

No. 64.

1st Session, 6th Parliament, 21 Victoria, 1858.

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An Act to prevent Claims secured by special Privilege or Hypothec on Real Property in Lower Canada, duly registered, from being lost by any subsequent Judicial Sale or Confirmation of Title.

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Hon. Mr. Atty. Genl. CARTIER.

An Act to prevent Claims secured by Special Privilege or Hypothec on Real Property in Lower Canada, duly registered, from being lost by any subsequent Judicial Sale or Confirmation of Title.

WHEREAS the Registry Laws are intended for the protection of those who comply with their requirements, and since the establishment of Registry Offices in Lower Canada, the hypothecs specially charged upon any real property and duly registered, can be readily ascertained, and it is unjust that parties who have lent money, or allowed credit for the price of property sold, on the security of such hypothecs, should be exposed to lose the same if they fail formally to oppose proceedings of which they receive no personal notice and of which they may be wholly unaware; and this risk of loss discourages the introduction of capital into Lower Canada, and the loan thereof for the improvement of real property, and obstructs the sale of land on credit; And whereas the reasons which formerly rendered such risk unavoidable no longer exist: Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

I. It shall not hereafter be necessary that any opposition be filed in any case of application for a judgment of confirmation, under the Act of Lower Canada, ninth George the Fourth, chapter twenty, for the more effectual extinction of secret incumbrances of lands, in order to preserve any privilege or hypothec for a sum of money specified and upon real property described in the instrument or memorial registered for preserving such privilege, or any conventional hypothec duly constituted under the twenty-eighth section of the Lower Canada Registry Ordinance, fourth Victoria chapter thirty, for securing any sum of money specified in the instrument creating such hypothec, on real property therein specially described, if such privilege or hypothec be duly registered under the said Ordinance and the Acts amending it, before the *first* publication of the notice that such application will be made: and unless special proceedings under the next following section of this Act are taken in such case, the judgment of confirmation shall not discharge any such privilege or hypothec as aforesaid, but shall be obtained subject thereto.

II. No privilege or conventional hypothec for securing any life-rent (*rente viagère*) or any payment depending on a contingency, shall be within the meaning of the first section of this

Preamble.

Special privileges and hypothecs duly registered not to be discharged by confirmation of title, unless special proceedings are taken under this Act.

Hypothecs for payments depending on

contingency to be discharged.

Act, but shall be discharged by the judgment of confirmation unless preserved by opposition, as shall also all privileges and hypothecs whatever not within the meaning of the said section and not preserved by opposition.

Proceedings if the applicant desires to discharge special privileges and hypothecs duly registered.

III. If the applicant for a judgment of confirmation under the above cited Act desires to discharge the privileges and conventional hypothecs mentioned in the first section of this Act, he shall, at the time of his application for such judgment, file a certificate of the Registrar of the proper County or Registration District, stating the privileged and conventional hypothecs within the meaning of the said first section which are registered against the property to which the judgment is to apply and have not been wholly discharged, stating the date of the instrument (if any) registered as creating or proving such hypothec, and the name of the Notary or Notaries if such instrument be notarial, and mentioning any partial discharge registered, and the sum which appears to be due for principal and interest in each case, and shall pay into Court the price (if any) mentioned in the title to be confirmed, or which he shall have made up by bidding in the manner allowed by the said Act ; and if such price be sufficient to pay all the charges on the property mentioned in the said certificate or in the oppositions filed in the case and maintained by the Court, and all costs, the judgment of confirmation shall be pronounced purely and simply ; but if such price be not sufficient to pay such charges and costs, or if there be no price mentioned in the title to be confirmed, the Court or any Judge thereof, shall, at the instance of the applicant for such judgment, appoint two *experts*, and the applicant shall appoint one, and such three *experts*, or a majority of them, shall value the property, and report the value thereof on oath, in writing under their hands, to the Court, and if the value so reported be not greater than the price paid in by the applicant as aforesaid, such price shall be deemed the value of the property, and the judgment shall be pronounced purely and simply ; but if the value so reported be greater than such price, or if there be no price mentioned in the title to be confirmed, the applicant shall pay the difference between the price and the said value, or the whole of the said value if there be no price, into Court, and the judgment shall then be pronounced purely and simply.

Price or value to be paid into Court.

Valuation of the property in certain cases.

Distribution of the price or value among the creditors.

Effect of Registrar's certificate and objections thereto.

