1911

*Oct. 11, 12, 16, 17.

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*March 21.

WILLIAM J. SMITH (PLAINTIFF) ....APPELLANT;

AND

THE NATIONAL TRUST CO. (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

*Mortgage—Manitoba "Real Property Act"—Power of sale—Special covenant — Notice — Statutory supervision — Registered title—Equitable rights—Possession by mortgagee—Limitation of action —Construction of statute, R.S.M.*, 1902, *c.* 148, *s.* 75—*"Real Property Limitation Act," R.S.M.*, 1902, *c.* 100, *s.* 20.

In respect of lands subject to the operation of the "Real Property Act," R.S.M., 1902, ch. 148, mortgagees have no registered interest, but merely obtain powers of disposing thereof; these powers do not vest as incidental to the estate mortgaged, but are efficacious only by virtue of the statute. Where the mortgage stipulates for a power of sale, on default, without notice, and contains no proviso dispensing with the official supervision required by the statute, a sale by the mortgagee, purporting to be made under that power, without compliance with the requirements of section 110 of the Act or an order of the court, cannot operate to extinguish the registered title of the mortgagor. Judgment appealed from (20 Man. R. 522) affirmed, Idington and Anglin JJ. dissenting.

*Per* Davies, Duff and Brodeur JJ., affirming the judgment appealed from (20 Man. R. 522).—The registered title of mortgagors in lands subject to the operation of the "Real Property Act," R.S.M., 1902, ch. 148, and of persons claiming through them, are protected by the provisions of the 75th section of that statute denying the acquisition of title adverse to or in derogation of that of the registered owner of such lands by length of possession only; the limitation provided by section 20 of the "Real Property Limitation Act," R.S.M., 1902, ch. 100, in favour of mortgagees, has no application to lands after they have been brought under the "Real Property Act."

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*PRESENT:—Davies, Idington, Duff, Anglin and Brodeur JJ.

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APPEAL from the judgment of the Court of Appeal for Manitoba(1), reversing the judgment of Metcalfe J., at the trial and dismissing the plaintiff's action with costs.

The case is stated in the judgments now reported.

*J. B. Coyne,* for the appellant.

*C. P. Wilson K.C.* and *A. C. Galt K.C.* for the respondents.

DAVIES J. agreed with Duff J.

IDINGTON J. (dissenting).—In December, 1892, one Beattie mortgaged land in Manitoba to mortgagees whose assignees, exercising a power of sale therein, on default, sold the lands to appellant by a written agreement dated on the 10th of June, 1901, and followed that by a deed of 24th November, 1908, which purported to transfer said lands pursuant to said sale to appellant.

The mortgagees had taken possession some six years before the said sale. Prior to all these transactions the land had been brought under the "Torrens System" of registration, and so continued.

The registrar refused to register the above mentioned deed of transfer on the ground that the steps required by the "Real Property Act," R.S.M. 1902, ch. 148, as amended, for selling under mortgage, had not been taken.

The issue is thus broadly raised that mortgagor and mortgagee of land brought under said system

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cannot usefully contract with each other for any power of sale.

With great respect, such is the logical result of the reasoning proceeded on by the learned Chief Justice and Mr. Justice Perdue in the Court of Appeal, the former pointing to the question of possession which he seems to hold cannot be contracted for but must depend on the terms of the Act, and the latter, that, as the instrument in question is under the Act, failure to comply with the mode of sale provided thereby is fatal to the sale now in question.

Counsel for respondents properly accepts this as the result for which he argues.

Mr. Justice Richards, if I understand him aright, does not go so far, but rather relies on the construction he gives the power of sale here in question.

The power of sale relied upon here is as follows:—

> It is also covenanted between me and the said mortgagees that if I shall make default in payment of the said principal sum and interest thereon, or any part thereof at any of the before appointed times then the said mortgagees shall have the right and power and I do hereby covenant with the said mortgagees for such purpose and do grant to the said mortgagees full license and authority for such purpose when and so often as in their discretion they shall think fit to enter into possession either by themselves or their agent, of the said lands, and to collect the rents and profits thereof, or to make any demise or lease of the said lands, or any part thereof for such terms, periods, and at such rent as they shall think proper, or to sell the said lands and such entry, demise or lease shall operate as a termination of the tenancy hereinbefore mentioned without any notice being required, and that the power of sale herein embodied and contained may be exercised either before or after and subject to such demise or lease. Provided that any sale made under the powers herein may be for cash or upon credit or partly for cash and partly for credit and that the said mortgagees may vary or rescind any contract for sale made or entered into by virtue hereof."

By a preceding clause the mortgagor had attorned to the mortgagee.

If we bear in mind that the main purpose of the ex-

emplars of this Act was, if at all possible, to relegate forever to the juristic lumber-room so many conceptions that had long dominated the ordinary mind of the lawyer as to frustrate the execution of the purposes of men in their dealings with each other, we will be better able to understand and apply the Act and give effect to it in its proper sphere.

That sphere is not to limit the powers of contracting in relation to real estate. It is, in the language of the recital, the earliest one, the "Land Registry Act," 1862,

> to give certainty to the title to real estates and to facilitate the proof thereof and also to render the dealings with land more simple and economical.

And this is the key-note of all like legislation. But it by no means covers the registration of all such contracts.

What we have first to do is throw away some preconceived notions of what a mortgage must be, and apply the common sense of the ordinary man knowing none of these things, but knowing that a mortgage is as section 100 of the Act seeks to constitute it and section 1 interprets it.

Section 100 reads as follows:—

> 100. A mortgage or an incumbrance under the new system shall have effect as security, but shall not operate as a transfer of land thereby charged, or of any estate or interest therein.

Then the interpretation section 2, sub-section (*d*) is as follows:—

> (*d*) The expression "mortgage" means and includes any charge on land created for securing a debt or loan or any hypothecation of such charge.

Again let us look at the definition of "mortgagor" in same section, sub-section (*f*):—

> (*f*) The expression "mortgagor" means and includes the owner of land or of any estate or interest in land pledged as security for a debt.

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The preceding sub-section interprets "mortgagee" to mean "the owner of a mortgage registered under this Act."

A good deal has been said in argument here, as well as in text-books, to raise puzzling questions which the above quoted sections give rise to. Most of them are beside the questions we have to resolve.

The mortgagees were, in this case, given their power of sale by the very instrument of mortgage registered and, notwithstanding the length at which I will, out of respect to the argument put forward, deal with this case, I have never had but one opinion relative to this phase of the matter. It is this, that the registration was not only a registration of the charge of the statutory character defined by the sections I quote, but of that charge coupled with this power, and this latter became of the very essence of the transaction, duly recognized by the officers on whom was cast, by section 83 of the Act, the duty to pass upon and if need be reject what is not within the provisions of the Act, and also became part and parcel of that claim which the mortgagees tendered and had irrevocably placed on record and is, for that reason, a part of that to which the mortgagee thereof acquired an indefeasible title.

I have never been able to see, notwithstanding the argument well presented, how it could be cut down to mean something else than the plain language imports.

It was a power to sell. To sell what ? I answer, all the interest the mortgagor had in these lands; nothing less, nothing more. And once thus properly sold and conveyed by virtue of ordinary common law principles being applied, as well as the recognition there-

of given by the Act, the title of the mortgagor disappeared and became rightfully that of the appellant. An estate in fee simple being what the mortgagor had, and the mortgagee was given power to sell, passed thereby as effectually as if the mortgagor had executed the deed himself.

The mortgage as registered being a charge and power, there cannot be any difficulty, to my mind, any more than if the power had been (what it is not) a simple power of attorney authorizing a sale and the execution of a conveyance in the name of the mortgagor as vendor. Indeed, a learned writer suggests this latter method as a means of overcoming another difficulty he sees in one of the English Acts of a similar character.

The conclusion to which I have referred, that no power of sale can be contracted for, finds no countenance in the grammatical language of the Act.

There is not a line therein that specifically prohibits an "owner" or a "registered owner" from conveying and contracting relative to his land as he may see fit or to render null such conveyances or contracts as he may have made.

The language of section 115 at first blush might suggest that the duty of the officers under the Act is absolutely to ignore any proceedings of foreclosure or sale unless the mortgagee had filed a certificate of *lis pendens* or notice in the land titles office.

Counsel did not seem to rely on this.

I think him well advised in that regard. It is only intended to relieve the officers from being bound to take notice of such proceedings as they may progress elsewhere. That is an entirely different thing from dealing with the title the proceedings when completed

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may result in vesting in the mortgagee, or those claiming under him; when so completed as to shew that the registered title has passed from the registered owner to the mortgagee or purchaser from him, executing a power of sale, and no other conveyance of interest or notice thereof, or of other claim has intervened, the registrar is as much bound to take it up and record it as if presented with a direct conveyance given in the Act to transfer from owner to purchaser. And much less does there appear any prohibition against the resort to statutory or other powers to transfer title.

The mortgagee proceeding outside the Act, as Cozens-Hardy L.J. puts the matter in another aspect of the "Land Transfer Act, 1897," section 20, in the case of *The Capital and Counties Bank* v. *Rhodes* (1), at page 656 at foot, and top of page 657, may be unwise in running the risk of some intervention instead of proceeding under the Act, and the Act may thus furnish a sort of indirect compulsion to use the Act's provisions.

