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*March 19, 20.

*May 1.

BERNARD SMITH (PLAINTIFF).....APPELLANT;

AND

THOMAS J. DARLING AND OTHERS (DEFENDANTS).....RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Mortgage—Action to redeem—Disabilities—Ontario "Limitations Act"—Action for recovery of land.

The disability clauses of the Ontario "Limitations Act" (R.S.O. [1914] Ch. 75) do not apply to an action by a mortgagor to redeem, Idington J. dissenting.

Faulds v. *Harper* (9 Ont. App. R. 537; 11 Can. S.C.R. 639) considered. Judgment of the Appellate Division (36 Ont. L.R. 587, affirmed.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1), reversing the judgment at the trial in favour of the plaintiff.

The plaintiff's action was to redeem mortgaged land and the "Statute of Limitations" was pleaded in defence. It was admitted that the statute barred the action unless the plaintiff was relieved by the provisions of section 40 of the "Real Property Limitations Act," R.S.O. [1914] ch. 75, which was the only question to be decided on the appeal.

A. B. Cunningham for the appellant cited *Hall* v. *Caldwell*(2), *Faulds* v. *Harper*(3), and *Pearce* v. *Morris* (4).

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

(1) 36 Ont. L.R. 587.
(2) 7 U.C.L.J. 42; 8 U.C.L.J. 93.
(3) 11 Can. S.C.R. 639.
(4) 5 Ch. App. 227.

J. A. Jackson for the respondent Darling, referred to *Pugh* v. *Heath*(1), *Kinsman* v. *Rouse*(2), and *Forster* v. *Patterson*(3).

J. L. Whiting, K.C. for the respondents Toner referred to Fisher on Mortgages (6 ed.) page 1403, *Lake* v. *Thomas*(4), and *Court* v. *Walsh*(5).

THE CHIEF JUSTICE.—The case has been very elaborately considered in the courts below and I do not find it necessary to deal with the arguments at any length.

The appellant admits that unless he is relieved by the provisions of section 40 of the "Limitations Act" because of his disability his claim is barred by the Act. I agree with the conclusion at which the judges of the Appellate Division unanimously arrived that we ought to follow the decision in *Faulds* v. *Harper* (6), to the effect that the disability clauses of the "Real Property Limitation Act" do not apply to actions of redemption. This decision followed the English cases of *Kinsman* v. *Rouse*(2), and *Forster* v. *Patterson*(3), construing the Imperial Act which for material purposes cannot be distinguished from the Ontario statute.

If the Chief Justice of Ontario had been content to rest his judgment upon the authority of this case it would have been unnecessary to say more, but in the course of his lengthy reasons he denies one of the grounds on which *Faulds* v. *Harper*(6), is supported, viz., that an action to redeem is not an action to recover land.

(1) 7 App. Cas. 235.
(2) 17 Ch.D. 104.
(3) 17 Ch.D. 132.
(4) 3 Ves. 17.
(5) 1 O.R. 167.
(6) 9 Ont. App. R. 537.

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The Chief Justice.

He says:

It is true that a suit to redeem has been decided to be a suit to recover land.

He does not refer us to any case in which it was so decided and I myself know of none. Reference is made indeed to an *obiter dictum* of Strong J. in *Faulds* v. *Harper*(1), to the effect that the House of Lords having decided in *Pugh* v. *Heath*(2), that a foreclosure suit is an action for the recovery of land, it follows *a fortiori* that a redemption suit is also an action or suit for the recovery of land.

I desire to speak with the greatest respect of the distinguished Chief Justice who presided for so long over this court, but the dictum cannot of course carry the same weight as a considered judgment in point. I do not understand how there can be any *sequitur*.

The action of foreclosure is different from the action to redeem in that by the former the mortgagee, who has the land merely as security for his debt, claims in default of payment to be adjudged the owner of the land. The action to redeem on the contrary supposes that the mortgagor is the owner of the property and seeks on payment of the amount of the debt for which it is security to have it discharged of the encumbrance.

I agree with the view expressed by Sir George Jessel M.R. in *Kinsman* v. *Rouse*(3), that

an action to redeem is not, properly speaking, an action to recover land.

Perhaps as Burton J. said in *Faulds* v. *Harper*(1),

a suit to redeem may be in a sense a suit to recover land.

