

FORECLOSURE OF THE CROWN

When a mortgagee finds it necessary to institute proceedings to realize his security and it is discovered that the Crown has acquired an interest in the equity of redemption, the solicitor having charge of the matter is confronted with the troublesome problem of extinguishing the Crown's interest.

In recent years this question has become of practical importance in this country by reason of the creation of various kinds of statutory liens and charges in favour of the Crown. Succession duty and corporation tax liens are the most important examples.¹ Also cases arise periodically where the charter of a company is surrendered without disposing of a subsequent mortgage or a leasehold or other interest. Where such an interest is in the nature of personalty, as in the cases mentioned, the Crown acquires an interest in the equity of redemption under the doctrine of *bona vacantia*.²

In exercising his rights under his mortgage a mortgagee usually adopts one of two remedies. He may exercise his power of sale or he may institute an action in court for foreclosure or sale. Whether the former remedy is effectual against the Crown seems never to have been decided nor even discussed in any case or text book available to the writer. It may be argued that proceedings under a statutory power of sale would not bind the Crown, following the ordinary rule that the Crown is not bound by the provisions of any statute unless expressly named therein. So far as the contractual power of sale is concerned it would not appear to be unreasonable to contend that where the Crown's rights are subsequent and subject to any existing contract that it should be bound by the provisions of such contract, relating to the manner in which the prior mort-

¹ Other examples of liens or charges in favour of the Crown or government agencies which are frequently encountered are Old Age Pension Commission notices; executions for unpaid income, excise and sales tax; executions for estreated bail; executions filed on behalf of the Workmen's Compensation Board and Hydro-Electric Power Commission and charges arising in favour of the latter.

In the case where an undisposed of interest in the equity of redemption vests in the Receiver General for Canada under sec. 86 (7) of The Bankruptcy Act, the Crown itself acquires no interest therein, and the Receiver General as statutory trustee of the estate in question may be proceeded against in the ordinary manner.

As to the procedure where property is vested in the Custodian of Enemy Property, see *Saskatoon Mortgage Co. v. Roton*, [1943] 3 D.L.R. at 58.

² *In re Wells*, [1933] Ch. 29. Personalty belonging to a dissolved corporation vests in the Province under the doctrine of *bona vacantia*, pursuant to secs. 102 and 109 of the B.N.A. Act: *The King v. A. G. of British Columbia*, [1924] A.C. 213, [1923] 4 D.L.R. 690.

gagee may realize his security, as much as it is bound by the priority of the mortgagee's claim. However that may be, it will be recognized that by reason of the absence of any precedent, the effectiveness of proceeding by power of sale in such cases is doubtful and difficulty may arise in attempting to sell the mortgaged property in that manner, and a mortgagee appears to be on surer and safer ground if he takes proceedings in court for foreclosure or sale.

The question of the right to extinguish the interest of the Crown in mortgaged lands by an action in court arose originally in cases where by attainder of treason or conviction for felony the mortgagor's interest became vested in the Crown by forfeiture, thus making the Crown a necessary party to any proceedings instituted by the mortgagee to realize his security; and in England the extinguishment of the Crown's rights by such proceedings does not appear to have been raised in any other cases.³

In dealing with this problem of terminating the Crown's interest in an equity of redemption by a proceeding in court two main questions present themselves for consideration. The first is to determine the procedure which may properly be adopted to bring the Crown before the court. This involves a discussion of the jurisdiction of the court and a subsidiary question as to the proper person to be named as defendant to represent the Crown. The second question concerns the nature of the relief which the court may grant to a mortgagee in such cases.

The first problem may be introduced by stating the general rule that no action lies against the Crown at the suit of a subject, and the only procedure ordinarily available to enforce a claim against the Crown is by petition of right.⁴ There are, however, a considerable number of exceptions to this rule, of which one of the most important comprises the cases where under certain circumstances equitable relief may be obtained against the Crown, the Attorney-General being named as

³ By the Forfeiture Act of 1870 (33 and 34 Vic. c. 23) forfeiture was abolished in most cases. Where it was retained the forfeited property in question is to be vested in an administrator "who it is believed is subject to the usual proceedings by foreclosure or otherwise"; Halsbury, 2nd ed. vol. 23, p. 457n; but see SETON ON DECREES, 7th ed. p. 1585. Since 1871 there have been no reported cases in England dealing with foreclosure or sale against the Crown.

