1950
*June 21, 22
Nov 20

MATHEW HANSON and TEKLA HANSON, (DEFENDANTS) .... APPELLANTS;

AND

THE CANADA TRUST COMPANY and WILLIAM D. GLENDINNING, (PLAINTIFFS) .... RESPONDENTS;

AND

BONDHOLDERS' RE-ORGANIZATION COMMITTEE and H. S. BLACK *et al* .... RESPONDENTS;

AND

J. M. HICKEY.......................... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Mortgage—Proposed Sale of Property subject to Bond Mortgage—for Consideration other than Cash—Condition governing Bond Holders and Court's approval—What "fair and reasonable" to all parties interested—The Judicature Act, R.S.O. 1937, c. 100, s. 15(i).

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

Default having been made on bonds secured by a mortgage or trust deed, a meeting of the bondholders was held to consider a plan submitted on behalf of the mortgagors which provided for the sale of the equity of redemption to a company to be formed, payment to the bondholders of the full amount of their capital investment but not of the interest in default, and preservation of an equity to the mortgagors. The majority of the bondholders having voted approval an order was obtained from the Court under the provisions of s. 15(*i*) of *The Judicature Act,* R.S.O. 1937, c. 100, approving the terms of the proposed sale. The decision of the Court of Appeal reversing the Order was appealed to this Court.

Held: That the appeal should be dismissed.

Held: also by the majority of the Court that:

(1) The proposed arrangement was in substance a sale for a consideration other than cash within the terms of s. 15(*i*) and the judge of first instance was right in entering upon the merits of the proposal but the section does not enable the Court to sanction a sale on terms which will yield the mortgagor a substantial part of the sale price while yielding the mortgagee only a portion of the mortgage debt and having regard to the value of the property the terms of the sale could not be held to be fair and reasonable within the meaning of the Act.

(2) The majority bondholder in voting in favour of the plan was influenced by motives of benevolence and a regard for the moral claims of the mortgagors rather than by a consideration of the interests of the bondholders as a class and therefore the resolution approving the plan could not stand. *British American Nickel Corp.* v. *O'Brien* [1927] A.C. 369; *Ex Parte Cowen. In re Cowen* L.R. 2 Ch. App. 563, applied.

Locke J. agreed with the majority of the Court that the appeal should be dismissed but on the ground that the sale referred to in s. 15(*i*) is a sale under the power of sale contained in a mortgage, and as the matter was one of jurisdiction, the Court was without power to make the Order approving the proposed sale.

APPEAL from a judgment of the Ontario Court of Appeal (1), setting aside an order of Urquhart J. (2), approving the sale of the mortgaged property. Affirmed.

R. F. Wilson K.C. and H. F. Gibson for the appellants.

J. J. Robinette K.C. for the respondents, the Bondholders Re-Organization Committee and certain bondholders.

J. D. Arnup for J. M. Hickey, the majority bondholder.

E. G. Arnold for the respondents, The Canada Trust Co. and W. D. Glendinning.

(1) [1949] O.W.N. 803; [1950] 1 D.L.R. 375; 30 C.B.R. 126.

(2) [1949] O.W.N. 630; [1949] 4 D.L.R. 657; 30 C.B.R. 1.

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The judgment of Taschereau and Cartwright JJ. was delivered by

CARTWRIGHT *J.*: This is an appeal from the judgment of the Court of Appeal for Ontario (1) setting aside an order of Urquhart J. (2), made under section 15 (*i*) of *The Judicature Act* of Ontario, ordering and approving the sale of an apartment house property in the City of Kingston to Hanson Apartments Limited.

The appellants are the owners of the equity of redemption in the property in question. In 1929 when the apartment house was in course of construction, the appellants arranged with United Bond Company Limited to underwrite a bond issue of $135,000 6½ per cent first mortgage bonds, secured by a mortgage and trust deed dated 20th June 1929 made by the appellants as mortgagors to The London and Western Trusts Company Limited and Howard C. Wade as mortgagees. The plaintiffs are successors to these trustees. The trust deed is not in the material before us but we were informed by counsel that it is made pursuant to the *Short Forms of Mortgages Act,* contains the mortgagors' covenant to pay, creates a fixed and specific charge in favour of the trustees and contains an express power of sale, in the usual short form, on one month's default and one month's notice. It contains no provision for the holding of meetings of bondholders and no provision enabling a majority of the bondholders to sanction a sale, transfer or exchange of the mortgaged premises for a consideration other than cash. Unfortunately, United Bond Company Limited went into receivership with the result that the appellants although liable to pay bonds totalling $135,000 actually received only $86,700, an amount insufficient to complete the building. They succeeded in completing the building by using their own resources and by obtaining a loan of $60,000 from the Ontario Equitable Life Insurance Company secured by a first mortgage on the property, to which the bond mortgage was postponed by order of the Supreme Court of Ontario dated 27th January 1931. As collateral security to this $60,000 mortgage, life insurance policies totalling $100,000 were taken and assigned to the Ontario Equitable Life Insurance Company. It was stipulated that default in payment of the life insurance premiums

(1) [1949] O.W.N. 803. (2) [1949] O.W.N. 630.

would be regarded as default under the mortgage. The first two interest coupons on the bonds were duly paid on 20th December 1929 and 20th June 1930, respectively, but no further interest was paid until 1943. Since June 1943 substantial payments on account of interest have been made to the bondholders. On 12th November 1930 an action was commenced in the Supreme Court of Ontario by the then trustees under the bond mortgage against the defendants to enforce the security. That action is still pending and the order of Urquhart J. is styled in that action and "In the matter of section 15 (*i*) of *The Judicature Act* R.S.O. 1937 c. 100".

Since 18th December 1930 the respondent, The Canada Trust Company, and its predecessor, have been in possession of the mortgaged premises as receiver.

In or about the year 1933 the appellants bought in bonds of the face value of $63,900 and surrendered them to the trustees. In 1939 an unsuccessful effort to re-finance and end the receivership was made.

In 1949 the appellants put forward the plan which was approved by Urquhart J. The plan is signed by the appellants under date of 7th March 1949 and the following statement is appended to it duly sealed by Hanson Apartments Limited and signed by its proper officers:

> HANSON APARTMENTS LIMITED hereby authorizes and approves the offer and plan contained in the within letter and undertakes and agrees to effectually complete the same forthwith upon approval being given in accordance with the provisions of The Judicature Act.
>
> WITNESS the seal of the Company under the hands of its proper officers at Kingston, this 12th day of May, A.D. 1949.