It is not an ordinary action to recover land within the meaning of the "Limitations Act."

(1) 11 Can. S.C.R. 639. (2) 6 Q.B.D. 345; 7 App. Cas. 235.
(3) 17 Ch.D. 104.

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The appeal should be dismissed and as I cannot see that the case admits of any doubt the respondents are entitled to their costs both here and in the courts below.

DAVIES J.—I concur with Anglin J.

IDINGTON J. (dissenting)—The question raised herein is whether an infant entitled to redeem and recover mortgaged lands may be barred by the mortgagee's possession for ten years which possibly had begun to run the day after the infant's birth.

It is stoutly maintained in argument and indeed seems to have been held in the court below, that such has been the state of law in Ontario, at least ever since "The Real Property Limitation Amendment Act, 1874" came into force.

I cannot entertain that view as ever having been correct. I need not, as will presently appear, for the purposes of this case, go so far as this rejection, which I express of such view, may imply.

Inasmuch, however, as the respondent's contention is that the "Real Property Limitation Act," as it stood in the R.S.O. of 1897, is what should govern the rights of the parties herein and alleged to be in substance and effect identical with the like Act as it stood in R.S.O. 1877, which was passed upon by the Court of Appeal for Ontario in 1883 in the case of *Faulds* v. *Harper*(1), adversely to the view I hold, I may be permitted to suggest in a few sentences the line of thought which followed up should demonstrate the fundamental error of that decision and the argument now rested thereon.

That court was dealing with the amending Act of 1874 above referred to, which did not come into force till the 1st July, 1877, by which time the legis-

(1) 9 Ont. App. R. 537.

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lature had passed, on the 2nd March, 1877, the bill for bringing into force the R.S.O. of that year then contemplated save as to the incorporation therein of the legislation of that session.

None of that legislation, so far as I can see, dealt with what we are concerned with herein.

The Legislature had thus provided, before the amending Act came into force at all, for its consolidation and hence for a declaration of the law as contained therein and in the prior relevant Acts thus to be substituted by the consolidation.

Much, I think too much, was made then and is yet of the provision of the Act expressing its purpose, when introducing and providing for enforcing the consolidation as to the latter not being new law.

It seems to me that the gist of the whole section 10 so providing, and which reads as follows:—

> 10. The said Revised Statutes shall not be held to operate as new laws, but shall be construed and have effect as a consolidation, and as declaratory, of the law as contained in the said Acts and parts of Acts so repealed, and for which the said Revised Statutes are substituted

is in the words "as declaratory of".

True, the official proclamation was not issued till 31st December, 1877. Yet I think the foregoing facts must be considered as relevant to a finding of the actual intentions of the legislature.

Again, the amending Act itself, by section 15 thereof, provided that the Acts so amended should be construed as in force therewith unless so far as inconsistent with the amending Act.

When almost the whole purpose of the amending Act was to shorten the limitation period, as the recital shews, I fail to see why we should find anything inconsistent in reading section 5 thereof as if it had been (using the very words of section 15) "substituted in

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such statute," *i.e.*, the Consolidated Statutes of Upper Canada of 1859, for section 45 thereof, which had been in the case of *Hall* v. *Caldwell*(1), so interpreted in the Court of Error and Appeal in accord with what is now urged by appellant as applicable herein.

Be all that as it may, I think the revision of 1877, construed as courts are bound by above quoted section 10 to construe it, as declaratory of the law, should be read as it stands, and so read I see no difficulty in appellant's way.

I may also point out that the clear opinion of this court in same *Fauld's* Case(2), was against the construction adopted by the Court of Appeal for Ontario, although that opinion was perhaps not necessary for the reversal which was granted by the judgment of this court.

The opinion thus expressed has generally been referred to as an *obitur dictum*, but the more carefully one reads the judgment, he is driven to doubt it was not in the last analysis necessary to form such an opinion to maintain the judgment of reversal at all.

Moreover, the decision in *Heath* v. *Pugh*(3), seems to have been relied upon for the opinion so expressed, and conclusively to establish the proposition that a suit for foreclosure is an action to recover lands within the meaning of the words used in the first section of the English "Limitations Act," and in the Ontario Act so far as copied therefrom. Hence I think the correlative suit for redemption must likewise be so held.