⁴ ROBERTSON'S CIVIL PROCEEDINGS, p. 2.

defendant. *Daniell's Chancery Practice*⁵ describes one class of these exceptions as follows:⁶

Although in general an action cannot be instituted against the Attorney-General for the purpose of enforcing equitable rights against the direct interests of the Crown, yet it seems that in certain cases actions may be instituted against the Attorney-General as representing the King for the purpose of establishing claims against the estates and revenues of the Crown without proceeding in the first instance by petition of right.

For our purpose it is not necessary to attempt to define and classify all the different kinds of actions covered by the above statement; suffice it to say that the uniform nature of the decisions now to be discussed will make it clear that actions for foreclosure or similar relief are included therein.

The earliest case of which we have any record of equitable relief being granted against the Crown in an action is *Pawlett v. Attorney-General*, decided in 1668.⁷ The plaintiff in that case being the owner of the equity of redemption filed a bill in the Exchequer Court against the Attorney-General claiming redemption of a mortgage which had become vested in the King by forfeiture, the mortgagee having been attainted of treason. It was said for the King that the plaintiff should have filed a petition for leave to redeem as a matter of grace and favour. The court however sanctioned this procedure by bill in the Exchequer Court against the Attorney-General. Chief Baron Hale based his decision on the ground that this relief was available in the old statutory Courts of Augmentation, Wards and Surveyors, whose jurisdiction had been inherited by the Court of Exchequer. The other member of the Court, Baron Atkyns, took a view which has been accorded the approval of time, and is now accepted as the true ground of the decision.⁸ He considered that as a principle of law the plaintiff ought to have the right of relief against the Crown. The report states his opinion in the following words.⁹

But Baron Atkyns was strongly of opinion that the party ought in this case to be relieved against the King because the King is the fountain and head of justice and equity; and it shall not be presumed

⁵ 8th ed., p. 47.

⁶ Cases in which a declaration is sought against the Crown to prevent it from doing something really constitute a separate and distinct class. For an example of this class see the relief claimed in *Dyson v. Attorney-General*, [1911] 1 K.B. 410.

⁷ Hardres Rep. 465.

⁸ HOLDSWORTH, HIST. OF ENG. LAW, Vol. 9, pp. 29, 30, 31.

⁹ Hardres Rep. 469.

that he will be defective in either. And it would derogate from the King's honour to imagine, that what is equity against a common person, should not be equity against him.

This method of proceeding against the Crown by action was next adopted in *Reeve v. Attorney-General*¹⁰ where the plaintiff filed a bill against the Attorney-General in the Court of Chancery seeking to have a will established where the estate of the testator had vested in the Crown by escheat. Lord Hardwicke dismissed the bill but suggested that the Court of Exchequer could grant the plaintiff relief and in support of his opinion he referred to *Lutwich's Case*,¹¹ where the plaintiff was allowed to file a bill in the Court of Exchequer against the Attorney-General praying foreclosure of the equity of redemption which had become vested in the King by forfeiture.¹² It is clear from his disposition of the suit and his remarks in the *Reeve Case* that the Lord Chancellor considered that applications of the kind mentioned for equitable relief might properly be brought against the Crown in the Court of Exchequer by naming the Attorney-General as defendant but that this procedure was not available in the Court of Chancery.¹³

The work on the plea side of the Court of Exchequer having greatly increased, in 1841 the equity jurisdiction of that Court was transferred to the Court of Chancery.¹⁴ Accordingly thereafter all actions against the Attorney-General claiming foreclosure or similar relief against the Crown were brought before the Court of Chancery and in none of them was the practice successfully challenged. In *Dyson v. Attorney-General*,¹⁵ although not a case where a mortgagee was seeking equitable relief against the Crown, the right of the subject to bring an action for equitable relief against the Attorney-General as representing the Crown without proceeding by petition of right was thoroughly examined, and this procedure in an action by a mortgagee to realize upon his security inferentially approved. Sir John Simon, as he then was, appearing on behalf of the Attorney-General, while admitting that an action might be brought against the Attorney-General where the Crown was only incidentally interested, contended that it did not apply to the case where the Crown was immediately

¹⁰ (1741), 2 Atk. 223.

