CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS.

JANE WILLIAMS (PLAINTIFF) ..... APPELLANT; 1910

AND *Oct. 26, 27.
*Nov. 2.

JOHN BOX (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Title to land—Mortgage—Foreclosure—Equitable jurisdiction of court—Opening up foreclosure proceedings—Construction of statute—"Real Property Act," R.S.M. (1902), c. 148—5 & 6 Edw. VII. c. 75, s. 3, (Man.)—Equity of redemption—Certificate of title.

Under the provisions of section 126 of the Manitoba "Real Property Act," R.S.M. (1902), ch. 148, as amended by section 3 of chapter 75 of the statute of Manitoba, 5 & 6 Edw. VII., the court has jurisdiction to open up foreclosure proceedings in respect of mortgages foreclosed under sections 113 and 114 of the Act, notwithstanding the issue of a certificate of title, in the same manner and upon the same grounds as in the case of ordinary mortgages, at all events where rights of a third party holding the status of a *bonâ fide* purchaser for value have not intervened.

Judgment appealed from (19 Man. R. 560) reversed.

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

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APPEAL from the judgment of the Court of Appeal for Manitoba(1), affirming the judgment of Mathers J., at the trial, by which the plaintiff's action was dismissed with costs.

The circumstances of the case are stated in the judgments now reported.

J. B. Coyne for the appellant.

G. W. Baker for the respondent.

THE CHIEF JUSTICE and GIROUARD J. agreed in the opinion stated by Mr. Justice Anglin.

DAVIES J.—This was an action brought by the mortgagor (appellant) to set aside a foreclosure of mortgage made by the district registrar under the "Real Property Act" of Manitoba and to cancel the certificate of title given by the registrar after such foreclosure so as to enable the mortgagor to redeem.

The trial judge, Mathers J., was of the opinion that the circumstances proved entitled the mortgagor (plaintiff) to be allowed in to redeem if the right of redemption had not been taken away by the "Real Property Act."

He reached the conclusion as he said with much regret that this Act did take away the right the mortgagor would otherwise have had and that he was powerless to grant the plaintiff (mortgagor) any relief.

On appeal the Court of Appeal was divided, Richards J. holding that the court had the jurisdiction to grant the relief asked, while Perdue and Cameron JJ. held with the trial judge that it had not.

(1) 19 Man. R. 560.

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On the hearing of the appeal at bar Mr. Baker for the respondent, mortgagee, frankly, and I think properly, conceded that but for the statute the plaintiff would have had the right to redeem. This concession relieves us of the necessity of examining the facts and of determining whether under them the ordinary right to redeem existed in the plaintiff when she brought her action, and leaves as the only question for us to determine whether or not the statute has taken away the right.

Mr. Coyne in his able argument contended that under the true construction of the Act the district-registrar could not foreclose the mortgage without such notice to the mortgagor of his intention to do so as would put the latter on her guard and give her an opportunity of shewing cause against the final order issuing and that the making of the final order of foreclosure without such notice was contrary to natural justice.

I incline to the opinion, however, that Mr. Baker was successful in shewing that the proceedings were in strict conformity with the Act, and that as a matter of fact they substantially followed the procedure of the old Court of Chancery in foreclosure cases.

The whole question before us, to my mind, turns upon the construction to be put upon the "Real Property Act" of Manitoba as it stood amended when the defendant (respondent) took his first step to foreclose under it.

Mr. Baker contended that these amendments affected a vested right his client possessed and being passed by the legislature after defendant became assignee of the mortgage would not be construed so as to affect that right.

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I am not able to accept this argument, as it seems to me the amendments do not so much affect vested rights as they do the mode and practice by and under which these rights can be given practical effect. The respondent became assignee of a mortgage and afterwards and while he was such assignee, and long before he had taken steps to foreclose, the legislature, it is contended, by the amendments to the "Real Property Act" made it clear that it was not the intention of that Act to take away or affect the jurisdiction of any competent court to foreclose or redeem statutory mortgages.

The question, therefore, is reduced to the meaning of these amendments. They are two in number, one to the 126th section of the Act and the other to the 108th section. The latter section was one declaring the statutory mortgagee's rights and remedies at law and in equity to be the same as if the legal estate had been vested in him and the amendment made evidently to set at rest any possible doubts added the words "including the right to foreclose and sell in any competent court."

