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*May 27.
*Sept. 26.

THE MORTGAGE CORPORATION OF NOVA SCOTIA (PLAINTIFF).... } APPELLANT;

AND

AMBROSE ALLEN (DEFENDANT).... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Mortgage—Order for foreclosure and sale—Terms of order

It is the proper practice in Nova Scotia, in an action by a mortgagee for foreclosure and sale, that the order provide for the advertisement and sale, not of the lands and premises in question *simpliciter*, but only of the interest of the defendant (mortgagor) and of persons claiming under or through him.

The court has full power and control over the advertising and the form of the deed which the sheriff is to execute.

Judgment of the Supreme Court of Nova Scotia *en banc* ([1929] 3 D.L.R. 225) settling the form of order in question, held to be clearly right, subject to certain slight changes in the wording of the order, which this Court suggested and to obtain which (and confined thereto) the plaintiff (mortgagee) was given leave to appeal (at its own cost) to this Court.

The proper wording of the order in such a case, and the meaning and effect thereof, discussed. Rules 8 (*d*) of Order XVI, 12 (*e*) of Order XIII, 10A (1) of Order LI, of the Rules of the Supreme Court of Nova Scotia, and R.S.N.S., 1923, c. 140 (*Law and Transfer of Real Property Act*), ss. 15, 16, 20, 24 (1), R.S.N.S., 1923, c. 144 (*Registry Act*), s. 18, and R.S.N.S., 5th series (1884), c. 123 (Act respecting *Sale of Lands under Foreclosure of Mortgage*), ss. 4, 6, considered.

*PRESENT:—Anglin C.J.C. and Duff, Rinfret, Lamont and Smith JJ.

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MOTION by the plaintiff for special leave to appeal from the judgment of the Supreme Court of Nova Scotia *en banc* (1) affirming the judgment of Paton J. refusing an order for foreclosure and sale in the particular terms asked for by the plaintiff.

The action was commenced on January 7, 1929, for the foreclosure of a mortgage, made by the defendant and his wife to the plaintiff, of lands at North Sydney, in the County of Cape Breton, Nova Scotia, for $5,500, and for the sale of the lands described in the mortgage in payment of the amount due on the mortgage, and for the possession of said lands, and recovery of the amount due on the covenants in the mortgage from the defendant. No appearance was entered by the defendant, and on February 19, 1929, application was made *ex parte* to Paton J. in Chambers for an order for foreclosure and sale. The form of order asked for by the plaintiff was, in part, as follows:—

> And it is further ordered that the equity of redemption of the defendant and of all persons claiming or entitled by, from or under the said defendant of, in and to the lands and premises sought to be foreclosed herein be barred and forever foreclosed.
>
> That the said lands and premises be advertised for sale * * *
>
> And unless before the day appointed for such sale the amount due * * * be paid * * * the said land and premises be sold at public auction * * * to the highest or best bidder. And that upon payment of the purchase money the said sheriff do make a good and sufficient deed to the purchaser thereof.
>
> * * * * *

PATON J. refused to grant the order in the form asked for, the objection being that the order directed the sale of the land instead of the sale of the right, title and interest of the mortgagor in the land.

Subsequently the plaintiff moved before the Supreme Court of Nova Scotia *en banc,* for the order, under the provisions of Order LVII, Rule 10, of the Rules of the Supreme Court. The Court affirmed the decision of Paton J., and settled the form of order. The order as thus settled read, in part, as follows:—

> And it is further ordered that the estate, interest and equity of redemption of the mortgagor in the said lands and premises described in the said mortgage be forever barred and foreclosed and that a sale of the said mortgaged premises be made by the sheriff * * * after notice * * * and unless before the day appointed for such sale the amount due to the plaintiff with its costs be paid to it or its solicitor the sheriff

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shall proceed to sell and shall execute to the purchaser or purchasers thereof at such sale a deed or deeds conveying and which shall convey to him or them all the estate right title interest claim property and demand of the mortgagor at the time of the making of the said mortgage foreclosed in this action, or at any time since, and of all persons claiming or entitled by from or under the mortgagor of in and to the lands respectively purchased at such sale.

* * * * *

The plaintiff applied to the Supreme Court of Nova Scotia *en banc* for special leave to appeal to the Supreme Court of Canada, which application was refused.