¹¹ Circa 1741; noted in *Reeve v. A. G.*, *supra*.

¹² Foreclosure was refused but the plaintiff was granted other relief to be discussed later.

¹³ This proposition is supported by Blackstone. See BL. COMM. vol. III, 428, 9.

¹⁴ 5 Vic. c. 5.

¹⁵ [1911] 1 K.B. 410.

or solely interested as was the situation in the *Dyson Case*. But the Court of Appeal did not agree, and Cozens-Hardy M.R., delivering one of the judgments of the court, referred to the procedure adopted in *Hodge v. Attorney-General*¹⁶ with approval. In that case a bill was filed in the Court of Exchequer against the Attorney-General—it will be noted that this was in 1838, before the transfer of the equity jurisdiction of the Court of Exchequer to the Court of Chancery—for a declaration that the plaintiff had an equitable mortgage and for a sale of the leasehold premises in question, the legal ownership of such premises having been forfeited to the Crown. In commenting on the *Hodge Case* the Master of the Rolls pointed out that the Attorney-General was the only defendant and the immediate and sole object of the suit was to affect the interest of the Crown in the premises in question. Proceeding, he stated:¹⁷

This seems to me a distinct authority that the Court has jurisdiction to maintain an action against the Attorney-General as representing the Crown although the immediate and sole object of the suit is to affect the rights of the Crown in favour of the plaintiffs. . . So far as I can discover the authority of *Hodge v. Attorney-General* has never been challenged and I think it ought to be followed.

Fletcher Moulton L.J. took the same line of argument and said in part:¹⁸

The objection taken by the Crown in the present case was there was no justification or precedent for the form of the action. . . Mr. Rowlatt on behalf of the Crown frankly stated that in chambers he relied solely on a paragraph in Mitford on Pleading¹⁹ which he considered to support his contention and the Master and Judge took this view. In my opinion the passage does not bear the interpretation he puts upon it. If it does bear that meaning it does not accurately state the law at the time for it would be inconsistent with *Hodge v. Attorney-General* where an action was brought against the Attorney-General as sole defendant as representing the Crown in order to obtain a declaration affecting the rights of the Crown and consequential relief.

Thus it seems clear that in certain cases the court may afford equitable relief against the Crown by granting a declaration and consequential relief, and an action may be instituted against the Attorney-General, and procedure by petition of right is not necessary. It is also clear from the approval given to the procedure adopted in the *Hodge Case* by the Court of Appeal in the *Dyson Case*, and from the further fact that similar procedure

¹⁶ (1838), 3 Y. & C. Ex. 342.

¹⁷ At p. 416.

¹⁸ At p. 419.

¹⁹ 5th ed. (1847), p. 32.

has been consistently followed in all the reported cases where a mortgagee has sought relief against the Crown²⁰ that, whatever may be the limits of this right to proceed directly against the Crown by action in this manner, actions by a mortgagee seeking appropriate equitable relief come clearly within this special class. The remarks of Ford J. in a judgment delivered by him in *Royal Trust Co. v. Attorney-General for Alberta*²¹ support this view. He said:

The case of *Great West Life Ass'ce Co. v. Baptiste*, [1924] 3 D.L.R. 1061, 20 A.L.R. 513, is another interesting example of the application of the rule laid down in *Dyson v. Attorney-General* to the effect that where the interests of the Crown are only indirectly concerned the Crown's rights may be affected in favour of a plaintiff in an action against the Attorney-General or in this Province against a specified minister of the Crown. In that case it was held that the Court may in a mortgage foreclosure action make an order dealing with the Crown's interest under a statutory lien for seed grain advances to the same extent as with the interest of a subject.