A new statutory remedy never takes away the old unless the new is given in substitution of the old or henceforth prohibits either expressly or by necessary implication those concerned from resorting to the old mode of relief.

The new Act may by its scope and provisions demonstrate such an inconsistency between the old and the new as to lead to the conclusion that the old remedy has been abrogated.

I infer from the scope and purpose as well as the terms of this Act that there can be no such necessary conflict or inconsistency between the rights and remedies existent before the Act and its enactments as to

(1) (1903) 1 Ch. 631.

drive us to the conclusion that this Act must be accepted not only as a registry Act designed to protect purchasers, but as one designed to limit the powers of contract in relation to interests in, or power over, real estate.

The Act itself by its very terms in section 70, sub-section (*j*), and section 126, demonstrates that this latter purpose was not within its purview.

Section 70 excludes specifically those numerous subjects of claim named, and as to sub-section (*j*) clearly anticipates future caveats, and on what can such caveats rest? I answer on any legal or equitable right enforceable against him getting the certificate.

Again section 126 is as follows:—

> Nothing contained in this Act shall take away or affect the jurisdiction of any competent court on the ground of fraud, or over contracts for the sale or other disposition of land, or other equitable interest therein, or over mortgages, nor shall anything contained in this Act affect the right of the mortgagee to foreclose or sell through any competent court, which right it is hereby declared may be exercised in such court.

The sale in this case was made but only took its effective form by a conveyance some two years after the Act had stood amended as quoted. It is, therefore, to be tested by the Act as amended in latter part of the section.

How can it be said in face thereof that it is not competent for the court to declare the rights of these parties and that declaration bind the registrar to register?

Again let us look at the language of the section 108, which expressly declares the *first mortgagee*

> shall have the same rights and remedies at law and in equity as * * * if the legal estate in the land * * * had been actually vested in him.* * * *

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What does it mean by "rights and remedies at law and in equity" if the usual remedy of executing a power of sale or of foreclosure, for example, be not respectively such? If it had used less comprehensive language we might have supposed or imagined from the resemblance the form of security given by the statute bears to a hypothec in civil law, it is to be implied that some judicial proceeding to enforce it must be resorted to as required under that system of law as usually developed in modern times. To simplify and clarify the register is the purpose of this form of mortgage and to supplement that record by this and other sections of the statute and thus give efficiency and practical utility thereto, is the plan or scheme provided.

Then section 109, which is the basis of the procedure given by the Act for sale or foreclosure, is as clearly permissive as can be.

Counsel cited as authority to shew that "may" in certain cases imposing a duty on a public officer to act, must be read in an imperative sense.

But there is no duty cast by this section on the officer. It is merely a permissive step for the mortgagee to take as preliminary to and laying the foundation for the proceedings in the subsequent sections where "may" is possible of the construction claimed.

But the initial step, the right of election, lies in the mortgagee alone to invoke these powers of the later sections and is entirely permissive.

If the draftsman had any such notions as are now claimed to have governed him, he erred in thus beginning.

This is a mortgage where if the power is good no notice was required. We are, therefore, not concerned

with the case, respecting which I express no opinion, of power conditional on a notice to be given and which once given it may be argued is imperatively required to be filed in the land office.

The power of sale herein is one that does not require notice.

I am not concerned with the bearing of the expression "without notice" in this power, for if notice is not required by the terms of a bare power it becomes operative on the events happening that are stipulated for as preliminary to its execution.

I am unable to reconcile the proviso at the end of section 110 with the contention set up that there cannot be a power of sale included in a registered mortgage.

Again the form of mortgage given by this Act leaves a space for covenants such as parties may agree upon and I would suppose it was intended to enable the parties to insert their agreed on terms and conditions of any kind not clearly inconsistent with the Act.

Not only does the Act fail to furnish ground for holding its provisions prohibitive of or inconsistent with the existence of a contractual power of sale, but the history of the law in regard to concurrent remedies for sale in the case of mortgages demonstrates them as existent both outside of such Acts as this and in harmony with the workings of such Acts.

Though foreclosure of mortgages by the court had existed for centuries, it was not until 1852, when by 15 & 16 Vict. ch. 86, sec. 48, an almost universal power of sale to enforce mortgages was conferred upon the court. The power had, as the result of the settled jurisprudence of that court, been before that enact-

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ment confined to a limited number of specific instances which are set forth by Story in paragraph 1026, page 207 (8 ed.), of his work on Equity Jurisprudence.

The court had half a century or more preceding this enactment reluctantly recognized as settled law that a power of sale might be agreed upon by the parties to the mortgage, and inserted therein, and when exercised honestly and in conformity with the terms of the power, the court could not interfere.

The arguments presented to us now as to clogging thereby the right of redemption and ousting or discarding the sacred powers and jurisdiction of that court, were, no doubt, ably presented and weighed for a long time before such an innovation could be conceded as possible.

The conferring by statute upon the court the ample powers of sale I have adverted to, never seems to have been so thought of by any one as to constitute that a substitution for the contractual power of sale so long recognized. Yet I venture to think it might as logically have been contended for as is the position taken here.

The "Cranworth Act," 23 & 24 Vict. ch. 145, sec. 11, as to trustees and mortgagees, some nine years later enabled the person to whom money secured or charged by a deed (as in the given terms is specified) was payable or his executors or administrators to sell.

Has any one ever conceived the idea that this new statutory power was so inconsistent with the powers of sale given the Court of Chancery as above or the usual contractual powers of sale that one or the other of these powers were superseded ?

This Act formed part of the law of England pre-

sumably introduced into Manitoba by, if not previous to, the declaratory Act of its own legislature, 38 Vict. ch. 12, which directs

> the court to recognize and be bound by the laws existing or established and being in England, as such were existing and stood, on the 15th of July, 1870, so far as the same can be made applicable to matters relating to property and civil rights in this province.

The terms of the "Cranworth Act" exclude the application of its powers from having any direct bearing on this case; but is it not in force in Manitoba ? Can there be a doubt of its having been introduced before and in force when the "Torrens System" was introduced ? Did any one ever suppose it was (if so introduced) in conflict with the then existing powers of the provincial courts or contractual powers as to affect them ? And can the "Real Property Act," passed later be held to be so inconsistent with it as to repeal it ?

Then we have in England the first indefeasible registration Act, 25 & 26 Vict. chs. 53-59, called by some as I have above, "The Land Registry Act, 1862," brought forward by Lord Westbury and so named hereafter as his Act.

Some lands were brought under that system and the registered owner thereof mortgaged them and later gave two subsequent mortgages.

On default the first mortgagee acting upon the power given by the "Cranworth Act," which was the earlier Act, sold and his purchaser applied for registration as appellant did here, and was refused.

Thereupon he appealed, and the appeal having been heard by Lord Romilly M.R., he directed registration. See *In re Richardson*(1).

(1) L.R. 12 Eq. 398.

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The registrar submitted but would not put the record so as to cut out the subsequent mortgages because of the restricted terms of the order, and again Lord Romilly was applied to(1), and he amended the order so that the purchaser got the indefeasible title the mortgagor had when he gave the first mortgage. The same learned judge in *Re Winter*(2), made an order resting upon similar views of that Act.

These cases are all instructive and the Richardson ones especially so when we consider the fact that Lord Romilly was two years before the first decision chairman of a royal commission to consider the "Westbury Act." The two first named cases are not very fully reported.

We have to rely on the statement of counsel for the source or character of the power there in question. The mortgage seems clearly to have been conformable to the Act, but the power was exercised by virtue of the "Cranworth Act."

Let it be noticed first that the learned Master of the Rolls states

> a first mortgagee sells under a power of sale to a purchaser

and next shews the existing subsequent mortgages on the register. He then points out that the purchaser has nothing to do with the application of the purchase money, which is the statutory protection given him, as is given by section 111 of the Act here in question. He then proceeds:—

> The registrar appears to think that there would be some inconsistency in registering the purchaser with an indefeasible title while the subsequent mortgages remain on the register; but I do not think that there is any inconsistency. The subsequent mortgagees have no claim against the land. They are entitled to be paid out of the sur-

(1) L.R. 13 Eq. 142. (2) L.R. 15 Eq. 156.

plus which remains after satisfying the first mortgage; but the purchaser has nothing to do with that; his title is perfectly good, and he is entitled to be registered as indefeasible owner.

Reading this I find much light shed on the peculiar form of mortgage given in the Act here and there which seemed such a puzzle to the court below and on argument here. Its purpose in each case was to create a charge without passing the legal estate and thus relieve from such puzzles.

The "Westbury Act" of 1862 expressly permitted the use either of the statutory form or the old form of a deed to create a mortgage, and hence this cannot be said to be a case decisive of the exact questions here. It is as a practical illustration of how the old and the new can be made to harmonize in a more complicated situation than the "Real Property Act" in question here may produce, that these decisions on that Act are instructive and thus demonstrate that it cannot be maintained there is any such necessary conflict or inconsistency as to drive us to hold that the power to contract for a power of sale has been abrogated and, as argued, can no longer exist.

The "Land Transfer Act" of 1875, amended in 1897, is much ampler in its provisions than the Manitoba Act, and has in it many provisions that suggest exclusiveness of contract, yet in the *Capital and Counties Bank* v. *Rhodes*(1), at pages 653 to 658, the possibility of working out such an Act is found to be quite consistent with the conveyancing powers outside its provisions being exercised.

It is true section 49 of that Act makes a reservation to remove any doubt on the subject, and hence the judgment in that case cannot govern this case.