As I suggested in argument, I am of the opinion that this case should be decided upon the "Limitations Act," being 10 Edw. VII., ch. 34, passed 10th March,

(1) 7 U.C.L.J. 42; 8 U.C.L.J. 93. (2) 11 Can. S.C.R. 639.
(3) 6 Q.B.D. 345; 7 App. Cas. 235.

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1910, long before the time had run for respondents to have acquired by possession any title in or right to bar appellant's remedy to recover the lands in question by virtue of any statutory limitation.

That Act was an independent piece of legislation which specifically repealed, by section 60 thereof, all the former Acts bearing in the slightest upon what is in question herein.

As I could not get any answer from counsel for respondent explaining why this statute should not govern, save that the revision of 1897, was in force when possession by his client began to run, I imagine there is no other answer.

I do not think it is a statute of limitation which happened to exist at any time before the title acquired by possession has extinguished that of him claiming, or at all events, barred or taken away his right of recovery, which can be made applicable and enforcible, but only a statute of limitations which either bars the remedy or extinguishes the title of him adversely affected by possession.

Clearly that of 1910 can alone be so depended on by the appellant or respondent, as defining and settling their relative rights.

Then the exception given therein in favour of such persons suffering disability as appellant was, whose rights are saved by section 40 of said Act, which was that in truth which was consolidated in the R.S.O. 1914, and by section 40 thereof, exactly the same (except two words not capable of altering the sense) would seem to me to be almost too clear for argument had we not actual proof of much argument in and about same by means only, however, of harking back to something repealed.

The said section 40, relating, as it expressly does, to the period of ten years or five years (as the case may be) herein limited, I am unable to see how there should be any doubt in regard to the construction of the Act if allowed to stand upon its plain reading without confusing it with other Acts it repealed, and other things which place no limitations upon the language used.

And when, by the revision and consolidation which took place four years later, this Act was consolidated with others in R.S.O. 1914, its adoption in its entirety was such as made of it a continuous uniform statutory definition of the relation of the parties hereto, from the time when that period of time brought in question thereby first began to run, up to the date of the bringing of this action.

Indeed, as already pointed out, virtually all prior Acts on the subject consolidated in chapter 133, R.S.O. 1897, except one section not bearing on what we have to deal with, had stood repealed for four years.

Again, if we consider the scope and purpose of the Act as a piece of independent and all comprehensive legislation on the subject, and we find it providing, as it does by section 24, for the common case of mortgage and other charges on land being barred by ten years after a present right to receive the money had accrued to some person capable of giving a discharge for or release of the same, thus obviously guarding the rights of infants, idiots and lunatics, it puzzles me to understand why the same classes as mortgagors or those who claimed under mortgagors, should intentionally be excluded from the like protection. I am clear it never was so conceived by the legislature.

Certainly there is in the frame of the Act and the language used in the parts involved herein, no resemblance between either of these Acts and that upon which

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the late Sir George Jessel or Bacon V.C. proceeded in the respective decisions given by either of them and so much relied upon.

There was more of something akin to analogy between the amending Act which the Court of Appeal for Ontario chose to act upon and the English Act. But why should that trouble us now? Why seek to rest a judgment herein upon the confusion of the past, obviously a possible means of injustice, when the legislature has made all clear and a possible source of injustice has been eliminated?

This is one of many cases wherein English judicial authority must be examined closely in relation to the Act construed in order to see, that the Act professing to deal with the same kind of subject matter as our own legislature may have dealt with, is in truth the same, and its purpose expressed in the same language.

The English decisions on analogous Acts may be most instructive, and no lawyer here should pass them idly by, but often they proceed as in the case before us upon an Act so differently framed that we cannot say they are in such cases authorities we are bound to follow, but rather may say are to be discarded, when found likely to confuse our thought and perpetuate injustice.

I think the appeal should be allowed with costs here and in the Appellate Division as against respondent Darling who should also bear the costs of the Toners.

There is a doubt in my mind as to the exact meaning of the formal judgment as it stands, and, rather than add to the confusion, I think, if the parties cannot agree as to the result flowing from the foregoing result, they should be left to speak to the minutes.