A further question was raised in the *Dyson Case* as to the jurisdiction of the court to grant equitable relief against the Crown, the argument being that there was something peculiar in the jurisdiction of the old Court of Exchequer which permitted it to grant such relief which did not pass to the Court of Chancery by the transfer made in 1841. The Court of Appeal did not agree with this contention and held that the equity jurisdiction of the Court of Exchequer "had nothing peculiar or distinguished from the Court of Chancery to which by statute this jurisdiction was transferred."²² This statement was approved and held to be perfectly accurate by the Judicial Committee of the Privy Council in *Esquimalt and Nanaimo Railway Co. v. Wilson*.²³ Therefore it seems to be settled that whatever jurisdiction the old Court of Exchequer had to grant equitable relief against the Crown, whether sought by action or by petition of right, passed to the Court of Chancery by the Act of 1841; and the common law provinces of Canada having adopted the jurisdiction possessed by the Court of Chancery in England at dates subsequent to 1841, such jurisdiction is now vested in the superior courts of such provinces.²⁴

²⁰ These cases are individually discussed later.

²¹ [1936] 4 D.L.R. at 106.

²² *Dyson v. Attorney-General*, [1911] 1 K.B. 410, per Cozens-Hardy M.R., at 416.

²³ [1920] A.C. at 368.

²⁴ A County Court would appear to have no such jurisdiction unless given it expressly by statute.

A question directly connected with the problem we have been discussing is to determine the person who should be named as defendant to represent the Crown in these cases. In *Deare v. Attorney-General*, Lord Abinger dealing with the question of who is the proper person to represent the Crown, stated:²⁵

I apprehend that the Crown always appears by the Attorney-General in a Court of Justice especially in a Court of Equity where the interest of the Crown is concerned. Therefore a practice has arisen of filing a bill against the Attorney-General or of making him a party in a bill where the interest of the Crown is concerned.

As far as can be ascertained this practice has been followed in all the reported English cases in which a mortgagee has sought some equitable relief against the Crown, and in two of the three reported Canadian cases.²⁶ Where the Crown is interested generally (for example, as in the forfeiture cases and where the Crown has acquired an interest under the doctrine of *bona vacantia*), this is the only correct method of procedure; but where the Crown has a lien, charge or other encumbrance which has been registered against the land, or an execution has been filed in the office of the sheriff or master of titles, by an officer empowered by the statute in question to take such proceedings, such officer is the proper person to be named as the party. The practice of making His Majesty the King represented by such officer the party is unnecessary,²⁷ unless the action or proceeding in question is instituted in the name of His Majesty. In cases where the Crown has a statutory lien or charge of which no notice has been registered, the practice is to add as the party the officer who by the statute in question has the power and authority to take all necessary proceedings to enforce such lien or charge. This is, of course, stretching the rule which allows an officer to be sued

²⁵ (1834), 1 Y. & C. Ex. 197 at 208. See also *The King v. Austen* (1821), 9 Price 142n, where the Court of Exchequer in answer to a question as to whether the Treasury should be served with notice of the proceedings said, "The Attorney-General is the only representative of the Crown recognized in this Court."

²⁶ *Dunn v. Attorney-General* (1864), 10 Gr. 482; *Bartlett v. Ousterhout*, [1931] O.R. 358. In *Great West Life Ass. Co. v. Baptiste*, [1924] 3 D.L.R. 1061, the Provincial Treasurer of Alberta was served.