The 126th section as amended reads as follows, the words in italics following the words "or over equitable interests therein" constituting the amendment:

> 126. Nothing contained in this Act shall take away or affect the jurisdiction of any competent court on the ground of fraud or over contracts for the sale or other disposition of land, or over equitable interests therein, *or over mortgages, nor shall anything contained in this Act affect the right of the mortgagee to foreclose or sell through any competent court, which right it is hereby declared may be exercised in such court.*

Now what is the true meaning of these two amendments made in 1906 ? Are they practically inoperative to effect anything beyond giving an alternative

remedy to the mortgagee to foreclose a statutory mortgage and sell through the courts in addition to the remedy of foreclosure and granting a certificate of title provided by the statute? In other language, must the words "or over mortgages" with which the amendment begins be read and construed as mere surplusage signifying nothing?

A little attention to the provision of the Act as first enacted, the conditions then existing and which it had to meet and also those existing when the amendments were made will, it seems to me, shew clearly that these words added to the 126th section "or over mortgages" were intended to have and legally do have a most important meaning and effect.

The 100th section of the statute enacts that

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

The 126th section declared that

> nothing contained in the Act shall take away or affect the jurisdiction of any competent court on the ground of fraud or over contracts for the sale or other disposition of land or over equitable interests therein.

So that except upon one of these three grounds,—either that there was fraud or that there was a contract for the sale of land involved or that there were equitable interests to be protected or enforced,—the jurisdiction of the courts to intervene or control the working of the Act by the district-registrar seemed to have been taken away.

Now the 100th section, above quoted, had explicitly declared the statutory mortgage to be a charge upon the land only and not a transfer of any estate or interest therein.

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The mortgage, therefore, created a statutory charge upon the land and the way and manner in which it should be enforced together with the mortgagee's other rights and remedies were specifically pointed out and enacted; sections 106 to 114.

These included the right to have the mortgage foreclosed by the district-registrar and such an order when made by him was declared by section 114 to

> have the effect of vesting in the mortgagee or his transferee the land mentioned in such order, *free from all right and equity of redemption on the part of the owner, mortgagor or incumbrancer,*

or of any person claiming through or under him subsequently to the mortgage or incumbrance.

This section 114, declaring the effect of an order for foreclosure when made by the district-registrar, read together with section 71 making the certificate of title the registrar was authorized to issue conclusive evidence of title against all the world, subject to certain specific reservations and exceptions, of which fraud is one, may well have led to the conclusion that the mortgagee's right under the statutory mortgage was not such "an equitable interest" in the lands charged as entitled the mortgagee to ignore the enabling provisions of the Act providing for foreclosure before the district-registrar and go into the courts and foreclose his mortgage there.

It was, I take it, to remove this possible doubt that the amendments to sections 108 and 126 expressly conceding to the mortgagee the right to foreclose in any competent court were enacted. There may have been other reasons. Part of the lands of Manitoba had been brought under this "new system" provided by the "Real Property Act"; part had not. A mortgagee of lands which had not clearly could still resort to the

courts to have his mortgage foreclosed. If that mortgage contained two plots of land, one of which had been brought under the "new system" and one of which had not, obvious difficulties arose with regard to foreclosure. The result was the specific declaration by the legislature, in 1906, of the right of any competent court, at the instance of the mortgagee, to exercise its jurisdiction respecting foreclosure over statutory mortgages.

An election on the part of the mortgagee, therefore, to invoke that jurisdiction involved necessarily a right to redeem on the part of the mortgagor. The mortgagee could not invoke the jurisdiction of the courts with respect to foreclosure without accepting that jurisdiction in full, involving the mortgagor's right of redemption in accordance with the ordinary practice and rules of the court.

