and in part payment of the purchase money; and he hereby agrees to complete the purchase according to the above conditions, and the said , as the vendor's Agreement with purchaser.

Sections 288-288b.

agent, hereby confirms the said sale and acknowledges the receipt of the said deposit.

Dated 19 .

Signed (*auctioneer or vendor's agent*).
Signed (*purchaser*).

[288a.]

MEMORANDUM OF AGREEMENT BY AUCTIONEER.

I HEREBY ACKNOWLEDGE that has been this day declared by me the highest bidder, and purchaser of (*description*) at the price or sum of dollars [*or* at the price or sum of per foot frontage *or* per acre] and that he has paid into my hands the sum of dollars as a deposit and in part payment of the purchase money; and I hereby agree, that the vendor , shall in all respects fulfil the conditions of sale hereto annexed.

Price.

WITNESS my hand at this day of 19 .

[Signed]

Auctioneer.

[288b.]

MEMORANDUM OF AGREEMENT BY PURCHASER.

I HEREBY ACKNOWLEDGE, that I have this day purchased at public auction all that (*description*) for the price or sum of dollars, [*or* for the price of per foot frontage *or* per acre], and have paid into the hands of the auctioneer, the sum of

Agreement to pay balance.

as a deposit, and in part payment of the said purchase money; and I hereby agree to pay the remaining sum of unto , the vendor, at on or before the day of and in all other respects on my part to fulfil the annexed conditions of sale. Sections 288b-288c

WITNESS my hand, this day of A.D. 19 .

[288c.]

NOTICE: PURCHASER TO MORTGAGEE-VENDOR TO COMPLETE CONTRACT.

I HEREBY GIVE YOU NOTICE and require you to complete the contract of sale bearing date the day of 19 , and entered into between you of the one part, and myself of the other part, whereby you agreed in consideration of the sum of dollars to sell and convey to me the following property, that is to say: (*description*). And I further give you notice that if you fail to carry out said contract within days from this date, I shall seek such relief as I may be entitled to in the courts of justice, [*or* I shall bring an action against you for specific performance and for damages, *or* I shall treat the contract as rescinded and void to all intents and purposes, and bring an action for the recovery of the deposit money by me paid to you.] Nature of relief.

Dated at this day of 19 .

[Signed]

Section 288d. [288d.]

NOTICE: MORTGAGEE-VENDOR TO PURCHASER TO COMPLETE CONTRACT.

I HEREBY GIVE YOU NOTICE that the time fixed for completion of the purchase by the agreement, dated the day of 19 , entered into with me by you for the purchase of the following property, that is to say: (*description*), is now long past, and that I am ready and willing to make out and execute [and to procure the concurrence of all necessary parties, if any, to] a conveyance to you, or as you shall direct, of the fee simple in possession [*or as the case may be*] of the above-mentioned premises, in accordance with the terms and conditions of the said agreement; and that I require you within days from this date to complete the purchase, and pay the remainder of the purchase money with interest up to the date of such completion, as provided by the said agreement; and that I further give you notice that I shall hold you liable for all loss or damage which I may incur by reason of any delay or default on your part in completing the said purchase, or otherwise in relation to the said agreement, [*or* that I shall forthwith bring an action against you for specific performance, and for damages incurred by reason of your default, *or* that I shall rescind the contract, forfeit the deposit already paid by you, and bring an action against you for any deficiency on a re-sale].

Nature of relief.

Dated this day of 19 .

[Signed]

[289.]

PURCHASE DEED (UNDER SHORT FORMS ACT). Section 289.

WHEREAS BY A MORTGAGE, bearing date the day of 19 , one mortgaged the lands hereinafter described to the said party of the first part, to secure the sum of $ and interest payable as therein mentioned, which mortgage was expressed to be in pursuance of the Short Forms Act, and contained a proviso that (*recite e.g. that* the said mortgagee, on default of payment for one month, might, on one month's notice, enter on and lease or sell the said lands); [and a further proviso that in case default should be made in payment of either principal or interest for two months after any payment of either should fall due, the power of sale and entry might be acted upon without any notice]; [and a further proviso that in default of the payment of the interest thereby secured, the principal thereby secured should become payable].

