Foreclosure By Power Of Sale: Securing a Proper Price in New Brunswick

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The author examines in four stages the process of foreclosing by way of power of sale with respect to securing a proper price in the Province of New Brunswick. The first stage outlines the nature and scope of the obligations being imposed upon mortgagees and a critique of the law as it now stands. The second stage compares the "standard of care" being exacted with what is perceived to be the general sale practices adhered to in this province. The author maintains that the standard being imposed by law is not met by present practice and goes on to deal with a number of arguments which might be advanced to support an improvident sale. The third stage examines the propriety of allowing a mortgagee to buy in at his own sale pursuant to the Property Act, while the fourth is directed at law reform.

L'auteur fait une étude en quatre étapes examinant la procédure de forclusion en guise du droit de vente, et comment cette procédure y attache (au droit de vente) un prix adéquate pour la province du Nouveau-Brunswick. La première étape établit le genre et l'étendue des obligations imposées sur les créanciers hypothécaire ainsi qu'une critique de la Loi telle quelle aujourd'hui. Le deuxième stage dépeind une comparaison entre la diligence exigée et ce qu'on entend comme pratiques de ventes générales adhérées dans cette province. L'auteur entretien que ce standard imposé par la Loi n'est pas reçu dans la pratique courante, et de plus, il traite plusieurs arguments à l'appui d'une vente imprévoyante. Le troisième itage examine la bienséance autorisant un créancier hypothécaire de s'approvisionner à sa propre vente conformément à la Loi sur les biens, tandis que la dernière étape prête attention aux lois de réforme.

INTRODUCTION

Ultimately a creditor may be faced with the realization that, in order to ensure the repayment of a debt or the performance of some other obligation secured by a mortgage of realty, it will be necessary to proceed against the land itself. In this respect, New Brunswick's revised Rules of Court[1] which came into effect on June 1, 1982, have narrowed the available

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[1](N.B.) Reg. 82-73 enacted under sections 73 and 73.2 of the *Judicature Act*, R.S.N.B. 1973, c.J-2, as amended.

remedies by effectively doing away with the ability to proceed by way of a "foreclosure action."[2] This state of affairs does not arise because of a specific rule but rather by the Rules Revision Committee's decision to omit any procedural and substantive guidelines which could be utilized by such a secured creditor in pursuing this remedy.[3] Notwithstanding this deliberate omission, it is conceivable that an action for foreclosure could be brought although it is probably mere academic speculation to suggest such action given the fact that this process of liquidating a secured debt had fallen into disuse. Thus, the power of sale invariably provided for in the mortgage document, when used in conjunction with the statutory provisions found in the *Property Act*,[4] can now be classified as the mortgagee's penultimate remedy. In the event that the property is sold for an amount less than that of the outstanding indebtedness then, as a matter of last resort, there is always an action on the personal covenant for a deficiency.[5]

It is, however, the power of sale as utilized in the Province of New Brunswick that will be the focal point of this article; a remedy which can justifiably be termed unique when compared with its use in other common law jurisdictions. The fact that a mortgagee can buy in at his own auction sale for his own purposes,[6] as though he were an independent third party, may be viewed with alarm if not astonishment by those unfamiliar with New Brunswick law. At the same time, it appears that the New Brunswick sale process is envied for having evolved to the point where the procedures cannot be characterized as time consuming or costly.[7]

Admittedly, such characteristics can be viewed positively, at least from the perspective of secured creditors, but it is the opinion of this writer: (1)

[2]The term "foreclosure action" is used in the sense that the mortgagee proceeds by way of an action commenced by a writ of summons (now a Notice of Action). This procedure leads to the mortgagee obtaining a *decree nisi* and in the event the mortgage is not redeemed within the allotted time than a *decree absolute* (foreclosure absolute). The right of an interested party, including the debtor or the creditor, to request a sale in the foreclosure proceedings is one found in statute: *e.g.*, England-Law of Property Act, 1925, 15 Geo. V., c.20, s.91; Ontario-see Rule 464, 467, and 470 of the Rules of Court where the court is given a general power to direct a sale. In New Brunswick under the "old rules" (Order 56, Rule 13) a creditor could bring an action for foreclosure and sale of mortgaged premises. Order 51, Rule 1 enabled the court to order a sale.

[3]Civil Procedure Rules Revision Committee (Barristers' Society of New Brunswick) Final Report — May 1981 at 39. While the Committee did consider the possibility of resurrecting foreclosure proceedings, because of the protection afforded to a mortgagor, it concluded that any imbalance could be best remedied by amendments to those provisions of the *Property Act*, *infra*, footnote 4 which govern the exercise of the power of sale.

[4]R.S.N.B. 1973, c.P-19, as amended, hereinafter referred to as the *Property Act*.

[5]On the other hand, the right to sue on the covenant for payment after having obtained an order for foreclosure absolute is extinguished unless the mortgagee is in a position to reconvey the land; *Lockhart* v. *Hardy* (1846), 9 Beav. 349 at 357; and see generally *Rushton* v. *Industrial Development Bank*, [1973] S.C.R. 552 at 562; (1973), 34 D.L.R. (3d) 582 at 589 wherein Laskin J. (as he then was) conveniently summarizes the law on this point.

[6]Subsection 44(4) of the *Property Act* provides that the power given to mortgagees to buy in at an auction, pursuant to subsection 44(1), is a power to buy in for its own benefit and its own use.

[7]Civil Procedure Rules Revision Committee (Barristers' Society of New Brunswick) Final Report, *supra*, footnote 3 at 39.

that the liquidation process, entailing adherence solely to the terms of the mortgage contract and the provisions of the *Property Act*, affords no protection to mortgagors or owners of the equity of redemption with respect to securing a "proper price" on a disposition under the power; (2) that such a practice may in fact expose this secured creditor to liability on the basis of a failure to take "reasonable precautions" in attempting to obtain a proper price notwithstanding strict compliance with any statutory provisions and; (3) that the practice of the mortgagee buying in at a sale for his own purposes and then suing for a deficiency, is open to serious criticism given the marketing techniques normally adopted when selling under a power of sale.

This article will examine the foregoing issues in four stages. The first will outline the nature and scope of a mortgagee's obligations or duties with respect to securing a proper price when exercising a power of sale as imposed by courts of equity and, provide a critique of the law as it now stands. The second will compare this so-called "standard of care" with what the writer believes to be the present sale practices (compliance with the provisions of the *Property Act* and mortgage document) generally adhered to in the Province of New Brunswick. This comparison necessarily entails a determination to whether the standard being imposed by law is, in fact, met by the present practice. Given that the writer adopts the position that this is not the case, then it is incumbent to deal with those arguments or defences which may reasonably be proffered in support of the claim that it is only obligatory to adhere to the provisions of the *Property Act* and the mortgage document. The third stage will examine the uniqueness and propriety of permitting a mortgage to buy in at his sale for his own purposes given the prices which are apparently being paid. The concluding segment will be directed at suggestions for reform within this area of mortgage law.

THE DUTY OWED BY A MORTGAGEE

Case Law

When one speaks of the rights of a mortgagee to sell the property of his debtor upon default without the latter's concurrence, and removed from the paternalistic jurisdiction of the court, it is inevitable that one would wish to establish the concommitant obligations or duties assumed by the former with regard to the precautions that must be taken in anticipation of a sale and the ultimate price for which property may be disposed. Perhaps these issues would be of less significance during a time of economic prosperity because of the ease with which property could be sold at a price reflecting its market value. However, given the dramatic fluctuations in interest rates over the past twelve months,[8] accepting the political predictions as to the large number of Canadian homeowners that will supposedly

[8]Anywhere from 13% to 21%.

lose their homes if mortgages are renewed at unprecedented high rates[9] and assuming that in the real estate market there may well be a notable absence of those who would normally be interested in becoming property owners,[10] the matters raised take on a more serious aspect. Yet the principles to the applied will remain unchanged in either of these economic climates.

Initially, any attempt to delineate the obligations to be subsumed by a mortgagee when exercising his power of sale turned on the characterization of the mortgagor-mortgagee relationship. This characterization process took on the form of a trust analogy whereby the mortgagee was called upon to embrace the duties and responsibilities as though having been appointed a trustee. Accordingly, the issue pertaining to the duty of a mortgagee was spoken of in terms of the following questions. Is the mortgagee a trustee of the power of sale and thus encumbered with the duty of adhering to the "standard of care" as though acting as a fiduciary vendor,[11] or is this secured creditor only a trustee of any surplus proceeds that may be realized once a sale is consumated? To maintain that a mortgagee is a trustee who must exercise the power as would any prudent man of business intimates that there is a lower standard which is or can be adhered to without fear of legal reprisal. The judicial controversy over the issue of proper characterization was resolved at an early stage by answering the first part of the question in the negative and thus the question was subsequently reformulated. Is a mortgagee, when exercising a power of sale, merely under a duty to act in good faith or in addition to that obligation, is he under a duty to take reasonable precautions in order to obtain what might be described as a "proper price"? Unfortunately, the answer to this question has been bantered about in the law reports even though the right to utilize a power of sale was given judicial sanction as early as 1802.[12] In a relatively recent decision of the English Court of Appeal, Lord Cairns succintly and accurately assessed the state of the Law (prior to the decision rendered in that case);

> I find it impossible satisfactorily to reconcile the authorities but I think the balance of authority is in favour . . .[13]

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[9]During preparation of this article the interest rate charged by Banks dropped from 21% to 13%. Should the rate increase over the next few years then the problem will once again be acute.

[10]In light of the fac that the federal government has instituted a $3,000 grant programme, available to first time home purchasers and those buying new homes, these remarks are to be tempered. As well, at the time of writing, all three provincial parties in the Province of New Brunswick adopted "mortgage interest relief" as a platform promise when campaigning for the 1982 October election.

[11]The standard of care required of a trustee was formulated by Lord Blackburn in *Speight* v. *Gaunt* (1883), 9 App. Cas. 1(H.L.) at 19: "as a general rule a trustee sufficiently discharges his duty if he takes in managing trust affairs all those precautions which an ordinary prudent man of business would take in managing similar affairs of his own." As to the effect of statutory provisions governing the equitable rule see D.W.M. Waters, Law of Trusts in Canada, (Carswell, 1974) at 685 *et seq.* and note 67.

[12]*Clay* v. *Charpe* (1802), 18 Ves. 346, 34 E.R. 348.

[13]*Cuckmere Brick Co. Ltd.* v. *Mutual Finance Ltd.*, [1971] 2 All. E.R. 633 at 653. A similar observation was made by Lord Salmon: "it is impossible to pretend that the state of the authorities on this branch of the law is entirely satisfactory" at 643.

The enigmatic problem of balancing the authorities is only perpetuated when reference is had to such a work as *Falconbridge on Mortgages* or for that matter *Halsbury's*.[14] Any historical analysis which attempts to reconcile either the English or Canadian authorities, or both, on this issue is bound to run afoul of Viscount Haldane's perceptive remarks—"the consideration of cases which turn on particular facts may be useful for edification, but it can rarely yield authoritative guidance".[15] At the same time, it would be remiss not to examine those decisions which have given rise to the confusion with respect to the required standard of care (good faith or good faith and reasonable precautions) and those cases which are most often cited as authority for either proposition. The source of the debate is found in three decisions of the English courts rendered between the years 1888 and 1897.

The first of these is *Farrar* v. *Farrar's Limited*,[16] a case in which three co-mortgagees in exercising their power of sale, sold the property to the defendant company in which one of the co-mortgagees was a minority shareholder. The plaintiff mortgagors commenced an action to have the sale set aside on the ground that a mortgagee cannot sell to himself either alone or with others.[17] The Court of Appeal in concluding that what had transpired was not in law a sale to the mortgagee but rather a sale to a distinct legal entity nevertheless held that the defendant was obligated to prove that the sale was not fraudulent nor at an undervalue. When examining the duties which a mortgagee owes to the mortgagor, Lindley L.J., delivering the judgment of the court, stated:

> A mortgagee with the power of sale, though often called a trustee, is in a very different position from a trustee for sale. A mortgagee is under obligations to the mortgagor, but he has his rights of his own which he is entitled to exercise adversely to the mortgagor. A trustee for sale has not business to place himself in such a position as to give rise to a conflict of interest and duty. But every mortgage confers upon the mortgagee the right to realize his security and to find a purchaser, if he can, and if in the exercise of the power he acts *bona fide* and takes reasonable precautions to obtain a proper price, the mortgagor has no redress, even although more might have been obtained for the property if the sale had been postponed.[18]

[14]See, Falconbridge On Mortgages (4th ed., by W.B. Rayner and R.H. McLaren) at 734-735; Halsbury's (4th ed.) Vol. 32, *par* 726 at 333.