(1) [1903] 1 Ch. 631.

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But like the cases cited above, it demonstrates how far men may go in dealing with land brought under the Act without resorting to the provisions of the Act and yet no necessity be found for holding them, as contended for here, exclusive.

*Weymouth* v. *Davis*(1), is another illustration. Here the land was on the register, and the possessory title appeared in a man who executed a charge in the form prescribed by the Act, but to save expense did not register it, but registered a notice of deposit of the certificate; and those things were all done after having taken a mortgage deed. The mortgagee foreclosed the latter, and on getting his final order of foreclosure and for possession, sought, though no reference had been made to the formal charge in such proceedings, to have his order of foreclosure registered, and on refusal of the registrar, an application was made to Swinfen Eady J., who ordered the rectification of the register as desired.

*Stevens* v. *Theatres Limited*(2), may be referred to as a case where the question of inconsistency between the exercise of the power of sale and foreclosure proceedings at the same time is discussed. However much the power of the court to interfere may exist yet the power of sale is held not extinguished by any mere inconsistency so as to defeat a purchaser's title under the power of sale.

I may also observe that in some jurisdictions the courts have passed orders to deprive mortgagees pressing all their remedies of ejectment, foreclosure, power of sale and action on the covenant at the same time, and I think statutory enactments exist to put them to their election in such cases.

(1) [1908] 2 Ch. 169. (2) [1903] 1 Ch. 857.

Such rules of court or statutes rather affirm than controvert the proposition that *primâ facie* they are in law not inconsistent.

In the case of *Cruikshank* v. *Duffin*(1), raising the question of the power of an executor enabled to mortgage, to give a power of sale in the mortgage, it was held he could. It was treated by the court then as a necessary incident of the power. See also *Russel* v. *Plaice*(2).

The reasoning upon which the judgment in the case of *Belize Estate Co.* v. *Quilter*(3) proceeds, may also be well borne in mind in this connection, as demonstrating that an Act such as the "Real Property Act" is not to be taken as an exclusive code relative to the rights men acquire in real estate.

Questions were suggested in argument as to a power of sale in an instrument merely charging the property, and suggestions were made as to the mortgagees not having the legal estate.

In the first place without needlessly going here deeply into the question of the legal estate, I may refer the curious to the work of Mr. Hogg on Australian Ownership, Part III., ch. 2, sec. 2 thereof.

The ascertainment of where the legal estate may, in any given case, be, under such a system as the "Real Property Act" creates, is there fully discussed.

I may also, to relieve those troubled about what seems to me vain imaginings relative to the legal estate, again refer to section 108, quoted from above.

I need not dwell upon the subject in the view I take of the power in question here.

The English "Conveyancing Act, 1881," section

(1) L.R. 13 Eq. 555. (2) 18 Beav. 21.
(3) [1897] A.C. 367.

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21, sub-section 4, provided that the power of sale conferred by that Act may be exercised by any person for the time being entitled to give and receive a discharge for the mortgage money.

It is equally competent, I think, for the contracting parties to provide a like power fully as efficient.

In the case of *In re Rumney and Smith* (1), it was contended the power of sale there in question could be executed by the party entitled to receive the money, but Stirling J. held they could not in that case and referred to the law as follows:—

> I am asked to hold that the power of sale contained in the mortgage deed is a mere security for the debt, and is exercisable in the absence of any contrary intention by any person who in equity can give a receipt for the mortgage money. I am far from saying that that would not be a reasonable state of the law, but the question is whether it is the present state of the law. In carefully drawn mortgages there is usually found a clause enabling any one who in equity can give a receipt for the mortgage debt to exercise the power of sale; but no such clause is found in the mortgage before me.

In considering this case in appeal, Chitty L.J. says, page 360:—

> We have now become so accustomed by virtue of improved conveyancing, and by reason of the statutes, to find a power of sale in a mortgage accompanying the debt, that there is a danger of assuming that as part of the general law. No doubt the statutes made it quite plain, and all the conveyances in years past made it perfectly plain.

I take it there can be no doubt of this and it all comes back to the proper construction of the power of sale herein.

The Act manifestly gives a power of sale which extends to and covers the legal estate or rather whatever estate the mortgagor may have. That is independent of any special power such as this in question.

(1) [1897] 2 Ch. 351.

The power in question expressly given by the instrument does not depend on the "Real Property Act" for its efficiency or execution, but must depend upon the intention of the parties so expressed.

A common law power does not need any technical language to give it force. The question always is whether it can be construed as giving the power. And repeating what I have already said there can be no doubt of the meaning and intent of the parties to this power as to what it was to enable the doing of.

Of course a power to operate by virtue of the "Statute of Uses" or in execution of some trust must, though needing no peculiar language to create it, be so expressed, as to shew its conformity to what such statute or trust may require.

Finding neither warrant in the statute nor in the principle of law applicable thereto for precluding mortgagees from stipulating for a power of sale in or collateral to a mortgage given on land brought under the "Torrens System" and the sale in question duly made under the mortgage in question I need not enter into the inquiry as to the effect of section 75 relative to the bearing of the statutes of limitations invoked in favour of appellant.

This appeal should be allowed with costs throughout.

I may observe that notwithstanding the profuse quotations from the opinions expressed here in disposing of the case of *Williams* v. *Box*(1), I fail to see the bearing of that case or what was said therein on this.

That was a case of a mortgagee resorting to this statute to enforce his rights of sale and foreclosure

(1) 44 Can. S.C.R. 1.

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seeking to set up his proceedings, which did not conform to the statute he chose to proceed under, to deprive the mortgagor of his property.

That case involved the examination of the judicial powers in that regard as contained in the Act. This case apart from the collateral questions incidentally arising, involves merely questions of conveyancing.

In turning to the report of that case I find it of the illuminating kind which contains neither full statement of fact nor argument, and hence apt to be misleading.

Since writing the foregoing the information has been given the court that section 110 was not in force till after the date of contract of sale, but in my view the fact does not alter though it may emphasize what I have already said.

DUFF J.—The action out of which this appeal arises was brought by the appellant against the respondents, the National Trust Company, as the administrator of the estate of one James Beattie, deceased, claiming a declaration that an "estate in fee simple" in certain lands — the property in dispute — became vested in him by virtue of a certain transfer to him executed by the Canada Permanent Mortgage Corporation. James Beattie was in his lifetime the registered owner of the lands in question which were registered under the "New System" established and governed by an Act of the Manitoba Legislature originally passed in 1885, and now known as the "Real Property Act." In 1892 the property was mortgaged by Beattie as registered owner in favour of the Freehold Loan and Savings Company, to secure the repayment of a loan, and the mortgage (with all the inci-

dental rights and powers of the mortgagees) was subsequently acquired by the Canada Mortgage Corporation. The transfer by the last mentioned company is said, according to the contention of the appellant, to have effectually transferred to him an estate in fee simple in this property on one of two grounds: 1st, that the company had acquired a title by possession, and 2ndly, that the legal authority to convey such an estate was vested in the company by a certain power of sale which was contained in the mortgage executed by Beattie and which, according to its terms, was exercisable by the mortgagees and their assigns.

As to the first of these grounds I may say at once that section 75 of the "Real Property Act," in my opinion, makes it untenable, and I am quite content to rest that view upon the reasons in support of it which have been given by the learned judges in the Court of Appeal for Manitoba.

The second contention raises questions of considerable importance which have been very ably discussed by counsel, and deserve a more particular examination. These questions turn primarily upon the effect of the legislative provisions which govern the transactions in dispute. It was assumed on the argument that it was only necessary to consider the Act of 1900 which was in force at the time of the attempted sale. I think it is immaterial in the result whether we confine our attention to the provisions of that Act or consider also the provisions of the enactments in force in December, 1892, when the mortgage was executed. I shall first discuss the effect of these latter provisions, which are to be found in the "Real Property Act" of 1891 as amended in April, 1892.

The mortgage in question is in the form prescribed

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by the Act and was admittedly intended to take effect under its provisions. By those provisions a statutory power of sale is an incident of every registered mortgage. It was not disputed on the oral argument before us that the transfer in question cannot be sustained as an exercise of this statutory power; but it was contended that a special agreement contained in the mortgage conferred on the transferors a conventional power of sale exercisable independently of the provisions of the statute. In considering this contention it is necessary to examine the constitution and characteristics of a mortgage under the Act.

By the provisions of the "Real Property Act" the owner of an estate in fee simple in land having applied to register his title under the system established by the Act called the "New System" and having complied with the statutory requirements leading to registration becomes entitled to a certificate called the "Certificate of Title" which declares him to be the owner of an estate in fee simple in the land of which he is the proprietor. This certificate is bound in a book called the "register," and a duplicate of it is delivered to the owner. Thenceforward the certificate not only evidences but constitutes the owner's title. Title to the land to which it relates can be affected only as the Act permits, and by an instrument registered as the Act provides. The purpose of the Act was to simplify and cheapen the transfer and the encumbering of and to give security of title to the owners of lands and interests therein; and, broadly speaking, the scheme devised is that title is acquired by registration in this register which contains the various certificates of title, each of which shews the interest of the registered proprietor and the encumbrances to which it is subject.

