A NOTE ON ONTARIO AND MANITOBA MORTGAGE ACTS.

Section 10 of 39 Victoria, chapter 7, enacts as follows: "The purchaser in good faith of a mortgage may, to the extent of the mortgage, (and except as against the mortgagor, his heirs, executors and administrators,) set up the defence of purchase for value without notice in the same manner as a purchaser of the property mortgaged might do."

This provision, first enacted in Ontario in 1876, now appears in the statutes of Ontario[1] and of Manitoba.[2] When it was first passed there had been two decisions[3] of Strong, V.C., holding that the purchaser of a legal[4] mortgage could not plead the defence of purchaser for value without notice. The ground of the decisions was that, although such a purchaser took a legal estate, he was also the assignee of the mortgage debt and was therefore within the ordinary rule that the assignee of a *chose in action* takes subject to equities; and this reasoning was supported by some authority.[5]

At all events, the legislature, by the section quoted above, made it clear that the purchaser of a mortgage[6] was to be entitled to the plea of purchase for value without notice, but added that he may set it up "in the same manner as a purchaser of the property mortgaged might do."

It is to these words last quoted that I request attention to be directed. The obvious comment is that, except where the mortgage is only equitable, the "purchaser of the property mortgaged" never could and cannot yet avail himself of that plea,[7] apart from cases where

[1] R.S.O. 1927, c. 140, s. 11.

[2] R.S.M. 1913, c. 130, s. 11.

[3] *Ryckman* v. *The Canada Life Assurance Co.* (1870) 17 Gr. 550, and *Smart* v. *McEwan*, (1871) 18 Gr. 623.

[4] In *Smart* v. *McEwan* (*supra*) it would seem from the report that the mortgage assigned was a second mortgage and therefore only equitable, but this is not mentioned in the judgment of Strong, V.C., who treats the case as being similar to *Ryckman* v. *The Canada Life Assurance Co.* (*supra*) and states that he adheres to his decision in that case.

[5] *Moore* v. *Jervis*, 2 Coll. 60; Lewin on Trusts, (3rd ed., p. 229); *Cockell* v. *Taylor*, 15 Beav. 103; Fisher on Mortgages (2nd ed., p. 696).

[6] It does not appear from the act whether this includes an equitable mortgage.

[7] See Ashburner on Mortgages, 2nd ed., p. 534, where he cites *Phillips* v. *Phillips*, 4 D.F. & J. 208; *Thorpe* v. *Holdsworth*, 7 Eq. 139; *Cave* v. *Cave*, 15 Ch. D., 639. The report of *Colyer* v. *Finch* in 5 H.L.C. 905, also cited by Ashburner, might seem to be to the contrary, but the rule is well established. See further Fisher on Mortgages, 6th ed., pp. 598-599, and the cases cited in *Thorpe* v. *Holdsworth*, *supra*.

the Registry Acts happen to have conferred such a right. The defence of purchaser for value without notice does not extend in favour of a person claiming a mere equity and not the legal estate.

The Registry Acts[8] give priority to the person entitled under a registered instrument where there is no actual notice before registration, whether his interest is equitable or legal, and registration is itself declared to be notice. But apart from cases of registration under any Registry Act or Torrens Act, the purchaser of an equity of redemption cannot rely solely on the plea of purchaser for value without notice.

Let us suppose that the purchaser of an equity of redemption finds that it is subject to a restrictive covenant, and, to avoid the Registry Acts, we suppose that both the purchaser and the covenantee have neglected to register. The purchaser tries to set up the plea of purchase for value without notice, but we know that he cannot do it.[9] Our purchaser quotes The Mortgages Act to the effect that the purchaser of a mortgage may set up the defence of purchaser for value without notice "in the same manner as a purchaser of the property mortgaged might do" and the Judge has to tell him that that section is faulty. The purchaser urges that the same words are to be found in the Manitoba Mortgage Act, and the Judge must reply that apparently the Manitoba draftsman might have done better with a little more originality.

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[8] R.S.O. 1927, c. 155, ss. 70(1), 71, 72 and 74 and R.S.M. 1913, c. 172 ss. 67, 69, 70 and 73.

[9] And Sir George Jessel has said that he cannot, *L.S.W. Ry* v. *Gomm*, 20 Ch. D., at p. 583.