ALBERTA C. PEW ..... APPELLANT;

AND

HARRY L. ZINCK (PLAINTIFF) and LOBSTER POINT REALTY CORPORATION, LYTTLETON B. P. GOULD and THE EASTERN TRUST COMPANY (DEFENDANTS) RESPONDENTS.

1952

*June 23, 24, 25, 26

1953

*Feb. 23

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA IN BANCO

Mortgagor and Mortgagee—Foreclosure and Sale—Following sale, equity of redemption extinguished and Purchaser entitled to Court's approbation as matter of right—R.S.N.S. 1923, c. 140, ss. 14 and 15—The Judicature Act, S. of N.S., 1919, c. 32, o. 51, r. 8.

Under the law of Nova Scotia the Court has no jurisdiction to allow a mortgagor of lands to redeem after a sale under a decree but before conveyance and before a report has been made to the Court and approved. *Dicta* in *Stubbings* v. *Umlah* 40 N.S.R. 269 at 271; *Ritchie* v. *Pyke* 40 N.S.R. 476 at 478, disapproved.

*PRESENT: Rand, Kellock, Estey, Locke and Cartwright JJ.

1953

PEW
v.
ZINCK
et al

Per: Locke J. While r. 8 of o. 51, *The Judicature Act*, R.S.N.S. 1919, c. 32, requires either the plaintiff in a foreclosure action or the sheriff after the sale to secure the approval of the Court, the Appellant in the present case was entitled as a matter of right to such approval since the sale had been conducted in the manner directed by the Court and the regularity of the proceedings was not impeached. The equity of redemption was extinguished by the sale.

APPEAL from a judgment of the Supreme Court of Nova Scotia *in Banco* (Illsley C.J. and MacQuarrie J. dissenting) (1), affirming the decision of Hall J. (2) permitting the respondent Lobster Point Realty Corporation, the owner of the equity of redemption in mortgaged lands, to redeem after foreclosure and sale by the Sheriff.

W. P. Potter, Q.C. for the appellant.

Donald McInnes, Q.C. for Lobster Point Realty Corp., and L. B. P. Gould, respondents.

The judgment of Rand, Kellock, Estey and Cartwright, JJ. was delivered by:—

RAND J.:—The question on which this appeal hinges is whether or not under the law of Nova Scotia the court has jurisdiction to allow a mortgagor of lands to redeem after a sale under decree but before conveyance and before a report has been made to the court and approved.

Several special features of that law should first perhaps be mentioned. The rule, as far back as 1833, authorized and since then followed, is that long ago adopted in Ireland under which, instead of foreclosure as in England, the realization of a mortgage is by way of sale. The order formally forecloses the equity of redemption and directs a sale, but reserves a further right of redemption until the day of the sale. By c. 140, R.S.N.S. 1923, continuing, in this respect, the provision of preceding enactments, the sale, unless otherwise ordered by the court, shall be made by the sheriff of the county in which the lands lie, who is authorized to execute a deed which "when delivered to the purchaser shall convey the land ordered to be sold." The purchaser can pay the price and the sheriff execute the deed immediately upon acceptance of the bid. The sheriff renders a report of the proceedings to the court, but whether

(1) (1951) 29 M.P.R. 208; [1952] 2 D.L.R. 359.

(2) (1951) 29 M.P.R. 201; [1951] 3 D.L.R. 73.

that report must be confirmed is disputed. Rule 8 of Order 51 of the Supreme Court practice provides that where an order is made directing any property to be sold,

> the same shall, unless otherwise ordered, be sold, with the approbation of the court or a judge, to the best purchaser that can be got, the same to be allowed by the judge, and all proper parties shall join in the sale and conveyance as the judge directs.

This, with an immaterial change, reproduces Order 51 of the Rules of the Supreme Court, 1883. This latter was, in turn, taken from Rule 13 of Order 35 adopted by the Court of Chancery in 1852 under the Chancery Procedure Act, c. 86, 15 & 16 Vict. For the purposes of the matter before us, it is, in my opinion, of no significance that the rule applies, but on the assumption that it does, I examine the main question.

Both the general practice in the Court of Chancery and the statute here speak of a "sale" of land, and the decisions make it clear that the transaction is not confined to a mere voluntary payment of money in exchange for the conveyance.

In *Ex parte Minor* (1), 32 E.R. 1206, in which the question was the point of time at which the equitable ownership became attributed to the purchaser, Lord Eldon had this to say:—

> The question (whether the purchaser must bear a loss by fire before confirmation of the sale) must depend upon the point, what is the date and time of the contract, at which it can be said to have been complete. Is the bidding in the Master's office the contract between the Court and the bidder; or only an authority to the Master to tell the Court, that if the Court approves, the Court may make a contract with him upon the terms proposed . . . In some of the cases that have been cited, the change of property is said to be from the date of the Report: in others from the time of the conveyance: so, that, though confirmed as the best purchaser, if he had not got the conveyance, he would have been entitled to say, the estate was not his. That cannot be according to the principle. Suppose, this person had insured the premises, while in the Master's office, from fire: would he according to the cases in late times have had an insurable interest? His interest is not near so thin as many, that have been considered insureable.

The decree was that the loss must fall upon the vendor and that there be deducted from the purchase price the amount of deterioration in value found by the master.

(1) (1805) 32 E.R. 1206; 11 Ves. Jr. 559.

1953

PEW v. ZINCK et al

Rand J.

But any inference that until the order of confirmation either the purchaser or the court could withdraw is clearly unwarranted. In *Anon* (1), after the report had been confirmed *nisi*, a motion made that the best bidder should complete his purchase and pay the money on or before a specified day was refused. In Lord Chancellor Loughborough's view, until confirmation the purchaser was always "liable to have the biddings opened; until that *non constat* that he is the purchaser": in other words, the purchaser could not be compelled to pay before confirmation of the report as the time fixed for performance, but with the implication that there is a continuing obligation and that he can be so ordered thereafter. In *Else* v. *Barnard* (2), property ordered to be sold by the court was bought in, but before the auctioneer had left the rostrum the unsuccessful bidder signed a contract to purchase it at the reserved price, improperly disclosed to him, slightly higher than the bid. Before confirmation, the purchaser repudiated and the question was whether he could do so. The Master of the Rolls, Sir John Romilly, holding that he could not, says:—

> I do not, at this present time, go into the question or consider whether that is a sale by auction or not, but I think it is impossible for Mr. Courtauld to say that it is not to be treated as a sale by auction, for he signs a bidding paper, by which he agrees that it shall be so treated; it is impossible for him afterwards to say that he is not bound by it . . . I am of opinion that this amounts to a contract, by which he agrees that it shall be treated as a sale by auction; that he must be treated as the highest bidder at the sum of £2,500; that he cannot repudiate his contract, but must be held to be the purchaser.

In *Anson v. Towgood* (3), where the question was when the purchase should be deemed to become effective to determine the right to receive interest on consols, Lord Eldon observed:—

> Can anything turn upon the report not being confirmed? There was a case about a house being burned down before the confirmation of the report (*ex parte Minor* (4)). But if the tenant for life had died the same night, must not the purchase money have been paid? The report I think, when confirmed, must have relation back to the purchase; and the contract, I apprehend, was made the moment that the purchaser's

(1) (1790) 30 E.R. 660; 2 Ves. Jr. 336.
(2) (1860) 54 E.R. 353; 28 Beav. 228.
(3) (1820) 37 E.R. 511; 1 Jac. & W. 637.
(4) 11 Ves. 559.

name was entered in the Master's book. If the purchaser had lived till the 6th of July, and then died, he would have had nothing if he is not entitled to these dividends.