[15]*Kreglinger* v. *New Patagonia Meat and Cold Storage Company Limited*, [1914] A.C. 25 at 40. These remarks arose in the context of a mortgagor arguing that a collateral advantage which endured past the date of redemption is void *per se*. His Lordship discussed at length the historical reasons for the existence of the rule, but which he felt were no longer relevant.

[16](1888), 40 Ch. D. 395 (C.A.).

[17]The rule that amortgagee cannot sell to himself when exercising the power is well settled: *Downes* v. *Gazebrook* (1817), 3 Mer. 200, 36 E.R. 77; *Robertson* v. *Norris* (1858), 1 Giff. 421, 65 E.R. 983; *Murchie* v. *Theriault* (1898), 1 N.B. Eq. 588, *King* v. *Keith* (1898), 1 N.B. Eq. 538. However, as previously noted the right of a mortgagee to do so is found in s.44 of the *Property Act*. See text *infra*, footnote 116, where this issue is dealt with in greater detail.

[18]*Supra*, footnote 16 at 410-411. Although not referred to in the judgment an earlier English decision, *Wolff* v. *Vanderzee* (1869), 20 L.T. (N.S.) 353, held that a mortgagee must take every proper precaution to secure the best price.

On the facts, the court was satisfied that the defendant had taken all reasonable precautions to obtain a purchaser and, accordingly, had discharged themselves of the burden. At this point in time, the mortgagee is perceived as a quasi-trustee who, is under a duty: to act *bona fide*; and to take reasonable precautions in order to obtain a proper price. The analogy, however, is curtailed by the lack of any duty to postpone the date of conversion so as to procure a better price.

A year later the Court of Appeal in *Tomlin* v. *Luce*[19] was confronted with a second mortgagee claiming an account of all monies received by the first mortgagee after exercising his power of sale. The issue in this case revolved around the determination of the amount for which the trustee would be liable for having misdescribed the property to the purchaser rather than a determination of whether or not a duty of care existed. The "mistake" was rectified after the auction by an agreement between the mortgagee and the purchaser whereby the sale price was reduced. At trial,[20] the *Farrar* decision was followed and, on appeal, the court merely varied this judgment with regard to the mode in which the loss caused by the "mistake" of (negligence) was to be calculated.[21] Thus, in addition to the obligations previously outlined, a mortgagee must as well carry out his duties in a non-negligent manner.

The divergence in judicial opinion as to the duties or obligations to be adhered to when selling under a power of sale stems from the respective decisions of the English Court of Appeal and the House of Lords in *Kennedy* v. *deTrafford*.[22] Here a mortgage, given by two tenants in common, went into default. The mortgagee was advised by a surveyor that it was improbable that the property could be sold by public auction for an amount sufficient to pay the principle and interest and, accordingly, they proceeded to advertise the property for sale by way of private tender, which subsequently proved unsuccessful in attracting purchasers. Ultimately, one of the co-mortgagors offered to purchase the property for himself for the amount of principle and interest on the condition that the mortgagee take back a mortgage for a substantial part of the purchase price. The mortgagee agreed to do so provided that he could not obtain a higher price elsewhere. Unable to obtain such a price, the property was sold under the power of sale to the co-mortgagor on the basis of his offer. Subsequently, the trustee in bankruptcy of the other co-mortgagor commenced an action to have the sale set aside and for a declaration that a right to redeem the mortgage existed. In the alternative, damages against the mortgagee were claimed

[19](1889), 43 Ch.D. 191.

[20](1889), 41 Ch. D. 573.

[21]The loss was to be calculated on the difference between the price realized and that which the property would have realized if there had been no misdescription and not on the sum allowed as compensation under the agreement.

[22][1896] 1 Ch. 762 (C.A.), aff'd [1897] A.C. 180 (H.L.).

on the basis of a failure to obtain the market value of the property even though the price realized equaled the debt.

The plaintiff argued that the sale should be set aside on the basis that his co-mortgagor had fraudulently contrived with the mortgagee to exclude him from any interest in the equity of redemption and that a co-mortgagor cannot buy his own property under the power of sale.[23] Both arguments were rejected by both appellant courts as was the claim that the mortgagee had acted negligently; a finding which could not be supported in light of the efforts made by the mortgagee to sell the property. More importantly though, Lindley L.J. in the Court of Appeal, took the opportunity to explain what he had meant in holding that a mortgagee had a duty to take reasonable precautions as formulated in the *Farrar* case. On appeal to the House of Lords, Lord Herschell took the opportunity to consider what law would reasonably expect of a mortgagee.

In the Court of Appeal, Lindley L.J. capitulated from his earlier position in the *Farrar* case by maintaining that:

> A mortgagee is not a trustee of a power of sale for the mortgagor at all; his right is to look after himself first. But, he is not at liberty to look after his own interests alone and it is not right or proper, or legal, for him, either fraudulently, or willfully or recklessly, to sacrifice the property of the mortgagor: that is all.[24]

On appeal to the House of Lords, the decision of the lower court already dealt with, was affirmed.[25] The judgment of the court pertaining to the duties of a mortgagee was delivered by Lord Herschell:

> My Lords, I am myself disposed to think that if a mortgagee in exercising his power of sale exercises it in good faith, without any intention of dealing unfairly by his mortgagor, it would be very difficult indeed, if not impossible, to establish that he had been guilty of any breach of duty towards the mortgagor. Lindley L.J., in the court below says that "it is not right or proper or legal for him either fraudulently or willfully or recklessly to sacrifice the property of the mortgagor." Well, I think that is all covered really by his exercising the power committed to him in good faith. It is difficult to define exhaustively all that would be included in the words "good faith," but I think it would be unreasonable to require the mortgagee to do more than exercise his power of sale in that fashion.[26]

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[23]In the Court of Appeal the argument was advanced that a co-mortgagor cannot purchase the property on the basis that a fiduciary relationship existed between these two debtors (see *ibid.*, Kay L.J. at 775-776). In the House of Lords the plaintiffs argued that the co-mortgagor who purchased was in fact the agent of the mortgagee, having collected rents for its creditor and was therefore not able to purchase the property (see, *ibid.*, Lord Herschell at 187-188). The rule being that a mortgagee cannot sell to himself, his agent, or a trustee.

[24]*Supra*, footnote 22 at 772.

[25]*Per* Lord Herschell: "My Lords, I confess I think this as hopeless an appeal as has ever been presented to your Lordships." *supra*, footnote 22 at 183.

[26]*Supra*, footnote 22 at 185.

Any binding effect that his judgment might have had on lower English courts was extinguished when his Lordship held firstly, that it was not necessary to exhaustively define the duties of a mortgagee and secondly, that even if this creditor was bound to take reasonable precautions, he had done so.

The issue as to the standard of care, for the most part remained undisturbed in England until 1971 at which time the Court of Appeal had to deal once again with the nature of the mortgagee's obligations.[27] It is this case which has found judicial approval in New Brunswick and, therefore, deserves careful consideration. Before doing so, however, it would be misleading not to refer to three decisions of the Privy Council and a decision of the Supreme Court of Canada in which the issue has been canvassed and which are often cited as authority for either one standard or the other.

In the first of the Privy Council decisions, *National Bank of Australia* v. *United Hand-in-Hand & Band of Hope Co. et al*[28] the court noted that if property were "sold at an undervalue owing to the want of due care and diligence, the ordinary reference to the master would be to charge the [mortgagees] with what but for their wilful negligence and default might have been received."[29] Unfortunately the latter part of this statement raises a further problem. Is the mortgagee only accountable if he has been grossly as opposed to being merely negligent as indicated in the former statement? A partial answer is found in a decision of the Privy Council rendered some thirty years later.

In *McHugh* v. *Union Bank of Canada*[30] the Privy Council was called upon to consider the trial judges assessment of damages arising from the defendant creditor's sale of certain horses given as security under a chattel mortgage. Lord Moulton in affirming the decision of the trial judge on the ground that the conduct of the defendant amounted to negligence stated:

> It is well settled law that it is the duty of a mortgagee when realizing the mortgaged property by sales to behave in conducting such realization as a reasonable man would behave in the realization of his own property, so that the mortgagor may receive credit for the fair value of the property sold.[31]

The facts of this case, however, reveal that this statement was made in relation to the mortgagee's treatment of the horses prior to the sale and not with regard to the conduct of the sale, nor the precautions taken to

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[27]The *Cuckmere* decision, *supra*, footnote 13.

[28](1879), 4 App. Cas. 391 — on appeal from the Supreme Court of Victoria.

[29]*Ibid.*, at 411-412.

[30][1913] A.C. 299.

[31]*Ibid.*, at 311.

realize a proper price. In realizing upon his security the mortgagee had driven the horses forty-five miles to the sale site in such a manner that some of the horses died while others were found to be in poor condition. This case is more analogous to those in which a mortgagor has sought an accounting from a mortgagee of realty who, prior to foreclosure or sale, has taken possession and has failed to prevent the property from deteriorating or is in fact the direct cause of any damage. What is the duty imposed upon a mortgagee in such circumstances? Interestingly enough, the classic textbook answer to this question is that this creditor will only be liable for deterioration occassioned by his "gross or wilful negligence".[32]

The last of the Privy Council decisions, *Haddington Island Quarry Co. Ltd.* v. *Hudson*,[33] involved an attempt to have a sale set aside on the allegation that the mortgagee had failed to use his "best efforts" to obtain the "best price". The amount eventually realized was inadequate so far as the mortgagor was concerned. The court concluded that even if these allegations could be sustained, that it would have no effect upon the purchaser unless collusion or want of good faith on the part of this third party could be shown. With regard to the nature of the mortgagor-mortgagee relationship *vis à vis* the power of sale, the court held that the latter is not a trustee of the power and if the power is exercised in good faith the court will not interfere even though the sale be at a disadvantageous price unless the price is so low as in itself to evidence a fraud.[34] While the plaintiff mortgagor argued that the property was worth at least $20,000 and therefore the sale price of $8,259 being at a substantial undervalue, the evidence as to value given on their behalf was flimsy and accordingly the action was ultimately dismissed.

By the turn of the twentieth century the scales of English justice favoured a less rigid standard of care. Needless to say, the position espoused and adopted by Canadian courts in later years was no different. Of those decisions, the one cited most often is that of the Supreme Court of Canada in *British Columbia Land & Investment Agency* v. *Ishitaka*.[35] Here, the mortgagor made the allegation that his property was sold at an undervalue because of the failure to take steps to obtain the best price. A majority of the Supreme Court concluded otherwise. Following *Kennedy* v. *deTrafford*, Duff J., stated:

> [the mortgagee] is bound to observe the limits of the power and he is bound to act in good faith, that is to say, he is bound to exercise the power fairly for the purpose which it was given. If mortgagee proceeds in a manner which is cal-

[32]See generally, Falconbridge On Mortgages, *supra.*, footnote 14 at 656 and Halsbury's, *supra*, footnote 14, at *par* 702-704, 321-322. But see the decision of Cross L.J. in the *Cuckmere* case discussed, *infra*, at footnote 41.

[33][1911] A.C. 722.

[34]*Ibid.*, *per* Lord DeVilliers at 729, quoting Kay J. in *Warner* v. *Jacob* (1852) 51 L.J. (Ch) 642.

[35][1911] 45 S.C.R. 302.

> culated to injure the interests of the mortgagor and if his course of action is incapable of justification as one which in the circumstances an honest mortgagee might reasonably consider to be required for the protection of his own interests; if he sacrifices the mortgagor's interests "fraudulently, willfully or recklessly", then, as Lord Hershell says it would be difficult to understand how he could be held to be acting in good faith. But that is a vastly different thing from saying that he is under a duty to the mortgagor to take (regardless of his own interests as mortgagee) all the measures a prudent man might be expected to take in selling his own property. The obligation of a trustee, when acting within the limits of the power, would be no higher . . . and it is clear that in exercising his power the mortgagee does not act as trustee.[36]

These remarks were made with respect to a sale in which the mortgagor was maintaining that he had offered to redeem the mortgaged property prior to the anticipated sale subsequently consumated for an amount equal to one half of its value. The majority of the court rejected the mortgagors estimation as to value.[37] Subsequent decisions of other Canadian courts for the most part adhere to the good faith standard as stated by his Lordship when considering the obligations of a secured creditor with respect to a sale of his security.[38]

The need for reassessing the duty owed by a mortgagee to its debtor arises as a result of the position adopted in 1971 by the English Court of Appeal in *Cuckmere Brick Co. Ltd.* v. *Mutual Finance Ltd.*[39] The plaintiff had borrowed £50,000 from the defendant on the security of a site comprising 2.65 acres for which planning permission had been obtained for a development consisting of one hundred flats. Eventually the plaintiff ran into financial difficulty and was unable to proceed with the proposed development. Meanwhile, planning permission had been obtained for a less costly undertaking, namely the construction of thirty-three houses. Ultimately, the plaintiff went into default and the defendants proceeded to exercise the power of sale by entrusting the property to estate agents who undertook advertising in national and local papers in anticipation of the

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[36]*Ibid.*, at 316-317. Justices Anglin and Davies reached the same conclusion. The Chief Justice and Idington J. dissented.