On 30th May 1949 Barlow J. made an order upon motion of the appellants and the trustees, and with the consent of The Canada Trust Company in its capacity as receiver, directing The Canada Trust Company to summon a meeting of the bondholders on 20th June 1949

> for the purpose of considering, and if thought fit approving and sanctioning with or without modification or amendment, FIRST, a certain plan proposed by the defendants, Mathew Hanson and Tekla Hanson dated the 7th day of March, 1949, being Exhibit "A" to the said affidavit of Mathew Hanson and Tekla Hanson filed, providing for the sale, transfer or exchange of the said property and assets for a consideration wholly or in part other than cash, all as therein set out; SECONDLY, in default of approval of the said plan either as proposed by the defendants Mathew Hanson and Tekla Hanson or as modified or amended, any other plan that may be proposed at the said meeting or at any adjournment thereof

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for the sale, transfer or exchange of the said property and assets for a consideration wholly or in part other than cash; and for the purpose of transacting such other business as may be incidental, consequential or supplemental thereto;

The order contained directions as to procedure at the meeting, and provided that upon the termination of the meeting or any adjournment thereof the minutes should be filed with the Court and that the Canada Trust Company might apply for further directions.

At the date of the offer the property in question was encumbered as follows:

Ontario Equitable Life Mortgage	$57,500.00
Bonds outstanding—principal	71,100.00
Interest owing on bonds	93,082.52

The life insurance policies held as collateral security by the Ontario Equitable had a cash surrender value of $26,825.

Hanson Apartments Limited was incorporated under the Ontario Companies Act with an authorized capital of fifteen hundred 4 per cent non-cumulative preference shares of the par value of $50 each and twelve hundred common shares without par value. The plan was stated to contemplate:

(1) The purchase by the above company of the equity of Mathew and Tekla Hanson in the New Annandale property together with any and all rights, interest, choses in action, claims and demands they may have against the Trustees under the Trust deed, the Receiver and Manager, The Equitable Life Insurance Company of Canada, any bondholder, bondholders, or other person, persons or corporations arising out of the ownership and financing of the New Annandale Building, to be paid for by the allotment to the said Mathew and Tekla Hanson, or their nominees, of the 1,200 common shares.

(2) A loan by Hanson Apartments Limited in an amount sufficient for the purposes later enumerated secured by

(*a*) a first mortgage on the New Annandale property, and

(*b*) an assignment to the mortgagee of the four Equitable Life Insurance Company policies having recently a cash surrender value of $26,825.

(3) Retirement of the $71,100 in bonds and a discharge of the trust mortgage by giving to the bondholders the option of,

(*a*) preference shares in an amount equal to the face value of bonds held or,

(*b*) cash for the face value of the bonds held.

(4) The proceeds of the first mortgage loan to be used,

(*a*) to pay off the present Equitable Life Mortgage now amounting to $57,500;

(b) to pay those bondholders who elect to take cash, or part cash, for their second mortgage bonds; to set up a reserve for missing bonds; and to provide for disbursements incidental to carrying out the plan of re-financing.

The meeting was duly held. Of the $71,100 bonds outstanding $66,950 were represented. Bonds totalling $35,650 were voted in favour of the plan and $31,300 against it. All of the bonds voted in favour of the plan were owned by the respondent J. M. Hickey. Those voted against it were owned in varying amounts by one corporation and nine individuals. Following the meeting the appellants moved before Urquhart J. for an order approving the sale. The trustees took a neutral position. The minority bondholders opposed the motion.

The material before Urquhart J. disclosed the facts set out above and also the opinion of three valuators as to the value of the mortgaged premises. The valuations varied from a low of $165,000 to a high of "$250,000 if not a forced sale or $225,000 if the property were sold at a forced sale". Mr. Colin Drever, an architect practising his profession in Kingston, in an affidavit filed on behalf of the appellants, placed the value at $175,000.

Urquhart J. granted the motion. The formal order of the Court ordered and approved "the sale to Hanson Apartments Limited" of the mortgaged premises "for the consideration and upon the terms of the offer of Hanson Apartments Limited set out in the plan submitted by the defendants Mathew Hanson and Tekla Hanson dated the 7th day of March 1949, a copy of which appears as Schedule "A" to this order and is declared to be a part hereof". Paragraphs 2 and 3 of the order provided:

AND THIS COURT DOTH DECLARE that such sale for the consideration and upon the terms aforesaid is fair and reasonable having regard to the interests of all parties interested in the premises and property so mortgaged or charged by the aforesaid Mortgage and Deed of Trust AND DOTH ORDER THE SAME ACCORDINGLY.

AND THIS COURT DOTH FURTHER ORDER that leave be reserved to the parties hereto to apply for a further and subsequent Order or Orders making provision in such manner on such terms in all respects as to this Court may seem proper for the transfer to and the vesting in the purchaser or its assigns of the whole of the right, title and interest of the Plaintiffs in their capacities aforesaid and of the plaintiff The Canada Trust Company as Receiver and Manager, in the said property, assets and undertaking of the Defendants, and for the transfer to and vesting in the purchaser or its assigns of the whole of the right, title

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and interest of the Defendants in the said property, and for the distribution or other disposition of the proceeds of such sale, and for the protection of any or all persons whose interests are affected by such Order, and for all such incidental, supplemental and consequential matters as the Court may deem just.

The Court of Appeal, in allowing the appeal, dealt with only one ground which is stated in the reasons as follows:

Nor do I think it necessary to consider the merits of the scheme of re-financing proposed to be completed if the order of approval of Urquhart J. stands. Suffice it to say that the sale in question is one arranged solely by the defendants (the mortgagors) and is to a Company organized by the defendants and in which they would hold all or the greater part of the stock.

In my opinion, it is beyond question that the proposed sale is not a sale under the power of sale in the mortgage or trust deed.

The sole question, therefore, for determination on this appeal is: Is the jurisdiction conferred on the Court by sec. 15 (*i*) of *The Judicature Act,* confined to the sanctioning of sales for other than cash only in proceedings to realize under a power of sale contained in a trust deed or mortgage securing bonds or debentures?

In my opinion a reading of the terms of sec. 15 (*i*) requires an affirmative answer to such question. To paraphrase the provisions of that section, it will be noted that "the Court may in such action order and approve such sale". Now what is "such sale"? Is it "the" sale which has been sanctioned and approved by the holders of such bonds and debentures and is "the" sale which is "for a consideration wholly or in part other than cash"? Referring further to the words of the section, what is "the" sale which bondholders may sanction and approve? Is it "the" sale which may arise where "any action shall have been brought or shall be brought for the purpose of enforcing or realizing upon any such mortgage or charge", i.e. upon a mortgage or charge securing bonds or debentures? This can only be a sale by the mortgagee in realizing upon the security and in my opinion cannot refer to a sale by a mortgagor attempting to salvage his equity of redemption. There is no pretence that the sale in question in this matter is one under the power of sale provision of the trust deed.

In the section prior to the 1935 amendment which was then repealed and had substituted therefor the present section 15 (*i*), it is more abundantly evident that the power of the Court to approve was only in an action brought by the mortgagee or trustee to realize upon the mortgage security by a sale for a consideration other than cash.