It is settled, too, that obedience to the contract can be enforced either by ordering a resale subject to the payment of all costs and any deficiency by the first purchaser or by attaching the latter to compel him to carry the bargain out: *Lansdown* v. *Elderton* (1); *Gray* v. *Gray* (2).

The conclusion from this is that on the acceptance of a bid either a contract is entered into by the purchaser with the court in its own capacity or as representing the parties in interest, or in the case of Nova Scotia, conceivably with the sheriff, that the one will buy and the other sell the land, subject only to the approval of the report; or the purchaser submits to the jurisdiction of the court on those contractual terms. The obligations are reciprocal and from them neither the court nor the purchaser can withdraw except upon the failure of the condition; but, apart from consent, only by its operation, which is determined by rules of law, can the obligation and correlative right of the purchaser be destroyed.

On what grounds, then, may the court refuse to confirm? Although it would be impossible to enumerate them all, fraud, mistake, misconduct by the purchaser, error or default in the proceedings are well established. But the controlling fact to which these grounds give emphasis, is that the purchase can be defeated only by juridical action. To hold, on the other hand, that the court, acting otherwise than in setting aside the sale, can destroy such a right would be to attribute to it the repudiation of its own contract without proper cause.

But it is said that so long as the court retains the power of approval, the original jurisdiction to permit redemption is preserved and that this is a further condition to which the purchaser submits himself. Redemption in that case would be an act intercepting the approval, not a ground for refusing approval: and allowing it would, on the theory advanced, wipe out all steps following the order for sale. Since no case has been cited in which that has been done, we have no indication of how the resulting matters would

(1) (1808) 33 E.R. 617; 14 Ves. Jr. 512.

(2) (1811) 48 E.R. 916; 1 Beav. 199.

1953

PEW v. ZINCK et al

Rand J.

be dealt with, such as the purchaser's discharge, the costs and expenses, the deposit, the reconveyance where the deed has been given before redemption. In the last situation, it would be extraordinary that the court should permit the instrument to remain outstanding.

If such a condition has, for the past century, been annexed to sales under decree, we surely would have some reference to it in the cases or in the standard works on equity practice; but the researches of counsel have failed to discover one instance in which such a power has been exercised in any jurisdiction within the British Commonwealth. There are a number of authorities directly in point from the United States: *Brown* v. *Frost* (1), holding that there was no power to redeem after a sale, although the mortgagee was the purchaser: *Pennsylvania Company* v. *Broad St. Hospital* (2), declaring that the mortgagor's right of redemption "must be exercised before the sheriff's hammer falls"; *Parker* v. *Dacres* (3), in which the United States Supreme Court, speaking through Harlan J. at p. 47 said:—

> In the view we take of this case it is unnecessary to express an opinion whether the provision relating to sales under execution, properly interpreted, give a right of redemption after sale under a decree of foreclosure. If it did not, the decree below must be affirmed, for a right to redeem, after sale, does not exist unless given by a statute.

Young's Appeal (4), in which Ross J. on appeal used this language:—

> The bona fide purchaser, at a public sale of land, the moment it is knocked off to him, if he complies in all respects with the conditions of sale, instantly acquires a vested right to the property sold.

and

Gibson v. *Winslow* (5), in which it is stated:—

> The moment the land was struck down, the interest of the purchaser attached.

In *Gordon Grant & Co.* v. *Boos* (6), action had been brought to enforce a mortgage of lands in Trinidad and for sale in default of payment. The property was sold by auction, purchased by the mortgagees and later disposed of for a much larger price. Thereafter the mortgagees sued

(1) (1843) 10 Paige Ch. (N.Y.) 243.
(2) (1946-47) Atl. R. 2d. 281.
(3) (1888) 130 U.S. 43.
(4) (1831) 2 Penrose & Watts (Pa.) 380.
(5) (1860) 38 Pa. State 49.
(6) [1926] A.C. 781.

in New York to recover on the personal covenant the mortgage debt less the amount realized on the sale under the decree. The mortgagor thereupon sought a declaration that his right to redeem had been revived and for an injunction, and the West Indian courts granted the latter relief. The Judicial Committee, speaking through Lord Phillimore, in reversing the judgment, had this to say on the nature of judicial sale:—

> No doubt the sale realized very little, and the mortgagee, who had leave to bid, apparently bought a valuable property for a small sum; and their Lordships can understand that the Courts in the West Indies may have felt some aversion to granting the mortgagee further advantages. But it was a judicial sale *which is not impeached,* and the mortgagor, who could have made a bid or procured a bid, must take the consequences.

There remains the question whether the existence of such a condition must be gathered from a uniform practice of the court in Nova Scotia, the disturbance of which might adversely affect existing rights or titles. The most diligent search by counsel has uncovered no case in which it has been directly decided. What is relied upon is *Stubbings* v. *Umlah* (1), decided in 1900, in which Meagher J. in an *obiter dictum* expressed himself as follows:—

> An absolute right of redemption exists in this Province, up to the completion of the sale, at least, if not, as I am inclined to think it does, up to the granting of the final order of confirmation.
>
> Even after that, especially where the plaintiff is the purchaser, and retains the title, the court, it seems to me, possesses a discretionary power to decree redemption, just as the court in England possesses such a power after a foreclosure order absolute has been made.
>
> There is, therefore, at least, this distinction between our decree and the English final order: that, under the former, the right of redemption exists absolutely, pending the sale and final confirmation thereof; while under the latter, no such absolute right exists.

Again by the same judge when speaking for the court consisting of MacDonald C.J., Weatherbe and Meagher JJ. in *Ritchie* v. *Pyke* (2), but likewise *obiter*:—

> Under our practice which has prevailed for nearly half a century at least, no time for redemption is fixed where a sale is ordered, but the right to redeem, of course, endures until the proceedings have been finally confirmed by order of the court, after the sale, payment of the price, and conveyance to the purchaser have been completed.

In *Wallace* v. *Gray* (3), on the other hand, Graham E.J. at p. 288 said:—

> In this province, where there is no intervening step between the sale and the deed, no confirmation of sale, payment into court, inquiry as to

(1) 40 N.S.R. 269 at 271. (2) (1904) 40 N.S.R. 476 at 478.
(3) (1892) 25 N.S.R. 279.

1953

PEW v. ZINCK et al

Rand J.

title, settling and execution of the deed by the proper parties, etc., before the deed is given, all causing delay, the amount of deposit required is not important. The deed, upon the name being inserted, may be executed by the sheriff directly the hammer falls.

and in *Power* v. *Foster* (1), at pp. 487 and 488, he speaks to the same effect:—

> The sale more resembling a sale of land under execution followed by a deed executed by the sheriff, and not by the party, there has grown up a practice differing from that prevailing in other places. The deed is given by virtue of a statute; and the provisions applicable to this case would be the Act of 1890, Ch. 14, secs. 5, 6 and 10.

I take this language to imply that the execution of the deed under statutory authority would end the matter; but if, contrary to his apparent understanding of the practice, confirmation should be necessary, then the contract would be subject only to the setting aside, on proper grounds, of the proceedings themselves.