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DUFF J.—The single question involved in this appeal can be stated and discussed without reference to any of the facts which have given rise to the litigation. The question is this—do the disability clauses of the "Limitations Act" (Ontario) ch. 75, R.S.O. 1914, (section 40 et seq.) apply in the cases provided for by ss. 20, 21 and 22, relating to the time limit on actions of redemption brought by a mortgagor against a mortgagee who has obtained the possession or the receipt of the profits of some part of the land or the receipt of any rent comprised in his mortgage.

I propose first to consider the provisions of the statute as it now stands in their bearing upon this question, that is to say of Part 1. The leading enactment is section 5, which I quote in full:—

> No person shall make an entry or distress, or bring an action to recover any land or rent, but within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to some person through whom he claims, or if such right did not accrue to any person through whom he claims, then within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing the same. 10 Edw. VII. c. 34, s. 5.

Section 6 contains a series of provisions laying down the rule for determining in each of the classes of cases dealt with, when the right to make an entry or distress or bring an action to recover land or rent shall for the purposes of the Act be deemed to have "accrued"; the point of time, that is to say, from which the statutory period is to run in these cases in which, including of course all the cases falling within section 5, the time limit is calculated from the accrual of the right.

These provisions of section 6 obviously are of no assistance for determining the effect or for dictating the application of section 20 or the two succeeding sections,

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21 and 22; that is so because the time limit fixed by these sections upon the mortgagor's action for redemption in the particular case dealt with, namely, where the mortgagee is in possession of the mortgaged property in whole or in part, is calculated not from the time at which the right to bring an action for redemption accrues to the mortgagor, but from the time when the mortgagee has obtained possession; *Re Metropolis and Counties Building Society*(1), at pages 706-7; and it may be added that although it is not difficult to bring a mortgagee's action of ejectment, or a morgtagee's action for foreclosure within the third subsection of section 6, in order to determine the time of the accrual of his right within the meaning of section 5, it is not easy to find in any of the provisions of section 6 language which appears to contemplate a mortgagor's action for redemption.

Section 20 and the complementary provisions contained in sections 21 and 22 are substantive provisions not organically related to sections 5 and 6, and not depending for their operation upon the ascertainment, through statutory definition or otherwise, of the time when the mortgagor's right to bring an action of redemption "accrues."

Turning now to section 40, that section provides, speaking broadly, that where a disability exists at the date when the right to bring an action to recover land or rent accrues at the expiry of the period of ten years or five years, limited in the preceding sections, the period shall be extended to the end of a further five years or until the time when such disability shall have ceased, whichever happened first.

The application of this section involves the deter-

(1) [1911] 1 Ch. 698.

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mination of the time when the right in question accrues; the section is dealing with periods of limitation calculated from that point of time; it connects itself naturally with sections 5 and 6 and fits in with them and it is perfectly obvious that it was framed with direct reference to them.

It is impossible to affirm any such thing as to its relations with section 20. I do not say that it is altogether a misnomer to describe an action of redemption against a mortgagee in possession, as an action for recovery of land. I am inclined to think that from the language used in *Heath* v. *Pugh*(1), at page 352, by Lindley J. (he is alluded to by Lord Selborne in appeal as a judge "especially familiar with equity") he would have thought it was not. It is nevertheless true, that Sir George Jessel had no hesitation in declaring that "action for recovery of land" is not an apt description of an action for redemption, the mortgagee being in possession, *Kinsman* v. *Rouse*(2), and Lord St. Leonards appears to have held the same view. But the most formidable difficulty in the way of connecting section 40 with section 20, arises from the circumstances already mentioned, that section 40 contemplates a period of limitation calculated from the date of accrual of the right of action, while the time limit laid down by section 20 for actions of redemption, is determined by reference to a date which has no necessary relation to the accrual of the right to commence the action. In order to meet this difficulty and to make section 40 applicable to cases arising under section 20, it is necessary to read the words in section 40,—

time at which the right * * * to bring an action * * * first accrues as herein mentioned,

(1) 6 Q.B.D. 345.

(2) 17 Ch.D. 104.