* * *

The present scheme which the Court has been asked to approve is in effect a compromise or adjustment put forward by the debtors to arrange and re-adjust their liabilities with their various creditors. Failing the unanimous consent of all creditors it is not a matter for the Court's approval.

On the foregoing ground alone, which goes to the very root of the order appealed from, the appeal must succeed.

With the greatest respect to the learned Justices of Appeal, if I had reached the conclusion that the order of

Urquhart J. should be upheld upon the merits I would hesitate to give effect to the objection to the Court's jurisdiction upon which the judgment of the Court of Appeal is based.

The conditions necessary to give jurisdiction to the Court to approve a sale under section 15 (*i*) of *The Judicature Act,* so far as they are relevant to the case at bar, appear to me to be as follows:

(*a*) the existence of bonds secured by a mortgage;
(*b*) an action shall have been brought for the purpose of enforcing such mortgage;
(*c*) both of the above conditions being fulfilled the Court shall have ordered a meeting of the bondholders to be summoned;
(*d*) the holders of the bonds by a vote at such meeting of not less than fifty per cent in principal amount of the total bonds outstanding shall have sanctioned the sale, transfer or exchange of the property mortgaged for a consideration wholly or in part other than cash.

If all the above conditions are fulfilled the Court has, I think, jurisdiction to approve of the sale so sanctioned. Nothing is contained in the section to guide the Court as to how that jurisdiction shall be exercised except the provision that if the sale is approved it must be "on such terms in all respects as the Court shall think fair and reasonable having regard to the interests of all parties interested in the premises and property so mortgaged".

It is clear that, in this case, conditions (*a*), (*b*) and (*c*) mentioned above have been fulfilled. Whether or not condition (*d*) has been fulfilled depends upon whether the arrangement which is contained in the order of Urquhart J. can properly be described as a sale of the mortgaged premises for a consideration wholly or in part other than cash.

Such arrangement is clearly not a sale under the power of sale contained in the mortgage. It could not be, because the mortgage contains no power to sell for a consideration other than cash. But one of the purposes of the section appears to be to enable such sales to be made under mortgages containing no such power.

I agree with Mr. Wilson's submission that the validity of the sale is not to be tested by the origin of the proposal, but to enable it to derive validity from section 15 (*i*) it must be a sale of the mortgaged premises. Had the order of Urquhart J. been carried out the result would have been

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that Hanson Apartments Limited would have become the owner of the mortgaged premises, subject only to the first mortgage to the Ontario Equitable Life. All title previously held by the trustees or by the appellants would have been vested in Hanson Apartment Limited. The consideration passing from it would have been 1,200 fully paid shares of its common stock and $71,100 paid in cash or by the allotment and issue of fully paid preference shares or partly in cash and partly by the issue of such shares. This seems to me to be in substance a sale of the mortgaged premises for a consideration wholly or in part other than cash. There is one marked dissimilarity between the proposed arrangement and an ordinary sale by a mortgagee. In the latter case the whole consideration would be paid to the mortgagee and the owners of the equity would receive only the surplus, if any, remaining after the mortgage debt was fully satisfied, while under the proposed arrangement a definite portion of the consideration is to pass to the owners of the equity. I do not think that this goes to jurisdiction. The section is not designed to cover ordinary sales by mortgagees but rather special cases where the circumstances are such as to move the Court to approve a sale for a consideration other than cash even though no power to make such a sale is contained in the mortgage. The fact that the consideration is other than cash renders it necessary for the Court to consider how such consideration should be apportioned between the mortgagee and the mortgagor. The fact that the parties tentatively make this apportionment in the proposal does not, I think, take the case out of section 15 (*i*) so as to deprive the Court of jurisdiction; although unreasonableness in the proposed apportionment would move the Court to refuse its approval.

In my view the proposed arrangement may properly be regarded as being, in substance, a sale of the mortgaged premises to Hanson Apartments Limited for a consideration wholly or in part other than cash within the terms of section 15 (*i*) of *The Judicature Act* and Urquhart J. was right in entering upon a consideration of the merits of the proposal; but, with the greatest respect, I differ from the conclusion which he reached.

Before dealing with the details of the proposed arrangement I think it desirable to consider the interpretation of section 15 (*i*). That section reads as follows:

> (*i*) (i) In case bonds or debentures are secured by a mortgage or charge by virtue of a trust deed or other instrument and whether or not provision is contained in the trust deed or other instrument creating such mortgage or charge giving to the holders of such bonds or debentures or a majority, or a specified majority of them, power to sanction the sale, transfer or exchange of the mortgaged or charged premises for a consideration other than cash, and in case any action shall have been brought or shall be brought for the purpose of enforcing or realizing upon any such mortgage or charge, or for the execution of the trusts in any such trust deed or other instrument with or without other relief, the court may order a meeting or meetings of the holders of such bonds or debentures to be summoned and held in such manner as the court may direct, and if the holders of such bonds or debentures shall sanction or approve the sale, transfer or exchange of the property so mortgaged or charged for a consideration wholly or in part other than cash, the court may in such action order and approve such sale on such terms in all respects as the court shall think fair and reasonable having regard to the interests of all parties interested in the premises and property so mortgaged or charged, and in such order or by any subsequent order may make provision in such manner, on such terms in all respects as to the court may seem proper, for the transfer to and vesting in the purchaser or his or its assigns of the whole or any part of the premises and property so mortgaged or charged and so sold, and for the payment of the proper costs, charges and expenses and remuneration of any trustee or trustees under such trust deed or other instrument and of any receiver or receiver and manager appointed by the court, and of any committee or other persons representing holders of such bonds or debentures, and for the distribution or other disposition of the proceeds of such sale, and for the protection of any or all persons whose interests are affected by such order, and for all such incidental, consequential and supplemental matters as the court may deem just.
>
> (ii) The approval of the holders of any such bonds or debentures may be given by resolution passed at a meeting, by the votes of the holders of a majority in principal amount of such bonds or debentures represented and voting in person or by proxy, and holding not less than fifty per centum in principal amount, or such lesser amount as the court under all the circumstances may approve, of the issued and outstanding bonds or debentures in question. 1935, c. 32, s. 22.

Urquhart J. has construed the section as enabling the Court to sanction a sale on terms which will yield the mortgagors a substantial part of the sale price while yielding the mortgagees only a portion of their debt. It is well settled that statutes which limit or extend common law

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rights and which detract from rights of ownership must be expressed in clear and unambiguous language (*vide* Halsbury's Laws of England, 2nd Ed., Vol. 31, p. 502, s. 645, and cases there cited). I can find no words in the section which are apt to bring about so revolutionary a change in the respective rights of mortgagees and mortgagors on a sale of the mortgaged premises.