[37]The minority viewpoint was premised on the acceptance of certain facts; for example the Chief Justice, in his dissent, held that the property was worth at least double the amount at which it was offered for private sale (*supra*, footnote 35 at 305). Contrary to this conclusion, Duff J. noted that there was not a word in the evidence as to the value of the property at the date of sale (*supra*, footnote 35, at 317).

[38]With respect to s.88 Bank Security [now s.179 of the Bank Act, S.C. 1980, c.40], see; *Canadian Imperial Bank of Commerce* v. *Heppner* (1965), 52 W.W.R. (N.S.) 295 at 302 (Sask. Q.B.); *Flying "L". Ranch Ranching Co. Ltd.* v. *Toronto-Dominion Bank* (1976), 9 Nfld. & P.E.I. R. (Nfld. C.A.) 209 at 219. With respect to a mortgage of realty see; *Kaiserhof Hotel Co.* v. *Zuber* (1912), 9 D.L.R. 877, 46 S.C.R. 651, aff'g 25 O.L.R. 194 (C.A.), which aff'd 23 O.L.R. 481 (Div. Ct.); *Wilson* v. *Taylor* (1912), 7 D.L.R. 316, aff'd 11 D.L.R. 455 (Ont. C.A.). With respect to a chattel mortgagee see; *J. & W. Investments Ltd.* v. *Black et al.* (1963), 41 W.W.R. 577 (B.C.C.A.). To illustrate the confusion in this area of the law see the judgment of Sheppard J.A. in the latter case at 592, to the effect that the mortgagor must prove that the mortgagee has acted in bad faith and that if the sales were properly conducted the goods would have sold for more. His Lordship in citing both Lord Lindley in the *Farrar* case and Lord Herschell in the *Kennedy* v. *deTrafford* case found both to be compatible statements of the law. On this point the headnote of the case is clearly misleading if not erroneous.

[39]*Supra*, footnote 13.

impending auction. As well, posters were published and particulars of sale were sent to land developers throughout the country. Yet, any reference to the existence of planning consent for one hundred flats was omitted. The evidence, which was accepted by both the trial and appellate courts, established: (1) that developers considered land which is suitable for flat development as being more valuable than land on which development is restricted to the construction of thirty-three houses and; (2) that because of the omission from the particulars of sale, this site did not come to the attention of flat developers who otherwise would have been attracted to it. Prior to the sale the defendants and the estate agents were informed of these opinions but proceeded with the sale over the objections of the plaintiff. The estate agents maintained the position, before and after the sale, that the land was unsuitable for development with flats. The property was sold under the power of sale for £44,000 and the plaintiff brought an action for damages on the basis of the defendant's failure to take reasonable precautions. The plaintiffs adduced evidence placing the value of the property at £65,000 and £75,000. At the request of both parties, the trial judge fixed the price for which the site would have realized at £65,000.

Salmon L.J., noted that the state of authorities on this branch of the law was not entirely satisfactory and concluded that a mortgagee owes both duties; that is, to act in good faith and to take reasonable precautions to obtain a true market value of the mortgaged property on the date on which he decides to sell it. Thus his Lordship held that the defendant's insistance on proceeding with the sale without advertising planning permission for both uses constituted a failure to take reasonable precautions. In dealing with the *Kennedy* v. *deTrafford* decision his Lordship seized upon the fact that Lord Hershell expressly refrained from deciding the issue because of the finding that the mortgagee in that case had, in any event, taken all reasonable precautions and thus technically his remarks, being obiter, were of no binding effect. With respect to the mortgagee's duties, his Lordship's analysis of the law clearly sets out recognizable parameters as to when a sale can take place:

> Once the power has accrued, the mortgagee is entitled to exercise it for his own purposes whenever he chooses to do so. It matters not that the moment may be unpropitious and that by waiting, a higher price could be obtained. He has the right to realize his security by turning it into money when he likes. Nor, in my view, is there anything to prevent a mortgagee from accepting the best bid he can get at auction even though the auction is badly attended and the bidding exceptionally low. Providing none of those adverse factors is due to any fault of the mortgagee, he can do as he likes.[10]

In addition the court had to resolve two further issues; the quantum of damages and whether the defendants were discharged of any liability by employing reputable auctioneers and estate agents. As to the former, his Lordship held that since the matter was not taken at trial, it could not

[10] *Ibid.*, at 643.

be raised on appeal. As to the latter, the learned judge's findings of fact and assessment of value were held to be unassailable.

Cross L.J. reaches the same conclusion with respect to the mortgagee's obligations, noting that if in the *McHugh* case a mortgagee in possession can be liable for loss occurring through negligence it would be illogical that the mortgagee's duty should suddenly change when one comes to the sale itself.[41] Contrary to the conclusion reached by Salmon L.J., his Lordship held that neither the mortgagee nor the estate agents were negligent in not advertising with respect to planning permission for flats. The fact that the estate agents adopted the position that development for such a purpose was not suitable and that any further advertising would have served no purpose amounted to an error of judgment and not negligence.[42] On this point his Lordship was in the minority and accordingly, he went on to hold as did the third judge, that the trial judge, in any event, was wrong to accede to the request to assess the quantum of damages on the basis of the evidence adduced.

The last judgment delivered by Cairns L.J. conveniently and succinctly sets out the issues in the form of seven questions with the appropriate responses. His conclusions may be summarized as follows: (1) the defendants were under a duty to take reasonable care to obtain a proper price; (2) failure to advertise without reference to the planning permission for flats amounted to negligence and was not merely an error of judgment although such an omission could not be considered reckless; (3) if it was negligent not to advertise the permission in the first instance, then it was negligent not to postpone the auction and readvertise; (4) both the defendant and their agents were liable; (5) that even if the fault was solely that of the agents, it was not open for the defendants to argue on appeal that they were not liable the point having not been raised at trial; (6) that because of the negligence the plaintiffs suffered damage, that is, on the evidence the proper inference was that a bid in excess of £44,000 would have been made and; (7) that the learned judge was wrong to accede to the request to assess the quantum of damages and the fairest course was to remit the matter to him as to the quantum.[43]

Putting aside the issues as to damages and the liability of a principal for the acts of his agent, the court was at least unanimous that the mortgagee is under a duty to take reasonable precautions and to refrain from acting negligently in carrying out this duty. Admittedly, the basis on which a distinction can be made between an act or omission which will be deemed, an error of judgment, mere negligence, or gross negligence, is nebulous.

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[41]*Ibid.*, at 649. But see *supra*, footnote 32 and preceding text to the effect that a mortgagor is only liable for "gross negligence".

[42]*Ibid.*, at 651.

[43]*Ibid.*, at 652-656.

Although the House of Lords has not had the opportunity to adjudicate upon this issue, the *Cuckmere* decision has been applied by the New Brunswick Court of Appeal in *Canadian Imperial Bank of Commerce* v. *Haley*.[44] This case involved the sale of security taken under s.88 [now s.179] of the *Bank Act*.[45] The plaintiff bank held an assignment of a company's inventory of wood products and proceeded to sell the goods in an attempt to extinguish the debt, only later to find it necessary to bring a deficiency action against the defendant guarantor. One of the defences pertained to the manner in which the plaintiff had decided to sell the inventory, that is, the inventory was sold in haste only nine days elapsing after the Bank had taken possession and without any effort to communicate with or to sell to other companies in the vicinity who were in the same business. The evidence as to value accepted by both the trial and appellate court placed the total value at $31,000 and the forced market value (between 60% and 75% of the market value) at $19,000. The inventory was sold for $5,900. After concluding that a proper demand had been made on the defendant, contrary to the conclusion reached by the trial judge, and that it had failed to take reasonable precautions, the court then went on to assess the plaintiff's claim, based on the outstanding indebtedness of the company less the sum realized on the sale. The deficiency claimed was reduced by $13,000, the difference between the latter sum and the forced market value. Hughes C.J.N.B. delivering the judgment of the Court, when considering the obligations imposed upon this secured creditor, adopts the law as stated by Salmon L.J. in the *Cuckmere* decision in the following terms:

> In my opinion, the law demands that a mortgagee, exercising a power of sale, owes a duty to the mortgagor not only to refrain from recklessness and gross carelessness and without caring whether or not the interest of the mortgagors are sacrificed, but also to take reasonable precautions to obtain the true market value of the mortgaged property at the time he chooses to liquidate it; and the same duty is owed by a bank holding a s.88 security.[46]

In the instant case, the basis of liability on the part of the bank was attributed to negligence in failing to contact other dealers in the lumber and woodworking business who might have been interested in purchasing the inventory. His Lordship did go on to note that the plaintiff had not undertaken any advertising and should not have acted so hastily even though some expense would have been involved in holding the inventory until a favourable opportunity for its sale arose.

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[44](1978), 25 N.B.R. (2d) 304.

[45]*Supra*, footnote 38, wherein reference is made to other cases in which the creditor held this particular type of security.

[46]*Supra*, footnote 44 at 313. In so concluding, his Lordship did refer to an earlier decision of the Court, *Bay Motors Co. Ltd.* v. *Traders Finance Corp. Ltd.* (1959), 19 D.L.R. (2d) 331 (N.B.C.A.). There the Court of Appeal concluded that a mortgagee was under a duty to act *bona fide* in exercising a power of sale under a chattel mortgage and to try to realize the fair value of the property. Ritchie J.A. based this conclusion on the general principles enunciated in *McHugh* v. *Union Bank, supra*, footnote, 30; *Kennedy* v. *deTrafford, supra*, footnote 22; and *B.C. Land & Investment Agency* v. *Ishitaka, supra*, footnote 35. One decision often overlooked is that of the New Brunswick Court of Appeal in *Gauvin* v. *Dionne* (1919), 51 D.L.R. 294 wherein Barry J. expressed the dictum that both duties were owed to the mortgagor (at p. 302).

A year later, in *Nova Scotia Savings & Loan* v. *MacKenzie*,[47] the Court of Queen's Bench of New Brunswick applied the *Haley* case when holding that a mortgagee of realty owes both duties to his debtor. The decision of this court will be dealt with fully when considering the right of a mortgagee to buy in at its own sale.

Defining — Good Faith/Reasonable Precautions

The aforegoing analysis has been restricted to a presentation of the often quoted statements of law, contradictory as they might appear, pertaining to the duty of a mortgagee. Admittedly, such an approach fails to provide guidance as to the conduct which constitutes acting in good faith or as to the nature of the precautions which will be deemed reasonable in attempting to obtain a proper price. Inasmuch as the judicial controversy usually centers on the duty of a mortgagee to act solely in good faith, it is still necessary to circumscribe in concrete terms the nature of a mortgagee's obligations when so restricted.

In this regard, lack of good faith is usually equated with acting either "fraudulently, wilfully or recklessly so as to sacrifice the property of the mortgagor".[48] Rather than dwelling on those acts or omissions which amount to such conduct, the courts have found it more convenient to refer to the sacrificial aspects of the sale, that is, to compre the amount realized with the value[49] of the property. But at what point does the difference between these two figures amount to a sacrifice of the mortgagor's equity of redemption? The classic statement is to the effect that so long as the mortgagee acts in good faith the court will not interfere even though the sale be at a disadvantageous price unless it is so low in itself to evidence a fraud.[50] Notwithstanding the fact that such a response does not provide a definitive answer to the question posed, it does indicate that even if one has acted in good faith there is a point at which a sale must not be effected, otherwise it will be deemed "fraudulent". On the other hand, it is clear in law that a sale cannot be attacked solely on the ground that the property was disposed of at an undervalue.[51] There appears to be no reported decision in which

[47](1979), 29 N.B.R. (2d) 78 (N.B.C.Q.B.).

[48]*Per* Lord Herschell in *Kennedy* v. *deTrafford*, *supra* footnote 22 at 185; the same explanation is given by Duff J. in *B.C. Land & Investment Agency* v. *Ishitaka*, *supra*, footnote 35.

[49]Value is being used in the sense ascribed by Hughes C.J.N.B. in the *Haley* case, that is, forced market value. However, see text *infra* with respect to the problems in arriving at such an evaluation.

[50]*Supra*, footnote 33 *per* Lord DeVilliers at 729 and preceding text.

