Foreclosure and sale by public auction is, by far, the most common remedy used by mortgagees in realizing on the security of land mortgages in Nova Scotia.

The normal Order granted by the Nova Scotia Supreme Court in mortgage proceedings declares:

(a) What the amount outstanding on the mortgage is;

(b) That all the interest of the maker of the mortgage at the time the mortgage was made in the lands subject to the mortgage being foreclosed, be sold by the Sheriff at public auction after notice of the sale is advertised for at least thirty days and sent to subsequent encumbrancers at least thirty days before the sale date;

(c) That the equity of redemption of the owner be barred and foreclosed unless the amount outstanding on the mortgage is paid before the sale.

The effect of the Order, therefore, is to extinquish the equity of redemption in the property if the property is not redeemed before the sale.

The power to order foreclosure is not statutory but comes from the inherent jurisdiction of Courts of equity to order foreclosure. How did this remedy develop? In order to answer this question it is necessary to examine the position of a mortgagor and mortgagee at common law. At common law, the title to mortgaged property becomes absolutely vested in the mortgagee when the money secured by the mortgage is not paid in accordance with the terms of the mortgage. However, since early times, the Chancery Court in England has interfered to prevent this harsh result, treating a mortgage as a pledge of real property with the owner of the property having an absolute right - the equity of redemption - to get the property back when he has paid the mortgage off: Kenny v. Chisholm (1883) 19 N.S.R. 497 per Rigby, J. at page 503.

This equitable right to redeem cannot, however, go on forever and the Chancery Court in England had to devise a correlative remedy to extinguish it. This remedy is foreclosure: Wayne v. Hanham 69 E.R. 415 at page 416. In essence, therefore, the court of equity stepped in and gave the owner of the equity of redemption a further chance to redeem before his equitable right was extinguished.

However, the equity of redemption can only be extinguished by juridical action, unless, of course, the owner of the equity of redemption voluntarily extinguishes this right by conveying the mortgaged property to the mortgagee. A procedure was, therefore, developed by the Court of Chancery in England for applying this remedy and this procedure can be very briefly described as follows: when a mortgage was in default the mortgagee could file a Bill of Foreclosure in the Court of Chancery. This Court would then set a date for payment of the mortgage and if payment was not made on that date, the Court would refuse to interfere again and the parties would be left to their legal rights: the mortgaged estate would, as a result, become absolutely vested in the mortgagee: Sampson v. Pattison 66 E.R. 1143 at 1144. All persons interested in the equity of redemption (the owner and subsequent encumbrancers) had to be joined as Defendants in a bill for foreclosure in the Chancery Court: T lee v. Webb (1843) 49 E.R. 939 at Page 941.

This equitable jurisdiction to order foreclosure, would have passed to the old Court of Chancery in Nova Scotia and, apparently, in the very early days the procedure was the same as in England - a decree for foreclosure without sale. In _Pew v. Zinck (1950-51) 27 M.P.R. 1 Ilsley, C.J., points this out:

"At first the English procedure was followed. Anderson v. Taylor (1756), Townshend's History of the Court of Chancery in Nova Scotia (1900), p. 71. There was a decree nisi, a decree absolute and no order for sale. Townshend says (p. 72) that the English practice could not have prevailed for any length of time. The procedure followed generally in the Court of Chancery soon came to be taken from and founded upon the procedure then followed in the Irish Court of Chancery and the method of foreclosure and sale in use in Ireland was adopted (Ibid. p. 79 and Murdoch's Epitome (1832), vol. 11, p. 115)."

The jurisdiction to order sale is now statutory. Apparently, the Court of Chancery in England could not, before enabling legislation was passed, always order sale in a foreclosure proceeding but only a foreclosure: James v. Bayley (1855) 51 E.R. 1161: Cox v. Tool 52 E.R. 588.

However, as pointed out by Ilsley, C.J. in Pew v. Zinc (supra), the Court of Chancery in Nova Scotia, in very early times, began to order foreclosure and sale as a matter of practice.

The present statutory power to order sale in foreclosure proceedings is found in Rule 47.14 of the Civil Procedure Rules which provides that the Court may order property to be sold whenever it appears necessary or expedient. Rule 47.16 gives the Court wide discretion to impose the terms of the sale and Rule 12.04 specifically provides for sale in a mortgage proceeding in which a defendant fails to file a defence. This Rule gives the Court power to order a sale on an application for foreclosure or foreclosure and sale. Paragraph 2(d) of this Rule dives the Court the power to "direct a sale of the mortgaged property on such terms as the Court thinks fit" and the form of Order being used in Nova Scotia, therefore, is not a statutory form of Order but rather a form settled by the Judges in the exercise of this wide discretionary power to determine the terms under which such sale is to be held.