The mortgage contemplated and provided for by the Act is a real security which primarily derives its efficacy as a security of that character from the statute itself. Section 99 is explicit, that a registered owner intending to charge or to create a security upon land by way of mortgage (which by the interpretation clause includes "any charge on land created for securing a debt or loan") shall "execute a memorandum of mortgage in the form contained in Schedule D., or to the like effect"; and by section 83 no instrument is to be "effectual * * * to render" any land under the "New System" liable as security for the payment of money or against any *bonâ fide* transferee of such land until such instrument be registered in accordance with the Act. The registered owner can charge his land in such a way as directly to burden the registered title only by the execution and registration of a memorandum in the prescribed form. It is quite clear, moreover, that the registration of a mortgage under the Act is not intended to vest in the mortgagee any registered "interest" in the mortgagor's land as that term is used in the Act. By section 100 it is declared that

> a mortgage * * * shall have effect as security, but shall not operate as a transfer of the land thereby charged,

and, in 1900, this section was amended by adding the words "of an estate or interest therein." The amendment only had the effect, however, of making unmistakable the real operation of such a security under the law as it stood before the amendment was passed. That such was the effect of the statute appears readily enough when we compare and contrast the provisions relating to the transfer and registration of any interest less than full ownership and compare them with

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the provisions relating to the creation and registration of mortgages. The Act does not, in a word, treat the mortgage authorized by it as an instrument immediately effecting any dismemberment of the mortgagor's registered title. The operation of the statute is rather this: When a registered owner wishes to charge his registered title as security for a debt, he is to execute an instrument by which he declares that he "mortgages" his land and that instrument being registered the mortgagee becomes invested with such rights in respect of the possession of the land and its profits and the registered title becomes (for the benefit of the mortgagee) subject to such powers of disposition as the statute expressly or by implication declares. It is in these rights and powers that the virtue of the mortgage as a real security consists; and it is, consequently, to the statute that we must primarily resort to ascertain what are the rights and powers incidental to such a security.

It is argued that the view thus stated is too narrow, and another view is put forward, which is this: that the mortgage authorized by the Act is to be regarded as having annexed to it all the legal incidents which by law belong to a mortgage at common law and as being capable of having annexed to it by contract all the incidents which may by contract be annexed to a mortgage at common law in so far as such incidents are not expressly or by necessary implication excluded. I think in either view the practical result of this appeal must be the same; but I must say that it seems to me to be an artificial and unnatural reading of the statute to regard the mortgage contemplated by it as primarily a common law mortgage, and I think that in adopting such a reading one incurs some risk

of losing the point of view from which the legislator envisaged the problem to which he was addressing himself. There is much in the Act to indicate an intention on the part of its authors that under the statutory mortgage the powers and rights of the mortgagee should in substance be economically equivalent to those possessed by a mortgagee under a common law mortgage; yet, juridically considered, there is — as I have indicated — this essential difference between the two instruments, viz.: that at common law the rights and powers of the mortgagee as such in respect of the mortgaged property are rights and powers which are incidental to the legal or equitable estate vested in him as mortgagee while under the statutory instrument the rights and powers of the mortgagee do not and cannot take their efficacy from any such estate because none is vested in him and his rights and powers must consequently rest directly upon the provisions of the statute itself.

This view, of course, does not involve the consequence that the mortgagee's rights are those only which the statute expressly gives him. It is obvious that many things are left to implication; and where, in any particular case, it appears that the rules governing reciprocal rights of the mortgagor and mortgagee under the mortgage contract in relation to the mortgaged property are left to implication then it is a question to be determined upon an examination of the statute as a whole how far the rights of the parties are to be governed by the rules of law which, apart from the statute, are applicable as between mortgagor and mortgagee.

It is to be premised generally that the statute nowhere countenances the idea that a registered owner

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can, except under the authority of some specific provision of the Act, by instrument *inter vivos* confer upon another the power to defeat or override his title by transferring a registered title to his property without constituting the donee of the power his agent for that purpose and without transferring any interest to the donee himself. It is probably needless to repeat what was said upon the argument that at common law an attempt by an owner of the legal estate in fee simple in land to endow, by an instrument *inter vivos,* a third person having no estate or interest legal or equitable in the land with power to vest an estate of freehold in another must, in the absence of an assurance to uses or a trust express or implied, utterly fail for reasons of the most elementary and obvious character; and there is nothing expressly or impliedly abrogating this general rule. There is nothing in a word to indicate any intention on the part of the legislature to declare or recognize any such general principle as that a licensee under a bare license to sell or convey land registered under the new system, given *inter vivos,* may validly transfer a title to such land otherwise than as agent of the registered owner. On the contrary the Act expressly forbids the registration of any

> instrument purporting to transfer or otherwise deal with or affect land under the new system—except in the manner herein provided for registration under the new system nor unless such instrument be in accordance with the provisions of this Act as applicable to the new system.

The provision dealing with the transfer *inter vivos* generally (sec. 78), authorizes transfer only by the registered owner. Cases in which it is intended that such a power of disposition should be vested in other than the registered owner in consequence of some act

*inter vivos* seem to have been carefully considered and specially provided for. All this, of course, has no reference to powers arising out of testamentary instruments. These stand, as everybody knows, upon another footing; and the rules governing the exercise of them have, of course, no relevancy whatever to any question we are concerned with on this appeal.

The statute contains express provisions conferring powers on the mortgagee to defeat the mortgagor's title by causing a title to vest in a purchaser through proceedings outside the registry (analogous to proceedings under a conventional power of sale in a common law mortgage) as well as by proceedings in the registry. There is nothing in the Act, however, indicating any intention to recognize the exercise of powers in that behalf by the mortgagee in addition to and independently of those conferred by these statutory provisions. On the contrary an examination of the legislation in the light of its history seems to shew that the legislature was dealing exhaustively with the powers of the statutory mortgagee to defeat the mortgagor's registered title in the express enactments relating to that subject and that in this respect nothing has been left to implication. I am not for the present considering the effect of an agreement introduced into a statutory mortgage as giving rise to equities between the mortgagee and mortgagor affecting the land in the mortgagor's hands; that I postpone for the present. I wish to examine the legislation with a view to ascertaining whether there is fair ground for an inference that by means of a conventional power introduced into a statutory mortgage, the mortgagee may be endowed with a power of divesting the mortgagor of his registered title by causing a registered

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title to the mortgaged property to be vested in a purchaser without the intervention of a court of equity and without taking advantage of the machinery expressly provided by the statute for that purpose.

The system of title by registration was introduced into Manitoba, as I have mentioned, by an Act of the Manitoba Legislature passed in 1885. The system had then for some years been in force in some of the Australian colonies and on the subject of mortgages the provisions of the Manitoba Act (with one significant exception) appear to be in substance those then in force in Victoria as will be seen by a reference to Mr. Hogg's invaluable book, "The Australian Torrens System." These provisions of the Victoria statute had been the subject of consideration by the courts in that colony as well as by the Privy Council; it is quite clear that judicial opinion was unanimously in favour of regarding these sections as providing the only means by which the mortgagee could extinguish the mortgagor's title. In the *National Bank of Australasia* v. *The United Hand-in-Hand and Band of Hope Co.*(1), at pages 405 and 406, Sir James W. Colville in delivering the judgment of the Judicial Committee, said:—

> The company was the registered owner of the mine under the provisions of the "Transfer of Land Statute," and the mortgage was made under and subject to the provisions of the 83rd and following sections of that Act, and was duly registered thereunder. The instrument itself is in the form set forth in the 12th schedule to the Act, except that it contains, as that form permits, a special covenant or agreement which will be hereafter considered. Hence the only way in which the mortgagee could extinguish the rights of the mortgagor in the mine was by foreclosure under 31 Vict. No. 317 (of which there is no question here), or by a sale under the 84th, 85th and 87th sections of the "Transfer of Land Act."

(1) 4 App. Cas. 391.

To the same effect is the decision of the Chief Justice of Victoria in *Greig* v. *Watson* (1), pronounced in 1881. I think it cannot be presumed that the Manitoba Act was framed in ignorance of these authoritative pronouncements upon the effect of the legislation that province was adopting in a matter so deeply important as the rights of a mortgagee in respect of the foreclosure or sale of the mortgaged property. Yet nothing was introduced into the Act of 1885 to negative such a construction; and the only provision of the Victoria statute affording by its terms any plausible support to the appellant's view, a provision which afterwards (in 1900) was introduced into the Manitoba Act and which was largely relied on by the appellant in this connection, was left out of the Manitoba Act of 1885. The fair inference appears to be that the view of the effect of the Victoria statute expressed by the Privy Council was that which the framers of the Act of 1885 deliberately adopted; and the provisions of the Act as a whole strongly support this conclusion. The form of mortgage prescribed by section 99 contains a direction permitting the introduction of special covenants. There is no suggestion of conventional powers. That circumstance is, in my judgment, not without significance. It is quite true that a power of sale might be expressed in the form of a covenant, but if it is to confer upon the mortgagee the authority to execute an assurance of the mortgaged property and extinguish the mortgagor's title it is in substance much more than a covenant. The provisions of the Act shew that the distinction which lawyers understand between a power to deal with property in such a way as directly and immediately

(1) 7 V.L.R. 79.