[51]"I do not consider, however, that that [a sale at an undervalue] in itself is evidence of fraud. In my judgment there must be something far beyond the mere fact of under-value" *per* Crossman J. in *Waring* v. *London & Manchester Assurance Co. Ltd.*, [1935] Ch. 310 at 319. Canadian Courts have adopted the same position: *e.g.*, *Uren* v. *Confederation Life* Association (1917), 40 O.L.R. 536 (H.C.J.); *Hoehn* v. *Marshall* (1918), 46 D.L.R. 149, 44 O.L.R. 241 (C.A.).

a sale under a power has been successfully attacked on the basis of a disposition for a fraudulent amount. Yet this issue has arisen in another foreclosure forum; namely, in an application for an order confirming a sale which has been held in a foreclosure action under the watchful eyes of the court.

In *Trust & Loan Company of Canada* v. *Lindquist et al*[52] the local master refused to confirm a mortgage sale held under an order of the Court during the depression. The mortgagor was disquieted by the sale price of $1,000 and accordingly produced in evidence an affidavit of a real estate agent who placed a value of $4,800 on the property. The affidavit evidence tendered by the liquidating creditor was sworn by one of its employees, an inspector of farm lands, who was of the opinion that, given the economic climate of the time, it was impossible to place a value on the land.[53] The court concluded that, in light of the fact that the mortgagor had ample time in which to attempt to sell the property, although to no avail, the price realized was not so low as to be in itself evidence of fraud and, accordingly, the sale ought to be confirmed.

One of the few cases in which one can reasonably conclude that the sale price was fraudulent is *Canada Permanent Mortgage Corporation* v. *Jesse*.[54] Here the mortgagee obtained an *order nisi* for sale and proceeded to buy in at the sale at which it was the only bidder. The property was knocked down to the mortgagee for the sum of twenty-five cents although it was in the process of negotiating a private sale at $1,600. The court refused to confirm the sale and held that justice required that a decree for disclosure absolute be issued thus preventing any deficiency action from arising.

Similarly, in *Briand* v. *Carver et al*,[55] Cowan C.J.T.D. refused to confirm a sale and to grant a deficiency judgment when the property, as valued by his Lordship, was probably worth $5,500 yet sold for the mere sum of $50 to the foreclosing mortgagee, leaving a deficiency of $4,500. Nevertheless, his Lordship was prepared to confirm the sale if the claim for a deficiency judgment was abandoned. The invitation to compromise achieved the same result as directed in the *Jesse* case; namely, foreclosure absolute in the technical sense or an acceptance of the security as full satisfaction of the debt. The court indicated that it had a discretion to assess the adequacy of the sale price and, in the circumstances, it was so grossly inadequate that it would be inequitable to permit the plaintiff mortgagee to purchase at that price and obtain a deficiency judgment.[56]

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[52][1933] 2 W.W.R. 410 (Sask. K.B.).

[53]The injustices which occur in allowing property to be sold at a price reflecting a nominal consideration is exacerbated during a depression. The American solution was to enact moratoria legislation which prevented a mortgagee from foreclosing; see generally, G.E. Osborne, Mortgages (2nd ed., 1970) at 694 *et seq*.

[54](1909), 11 W.L.R. 295 (Sask. S.C.).

[55] (1967), 66 D.L.R. (2d) 169 (N.S.T.D.).

[56]*Ibid*., at 180.

The reluctance of courts to interfere with a sale at an undervalue is subject to the overriding qualification that it must not be for a fraudulent amount. Presumably a property worth $40,000 at the time the mortgagee chooses to sell it, if sold for $50, $100 or even $1,000, can be viewed as a sham sale. Whether or not the mortgagee can be said to have acted in good faith is irrelevant once a fraudulent sum has been accepted. Whether or not a sale of the same property for $10,000 would be classified as coming within the fraudulent rule is a question for which varying responses might be invoked. Rather than dwelling on this problem, which may very well prove to be a fruitless task, it would be far more beneficial to determine the causes of such price inadequacies.

One cannot help but wonder why it is that property would sell for a fraction of its value even if it can be said that the mortgagee has acted in good faith. The *Briand* case vividly illustrates the nature of the problem. There, the court supervised the sale by directing that the land be sold at public auction after advertising in a local newspaper. No one would wish to debate that so long as the mortgagee has adhered to instructions as laid down by the court, he may be regarded as having acted in good faith. Yet his Lordship commented that he found it difficult to explain satisfactorily how it could happen that in times of housing shortages, property could be exposed for sale at public auction after advertisements over a five-week period in a newspaper without creating any real interest in the public in attending the sale and in bidding for the property. The answer to this question may lie in the nature and content of the advertisements, the physical condition of the property, its physical location, or perhaps the inadequate technique of marketing property solely by legal advertisement.

Without embarking on an analysis of whether the Nova Scotia practice of foreclosing on real property as directed by a judge would meet the "standard of care" required of a mortgagee in exercising a power of sale, it is inevitable that at some point a court is going to accept the argument or adopt the position that a mortgagee who fails to take reasonable precautions has not acted in good faith. Indeed, one can readily appreciate that in the sale of real property, one of the key factors in effecting a disposition at the "best price" involves the adherence to proper marketing techniques. A failure on the part of the mortgagee to act accordingly can only increase the likelihood of the security being sacrificed to the detriment of the mortgagor. In other words the mortgagee is acting recklessly.

This approach was adopted by the Newfoundland Supreme Court in *Frost Ltd.* v. *Ralph et al*[57] wherein a second mortgagee sold two mortgaged hotel properties valued at slightly under $3,000,000[58] for the sum of $123,000

[57](1981), 115 D.L.R. (3d) 612.

[58]The appraised market value of $2,975,000 did not take into account the fact that the title of the mortgagor and the mortgagee was under attack in other proceedings and that any purchaser would have to spend several hundred thousand dollars to comply with work orders issued by the fire marshall. The three million dollar value was computed on the basis of the income approach (see, *ibid.*, 617-18).

(the amount of the debt), subject to a first mortgage on which $60,000 was owing. While it might have been appropriate to dispense with any argument as to the standard of care on the basis of a sale at a fraudulent price, Goodridge J. adopted a different approach and after reviewing the various judgments previously examined, utilized them in formulating the "good faith theory".

> A mortgagor is not acting in good faith when the price realized is plainly and significantly short of the true value of the property sold, when the mortgagee acts willfully and recklessly in the conduct of the sale with the result that the interests of the mortgagor are sacrificed, when he fails to take reasonable precautions to obtain a proper price, or fails to act in a prudent and business-like manner with a view to obtaining as large a price as may fairly and reasonably with due diligence and attention be under the circumstances obtainable.[59]

His Lordship concluded that the mortgagee, by omitting to obtain an appraisal, by failing to test the market in a public forum and by selling the property for just enough to satisfy its mortgage debt, had failed in its duty to act in good faith, that is, to take reasonable precautions to obtain a proper price.[60] The court's approach, albeit a unique and novel one, bridges the gap between what have been traditionally viewed as two opposing standards. In addition, the judgment does provide some guidance as to the type of conduct required of a mortgagee in order to prevent a sale from being challenged by the debtor.

Of the more recent decisions which deals with the issue as to the "standard of care", the most revealing with respect to outlining the types of precautions which should be adopted is that of Eberle J. in *Wood* v. *Bank of Nova Scotia et al.*[61] The defendant bank, through its solicitors, before proceeding to sell the plaintiff's property under the power of sale obtained an "informal appraisal" from a real estate agent which placed the property's value at $51,000. Shortly thereafter an oral listing was given to the agent and about a month later an offer of $45,000 was accepted. The plaintiff commenced an action to have the sale set aside or, in the alternative, for damages for failing to give notice of the exercise of the power of sale as required by statute and for selling at a gross undervalue.

With respect to notice, the court found in the plaintiff's favour. With respect to the sale price, the court held that the defendant bank had failed to take reasonable precautions to bring the property to the attention of a sufficient number of persons in the market place.[62] The appraisal given by the real estate agent afforded the defendant no protection as it was in-

[59]*Supra*, footnote 57 at 622. His Lordship maintains that his analysis of the law on this issue is merely a restatement of the good faith theory.

[60]*Supra*, footnote 57 at 622.

[61](1979), 10 R.P.R. 156 (Ont. S.C.).

[62]After reviewing the authorities, which his Lordship terms an examination of different word formulae, the law as stated by Salmon J. in the *Cuckmere* case is preferred. See, *ibid.*, at 175.

adequate. It disregarded such factors as zoning, services and "market value".[63] As well, in adhering to the "income approach" as a method of evaluation, the agent utilized inaccurate figures given by an employee of the defendant bank. As for setting aside the sale, the court held that as there was no covert scheme or arrangement between the purchaser and the bank, a sale even at a gross undervalue, is not sufficient to warrant such relief.[64] Damages were awarded on the basis of the difference between the sale price and the value of the property ($65,000) as fixed by the court after hearing the evidence of three other agents.

Aside from the actual disposition of the case, the comments made by the court as to the proper method of effecting a sale provide recognizable parameters surrounding a nebulous area of the law. Firstly, the property should have been put on a multiple listing service or other steps should have been taken to see that the property came to the attention of a wide segment of the market. His Lordship, however, clearly stated that he should not be taken as saying that such a marketing technique is called for in every case.[65] Secondly, advertising, such as by placing a "for sale" on the property, should be considered. Thirdly, the mortgagee should consider whether there is a need to sell the property quickly. If not, then it can be left on the market for a longer period, such as a normal listing period.[66]

Notwithstanding the plaintiff's success so far as an entitlement to damages was concerned, an appeal was launched by the plaintiff on the ground that the damages assessed by the trial judge were inadequate.[67] While that appeal was summarily dismissed, the defendants cross-appealed on the basis that notice had been given to the plaintiff pursuant to the statutory provision and that the test applied by Eberle J. with respect to the conduct of a mortgagee was not the proper one. The Ontario Court of Appeal reversed the trial judge on the first point, but as to proper test, Arnup J.A., in delivering the judgment of the Court, held that it made no difference as the defendant bank had failed to meet either. Accordingly, the cross-appeal was dismissed. On this issue, the judgment is very cursory and refers only to the good faith test as being less stringent when compared with the more

[63]His Lordship commented that he found it strange that the agent ignored the "market value" when undertaking to place a value on the property, that is, the objective for which the appraisal was done in the first place. It would appear that the agent was giving an opinion of value calculated soley on the income approach rather than by the comparative or market data approach.

[64]So far as purchasers are concerned, courts are unwilling to set aside a sale provided that the purchaser has acted *bona fide*; *e.g.*, *Haddington Island Quary Co. Ltd.* v. *Hudson*, *supra*, footnote 33. Interestingly enough his Lordship in dismissing the action against the purchaser would not award her costs given the "suspicious circumstances" of the sale.

[65]*Supra*, footnote 61 at 166 and 170.

[66]It should be noted that the judgment seems to imply that property should not be sold in the middle of winter unless necessary — "There does not appear to have been any overwhelming need to sell the property quickly, nor in the middle of winter. The property could well have been left on the market for a longer period such as a normal listing period." — *Ibid.*, at 170. *Contra*, the *Cuckmere* case *per* Salmon J.

[67](1981), 14 R.P.R. 1 (Ont. C.A.).

stringent test, that is, "the conduct of the mortgagee must be more flagrant than that which is required by the less stringent test [in good faith]".[68]

Putting aside the view that to act in good faith necessarily entails taking reasonable precautions when disposing of security under a power of sale, the lack of judicial certainty as to the proper standard of care or the proper test to be applied in judging the mortgagee's conduct perpetuates even greater doubt as to how a secured creditor should undertake a sale. To comply with the test of acting in good faith, a mortgagee must refrain from acting fraudulently, willfully or recklessly so as to sacrifice the property of the mortgagor. In this regard, sales for a fractional amount of the property's value come within this rule even though a mortgagee may have acted reasonably. Yet a sale for an amount less than the value of the property is not of itself sufficient to constitute acting in bad faith although the demarcation zone chosen as to when a sale price will come within the definition of "fraudulent" has not been clearly drawn.

On the other hand, the duty to take reasonable precautions encompasses consideration of the following matters: obtaining "proper" appraisal(s); undertaking sufficient advertising; employing a real estate firm; utilizing a multiple listing service and exposing the property to the market for a sufficient period of time, that is to refrain from acting hastily. So far as the mortgagee is concerned, once he has acted in accordance with the prescribed standard, there is no duty to postpone a sale until such time as a better price can be obtained. This is true even though the price accepted be below appraised value, subject to the qualification that the inadequacy should not be caused by any acts or omissions of the liquidating creditor or its agents.[69]

Critique

Despite the apparent conflict in judicial opinion, the distinction between a mortgagee who acts solely in good faith and one who, as well, takes reasonable precautions is more illusionary than real. The question as to whether there is in fact any appreciable difference between what might appear to be conflicting statements as to the law, to a very limited extent, could be answered by re-examining those cases previously discussed from a factual perspective. For example, in the *Farrar* and *Kennedy* v. *deTrafford* cases the court held that the mortgagee had taken all reasonable precautions in any event, while in *B.C. Land & Investment Agency* v. *Ishitaka*, the divergence in judicial opinion stems from a failure to agree on the value of the property sold and not on the precautions taken. Similarly, in the *Haddington* case there was no evidence to support a sale at a substantial undervalue.