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as the equivalent of

time from which the periods of limitation herein provided for, begin to run, as herein mentioned,

I think such a construction could not be supported. There is nothing in section 20 or section 40 either in language or substance which justifies the importing into section 20 of a qualification based on section 40. That section and the succeeding sections find their natural and, I think, their full effect when they are applied to cases arising under sections 5 and 6 and to any other cases, if there be such, where the period of limitation begins to run from the date of the accrual of the right of action.

I conclude, therefore, that the statute as it now stands, when due effect is given the structure of the relevant sections, read as a whole, gives no support to the appellant's claim. I should not have found it necessary to examine the history of the legislation, but I have, however, attentively considered the discussion of the subject in the judgment of the Chief Justice of Ontario, which shews very clearly that such an examination would afford confirmatory grounds for the view at which I have arrived.

As to *Faulds* v. *Harper* (1), I have only to repeat that the question upon which we have to pass is still unsolved, after one has reached the conclusion that an action for redemption against a mortgagee in possession may for some purposes, be considered an action for the recovery of land. I should be disposed indeed to think it is so within the meaning of section 16 of the "Limitations Act"; the question, as I have said, is whether it is an action to recover land within the meaning of section 40 of the "Limitations Act," and

(1) 9 Ont. App. R. 537.

that is a question which must, to my thinking, be decided, as I have already said, with reference to the enactments of the statute read as a whole.

ANGLIN J.—The material facts of this case are fully stated in the judgments below, 36 Ont. L.R. 587. All the authorities bearing upon the important question which it presents—whether the disabilities sections of the "Real Property Limitations Act of Ontario" are applicable to "actions to redeem"—are there so fully, and, if I may say so with respect, so ably discussed by the learned Chief Justice of Ontario, that any further detailed reference to them would be supererogatory. It is perhaps needless to add that they have, however, been carefully examined and fully considered.

I agree with the learned Chief Justice that the opinion expressed by Strong and Henry JJ. in *Faulds* v. *Harper*(1), that the disabilities sections apply to actions of redemption—must be regarded as obiter. Mr. Justice Strong, with whom Ritchie C. J., Fournier and Taschereau JJ. concurred, certainly disposed of that appeal on the ground, which had been taken by Spragge C.J.O. in the Court of Appeal(2), that the possession of the defendant was not that of a mortgagee but that of a fraudulent purchaser, and that the case was therefore not within the purview of the section of the statute which limits the time for bringing an action to redeem. There is no English decision upon the question presented which binds us—*Kinsman* v. *Rouse* (3), and *Forster* v. *Patterson*(4), the two authorities relied upon by the appellant, having been decisions of single judges. Nor is there any such well established

(1) 11 Can. S.C.R. 639.
(2) 9 Ont. App. R. 537.
(3) 17 Ch.D. 104.
(4) 17 Ch.D. 132.

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line of authority in the Province of Ontario as it would be undesirable that we should disturb. The view which prevailed in the Upper Canada Court of Error and Appeal in *Hall* v. *Caldwell*(1), was not accepted by the Ontario Court of Appeal in *Faulds* v. *Harper*(2), where the majority of the court approved and accepted the decisions in *Kinsman* v. *Rouse*(3) and *Forster* v. *Patterson*(4), overruling a divisional court which had declined to follow them(5). The view of the Court of Appeal was not accepted in this court by Strong and Henry JJ. who preferred that of the Court of Error and Appeal in *Hall* v. *Caldwell*(1). The question may, therefore, be regarded as quite open, if not *res integra*, in this court.

I should here state that there was no material difference between the terms and the collocation of the material sections in ch. 108 of the R.S.O. 1877, with which the courts dealt in *Faulds* v. *Harper*(2) and the corresponding terms and collocation in the Consolidated Statutes of 1859, ch. 88, upon which *Hall v. Caldwell*(1) had been decided. In both statutes the disabilities sections followed the section dealing with actions to redeem, and the "as aforesaid" in section 43 of 1877 was substantially the equivalent of the "hereinbefore mentioned," in section 45 of 1859. As now, in neither statute did the section dealing with actions to redeem contain any reference to disabilities.

Courts of equity, applying the provisions of the statute of 21 Jac., 1 ch. 16, to redemption suits in equity by analogy held plaintiffs therein to be entitled by a like analogy to the benefit of the disabilities section of that Act. *Beckford* v. *Wade*(6), on page 99; *Cook* v.