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to effect the title to it and a mere personal obligation was not overlooked by the authors of the Act and in the form referred to the word "covenant" appears to be employed in this its usual sense. The Act again permits mortgages only in the specified form (sections 83 and 99), and declares this form to be a part of the Act (sections 3 and 4). If the intention had been to permit the introduction of an agreement authorizing the mortgagee to deal with the title in a manner which the Act itself not only does not provide for, but which would appear to do violence to some of its express provisions, I think, in view of these stringent provisions, we might have expected something more explicit than a direction authorizing the introduction of "special covenants." Then there is no provision for the registration of a transfer executed by a mortgagee under such a power. The Act, as I have pointed out, forbids the registrar to

> register any instrument purporting to transfer or otherwise deal with or affect land under the new system, except in the manner herein provided for registration under the new system, nor unless such instrument be in accordance with the provisions of the Act, as applicable to the new system (sec. 83).

The transfer authorized by section 78 of the Act is a transfer by the registered owner; and such a transfer could not, of course, be executed by a mortgagee, as such. Provision is specially made for the registration of the transfers made by the mortgagees in execution of the express powers of sale vested in them by the Act itself (section 110), but that provision is strictly limited to such transfers. Provision, moreover, is expressly made preserving the rights and powers of mortgagees under mortgages existing at the time the land is brought under the "new system." In face of all this the omission of any provision touching the

execution or the registration of transfers by a mortgagee under a statutory mortgage exercising a conventional power of sale appears to be significant.

There is a provision of the Act which was introduced as an amendment in 1889 and requires particular notice. It is contained in section 77 of that Act and is in these words:—

> 77 * * * Provided, however, that where an instrument, in accordance with the forms in use or sufficient to pass an estate or interest in lands under the old system deals with land under the new system, the inspector may, in his discretion in a proper case, direct the district registrar to register it under the new system, and when so registered it shall have the same effect as to the operative part thereof as and shall by implication be held to contain all such covenants as are implied in an instrument of a like nature under the new system, and if it is a mortgage the mortgagee may, for the purpose of foreclosure or sale under the mortgage, elect to proceed either under the provisions of this Act or as if the land were subject to the old system, but in case he proceeds under the provisions of this Act, and the mortgage covers other land not under the new system, he must before doing so bring all the land intended to be foreclosed or sold under the new system.

There can be little doubt as to the occasion which led to the enactment of this provision. The preparation of conveyances of land by unlearned persons (a practice facilitated by the general use of printed forms for such purposes even by professional lawyers) was, at the time of the passing of this Act, a very general practice in many of the provinces of Canada; and it was probably found that such forms in many cases were made to do duty for mortgaging and transferring land under the new system; and the provision mentioned was doubtless suggested by the frequent occurrence of such cases. It was evidently thought that in those cases it would be unfair to deprive the mortgagee of the benefit of powers which the parties might be presumed to have contemplated he should be entitled to exercise and he was given the option

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of resorting to them if the inspector of land registries should approve of the registration of his mortgage. The points to be noted are, first, that it was deemed necessary to make a special provision conferring on the mortgagee in such circumstances a right at his election to proceed under his conventional powers, a provision which seems superfluous if the appellant's contention be correct that the mortgagee under any registered mortgage may *ipso jure* have the benefit of rights and powers which he might at common law have exercised under a mortgage containing the like provisions; and secondly, the language used in authorizing the mortgagee "to proceed as if the land were under the old system" rather pointedly indicates that in the legislator's view proceedings by way of sale under a conventional power or by way of sale or foreclosure through a court of equity were as a general rule competent to a mortgagee only in respect of land "subject to the old system."

Thus far of the legislation as it stood in 1892 when the mortgage in question was executed. In 1900 some amendments were introduced and it was one of these (section 108 of that Act) on which Mr. Coyne chiefly relied on this branch of his argument. That section is as follows:—

> In addition to and concurrently with the rights and powers conferred on a first mortgagee, every present and future first mortgagee for the time being of land under this Act, shall, until a discharge from the whole of the money secured or until a transfer upon a sale or order for foreclosure (as the case may be) shall have been registered, have the same rights and remedies at law and in equity as he would have had or been entitled to if the legal estate in the land or term mortgaged had been actually vested in him with a right in the owner of the land of quiet enjoyment of the mortgaged land until default in the payment of the principal and interest money secured or some part thereof respectively, or until a breach in the performance or observance of some covenant expressed in

the mortgage or to be implied therein by the provisions of this Act. Nothing contained in this section shall affect or prejudice the rights or liabilities of any such mortgagee after an order for foreclosure shall have been entered in the register or shall, until the entry of such an order, render a first mortgagee of land leased under this Act liable to or for the payment of the rent reserved by the lease or for the performance or observance of the covenants expressed or to be implied therein.

The contention is that the mortgagee is by virtue of this enactment in the same position for all purposes as if the legal estate were vested in him and it follows, it is said, as a necessary corrollary that a conventional power of sale confers upon a statutory mortgagee the same powers of disposition over the mortgagor's title as would be vested in a legal mortgagee at common law.

The section read by itself with due attention to the phraseology employed appears to me to mean this: So long as the security is on foot as a security and the ownership of the land is consequently vested in the mortgagor the first mortgagee is to have certain rights and powers in respect of the land and they are to be the rights and powers to which he would by law be entitled if the legal estate were actually vested in him under an instrument such as that described. That is not to say — at least so it seems to me — that by this enactment the statutory mortgagee is endowed with any novel power to extinguish the mortgagor's title or to convey an estate to a purchaser; and there are some considerations which I think make it impossible to give such an effect to the section. The first of these considerations is that this section, as I have already mentioned, was to be found in the Act which the Judicial Committee was discussing in the passage I have quoted and I think if the intention in re-enacting the section in Manitoba had been to estab-

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lish the law upon a footing different from that indicated in the view there expressed we might have expected something explicit to indicate that intention.

Then this section deals with the rights of the first mortgagee only. That would appear to indicate that those rights only are contemplated with which the law would invest a legal mortgagee as peculiarly incidental to his possession of the legal estate. If rights of foreclosure and sale, independently of the other provisions of the Act, were in view there appears to be no explanation why the benefit of such rights was withheld from the holders of mortgages subsequent to the first.

In considering, moreover, the effect of the amendment embodied in section 108 it is to be observed that it must be read with other amendments which were introduced into the statute at the same time and particularly with the amendments affected by sections 100 and 110 of the Act. These latter amendments, it is true, are not expressly (as section 108 is) made applicable to existing mortgages. But it is not, of course, to be supposed that the last mentioned enactment having been declared to be applicable to existing as well as to future mortgages was intended to have an operation in respect of future instruments different from its operation in respect of those already existing; and we may properly look at the whole of the contemporary legislation which is *in pari materiâ* in order to ascertain the effect of any part of it. Section 100 makes explicit what, as I have already mentioned, was already implicitly in the Act; that the mortgage does not vest in the mortgagee any estate or interest in the land pledged as security. That section declares that the first mortgagee is to have no

"interest" in the land — thus emphasizing the characteristic of the statutory mortgage upon which I have been dwelling, viz., that, as regards title, the mortgagee has no registered interest, but only powers of disposition.

The amendment embodied in section 110 emphasizes another feature of the Act, viz.: that, in course of the exercise of the statutory powers to extinguish or dispose of the mortgagor's title, the legislature has provided for the protection of the mortgagor by subjecting such proceedings to the supervision of a public officer. The proviso to that section is as follows:—

> Provided that, in case the mortgage or incumbrance contains a provision that the sale may take place without any notice being served on any of the parties, the district registrar may order such sale to take place accordingly.

This enactment affords evidence of the care with which the legislature deemed it necessary to protect the mortgagor against oppression or unfairness or mere carelessness on the part of the mortgagee as well as improvidence on his own part in this matter of the sale of the mortgaged property. The provisions of section 109 by which the period of one month which that section requires shall elapse between the mortgagor's default and the service of notice of intention to sell is permitted to be extended, but is not allowed to be abridged; and the provision of section 110, first introduced in 1892, requiring that the manner in which the sale is to be conducted as well as the conditions of sale shall be determined by the registrar are other instances of the same careful forethought for the interests of the embarrassed mortgagor. I have no doubt these precautions were not taken without

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good reason; and it would require some language more apt to the purpose than that of section 108 to convince me that the legislature intended by that section to enable the mortgagee by the simple expedient of exacting a conventional power of sale to neutralize these carefully devised expedients for the protection of the mortgagor.

For these reasons I think that whether we regard the rights of the mortgagee as governed by the enactments of the Act of 1900, or by those in force in 1892 when the mortgage was executed, the conventional power of sale on which the appellant's title rests conferred no legal authority upon the mortgagee to extinguish the registered title of the mortgagor except under and according to the express provisions of the statute in that behalf.

It is still necessary, however, to refer to the Act of 1906. Sections 2 and 3 of that Act are as follows:

> 2. Section 108 of the said Act is hereby amended by inserting after the word "equity" in the seventh line thereof the words "including the right to foreclosure or sell through any competent court."
>
> 3. Section 126 of the said Act is hereby amended by adding after the word "therein" in the fourth line thereof the following, "or over mortgages, nor shall anything contained in this Act affect the right of the mortgagee to foreclose or sell through any competent court, which right it is hereby declared may be exercised in such court."