And whereas default for over twelve months and more having been made in the payment of (*e.g.,* the interest thereby secured), the said party of the first part [although not required so to do] gave to the said (*name of mortgagor*), *and to all other persons appearing to have any interest in or claim upon the said lands,* Notice of his intention to proceed to exercise the said power of sale, and thereupon, after [more than one month from] the giving of such notice, and after public advertisement, did offer the said lands for sale by public auction] and the said Default notice and sale.

Section 269.

party of the part, being the highest bidder, became the purchaser thereof], or [but no sufficient bid being made therefor, the same remained unsold; and such default as aforesaid having continued, the said party of the first part has now agreed to sell the said lands to the said party of the part].

Consideration (where mortgage back for balance of purchase money).

In pursuance of the premises and in consideration of the sum of dollars,* whereof the sum of dollars had been in hand paid to the said party of the first part (the receipt whereof is hereby acknowledged), and the remaining dollars whereof remains unpaid a lien upon the lands hereby conveyed, and is to be collaterally secured by a mortgage of the said lands.

Operative words.

The said party of the first part, by virtue and in exercise of the aforesaid power of sale, and

* How far an exchange of land (instead of money) is good consideration for a sale under power, is dealt with in the following case, reported in the daily newspaper reports:

"CHANCERY DIVISION. March 26th, 1892.
BEFORE BOYD, C.

SMITH v. SPEARS.—Judgment on appeal by the defendant from finding by the Master in Ordinary that the plaintiff has a good title as assignee to a mortgage in question. The mortgaged lands were purchased by the mortgagor from one Palmer, who claimed title under a conveyance to him in alleged pursuance of power of sale in a former mortgage. The defendant in this action alleged that the transaction between Palmer and the original mortgagee was not a sale under the power, but an exchange of the land mortgaged for land owned by Palmer, and that the power of sale did not justify an exchange. The Chancellor holds that (apart from the mortgagee having acquired a title by possession against the mortgagor) the mortgagee was justified in taking land instead of money for the mortgaged property, and that the transaction was a valid one extinguishing the mortgagor's equity of redemption. Appeal dismissed with costs; but appellant on payment of costs may have a reference back to take *viva voce* evidence as to possession. If the further evidence corroborates the affidavits, appellant to pay costs of reference. William Macdonald for the appeal. Eddis for the plaintiff, *contra*."

of all other powers thereunto enabling, doth grant, etc. Sections 289-290.

To have and to hold, etc. * * crown and subject to the payment of the said unpaid purchase money, and to taxes and local improvement rates unpaid thereon. Habendum.

And the said party of the first part covenants with the said party of the part that he has done no act to encumber the said lands. Covenant.

[289a.] THE SAID PARTY of the first part covenants with the said party of the (*second*) part that the mortgage security is now in full force unprejudiced and unreleased in whole or in part, and that default has so happened as aforesaid in the payment of the money due thereby. Covenant that mortgage valid and default existing.

[289b.] AND WHEREAS the said lands have been advertised for sale pursuant to the said power contained in said mortgage, by public auction, at , by advertisement thereof inserted in the newspaper and by posters, for the space of weeks. Fuller recital of advertisement.

[290.] MORTGAGE BACK TO VENDOR.

WHEREAS BY INDENTURE bearing even date herewith the said party of the part did grant and convey the lands hereinafter described unto the said party of the first part, under and by virtue of a power of sale in a certain mortgage therein mentioned for the sum of Recital.

Sections 290-291.

dollars; and whereas the parties hereto have agreed that the sum of dollars, being part of the said purchase money shall be payable as hereinafter mentioned, and be secured by these presents.

Consid-ration.

In pursuance of the premises and in consideration of the said sum of dollars, etc.

[291.]

CONVEYANCE OF LEASEHOLDS UNDER POWER OF SALE.

THIS INDENTURE, made in duplicate the day of 19 , Between (*name and description of mortgagee-vendor*) of the first part and (*name and description of purchaser*) of the second part.

Recital of lease.