(1) 8 U.C.L.J. 93.
(2) 9 Ont. App. R. 537.
(3) 17 Ch.D. 104,
(4) 17 Ch.D. 132.
(5) 2 O.R. 405.
(6) 17 Ves. 87.

Arnham(1), at page 287, note (*w*). But suits in equity were brought directly within the Imperial Limitations statute, 3 & 4 Wm. IV., ch. 27, by sec. 24 thereof, and they were likewise expressly provided for in section 32 of the Upper Canada statute, 4 Wm. IV., ch. 1, which was carried into the Consolidated Statutes of 1859 as section 31 of ch. 88 and continued in the Ontario revision of 1877 as sec. 29 of ch. 108. This section was dropped from the revision of 1887, presumably because thought unnecessary after the introduction of the "Judicature Act" of 1881. Suits for redemption, specially provided for by section 28 of the Imperial Act of 3 & 4 Wm. IV., and by section 36 of the Upper Canada statute, 4 Wm. IV., ch. 1, are still explicitly covered in like terms by section 20 of the present Ontario statute. Since the statute of Wm. IV., it has not been necessary or permissible to deal with them by analogy as was formerly the practice in equity. The period of limitation to which they are subject and any qualifications upon it must be found within the statute.

The history of the Ontario statute under consideration is by no means conclusive upon the question before us. It rather presents different aspects according to the mode of looking at it, one or other of which lends colour to the contention of either party. The collocation of the sections in the Act of 1874 (ch. 16), and the use of the phrase "hereinbefore limited" in the disabilities section (No. 5) thereof made it very clear (as it had been under the Act of 4 Wm. IV., ch. 1) that that section was not meant to apply to the subsequent section dealing with actions of redemption (No. 8). The order of the sections was changed, however, in the revision of 1877, the redemption section (No. 19) being

(1) 3 P. Wms. 283.

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then placed before the disabilities section (No. 43) and the words "as aforesaid" replacing the words "hereinbefore limited" in the latter—a restoration of the collocation of the Consolidated Statutes of 1859 on which *Hall* v. *Caldwell*(1) had been decided. That this change might give rise to some uncertainty apparently occurred to the revisors of 1887, because, while they maintained the order of 1877, they substituted for the words, "as aforesaid," in section 43, the words "as in sections 4, 5 and 6 mentioned," thus putting it beyond question that section 43 was intended to apply only to cases within the three sections so enumerated and not to "actions to redeem" specially dealt with by section 19. No change was made in the revision of 1897. A new Act was passed in 1910 (chapter 34) preparatory to the revision of 1914. In view of the terms in which the commission of the revisors was couched (R.S.O. 1914, Vol. III, p. cxxxvii.) and of the fact that "The Limitations Act" was introduced and enacted in 1910 not as part of a revision, but as a separate Act, that statute cannot, I think, be regarded as subject to section 9 (1) of the "Act respecting the Revised Statutes of 1914," (3 & 4 Geo. V., ch. 2), but must be treated as new legislation. In the first of the disabilities sections of this Act (40) the words "as herein mentioned" were substituted for the words of section 43 of the Acts of 1887 and 1897, "as in sections 4, 5 and 6 mentioned," the collocation of the sections being left unchanged. The Revised Statute of 1914, ch. 75, is identical with the Act of 1910. Any uncertainty in the application of the disabilities sections caused by the change in the order of sections made in 1877, which had been so carefully counteracted in 1887, was thus unnecessarily

(1) 8 U.C.L.J. 93.

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and, I cannot but think, unfortunately revived. If any section which should have been included was omitted from the enumeration it might have been added.

Without suggesting that there was sufficient ground for such uncertainty, I am, with great respect, unable, in view of the explicit provision of clause (i) of section 29 of the "Interpretation Act" (R.S.O. ch. 1), to assent to the view expressed by the learned Chief Justice of Ontario that "the words 'as herein mentioned'" in section 40 of the Act of 1910 are "the equivalent of the words of the sections in the Revised Statutes of 1887 and 1897 which correspond to section 40, 'as in sections 4, 5 and 6 mentioned.'"

I have made this resumé of the history of the legislation under consideration in order that it may be understood that the effect of the various changes has not been overlooked.