The plaintiff then moved before the Supreme Court of Canada for special leave to appeal, contending, *inter alia,* that the matter in controversy came within clauses (*c*), (*d*), and (*f*) of the proviso to s. 41 of the *Supreme Court Act*; that it was a matter of general public interest affecting the title to the great majority of real estate properties in the province of Nova Scotia; that it involved the substantial rights of the parties and was not merely a question of procedure and practice; that the judgment was erroneous in law; that the Supreme Court of Nova Scotia had no jurisdiction to make an order or decree for the sale merely of the estate, title and interest of the mortgagor in lands; that no court of equity will decree a sale merely of the estate, right, title and interest in land but must ascertain the interest to be sold; that the order or decree asked for by the plaintiff was the settled form of order or decree granted by the Court over a great period of years and could not now be changed; that the order sought to be appealed from purported to foreclose only the estate, interest and equity of redemption of the mortgagor in the land described in the mortgage, leaving unmentioned the interests of judgment creditors mentioned in the Registrar's certificates and all others claiming under the mortgagor whether equitably or otherwise and whether registered or unregistered; that the order sought to be appealed from purported to order a sale of "said mortgaged premises," which phrase had been construed by the judgment sought to be appealed from to mean only the "right, title and interest" of the mortgagor, and by said judgment plaintiffs in foreclosure suits who do not conform to the form settled and who advertise and sell more than such "estate, title and interest" are debarred from having their sales con-

firmed and their costs of advertising or sheriff's deed allowed; that a sale under the order would not carry the legal estate and title of the mortgagee and that a purchaser at such sale would take the mortgagor's estate and interest, if any, subject to all equities to which it was subject in his hands when the mortgage was made and subject to all encumbrances attaching thereto subsequent to the making of the mortgage whether registered or unregistered; that a purchaser would be unable to get a good title at the foreclosure sale, and the rights of the plaintiff and also of the defendant would be thereby prejudiced and the chance of holding a good sale destroyed, and that the titles of all properties hereafter sold in foreclosure actions pursuant to orders in the form fixed by the said judgment would be rendered defective; that it was important in the interests of the parties to the suit and of the owners of all real estate in the province and of mortgagees that the judgment of the highest court of appeal should be obtained as to whether, in actions for foreclosure and sale in Nova Scotia, the decree of the court should be for the sale of the land described in the mortgage or merely for the sale of the mortgagor's interest therein whether ascertained or unascertained, and also that the effect of the common form of decree for foreclosure and sale in use in the province should be determined.

A. Whitman K.C. for the motion.

No one *contra.*

The judgment of the Court was delivered by

ANGLIN, C. J. C.—The plaintiff has moved for special leave to appeal from a judgment of the Supreme Court *en banc* of Nova Scotia (1) affirming a judgment of Paton, J., refusing an order for foreclosure and sale in this action in the particular terms in which it was asked. The case appears to fall within one or more of the clauses of the proviso to s. 41 of the *Supreme Court Act;* and, although at first disposed to regard the questions raised as purely matters of procedure, which should not be made the subject of an appeal to this Court, on further consideration it

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appears to us that they may affect some substantive rights and that, even if mere matters of procedure, they are of such general importance in Nova Scotia that they may properly be considered and dealt with here.

In the judgment of the Full Court the terms of the order proper, in the opinion of that Court, to cover a case such as this are settled and embodied. The chief complaint made against this order is that it provides for the advertisement and sale only of the interest of the mortgagor and of persons claiming under and through him, instead of, as the plaintiff desires, providing for the advertisement and sale of the lands and premises in question *simpliciter*.

The contention put forward on behalf of the plaintiff, in this respect, is, in our opinion, entirely wrong. It never was, and never could be, the purpose of the legislation and rules governing the matter that the court should do anything so misleading as to authorize the advertisement and sale of anything more than the interest of the mortgagor at the time the mortgage was made and any interest subsequently acquired by him and the interests of all persons claiming by, through or under him, including, of course, the plaintiff itself.

While we entirely agree with the view expressed by Chisholm, J., who dissented, that "either course" (i.e., that directed by the Court *en banc,* or that urged by Mr. Whitman)

> leads at least to this result, namely that nothing more than the interest of the mortgagor is or can be conveyed to the purchaser at the Sheriff's sale.