The effect of the section is, I think, to create a new procedure in an action on a bond mortgage. It enables a majority of the bondholders to bind all the bondholders by the terms of a sale of the mortgaged premises for a consideration wholly or partly other than cash, but the power so given is made subject to the safeguard that it may be exercised only upon the Court being satisfied that the terms are fair and reasonable having regard to the interest of all parties interested in the premises. I find nothing in the section, certainly nothing in express words, to suggest that the consideration received shall be dealt with, as between the mortgagee and the mortgagor, in any manner other than that long established in equity; that is to say the mortgagee is entitled to receive the full amount of his debt and must account to the mortgagor only for the surplus, if any, remaining thereafter.

In the case of a sale for cash this is a mere matter of accounting; but when the sale is for other than cash it is necessary to determine what portion of the consideration is a fair equivalent of the mortgage debt and should therefore become the property of the mortgagee and what, if anything, remains for the mortgagor. No doubt cases may arise where there is room for difference of opinion as to whether the portion of the consideration proposed to be treated as payment of the mortgage debt is a fair equivalent of that debt, and in such cases the bona fide opinion of the majority bondholders may well be allowed to govern the minority. The owners of the equity also have a vital interest in the matter if it can be suggested that the total consideration is of greater value than the amount of the mortgage debt. Considerations such as these, and the list is not intended to be exhaustive, would seem to give meaning to the words of the section stressed by Urquhart J. "having regard to the interests of all parties interested in the premises and property so mortgaged". I do not think

that these words should be interpreted as enabling the Court to sanction the appropriation of part of the consideration for the sale to the owners of the equity in a case where it is clear that part only of the mortgage debt is being satisfied.

In the case at bar, if the lowest figure mentioned in any valuation is taken, the mortgaged premises would appear to be worth $165,000. If from this is deducted the difference between the amount of the first mortgage and the cash surrender value of the life insurance policies held as collateral thereto, there remains a net value of $134,325. Under the proposal put forward the mortgage debt, which with interest amounts to $164,182.52, is to be extinguished by the payment of $71,100 in cash or paid up preference shares and the balance of the consideration is to go to the owners of the equity. It was not suggested that the four per cent non-cumulative preference shares could be reasonably regarded as worth more than their par value.

On its face the proposal does not seem attractive from the bondholders' point of view nor such as should be forced upon an unwilling minority. It is said, however, that the majority of the bonds have been voted in favour of the proposal and that the Court should not, in the words of McTague J. "substitute its judgment for the business judgment of reasonable men voting in their own interest" (*Montreal Trust Co.* v. *Abitibi Power & Paper Co.* (1). On the material in this case, I do not think that the proposal could be held to be reasonable having regard to the interests of the minority bondholders.

It will be remembered that all the bonds voted in favour of the proposal were owned by Mr. J. M. Hickey. It is conceded by all counsel that Mr. Hickey has acted throughout in good faith; but I can find no support in the material for the finding of Urquhart J. that Mr. Hickey "thought what he did was the best in his own interest" or that the rejection of the proposal would "put his holdings in jeopardy".

Two affidavits made by Mr. Hickey appear in the material but neither of them touches on his motives for supporting the plan, although they negative any sugges-

(1) [1938] O.R. 81 at 92.

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tion that he was acting as agent of the appellants. It seems to me that Mr. Hickey's motive is to be inferred from the wording of the plan. The plan points out that most of the outstanding bonds were acquired by their present holders for a fraction of their face value so that if the bonds are now surrendered on payment of the principal only the investment will have been a profitable one for the bondholders; that the bondholders' position has been greatly improved by the action of the appellants in purchasing and surrendering $63,900 of the bonds; that the appellants have made a total investment in the property of a very large amount all of which they are in danger of losing if the bondholders insist on their full legal rights; that the appellants have had no income from their investment during a period of twenty years while the total interest payments to the bondholders have been very substantial and that the present comparatively satisfactory condition of the investment is the result of the strenuous, prolonged and unrewarded efforts of the appellants. Following the recital of these facts the plan contains the following:

> We appeal to your sense of justice and fair play. We ask you to conscientiously review the facts that we have given you. If you do that we are confident you will give this plan your support.

The plan is, I think, a frankly worded appeal to the generosity and fair-mindedness of the bondholders. It does not attempt to disguise the fact, which would appear from the figures as to the value of the premises quoted above to be self-evident, that, if minded to do so, the bondholders can obtain payment of a substantially greater proportion of the mortgage debt than is offered by the plan.

This is not a case in which we are considering findings of fact made by the judge of first instance after hearing *viva voce* evidence. The application was argued and decided on affidavits and an appellate court is in as good a position as was the learned judge who heard the motion to draw inferences from the facts deposed to. I think the proper inference is that Mr. Hickey was moved to vote as he did by generosity and by an appreciation of the strong moral claims put forward by the appellants. Having reached this conclusion I think that we are bound by authority to hold that a resolution passed by votes cast

with such a motive cannot stand. I think that the principle to be applied is set out in the following passages from the judgment of the Judicial Committee in *British America Nickel Corporation* v. *O'Brien* (1). At page 371 Viscount Haldane says:

Before their Lordships proceed to consider the somewhat involved circumstances in which the question arises, it will be convenient that they should refer to the principle to be applied in weighing the outcome of these circumstances.

To give a power to modify the terms on which debentures in a company are secured is not uncommon in practice. The business interests of the company may render such a power expedient, even in the interests of the class of debenture holders as a whole. The provision is usually made in the form of a power, conferred by the instrument constituting the debenture security, upon the majority of the class of holders. It often enables them to modify, by resolution properly passed, the security itself. The provision of such a power to a majority bears some analogy to such a power as that conferred by s. 13 of the English Companies Act of 1908, which enables a majority of the shareholders by special resolution to alter the articles of association. There is, however, a restriction of such powers, when conferred on a majority of a special class in order to enable that majority to bind a minority. They must be exercised subject to a general principle, which is applicable to all authorities conferred on majorities of classes enabling them to bind minorities; namely, that the power given must be exercised for the purpose of benefiting the class as a whole, and not merely individual members only. Subject to this, the power may be unrestricted. It may be free from the general principle in question when the power arises not in connection with a class, but only under a general title which confers the vote as a right of property attaching to a share. The distinction does not arise in this case, and it is not necessary to express an opinion as to its ground. What does arise is the question whether there is such a restriction on the right to vote of a creditor or member of an analogous class on whom is conferred a power to vote for the alteration of the title of a minority of the class to which he himself belongs.

Viscount Haldane then proceeds to discuss the cases of *Northwest Transportaton Company* v. *Beatty* (2) and *Burland* v. *Earle* (3) and continues:

It has been suggested that the decision in these two cases on the last point is difficult to reconcile with the restriction already referred to, where the power is conferred, not on shareholders generally, but on a special class, say, of debenture holders, where a majority, in exercising a power to modify the rights of a minority, must exercise that power in the interests of the class as a whole. This is a principle which goes beyond that applied in *Menier* v. *Hooper's Telegraph Works* (4), inasmuch as it does not depend on misappropriation or fraud being proved. But their Lordships do not think that there is any real difficulty in combining the principle that while usually a holder of shares or debentures may

(1) [1927] A.C. 369.
(2) (1887) 12 App. Cas. 589.
(3) [1902] A.C. 83.
(4) (1874) L.R. 9 Ch. 350.