Whereas by an Indenture of Lease dated the day of 19 , and made between (*name, etc., of lessor*) of the one part, and (*name, etc., of mortgagor*) of the other part, all that messuage or tenement (*description of parcels as in lease*) were demised by the said (*name of lessor*) unto the said (*name of mortgagor*), his executors, administrators and assigns, from the day of 19 for the term years at the yearly rent of dollars and subject to the covenants and conditions in the said indenture of lease contained, and on the part of the lessee to be observed and performed and whereas by Indenture of mortgage dated (*date and parties*) the said premises were demised by the said (*name of mortgagor*) unto

the said (*name of mortgagee*) for the residue of the said term of years, except the last [ten days] thereof, subject to a proviso for the redemption thereof upon payment by the said (*name of mortgagor*) to the said (*name of mortgagee*) of the sum of dollars with interest thereon, as provided in the said indenture; which mortgage contained a proviso that (*recite power of sale, default, notice, advertisement, agreement to purchase, etc., as in* [289]). Now this Indenture witnesseth that in pursuance of the premises and in consideration of the said sum of dollars, to him in hand paid at or before the execution of these presents (the receipt whereof is hereby acknowledged) he the said party of the first part hereby assigns unto the said party of the second part, The piece of ground and other the premises comprised in and demised by the said indenture of lease, and the messuage or dwelling-house and other buildings which have been erected on the said piece of ground since the said indenture of lease, To hold the same unto the said party of the second part for all the residue now unexpired of the said term of years created therein as aforesaid, subject to the rent reserved by the said indenture of lease, and the covenants and conditions in the same indenture contained and which henceforth on the part of the lessee ought to be observed and performed [and the said party of the second part hereby covenants with the said party of the first part that the said party of the second part, his executors, administrators, and assigns will during the residue of the said

Section 291.

Witnessing part.

Covenant by purchaser to observe covenants.

Sections 291-292.

term pay the rent reserved by the said indenture of lease, and observe and perform the covenants and conditions therein contained, and which henceforth on the lessee's part ought to be observed and performed, and will keep indemnified the said party of the first part and his estate and effects from and against all claims and demands on account of the same.]

IN WITNESS, etc.

[292.]

DEED BY BUILDING SOCIETY UNDER POWER OF SALE.

THIS INDENTURE, made in duplicate the day of A.D. 19 , in pursuance of the Act respecting Short Forms of Conveyances, between the Loan and Savings Society, of in the County of , of the first part, and of in the County of of the second part.

Recital of mortgage.

WHEREAS by Indenture of Mortgage, dated the day of A.A. 19 , and made between of in the County of of the first part [his wife of the second part], and the said society of the part, the said for and in consideration of the sum of advanced and paid to him by the said society, did grant and mortgage to the said society the lands and premises hereinafter described; in which said Indenture of Mortgage is contained a proviso [that if the said should well and truly pay to

the said society, their successors or assigns, the said sum of money, interest and charges in equal instalments of on the day of every month during the term of months until the said sum of money, interest and charges should be fully paid, and also during the whole time aforesaid pay to the said society, their successors and assigns all other monthly payments and contributions for, upon, or in respect of the shares therein mentioned, and also all fines and other charges whatsoever imposed or thereafter to be imposed by the said society and their successors upon the said , his heirs, executors, administrators and assigns, as a member or members of the said society, or upon the shares therein mentioned, or for, upon, or in respect of any default or neglect or breach of any of the rules and regulations or by-laws of the said society by the said , his heirs, executors, administrators and assigns, without any deduction or abatement whatsoever, and also all taxes, assessments, premiums of insurance, interest thereon, and other charges for, upon, or in respect of the said premises and every part thereof, then the said presents and everything therein contained should be void]. And whereas it was in and by the said Indenture of Mortgage agreed that if default (*insert terms of power of sale clause*).

Section 202.

Proviso for redemption.