We are also fully in accord with the observation of the learned Chief Justice that

> the court will not and should not lend itself to any practice calculated to have the effect of deceiving unwary persons into believing that they were buying and getting something which they were not getting.

Ritchie, E. J., puts the matter very clearly in *Diocesan Synod of Nova Scotia* v. *O'Brien* (1).

Of course, as Chisholm, J., points out, the property is always sold and conveyed subject to paramount liens (if any) created by law (e.g., for taxes), whether they arose before or after the making of the mortgage, and the phrase, "the interest of the mortgagor at the time of the making of the mortgage" must be so understood. Moreover, we

(1) (1879) R.E.D., 352

agree with the learned Chief Justice that "the court has full power and control * * * over the advertising (and) the form of the deed which its officer, the sheriff, is to execute".

On the main ground of the plaintiff's appeal, therefore, we are of the opinion that the judgment below was clearly right and that special leave to appeal from it should not be granted.

There are, however, one or two subsidiary matters, not so much pressed at bar, but in regard to which slight improvements may, we think, be made in the wording of the order as settled by the Full Court.

The first paragraph of the order so settled reads as follows:

> It is ordered that the estate, interest and equity of redemption of the Mortgagor in the said lands and premises described in the said Mortgage be forever barred and foreclosed * * *

In this sentence we think the word "mortgagor" an undesirable substitute for the word "defendant", which is the word used in the English form as given in Seton's Judgments and Orders (7th Ed.), at p. 1825. An advantage of using the word "defendant" is that it makes more readily and obviously applicable the provisions of Rule 8 (d) of Order XVI of the Rules of the Supreme Court of Nova Scotia, which reads:

> 8 (*d*). It shall not be necessary to make beneficiaries or subsequent incumbrancers defendants, but the court or a judge may direct notice to be given to the beneficiaries or subsequent incumbrancers by mailing a notice of the order with a copy of the advertisement of the sale, and after such notice any such beneficiary or subsequent incumbrancer shall be bound by the proceedings in the same manner as if he had originally been made a party, and any person so notified may within one month thereafter apply to the court or a judge to discharge, vary or add to the said order, or for such other relief in the action as he is entitled to, and the court or a judge in addition to directing such notice to be given, may direct such proceedings as are necessary to protect the rights of the parties,*

and of the statute c. 140, R.S.N.S., 1923, s. 24 (1), which is in the following terms:

> (24 (1) Where by reason of any of the rules of the Supreme Court, providing that it shall not be necessary in certain cases to make incumbrancers, beneficiaries, widows, devisees, or heirs, parties to actions for foreclosure and sale of mortgaged lands, such persons are not made parties, and such lands are sold in any such action, and a deed thereof

*See R.S.N.S., 4th Series, (1873), c. 95, s. 20.

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executed, such deed shall be effective to convey to the grantee all the interest in the land so sold of all such incumbrancers, beneficiaries, widows, devisees, and heirs at law as if they had been parties to such action. Prior unregistered instruments are ineffective as against a registered purchaser for valuable consideration without notice at a sale under a subsequent registered mortgage. R.S.N.S., 1923, c. 144, s. 18.

The effect of the rule and statute quoted, when applied to an order such as that before us (the word "defendant" being substituted for the word "mortgagor"), when served as prescribed by Rule 8 (d), clearly is to debar and foreclose the interests of all persons claiming by, through or under the mortgagor as well as of the mortgagor himself, who is the actual defendant.

With this verbal change, which we have no doubt would have been made by the Full Court had its attention been specifically drawn to the matter, the first clause of the order as settled seems unexceptionable. While in substance the same, it is, in our opinion, preferable to the clause suggested in the draft order, pressed for by counsel for the plaintiff, which reads:

> And it is further ordered that the equity of redemption of the defendant and of all persons claiming or entitled by, from or under the said defendant of, in and to the lands and premises sought to be foreclosed herein be barred and forever foreclosed.

The order settled by the court proceeds:

> That a sale of the said *mortgaged premises* be made by the Sheriff of the County of Cape Breton.

Objection is taken here to the term "mortgaged premises," for which the plaintiff would substitute "the *said* lands and premises," i.e. "the lands and premises sought to be foreclosed herein."