[68] *Ibid.*, at 4.

[69] In the event there is no market for the property (notwithstanding the precautions taken), for example, during a depression, then other relief may be necessary — see *supra*, footnote 53.

Regardless of the manner in which a court describes the obligations of a secured creditor, the writer is of the opinion that none of these cases can be criticized with respect to the result ultimately achieved. The legal application remains the same.

Pursuing this issue in such a vein will add little to clarify the legal debate perpetuated through time by the adherence to "word formulae"[70] adopted in cases each with their own unique circumstances. The preoccupation with deciding which line of authority is "correct" or to be "followed" detracts from the real issue; a determination as to which of the two supposedly differing viewpoints is to be preferred. This determination calls upon one to question why it is that the obligation or duties of the liquidating creditor should be restricted or less stringent. Of the decisions dealt with in this article, there are only two in which the court addressed this issue. The first is found in the judgment of Lindley L.J. in the *Kennedy* v. *deTrafford* case; the second in the judgment of Lord Salmon in the *Cuckmere* case.

Lord Lindley's justification for a less stringent standard turned on the fear that a mortgagee would be unable to liquidate the security with comparative ease and safety. This situation might result in fewer people willing to lend money, thus impairing the ability of would-be debtors to raise capital.[71] Clearly one need spend but little time considering this argument in light of present lending practices. Furthermore, such reasoning fails to consider the fact that it is in the interest of the mortgagee to take reasonable precautions, for in so doing, the risk of any financial loss associated with a lending transaction might be eliminated. Such conduct may obviate the need to bring an action on the covenant for a deficiency or at least reduce the amount of the ultimate loss should a deficiency judgment be of no consequence. Obviously, it is in the interest of the mortgagor to require a more stringent type of conduct. A sale undertaken on this basis will best ensure that there is no deficiency or that it is minimized.

From another perspective, it can be argued that should the value of the property exceed the amount of the debt, then the mortgagor's equity in the property stands a greater chance of being realized in the form of surplus proceeds, for which the mortgagee must account. Lord Salmon in the *Cuckmere* case, in concluding that a mortgagee owes both duties, adopted this line of reasoning.[72] But the justification for insisting on a greater standard of care should not be viewed solely from the perspective of either the debtor or the creditor, for there may well be other vitally concerned and affected parties who have a vested interest in the ultimate price for which the security is sold.

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[70]Eberle J. in the *Wood* case noted that many of the seemingly conflicting word formulae utilized in defining the obligations of the mortgagee had resulted in a great deal of confusion, *supra*, footnote 61 at 171-172.

[71]*Supra*, footnote 22 at 773.

[72]*Supra*, footnote 13 at 643.

The extent of the liability of a guarantor in a deficiency action will be based upon the price which is obtained when effecting a sale.[73] Subsequent encumbrancers, whether they be judgment creditors (by way of memorial of judgment) or subsequent mortgagees, albeit in the unenviable position of forfeiting the right to realize upon their security are, entitled to any surplus funds generated by a sale, in priority to the mortgagor or ultimate holder of the equity of redemption.[74] For these reasons, the law, as emphatically stated by Hughes C.J. in the *Haley* case to the effect that a mortgagor owes both duties, is difficult to assail. This view of the law is entirely in accord with the requirements being articulated in legislation governing the conduct of various secured creditors, even though the actual word formulae adopted may differ. For example, under s.179 of the *Bank Act*[75] [formerly s.88] a bank is required to act honestly and in good faith in connection with the sale of its security and in addition is required to deal with the property in a timely and appropriate manner having regard to the nature of the property and the interest of the person by whom the security was given. Similarly under the *Personal Property Security Act* of Ontario[76] a secured creditor may dispose of collateral on any terms so long as every aspect of the disposition is "commercially reasonable".[77]

Clearly the mortgagee cannot be characterized as a trustee. On the other hand, would a trustee be required to act any differently if he were selling trust property? The trustee discharges his duty by taking all those precautions which an ordinary prudent man of business would take in managing his own affairs.[78] The mortgagee is required to act in good faith and to take reasonable precautions to obtain the best price. Of course, the manifest difference between the two lies in the fact that the former would surely be under a duty to postpone a sale until better market conditions arose,[79] whereas the latter once he has acted in accord with the standard

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[73]It is generally accepted that a surety is entitled to any right of set-off or counterclaim which the principal debtor possesses against the creditor (see generally; Halsbury's, *supra*, Vol 20, para. 190), but recently doubt has been cast upon this proposition — *Barclays Bank Ltd.* v. *Thienel et al*, unreported decision of Thesiger J., noted in 122 Sol. Journal 472. However, it has been widely criticized; *e.g.*, Rowlatt On the Law of Principal And Surety (4th ed. by D. Marks & G. Moss) at 182, and is difficult to reconcile with other authorities; *e.g.* the *Haley* case, *supra* footnote 44.

[74]*E.g.*; *Canada Permanent Toronto General Trust Co.* v. *Hollis Pharmacy Ltd. et al* (1964), 48 D.L.R. (2d) 747 (N.S.) — application by second mortgage for payment out of surplus proceeds in priority to two judgment creditors; *Tomlin* v. *Luce*, *supra*, footnote 19 — action by second mortgagee against first mortgagee claiming an account of all monies that were received or should have been received but for the latter's negligence in misdescribing the property at the auction sale.

[75]S.C. 1980, c.40.

[76]R.S.O. 1980, c. 375 as amended.

[77]*Ibid.*, s.59(3).

[78]*Supra*, footnote 11.

[79]See D.W.M. Waters, Law of Trusts in Canada, *supra*, footnote 11 at 661-665.

of care can sell even if a better price could have been obtained by postponing the sale.[80]

The difficulty most likely to be encountered when exercising a power of sale will lie in the mortgagee scrutinizing his own conduct to see whether he is acting in accord with the somewhat illusive standard prescribed by law and perhaps more importantly, to adhere to that standard without acting negligently. The simplest solution with respect to taking reasonable precautions is to employ the services of a real estate agent who can advise as to the proper marketing techniques and in addition can undertake the task of properly marketing the property in such circumstances.[81] In so doing, the mortgagee transfers many of the legal duties imposed upon him to a professional who will bear responsibility for acting in a negligent manner either in failing to adopt reasonable precautions or carrying them out in such a manner which can be categorized as more than "error of judgment".

The problems which arose in the *Cuckmere* case as to the liability of a principal for the acts of its agents, even if the estate agent was classified as an independent contractor, could have been avoided had the defence been properly raised at trial and the estate agents joined as a party. Ultimately, the estate agent would have been called upon to compensate either the defendant mortgagee if he were held liable or if not, then the plaintiffs directly.[82] For those who feel that the error was one of judgment, rather than negligence, it is interesting to note that no experts were called upon to give evidence in support of the estate agent's opinion.

The utilization of professionals in marketing property constitutes more than a method of avoiding responsibility and liability. It ensures prudent conduct in attempting to realize a proper price. Admittedly, there are individuals who effect a sale of their property, outside the realm of forced sales, and without the aid of real estate agents, but it must be acceded to that for the most part it is more efficient and appropriate to engage the

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[80] *E.g.*, *Re McMurdo, Penfield* v. *McMurdo*, [1902] 2 Ch. 684 (C.A.); the *Cuckmere* case, *supra*, footnote 13. While the mortgagee is not under an obligation to postpone the sale till market conditions improve (But *cf. Wood* v. *Bank of Nova Scotia et al*, *supra*, footnote 61) this creditor is still under an obligation to expose the property to the market for a sufficient period of time, that is, to refrain from acting hastily when there is no need. Nonetheless it must be admitted that given poor market conditions it may well be necessary to keep the property in the market place for a greater period of time; a consideration which has the effect of postponing a sale.

[81] As to the matters which should be considered in marketing property in "forced-sale situations", secured creditors and their solicitors will find Martin Stambler's article, "Selling The Property" — 1981 Mortgage Rights and Remedies — Department of Continuing Education, The Law Society of Upper Canada (I-1 to I-42) a practical and invaluable guide.

[82] The liability of a principal for a tort committed by its agent, who is classified as a servant, acting within the scope of his authority is clear. The difficulties arise in subscribing a meaning to the phrase "scope of authority". Whether a principal is liable for the tort of an independent contractor is a question to which the law has not provided a definite answer. A further problem arises when one seeks to determine whether a real estate agent is classified as an independent contractor; see generally R. Powell, The Law of Agency (2nd ed.) at 184 to 187, 197 and 343.

services of a professional when marketing real property. Whether the sale be effected by private contract, public tender or public auction, the realizable sale price is dependent on the property being properly exposed to the market place. Advertising and salesmanship are essential ingredients in an attempt to protect the interests of the debtor, its guarantors and other creditors, including the one exercising the power of sale.

Given this theoretical framework, the writer's task must turn to an examination of the practice surrounding forced sales in this Province and to compare it with the prescribed standard, nebulous as it might seem. The objective is to determine whether the foreclosing mortgagee would be exonerated of any culpability in the event of a sale at an undervalue.

EXERCISING THE POWER OF SALE — NEW BRUNSWICK PRACTICE

General

Any attempt to outline the practice being followed in carrying out a remedial process, which is private in nature, is open to the valid criticism that at best it is only a perception which may or may not be true in any one particular situation or at any one point in time. Accordingly, it is necessary to make a number of fundamental assumptions.

Firstly, the general practice is perceived to be one in which the only precautions which are being taken are those required by the terms of the mortgage document and the *Property Act* respectively. With respect to the former, it is generally acknowledged that mortgagees are content to rely on the statutory power and in any event are better advised to refrain from drafting any contractual provisions which differ from it.[83] Thus this article proceeds on a second assumption; namely that the contractual provisions do not materially differ from the statutory requirements. Thirdly, the general practice is perceived to be one in which the vast majority of mortgage sales, in New Brunswick are effected under the auspices of the local sheriff by way of public auction. If this is correct, then one can specualte with some certainty that this phenomenon arises as a result of a mortgagee being able to buy in for his own purposes so long as the sale is effected in this manner.[84]

[83]*Supra*, footnote 14, Halsbury's states that it would be unusual after 1882 to insert an express power of sale except in special circumstances—see para. 708 at 323. Fisher and Lightwood's Law of Mortgages (9th ed., by E.L.G. Tyler) indicates that reliance is usually placed on the statutory power (at 360). Variations from the statutory power in New Brunswick are permitted by s.44(2) of the *Property Act*. However, in *Gauvin* v. *Dionne*, *supra*, footnote 46 it was held that certain variations could result in the mortgagee being unable to rely on the statutory power so as to take advantage of its provisions; *e.g.*, power to buy in for ones own purposes pursuant to s.44(4).

[84]*Ibid.*, and *supra*, footnote 6.

Viewing the general practice from this vantage point, the issue turns on whether mere compliance with the *Property Act* is apt to result in a sale at a reasonable price. The Act requires a mortgagee in exercising the power of sale (in addition to giving notice to the mortgagor) to insert in two succeeding issues of the Royal Gazette a notice of the impending sale;[85] to insert a notice of sale in a local newspaper once each week for four weeks[86] and to post one printed handbill on the local court house, one in the appropriate registry office and one at another public location.[87] Are these marketing techniques appropriate? Do they have the effect of attracting potential purchasers who are willing to pay a reasonable price? The response is obvious when comparing the types of precautions taken in the *Cuckmere* case and the remarks of Eberle J., in *Wood* v. *Bank of Nova Scotia*.[88] Moreover, there is other evidence which would lead to the conclusion that the marketing techniques adhered to in this Province are ineffectual.

In canvassing the Sheriffs of four judicial districts the writer was informed that at the vast majority of auction sales the only person in attendance was the foreclosing mortgagee or its solicitor.[89] It is not unwarranted to conclude that a mortgagee who is guided solely by the statutory provisions is unlikely to effect a sale at a reasonable price unless the property is of a nature which does not need marketing in the usual manner.[90] The price at which a foreclosing mortgagee buys in at these sales gives rise to other considerations which will be discussed in turn.

Perhaps the most blatant example of conduct which falls below the required standard is the adherence to the practice of providing a legal description of the property without even referring to the civic address, should one exist. This phenomenon is true even though the *Property Act* specifically states that it is not necessary to provide a legal description so long as the premises can be readily identified.[91] In any event no attempts are being made to bring out the "saleable" features of the property; that is, the advertisements are only inserted for the purpose of complying with the Act.