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vote as his interest directs, he is subject to the further principle that where his vote is conferred on him as a member of a class he must conform to the interest of the class itself when seeking to exercise the power conferred on him in his capacity of being a member. The second principle is a negative one, one which puts a restriction on the completeness of freedom under the first, without excluding such freedom wholly.

I think that the words of Lord Cairns in *Ex parte Cowen. In re Cowen* (1) are applicable to the case at bar. The effect of the judgment is accurately summarized in the head-note as follows:

The power given by the 192nd section of the *Bankruptcy Act*, 1862, enabling the majority of creditors assenting to a deed of arrangement to bind the non-assenting minority, is a statutory power, and must be exercised *bona fide* for the benefit of all the creditors.

At page 570 Lord Cairns says:

But even without any ingredient of fraud, if the creditors, from motives of charity and benevolence, which might be highly honourable to them, were willing to give the debtor a discharge on payment of a composition wholly disproportioned to his assets, that would not be such a bargain as the Act requires, and would not bind the non-assenting minority.

I cannot find on the material that Mr. Hickey exercised his voting power for the purpose of benefiting the class of bondholders as a whole although, if I may borrow the words of Lord Cairns, I think that his motives were highly honourable to him.

For the above reasons I think that the resolution approving the plan cannot stand and that this appeal should be dismissed.

I should mention that while it appears to have been argued in the Courts below that section 15 (*i*) of the *Ontario Judicature Act* is *ultra vires* of the Provincial Legislature, no such argument was addressed to us and for the purposes of this appeal I have assumed, without deciding, that the section is valid. I do not mean by this form of expression to suggest that I entertain any doubt of its validity in a case where no question of insolvency is raised.

Ordinarily, when we are dismissing an appeal we should not, I think, vary the order as to costs made by the Court of Appeal; but I understood all counsel to assent to the view expressed by Mr. Wilson at the conclusion of his able

(1) (1867) L.R. 2 Ch. App. 563.

opening argument that, regardless of the outcome of the appeal, all costs should be ordered to be paid out of the assets in the possession of the Canada Trust Company as receiver and I think that under the peculiar circumstances of the case this is a proper course to follow. I would therefore dismiss the appeal and direct that the costs of all parties of the motion before Urquhart J., of the appeal to the Court of Appeal and of the appeal to this Court be paid forthwith after taxation thereof by the Canada Trust Company out of the property and assets in its possession as receiver and manager, the costs of the plaintiffs as between solicitor and client.

RAND J.:—As I apprehend it, the judgment of the Court of Appeal centres on the view that, as the effect of section 15 (*i*) of *The Judicature Act* is to enlarge a power of sale under a trust deed or similar instrument by annexing to it authority to sell for a consideration in whole or part other than cash, the sale proposed here, being that of the equity of redemption and not under the power, is unauthorized.

The provision, in the statute, for terms which the Court "shall think fair and reasonable having regard to the interests of all parties interested in the premises", and "for the protection of any or all persons whose interests are affected by such order", including those of the mortgagor, particularly as contrasted with the language of the subsection as enacted in 1917 and repealed by the amendment now in force, makes it clear, whether the power is viewed as purely statutory or as an addition to that provided by the deed, that in such a transaction, the senior security holders and the Court may approve of benefits to junior interests: and I see no reason why it should not extend to the case where the mortgagor is an individual.

The language of the proposal is not as apt and precise to the form contemplated as it might be; but that it is intended to propose a disposal appropriate to and made under the relief claimed in the proceedings is, I think, unquestionable. There is nothing technical necessary to its language and why any interested party should not be at liberty to make it has not been made apparent. What must be looked at

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is the arrangement as a whole and the object in view. In the preliminary stages of meetings and approval, there was no doubt in the minds of any of those now objecting of what was being put before them, and there is equally no doubt of that in my mind: it was and is a sale in the proceedings on the terms presented, and the proceedings are within the very words of the section.

That being the case, can the terms be said to be fair and reasonable? The conditions in which this legislation was enacted are a matter of common knowledge. We were in the depths of a worldwide depression, which, in this country, reached unexampled proportions. The terms are to be "fair and reasonable". What is "fair" to the mortgagee? to the mortgagor? This is not an oft-used word in the ordinary statutory vocabulary relating to mortgages; and the question which meets us at the outset is, can the existing balance sheet between the two parties be deliberately altered in favour of the mortgagor?

That question is one of difficulty, but I have been driven to the conclusion that where, as against a sale for cash, the terms could not prejudice the mortgagor and could not add to the benefit or interest of the mortgagee, the obligation cannot be altered for the purpose of transferring a possible benefit to the mortgagor. No one here suggests a sale for cash; the interest of both mortgagee and mortgagor seems to lie in working out the debt over a long term; but in that form, to require the mortgagee to surrender part of his claim is to transfer a possible benefit from him to the mortgagor. If, in the end, only the amount as reduced should be realized, the mortgagee would take all; if any more were realized, he would so far be prejudiced to the advantage of the mortgagor.

The ordinary rule is that such a right can be impaired only by clear and precise language of legislation, but that is not the nature of the language before us. The bonds have the entire solvency of the mortgagor to support them, and to cut the amount down except by a discharge in bankruptcy has uniformly been looked upon as an exceptional exercise of legislative power. The conduct of the mortgagor in relation to this matter has admittedly been most meritorious; his appeal for consideration is corre-

spondingly strong; and one may be without any sympathy whatever with the action and attitude of the mortgagee. But the desirability of adjusting the interests of these parties in the "fair and reasonable" manner conceived by Urquhart J. is one that must be decided by the legislature and declared, not by general words which leave the long established underlying rules of interpretation untouched but, as in the case of the *Farmers' Creditors Arrangement Act,* S. of C., 1934, c. 53, by words which are unmistakable in intent.

I am, therefore, unable to find that the proposed terms are within the section, and the appeal must be dismissed. The costs of all parties will be paid out of the property.

ESTEY J.:—This is an appeal from an order of the Court of Appeal in Ontario reversing an order approving a sale of property under s. 15 (*i*) of *The Judicature Act,* R.S.O. 1937, c. 100.

Mathew and Tekla Hanson, with a view to the construction of the new Annandale Apartments in the City of Kingston, under date of June 20, 1929, arranged with United Bond Company Limited to underwrite a bond issue of $135,000 with interest at 6½ per cent secured by a first mortgage.

On November 12, 1930, the mortgagors having made default, action was commenced by writ of summons in the Supreme Court of Ontario to enforce the mortgage dated June 20, 1929, for $135,000, and for the appointment of the London and Western Trust Company Limited as receiver and manager. On December 18, 1930, the said Trust Company was appointed receiver and manager and it or its successor, The Canada Trust Company, has been in receipt of the rents and profits at all times since that date. The apartment at that time was 75 per cent completed. It was finished by virtue of a further loan of $60,000 from the Ontario Equitable Life Insurance Company of Canada secured by a mortgage which was given priority over that for the $135,000 securing the bonds.