Rule 12 (*e*) of Order XIII of the Rules of the Supreme Court of Nova Scotia, dealing with foreclosure and sale proceedings, reads as follows:

> (*e*) The Court or judge may direct a sale of *the property* on such terms as the court or a judge thinks fit, and without previously determining the priorities of incumbrancers or the amount due on their incumbrances.

"The property" here, beyond doubt, means the interest which the mortgagor had in the lands immediately prior to the making of the mortgage sued upon, which alone could have been the subject of the mortgage—and, possibly, also any further or other interest therein subsequently acquired by him.

In his judgment the learned Chief Justice said:—"The practice to-day is what it was immediately preceding the first of October, 1884;" and he added that "so far as sales are concerned it was continued by s. 6 of the statute to which reference has been made" (c. 117, R.S.N.S. First Series, 1851; R.S.N.S. (1884) Fifth Series, c. 123, s. 6).

On reference to Rules Nos. 11 and 12 of the Supreme Court of Nova Scotia brought into force on the 1st of October, 1884,* as set out in the R.S.N.S., 5th Series, 1884, at p. 833, we find that they read as follows:

11. Where the action is in respect of a mortgage, and the plaintiff claims foreclosure or sale, or redemption, or where the action is for the administration of an estate, or for a partition, the plaintiff shall be entitled to a judgment on such evidence (if any) and in such cases (as nearly as may be) as provided for by the practice immediately preceding the first day of October, 1884, relative thereto.

12. Where the action is for the foreclosure or redemption of a mortgage, or sale of mortgaged premises, if the plaintiff is not entitled to a judgment or would not according to the practice immediately preceding the first day of October, 1884, be entitled to such a judgment or order as he desires, he shall be entitled to the proper judgment or order, on notice or otherwise, according to the said practice where a cause is heard or on an order to take the Bill *pro confesso* or otherwise.

These rules seem not quite to provide that the practice in mortgage actions which was prevalent immediately prior to the 1st of October, 1884, shall continue in its entirety, but rather that the plaintiff shall be entitled to a judgment "on such evidence and in such cases as provided for by the practice immediately preceding" that date. But, however that may be, it seems clear that, at all material times in the past, the property directed by the statute to be advertised and sold in Nova Scotia was not "*the lands and premises*" but "*the lands mortgaged*" (*Vide*: R.S.N.S., 5th Series (1884), c. 123, s. 4), i.e. the interest in the lands which had been mortgaged.

By the Rule of Court presently in force, however, above set forth, viz. Rule 12 (*e*) of Order XIII, the word "*property*" appears to be substituted for the word "*lands*" in earlier use. In order, therefore, to conform more precisely to the terms of the present rule and at the same time clearly to restrict the subject matter of the advertisement and sale to the interests of the mortagee and of the mortgagor and those claiming by, through or under the latter, we would

*See 47 Vic. (1884) c. 26, s. 3; Royal Gazette Extraordinary of Nova Scotia, October 2, 1884; and 48 Vic., 1885, c. 1, s. 9.

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suggest the substitution in the paragraph of the order as settled by the Full Court of the words "*the said mortgaged property*" for the words "*the said mortgaged premises.*" Again, however, we are satisfied that this purely verbal change would have been sanctioned by the Full Court had it been suggested on the settlement of the minutes of the judgment of that Court.

Finally, the form of order as settled by the Full Court directs that the sheriff

> shall execute to the purchaser or purchasers thereof (i.e. of the mortgaged property) at such sale a deed or deeds conveying and which shall convey to him or them all the estate, right, title, interest, claim, property and demand of the mortgagor at the time of the making of the said mortgage foreclosed in this action, or at any time since, and of all persons claiming or entitled by from or under the mortgagor of, in and to the lands respectively purchased at such sale.

In lieu of this provision the draft order prepared by the plaintiff, which it insists should be substituted for that settled by the Full Court, reads:

> And that upon payment of the purchase money the said sheriff do make a good and sufficient deed to the purchaser thereof.

i.e., presumably, of "the lands and premises sought to be foreclosed."

Order LI of the Rules of the Supreme Court of Nova Scotia, Rule 10A (1), reads as follows:

> 10A (1). In an action for foreclosure and sale, if the order directs a sale in default of payment, *the premises* shall be sold upon such default in accordance with the advertisement of sale by the sheriff of the county in which the lands lie, or by such other person as is authorized by the court to make such sale, and such sheriff or person so authorized may execute the deed of the premises to be given to such purchaser.