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[85]Section 45(1)(a) of the *Property Act* requires compliance with the Sale of Lands Publication Act, R.S.N.B. 1973, C. S-2, which calls for the insertion of notices in the Royal Gazette. Section 1(4) of the latter Act states that a sale is invalid unless the provisions of this Act are followed.

[86]Section 45(1)(c) of the *Poroperty Act*.

[87]*Ibid*.

[88]See *supra*, footnote 61 and text which follows.

[89]I am indebted to Sheriffs; Peter Dickens (Judicial District of Fredericton), Donald Hadley (Judicial District of Bathurst), Harold Gillespie (Judicial District of Saint John), James Wolfe (Judicial District of Saint John), for providng me with information relating to mortgage sales. The following percentages are estimates of auction sales in which the mortgagee or its solicitor is the only person in attendance: Saint John 99%; Fredericton 80%; Moncton 95% Bathurst 95%.

[90]Sheriff Gillespie indicated that auction sales were well attended in Saint John when the property in question was of an exceptional industrial nature. Sheriff Dickens indicated that very few commercial buildings in Fredericton reached the auction block.

[91]Section 45(3) of the *Property Act*.

The fact that a mortgagee who adheres solely to the statutory requirements would be in breach of the duty being imposed by the courts, does not necessarily entail the conclusion that this creditor is under the same obligation when it comes to liquidating a debt pursuant to the *Property Act*. Surely there must be a justification or reason for adhering to the perceived present practice, notwithstanding the law as expounded by the courts over the past ten years. In other words, what defences are there to an action in which it is alleged that the liquidating mortgagee has failed to abide by his obligations and therefore must account for what he should have received but for this failure? The available defences seem to be limited to two: (1) that the advertising requirements of the *Property Act* constitute a complete code with respect to the precautions necessary in order to effect a sale and; (2) that certain statutory provisions extricate the mortgagee from liability with regard to a sale at undervalue. Of these two defences, it would appear that only the second has been argued in a judicial forum. Unfortunately, the court declined the opportunity to enter into an "academic debate" as to the meaning of those provisions.[92]

Defences

The validity of the proposition that the *Property Act* provides a complete code as to the conduct required of a mortgagee finds some credence in *Falconbridge On Mortgages* wherein a portion of a vintage Ontario judgment is quoted: "It is the ordinary course before a sale by auction to give every publicity to it by advertisement in the newspapers, and by handbills; I should have said it is the invariable practice . . . It is the course of this court and the practice of everyone who desires to get the best price that can be gotten for the property to be sold."[93] From an historical perspective, one can appreciate that such advertising might have been sufficient during the 19th century. For example, printed handbills posted at prominent public locations and in sufficient numbers were apt to be seen and read by those wishing to purchase property, much as today one would look at the real estate section in a local paper.

Nonetheless, the past is present and we find in the City of Saint John one of three notices being posted behind the glass enclosure at "Chubb's Corner" affixed one atop another due to a lack of space or thumb tacks. Only the articling clerk ever asks why and even then the justification lacks any merit. Yet the entire argument that the act represents a complete code is based on the assumption that the purpose of complying with the notice requirements is to attract purchasers to an impending sale. One might

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[92]*Nova Scotia Savings & Loan* v. *MacKenzie*, *supra*, footnote 47.

[93]*Supra*, footnote 14 at 737 quoting Spragge V.C. in *Richmond* v. *Evans* (1861), 8 Gr. 508 at 518. With respect to printed handbills the 3rd edition of Falconbridge (1942) referred to the fact that it would be usual to post about one hundred posters although fifty would be sufficient (at 693). This is a far cry from he three required under the *Property Act*.

obtain such an impression upon reading the applicable section of the *Property Act* but even then doubt can be cast upon such an interpretation.

The comparable section enacted in 1903[94] stated that the power of sale could not be exercised unless the mortgagor was given at least two months notice of the impending sale; or unless such notice was published in the Royal Gazette or some daily or weekly newspaper and printed handbills were posted at three designated locations.[94] Clearly, at this point in time, this statutory provision was aimed at ensuring that the mortgagor was given notice of the sale through one medium or another. In the absence of this particular provision, the power of sale could have been exercised without notice if expressly provided for in the mortgage document.[95] Thus if one wished to take advantage of the statutory provisions then notice was necessary and a potential source of abuse was avoided.

The Revised Statutes of New Brunswick of 1927 evidence a reworking of the section so as to indicate unequivocally that its purpose was to provide alternative methods of providing the mortgagor with notice.[96] However, in the Revised Statutes of New Brunswick of 1952, the relevant section failed to include any conjunctions such that the section read as follows:

> 43. (1) A mortgagee shall not exercise the power of sale conferred by section 42 unless:
>
> (a) he has given to the mortgagor at least one month's notice in writing, specifying the time and place of sale;
>
> (b) such notice has been published for at least one month in The Royal Gazette or some daily or weekly newspaper published in the county within which the lands lie (or in the case of chattels personal, where the mortgage is recorded or filed), and in the case of lands, by printed handbills, one of which has been posted in or on the court house, one at, in or on the registry office, and one in some public place in the city, town or parish in which the lands are situate;

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[94]*Real Property Act*, Con. Stat. of N.B. (1903), Chpt. 152, s.42.

[95]See generally, Falconbridge On Mortgages, *supra*, footnote 14 at 723, notes 1 & 2.

[96]R.S.N.B. 1927, Chpt. 168, s.42(1).

> (1) A mortgagee shall not exercise the power of sale conferred by the last preceding section unless:
>
> (a) He has given to the mortgagor at least one month's notice in writing, specifying the time and place of sale; or,
>
> Such notice has been published for at least one month's notice in writing, specifying the time and place of sale; or,
>
> Such notice has been published for at least one month in The Royal Gazette or some daily or weekly newspaper published in the county within which the lands lie or in the case of chattels personal where the mortgage is recorded or filed, and in the case of lands, by printed handbills, one of which has been posted in, or on the court house, one at, in or on the registry office, and one in some public place in the parish in which the lands are situate.

(c) he has complied with the provisions of the Sale of Land Publication Act.[97]

Two practical problems arose at this time; (1) a mortgagee for some unknown reason had to comply with all notice and publication requirements and; (2) the reference to the *Sale of Lands Publication Act* meant further publication in The Royal Gazette.[98] An attempt to correct these problems was made in 1954 by amending the above quoted section by adding the word "or" at the end of clause "a" and the word "and" at the end of clause "b".[99] Regrettably, this amendment then created a further ambiguity. Was a mortgagee required to comply with clause "a" and in the event this could not be done then clause "b" and "c", or in the alternative was it necessary to comply with either clause "a" or clause "b" (but not both) and then as well clause "c"? The first option does not seem reasonable unless a mortgagee merely complied with clause "a". The second only made sense if a mortgagee complied with clause "a" and clause "c" (rather than clause "b" and "c") for it avoided duplicity of publication in the Royal Gazette. This dilemma was inadvertently resolved when in the Revised Statutes of New Brunswick of 1973 the word "or" at the end of clause "a", was omitted; an oversight which resulted in the necessity of complying with all three subsections.[100] Accordingly, the legislature intervened in 1975 by enacting an amendment to the section adding the word "or" after clause "a".[101] In so doing the problems which existed in 1954 arose once again.

It was not until 1979 that the ambiguities contained in the relevant section were finally resolved. The entire subsection was repealed and replaced with a provision calling for compliance with; (a) the *Sale of Lands Publication Act*; (b) notice being given to the mortgagee by way of registered mail and; (c) publication in a daily or weekly newspaper and in addition, the posting of printed handbills at the three designated locations.[102] Has legislative intent been sacrificed for the sake of clarity? Bearing in mind that the Royal Gazette has a limited and elite number of subscribers, that advertising is usually restricted to providing a legal description and that notices posted at three public locations serve no useful purpose, it is difficult to accept that the legislature ever intended that the *Property Act* be regarded as providing a complete code as to the conduct required of a mortgagee.

While it is clear that this Act is no longer concerned with providing the mortgagee with alternative methods of serving the mortgagor (and

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[97]R.S.N.B. 1952, Chpt. 177. The amount of notice to be given to the mortgagor was reduced to one month.

[98]*The Sale of Lands Publication Act*, R.S.N.B. 1952, Chpt. 200, s.1, required publication of a notice of sale in two succeeding issues of the Royal Gazette.

[99]S.N.B. 1954, Chpt. 68, s.1.

[100]R.S.N.B. 1973, c. P-19, s.45(1).

[101]S.N.B. 1975, Chpt. 46, s.1.

[102]S.N.B. 1979, c.58, s.1.

those with an interest in the equity of redemption) with notice of the impending sale, it is more than interesting to note that the publication of notices in both the Royal Gazette and local newspapers continues to be addressed solely to these parties. At no time has the writer seen an advertisement inserted with the obvious intention of attracting those who might be interested in purchasing the property or of elaborating on its marketable features.

There are two subsections which refer to the lack of responsibility for loss which occurs upon exercising the power of sale. The first is found in paragraph 44(1)(a) which provides:

> 44(1) A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers to the like extent as if they had been in terms conferred by the mortgagee deed, but not further, namely:
>
> (a) a power, when the mortgage money, or any interest thereon has become due, to sell, or to concur with any other person in selling, the mortgaged property or any part thereof, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title or evidence of title or other matter as the mortgagee thinks fit, *with power to vary any contract for sale, and to buy in at auction, or to rescind a contract for sale and to resell, without being answerable for any loss occasioned thereby*; [emphasis added]

The right to buy in at an auction without being answerable for any loss might be interpreted as providing a mortgagee, who complies with the statutory power, with insulation against anyone dissatisfied with the sale price. On the other hand, this provision could be interpreted so as to provide the mortgagee with protection only if he has acted in accord with the standard prescribed by law. There is, however, a third view which is for the most part only of historical significance. Yet it does provide one with a plausible and rational explanation as to the original purpose of this particular subsection.

Statutory provisions with respect to the power of sale were first enacted in England in 1860 with the introduction of *Lord Cransworths Act*,[103] and later replaced by the *Conveyancing and Law of Property Act* in 1881.[104] Section 19 of the latter Act, the equivalent of the New Brunswick provision, read as follows:

> A power, when the mortgage money has become due, to sell, or to concern with any other person in selling, the mortgaged property or any part thereof, either subject to prior changes or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting titles, or evidence of titles, or other matters, as he (the mortgagee) thinks fit, *with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to resell without being answerable for any loss occasioned thereby*; [emphasis added].

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[103] "An Act to give to Trustees, Mortgagees and others certain powers now commonly inserted in Settlements, Mortgages and Wills," 1860, U.K., c.145.

[104] 1881 U.K., c.41.

The substantial difference between the present New Brunswick provision and that just quoted lies in the crucial placement of one comma. After the phrase "to rescind any contract for sale" the English section contains a comma and then goes on to say that a mortgagee can resell without being answerable for any loss occasioned thereby. The English section is interpreted as permitting a mortgagee to buy in at a sale for the purpose of reselling without being answerable for any loss or to rescind a contract for sale and to resell (by way of contract) without being answerable for any loss.[105] The right to buy in at a sale for the purpose of reselling may be viewed as a device to avoid a sale at an undervalue or at a price that a mortgagee does not think reasonable.[106] Should the second sale not realize an amount at least equal to the first, then provided the mortgagee has taken reasonable precautions he should not be called upon to account for the difference. The error, if any, is one of judgment and not negligence.

The right to rescind a contract and subsequently sell at a lower price without fear of being called upon to account for the higher price is justified. A mortgagee who enters into a contract of sale under the power at an agreed price may find the purchaser withdrawing from the transaction in breach of his obligations. The mortgagee then discovers that the same price cannot be obtained and ultimately sells for a lower amount. So long as the mortgagee has acted reasonably, it would be unjustified to have him account for the proceeds based on the higher sale amount.[107]

The statutory provision of 1881 found its way into the Acts of New Brunswick in 1903[108] including the comma referred to earlier. However, in 1919, the New Brunswick Court of Appeal in *Gauvin* v. *Dionne*[109] held that the power to buy in at an auction meant to buy in for one's own purposes in the same way as was done when leave to all parties to bid was given by a decree for foreclosure and sale in Chancery. This decision although still doubted,[110] was subsequently codified by the New Brunswick legislature in 1952, and the "comma" was removed so as to coincide with the interpretation given by the court of appeal, this is, to buy in for its own

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[105]*Supra*, footnote 14, Falconbridge on Mortgages at 742, note 8.

[106]One could achieve this end by setting a reserve price.

[107]One of the few cases in which this statutory provision was of benefit to a mortgagee is *Wright* v. *N.Z. Farmers Co-Operative Association of Canterbury Ltd.*, [1939] A.C. 439 (P.C.). Here the mortgagee was held not accountable to the mortgagor for the purchase price for which the property was agreed to be sold under a rescinded contract. It was rescinded because the purchaser had failed to complete the transaction before the property had vested in him. The mortgagee was unable to get as high a price when entering into a subsequent contract with another pruchaser. It would appear that the mortgagee was under no obligation to sue for damages if such were recoverable.