The question seems to have been raised still earlier. In *Slayter* v. *Johnston* (2), a suit for redemption, Young C.J. at pp. 508-9 said:—

> We are told that the foreclosure might be opened, which would be a strange thing, at the instance of the mortgagee, and a very startling thing if it could be done at the instance of the mortgagor in this country after a sale.

and Wilkins J. at pp. 522 and 523:—

> If there had been, and there has not been, so far as we are informed, an instance in this Province, of opening a decree of foreclosure *after sale,* where there was no fraud or illegality, and if an authority were adduced, as there has not been, warranting us to take that judicial course in a case where a mortgagee elected to purchase at the sale; still, it would be our duty to proceed further, and, considering the origin of the doctrine contended for to inquire, how far it would consist with adjudicated cases, or (in the absence of these) with equitable principles, to apply it to such a case as this.

In *Bigelow* v. *Blaiklock* (undated but between July, 1873 and December, 1877) Russell's *Equity Decisions of Ritchie E.J.*, the mortgagor claimed a re-sale on the ground of a misunderstanding at the sale because the properties were described differently in the advertisement and in the mortgage and writ. He was held entitled to a re-sale notwithstanding that the mortgagee, after having purchased at the sale, had agreed to sell one of the lots, since he had obtained

(1) (1901) 34 N.S.R. 479. (2) (1864) 5 N.S.R. (Oldright) 502.

no deed and the sale had not been confirmed. Ritchie E.J. at p. 25 said:—

> Though I have in this case ordered a resale on the grounds I have stated, the plaintiff being the purchaser, and under similar circumstances the result might have been the same *if a stranger, possessed of the same knowledge, had been the purchaser, yet there is a manifest distinction between the plaintiff in a suit and a stranger;* and I do not wish it to be inferred from what I have said, that in a case where the plaintiff himself has bid on the mortgaged property, and the amount of principal, interest and costs is tendered to him before the deed is given and the sale confirmed, he would not be required to take it and give up the purchase. This point, however, is not before me at present.

In *Diocesan Synod N.S.* v. *O'Brien* (1879) *Russell's Equity Decisions,* 352, a purchaser at a foreclosure sale who had made a deposit of 10 per cent as required by the terms of the sale refused to complete on the ground that a good title in fee simple could not be given. The Court declined to enforce specific performance, but ordered the payment of the deposit to the mortgagee. Ritchie E.J. at p. 354 remarked:—

> Inasmuch as the terms of sale are clear and unambiguous, and the purchaser by paying the balance of the purchase money could have got all that he bid for and agreed to buy, he cannot recover back the deposit, the vendor being willing to convey to him all that was offered for sale.

It would seem to be an astonishing proposition that the sale under such a power and *a fortiori,* the title, before confirmation, should still carry with it an inverted equitable clog of a right to redeem. Between the conveyance and the confirmation, the property might have passed through the hands of several bona fide purchasers; what would their position be? Would they, through their notice of the title at sale, be bound by that equity? The judicial statements brought to our attention pertinent to this are those first of Jessel M.R. in *Campbell* v. *Holyland* (1):—

> Under what circumstances that discretion should be exercised is quite another matter. The mortgagee had a right to deal with an estate acquired under foreclosure absolute the day after he acquired it; but he knew perfectly well that there might be circumstances to entitle the mortgagor to redeem, *and everybody buying the estate from a mortgagee who merely acquired a title under such an order was considered to have the same knowledge, namely, that the estate might be taken away from him by the exercise, not of a capricious discretion, but of a judicial discretion by the Court of Equity which had made the order.*

and of Meredith, C.J.C.P., to the same effect, in *Dovercourt Land Building & Savings Co.* v. *Dunevegan Heights Land Co.* (2).

(1) (1877) 7 Ch. D. 166.

(2) (1920) 47 O.L.R. 105.

1953

PEW v. ZINCK et al

Rand J.

But proceedings in foreclosure and those for sale under statutory authority are essentially different: the one deals with an equitable creation of the court, the equity of redemption, the other with a statutory power to convey both the legal and beneficial interests of the mortgagor in the land. I am quite unable to accept the view that the statutory sale is burdened with a discretionary right of redemption in the absence of an express term in the conditions of sale, or an undisputed practice or rule of court; whether such a term, practice or rule could be annexed to the power where the intention that it should be so could not be inferred from the legislation, it is unnecessary to consider: nothing of the sort is present here. A sale under a power in the mortgage or given to the mortgagee by statute means what the term implies, a power to make an out-and-out transfer of ownership: *Waring (Lord)* v. *London & Manchester Assurance Co.* (1); *Saltman* v. *McColl* (2), on what ground, then, should we attach to a like statutory power given the court a collateral condition that can nullify its exercise?

That no disturbance of titles could result from its rejection in this case admits of no doubt. If a purchaser has acquiesced in a redemption notwithstanding his contract, it would mean that he had abandoned it or that it had with his consent been rescinded or otherwise terminated. If there had been a conveyance, the contract had become fully executed and he must have re-conveyed or acquiesced in an order setting it aside, which he would now be estopped from questioning: in either case, if acting under a mistake, it would have been as to his rights in law.

The question of the right to raise before us the point of the discretionary jurisdiction to permit redemption, which had been decided in an earlier appeal to the Court *en banc,* was challenged. The issue here is between the mortgagor and the purchaser in which the mortgagee is not interested, and although the action was brought in 1948, that issue arose only in 1950. By s. 41 of the *Supreme Court Act* this Court has jurisdiction to grant leave to appeal from the first ruling, and in the circumstances, but without touching the question of our right, in this appeal,

(1) [1935] 1 Ch. 310.

(2) (1910) 19 Man. R. 405.

to deal with the first judgment without it, leave is given and all necessary ancillary orders made, to enable the question now to be dealt with.

I would, therefore, allow the appeal and direct the conveyance of the lands in accordance with the contract made at sale. The appellant will have her costs in this Court and in the Court *en banc* on the second motion: there will be no costs of the first motion to the Court *en banc* or on either application in chambers.

LOCKE J.:—This is an appeal by Alberta C. Pew, a purchaser of lands at a mortgage sale, from a judgment of the Supreme Court of Nova Scotia *in banco* by which an appeal of the present appellant from a judgment of Hall J., whereby the respondent corporation was declared to be entitled to redeem the lands in question and in respect of which an order for foreclosure and sale had been made upon the application of the respondent Zinck was dismissed.

The facts, in so far as they appear to me to be relevant, are as follows: On September 30, 1929, the respondent Zinck conveyed to the respondent Gould, Sr. the lands in question, in consideration of the payment of a sum in cash and the granting of a mortgage dated October 23, 1929, to the said Zinck in the sum of $25,000, the balance of the purchase price, such sum to be repaid in instalments over a period of eight years. In the year 1931 Gould conveyed the lands, subject to the mortgage, to the respondent corporation. During the interval between this conveyance and February 26, 1948, when the writ in the present action was issued, there were various defaults in payment under the mortgage: in the year 1934 mortgage foreclosure proceedings were instituted by Zinck and an order for foreclosure and sale made but these proceedings were not carried to a conclusion, the parties entering into an agreement extending the time for payment of the mortgage moneys: this was followed by other agreements the last of which was made on October 1, 1938, which substituted new terms and times for payment for those provided by the mortgage. In the present action the plaintiff alleged a series of defaults on the part of the mortgagor and the respondent corporation in respect of instalments and interest and principal and interest due under the terms of the mortgage, as amended

1953

PEW v. ZINCK et al

Locke J.

by the said agreement, and in payment of various taxes and claimed payment of the principal amount due with accumulated interest.

and in default of payment foreclosure of the said mortgage as altered or modified by the said agreement of the 1st of October 1938 and/or rescission of the said Agreement, sale of the mortgaged premises and possession of the same; and if the purchase money is insufficient to pay what is found to be due to the plaintiff for principal, interest, insurance premium, taxes, rates, charges and interest and costs of this action the plaintiff further claims an order for judgment for the payment of the deficiency against the defendant, Lyttleton B. P. Gould, mortgagor as aforesaid.