The Law and Transfer of Real Property Act, c. 140 of the R.S.N.S., 1923, contains the following pertinent provisions:

> Section 15. Where an order is made, whether in court or in chambers, directing any land to be sold, the same shall be sold, unless the court or a judge otherwise orders, by the sheriff of the county in which the land or part of the land lies.
>
> Section 16: In every such case the deed shall be executed by the person authorized to make such sale, and such deed, when delivered to the purchaser, *shall convey the land ordered to be sold.*
>
> Section 20: Every deed of land made by any person authorized by the court or a judge to sell the same shall be presumptive evidence of,
>
> (*a*) the regularity of the sale,
>
> (*b*) the validity of the order under which the sale was made, and
>
> (*c*) the regularity of the proceedings on which such order was founded.
>
> Section 24 (1): Where by reason of any of the rules of the Supreme Court, providing that it shall not be necessary in certain cases to make incumbrancers, beneficiaries, widows, devisees, or heirs, parties to actions for foreclosure and sale of mortgaged lands, such persons are not made

parties, and such lands are sold in any such action, and a deed thereof executed, such deed shall be *effective* to convey to the grantee all the interest in the land so sold of all such incumbrancers, beneficiaries, widows, devisees, and heirs at law as if they had been parties to such action.

The effect of these several provisions is, no doubt, to make the sheriff's deed "convey(ing) the land ordered to be sold" (s. 16) operate to convey "all the estate etc." mentioned in the form of order as settled by the Full Court, and it was apparently unnecessary to do more in that order than to direct that the sheriff should execute to the purchaser or purchasers a deed or deeds conveying "the *property*" or "the *premises*" directed to be sold. *Expressio eorum quae tacite insunt nihil operatur.* But no possible harm or prejudice can accrue to anybody from setting forth, as is done in the settled order, that which the statutes say shall be the effect of the deed or deeds executed by the sheriff. *Abundans cautela non nocet.* Moreover, while the words explanatory of the estate etc. to be conveyed may be regarded as *clausula inutilis* in their immediate collocation, they may affect the construction of earlier clauses which order foreclosure, advertisement and sale and, occurring where they do, they seem apt to declare and confirm the title acquired by the purchaser and also to remove any doubt that might affect the mind of anybody not learned in the law. 4 Co. Rep., 73b; Littleton's Tenures, s. 331. In order to comply more precisely, however, with the terms of the rules of court and the statutes governing, we think it better that a slight modification should be made in the form of order as settled by the Full Court by inserting after the words "shall convey to him or them" the words "the mortgaged property, and which shall be effective to convey" (*Vide:* R.S.N.S. (1923), c. 140, s. 24 (1), and R.S.N.S., 5th Series (1884), c. 123, s. 6.)

This, again, is a change, which, we have no doubt, would have been made by the Full Court had it been specifically requested on the settlement of the minutes of judgment.

On the whole, while not strictly necessary, we think it better, having regard to the doubts which have been suggested as to the prevalent practice in Nova Scotia and as to the effect of a judgment for sale in a foreclosure action, that the order should set forth, as it does in the form settled by the Full Court, subject to the modification suggested,

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the extent of the estate, etc. which the purchaser acquires at the sale and by the sheriff's deed.

In view of the fact that we are convinced that the plaintiff cannot have any relief in respect of the principal matter urged at bar, and having regard to the more or less formal nature of the alterations we suggest in the terms of the order, while, if the plaintiff so desires, we will grant special leave to appeal confined to the latter matters, we do so only upon the terms that it must, in any event, carry on such appeal entirely at its own cost.

Under all the circumstances we do not think there should be any order as to the costs of the present motion. The defendant and those claiming under him were not represented, and the plaintiff has not, in our opinion, made out a case that would justify an order allowing it to add such costs to its claim for the mortgage debt.

It will have been observed that in dealing with this motion the merits of the proposed appeal have been discussed. This somewhat unusual course has been taken because such merits were fully argued by counsel representing the applicant for leave and also because of the terms on which, in our opinion, special leave should be granted and of the probability that further proceedings, if taken, will be purely formal.

Motion refused as to main ground of appeal, but allowed, on terms, as to certain matters indicated; no order as to costs of present motion.

Solicitor for the appellant: *Alfred Whitman.*