But if those amendments giving the mortgagee his alternative remedy of foreclosure in the courts or in the district-registrar's office stood alone, where would the mortgagor stand ? He certainly had no equitable interest in the land charged which would enable him, under the 126th section before it was amended, to invoke the equitable jurisdiction of the court and open up a statutory foreclosure. He was the owner of the land possessing the entire legal estate. He could not, therefore, invoke the aid of the courts to give him relief against an order of foreclosure made by the district-registrar unless he brought his case within the cases expressly excepted by the statute in which the district-registrar's order was not to be conclusive. The consequences would be that, with respect to statutory mortgages foreclosed before the district-registrar, the mortgagor would be in an anomalous position and

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might be powerless to have a great wrong remedied. He certainly could not have recourse against the insurance fund in such a case as this, and if the courts had not jurisdiction to grant him relief he would be without remedy.

It was just this condition of things, it seems to me, which was in the mind of the legislature when amending the "Real Property Act" in 1906, which induced the insertion of the words "or over mortgages" amongst the amendments to section 126 reserving to the courts their jurisdiction.

The words were intended to have, and in my judgment do have, an important meaning. They refer to statutory mortgages, not to mortgages outside the statute as to which there never was or could be any doubt as to the court's jurisdiction. They were inserted for the benefit of the statutory mortgagor who, not having any equitable interest in the lands mortgaged (section 100), had no remedy in the courts unless in cases of fraud to impeach an utterly unjust statutory foreclosure order. The district-registrar would, I conceive, have no right to open up such an order. He was *functus officio* when he had issued it, and the courts could not interfere.

The amendment, therefore, was made so that, in a proper case, the mortgagor might, even if there was no fraud, obtain relief. The jurisdiction of the courts was made clear. Section 126 as amended reads:

> Nothing contained in this Act shall take away or affect the jurisdiction of any competent court on the ground of fraud, or over contracts for the sale or other disposition of land, or over equitable interests therein or over mortgages, etc.

No matter, therefore, how strong the language of the sections are declaring the effect of the order for

foreclosure or the certificate of title they must be read as subject to section 126. Just as the courts retain by that section the right to re-open certificates of title on the ground of *fraud,* so they retain a similar right to re-open, in proper cases, such certificates and the orders for foreclosure on which they are founded, in the cases of statutory mortgages. And this they retain by virtue of the insertion of these amending words, "or over mortgages," in the section.

It is idle to refer in construing these amendments to the decisions of the courts in New Zealand, or New South Wales, or elsewhere, upon their "Real Property Acts," or to the appeals from those decisions to the Judicial Committee. I have carefully read all of these. Such sections as we have before us for construction were not in the Acts of these colonies. If section 126 bears the construction I have put upon it, then the 71st section of the Act, making the certificate of title conclusive evidence, and the 114th, declaring the effect of the order of foreclosure, must as between the parties to the mortgage and their transferees in actions to redeem by the mortgagor or his representatives be read and construed as subject to the 126th section.

I need not say that this construction of the Act has nothing to do with the case of a *bonâ fide* purchaser for value. His title stands clear of any infirmities which as between the immediate parties, mortgagor and mortgagee and their representatives, the courts can investigate and, of course, cannot be attacked on the ground of any such infirmity existing prior to the certificate of title on the faith of which he is entitled in perfect confidence to buy or deal with the land. Such a case is not, however, before us now.

For these reasons I would allow the appeal with

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costs here and in the courts below, giving the plaintiff a reasonable time to be fixed by the prothonotary of the court within which to redeem.

IDINGTON J.—If we would interpret correctly the meaning of any statute or other writing we must understand what those framing it were about, and the purpose it was intended to execute.

The "Real Property Act" of Manitoba, so far as it related to the adoption and application of the "Torrens System," was as clearly as anything could well be intended to provide a registered title to which intending purchasers could resort with facility to ascertain the ownership and upon which they might rely with absolute safety in buying or acquiring any interest.

The primary purpose of the Act was not for the purpose of determining the right *inter se* or of quieting titles.

The "Real Property Act" provides machinery that may result in depriving men of their rights at common law or in equity.

Its operation cannot be permitted to take away men's recognized rights beyond that which the statute expressly enacts.

Ingenious arguments are presented based upon the meaning of the word "'foreclosure" and the application of the ordinary proceedings in equity, known or qualified by that term to the system of registration now in question.

In the first place this jurisdiction now invoked is for redemption. In the sense used in the amendment I am about to deal with, it has nothing to do with foreclosure. It is sought to be applied to open up a foreclosure.