But apart altogether from, and notwithstanding their history and the collocation of the sections in question in the Act of 1910 and the R.S.O. of 1914, ch. 75, I find in the terms of section 40 itself, cogent internal evidence of its inapplicability to section 20—the section dealing with "actions to redeem." The subject matter of section 40, as appears in its introductory terms, is a limitation period computed from

the time at which the right of any person to make an entry or distress or to bring an action to recover any land or rent first accrues.

It enables such a proceeding to be instituted

at any time within five years next after the time at which the person to whom such right first accrued ceased to be under any such disability or died, whichever of those two events first happened.

Section 5 prescribes the period within which the right to

make an entry or distress or bring an action to recover any land or rent.

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shall be exercisable, and section 6 defines when that right shall be deemed "to have first accrued." The identity of the language used in section 40 with that found in sections 5 and 6 is most significant.

Section 20, on the other hand, deals with a period of limitation reckoned not from the time of the first accrual of the right of action to redeem, but from another and usually an entirely different date, namely,

the time at which the mortgagee obtained the possession or receipt of the profits in any land or the receipt of any rent comprised in his mortgage,

which it fixes as that from which the period of limitation upon the right of the mortgagor, or any person claiming through him, to bring an action to redeem shall be computed.

The equitable right to sue for redemption accrues as soon as non-fulfilment of the condition or proviso for defeasance has made the estate of the mortgagee absolute at law. It is not from the date of that first accrual of the right to bring an action to redeem that the prescriptive period runs under section 20, but from that of obtaining possession or receipt of the profits of the land. The right of redemption, when that occurs, may not be in

the person to whom such right first accrued.

Yet it is from the cesser of his disability or his death that the five years' period under section 43 is to be reckoned. These are the incongruous features which seem to me to afford practically conclusive evidence that the provisions of section 40 were not intended to be applicable to the case specially dealt with by section 20. Section 43, as Sir George Jessel said in *Kinsman* v. *Rouse*(1),

evidently refers to cases of ordinary ownership, where the rightful owner has been dispossessed.

(1) 17 Ch.D. 104.

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Section 20, on the other hand, deals with cases where a mortgagee has taken the possession to which the terms of his deed entitled him. To quote the learned Chief Justice of Ontario:

> The words, "as herein mentioned," in s. 40 (*i.e.*, of the Revised Statutes of 1914), it will be observed, apply to the time at which "the right of any person to make an entry or distress or to bring an action to recover any land or rent first accrues." That is a matter dealt with by sec. 6, which defines the time at which the right first accrues in various cases, none of them being the case of a mortgagor seeking to redeem, and it is, I think, to these provisions that section 40 refers. The mortgage sections do not define the time at which the right to redeem shall be deemed to have first accrued, but the provision is that the action shall not be brought but within ten years next after the time at which the mortgagee obtained possession or receipt of the profits of the land.

Although, as was pointed out by Sir John Beverly Robinson in *Hall* v. *Caldwell*(1), the sole apparent object of making the special provision for mortgagors' actions to redeem, now found in section 20, was to settle the time from which the prescriptive period governing them should be computed (see comment of Patterson J. A. in *Faulds* v. *Harper*(2), at pp. 556-7), and although such actions, especially when the mortgagee is in possession after default, should be regarded as actions to recover lands, the fact that the statute makes such a special and essentially different provision for them takes them out of the operation of sections 5 and 6.

Because the terms in which it is couched in my opinion as clearly preclude its application to cases within section 20 as they make obvious its reference to cases within sections 5 and 6, I respectfully concur in the conclusion of the Appellate Division that the disabilities section (40) with the ancillary sections 41 and 42, does not apply to actions to redeem. But

(1) 8 U.C.L.J. 93.

(2) 9 Ont. App. R. 537.

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for the respect which I entertain for the eminent judges of this court and of the former Court of Error and Appeal of Upper Canada who held contrary opinions, I should have reached this conclusion without much hesitation.

Appeal dismissed with costs.

Solicitor for the Appellant: *A. B. Cunningham.*
Solicitor for the respondent Darling: *J. A. Jackson.*
Solicitors for the respondents Toner: *Nickle, Farrell and Day.*