IV. The price or value so paid into Court shall be distributed by the Court among the opposants (if any) and the privileged and hypothecary creditors mentioned in the Registrar's certificate, according to the order and rank of their privileges and hypothecs : the Registrar's certificate shall be *prima facie* evidence of the facts therein mentioned, but any such fact or any matter to which such certificate relates, may be disputed by any party interested, and the Court may then receive evidence contradicting or modifying any statement in such certificate, and give judgment accordingly, and no

notice or service of any proceeding to or upon any party not appearing in the case, shall be necessary unless specially ordered by the Court; but if it be objected that any statement of fact in the certificate is false in any particular
 5 involving error or fraud on the part of the Registrar, or in his books, then the Registrar shall have notice of such objection, and may appear and defend his certificate, and obtain and file authentic copies of all deeds or other documents requisite to such defence, and if he be successful in defending his
 10 certificate, he shall have his full costs against the party disputing it; and the Court may order any person interested to be called in (*mis en cause*) if the purposes of justice shall require it, and such party shall be then called in by service of such order personally or at his domicile, or by advertisement, as by law pro-
 15 vided if he be an absentee.

Court may order any party to be called in.

V. The collocation in favor of any non-opposant shall be to him and his legal representatives or *ayants cause*, and the amount thereof shall remain in the hands of the Prothonotary until he or they shall demand the same and give a valid discharge
 20 therefor.

Collocation to non-opposants.

VI. Nothing in the foregoing provisions shall prevent any party from consenting that the judgment of confirmation be given subject to his claim, or from filing an opposition if he think proper; and no valuation by *experts* shall be requisite where the
 25 title to be confirmed by the judgment relates to property taken by the Crown for purposes of public utility, or by any Corporation or other party under any law authorizing the taking of such property without the consent of the owner, provided the price or compensation shall have been settled by arbitration or
 30 *expertise* under such law.

Act not to prevent certain things being done by consent.

Valuation not required in certain cases.

VII. No opposition shall be requisite in any case of Sheriff's Sale or Forced Licitation, in order to preserve the claim upon the price of the property in question under any such privilege or hypothec as is mentioned in the first section of this Act; but
 35 his Sheriff having the execution, shall procure and file with his return to the writ,—or the party prosecuting such licitation shall procure and file in the Office of the Prothonotary of the Court having the distribution of the proceeds of the sale, and before such distribution shall be made,—a certificate of the
 40 proper Registrar, such as is mentioned in the third section of this Act, and made up to the day of the sale; and such certificate shall have the same effect in preserving the claims founded on the privileges and hypothecs therein mentioned, as provided in the preceding sections with respect to judgments
 45 of confirmation of title, and shall be subject to the like incidents and provisions.

Oppositions not requisite in case of Sheriff's sales to preserve privileges and claims mentioned in section 1.

VIII. Any provision of the Act first above cited, or of the Act eighteenth Victoria, chapter one hundred and ten, to regulate
 Inconsistent enactments repealed.

Rules of practice may be made under this Act.

proceedings on Forced Licitations, which may be inconsistent with this Act, is hereby repealed; but no provision of law not inconsistent with this Act shall be affected by it; and such rules of practice as may be requisite for carrying out its provisions in matters unprovided for, and such alterations in any form of notice, judgment, or otherwise, as they may think necessary for that purpose, may be made by the Judges of the Superior Court. 5

Act not to affect pending cases.

IX. The foregoing provisions of this Act shall not apply to any case in which proceedings for confirmation of title or for forced licitation shall have been commenced, or the property shall have been seized by the Sheriff before the passing of this Act. 10

Act 9 G. 4, c. 20, made permanent as amended.

X. The said Act of Lower Canada, ninth George the Fourth, chapter twenty, as hereby amended, is hereby made permanent, and shall remain in force until repealed by the Legislature. 15

Declaratory clause as to effect of Sheriff's sales or forced licitation.

XI. And for the avoidance of doubts; it is hereby declared and enacted, that no adjudication of any real property by the Sheriff, or in any case of Forced Licitation, has vested or shall vest in the *adjudicataire* any greater or better title to such property than was vested in the party or parties upon whom it was seized, or as belonging to whom it was put up for sale in such case of Forced Licitation; and that no such adjudication did or shall remove or discharge any servitude to which the property was theretofore subject, nor shall any opposition to preserve any such servitude be allowed, and if any be made, it shall be dismissed with costs; and that all servitudes in favor of any property so adjudged, have passed and shall pass with it and be enjoyed by the *adjudicataire* and his *ayant cause*. 20 25

Purchaser troubled by hypothecary or revendicatory action may delay payment, &c. Exception.

XII. If the purchaser of any real property is troubled or has just cause to fear that he will be troubled by any hypothecary or revendicatory action, he shall be entitled to delay the payment of the purchase money until the vendor shall have removed such trouble, unless the vendor shall prefer to give security, or unless it shall have been stipulated in the Contract of Sale that the purchaser should pay notwithstanding such trouble. 30