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Quite true the suit for redemption might end by a foreclosure, so the suit for foreclosure might end in redemption.

All I am concerned with here is to shew they are neither interchangeable terms as definitions of a legal proceeding nor in any way to be treated as if they were so in construing this amended statute, and especially the amending part.

Mr. Justice Perdue explains that under this registration system the mortgagee never has vested in him the legal estate, never has and cannot get more than a charge upon the land, and then he suggests foreclosure never could exist as a method of procedure in regard to such a form of mortgage.

I will assume that to be so without entering into that which is a wide field in some aspects of it, and certainly do not question the general principle. See the judgment of Sterling J. in *Re Lloyd*(1), at p. 397, speaking for the court.

Its application to this case has, I respectfully submit, entirely different results from those Mr. Justice Perdue deduces therefrom as will presently appear.

These several observations and the legal consequences thereof also being borne in mind, let us turn to section 71 of the Act, which is its essentially operative clause. This case must be determined by the construction of that section and the amended section 126. Section 71 is as follows:

> Every certificate of title hereafter or heretofore issued under this Act shall, so long as the same remains in force and uncancelled, be conclusive evidence at law and in equity as against His Majesty and all persons whomsover that the person named in such certificate is

(1) [1903] 1 Ch. 385.

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entitled to the land described therein for the estate or interest therein specified, subject, however, to the right of any person to shew that the land described in such certificate is subject to any of the exceptions or reservations mentioned in the seventieth or seventy-fourth sections of this Act, or to shew fraud wherein the registered owner, mortgagee or incumbrancee has participated or colluded and as against such registered owner, mortgagee or incumbrancee; but the onus of proving that such certificate is so subject, or of proving such fraud, shall be upon the person alleging the same.

Section 126, as amended, is as follows:

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

Stress is laid by the respondent upon the operative words of section 71.

With great respect I may be permitted to say that so much has been the effect given to these strong words that the limiting words, "so long as the same remain in force and uncancelled," have been entirely overlooked.

Do these words not imply a possibility of the certificate of title being cancelled? And if cancelled by what power? And under what circumstances?

We have as a piece of great caution the exceptions made therein of the 70th and 74th sections and fraud added. Their repetition in the section does not add to or detract from what its operation would have been without such addition. It must have, in any case, been held, as regards the finality of title, to be subject to these express limitations in the other sections named. In like manner it also was always subject to the 126th section or its predecessor. And, as to fraud,

everything is subject to be avoided by reason of fraud. It need not have been specified.

But who is to pronounce upon the fraud? Is it the registrar? How can he deal with it? I do not say he may not in some way act to defeat fraudulent devices that may have been practised upon him. But the possibilities of how far the fraud may have operated when the whole transaction is not involved must, of necessity, be relegated to the courts, if for no other reason than this, that fraud may be only voidable at the instance of some one complaining.

The rights arising under sections 70 and 74 might also have required the assistance of the courts to determine conflicting rights arising thereunder as against the certificate of title.

Sections 49 and 52 indicate clearly that the registrar and a judge of the Court of King's Bench have each powers independent of the other for the correction of error. The latter section anticipates and provides for the decree of a court being executed save as in the proviso that the issuing of a new certificate must have the registrar's approval in the case and way stated.

This 52nd section clearly contemplates such actions and, when we have regard to the purview of the Act, the results of such actions, as well as those section 126 reserves to the court, must be worked out by the court and given effect to by the registrar. At the same time by way of precaution for the protection of the rights of others (not parties to such litigation) which may have arisen, such rights are protected from being cut out by a new certificate until the registrar has had opportunity to see no harm can arise.

The decree of the court, signified by a judge's

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order, is as to all else to be obeyed and to determine the rights of the parties before it.

Let us turn to section 126 and we find it gives the jurisdiction and is indeed the only effective jurisdiction given by the Act in respect of the subjects stated and had, as the section stood originally, the subjects of fraud, contracts for sale of such lands as dealt with, and equitable interests therein, all put on the same footing.

These subjects thus given did not impair in the slightest the efficiency of the "Real Property Act" for the purpose for which it was framed.