While the defendant corporation and Gould entered a statement of defence to the action, they did not appear when the action was set down for trial and on November 25, 1949, Parker J., after hearing evidence for the plaintiff proving the various defaults and the amount of the sum due, found that the amount due on the mortgage and on the agreement was the sum of $15,266.10 as of October 2, 1949, with interest on the principal sum secured at the rate of six per cent from that date and directed that the interest of the respondent corporation in the lands and premises be foreclosed and that the property be sold. The formal judgment was entered on December 16, 1949, and included the following terms:—

AND IT IS FURTHER ORDERED that the estate, interest and equity of redemption of the Defendant, Lobster Point Realty Corporation, and of all parties claiming or entitled by, through or under the Defendant, Lobster Point Realty Corporation, in the lands and premises described in the Mortgage be forever BARRED AND FORECLOSED and that a sale of the mortgaged property described in the statement of Claim herein be made by the Sheriff of the County of Lunenburg after four notices in the *"Chronicle-Herald"* and in the *"Mail-Star"* newspapers published at Halifax in the County of Halifax alternatively by two notices in each of the said newspapers for at least thirty days prior to the day appointed for such sale and by one notice in the *"Progress-Enterprise"* newspaper published at Lunenburg, in the County of Lunenburg for at least 30 days prior to the day appointed for such sale and by handbills posted in the municipality of Chester in the County of Lunenburg for at least twenty days before the day appointed for such sale.

This was followed by a direction that unless before the day appointed for the sale the amount found due, together with the costs and disbursements thereafter referred to, should be paid to the plaintiff:—

the said Sheriff shall proceed to sell and 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, Lyttleton B. Gould and of the defendant, Lobster Point Realty Corporation, owner of the equity of redemption, and of each of them at the time of the making of the Mortgage and at the time of the making of the Agreement foreclosed in this action, or at any time since, and of all parties claiming or entitled by, from or under the original Mortgagors or either of them of, in and to the lands purchased at such sale.

This was followed by a term providing for the disposition by the sheriff of the proceeds of the sale, for paying the arrears of taxes upon the lands, the costs of the proceedings, the amount found due as the mortgage debt and interest, the amount paid by the plaintiff for fire insurance premiums on the property and the balance, if any, to the Accountant General of the Supreme Court to abide further order.

The property was duly advertised for sale by the sheriff in accordance with the directions of the judgment and on March 25, 1950, bids were asked at public auction and on behalf of the appellant Edmund Fader offered the sum of $18,000, a bid which was accepted by the sheriff. The plaintiff's agent, Edmund Fader, thereupon paid to the sheriff a sum of $2,300 on account of the purchase money and, at the sheriff's request, signed a memorandum endorsed on the back of one of the posters advertising the sale which read as follows:—

Lunenburg, N.S.
March 25, 1950.

I acknowledge purchasing at foreclosure sale this day the property as within described for the sum of $18,000.

Edmund Fader
Agent for Mrs. Alberta C. Pew of
Ardmore, Penn.
Married Woman.

Fader then inquired from the solicitor for the plaintiff as to when he could expect to receive a deed of the property, saying that he would be prepared to pay the balance of the purchase price whenever it was ready and was referred by the solicitor to the sheriff. On April 21, 1950, Fader, accompanied by the solicitor for Mrs. Pew, attended upon the sheriff and paid the balance of the purchase price of $18,000 and asked for a deed. On May 22, 1950, the solicitors for the plaintiff moved before Hall, J. for an order to confirm the sale and on this application the respondent corporation and the respondent Gould were represented by counsel and asked that an order be made declaring that the

1953

PEW
v.
ZINCK
et al

Locke J.

respondent corporation was entitled to redeem the property. Mrs. Pew was also represented by counsel on this application. After argument, Hall J. made an order to the effect that the respondent corporation was entitled to redeem the property sold, by paying to the plaintiff the sums specified in the order for foreclosure and sale and certain sums for costs on or before May 8, 1950, and redirecting that if such redemption took place the sheriff should refund to Mrs. Pew the amounts paid on her behalf to the sheriff.

By order of the Supreme Court *in banco,* Mrs. Pew was granted leave to appeal from this order and, on this appeal, the order of Hall J. was set aside and the matter remitted to him to permit the respondent Zinck to renew his motion to confirm the sale, the respondent corporation, the respondent Gould and the present appellant to be at liberty to file further affidavits upon the renewal of the hearing. All of the members of the Court were of the opinion that, despite the sale, the Court was not in the circumstances without power to permit redemption. On April 10, 1951, Hall J., after again hearing the matter and considering the further material, found that the respondent corporation should be permitted to redeem upon the terms set out in his previous order. The present appellant appealed from this order and by the decision of the majority of the members of the Court the appeal was dismissed. Ilsley C.J. and MacQuarrie J. who dissented, were of the opinion that the material filed did not disclose a proper case for such relief and would accordingly have set aside the order of Hall J.

No objection of any kind is made to the regularity of the proceedings taken by the plaintiff in the action up to the time of the holding of the sheriff's sale. While in asking for an extension of time for redemption the respondent Corporation and Gould filed some evidence in the form of affidavits, in an endeavour to show that the sale had been made at an undervalue, it is not suggested that this was a ground for impeaching the regularity of the sale. The present appellant was an entire stranger to the proceedings up to the time the sale was held. It is said on her part that it was unnecessary that any application should have been made by the plaintiff in the action to confirm the sale. The question to be determined on this appeal is as

to the nature of the rights of a purchaser at such a sale which, assuming confirmation to be necessary, has not been confirmed.

The appellant who had been permitted to intervene in the litigation by a rule of the Court did not appeal from the first judgment of the Court *in banco*. The question as to whether the first judgment of that Court in which it was decided that the Supreme Court of Nova Scotia might in a proper case extend the time for redemption after a sale has been held, pursuant to the judgment of the Court, was a final judgment and whether, accordingly there having been no appeal, the matter was to this extent *res judicata,* has been argued before us. The appellant, while contending that that judgment was interlocutory in its nature, asks leave to appeal if we should be of a contrary opinion. Since the issues raised on the appeal arise entirely from matters occurring after the 1949 amendment to s. 41 of the *Supreme Court Act,* this Court has, in my opinion, jurisdiction to grant such leave and, without expressing a decided opinion as to it being necessary, I would, in the circumstances of this case, grant leave to the present appellant to appeal from the first judgment.