AND WHEREAS the said hath made default in payment for of the said instalments of as are in and by the said hereinbefore in part recited Indenture of Mortgage

Sections 292-293.

covenanted to be paid as aforesaid. And whereas the said society, under and by virtue of the said hereinbefore recited Power of Sale, did, on the day of A.D. 19 , sell by public auction at the of the lands and premises hereafter described to the said party of the second part, and for the price or sum of , he being declared the highest bidder therefor.

Now this Indenture witnesseth, etc., as in [289.]

[293.]

NOTICE: MORTGAGEE-VENDOR TO TENANT TO PAY RENT TO PURCHASER.

I HEREBY GIVE YOU NOTICE that of the of in the County of has purchased the premises known as (now in your occupation), under the power of sale contained in a mortgage bearing date the day of 19 , and registered in the Registry Office for the County of , on the day of 19 , as Number , and made by one (*name of mortgagor*) to (*name of mortgagee*), and now held by me; and you are requested to pay to the said , or to such person as he may appoint to receive the same, all arrears of rent now due, and also the rent payable by you for the said premises on the next day of payment of such rent, and so

Recital of mortgage.

all future accruing rents until further notice from him in that behalf. Sections 293-295.

Dated at this day of 19

[Signed]

[294.]

NOTICE: PURCHASER OF PREMISES TO TENANT.

I HEREBY GIVE YOU NOTICE that by an Indenture made between one (*name of mortgagee-vendor*) and me, bearing date the day of 19 , and registered in the Registry Office for the County of , on the day of 19 , the premises known as (now in your occupation), were conveyed to me; and I hereby require you to pay to me, or to such person as I may appoint to receive the same, all arrears of rent now due, and also the rent payable by you for the said premises on the next day of payment of such rent, and so all future accruing rents until further notice from me in that behalf; and in default thereof I shall pursue such remedies as are allowed by law for the recovery of the same. Recital of mortgage.

Dated at this day of 19 .

(Signed)

[295.]

QUIT CLAIM DEED BY MORTGAGOR TO PURCHASER.

THIS INDENTURE, made in duplicate the day of A.D. 19 , Between , of the first part; wife Quitclaim.

Section 205. of the said party of the first part, of the second part; and of the third part:

WHEREAS the said party of the first part (and the said party of the second part to bar her dower) formerly mortgaged the lands and premises hereinafter described to one by Indenture bearing date the day of 19 , to secure the sum of dollars and interest as therein provided; in which mortgage there was a power of sale on default of payment. And whereas default having occurred in the payment of the said sums secured, the said proceeded to sell the said lands, and the said party hereto of the third part became the purchaser thereof. And whereas the said parties hereto of the first and second parts have agreed with the said party of the third part to testify their assent to such sale and purchase by the execution of these presents: NOW THIS INDENTURE WITNESSETH that the said parties of the first and second parts, for and in consideration of the premises and of the sum of dollars of lawful money of Canada, to them in hand paid by the said party of the third part, at or before the sealing and delivery of these presents (the receipt whereof is hereby acknowledged) have granted, released and quitted claim, and by these presents do grant release and quit claim unto the said party of the third part, his heirs and assigns all their estate, right, title, interest, claim and demand whatsoever, both at law and in equity, or otherwise howsoever, and whether in possession or expec-

tancy, of, in, to or out of, all and singular the certain parcel or tract of land and premises situate, lying and being

Sections 295-296.

Together with the appurtenances thereto belonging or appertaining, to have and to hold the aforesaid land and premises, with all and singular the appurtenances thereto belonging or appertaining, unto and to the use of the said party of the third part, his heirs and assigns for ever; subject, nevertheless, to the reservations, limitations, provisos and conditions expressed in the original grant thereof from the Crown.

Appurtenances.

IN WITNESS WHEREOF, etc.

[296.] RELEASE OF EQUITY OF REDEMPTION.

THIS INDENTURE, made in duplicate the day of A.D. 19 , in pursuance of the Act respecting Short Forms of Conveyances: Between , whereas, by an Indenture dated the day of one thousand eight hundred and , did grant and mortgage unto the lands hereinafter described, for securing payment of the sum of and interest as therein mentioned:

Release of equity.