²⁷ *The King, et al v. Canadian National Railway Co.*, [1923] A.C. 714, [1923] 3 D.L.R. 719, where both the King and Provincial Treasurer for Alberta were made co-plaintiffs, and Lord Parmoor said: "Having regard to the designation of the Provincial Treasurer as the person in whose name any penalty might be recovered, there appears to be no reason why the King should be added as a party." See also the Scottish case of *King's Advocate v. Lord Douglas*, 15 Court Sess. Cas. 1st series. 814, where Lord Melwyn referring to the procedure when bringing an action against the King, stated: "His officers are cited instead of the Sovereign and to defend his interest on the ground that it was thought improper to call the King personally into Court."

where the statute so provides because usually in these cases the statute is silent on that point, but it is submitted that this procedure may be justified on two grounds, (a) that in such cases the officer is not being sued, but merely made a party, and (b) the officer, given the power and authority under the statute to enforce the lien or charge in question, is the logical person to be added as a party and allowed the opportunity of enforcing the right of the Crown by proving a claim in the mortgage action. In delivering the judgment of the Alberta Court of Appeal in *Great West Life Ass'ce Co. v. Baptiste*²⁸ Beck J.A. approved this procedure in the following words:

In England the Attorney-General always represents the Crown but under our system of Government, where by statute, both Dominion and Provincial, the several Departments of Government are constituted under different Ministers of the Crown and the authority and duties of the designated Ministers are defined, the Crown is represented by such designated Minister, although the Attorney-General has a general authority over proceedings by or against the Crown or by or against a Minister as representing the Crown. Here the particular Minister who represented the Crown in the right of the Province was notified in accordance with the practice of the Court of the jeopardy in which the lien of the Crown would be placed, unless the provincial treasurer should see fit to redeem the plaintiff and the provincial treasurer appears by the Attorney-General.

The answer to the second question to be dealt with, namely the kind of relief which is available to a mortgagee against the Crown, depends upon the nature of the Crown's interest. For this reason, instead of examining the authorities in chronological order, it will be more convenient to classify them according to the nature of the interest involved, and deal with the various classes in turn.

We will discuss first the class of case where the Crown has acquired the legal estate. This situation is unlikely to arise today and can happen only when the mortgagee has merely an equitable interest. In the old cases in which it arose the legal title to the land vested in the Crown by forfeiture after the mortgagee had acquired an equitable mortgage. There appear to be only two cases coming within this category: *Hodge v. Attorney-General*²⁹ and *Hancock v. Attorney-General*.³⁰ In the former case the plaintiffs sought a declaration that they had a valid equitable mortgage by deposit of title deeds, and asked for consequential relief by way of a sale. Alderson B. in refusing to direct a sale, gave the following reasons:

²⁸ [1924] 3 D.L.R. at 1064.

²⁹ (1838), 3 Y. & C. Ex. 342.

³⁰ (1864), 10 Jur. N.S. 557.

I do not think I have any jurisdiction in this case to order a sale. Here the legal estate is vested in the Crown, and I do not know any process by which the Court can compel the Crown to convey the legal estate. In the case before Lord Langdale³¹ the legal estate was not in the Crown and there the Court directed a sale because it had jurisdiction over those who had the legal estate and therefore could carry the sale into effect. In that case the Crown had only an equitable interest and the difficulty which exists in the present case did not arise.

Although the court refused to order a sale it made a declaration that the plaintiffs were equitable mortgagees of the property in respect of their lien and granted consequential relief by directing a reference to take an account of what was due to the plaintiffs and gave them possession of the property until their lien was satisfied.

In the *Hancock Case* the essential facts were similar and the court followed the law as stated by Alderson B. above, but varied the decree by directing a sale of the Crown's interest, the judgment containing a provision that the Attorney-General did not pledge to convey.

This rule that the court has no jurisdiction to order the Crown to convey where it has the legal estate was mentioned by Farwell L.J. in *Dyson v. Attorney-General*³² when he said:

It has been settled law for centuries that in a case where the estate of the Crown is directly affected the only course of proceeding is by petition of right because the Court cannot make a direct order against the Crown to convey its estate without the permission of the Crown.

The last few words suggest that if the plaintiff proceeded by petition of right the court would have jurisdiction to order a sale in these cases, and perhaps direct foreclosure in the cases where it has been held it has no such power.

Cases coming within the second class are those where the Crown has acquired an equitable interest under the common law. In most of the cases we shall examine the Crown appears to be the owner of the equity of redemption by forfeiture or escheat. In the earliest reported decision in this class, *Lutwich's Case*,³³ the owner of the equity of redemption had been attainted of treason subsequent to the making of the mortgage and his interest was forfeited to the Crown. The mortgagee filed a bill against the Attorney-General in the Court of Exchequer praying

³¹ *Prescott v. Tyler*, to be referred to later.