If any one bought on faith of a certificate he would be protected and the protection thus given him might limit the powers of the court to reach and effectively remedy a wrong. But short of that the court could as between him who got and still held the certificate by means of some wrong done in violation of duties had in view in said section enforce the rights of the parties arising out of the specified subject-matters and if need be direct the certificate to be cancelled; or by a more indirect method direct the wrongdoer holding the title to transfer it or such interest as demands of justice required, to the person or persons the court had found entitled.

I cannot for a moment suppose as has been suggested that these subjects so added to that of fraud had ever the remotest relation to an action on covenant for price or anything collateral to the contract or trust that affected the land. It was only the land or interest therein that was being dealt with at all.

Such having been substantially the state of the law for many years the legislature saw fit to amend it by adding the like power "over mortgages." Could any-

thing be more comprehensive? If we bear all this in mind and then give the plain ordinary meaning to the words "or over mortgages" or the meaning of the interpretation clause of the last word of the phrase, equally wide we find thus conferred a jurisdiction that must comprehend all judicial powers relative to mortgages.

Of these the most elementary, beneficial and far-reaching is the power to enforce redemption which is that now in question.

Unless the express language is to be frittered away, that jurisdiction has been given to deal with such cases as this.

The courts of equity have repeatedly interfered to open up final orders of foreclosure, and permit redemption. They have not hesitated to deal with the exercise of powers of sale when not conducted in conformity with the principles of justice that the courts have approved of and enforced.

Without adopting in its entirety (unless connecting therewith the considerations I am about to present) the argument of Mr. Coyne, so well presented, when he contended that the act of the registrar being a judicial one he should have given or directed notice to be given, and hence his failure to do so rendered his action a nullity, I think the failure (when the property was shewn to him to be worth twice the sum the mortgage stood for) to do so or to direct a sale under his own supervision such as section 114 contemplates was an improvident proceeding and so oppressive that the court might now under the amendment well exercise its inherent powers respecting mortgages in the way desired.

Moreover, it might well exercise its powers over

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the oppressor who thus abused the use of the powers of an inferior court, to direct that such abuse shall not avail him, but that he re-convey what he has so got thereby upon payment of what is due him.

It was conceded at the opening of the argument, and has been throughout in the court below assumed, that the case was one in which a court of equity would open up its own final order of foreclosure.

This proceeding given by the Act is but a statutory application of the ordinary power of sale in a mortgage, plus the power of final foreclosure, or rather statutory transfer of property.

It is a substitute for the ordinary bill of complaint, or like procedure appealing to equitable jurisdiction, of the mortgagee praying a sale and coupling with it a statutory alternative foreclosure.

And when it is supplemented by the added power given the courts in the amendment as to mortgages and both read together as they must be, implies what is usual in foreclosure in the way of the limited right to redeem by opening a judicial order. I think it must now be implied under this amended section, and can be enforced as between the original parties. As will be seen presently I do not rest entirely upon this implication.

No harm, however, can follow this interpretation, for the mortgagee gets what he is entitled to, and it only deprives him of the fruits of oppression or fraud as the case may be.

To put another construction that would cut out this power of the courts relative to foreclosure or redemption proceedings would equally cut out fraud classed in the same amended section 126, of the Act as within the power of the courts.

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It seems to me the New South Wales statute and the cases that have arisen on that or other like Acts are beside the question.

None of these statutes upon which such questions have been raised have conferred any jurisdiction upon the courts relative to mortgages and of the comprehensive character involved in the jurisdiction here given over mortgages.

In giving that jurisdiction I think something far beyond what is suggested in the court below has been intentionally given by these words, "or over mortgages," to the courts. And I do not think it is to be restricted either to the limits of the mere matter of procedure, discarding the principles involved or to the cases of a foreclosure suit or incident thereto.

The grammatical construction of the language does not permit of its restriction to a foreclosure proceeding, for that is a distinct thing of itself as the language indicates and especially so when we have due regard to the distinction I have already adverted to between redemption and foreclosure.

I prefer interpreting the amendment of a beneficent enactment so that the wrong to be redressed may be redressed, and so effectually that the principles upon which courts of equity have always acted become applicable to the like procedure under a somewhat different form when operated by means of an inferior jurisdiction merely having another name, but the real character of which is a substitution of one form of procedure for another.