NOW THIS INDENTURE WITNESSETH, that the said part of the first part, in consideration of the sum of of lawful money of Canada, to well and truly paid by the said part of the second part (the receipt whereof is hereby acknowledged), do

Sections 296-297.

grant, release and confirm unto the said part of the second part, heirs and assigns, all . And also all estate, right, title, interest and equity of redemption of and in the said lands which the said part of the first part now ha or may hereafter claim, either at law or in equity, of, in, to or out of the said lands:

TO HAVE AND TO HOLD unto the said part of the second part heirs and assigns, to and for and their sole and only use for ever; subject, nevertheless, to the reservations, limitations, provisos and conditions expressed in the original grant thereof from the Crown:

Covenant.

The said part of the first part covenant with the said part of the second part that he ha the right to grant and release the equity of redemption of the lands before described: And that the said part of the first part ha done no act to encumber the said lands: And that the said part of the second part shall have quiet possession of the said lands: And that the said part of the first part will execute such further assurances of the said lands as may be requisite.

IN WITNESS WHEREOF, etc.

[297.] CONVEYANCE BY A MORTGAGOR AND MORTGAGEE, PART OF PURCHASE MONEY BEING PAID TO MORTGAGEE IN SATISFACTION OF HIS DEBT.

Recital of mortgage.

THIS INDENTURE made in duplicate the day of A.D. 19 , in pursuance

of the Act respecting Short Forms of Conveyances, Between (*mortgagee*) of the of in the County of of the first part, (*mortgagor*) of , of the second part, and (*purchsaer*) of , of the third part: Whereas by Indenture of Mortgage dated the day of and made between the said party of the second part of the one part and the said party of the first part of the other part, the said party hereto of the second part did grant and mortgage the lands and premises hereinafter described to the said party hereto of the first part to secure the sum of (*e.g.* $3,000) with interest thereon: And whereas the said party of the second part has agreed to sell the said lands and premises to the said party of the third part for the price or sum of (*e.g.* $5,000): And whereas there is now due on the security of the hereinbefore recited indenture the sum of (*e.g.* $3,000): And whereas it was agreed and understood among all the parties hereto that the said sum of (*e.g.* $3,000) should be paid to the said party of the first part out of the said purchase money: NOW THIS INDENTURE WITNESSETH that in consideration of the sum of (*e.g.* $3,000) to the said party of the first part paid by the said party of the third part, on or before the execution of these presents, by the direction of the said party of the second part, (the receipt whereof the said party of the first part hereby acknowledges) and in consideration of the sum of (*e.g.* $2,000) to the said party of the second part at the same time paid by the said party of the third part (the payment and receipt

Section 297.

Sum due on mortgage to be paid out of the purchase money.

Sections 297-298.

in manner aforesaid of which said sums of $3,000 and $2,000, making together the said sum of $5,000, the said party of the second part hereby acknowledges) he the said party of the first part as mortgagee, by the direction of the said party of the second part doth grant and he the said party of the second part doth grant unto the said party of the third part, his heirs and assigns for ever all and singular (*description*) TO HAVE AND TO HOLD unto the said party of the third part, his heirs and assigns, to and for their sole and only use for ever absolutely discharged from all principal money and interest secured by and all claims and demands under the hereinbefore recited indenture of mortgage: subject nevertheless, to the reservations, limitations, provisos and conditions expressed in the original grant thereof from the Crown.

Habendum.

(*Usual covenants by vendor,—i.e., mortgagor,—covenants against incumbrances by mortgagee.*)

[298.] RECITAL IN CONVEYANCE BY MORTGAGOR AND MORTGAGEE, WHERE LATTER SATISFIED THAT REMAINING SECURITY SUFFICIENT.

AND WHEREAS the said party of the first part, being satisfied that his said mortgage debt is otherwise sufficiently secured, has agreed to join in these presents in the manner hereinafter expressed.

Section 299.

[299.] SIMILAR CONVEYANCE, WHERE IT IS DESIRED TO KEEP MORTGAGE DEBT ON FOOT.