In deciding that in a proper case the Court might permit redemption on the application of the mortgagor after the premises had been sold by the sheriff pursuant to a judgment of the Court, the majority of the learned Judges of the Supreme Court *in banco* expressed the view that a statement of the law made by Sir George Jessel M.R. in *Campbell* v. *Holyland* (1), might properly be applied. In that case, after saying that an order for foreclosure, according to the practice of the old Court of Chancery, was never really absolute and that the principle applied has always been that, though a mortgage is in form an absolute conveyance when the condition is broken in equity it is always security, and that courts of equity interfered with the actual contract to this extent by permitting redemption after foreclosure in a proper case where the mortgagee retained title or control of the property, the Master of the Rolls said in part (p. 172):—

> Under what circumstances that discretion should be exercised is quite another matter. The mortgagee had a right to deal with an estate acquired under foreclosure absolute the day after he acquired it; but

(1) (1877) 7 Ch. D. 166.

1953

PEW
v.
ZINCK
et al

Locke J.

he knew perfectly well that there might be circumstances to entitle the mortgagor to redeem, *and everybody buying the estate from a mortgagee who merely acquired a title under such an order was considered to have the same knowledge, namely, that the estate might be taken away from him by the exercise, not of a capricious discretion, but of a judicial discretion by the Court of Equity which had made the order.*

Reliance was also placed upon a passage from the judgment of Meredith C.J.C.P. in *Dovercourt Land Building and Savings Co.* v. *Dunvegan Heights Land Co.* (1), which reads (p. 108):—

> It is accurately said that a Court of Equity is always ready to hear a meritorious application for relief against a foreclosure, and will open it whenever good and substantial reasons for such a course are shown to it . . . the true equitable principle has always been that the mortgagor may be permitted to redeem when the equities in favour of it undoubtedly outweigh all that are against it.

This statement of the learned Chief Justice was founded primarily on what had been said by the Master of the Rolls in *Campbell* v. *Holyland* (*supra*).

The accuracy of that portion of the judgment of Sir George Jessel which is above italicized has not as yet been considered in this Court. Since the present case is as to the status of a purchaser at a judicial sale, it is not necessary for the disposition of this matter to consider it. It may be noted, however, in passing, that the purchaser whose rights were considered in that case had not purchased the property from the mortgagee after foreclosure, rather had he purchased the mortgagee's interest after the decree *nisi* but before the granting of the decree absolute. While it was Campbell, the mortgagee, who applied for the decree absolute, he did so on behalf of the purchaser Ford. At the time of the transaction between these persons, therefore, Campbell had not acquired title to the mortgaged property and could sell merely his interest as mortgagee. These being the facts, the portion of the quotation to which I refer was clearly *obiter*.

In considering the position of the appellant after her bid for the property was accepted by the sheriff and she had, through her agent, paid part of the purchase money and bound herself to pay the balance, the question as to the necessity of thereafter obtaining an order approving the sale while not, in my opinion, decisive, should be considered. The order for the sale of the property in this

(1) (1920) 47 O.L.R. 105.

matter was made under the powers vested in the Court by An Act relating to the Law and Transfer of Real Property (c. 140, R.S.N.S. 1923), by *The Judicature Act* (c. 32, Statutes of N.S. 1919) and by Rules of Court made under powers conferred on the Judges of the Supreme Court by statute and having legislative approval. Rule 8 of Order 51 of the Supreme Court of Nova Scotia provides that where a judgment or order is given or made directing any property to be sold:—

> the same shall, unless otherwise ordered, be sold, with the approbation of the court or a judge, to the best purchaser that can be got, *the same to be allowed by the judge,* and all proper parties shall join in the sale and conveyance as the judge directs.

The text of this rule, with a slight change which does not alter its meaning, is taken from Rule 3 of Order 51 of the Rules of the Supreme Court 1883, adopted in England in that year. The English Rule 3, in turn, was in the same terms as Rule 13 of Order 35 adopted in the Court of Chancery on October 16, 1852, under powers conferred upon the Judges by s. 48 of the Chancery Procedure Act (c. 86, 15 & 16 Vict.). Prior to the Chancery Procedure Act there was no statutory authority in England for a sale of property in proceedings upon a mortgage and the practice, unlike that in Ireland, was to order a foreclosure. The Rules of Court made under the Chancery Procedure Act adopted the practice which had theretofore been followed in regard to sales of land in administration and other like actions. That practice is described in the first edition of Daniel's Chancery Practice, Vol. 2, p. 92, published in 1837. If, at the sale, a sufficient bid was obtained, the bidder was required to sign a memorandum whereby he agreed to become the purchaser of the property, and, thereafter, to procure a report of the Master showing the result of the sale and then apply to the Court by motion for its confirmation.

While Rule 13 of Order 35 of the Court of Chancery was supplemented by other rules defining the procedure to be followed, which was in effect simply an adoption of the previous practice, in my opinion, the language of the rule itself made it clear that, after the holding of the sale directed by the order, the approval of the Court was to be obtained. The sale was to be made, with the approbation

1953

PEW v. ZINCK et al

Locke J.

of the Judge, "to the best purchaser that can be got, the same to be allowed by the Judge." Clearly, "the same" refers to a sale that had been held. There are further rules supplementing Rule 3 of Order 51 and the form prescribed in the conditions of sale (Form 15, Appendix L), requires in terms that the approval of the Court be obtained after the sale. While there are no such rules supplementing Rule 8 of Order 51 and the only conditions of sale were, in the present matter, those contained in the judgment entered pursuant to the order of Parker J. on December 16, 1949, Rule 8 is, in my opinion, to be construed in the same manner as the English Rules and, after the sale has been held, the approval of the Judge must be obtained.

For the appellant it is, however, contended that Order 8 does not apply to sales which are ordered in foreclosure proceedings. This argument is based upon the fact that the twelve rules which form part of Order 51 are grouped under sub-headings, namely "Lunatics and Infants' Estates" under which Rules 1 to 5 appear, "Sales in Other Cases" under which appear Rules 6 to 9 and "Foreclosure Sale" under which Rules 10 to 12 are to be found. The contention is that Rule 8 accordingly applies to sales other than those ordered in proceedings under a mortgage. I think this argument fails. Order 8 of Rule 51 first appeared in the Rules of the Supreme Court of Nova Scotia as Rule 3 of Order 42 in c. 25 of the Statutes of 1884. Rule 3 was one of four rules in Order 42, all of which appeared under a sole heading "Sales by the Court." In the revision of the statutes in that year, c. 25 became c. 104 and Order 42 became Order 51. Instead of the general heading "Sales by the Court," sub-headings, namely, "Lunatics and Infants' Estates" containing Rules 1 to 5, "Generally" under which Rules 6 to 9 were grouped and "Foreclosure" under which Rules 10 to 12 appeared. In 1900 the statutes were again revised and the Judicature Act re-enacted as c. 155. In this revision, the sub-title "Generally" in Order 51 was changed to read as at present "Sales in Other Cases" and the sub-heading "Foreclosure" changed to "Foreclosure Sale." When the statutes were revised in 1923 these sub-headings remained unchanged.

The revision of the statutes in the year 1900 was authorized by c. 44 of the statutes of that year. Section 12(3) of that Act reads:—

> The marginal notes and headings in the body of the said Revised Statutes and references to former statutes or provisions shall be held to form no part of the said statutes, but to be inserted for convenience or reference only.