Among the many considerations presented to my mind, though not noticed in the excellent arguments presented, as possibly worth noting was this, that it might be urged that at the time when the court's juris-

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diction was invoked the security by virtue of the certificate and force of the Act ceased to be a mortgage and hence no mortgage upon which the courts could act.

The illustration Mr. Justice Richards has given relative to a mortgage by way of absolute deed or where the consideration had not been advanced (or I may add only in part) as among the evils to be remedied might all be cases wherein justice might be defeated by the technical interpretation I have suggested, convinced me it should not be applied.

A question is raised that this new form of procedure is to be treated as a sale for taxes.

I first answer, even sales for taxes when not conducted with due regard to the inherent rights of those concerned that a fair sale be had, have been set aside even when the statutory and, as it were, external forms have been literally observed, but injustice has been done.

In the next place we are dealing with a statute so amended as to rectify or furnish the means of rectifying the exercise of a power thus inferentially restricted to operate within the recognized principles of justice as administered in the courts of equity.

No question is raised in the factum submitted respecting the form of notice served on the appellant, upon which the alleged foreclosure is founded. However, it was pointed out from the bench that the notice does not, as usual in suits for foreclosure anticipating possible default on the part of the mortgagor or owner of the equity of redemption, make clear that in default of appearance the proceedings would be taken *ex parte* and without further notice.

Respondent's counsel in answer to this pointed to

and relied upon the first section of the notice after the demand gives notice that in default of payment within the time there specified the mortgagee would proceed

without any further notice to enter into possession of the land and to receive and take the rents, issues and profits thereof,

and to lease, etc.

It does not seem to me this notice fully supplies all it should. It rather seems to imply that the ulterior proceedings to be taken without further notice are limited to those above stated, *i.e.,* the taking possession and reaping the fruits thereof.

It does not in regard to the later steps threatened, declare they or either of them, shall be taken without further notice.

Suppose the mortgagee had gone into possession and so remained and obtained from the rents the greater part of his claim, and then without further notice, there being still default in completing the payment of the full sum due, offered the property for sale, and that the attempted sale proved abortive by reason of not reaching the reserved bid properly fixed, and a year or two later, without further notice, made his application to the registrar for a final order of foreclosure, and got it, he would, if respondent's position is correct, have barred forever the owner of the equity of redemption.

And that would be supposed to have been the administration of justice.

The registrar is called and states there never has been an advertisement under section 114, and indicates pretty clearly the first part of the section is treated as if null.

And, of course, no time or place is appointed for

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hearing or for payment of the amount due when the ulterior proceedings may be resorted to.

On the face of the proceedings an affidavit filed on the application for final order shews the amount due and the value of the property.

The value thus shewn is about double the indebtedness.

The affidavit of value was for the purpose of fixing the fees to go into the guarantee fund which the Act provides for.

The learned trial judge finds as a fact the property is worth five or six times the amount against it.

Making due allowances for the differences of opinion people may form as to values of real estate the affidavit fixing the value at $4,000 and no more does not seem to have been a proper statement of fact.

The purpose for which it was made may, however, render the statement of no legal consequence in this connection. Yet it is illustrative of what the registrar conceives his duty to be under the Act when such facts appearing on an *ex parte* proceeding under the Act he does not think the power he had should be executed.

Assuming for the moment his view and practice quite correct, but without passing upon it any opinion, the existence of such a practice and long continuance thereof rendered it doubly important that the original notice given by the respondent should be so clear and explicit that no one could mistake what it meant, and no one could ever suppose all threatened was to be done, without further notice.

Section 109 enabling the proceeding by such a notice to sell, contemplates the possibility of the mortgagor being content with possession and its fruits but enables without defining more the giving in the same

a notice for sale and the further notice for resorting to competent remedies.

Section 110 seems to contemplate the directions of the registrar to fix the conditions. Nothing of the kind seems to have been done so far as the record discloses. The statement of claim merely challenges the service of notice under section 109 and does not make any point of the absence of the direction by the registrar. But even so its absence adds force to the contention set up generally that proceedings so far as the registrar was concerned and had power to direct, were judicial, and in absence of an opportunity having been given to be heard, are null.