These enactments were passed long after the sale in question took place and, notwithstanding the form of the amendment in section 3 and notwithstanding the fact that the amendment of section 108 would by the express terms of that section apply to mortgages in existence at the time the amendment was passed, they cannot, I think, be taken to have any such retrospective effect as to determine the construction and operation of the "Real Property Act" at the date

either of the execution of the mortgage in question on this appeal or of the professed exercise of the power of sale. *Harding* v. *Commissioners of Stamps for Queensland*(1), at page 775. These amendments are, however, to a limited degree not without relevancy to the point under discussion. They afford an additional instance in which the legislature, having before it the subject of proceedings by the mortgagee for the extinguishment of the mortgagor's title, seems to have deliberately avoided any recognition of proceedings under a conventional power of sale; and, furthermore, while these enactments constitute a departure from the strict principle of the earlier enactments as explained by the Privy Council in *National Bank of Australasia* v. *United Hand-in-Hand Band of Hope Co.*(2), at pages 405 and 506, in that they provide for proceedings for foreclosure and sale in Equity they indicate no abandonment of the principle to which I have adverted, of requiring all proceedings for the extinguishment of the mortgagor's title to take place under the supervision of a public officer.

As I have already said, I do not think it was seriously contended that the transfer in question could be supported as a transfer made in execution of the statutory power of sale; and I agree that such a contention is quite hopeless.

I think it is not a forced construction of the Act of 1891, as amended in 1892, or of the Act of 1900, to say that the express provisions of these statutes in respect of the exercise of the statutory power of sale relating to the supervision by the registrar over the manner and conditions of sale and to the

(1) [1898] A.C. 769. (2) 4 App. Cas. 391.

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giving of notice of intention to sell are imperative provisions; and that the "special covenants" which are authorized to be introduced into the statutory mortgage must be such as are not repugnant or contrary to those provisions. Assuming then that the power of sale in the mortgage in question may fairly be read as professing to give an authority to the mortgagee to sell without notice, and assuming also that the rights of the parties are not to be governed by section 110 of the Act of 1900, such a dispensation from observance of the requirements of the statute could, nevertheless, not be permitted to take effect. The respondent's case, however, does not necessarily rest upon this view that the proceedings by the mortgagee under the statutory power are thus inexorably prescribed by the statute; because it is perfectly clear that there is nothing in the mortgage indicating an intention to dispense with the supervision by the registrar, required by section 109 of the Act of 1891 as amended by that of 1892, and, moreover, there is no pretence that any supervision took place, or that there was any attempt in fact to observe the conditions of the statutory power or any intention to exercise that power.

But it is suggested that the power in question gave some authority to a mortgagee to vest equitable rights in a purchaser in defeasance of the mortgagor's title. On that suggestion I have to make two observations *in limine*. First: No court governed by equitable principles would permit itself to be made an instrument in effecting the evasion of the imperative provisions of section 110 (either as to notice or as to supervision), under the pretence of protecting equitable as distinguished from legal rights; and, secondly,

the action was not brought to enforce equitable rights. There is not a shadow of a suggestion of such rights in the pleadings or in the record from the first to the last page. The right asserted is the absolute legal right to be registered as owner of the mortgaged property. What facts relating to the conduct of the parties having a bearing upon the equities between them might have been disclosed if a claim based upon equitable grounds had been put forward it is impossible now to say. It is clear, however, from the mortgage deed alone that no equitable rights in the land in question have been vested in the appellant. If an attempt were made by a debtor (without formally vesting in his creditor an estate or interest and without creating any trust or executing any assurance to uses) to confer on the creditor as security for his debt a power to sell land held under a common law title then no doubt a court of equity might, in a proper case, find a method of giving effect to such an instrument by way of equitable charge. And in the case of an informal document professing to create such a power a trust in favour of the creditor or in favour of purchasers from him might be implied if it were necessary to imply such a trust in order to prevent the instrument failing of operation entirely. Such a case is perhaps conceivable.

But it is clear that it would be a violation of principle to imply any such a trust unless on the one hand it was manifest that the parties really intended a trust to be created or on the other it was necessary to assume they had done so in order to prevent a failure of consideration. Now consider the instrument before us. First the instrument is a formal conveyance prepared, as we may assume, by the solici-

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tors of a great mortgage company. There is not a word in the document to indicate an intention on the part of anybody that a trust in favour of the mortgagees or a purchaser should be created. On the other hand it is indisputable that the instrument was intended to be a statutory mortgage taking effect under the statute and all the probabilities of the case favour the view that the power of sale was intended to be a power taking effect as incidental to such a mortgage and to confer authority to deal with the registered title and to vest in the purchaser a title under the "Real Property Act" by the execution of a transfer which could be registered under that Act without resorting to judicial proceedings.

The assumption that the parties intended to create a trust in favour of the mortgagee, or a purchaser to be nominated by him, would really be a very extravagant one; and I do not think it was welcomed by Mr. Coyne when I suggested it to him during the course of his useful and able argument. It is really impossible to suppose that these parties ever entertained the idea of vesting in the mortgagee (in addition to the legal authority to deal with the mortgagor's estate conferred upon him by the statute) some equitable right to which effect could only be given by proceedings in equity or the authority to confer some such right upon a purchaser. The reading of the clause in question most consonant with the probable intentions and expectations of the parties is, as Mr. Wilson argued, that which treats it as a power of sale to be given effect to under the authority of and through the machinery provided by the statute.

ANGLIN J. (dissenting).—On this appeal several questions present themselves for determination:—

(1) Whether the title of a registered owner of land under the "Real Property Act" of Manitoba is extinguished by adverse possession of the land held by his mortgagee and persons claiming under him in circumstances and for the period which would under section 20 of the Revised Statutes of Manitoba, chapter 100, extinguish the title to it of the mortgagor if the land were not under the Act.

(2) Whether, in the case of a mortgage of land registered under the Act, the mortgagor may, by introducing apt and sufficient words into a statutory mortgage, confer upon his mortgagee a power of sale additional to and independent of the statutory power given by sections 109 and 110 of the Act, and whether such a power, if so created, may be exercised by the mortgagee as in the case of a like power conferred on a mortgagee of land not under the Act and without reference to the provisions of sections 109 and 110.

(3) Whether the power of sale contained in the mortgage in question in this action should be deemed a power independent of and additional to the statutory power conferred by sections 109 and 110 or should be deemed merely a variation of such statutory power.

(4) Whether the words used in the mortgage are sufficient to confer an effectual power of sale.

(5) Whether they give a power of sale without notice; and

(6) Whether, in view of the fact that the mortgagee takes no interest or estate in, but merely obtains security on, the land (section 100), the special power of sale, if effectually given, can be exercised without resorting to the provisions of sections 109-112 of the Act.

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The clause in the mortgage upon which the five latter questions arise is as follows:—

> It is also covenanted between me and the said mortgagees that if I shall make default in payment of the said principal sum and interest thereon, or any part thereof at any of the before appointed times then the said mortgagees shall have the right and power and I do hereby covenant with the said mortgagees for such purpose and do grant to the said mortgagees full license and authority for such purpose when and so often as in their discretion they shall think fit to enter into possession either by themselves or their agent, of the said lands, and to collect the rents and profits thereof, or to make any demise or lease of the said lands, or any part thereof for such terms, periods, and at such rent as they shall think proper, or to sell the said lands and such entry, demise or lease shall operate as a termination of the tenancy hereinbefore mentioned without any notice being required, and that the power of sale herein embodied and contained may be exercised either before or after and subject to such demise or lease. Provided that any sale made under the powers herein may be for cash or upon credit or partly for cash and partly for credit and that the said mortgagees may vary or rescind any contract for sale made or entered into by virtue hereof.

The mortgage provides that the expression "mortgagees" wherever it is used in the mortgage shall include the mortgagees' "successors and assigns."

For convenience I shall deal with the questions in an order somewhat different from that in which I have stated them.

Assuming for the moment, that an owner of land registered under the "New System" can, in a statutory mortgage under the "Real Property Act," confer on his mortgagee a power of sale other than and independent of the statutory power, I think that the provision of the mortgage which I have quoted creates such a power. It purports to give to the mortgagee an express authority "to sell the said land" without attaching to it any of the conditions of the statutory power. The statutory power (at all events unless expressly negatived, section 157) is inherent in every statutory mortgage. No words conferring or declar-

ing it are required in the mortgage. Reference is properly made to it only for the purpose of modifying, or, perhaps, of excluding it. Unless another and an independent power was contemplated by the parties, the provision in the present mortgage granting to the mortgagees full license and authority to sell the lands is entirely supererogatory. It is scarcely necessary to refer to the canon of interpretation opposed to such a construction. Moreover, the reference in the concluding proviso of the clause quoted from the mortgage to "any sale made under the powers herein" indicates that the parties contemplated the existence of more than one power of sale — the inherent statutory power and also the power expressed in the mortgage.

In the absence of any other allusion in the mortgage to the statutory power I find no support for the suggestion that the purpose of the clause under consideration was not to create a special and independent power of sale, but merely to modify the statutory power.

I agree with the learned judges of the Court of Appeal for Manitoba that the words "without any notice being required" apply only to the termination of the tenancy of the mortgagor provided for in the mortgage and do not affect or qualify the authority to sell. But I am also of the opinion that, in the absence of any condition as to notice being annexed to it, the express power of sale conferred by the mortgage may be exercised without notice. *Jones* v. *Matthie*(1); Bythewood and Jarman's Conveyancing (4 ed.), p. 689; Smith's Equity (4 ed.), p. 297.

No precise or technical form of words is necessary

(1) 11 Jur. (1847) 504.