A like provision appears in s. 12(3) of c. 12 of the Statutes of 1921, which authorized the revision which was carried out in 1923. While Orders 10, 10A, 11 and 12 deal with certain matters applicable only to mortgage sale proceedings, their subject matter is different from that of Rule 8 providing, as they do, for cases where in any action for foreclosure or sale a sale is sought by a subsequent mortgagee or encumbrancer, directing that where a sale is ordered in default of payment it shall be conducted by the sheriff of the county in which the lands lie, providing for a judgment for any deficiency after the sale and the distribution of the surplus, if any such results, requiring the mortgagee to convey the mortgaged premises if the amount found due is paid before the sale, and dealing with sales where the lands to be sold are situate partly in two counties. Only in Rule 8 is to be found the provision that where a sale is ordered it shall, unless otherwise ordered, be sold, with the approbation of the Court or a Judge, to the best purchaser that can be got, the same to be allowed by the Judge, and providing that all proper parties shall join in the sale and conveyance as the Judge directs. The subheading "Sales in Other Cases" is, I think, misleading: the scope of the rule was more accurately described by the word "Generally" under which it appeared in the revision of 1884.

Rule 3 of Order 51 of the English Rule has been applied in mortgage sale proceedings in England since 1883 and, in my opinion, the Nova Scotia Rule 8 was directed towards such proceedings from the time it was enacted in 1884. This view, I think, finds further support in the provisions of c. 136, R.S.N.S. 1900 and in c. 140, R.S.N.S. 1923. Section 14 of each of these statutes authorized the Supreme Court or any judge thereof to order the sale of real property in all cases in which any court or a judge in England has power to order such a sale. Section 15 provides that where

1953

PEW v. ZINCK et al

Locke J.

an order of sale has been made the property 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 provides that the deed shall be executed by the person authorized to make the sale and that, when delivered to the purchaser, it shall convey the land ordered to be sold. Section 17 provides that all sales theretofore made by any person authorized by the court or a judge shall be deemed to be good and effective to vest the title of the land in the purchaser, although such deeds were not confirmed by the court or a judge. Order 8 prescribes the manner in which the powers vested in the court by s. 14 shall be exercised and deals with matters not dealt with elsewhere.

Upon this aspect of the matter, I am of the opinion that the rule of court and the established practice required either the mortgagee plaintiff or the sheriff to apply to the Court for its approval of the sale to the appellant. If I correctly appreciate the contention of the respondent Corporation, it is that, this being so, it cannot be said that the equity of redemption has been extinguished by the sale and that the matter still being under the control of the Court an order extending the time for redemption might properly be made.

The question is one of great importance, not only in Nova Scotia but in other provinces where Rule 3 of Order 51 of the Rules of the Supreme Court 1883 has been adopted verbatim. I can perceive no logical reason why the position of a purchaser at a sale regularly held under the direction of the court in proceedings upon a mortgage is to be distinguished from that of a purchaser at mortgage sale proceedings regularly conducted by a mortgagee out of court. While vast numbers of such sales have been held in various parts of Canada, I am not aware of any case in which a sale regularly made by a mortgagee upon default by the mortgagor has been set aside on the sole ground that the mortgagor is able and desires to redeem, nor have we been referred to any case in which the principle enunciated by Sir George Jessel in *Campbell* v. *Holyland* has been applied after a mortgage sale regularly held.

The only case which I have been able to find in which such a contention was made, other than the present, is *Saltman* v. *McColl* (1). In that case, after sale proceedings regularly taken by a mortgagee of land under the Real Property Act of Manitoba, whereby the property was sold to a bona fide purchaser who made the first payment called for by the terms of sale and bound himself to complete the purchase, the mortgagor brought an action for redemption. It was contended for the mortgagor that the property had been disposed of at a gross undervalue, that the purchaser had made default in payment of the second instalment of the purchase price and, therefore, was not entitled to as great consideration by a court of equity as was the mortgagor, as the equities being equal the first in point of time should prevail and that since the sale had not been completed by conveyance the mortgagor was entitled to redeem. There was no allegation of fraud or irregularity in the conduct of the sale other than that the property had been sold for much less than it was worth and Macdonald J. dismissed the action. The plaintiff appealed and the report of the argument shows that *Campbell* v. *Holyland* (*supra*) and *Trinity College* v. *Hill* (2), in which *Campbell's* case had been applied, and *Stubbings* v. *Umlah* (3), were cited on behalf of the appellant. The Court dismissed the appeal without calling on counsel for the respondent—unfortunately no written reasons were given.

Prior to 1867 there was a practice in England described as opening the biddings under which, after property had been sold at a judicial sale, if a better offer was made before confirmation of the sale it might be accepted. In discussing the position of a purchaser whose bid had been accepted at a sale, Loughborough L.C. in 1794, in a case reported as *Anon* (4), where a motion was made that a person reported to be the best bidder should complete his purchase and pay in the money at a time when the report had been confirmed *nisi* but not absolutely, said that he felt a difficulty as, until confirmation, the purchaser was always liable to have the biddings opened and until that *non constat* that he is the purchaser. The practice of opening biddings was abolished by the Sale of Lands by Auction Act 1867 (30-31

(1) (1910) 19 Man. R. 456.
(2) (1884) 10 O.A.R. 107.
(3) (1900) 40 N.S.R. 269, at 271.
(4) 30 E.R. 660; 2 Ves. Jr. 336.

1953

PEW
v.
ZINCK
et al

Locke J.

Vict. c. 48, s. 7) which provided that in sales held thereafter in the Court of Chancery the highest bona fide bidder at the sale, provided he shall have bid a sum equal to or higher than the reserved bidder, shall be declared the purchaser, unless the Court or Judge should on the ground of fraud or improper conduct in the management of the sale either open the biddings, hold the bidder bound by his bidding or discharge him from being the purchaser and order the land to be resold.

It was, I think, for the reason that the sales conducted under orders of the Court in England were thus not absolute prior to 1867 that in the first edition of Daniel's Chancery Practice published in 1837, Vol. 2, pages 909 and 910, it was said that, while in ordinary sales by auction or by private agreement a contract is complete when the agreement is signed, a different rule prevails in sales before a Master where the purchaser is not considered as entitled to the benefit of his contract until the Master's report of the purchaser's bidding is absolutely confirmed. This is explained in the judgment of Sugden, L.C. in *Vesey and Elwood* (1). Daniel's further statement that the bidder not being considered as the purchaser until the report is confirmed is not liable to any loss by fire or otherwise which may happen to the estate in the interim, is based upon a decision of Eldon L.C. in *Ex parte Minor* (2).

The judgment ordering the sale in the present matter directed that a sale of the mortgaged property be made by the sheriff of the County of Lunenburg after such sale had been advertised in the manner provided by the judgment and that the sheriff should execute to the purchaser a deed conveying all the estate or interest of the respondent Gould and the respondent Corporation in the said lands. This was the subject matter of the sale and purchase. The sale was made in exercise of a statutory power which authorized an outright sale of the interest of these respondents in the property. The respondent's contention is that, conceding this to be so, none the less the purchase was subject to the condition that if the mortgagor should find the money before the time when the judge's approval of the sale was given he might still be permitted to redeem.

(1) (1842) 3 Dr. & War. 74 at 79. (2) (1805) 11 Ves. 559.