AND WHEREAS upon the treaty for the said purchase it was agreed that the said mortgage debt of (*e.g.* $3,000) should be paid by the said party of the third part to the said party of the first part out of the said purchase money, that the said mortgage debt should be kept on foot as a protection against subsequent incumbrances in the manner hereinafter mentioned: NOW THIS INDENTURE WITNESSETH, that in pursuance of the aforesaid agreement in this behalf, and in consideration, etc., ($3,000 *to the mortgagee and* $2,000 *to vendor*) the said party of the first part, as mortgagee, by the direction of the said party of the second part, hereby assigns unto the said party of the third part the principal sum of ($3,000) secured by the said indenture of mortgage: To hold the same unto the said party of the third part absolutely: AND THIS INDENTURE FURTHER WITNESSETH that in pursuance of the aforesaid agreement in this behalf and for the considerations aforesaid the said party of the first part, *etc., as in* [297].

Recital of agreement to keep mortgage on foot.

Assignment.

Section 300.

[300.] Items of Bill of Costs of Sale Under Power.

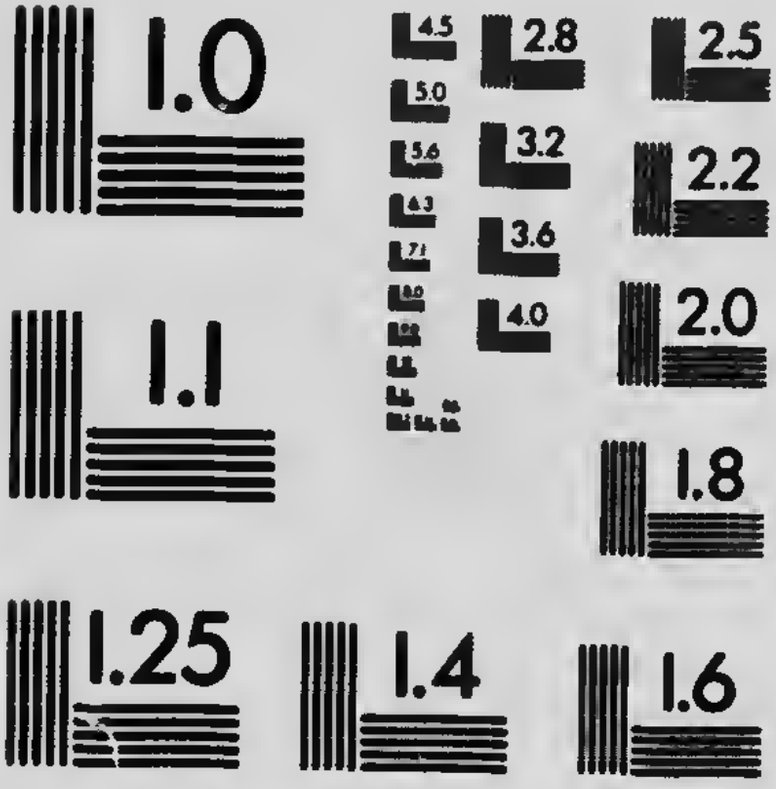
(ADAPTED FROM MR. EWART AND OTHERS.)

Instructions to sell	$ 3	00
Letter to mortgagor	50	03
Letter to surety (if any)	50	03
Letter to owner of equity	50	03
Letter to Registrar with abstract to be continued	50	03
Letter to Sheriff for certificate	50	03
Letter to Treasurer for certificate	50	03
Having received abstract letter to Registrar with his fees	50	08
Paid fees		
Having received certificate letter to Sheriff with his fees	50	08
Paid fees		
Having received certificate letter to Treasurer with his fees	50	03
Paid fees		
Drawing notice of sale (for service) per folio	20	
Fee revising (to be increased according to length and intricacy)	2	00
Engrossing per folio	10	
Each copy for service, per folio	10	
Attending to serve, each	50	
(Or paid for service, where not served from the office)		
Declaration of service, each	1	00
Copy to post up, per folio	10	
Attending to post upon premises	50	
(or paid for posting up, etc.)		
Declaration of posting up	1	00
[When notice published]		
Drawing notice of sale for publication, per folio	20	
Fee revising (to be increased, etc.)	2	00
(Other charges for printing and inserting as in advertisement of sale below)		
Attending to search files of newspaper	50	
Drawing declaration of publication of notice, per folio	20	
Engrossing, per folio	10	