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to create a power of sale. It suffices that the intention be sufficiently denoted. Sugden on Powers (8 ed.), p. 182; Farwell on Powers (2 ed.), p. 48. The intention is here clearly expressed; the donor was competent; the instrument — a deed — is apt; and the object is lawful and proper.

The objection to the sufficiency of the power urged on behalf of the respondents, that the donee of it has no estate, legal or equitable, in the mortgaged land, is possibly met, as Mr. Coyne contended, by the provisions of section 108 of the Act which gives to every first mortgagee

> the same rights and remedies at law and in equity as he would have had or been entitled to if the legal estate in the land or term mortgaged had been actually vested in him, etc.

I rather think, however, that this provision is intended to preserve to, or to confer upon the mortgagee, for the protection of whatever interest he may have under the terms of the statutory form of mortgage, rights and remedies other than the power to convey the land and that it would not enable him in the exercise of a power of sale other than that conferred by the statute to give a conveyance which would have the effect of vesting in his purchaser the mortgagor's title and estate in the mortgaged registered land. I am confirmed in this view of the scope and purpose of section 108 by the fact that, notwithstanding its presence in the statute, the legislature deemed special provisions necessary to give to the conveyance of a mortgagee exercising the statutory power of sale the effect of vesting in the transferee the mortgagor's title and estate (sections 111, 112).

But the objection, in my opinion, cannot prevail, although it should be held that, for the purposes of

powers of sale section 108 is inapplicable and that the mortgagee is in the same position as if he were a stranger without any estate or interest in the land, and although the power should be regarded as simply collateral, or as a power in gross because exercisable for the benefit of the donee. Sugden on Powers, p. 47(8). A power given to nominees of a testator to sell estates vested not in them, but in devisees of the donor was held by Kay J. in *Re Brown*(1), to be unquestionable and was treated as an instance of the equitable powers arising, as put by Lord St. Leonards in his book (8 ed., pp. 45-6) out of

> declarations or directions operating only on the consciences of the persons in whom the legal estate is vested.

and whom

> equity would compel * * * to convey according to the (donee's) contract (32 Ch. D. at p. 601).

In the *Brown Case*(1), the donor's devisees of the estate were bound in equity to convey to the purchaser from the donees of the power; in the present case the mortgagor, in whom the whole estate remained notwithstanding the mortgage (section 100) and those claiming under him are subject to the like duty arising out of the trust of the land declared by the mortgagor in giving to his mortgagees a special express power of sale, while retaining the whole estate in the land. If the mortgagees neither had themselves, nor had the right, by a contract made in the exercise of their power of sale, to create in their purchaser an equitable interest in the land, which the mortgagor or his representatives might be compelled to perfect by a transfer or conveyance, they were at all events em-

(1) 32 Ch. D. 597.

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powered to confer on him a right to claim such a transfer or conveyance which a court exercising equitable jurisdiction will enforce. The registrar is not obliged — indeed he is probably not entitled — to recognize or to register a transfer of the land executed by a mortgagee of new-system land acting under any other than the statutory power. But the equity which the mortgagee acting under a special power of sale creates as against the mortgagor and those claiming under him by the contract with his purchaser, will be recognized by the courts and will in a proper proceeding be enforced against them; *Re Massey and Gibson* (1); *Wilkie* v. *Jellett* (2); and the court will give proper directions for the execution of any necessary assurances and for action by the registrar upon them.

It is noteworthy that the statute itself contains a provision under which a purchaser from a mortgagee, selling new-system land under a power of sale in his mortgage may, in order to complete his title, be entitled in equity to a transfer from the mortgagor or the registered owner claiming under him and may be obliged to resort to a court of equity to compel such a conveyance. Section 83 provides for the registration of old-form instruments dealing with lands registered under the new system. As to its "operative parts," when so registered such an instrument is declared to have the same effect as "an instrument of like nature under the new system." Estates or interests in land under the new system are transferable not by execution and delivery of an instrument, but only by and upon registration of it (sections 80 and 81). An unregistered instrument merely confers a right or claim

(1) 7 Man. R. 172, at pp. 178-9.

(2) 2 Terr. L.R. 133; 26 Can. S.C.R. 282.

to its registration (section 90). An old-form mortgage of land under the new system, though its registration should be procured under section 83, does not transfer to the mortgagee any estate or interest in the mortgaged premises (section 100). But section 83, nevertheless, provides that

> the mortgagee may, for the purpose of foreclosure or sale under the mortgage, elect to proceed either under the provisions of this Act, or as if the lands were subject to the old system.

Should he exercise the latter option and proceed to sell under his power of sale without reference to the registrar, having no estate or interest in the land, he could not, in the absence of some statutory provision giving that effect to his conveyance, vest any legal title in his purchaser. *Re Hudson and Howes' Contract*(1). Such a provision is made by section 112 in respect of conveyance by mortgagees in the exercise of powers of sale contained in mortgages affecting the land before it was brought under the new system:

> Upon the registration of any memorandum or instrument or transfer executed * * * by a mortgagee selling under the power of sale in any mortgage which affected the land when the first certificate of title issued therefor, the estate or interest of the owner of the land mortgaged or incumbered shall pass to and vest in the purchasers, etc.

In the case of a purchase from a mortgagee exercising under the old system the power of sale in an old-form mortgage registered under section 83 against new-system land, unless the mortgagee had been made the mortgagor's attorney to convey his estate and the sale was made while the mortgagor was still the owner of the land, the purchaser or transferee would acquire merely an equitable interest or an equitable right to a transfer which the mortgagor, or his representative,

(1) 35 Ch. D. 668.

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would be compellable in a court of equity to perfect by a legal transfer of the mortgaged property.

If, therefore, it is competent for the registered owner of land under the new system, when giving a mortgage under the Act, to confer upon his mortgagee a power of sale independent of and additional to the inherent statutory power conferred by sections 109 and 110 and exercisable without reference to those sections, no case having been made of fraud or mistake affecting the creation, or of imposition or unfair dealing affecting the exercise of the power here in question, I see no reason why the sale under it by the assigns of the mortgagees should not be upheld as giving to their purchasers an equitable interest or right enforceable against the mortgagor or his representatives, or why the plaintiff, who was that purchaser, should not in this action obtain appropriate relief. In the absence of a provision, such as is found in section 112, or of a power-of-attorney from the mortgagor enabling the mortgagee effectually to transfer the mortgaged land to, and to vest it in his purchaser, the latter must, if the mortgagor or his representatives will not voluntarily execute a transfer in his favour, seek the aid of the courts to perfect his title and to put him in a position to become the registered owner.

Finding nothing in the statute which ousts their jurisdiction, I know of no reason why the courts should not grant to the plaintiff the relief to which he has shewn himself to be entitled.

But, can the owner of land registered under the "new system" give to his mortgagee a power of sale other than the statutory power and exercisable without observance of the requirements of sections 109

and 110 of the Act ? There is no clause in the "Real Property Act" which forbids him doing so. Neither can it be said that the existence of such a right would be incompatible with any provision of the Act or destructive of any right which it confers or of the machinery which it provides for the cases to which it applies. All that the statute enacts is that, without an express power of sale being given him in his mortgage, a mortgagee taking a statutory form of mortgage is authorized and empowered to sell the mortgaged land. If he should elect to exercise this statutory power certain terms and conditions are prescribed which he must observe. But nowhere does the Act say that the statutory power shall be the only power of sale which a mortgagee of land under it shall have or exercise, or that any other power of sale which the mortgage may purport to give shall be exercisable only on terms and conditions the same as those prescribed for the exercise of the statutory power. Neither is it provided by sections 109 and 110, or by any other section of the Act, that, in every case and notwithstanding any provision to the contrary which may have been made in the mortgage, it shall be the right of a mortgagor that his mortgagee shall not exercise any power of sale of the mortgaged premises until there has been one month's default and (as the Act stood prior to 1900, or 1902) until a notice has been given by the mortgagee under section 109 and another month has elapsed after the giving of such notice. No such right is conferred on the mortgagor. All that the statute provides is that, if the mortgagee wishes to avail himself of the statutory power of sale which it confers, he may do so only upon observing the prescribed conditions. In this respect the provi-

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sions of the Manitoba "Real Property Act" are similar to those of "Lord Cranworth's Act." No one ever thought that the provisions for a statutory power of sale made by that legislation prevent mortgagors and mortgagees contracting for independent and additional powers of sale upon such terms as they may think proper.

It is contended for the respondents, however, that it is a fair and reasonable implication from the Act taken as a whole that the legislature intended to deny to mortgagors and mortgagees of land under it the right of contracting for any special power of sale and to prevent a mortgagee of such land obtaining any power of sale other than that which the Act itself confers on the statutory mortgagee; and in support of this view great reliance is placed on the fact that a mortgagee of land under the Act acquires no estate or interest in it.

In examining the statute in order to discover whether it affords evidence of any plan or scheme of legislation incompatible with the existence of a right to provide in the statutory mortgage for a special power of sale exercisable independently of sections 109 and 110, I find that in section 99 a form of mortgage of new-system land is prescribed. But by clause (*z*) of section 2, it is provided that:—

> Whenever a form in the schedules hereto is directed to be used such direction shall apply equally to any form to the like effect * * * and any variation from such forms not being a variation of a matter of substance shall not affect their validity or regularity, but they may be used with such alterations as the character of the parties or the circumstances of the case may render necessary.