³² [1911] 1 K.B. at 421.

³³ *Circa 1741*: noted in *Reeve v. Attorney-General* (1741), 2 Atk. 223.

³⁴ That this is the reason behind the refusal to grant foreclosure against the Crown in these cases is clear from the argument in *Hodge v. Attorney-General* (1838), 3 Y.&C. Ex. at 345.

foreclosure against the Crown. This relief was refused by the court on the ground that as time does not run against the Crown the court has no power to foreclose it for failure to redeem within the time fixed for redemption,³⁴ but the court got at the justice of the case by directing that the mortgagee be allowed to hold and enjoy the property until the Crown thought fit to redeem.³⁵

In the next case to be noticed, *Casberd v. Attorney-General*,³⁶ a simple contract debtor of the Crown created an equitable mortgage by deposit of title deeds prior to the issue of an extent by the Crown. On an application by the mortgagee to the Court of Exchequer to be allowed to realize upon his equitable security, an order was made directing a sale of the property and for payment of the plaintiff's claim out of the proceeds of the sale, in priority to the claim of the Crown. Richards C.B. stated that his decision was based on the fact that the Crown did not have the legal estate. If that had been the case he doubted whether any relief could have been given to the mortgagee, but the rights of both parties being equitable, equity operated against the Crown and the priority of their respective charges depended upon which was first in point of time.³⁷ In this case it will be noted that the Crown was interested in the equity of redemption merely as an encumbrancer.

The case referred to by Alderson B. in the *Hodge Case*, *Prescott v. Tyler*,³⁸ does not appear to be of much value because Lord Langdale held there was no foundation for the claim of the Crown to be interested in the equity of redemption by escheat, the legal estate being in trustees. However the case is cited as an authority for the proposition that an equitable mortgagee may sell against the Crown where the latter's interest is merely an equitable one.

*Rogers v. Maule*³⁹ was an administration action. The owner of property died intestate, unmarried and illegitimate, having mortgaged his real estate to the plaintiff, who in these proceedings sought to be allowed to accept and retain the mortgaged premises in satisfaction of his debt, it being admitted that the estates were not sufficient in value to pay the mortgagee. But the court refused to make such an order in view of the fact that

³⁵ HALSBURY, 2nd ed., vol. 23, p. 456n.

³⁶ (1819), 6 Price 411.

³⁷ This is one of the leading cases on the priority of Crown debts. For a Canadian case in which it was followed see *Bartlett v. Ousterhout*, [1931] O.R. 358.

³⁸ (1837), 1 Jur. 470.

³⁹ (1841), 1 Y.&C. Ch. 4.

the mortgagor's equity of redemption had escheated to the Crown. Counsel for the Attorney-General suggested that the property might be sold as against the Crown in the administration of assets, which view Knight-Bruce V.C. adopted. This follows the rule laid down in the earlier cases that where the Crown has merely an equitable estate, although it cannot be foreclosed a sale may be directed against it.

*Scott v. Roberts*⁴⁰ was a foreclosure suit. The mortgagor having been outlawed, the first mortgagee was given the right to have an immediate sale, or a decree for foreclosure of the encumbrancers and if they should not redeem, the right to sell against the Crown.

We now come to *Dunn v. Attorney-General of Upper Canada*,⁴¹ the first reported case in this country where a mortgagee sought to extinguish the Crown's interest in a mortgage action. The plaintiff held a mortgage covering premises which had since the making of it become vested in the Crown, and filed a bill to recover the amount due. The Attorney-General was the sole defendant. A question arose as to the form of decree to be drawn up and Vankoughnet C. stated:

This Court has no authority to decree relief in such cases against the Crown except such as is possessed by the Court of Chancery in England. If a decree were made for sale the interest of the Crown might thus be wholly vested in the purchaser, but if foreclosure be asked the Court can on default only order that the plaintiff be at liberty to enter into possession of the mortgaged premises and hold and enjoy the same and receive the rents and profits thereof until the Crown thinks proper to redeem.