On May 30, 1949, Mr. Justice Barlow in the foregoing action authorized under s. 15(*i*) the holding of a meeting

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of the bondholders to consider the sale of the property for a consideration other than cash. The meeting was held on June 20, 1949. At that time there were $71,100 of the original $135,000 bonds outstanding, of which $66,500 were represented at the meeting. The proposed sale was approved by a vote representing $35,650 in favour, while the holders of $30,850 voted against it. (This figure of $30,850 was later corrected to read $31,300, and the total therefore represented at the meeting was $66,950.) One person owned all the bonds voted in favour of the sale.

On June 20, 1949, the first mortgage in favour of the Ontario Equitable Life Insurance Co. amounted to $57,500 with a cash surrender value in the four insurance policies held as collateral thereto of $26,825. The net mortgage position was therefore $30,675 plus $71,100 of bonds and unpaid interest on these bonds of $93,082.50, or a total in mortgage indebtedness of $194,857.50 of the original mortgage indebtedness of $195,000.

The proposed purchaser, Hanson Apartments Limited, is a corporation of which the mortgagors obtained the incorporation for the purpose of concluding the proposed sale. The capital stock consists of (*a*) 1500 4 per cent non-cumulative preference shares par value of $50 each, (*b*) 1200 common shares without nominal or par value.

The proposal is that Hanson Apartments Limited would purchase "the equity of Mathew Hanson and Tekla Hanson in the New Annandale property" and would pay therefor 1200 common shares. Hanson Apartments Limited would borrow upon the security of the New Annandale property and the cash surrender value in the policies of insurance above mentioned a sum sufficient to pay off the $57,500 of the first mortgage to the Ontario Equitable Life Insurance Company of Canada, and such further amount as might be required to pay to those holders of the $71,100 bonds who desired to be paid cash. These bondholders might elect to take either cash or the 4 per cent non-cumulative preference shares. The plan provided for the retirement of the preference shares, but so long as they were held by the bondholders, the latter would share equal voting rights with the common shareholders.

The mortgagors in presenting the proposal described it as "eminently fair and equitable." These bonds they emphasized were quoted in the 1930's as low as $200 a thousand and had gradually increased until the end of 1948 "the quoted bid price had increased to $920 a thousand." This, it was suggested, was due largely to the fact that the mortgagors had purchased these bonds which, in terms of par value, totalled $63,900 and had, in 1931, surrendered them to the trustees. They point out that had they not done so the present "offer of a full return of capital on second mortgage bonds would be impossible"; that there are very few of those who purchased bonds originally who are now the holders thereof and that the great majority of the present holders purchased them as a speculative investment and, in particular, those who had purchased bonds at less than $680 have, since 1943, received an "impressive" rate of interest; that over the 20 year period the bondholders had received 3 per cent simple interest on the par value of the bonds, while the mortgagors' investment of $150,000 had remained frozen without income and in continual jeopardy. The plan concluded:

> We appeal to your sense of justice and fair play. We ask you to conscientiously review the facts that we have given you. If you do that we are confident you will give this plan your support.

The minority bondholders contend that the sale is not fair and reasonable. They point to their contractual rights and the mortgage position of the premises; that the first two coupons were paid on the respective due dates December 20, 1929, and June 30, 1930. No. 3 coupon was not paid until June 20, 1943. Thereafter coupons were apparently paid as and when funds permitted. Since 1943 nine coupons have been paid in full and there is still outstanding a total of over $93,000 of unpaid interest; that, in fact, the mortgagors have no equity in the premises and through this sale seek to acquire an immediate equity about equal to the arrears of interest in an amount of over $93,000.

Sec. 15(*i*) provides that after the bondholders have approved of the sale then

> the court may in such action order and approve such sale on such terms in all respects as the court shall think fair and reasonable having regard to the interests of all parties interested in the premises and property.

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The first mortgagee (The Equitable Life Insurance Company of Canada) would, under the plan, be paid in full and has taken no part in this application. The parties whose interests, therefore, must be considered are the bondholders and mortgagors.

The provisions of sec. 15(*i*) require consideration of the terms of the proposed sale rather than its origin or purpose. Wherever or however the sale may originate, the approval authorized by the Statute is of a sale the terms of which are "fair and reasonable having regard to the interests of all parties interested in the premises and property." Many of the factors which have been urged in support of this plan may be of importance if the matter were to be considered from another point of view, but they do not assist in determining whether the sale is fair and reasonable within the meaning of the Statute.

Affidavits were filed in which the deponents expressed their respective opinions as to the value of this property and these varied from $165,000 to $250,000. If a valuation approximating $200,000 be accepted, a sale for that amount would discharge the mortgage indebtedness of about $195,000 in full. At the hearing it seemed to be the opinion that either that amount or some amount approximating $225,000 would be a fair value. If the property was sold at the latter amount the equity of the mortgagor would be approximately $30,000. Under the present plan the bondholders forego over $93,000 of interest and, if they accept bonds, their interest rate is reduced from 6½ per cent to 4 per cent and it would seem that the benefit of this reduction would pass to the mortgagors who, if the plan worked out as contemplated, would ultimately own the shares in Hanson Apartments Limited.

A statement of receipts and disbursements was filed for the 7½ year period from January 1, 1941, to June 15, 1949. It disclosed that for that period the property had not earned sufficient to pay the carrying charges and the interest in full. No attempt, however, was made to break down or analyze the 7½ year financial statement, or to compute,

upon the basis thereof, what the property ought to realize at a sale. Moreover, one of the valuators stated:

> The apartments are attractive and I should consider they would always be in demand * * * It seems to me that the rentals of all the apartments are low, particularly the upper five-room apartments.

He suggested the low rents were due to rent control.

S. 15(i), in providing for a sale in judicial proceedings for a consideration other than cash, effects a change in the common law. Apart from this express change it would appear the Legislature intended the sale here contemplated should retain all its other common law attributes. When, moreover, the section provides "a Court may * * * order and approve such sale on such terms in all respects as the Court shall think fair and reasonable having regard to the interests of all parties interested in the premises * * *", it clearly expresses the factors that ought to be considered upon an application for the Court's approval.

Under the terms of the proposed sale the mortgagees forego the items above indicated and the mortgagors, through Hanson Apartments Incorporated, benefit thereby. This is sought to be justified upon the basis that the history of the property and the contribution of the mortgagors have been such that the mortgagees ought to accept this sale as "eminently fair and equitable." A sale supported only upon that basis is not contemplated by the statute. Then when regard is had to the valuation of the premises filed as a part of this record, as well as the desirability of the premises and the low rents that have been realized, there is absent in the material the evidence which would support a conclusion that the sale is fair and reasonable within the meaning of s. 15.