Section 113 imposes upon the mortgagee the burden of shewing that the lands

> had been offered for sale at public auction after a notice of sale served as hereinbefore provided, etc.

It pre-supposes that the direction of the registrar in section 110, regarding such sale had been taken and acted upon.

I repeat such not being shewn to the registrar it became on the material before him doubly his duty to see that the appellant's land was not taken from her without an opportunity to be heard.

The absence of notice to her under such circumstances rendered the proceedings null within the meaning of the numerous authorities collected by appellant and referred to in the factum so fully and carefully prepared.

I do not think such a general notice as given by respondent in originating these proceedings is of such a character as to dispense with the later notice that the discharge of a judicial duty implies should be given.

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It seems to me such being the condition of things existent in the administration of justice it was high time there was a remedy applied.

And I can give no limited meaning to the words "or over mortgages" which assigned expressly to the courts entire, if not exclusive, jurisdiction as a check upon such abuses. Much less can I read them out of the statute.

I think, adopting the language used in *Heydon's Case*(1), that there appears here "the true reason for the remedy," and that our duty is

> always to make such construction as shall suppress the mischief and advance the remedy and to suppress subtle inventions and evasion for the continuance of the mischief and *pro privato commodo* and to add force and life to the cure and remedy according to the true intent of the makers of the Act *pro bono publico*.

The appellant's rights not having been taken away judicially she is entitled by virtue of the remedy given to the relief prayed for, and if need be to the cancellation of the certificate in question.

I think the appeal should be allowed with costs throughout.

ANGLIN J.—The plaintiff (appellant) brings this action to open up foreclosure proceedings taken under sections 113 and 114 of the "Real Property Act" of Manitoba, R.S.M. (1902), ch. 148. Under these sections and those immediately preceding, provision is made for the foreclosure of "new system" mortgages without action.

The regularity of the defendant's proceedings is attacked by the plaintiff principally on the ground that, although he gave her notice under section 109

(1) 3 Co. Rep. 7*b*.

that he intended to enter into possession of the lands and to take the rents and profits thereof, that in default of payment he would proceed to sell the lands and that in the event of the attempted sale not realizing sufficient to satisfy the moneys secured by the mortgage and expenses he would, after six months' default, make application for foreclosure, she did not receive any further notice of the application for foreclosure or any notice whatever of the date fixed by the district-registrar under section 114, on or after which he would issue a final order of foreclosure. The provincial courts have held that the plaintiff was not entitled to such further notice. The question is not free from difficulty. But in the view which I take of section 126 and of other provisions of the statute, it need not be dealt with.

Section 126, as amended in 1906, reads as follows, the amendment being italicized:

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

In the Manitoba Court of Appeal, Perdue and Cameron JJ.A. took the view that the sole purpose of this amendment was to enable mortgagees who held mortgages taken under the "new system" (*i.e.*, mortgages to which the foreclosure procedure provided by sections 113 and 114 is applicable) instead of proceeding under those sections, to bring an ordinary action of foreclosure. Richards J.A., who dissented, thought that in respect of the statutory foreclosures of mortgages under the new system, the amendment restored

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to the court (if it had been taken away) the jurisdiction which it has always undoubtedly possessed over ordinary foreclosure proceedings. With very great respect for the views of the majority in the Court of Appeal, I think that the construction which they have placed on section 126 involves reading out of it the words "or over mortgages." To treat any part of a statute as ineffectual, or as mere surplusage, is never justifiable if any other construction be possible. The rejection or excision of a word or phrase is permissible only where it is impossible otherwise to reconcile or give effect to the provisions of the Act. I find no such difficulty in the Manitoba "Real Property Act." I cannot see that giving full effect to the words "or over mortgages" does violence to any other provision of the statute.

Section 71 of the Act deals with the effect of certificates of title and declares them to be "conclusive evidence at law and in equity," except in certain specified cases, but only "so long as the same remain in force and uncancelled."

As pointed out by Richards J.A., the present section 52, enabling a judge to order a district-registrar to issue, cancel, or correct certificates, etc., is the successor of section 128 of the "Real Property Act" of the revision of 1892. Section 128 of that Act, however, contained the following additional proviso, which is not found in the present section 52:

(*a*) Provided that no certificate of title shall be cancelled or set aside except in the cases especially excepted in the fifty-seventh section of this Act.