[108]*Supra*, footnote 94, s.41.

[109]*Gauvin* v. *Dionne*, *supra*, footnote 46.

[110]See Falconbridge On Mortgages, *supra*, footnote 14 at 742, note 8.

purposes rather than for the purpose of reselling.[111] In attempting to avoid any ambiguity as to the right of a mortgagee to buy in at a sale, the meaning to be given to the phrase, "and to resell", was restricted to situations in which the contract was rescinded. In so doing, it is questionable whether the legislature ever intended that the mortgagee be relieved of its duty to take reasonable precautions. Indeed, this runs contrary to the decision of Barry J., in the *Gauvin* case where he held that although a mortgagee has a right to buy in for his own purposes, he is still under the duty to take reasonable precautions.[112]

The second statutory provision which might be utilized in an attempt to avoid an accounting on the basis of what a mortgagee should have received had he taken reasonable precautions is found in section 47(6) of the *Property Act*:

> The mortgagee, his executors, or assigns, shall not be answerable for any involuntary loss happening in or about the exercise or execution of the power of sale conferred by section 44 or of any trust connected therewith.[113]

The meaning which is to be attributed to the words "involuntary loss' is extremely difficult to ascertain in the absence of any judicial pronouncement, but it has been said that the practical value of this statutory protection is doubtful.[114] On the other hand the section seems to imply, that a mortgagee is responsible for any voluntary loss which could be construed as meaning any loss resulting from a failure to take reasonable precautions. This interpretation runs contrary to paragraph 44(1)(a) of the *Property Act* which states that a mortgagee who buys in at a sale is not answerable for any loss. Any reconciliation of the two provisions can only be effected by holding that paragraph 44(1)(a) does not negate any obligation to take reasonable precautions.

For the secured creditor who insists that these provisions offer a shield in the event of an attack upon a sale, there is one statutory provision which could be cited for the proposition that a mortgagee is liable for a failure to take reasonable precautions. Sub-section 47(2) of the *Property Act* provides:

> Where a conveyance is made in professed exercise of the power of sale conferred by section 44 the title of the purchaser is not impeachable on the ground that no case had arisen to authorize the sale, or that due notice was not given or that the power was otherwise improperly or irregularly exercised; but any person damnified by an authorized or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

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[111] R.S.N.B. 1952, Chpt. 177, s.42(a).

[112] *Supra*, footnote 46 at 302.

[113] A similar provision was first enacted in England; *The Conveyancing and Law of Property Act*, 1881, U.K., c.41, subsection 21(6).

[114] *Supra*, footnote 14, para. 728 at 335; P. Butt, "The Mortgagee's Duty on Sale", 53 Aust. L.J. 172 at 183 to the same effect and other writers cited therein who have adopted the same view.

The reference to an improper sale, although one which will not be set aside by the court,[115] could be taken as meaning that a mortgagor, for example, has his remedy in damages in the event there is a failure to adhere to the prescribed standard.

The purpose of the aforegoing analysis was not to provide answers to questions which arise in interpreting various sections of the *Property Act*. Rather it was to show the inherent weaknesses in those arguments which could be advanced to support an improvident sale conducted in a manner as evidenced by present practice. Ultimately, the answers will depend upon the construction placed upon these provisions by a court. In so doing, one has to be cognizant that, in the absence of clear language, a court will choose the one that is less likely to work an injustice or hardship on interested parties. Indeed, it would seem contradictory for a court to impose a certain standard of conduct only to interpret statutory provisions with the result that this standard can be ignored. If the legislature has failed to address the issues raised, then is there any argument which would justify a court in allowing a lower standard to be observed?

Of course, the need to resort to any arguments will be unnecessary if the mortgagee has sold the property, albeit to himself, at what may be termed a reasonable price in the circumstances. Not only must there be a duty which is breached but as well "damages" must result from a failure to observe it. It is conceivable that a property could sell for a very advantageous price notwithstanding the fact that very little marketing had been carried out in anticipation of the sale. On the other hand, should the property be sold to the mortgagee for a fractional amount of its value, then problems arise which are unknown to other common law jurisdictions. Not only can the mortgagee buy in at the sale, but as well he can sue for a "deficiency". Thus the right of a mortgagee to buy in at an auction sale gives rise to further issues, the resolution of which may affect the interpretation of the statutory provisions already discussed.

THE RIGHT OF A MORTGAGEE TO BUY IN AT ITS OWN SALE

The Right To Do So

English and Canadian courts have for the most part been unswayed by any argument in support of the proposition that a mortgagee should be permitted to buy in at its own mortgage sale conducted pursuant to a power of sale.[116] By contrast, in "foreclosure and sale proceedings", a liquidating mortgagee may be permitted to buy in at a sale at the discretion of the court. For example, in Ontario, the mortgagee instituting the action

[115]This subsection will not protect a purchaser in the event he has actual or constructive notice: *Bailey* v. *Barnes*, [1894] 1 Ch. 25 (C.A.) *per* Stirling J. at 30.

[116]*Supra*, footnot 17 and cases cited therein. The exception to the rule is found in *Gauvin* v. *Dionne*, *supra*, footnote 46.

may not bid except where leave is given in which case the sale is conducted by a solicitor for one of the other parties.[117] The precautions taken in such circumstances stem from the view that a mortgagee would be in conflict with his duty to obtain the best price and his interest to pay the lowest amount possible.[118] At the same time, if preparations for a sale have been extensive, then theoretically in a forum of competitiveness, the inclusion of the mortgagee in this group of would-be purchasers should enhance the sale price which is ultimately realized. This is all predicated on the understanding that the mortgagee or party who has control of the sale is under an obligation to take reasonable precautions in marketing the property.

The justifications proferred by chancery judges in the nineteenth century when establishing the rule that a mortgagee may not purchase under the power, property which he has taken as security, are limited to two; the first, that a man cannot contract with himself and the second, that a trustee cannot purchase the property which is the subject of the trust.[119] The second rationale is non-existent given the fact that the mortgagee is no longer characterized as a trustee. Be that as it may, the right of a mortgagee to buy the property of its debtor under the power arises under legislative authority in New Brunswick. The right, however, is limited to a sale by way of public auction and can be viewed as one of the primary advantages in conducting a sale pursuant to the provisions of the *Property Act*. Yet the real issue is not whether the legislature should allow a mortgagee to buy in but rather at which price may this liquidating creditor do so? This issue has arisen in New Brunswick.

In *Nova Scotia Savings & Loan* v. *MacKenzie*,[120] the defenant mortgagor went into default on its mortgage to the plaintiff, at which time approximately $39,000 was due on principal and interest. The plaintiff exercised his power of sale and was the successful and sole bidder at $10,000, which left a deficiency of $29,000. Three months later the plaintiff sold the property through a real estate agent for $9,000 more than it had paid and then commenced an action for a deficiency based on the amount obtained on the first sale. Angers J. (as he then was), in a summary manner, notes the apparent conflict between paragraph 44(1)(a) and sub-section 47(6) of the *Property Act* but declined the opportunity to "attempt an academic reconciliation of how much any involuntary loss should restrict any loss."[121] In

[117]Rule 455 of the Ontario Rule of Court provides that all parties may bid except the party having the conduct of the sale. See generally, Marriot and Dunn Practice In Mortgage Actions In Ontario (4th ed., by G.W. Dunn & E.J. Freyseng) at 200. As well, in Nova Scotia, a mortgagee is permitted to buy in at a sale; see Practice Memorandum 16 issued by Cowan, C.J.T.D. contained in Canadian Mortgage Practice Reporter at 74-401; see also *Briand* v. *Carver et al*, *supra*, footnote 55.

[118]*Supra*, Marriot & Dunn at 200.

[119]*Farrar* v. *Farrars Ltd.* (1881), 40 Ch. D. 395 at 404, *per* Chitty, J. at trial.

[120]*Supra*, footnote 47.

[121]Ibid., at 80.

holding that a mortgagee is obligated to take reasonable precautions, his Lordship stated: "it must be borne in mind that New Brunswick contrary to other provinces gives statutorily very little protection to the mortgagor in cases where the mortgagee purchases at the sale. The law, as stated by Chief Justice Hughes in *Canadian Imperial Bank of Commerce* v. *Haley*, gives him more."[122]

His Lordship then went on to hold that the plaintiff had failed to take any, let alone reasonable, precautions to obtain the true market value of the property and accordingly fixed its value on the basis of the second sale and allowed a judgment for a deficiency utilizing this figure. It must be assumed that the plaintiff merely complied with the statutory provisions and had relied on s.44 of the *Property Act* to avoid an attack on the first sale, as these points were not fully set out in the judgment.[123]

Even though one might view this case as an instance in which principles of "justice and fairness" prevail over technical arguments, there are going to be instances where a mortgagor is unable to defend an action in which a deficiency is being claimed so as to argue an improvident sale based on a failure to take reasonable precautions. In addition, an action on the covenant for a deficiency could be brought prior to the mortgagee effecting a private sale. Presumably on the basis of the *Haley* and *Nova Scotia Savings & Loan* cases, the mortgagee would have to account for what he should have received had he taken reasonable precautions. If the practice surrounding mortgage sales continues despite the volley of warning shots being fired by New Brunswick courts, then at what price should the property be sold to the foreclosing mortgagee? There are at least three approaches which are being adopted; (1) to buy in at a nominal amount; (2) to buy in at the amount of the outstanding indebtedness and; (3) to buy in at the fair or forced market value.

Not only does the general practice in New Brunswick involve a mortgagee buying in at its own sale but, as well, it involves buying in for a nominal amount, varrying from $100 to $1,000.[124] Such sales can only be

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[122]*Ibid.*, The same could be said of a sale in which the mortgagee is not the purchaser in the event reasonable precautions have not been taken.

[123]The power of sale in this case was exercised prior to the 1979 amendment of the Property Act (*supra*, footnote 102) and therefore it is conceivable that the mortgagee might have only given notice to the mortgagor and refrained from inserting any advertisement in either the Royal Gazette or a local newspaper (see text *supra*, commencing at footnote 99). However, the writer has been lead to believe that prior to the 1979 amendment the general practice entailed compliance with all of the notice provisions.

[124]Sheriff Dickens (Judicial District of Fredericton) indicated that of the 80% of sales in which the mortgagee is the sole bidder, the usual sale price hovers around $500; Sheriff Wolfe (Judicial District of Moncton) indicated that in 30% of the cases the properties were bid in at a very low figure; Sheriff Gillespie (Judicial District of Saint John) estimated of the 99% of sales in which the mortgagee is the sole bidder, the usual sale price is around $100; Sheriff Hadley (Judicial District of Bathurst) estimated of the 95% of sales in which the mortgagee is the sole bidder, 10% of these sales are for an amount varying from $500 to $1,000. The discrepancy as to the percentage of mortgages who buy in at a nominal amount in Moncton and Bathurst is due the fact that the general practice involves a mortgagee buying in for an amount equal to the mortgage debt.

viewed as "fraudulent" and could be disputed on the basis of a failure to act in good faith.[125] Whether or not a mortgagee is under a duty to take reasonable precautions, is irrelevant.[126] To maintain that the *Property Act* dictates the standard of care required of a liquidating creditor and that s.44 should be viewed as an exculpatory clause should at most strain the patience of a court. To sanction such a sale is to establish a rule of law that a mortgagee is permitted not only to keep property, which had been taken as security, but as well, to sue on the covenant for virtually the full amount of the outstanding debt. In effect, it would amount to an order for foreclosure absolute coupled with a right to sue on the covenant without the creditor having to reconvey the property; a feat which is not permitted when foreclosure proceedings are taken under the watchful eyes of equity judges.[127] In other words, a court of equity will not permit a mortgagee "to have its cake and eat it too!" The legal phrase used to describe this predicament is "unjust enrichment".

The general practice of buying in at a nominal amount seems to be tempered at times by the practice of buying in for the amount of the mortgage debt.[128] So too can this practice be criticized on the ground that while the debt may be extinguished, thus precluding any subsequent deficiency action, the value of the property may have exceeded the amount of the indebtedness.[129] The mortgagee may still find itself in the position of having to defend the sale for having sacrificed the mortgagor's equity in the property.

The third approach would not appear to be wide spread but does deserve consideration. To buy in property for its fair or forced market value would seem to obviate the need to take reasonable precautions on the ground that no one can complain that a sale at an undervalue has taken place. The interests of the mortgagor or owner of the equity of redemption, subsequent mortgagees, or judgment creditors with a registered claim, are all protected. Should a deficiency still exist, then an action on the covenant is justified, the debt not having been extinguished. Yet this approach is not without its limitations. The problem is really of a three-fold nature; can a valid distinction be made between a fair as opposed to a forced market value; if so, what is the cause of this discrepancy and what empirical evidence is there upon which one can arrive at two distinct valuations.