			Section 300.
Preparing exhibits, each	$0 10		
Attending to declare and paid	50	20	
Paid marking exhibits, each		10	
Instructions for application for order allowing "further proceedings" (County Court)	1 00		
Drawing affidavits, each, per folio	20		
Engrossing, per folio	10		
Attending to swear and paid, each	25	20	
Preparing exhibits, each	10		
Paid marking exhibits		10	
Counsel fee on motion		1 00	
Drawing order, per folio	20		
Attending to bespeak and for	50		
Paid besides filings			
Fee on order	50		
Letter to auctioneer as to his terms for sale	50	03	
Having received reply, letter accepting his terms	50	03	
Drawing advertisement of sale	2 00		
for each folio over five, per folio	20		
Copy of advertisement for printer, per folio	10		
Attending printer with	50		
Attending for proof	50		
Revising proof	1 00		
Attending printer with revised proof	50		
	Paid, etc.		
Copy of advertisement for newspaper, per folio	10		
Attending for insertion	50		
	Paid.		
(Ditto for other papers where advertisement appears)			
(Ditto for printing posters)			
Attending bill poster with posters	50		
	Paid.		
Notices of auction to interested persons, each (registered letter)	50	08	
Declaration as to sending same, per folio	20		
Engrossing, per folio	10		
Preparing exhibits, each	10		
Attending to declare and paid	50	20	
Paid marking exhibits	10		
Drawing particulars of property	1 00		
Copy for auctioneer, per folio	10		
Drawing conditions of sale, per folio	20		

MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No. 2)



APPLIED IMAGE Inc

1653 East Main Street
Rochester, New York 14609 USA
(716) 482 - 0300 - Phone
(716) 288 - 5989 - Fax

Section 300.

Conferring with vendor and reading over to him	$1	00	
Fee revising (to be increased, etc.)	2	00	
Engrossing, per folio		10	
Copies (for solicitor, auctioneer, vendor, *et al.*,) each, per folio		10	
Memorandum of agreement to be signed by purchaser	1	00	
Attendance on persons applying for particulars, each		50	
Conferring with auctioneer as to sale	1	00	
Settling reserved bid	1	00	
Fee on conducting sale when held where solicitor resides	5	00	
If solicitor is engaged more than three hours, for every hour beyond that time	1	00	
Fee on conducting sale elsewhere, besides all necessary travelling and hotel expenses.	10	00	
If the sale occupies more than one day (then according to circumstances)			
(Where solicitor not present in person) letter to auctioneer for deposit		50	03
Letter acknowledging receipt of same		50	03
Paid auctioneer's fee (usually $5 to $10 for unsuccessful, and $10 to $20 for successful sale, being larger where property sold in lots)			
Instructions for declaration setting out default	1	00	
Drawing same, per folio		20	
Engrossing, per folio		10	
Preparing exhibits, each		10	
Attending to declare and paid		50	20
Marking exhibits, each		10	
Ditto for declaration of auctioneer			
Ditto for declaration of bill poster			
Attending to search files of newspaper		50	
Declaration of publication of advertisement (as above)			
Having received requisitions on title, drawing answers, per folio		20	
Fee revising (to be increased, etc.)	2	00	
Engrossing, per folio		10	
Copy to serve, per folio		10	
Attending to serve		50	

Attending purchaser's solicitor, going over requisitions and answers, per hour	$1	00
(Declaration to clear up title, etc.)		
Drawing conveyance, including recitals, affidavit, etc., per folio		20
Fee settling (to be increased, etc.)	2	00
Attending purchaser's solicitor with draft		50
Engrossing conveyance, per folio		10
Attending execution, each	1	00
Affidavits of execution, each	1	00
(Ditto with mortgage where vendor prepares same).		
Attending purchaser's solicitor on settlement..	2	00
or per hour	1	00
Attending to register deeds		50
Paid fees		
Attending for mortgage at registry office.....		50
Total		

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