The respondent relies mainly upon two decisions in the courts of Nova Scotia to support this position. In *Stubbings* v. *Umlah supra,* Meagher J. said in part (p. 271):—

> A plea of foreclosure in England is not good, unless the foreclosure has been made absolute by the granting of a final order. *Senhouse* v. *Earl* (1).
>
> The same principle should, it seems to me, apply with us, at least, until the sale has taken place, and, more than likely, until the order confirming it passed.

In a later case, *Ritchie* v. *Pyke* (2), Meagher J., delivering the judgment of a court consisting of McDonald C.J. and Weatherbe J. in addition to himself, said (p. 478):—

> Under our practice, which has prevailed for nearly half a century, at least, no time for redemption is fixed where a sale is ordered; but the right to redeem, of course, endures until the proceedings have been finally confirmed by order of the court, after the sale, payment of the price, and conveyance to the purchaser have been completed.

No authorities were cited by Meagher J. for either of these statements. The statement in the later case, it will be noted, is more positive than that made in the earlier. These statements of the law, as has been pointed out in the judgments of the learned judges of the Supreme Court *in banco* were *obiter* and, with respect, they do not appear to me to be supported by authority, unless such is to be found in the judgment of Ritchie C.J. in *Bigelow* v. *Blaiklock,* Russell's Equity Decisions, p. 23. In that case, at a sheriff's sale of property directed in proceedings upon a mortgage, the property to be sold was misdescribed. The mortgagee had purchased the property at the sale and thereafter had agreed to sell part of the property to a third person. Ritchie C.J. said that he took no account of the fact that the plaintiff had agreed to sell one of the lots; that he had no right to do so as he had obtained no deed and the sale had not been confirmed by the court, as required by its practice, and directed a resale. He then proceeded to say that, though he had ordered a resale, the plaintiff being the purchaser, and that under similar circumstances the result might have been the same if a stranger possessed of the same knowledge had been the purchaser, yet there was a manifest distinction between the plaintiff in a suit and a stranger. The learned judge did not refer to any authority in support of any of these statements and the

(1) 2 Ves. Sr. 450.

(2) (1904) 40 N.S.R. 476.

1953

PEW v. ZINCK et al

Locke J.

exact nature of the difference which he considered to exist between the position of a stranger and that of a mortgagee plaintiff is not made clear.

As opposed to this, in *Slayter* v. *Johnston* (1), a suit in equity for the redemption of a mortgage, Young C.J., referring to an argument that the plaintiff should be permitted to redeem, said (p. 508):—

> We were told that the foreclosure might be opened, which would be a strange thing, at the instance of the mortgagee, and a very startling thing if it could be done at the instance of the mortgagor in this country after a sale.

Wilkins J. (p. 522) said that there had not been, so far as the Court was informed, any instance in the Province of vacating a decree of foreclosure after sale where there was no fraud or illegality.

In *Wallace* v. *Gray* (2), the action was brought to set aside a sale directed in what were apparently proceedings for partition upon the ground of certain irregularities in the proceedings. Townshend J., referring to the fact that the plaintiff had been well aware of the alleged irregularities, said in part (p. 282):—

> Now the authorities are clear that it was his duty at the earliest moment to apply to a judge, before the sale was made, and that it is too late after the property has been knocked down and sold, as in this case, to an innocent purchaser. It would be most unjust if he were permitted to do so, and hurtful to the confidence placed in sales made under the authority of the court.

Whatever may have been the practice prior to 1884, this case was decided after Rule 8 of Order 51 was enacted and, accordingly, the approval of the judge to the sale, after it has been held, was necessary.

I think a sharp distinction is to be drawn between the position of a purchaser, such as the present appellant, and that of a mortgagee who has acquired title to the property by foreclosure and who retains it in his possession. Whether there is any distinction between the position of the appellant and one who equally in good faith, though aware that the title of a mortgagee had been acquired by foreclosure, purchases the property from the latter, it is unnecessary to decide. There is no evidence before us that there was ever at any time a practice of opening the biddings in Nova Scotia such as existed in England prior to 1867. Doull J. says in his judgment on the first appeal that the practice

(1) (1864) 5 N.S.R. 502.

(2) (1892) 25 N.S.R. 279.

does not seem to have existed, at any rate in that form, in Nova Scotia, then, however, proceeding to say that such sales were not made "subject to the approbation of the court" if the order for sale is followed. While there is no statute in Nova Scotia containing provisions similar to those of s. 7 of the Sale of Land by Auction Act 1867 in England, in my opinion, the decided cases do not support the view that a judicial sale of land in mortgage sale proceedings regularly conducted in accordance with the judgment of the court, as in the present case, may be set aside merely on the ground that the mortgagor has, after the event, succeeded in raising the mortgage money.

In *Bennett* v. *Hamill* (1), where the proceedings were to set aside a judicial sale on the ground of irregularities in the proceedings, Lord Redesdale L.C. said (p. 577) that the purchaser had a right to presume that the court had taken the steps necessary to investigate the rights of the parties and properly decreed a sale and that, if he gets a proper conveyance of the estate, his title ought not to be invalidated and that if the court went beyond this it would be to introduce doubts on sales made under the authority of the court, which would be highly mischievous.

In *Matthie* v. *Edwards* (2), Knight Bruce V.C., where the action was to set aside a sale made under the powers given by a mortgage, set aside the sale on the ground that it had been harsh, oppressive and inequitable. The action had been contested by the purchaser at the sale as well as by the mortgagee and, as to the former, the learned Judge said that there were facts in evidence more than sufficient to prevent his case from standing better than that of his vendor. On appeal, this judgment was reversed: 11 Jur. 504. Cottenham L.C., dealing with the ground upon which the judgment appealed from had proceeded, said (p. 505):—

> 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. 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 interests, however, of society require that these powers should not be interfered with, and there is no reason why they should be.

(1) (1806) 2 Sch. & Lef. 566. (2) (1846) 10 Jur. 347.

1953

PEW v. ZINCK et al

Locke J.

The only fact alleged which might have affected the purchaser was apparently that his solicitor was also the solicitor for the mortgagee who conducted the sale proceedings on behalf of the latter, but Lord Cottenham found no evidence of impropriety in this. He considered that to confirm the judgment of the Vice Chancellor would be to lay down a new rule for the interference of courts of equity.

In *Adam* v. *Scott* (1), where a sale by a mortgagee under a power of sale contained in the instrument was attacked on the ground that it had been made at an undervalue and that the mortgagor desired to redeem, Wood V.C. said that, assuming the allegations made for the plaintiff were all true, the plaintiff was bound to have shown that the power, the existence of which was stated in his bill, had been exercised improperly or contrary to its terms, that there had been some fraud attending the sale and that the purchasers had notice of such fraud. As nothing of this nature was alleged, the defendant's demurrer was allowed and the action dismissed.

In *Shaw* v. *Bunny* (2), a mortgagee, in exercise of a power of sale given by a mortgage, had sold part of the mortgaged property to the defendant who held a second mortgage on the property. The default was not denied or that the sale had been made in accordance with the power granted but it was objected that such a sale to a second mortgagee could not be supported. The Master of the Rolls had dismissed the action. On appeal, Knight Bruce L.J. said (p. 471):—

> The Master of the Rolls has held . . . that the second mortgagee has, under his purchase, in the absence of special circumstances, the same absolute and irredeemable title as a stranger purchasing would have had. And there being, I think, not any special circumstance in the present instance to prejudice or affect the purchaser's right, his title against the mortgagor to the benefit of the purchase seems to me also, as absolute as that of a mere stranger purchasing would have been.