Presuming that the interest of the Crown here was merely equitable, the legal estate being in the plaintiff, this judgment correctly states the law as outlined in the old cases we have been discussing. The Chancellor's opinion that the Court might vest the Crown's interest in a purchaser is to be noted.

The last English decision coming within the class we are considering is *Bartlett v. Rees*⁴² decided in 1871. This was a suit by a mortgagee for foreclosure of the equity of redemption in property which had been forfeited to the Crown. Leave was given to apply in chambers for a sale of the Crown's interest after the expiration of the time fixed for redemption by the encumbrancers.

⁴⁰ (1856), 4 W.R. 499.

⁴¹ (1864), 10 Gr. 482.

⁴² L.R. 12 Eq. 395.

Not for fifty-three years after *Bartlett v. Rees* was decided did this question of the right of a mortgagee to realize his security against the Crown again become the subject of a reported case. This is understandable when we realize that the large majority of cases up to this time arose by reason of the mortgagor's interest having become forfeited to the Crown, and that forfeiture was abolished in 1870.

The third class comprises cases arising out of a new type of interest, the statutory lien or charge. In Alberta in 1920 and subsequent years statutes were passed providing for the advancement to farmers of funds to purchase seed grain, and the statute created a lien on the land in question for the amount of the advance in favour of the Provincial Treasurer. In 1924 two actions were brought which were disposed of together: *Great West Life Assurance Co. v. Baptiste*, and *Canada Life Assurance Company v. Mills*, wherein the rights of the Crown respecting such liens were before the court. In the *Baptiste Case* the action was for foreclosure and in the *Mills Case*, for sale. When the matters came before the master on an application by the plaintiffs for an order extinguishing the Crown's liens, the master being doubtful of the of the law in view of the cases we have been considering, referred the matter to a judge. The cases came on to be disposed of by Ives J.⁴³ who after holding that the liens were not continuing liens, found that as they were creatures of the statute the Crown had no greater right respecting them than was granted by the statute and therefore it could not rely on the "exceptional rights conferred on the Crown under the common law." He then directed that the Crown be foreclosed in the *Baptiste* action and the order made for sale in the *Mills Case*. The Provincial Treasurer appealed and the cases came on for hearing before the Alberta Court of Appeal, the judgment of the five judge Court being delivered by Beck J.A.⁴⁴ After stating generally that he agreed with Ives J. that the rights of the Crown were governed by the statute and that the common law rules were not applicable, and after dealing at length with the question whether the liens were continuing liens, Beck J.A. proceeded as follows:

Then comes the question of foreclosure of the liens on the land. Counsel for the Crown contends that the claims under the seed grain lien Acts are debts owing to the Crown and that sale and foreclosure cannot be taken against the Crown. The older cases apparently held that where the legal estate was in the Crown this was so. This is not at all events the case here. . . I have no hesitation in holding that the

⁴³ [1924] 2 D.L.R. 327.

⁴⁴ [1924] 3 D.L.R. 1061.

Court is authorized to make an order dealing with the Crown's interest in the land in question to the same extent as with the interest of a subject.

While the above statement respecting the common law rule where the Crown held the legal estate is correct so far as it goes, it is submitted with respect that it does not fully cover the situation involved, because the Crown's interest in each of these cases was an equitable one and the above argument suggests that where the Crown did not have the legal estate, at common law the court had power to order foreclosure or sale against the Crown, whereas as we have seen that inference is only half true, being correct with respect to an order for sale; foreclosure not not being available at all against the Crown under the common law. Therefore, although the decision in the *Mills Case*, where the action was for sale, can be justified on the above grounds alone, other reasons must be found to support the decision in the *Baptiste Case* where the action was for foreclosure. The true *ratio decidendi* in both these cases appears to be contained in the reasons for judgment delivered by Ives J., which were approved by the Court of Appeal, to the effect that these liens are creatures of statute and are governed thereby and not by the exceptional rights conferred upon the Crown by the common law. In the older cases the Crown's interest was acquired by forfeiture or escheat, both special rights of the Crown created by the common law⁴⁵ and in that atmosphere the special privileges of the Crown have been developed. In view of modern disapproval of the many restrictions and complications attached to all proceedings against the Crown,⁴⁶ and as these exceptional privileges work a hardship on the subject, they should not be extended to apply to a situation which was not contemplated when such rules were developed. Although these decisions are not binding on the courts of other provinces, they are of course of considerable persuasive authority and in practice have been followed in many provinces without any objection being raised by the Crown.