The respondent bondholders not only opposed the approval of the sale on the basis that it is not fair and reasonable, but that the approval of the majority bondholder is not, in the circumstances, valid within the meaning of the section. They do not suggest bad faith on his part. They do contend, however, that in casting his vote he did not exercise a sound business judgment *qua* bondholder, but rather was unduly influenced to do so out of consideration for the mortgagors. The record discloses

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that this bondholder has acted as solicitor for the mortgagors on other occasions, in particular upon a similar but unsuccessful application in this action in 1939. He acquired a number of these bonds in his own right and, as he deposed:

> In 1948, finding myself with a substantial investment in Annandale bonds but not with the majority of the bonds outstanding, I purchased some bonds at a premium over par for the purpose of holding the majority of the bonds to protect my investment.

Moreover, the appellants point to the fact that in submitting this plan to the bondholders the mortgagors ask that those bondholders who were favourable to the plan and who propose to vote by proxy should nominate the majority bondholder as their proxy.

The authority of the majority to bind the minority is contained in s. 15(*i*) and the relevant principle to be applied is stated by Viscount Haldane:

> But their Lordships do not think that there is any real difficulty in combining the principle that while usually a holder of shares or debentures may vote as his interests directs, he is subject to the further principle that where his vote is conferred on him as a member of a class he must conform to the interest of the class itself when seeking to exercise the power conferred on him in his capacity of being a member. The second principle is a negative one, one which puts a restriction on the completeness of freedom under the first, without excluding such freedom wholly. *British America Nickel Corporation* v. *O'Brien* (1).

And at p. 378 (1128 D.L.R.):

> But as that vote had come to him as a member of a class he was bound to exercise it with the interests of the class itself kept in view as dominant.

That such must be the dominating factor is emphasized by Lord Cairns in *Ex parte Cowen* (2):

> But even without any ingredient of fraud, if the creditors, from motives of charity and benevolence, which might be highly honourable to them, were willing to give the debtor a discharge on payment of a composition wholly disproportioned to his assets, that would not be such a bargain as the Act requires, and would not bind the non-assenting minority.
>
> But if not * * * that these assenting creditors, being connected with the debtor, or his personal friends, and wishing to shew kindness and generosity to him, were content to take this nominal composition, and to give him his discharge. In that case, although the transaction

(1) [1927] A.C. 369 at 373; [1927] 1 D.L.R. 1121 at 1124

(2) (1867) L.R. 2 Ch. 563 at 570.

might not amount to a fraud, yet it was not a *bona fide* bargain, and could not bind the minority. In either view of the case, therefore, the Commissioner was right, and the appeal must be dismissed with costs.

The majority bondholder acquired, in 1948, sufficient additional bonds at a price above par in order that he might have a majority thereof for the purpose of protecting his investment, and in 1949 cast his vote in favour of the approval of a sale that, in effect, cancelled all arrears of interest upon these bonds and reduced his return from 6½ per cent to 4 per cent if he accepted preferred shares, while the other bondholders holding a very substantial proportion of the bonds opposed the sale. Without in any way doubting his good faith, these circumstances, unexplained as they are, support the view that the majority bondholder, in voting in favour of the plan, was prompted to do so by reasons of benevolence rather than those business considerations which one would take into account when determining a vote in the interests of the bondholders.

The appeal should be dismissed, the costs of all parties to be paid by the Canada Trust Company out of the assets in its possession as receiver and manager of the property in question. The trustees will have their costs on a solicitor and client basis.

LOCKE J.:—This is an appeal from a judgment of the Court of Appeal for Ontario reversing an order of Urquhart J. made under the provisions of section 15(*i*) of *The Judicature Act,* R.S.O. 1937, c. 100, approving the sale of the New Annandale Apartments in Kingston, the property of the appellants, under the following circumstances.

By a mortgage and deed of trust dated the 20th day of June, 1929, the appellants mortgaged and charged the property in question in favour of the London and Western Trusts Company Limited and Howard C. Wade to secure the payment of an issue of bonds in the principal amount of $135,000 payable over a period of seven years, together with interest at 6½ per cent per annum. The purpose of the bond issue was to finance the building of the apartment block but, while bonds to the full amount made their way into the hands of the public, only a portion of the amount realized was received by the mortgagors, owing mainly to

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the subsequent insolvency of the fiscal agents employed in marketing the bonds, and the amounts received were insufficient to complete the building. Defaults having been made under the mortgage the trustees on November 12, 1930, issued a writ, endorsed with a claim to enforce the deed of trust, for the appointment of the London and Western Trusts Company Limited as receiver and manager, and for possession. By an order of the Supreme Court of Ontario made on December 18, 1930, the trust company was appointed receiver and manager of all the property and assets covered by the mortgage on behalf of the mortgagees and the holders of first mortgage bonds. On January 27, 1931, a further order was made granting liberty to the receiver to borrow a sum of $60,000 from the Ontario Equitable Life and Accident Insurance Company for the purpose of completing the building and permitting the appellants to execute a mortgage to secure the amount, such mortgage to constitute a first charge upon the property and assets in priority to the mortgage of June 20, 1929. With these further moneys the building was completed: the London and Western Trusts Company Limited continued in possession as receiver, collecting the rents and managing the property until the acquisition of the undertaking and assets of that company by the respondent the Canada Trust Company early in the year 1947: since that time these duties have been performed by the last named company. By an order of October 31, 1947, it was directed that the action commenced in November 1930 be continued in the name of the said Canada Trust Company and the respondent Glendinning who, by an order made in February, 1932, had been substituted as trustee in the place of Wade. The result of the operation of the property by the receiver up to the date of the present application of the appellants has been to reduce the principal amount of the first mortgage to the Ontario Equitable Life and Accident Insurance Company to the amount of $57,500 to maintain in force life insurance policies taken out in 1931 as additional security for the said company's loan then having a cash surrender value of $26,825 and to maintain the property. The appellants during this period have purchased and

retired bonds of the principal amount of $63,900 of the original issue of $135,000 leaving bonds to the amount of $71,100 outstanding.