The Court of Chancery was first vested with power to direct a sale of property in proceedings upon mortgages by the Chancery Procedure Act of 1852. We have not been referred to any such proceedings between the passage of that Act and of the statute of 1867 which abolished the practice of opening biddings, in which any such question

(1) (1859) 7 W.R. 213.

(2) (1864) 2 De G.J. & S. 468.

as arises here, as to the rights of a purchaser at such a sale, was considered. Cases decided since that time must be considered, bearing in mind the provisions of s. 7 which has been referred to above. Its effect was considered by Peterson J. in *re Joseph Clayton* (1).

Some of the cases decided after 1867 in mortgage sale proceedings out of court are of assistance, though s. 7 does not apply to them. In *Warner* v. *Jacob* (2), after a sale by a mortgagee in proceedings out of court, the mortgagor brought an action against the mortgagee and the purchaser for redemption, alleging that the sale had been made at an undervalue and for the purpose of embarrassing him. Kay J. referred to what had been said by Lord Cottenham in *Jones* v. *Matthie* (3) and by Vice-Chancellor Wood in *Adams* v. *Scott* (4) and said that if the mortgagee exercised the power of sale *bona fide* for the purpose of realizing the debt without corruption or collusion with the purchaser, the Court would not interfere even though the sale be very disadvantageous, unless indeed the price was so low as in itself to be evidence of fraud.

In *Gentles* v. *Canada Permanent* (5), the defendant mortgagee had advertised a sale of mortgaged premises and the property was knocked down to the plaintiff, who was declared to be the purchaser. The mortgagor who had made arrangements to pay the amount in default but, through mischance, had not tendered the amount before the sale, wished to redeem and the mortgagee thereupon informed the purchaser that it would not carry out the sale unless forced to do so by the Court. As the regularity of the proceedings was not impeached, Street J. directed specific performance.

In *Huson* v. *Haddington* (6), where a sale under proceedings by the mortgagee taken out of court was attacked on the ground that it had been made without due regard to the interests of the mortgagor and that the property had been sold at a great undervalue, the Court of Appeal set the sale aside. On appeal to the Judicial Committee, this judgment was reversed: (7). The pleadings had not

(1) [1920] 1 Ch. 257 at 264.
(2) (1882) 20 Ch. D. 220.
(3) 11 Jur. 504.
(4) 7 W.R. 213.
(5) (1900) 32 O.R. 428.
(6) (1911) 16 B.C.R. 98.
(7) [1911] A.C. 722.

1953

PEW
v.
ZINCK
et al

Locke J.

contained any charge of fraud or collusion or bad faith against the defendant purchasers and there had been no notice before trial that inadequacy of price would be relied upon as evidence thereof and the purchasers had accordingly given no counter-evidence of its sufficiency. Lord De Villiers, in delivering the judgment, made it clear that, in the absence of any allegation of fraud or collusion or bad faith or knowledge of the existence of facts which would invalidate the sale on the part of the purchasers, or any evidence of such, the action failed.

In *Gordon Grant & Co.* v. *Boos* (1), the lands had been sold at a sale directed in proceedings upon a mortgage in the Supreme Court of Trinidad. The appellants, the mortgagees of the property, having obtained leave to bid, purchased the property and subsequently sold it at a much larger price. Thereafter they sued the respondent in New York on his personal covenant for the balance found due on the mortgage, less the sum realized at the sale, whereupon the respondent brought an action for redemption. Lord Phillimore, in delivering the judgment of the Judicial Committee, pointed out that, while the judicial sale had realized a very small amount, the regularity of the proceedings was not impeached and the mortgagor who could have made a bid or procured a bid must take the consequences.

In *Waring (Lord)* v. *London and Manchester Assurance Co.* (2), a mortgagor brought an action and moved for an injunction to restrain a mortgagee from giving a conveyance of the mortgaged property to a purchaser to whom it had been sold, in the exercise of the power of sale conferred by s. 101 of the Law of Property Act, 1925. An agreement for the sale of the property between the mortgagee and the purchaser had been completed but the conveyance had not yet been made. The report of the argument shows that it was contended by counsel for the plaintiff that the mere entering into of a contract for sale of the property comprised in a mortgage does not exclude the mortgagor's right of redemption. A further contention was that the sale was at a gross undervalue. Crossman J., in delivering judgment dismissing the motion, pointed out that the contract for the sale of the property entered into by the

(3) [1926] A.C. 781.

(2) [1935] 1 Ch. 310.

mortgagee was not conditional in any way. As to the argument that the plaintiff's equity of redemption had not been extinguished as there had been no completion by conveyance and the plaintiff was, accordingly, still entitled to redeem, he said that s. 101 of the Act, which gave to the mortgagee power to sell the mortgaged property, was perfectly clear and meant that the mortgagee had power to sell out and out by private contract or by auction and, subsequently, to complete by conveyance, and that the power to sell was a power by selling to bind the mortgagor. After saying that if that were not so the extraordinary result would follow that every purchaser from a mortgagee would, in effect, be getting a conditional contract liable at any time to be set aside by the mortgagor coming in and paying the principal, interest and costs, he said that it seemed to him impossible seriously to suggest that the mortgagor's equity of redemption remained in force pending completion of the sale by conveyance. Dealing with the argument as to the sale at an undervalue, he referred to what had been said by Kay J. in *Warner* v. *Jacob* and said that on the facts of the case before him it was impossible to conclude that the price was so low as to be evidence of fraud.

In the cases above referred to, other than that of *Gordon Grant & Co.* v. *Boos,* the sale proceedings were carried out either under powers of sale contained in the mortgage itself or under a statutory power of sale and were made out of court. In none of them, other than the Manitoba case, was the mortgagor's claim for relief based upon the grounds upon which the judgments in the present matter have proceeded. While, for the reasons which I have given, I think Rule 8 of Order 51 requires either the plaintiff in the action or the sheriff to ask the approval of the Court of the sale which had been made, in my opinion, the plaintiff and the present appellant were entitled, as of right, to such approval, since it is conceded that the sale had been conducted in the manner directed by the judgment.

It was the entire interest of the respondent Corporation and of the respondent Gould which was offered for sale under the judgment of Mr. Justice Parker and which the plaintiff purchased and, in my opinion, the regularity of

1953

PEW v. ZINCK et al

Locke J.

the sale proceedings being conceded, the appellant's legal position following the sale and payment of part of the agreed purchase price and the execution on her behalf of an agreement binding her to pay the balance, did not differ from the position of the purchaser in *Waring's* case. In my opinion, the equity of redemption of the mortgagor was extinguished by the sale (Waldock on Mortgages, 2nd Ed. 377 and cases cited Note 279). Had the appellant refused to complete the purchase, a decree of specific performance might have been made against her (*Else* v. *Barnard* (1); *Power* v. *Foster* (2)). Upon application to the Court, she was, in my opinion, entitled to an order that the sheriff do deliver to her the deed of the property, as had been directed by the judgment of Parker J.

For these reasons, it is my opinion that this appeal should be allowed and the conveyance of the interest sold to the appellant directed. I agree with the order as to costs proposed by my brother Rand.

Appeal allowed.

Solicitor for the appellant: *W. P. Potter.*

Solicitor for the respondents, Lobster Point Realty Corp. and L. B. P. Gould: *Donald McInnes.*