While this proviso remained in the statute the jurisdiction of the court to cancel certificates was confined to the cases specially mentioned by way of excep-

tion in section 71, the successor of former section 57. With this restriction upon the power given to the court to order the cancellation of certificates removed, and the provision that they shall be conclusive evidence, etc., only so long as they remain in force and uncancelled, the court, independently of the present section 126, would probably have jurisdiction in such an action as this, which in my opinion is not within section 76, upon equitable grounds other than those specially excepted in section 71, to order the cancellation of a certificate, at all events where rights of a third party holding the status of a *bonâ fide* purchaser for value have not intervened.

By section 52 the court is further enabled to require the district-registrar

> to do every such act and make every such entry as may be necessary to give effect to the judgment, order, or decree of the court.

Under this provision I am of the opinion that in a proper case the court may require that an order of foreclosure shall be removed from the register whether a certificate of title based upon it has or has not issued. I have not failed to note that by section 114 an order of foreclosure when entered in the register is declared to

> have the effect of vesting in the mortgagee or his transferee the land mentioned in such order free from all right and equity of redemption on the part of the owner, mortgagor or incumbrancer,

and that such an order is not expressly made subject to the provision, "so long as the same remains in force and uncancelled," as are certificates of title under section 71. But section 114 proceeds to provide that upon entry of the order of foreclosure the

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mortgagee, incumbrancee or transferee shall * * * be deemed a transferee of the land and be entitled to receive a certificate of title for the same.

Where a certificate of title issues it is the culmination of the proceedings for foreclosure. It cannot be that, although this certificate is subject to cancellation under the combined effect of sections 52 and 71, the order of foreclosure is so irrevocable and conclusive that it renders effective action by the courts impossible and the cancellation or vacating of the certificate based upon it entirely futile. It is true that on its face the language of section 114 is absolute and subject to no qualification. But reading this section in the light of sections 52 and 71, and having regard to the nature and the office of the certificate of title and its relation to the foreclosure proceedings, it is, I think, reasonably clear that an order for foreclosure under section 114 must be subject to the jurisdiction of the court at least to the same extent as a certificate of title and that such an order is an instrument with which the court is empowered by section 52 to require the registrar to deal as it may direct.

But I entertain no doubt that since the amendment to section 126, conferring upon the court, or declaring it to possess, in respect of mortgages, the jurisdiction which it would have if the "Real Property Act" had not been passed (probably enacted to remove doubts), the court has power to open up foreclosure proceedings taken under sections 113 and 114 of the "Real Property Act" in the same manner and upon the same grounds as it may open up a foreclosure decreed in an ordinary action. I express no opinion

upon the existence or the exercise of this power in cases of statutory foreclosure where the rights of a *bonâ fide* purchaser for value have intervened. That case is not before us. But while the property still remains entirely in the control of the mortgagee, his statutory foreclosure under sections 113 and 114 is, in my opinion, clearly subject to the equitable jurisdiction of the court.

It was held by the learned trial judge, not dissented from in the Court of Appeal, and admitted at bar in this court, that if this foreclosure had been in an ordinary action the court would in the exercise of its discretion open it up and appoint a new day for redemption. This admission renders it unnecessary now to consider the sufficiency of the grounds on which the plaintiff claims relief.

I merely desire to add that a perusal of the record has satisfied me that the view of the learned trial judge is abundantly supported and that the admission of counsel for the respondent was well advised. *Platt* v. *Ashbridge*(1); *Campbell* v. *Holyland*(2), at page 172.

The plaintiff's appeal should be allowed with costs in this court and in the provincial Court of Appeal. In my opinion she is also entitled, in the peculiar circumstances of this case, to her costs of action. She should be declared entitled to redeem the mortgaged premises upon payment of the proper amount of redemption moneys to be fixed according to the usual practice in the Court of King's Bench for Manitoba,

(1) 12 Gr. 105.

(2) 7 Ch.D. 166.

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which should also appoint a new day for redemption. In default of redemption under this judgment the plaintiff's appeal should be dismissed with costs.

Appeal allowed with costs.

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

Solicitors for the respondent: *Baker & Young.*