On March 7, 1949, the appellants made a written proposal to the remaining holders of the bonds for what was in effect a compromise of their indebtedness. As expressed in the proposal, the plan was for the sale to a new company named Hanson Apartments Limited of the equity of Mathew and Tekla Hanson in the New Annandale property, the retirement of the outstanding bonds and discharge of the second mortgage by paying to the bondholders at their option either the principal amount of their bonds in cash or preference shares bearing a four per cent non-cumulative dividend to their face amount: the carrying out of the plan involved paying off the Equitable Life mortgage and the surrender to the new company of the cash surrender value of the insurance policies. On May 30, 1949, the trustees applied to the Supreme Court of Ontario for an order directing that a meeting of the holders of the bonds be convened to consider this offer and an order was made directing that such a meeting be held at the City of Toronto for the purpose of considering the plan proposed by the Hansons, and alternatively in default of the approval of that plan, either as proposed or as modified or amended, any other plan that might be proposed at the said meeting for the sale, transfer or exchange of the property and assets for a consideration wholly or in part other than cash. Pursuant to further directions in the order the Canada Trust Company gave written notice to the parties interested of a meeting called for the purpose of considering first "a certain plan proposed by the said Mathew Hanson and Tekla Hanson dated the 7th day of March, 1949, providing for the sale, transfer or exchange of the property and assets described in the said mortgage and deed of trust for a consideration, wholly or in part, other than cash, all as therein set out;" and secondly, in default of the approval of such offer, any other plan that might be proposed at the meeting. The meeting so called was held on June 20, 1949. At that time there were large arrears of interest payable on the outstanding bonds so that the cash offer represented less than the amounts due to the bondholders

and, assuming the preference shares offered would have been worth no more than par, their value also was less. While the question as to whether the offer of the appellants was a fair offer of compromise is not, in my opinion, decisive of the matter, it is to be noted that the amount required to discharge the first mortgage of the Equitable Life after crediting the cash surrender value of the insurance policies was $28,350 and the principal amount outstanding on the bonds $71,100 a total of $99,450. The fair value of the property as shown by an affidavit filed in the proceedings on behalf of the present appellants was $175,000 while a valuator employed by the respondents considered that it would realize at a forced sale $225,000. The arrears of interest upon the outstanding bonds approximated $93,000 and the appellants' proposal involved a release of their indebtedness for this amount. Even if the personal covenants of the appellants had been without value, it is apparent that the bondholders would have realized a substantial amount of their claim for interest had the property been sold under the power of sale in the mortgage. The holders of the majority of the outstanding bonds, however, favoured the acceptance of the offer and the proposed sale was approved by the order of Urquhart J. made on September 15, 1949.

The judgment of the Court of Appeal proceeds upon the ground that subsection (*i*) of section 15 of the *Judicature Act* does not authorize the approval of a sale of mortgaged or charged premises other than one which is proposed to be made under the power of sale contained in a mortgage or trust deed. While the London and Western Trusts Company Limited had commenced action in 1930 to enforce the mortgage, for the appointment of a receiver and for possession and a receiver and manager had been appointed, no further steps had been taken in that action by the delivery of a statement of claim or otherwise, except an application made in the year 1939 which was dismissed and the present application to approve proposed sales of the property. While the present application was made in the name of the Canada Trust Company, it was not to approve a sale made under the power of sale contained in the mortgage but simply for the approval of a sale by the Hansons of their

equity of redemption in the property to the new company upon the defined terms. Subsection (*i*) of section 15 was originally introduced into the *Judicature Act* (though not in its present form) by section 17 of the *Statute Law Amendment Act*, 1917 (Ont.) c. 27. That amendment provided that when debenture holders were entitled to a charge by virtue of a trust deed and under its terms a majority of them were given power to sanction the sale or exchange of the mortgaged premises for a consideration other than cash, the court should have power in any action brought for the purpose of realizing upon such mortgage or the execution of the trusts to sanction any such sale and to give the necessary directions for the purpose of carrying the same into effect and to direct the trustee to exercise all or any of the powers conferred by the trust deed. By *The Judicature Amendment Act*, 1935 this subsection was repealed and there was substituted therefor a subsection which, in so far as relevant, provides that in case bonds or debentures are secured by a mortgage or charge by virtue of a trust deed or other instrument and whether or not provision is made in such instrument giving to the holders of the bonds or a majority of them power to sanction the sale of the mortgaged premises for a consideration other than cash, and in case any action shall have been brought for the purpose of realizing upon the mortgage or for the execution of the trust in any trust deed, the court may order a meeting of the holders of the bonds to be summoned and, if they sanction or approve the sale of the property for a consideration wholly or in part other than cash, the court may in such action order and approve such sale on such terms as it may think fair and reasonable and may make provision for the transfer of the property to the purchaser, for the payment of the proper costs, charges and expenses of the trustee, for the distribution of the proceeds of such sale and for all such incidental, consequential and supplemental matters as it may deem just. It is further provided by the amendment that the approval of the holders of any such bonds may be given by resolution passed at a meeting by the votes of the holders of a majority

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in principal amount of such bonds or debentures and holding not less than fifty per cent of the issued and outstanding bonds.

In the present case the mortgage is expressed to be made in pursuance of the *Short Forms of Mortgages Act* (R.S.O. 1937, c. 160) and contains the statutory power of sale. The bonds secured by it and which are held by the respondents contain the covenant of the appellants to pay their principal amount and interest at the stipulated rate. In neither instrument is there any provision for calling meetings of the bondholders or giving to them or a specified majority of them power to sanction a sale of the premises, whether for cash or for a consideration other than cash, or enabling any such majority to authorize a sale of any kind. The contention of the appellants is that when the holders of a majority in principal amount of the bonds represented and voting at a meeting and holding not less than fifty per cent in principal amount approve a sale at such figure and upon such terms as they may approve, the court may authorize such a sale under the subsection even though, as in the present case, it involves depriving all of the bondholders of a substantial part of their claims. I do not think that any such power is vested in the court. Subsection (*i*) of section 15, as enacted by the amendment of 1917, appears to me to have been enacted solely for the purpose of providing a means whereby in proceedings by the mortgagee named in the mortgage and deed of trust to realize upon the security the court might sanction a sale for a consideration other than cash when under the terms of the trust deed the debenture holders or a majority of them were empowered to sanction such a sale and had exercised such power. As amended in 1935 the subsection vested this power in the court in proceedings by such a mortgagee to realize the security when the instrument did not contain provisions vesting this right in the debenture holders and I think that nothing more was intended. That amendment provides that in case the bonds are secured by a mortgage which does not contain any provision giving to the holders of the bonds or the majority of them power to sanction a sale of the mortgaged premises for a consideration other than cash, and in case an action has been brought

for the purpose of realizing upon the security if the requisite majority of the bondholders approve a sale for such a consideration: "the court may in such action order and approve the sale."

I think the clear meaning of this language to be that the sale referred to is a sale under the power contained in the mortgage. I find nothing in the subsection to indicate that it was intended to vest in the court power of the nature given to bankruptcy courts to enforce a compromise of debts against the will of the creditors or any part of them. The question as to whether or not the proposal is a fair one does not enter into the matter: the matter is one of jurisdiction and I respectfully agree with Mr. Justice Hope that the court was without power to make the order of September 15, 1949.

The appeal should be dismissed. I agree with the order as to costs proposed by my brother Cartwright.

Appeal dismissed.

Solicitor for the appellants: *H. F. Gibson.*

Solicitor for the respondents: *J. S. D. Tory.*

Solicitor for the Bond Holders Re-Organization Committee and certain Bondholders: *A. G. McHugh.*

The majority Bondholder, J. M. Hickey, in person.