On turning to the prescribed form, "D," I observe that, in the third clause, it contemplates special pro-

visions being made — "Here set forth special covenants if any." Section 157 of the statute provides that

> every covenant and power declared to be implied in any instrument by virtue of this Act may be negatived or modified by express declaration in the instrument or indorsed thereon.

Although the power of sale given by section 110 is not "declared to be implied in" the statutory mortgage, as are the covenant for indemnity mentioned in section 89 and the covenants and powers in statutory leases mentioned in sections 94 and 95, I incline to the view that the power of sale given by section 110 should be regarded as within the provisions of section 157. But whether that is or is not the case, the special power of sale given by the mortgage now under consideration was a "special covenant" and was an alteration in the nature of an addition to the prescribed form which it was, in my opinion, competent for the parties to make, if they thought "the circumstances of the case rendered it necessary," and it was not "a variation in substance" and certainly did not affect the "validity or regularity" of the instrument.

It is not the scheme of the Act that the implication of statutory covenants or powers in other instruments should preclude the introduction of express covenants and powers of an entirely different character and not mere modifications of the implied covenants and powers, or the enforcement, in the event of breaches, of such express covenants or of any special remedies for which the parties may have contracted. This has been held in respect to clauses in the New South Wales and South Australian Acts, similar to sections 93-96 of the Manitoba statute, which provide for implied covenants and powers in leases and for the determination of such leases by proceedings in the

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registrar's office where there has been non-observance of the implied covenants. *Baker's Creek Consolidated Gold Mining Co.* v. *Hack*(1); *Bucknall* v. *Reid*(2).

Provision is made by sections 83 and 112 of the Act, already alluded to, for the exercise by a mortgagee in certain cases of powers of sale in respect of new-system land other than that conferred by the statute and without observance of the provisions of sections 109 and 110. The respondent bases on the presence in the statute of sections 83 and 112 an argument, undoubtedly entitled to some weight, that they indicate an intention on the part of the legislature that, except in the cases thus specially provided for, no power of sale other than the statutory power conferred by section 110 shall be exercisable by a mortgagee of new-system land. I rather think, however, that these provisions indicate that the Act was not meant to be so inelastic as the respondents contend; that contractual powers of sale other than the statutory power are not precluded; and that, while, except in the special case dealt with by section 112, the statute does not facilitate the exercise of contractual powers specially created, or aid or give efficacy to transfers made under them, persons using them and claiming under them are permitted to assert and exercise such rights as their contracts expressly give them and to obtain such relief as the courts may allow.

There is nothing to prevent the parties inserting a provision enabling the mortgagee who exercises a special contractual power of sale to convey to his purchaser, as attorney of the mortgagor, the latter's estate in the mortgaged land. Because not essential

(1) 15 N.S. W.L.R. (Eq.) 207. (2) 10 S.A.L.R. 188.

to its exercise, the power of sale does not, I think, carry such a power of attorney as a necessary incident. To avoid the expense and delay involved in recourse to the courts, such an express provision would, however, seem to be reasonable and desirable in the interest of all parties whenever a special contractual power of sale is given. But when the mortgagee is not so empowered to convey the mortgagor's estate, or where the mortgagor has parted with his estate, I perceive no reason why the purchaser under a special power of sale lawfully exercised may not successfully invoke the equitable jurisdiction of the courts.

If this view be not correct it would be impossible for mortgagors and mortgagees to provide for the sale of land mortgaged under the new system until there had been one month's default as the Act now stands, and, as it was prior to the introduction in 1900, or 1902, of the proviso to section 110, until there had been at least two months' default and certain notice had been given. In many cases where the property dealt with is highly speculative in character or where for other reasons the mortgagee is willing to lend his money only if enabled in the event of default to realize immediately upon his security, owners of registered land might find themselves seriously embarrassed and perhaps even driven to sacrifice it because unable to obtain a loan upon it. Again, if the statutory power of sale is the only permissible power, and if it is necessarily inherent in every mortgage (as it must be unless it may be negatived under section 157) an owner of new-system land insisting that his mortgagee should have no power of sale whatever would find himself unable to give a mortgage on his land.

Having regard to the tendency of modern legisla-

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tion towards permitting freedom of contract in dealing with land as with other property and to the inconveniences and difficulties which such a construction of the statute would entail, I think we would not be justified in assuming that the legislature meant to tie the hands of owners of land registered under the new system, as is contended for the respondents, unless, that intention not being distinctly expressed, it is abundantly clear that the scheme of the Act would be defeated if the contrary view should prevail.

Notwithstanding the explicit language of section 80 that

> every transfer (of land) shall, when registered, operate as an absolute transfer of all such right and title as the transferor had therein at the time of its execution unless a contrary intention be expressed in such transfer,

I have no doubt that where it was intended to operate as a security for money, a registered transfer of land under the Act may, as between the parties, have no greater effect than a mortgage of land had under the old system, and that it is within the power of a court clothed with equitable jurisdiction to declare that the person registered as owner under such a transfer is merely a mortgagee and that his transferor has an equity of redemption in the land and to require the person registered as owner to submit to redemption. That such a court may exercise this jurisdiction where there is an unregistered deed of defeasance was determined in *Sander* v. *Twigg*(1). That it can afford the same relief where it is proved that the real understanding of the parties was that a transfer though absolute in form, should be taken by way of security only is, I think, equally clear — and that

(1) 13 V.L.R. 765.

apart from the provisions of section 126 of the statute. *Williams* v. *Box*(1). I make this passing allusion only because it is illustrative of the equitable jurisdiction which the statute, notwithstanding its sweeping terms, should be held not to have destroyed.

Although section 71 declares that—

> every certificate of title hereafter or heretofore issued under this Act shall, so long as the same remains in force and uncancelled be conclusive evidence at law and in equity as against His Majesty and all persons whomsoever that the person named in such certificate is entitled to the land described therein for the estate or interest therein specified,

were it not for the express provision of section 75, the title of a registered owner of land holding such a certificate would, nevertheless, be extinguishable by adverse possession for the period prescribed by the Statute of Limitations. *Belize Estate and Produce Co.* v. *Quilter*(2).

Without committing myself to the proposition advanced by Mr. Coyne that the Manitoba "Real Property Act" "merely introduced a simpler system of registration" and did not in any other respect interfere with, modify or displace the general law respecting real property, I think, that, in view of the instances to which I have alluded, it cannot be said that there is any clear or well-defined scheme of the Act to which it would be repugnant that a mortgagee should be given by contract a special power of sale independent of, and exercisable without reference to the provisions of sections 109 and 110. It would have been so very easy for the legislature to have provided, if that were its purpose, that, whatever the provisions of his mortgage, a mortgagee of land under the new

(1) 44 Can. S.C.R. 1. (2) [1897] A.C. 367.

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system should not have or exercise over the mortgaged land any power of sale other than that conferred by the statute, that, in the absence of such a provision, I think we would not be justified in assuming that it was intended that this should be the effect of the statute.

The argument against the existence of the right to confer any power of sale other than the statutory power based on the fact that the mortgagee has no estate or interest in the land loses any force it might otherwise have when we find that, notwithstanding that fact, a contractual power of sale and its exercise without reference to the provisions of sections 109 *et seq.* are expressly permitted under section 83, the purchaser, in the absence of a special provision in the mortgage enabling the mortgagee to convey the mortgagor's estate, being left to obtain title either by the voluntary act of the mortgagor or his representatives, or through the intervention of a court of equity.

Although the observation of Lord Macnaghten that

> no one, I am sure, by the light of nature, ever understood an English mortgage of real estate (*Samuel* v. *Jarrah Timber and Wood Paving Corp.*(1)),

may be applied with peculiar fitness and significance to a mortgage under the Manitoba "Real Property Act," I am, for the foregoing reasons, of the opinion that it is competent for the parties to such a mortgage to provide for a special power of sale exercisable without reference to the provisions of sections 109 and 110; that in the mortgage now before us this has been sufficiently done; that, in the absence of any proof of fraud or mistake in its creation or of imposi-

(1) [1904] A.C. 323 at p. 326.

tion or unfairness in its exercise, the power was effectual and was well exercised; and that the plaintiff obtained if not an equitable interest in the land at least an equitable right to a conveyance of the land from the mortgagor or his representatives which the court, in the exercise of its equitable jurisdiction, will recognize and enforce.

I would, therefore, with respect, allow the plaintiff's appeal with costs.

Judgment should, in my opinion, be entered declaring that the sale of the lands to the plaintiff was a valid and proper exercise of the power contained in the mortgage in question, and directing that the defendants, the National Trust Company, in whom as personal representatives of the deceased mortgagor, the legal ownership of such land is vested under 5 & 6 Edw. VII. (Man.), ch. 21, shall execute and deliver a transfer of such lands to the plaintiff, and that, upon the plaintiff filing in the land titles office such transfer together with the deed executed by the mortgagees in the exercise of the power of sale, the district-registrar shall cancel the existing certificate of title and issue a new certificate of title to the lands in question in favour of the plaintiff for such estate as the mortgagor held therein. The plaintiff should also have his costs of this action including the costs of the appeal to the Court of Appeal for Manitoba.

BRODEUR J.:—I concur with the views expressed by Mr. Justice Duff.

*Appeal dismissed with costs.*

Solicitors for the appellant: *Aikins, Fullerton, Coyne & Foley.*

Solicitors for the respondents: *Tupper, Galt, Tupper, Minty & McTavish.*