The fourth and last class covers the case where the Crown has taken proceedings in court to enforce its rights and has thereby acquired a charge on the land in question. The only decision to note under this heading is *Bartlett v. Ousterhout*.⁴⁷ In that case

⁴⁵ CHALLIES, *REAL PROPERTY*, pp. 33, 37.

⁴⁶ See, *THE CROWN AND THE COURTS*, by J. W. Gordon, K.C., 1928, which discussion the attempts made by Lord Birkenhead to introduce reforms in these matters.

⁴⁷ [1931] O.R. 358.

⁴⁸ Whether this distinction is material to the question is doubtful because if the case of *Great West Life Ass. Co. v. Baptiste*, *supra*, was correctly decided the real difference is that in the *Dunn Case* the Crown's

judgment was rendered against the defendant Ousterhout for income and sales taxes and executions thereon filed in the sheriff's office. The King and the Attorney-General for Canada were added as parties in the master's office, but the master refused to make an order foreclosing the Crown. The plaintiff appealed and Logie J., after distinguishing the case from *Dunn v. Attorney-General* by pointing out that in the latter case the Crown was the owner of the equity of redemption,⁴⁸ held that it was well established that the Crown by instituting an action submits itself to all the ordinary rules of practice and procedure and therefore it can be foreclosed in another action the same as any other litigant.

The conclusions to be drawn from the foregoing may be shortly summarized as follows:

(1) Where the interest of the Crown arises under the common law, as for example by forfeiture, escheat⁴⁹ or under the doctrine of *bona vacantia*, a mortgagee may exercise the following rights:

(a) If the Crown has the legal estate an equitable mortgagee's only remedy is to institute an action against the Attorney-General⁵⁰ for a declaration that he is entitled to a lien on the property in question and for consequential relief. The English authorities⁵¹ indicate that such relief would likely take the form of a judgment for sale, it being understood that the Crown is not pledged to make any grant to a purchaser. As an alternative the court may allow the mortgagee to hold and enjoy the property until the Crown should think fit to redeem or his lien should be satisfied.

(b) Where the Crown is the owner of the equity of redemption, a mortgagee may bring an action against the Attorney-General for sale or in the alternative for possession. In such cases the court may order an immediate sale and may vest the interest of the Crown in the purchaser, or allow the mortgagee to take possession and receive the rents and profits, until the Crown redeems or the mortgage debt is satisfied. There is no right to foreclose.

(c) As a mortgagee has the right to a sale against the Crown where the latter is the owner of the equity of redemption

rights were acquired under the common law, whereas the rights of the Crown in the *Bartlett Case* were acquired originally under the Income War Tax Act and other statutes.

⁴⁹ The procedure may be modified by the statutory provision which most provinces have enacted respecting forfeiture and escheat.

⁵⁰ In Canada it would of course be the provincial attorney-general.

⁵¹ FISHER AND LIGHTWOOD, *LAW OF MORTGAGES*, 7th ed., p. 426.

a fortiori he has a similar right where the Crown has acquired an interest under the common law as a subsequent encumbrancer, but as above there is no right to foreclose.

(2) Where the Crown acquires an interest under an execution or by way of a statutory lien or charge, whether registered or not, the same remedies are available to a mortgagee as may be exercised against a subject. In such cases the practice is to add as the party representing the Crown, the minister in whose name the execution is filed or the lien is registered, or in whose name the lien or charge may be enforced, as the case may be.

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