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[125]The writer is making the fundamental assumption that the value of the property greatly exceeds $1,000.

[126]See text, *supra*, commencing with footnote 46.

[127]The right of a mortgagee to sue on the covenant for a deficiency after exercising the power of sale or after a sale in foreclosure proceedings stems from the fact that the mortgagee has to account for any surplus generated by the sale. If the mortgagee obtains an order for foreclosure absolute, he has elected to take the security in satisfaction of the debt and cannot sue on the covenant unless he is in a position to reconvey the land; see *supra*, footnote 5.

[128]*Supra*, footnote 124.

[129]*Cf. Frost Ltd.* v. *Ralph et al*, *supra*, footnote 57, where the mortgage sold for just enough to cover its debt and the amount of the first mortgage.

The decision of the New Brunswick Court of Appeal in the *Haley* case clearly holds that the secured creditor is only accountable for the difference between the amount obtained and the amount that would have been obtained but for the failure to take reasonable precautions or having acted negligently in their performance; that is, the forced market value less the sale price. The court was satisfied that the property could only be sold for an amount between 60% and 75% of its fair market value. The distinction would appear to lie on the understanding that fair market value is the price which property will fetch in the open market between a willing buyer and a willing seller bargaining on an equal footing and with the same knowledge.[130] A forced market value is determined in the context that the vendor is unwilling, a factor known by potential purchasers, and on the basis that the property must be sold within a limited time frame.

The negative impact on the realizable price which such phrases as "Mortgage Sale", Bankruptcy Sale", "Sale by Receiver" or even "Estate Sale" have, are all too evident even to the most unsophisticated purchaser. They are indicia that a bargain is to be had. The psychological impact with respect to the price which a potential purchaser will pay for property, when it is known that a sale is a forced one, is difficult if not impossible to ascertain and one which in any event may be unavoidable. However, should the difference in values arise because of the marketing techniques employed in a forced sale setting being different from those in a normal sale, then the discrepancy cannot be justified. The difference, if any, should arise because in a forced sale situation there is a point in time at which the property has to be sold after allowing for an appropriate amount of time to market the property. In normal sales the vendor usually has the discretion to prevent a sale at what he considers an undervalue.[131] The difference can be minimized if secured creditors were to adopt the stance that notwithstanding the fact that the sale is a forced one, the property will not be sacrificed so as to benefit "bargain hunters". The more a forced sale resembles a sale at "fair market value" the higher the probability that the best price will be obtained. A 'fair market value" is, in truth, only an estimate made on the assumption that reasonable precautions will be taken to expose the property to the greatest number of individuals in any one market.

Appraisal theory does not exist in a vacuum and accordingly any estimate as to value has to involve a method of calculation, i.e., concrete data upon which an estimate can be made. They are limited to three: the "market

[130]Other than in the area of expropriation law, appraisal theory has for the most part been ignored when discussing the amount for which a mortgagee is to be held accountable: *e.g.*, the *Cuckmere* case in which the issue as to quantum was avoided by remitting the case to the trial judge for consideration. As for a comprehensive guide to defining the phrase "fair market value" see E.C.F. Todd, The Law of Expropriation in Canada, (Toronto: Carswell, 1976) at 119 *et seq*. For a thorough analyses of real estate appraisal theory, reference should be made to P.F. Wendt, Real Estate Appraisal Review and Outlook (University of Georgia Press: 1974).

[131]Even in the open market, there will be instances where a "willing vendor" is under compulsion to sell; *e.g.*, a change in job location. In setting the fair market value, it is doubtful that appraisers take this factor into account.

comparison" or "market data" approach; the "replacement cost" approach and; the "income investment or economic" approach. For the purposes of discussion and simplicity, assume that the property to be sold at a forced sale is a single family dwelling. In these circumstances the market data approach is the more appropriate method upon which to base an appraisal as to fair market value.[132] Reference to actual sales of a comparable property will hopefully be available although adjustments will be made in light of the physical condition and location of the property, *etc*. Turning to an appraisal in which the estimate as to value is made on the basis of a forced sale, then one would presume that it would be based on comparable properties which have been sold in forced sale situations. Does such data exist? Hopefully resort would not be made to sales in which the mortgagee is the purchaser at a nominal amount.

A mortgagee who has bought in at a sale at "fair market value" might feel insulated from attack for an improvident sale but there is always someone who will advance another opinion as to value.[133] Those who might prefer to buy in at the forced market value may well find it extremely difficult, from an evidentary standpoint, to adduce cogent evidence as to value. If it is not sufficient then a court may have to resort to fair market value.[134] In the end, there is only one way in which a liquidating creditor can be assured that the best price was obtained and that the sale will be unsuccessfully assailed. It involves adherence to the principle that a mortgagee should take reasonable precautions in selling the property, that is, to adopt reasonable marketing techniques.

Abuse-Theory v. Practice

Putting aside a sale to the liquidating mortgagee at fair or forced market value, then within the theoretical framework outlined, the fact that many mortgagees are buying in for a nominal amount or for an amount just sufficient to cover the debt would lead one to conclude that these practices can be characterized as being oppressive if not an abuse of a remedial right. If this is so, then why is it that the court dockets and law reports are not replete of cases brought by aggrieved mortgagors and junior mortgagees? A number of reasons may exist which could explain this phenomenon. Mortgagors who are unable to meet their debt obligations are just as well unable to meet the cost of litigating an improvident sale or defending an action for a deficiency. Junior mortgagees undoubtedly adhere to the same unquestioned practices and may be willing to accept the

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[132]Where the property to be sold is commercial in nature, then the income approach as a method of evaluation might be preferred; *cf. Frost Ltd.* v. *Ralph et al, supra*, footnote 64 and see footnote 65; *Wood* v. *Bank of Nova Scotia et al, supra*, footnote 69.

[133]*E.g.*, *Wood* v. *Bank of Nova Scotia et al, supra*, footnote 69, where the trial judge concluded that on the basis of expert opinion, the fair market value was $65,000. The plaintiffs, however, entered into evidence two appraisals, one at $93,200 and the other at $95,000.

[134]*Cf.*, *Nova Scotia Savings & Loan* v. *MacKenzie*, *supra*, footnote 47.

loss which arises from such sales. More important, however, is the course of action which a foreclosing mortgagee takes after having bought in for a nominal amount or for the amount of the debt. Presumably the mortgagee in such circumstances will then make attempts to sell the property in the normal commercial way unless the proerty is of some special value to him. After effecting the second sale the state of accounts as between interested parties will fall into one of two categories. Either the mortgage debt will have been satisfied or the sale price will be insufficient to cover the amount of the indebtedness.

If the sale falls into the first category, then mortgagees may be content with the results and thus taking no further action based on the first sale. However, in the event there is a surplus, are mortgagees accounting to those who would have been entitled had reasonable precautions been taken in the first instance? If the price realized is insufficient to cover the debt then a mortgagee may still be inclined to sue for a deficiency, particularly if there is a guarantor. From a legal standpoint, the deficiency should be based on the price paid under th first sale. Adherence to a higher standard of care in effecting a sale under the power would dictate that this is the proper approach in calculating a deficiency. On the other hand, given the present practice surrounding sales, principles of justice would dictate that this amount be determined upon the price realized under the second sale.

If mortgagees are proceeding in this manner, then the decision of Mr. Justice Angers in *Nova Scotia Savings & Loan* v. *MacKenzie* is being followed, albeit indirectly.[135] This approach may mollify the view that the sale practices in New Brunswick are oppressive but it is not to be taken as suggesting that it is an acceptable alternative to the obligation to take reasonable precautions in the first instance. Nor does it detract from the injustices which arise in the event a second sale yields a surplus, even though it may well be a rare occurrence, unless of course mortgagees are accounting for the excess.

CONCLUSIONS/RECOMMENDATIONS

The initial problem of proper characterization of this particular debtor-creditor relationship has been resolved. Notwithstanding the fact that the mortgagee's obligations are not identical to those of a trustee, the debate as to whether this creditor is under an obligation to act merely in good faith or in addition is under a duty to take reasonable precautions when exercising its power of sale continues. While the weight of judicial authority tips the scales of justice in favour of a higher standard, the distinction between a mortgagee who acts solely in good faith and one who as well takes reasonable precautions, is more illusionary than real.

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[135]In effect the mortgagee is buying in for the purpose of reselling as was originally intended when the equivalent of paragraph 44(1)(a) of the *Property Act* was first enacted in 1903.

The analysis of Canadian and English cases leads one to the conclusion that the debate has focused entirely on the appropriate word formulae to be utilized in denoting the mortgagee's obligations and has not, for the most part, been directed at circumscribing the type of conduct required of this liquidating creditor. However, the resolution of this issue should not depend on the examination of cases within a particular factual setting, but rather on the rationale which can be offered as a justification for requiring either a less stringent or higher duty of care. Given that it is in the best interests of the mortgagor, the liquidating mortgagee and other interested parties that a higher standard of care be imposed, then it is difficult to assail a rule of law as expressed in the *Haley* case. Truly, the issues today with respect to the power of sale should center on the nature of the reasonable precautions necessary in order to dispose of property at a fair price. In so doing, the problem of price inadequacy will have been addressed even though the amount realized may not reflect its market value.

Against this theoretical background, the perceived general practice surrounding mortgage sales in the Province of New Brunswick leaves no doubt that mere compliance with the provisions of the *Property Act* affords no protection to either the debtor or creditor. So far as the liquidating mortgagee is concerned, to maintain that the *Property Act* lays down a complete code as to the conduct required in selling the security is to ask a court to accept an interpretation which is at variance with the obligations which it has imposed and one in which it is doubtful that the legislature ever intended. To insist that certain provisions of the *Property Act* should be interpreted as exculpatory clauses is as well at variance with the imposed standard and, in any event, is at odds with other provisions.

Whether or not the power of sale as a means of liquidating a debt is, in practice, being abused does not detract from the fact that it is open to such abuse if mortgagees are acting arbitrarily. The oppressive nature of a sale in which the mortgagee buys in for a nominal amount or one just sufficient to cover the debt can admittedly be tempered by the mortgagee suing for the deficiency on the basis of the second sale. But these approaches should not be viewed as acceptable alternatives to the duty to take reasonable precautions in the first instance. As for creditors who wish to buy in at fair or forced market value, they may well find themselves in the unenviable position of justifying either sale price because of the failure to take reasonable precautions. There is only one method which will ensure that all interested parties are protected and in all cases; the adherence to proper marketing techniques when exercising the power.

The essence of any recommendation seeking to clarify the obligations or duties of a mortgagee when exercising a power of sale must lie in the acceptance that this creditor should take reasonable precautions in disposing of his security. Legislative direction on this matter would appear to be the most convenient and expedient way to proceed. Moreover, to recommend a statutory provision embodying such a rule of law is only the

vertex in legislative reform. The existing statutory provisions found in the *Property Act* are nearly identical to those first enacted in England in 1881[136] and should be reassessed with a view to eliminating ambiguities and bringing them into line with the commercial realities of today. Legislative intent should not be made a matter of speculation, nor should it be sacrificed for the sake of clarity. Nor should reform occur solely in a theoretical or academic vacuum.

The problems and issues which arise in an adversarial context can only be circumvented by a re-examination of the entire liquidation process by those familiar with its application. This group is not to be restricted to secured creditors but as well should include, for example, those normally called upon to market property. The expertise of real estate agents should throw light on the proper precautions which can be deemed reasonable when selling properties of varying kinds. For example, there will be situations in which it is far more appropriate to effect a sale by private contract or by tender rather than by public auction in order to obtain a just return. Similarly, the nature of the property may dictate that advertising on the national level, as well as on a local and a provincial level, is more appropriate. Even then, advertising should focus on the saleable features of the property and not solely on compliance with the *Property Act*. Admittedly such matters may be incapable of codification but they are but a few of the many questions which can arise in the forced sale setting. In addition, one might ask whether it is necessary to have more than one appraisal and if so, why? If a reserve price is to be set, how is it to be determined? Is there a valid distinction between a fair as opposed to a forced market value? The latter question is properly the domain of an appraiser.

In the end, legislative reform should seek to provide the secured creditor with a simple and efficient way in which to liquidate his debt while at the same time providing adequate protection to all interested parties, including the creditor, with respect to obtaining the best price possible in the circumstances.[137] The resulting legislation should not seek to effect a compromise but rather to effect a process which can ensure the adequacy of the price realized when property is foreclosed upon under a power of sale.

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[136]*Supra*, footnote 104.

[137]*Supra*, footnote 3 with respect to the recommendation of the Civil Procedure Rules Revision Committee.