It is interesting to note that before the fusion of equitable and common law jurisdiction in the Supreme Court, the Supreme Court, as a common law Court was, by statute, given the power to order not only redemption of mortgaged property upon payment of the mortgage debt but also the power to order the sale of the property after reasonable notice of the time and place of such sale; the equity of redemption being barred and foreclosed by the sale. This was provided for in an Act for the More Easy Redemption and Foreclosure of Mortgages, Stats. N.S., 1833, c. 19. This Act provided, however, that the Supreme Court had jurisdiction to do this only if there was no suit pending in the Court of Chancery with respect to the same mortgage.

In 1855 the Court of Chancery was abolished stats. N.S., 1855, C. 23) and its equity jurisdiction was transferred, by that statute, to the Supreme Court.
It would appear, therefore, that between 1833 and 1855 mortgagee could realize on mortgage security in Nova scotia by either filing a bill for foreclosure and sale evoking the inherent jurisdiction of the Court of Chancery order foreclosure or foreclosure and sale, or by commencing an action and invoking the statutory jurisdiction the common law Court.

It should be noted, however, that the 1833 Act was confined only to the enforcement of a "bond - note secured by mortgage for non-performance of covenants herein contained".

In 1864, legislation was passed to provide for the appointment of an equity judge as part of the Nova Scotia Supreme Court (Stats. N.S. 1864, c. 10) and then in 1884 the judicature Act (Stats. N.S. 1884, c. 25) was passed to provide that the jurisdiction of the Supreme Court include the jurisdiction which, immediately preceding the coming into force of that Act, was vested in or capable of being excercised by all or any one or more of the Judges of the Supreme Court sitting in Court or Chambers or elsewhere. By the Act of 1884, therefore, the equitable jurisdiction inferred on the Supreme Court by the 1855 Act and then given to the Judge in equity by the 1864 Act, was conferred on all the Judges of the Nova Scotia Supreme Court. The adicature Act of 1884 was replaced, in 1972, by the present judicature Act (Stats. U.S. 1972, c. 2). The jurisdiction of the Court, including the equitable jurisdiction given it under the Acts of 1855 and 1884, is continued by Section 3 of present Act which provides that:

"The Court shall continue to be a superior Court of record, having civil and criminal jurisdiction and it has all the jurisdiction, power and authority, that on the coming into force of this Act, was vested in or might have been exercised by the Court and such jurisdiction, power and authority, shall be exercised in the name of the Court."

Does the Nova Scotia Supreme Court now have arisdiction to order foreclosure instead of foreclosure and ale?

It will be recalled that in the very early days the court of Chancery in Nova Scotia had, apparently, arisdiction to decree strict foreclosure and simply changed is practice to order foreclosure and sale, and that the legislation just discussed, has transferred the urisdiction of the old Court of Chancery to the Nova Scotia upreme Court. It may very well be that this equitable urisdiction to order strict foreclosure still exists, lthough it has not been used for very many years. Rule 2.04 of the Civil Procedure Rules apparently recognizes his, describing, as it does, the material to be submitted o the Court on an application for "foreclosure or oreclosure and sale".

Rule 12.04, 2(d) provides, however, that the Court may direct the sale of the mortgaged property.

A literal reading of Rule 12.04 would lead one to the onclusion that the Court does have jurisdiction to order trict foreclosure, but that if a proceeding is brought for trict foreclosure in a default situation, the Court has a iscretion and can either order foreclosure or refuse it and rder foreclosure and sale instead if it decides that strict oreclosure is not appropriate in the circumstances.

WHEN PROCEEDINGS MAY BE COMMENCED

Proceedings for foreclosure and sale may be commenced when a default has occurred under the mortgage. It is not necessary that the full amount secured by the mortgage be due when proceedings are commenced.

In most cases, however, a mortgage contains a provision that if the payments are not made at the time required in the mortgage, or if there has been a breach of some covenant contained in the mortgage, then the entire amount secured by the mortgage becomes due at the option of the mortgagee. Such a clause is called an "acceleration clause" and can be in the following form:

"PROVIDED that in default of the payment of any installment of the principle or interest hereby secured, on on breach of any covenant or proviso herein contained or if waste be committed or suffered on said lands the whole of the monies hereby secured remaining unpaid shall become payable, but the mortgagee may waive his right to call in the principle and shall not be therefore debarred from subsequently asserting and exercising his right to call in the principle by reason of said waiver or by reason of any future default."

However, as already mentioned, the right to commence proceedings can arise on default even if the mortgage does not contain an accelaration clause. In Fenton and Montreal Trust Company v Zinck (1962) 33 D.L.R. 29 , Coffin,' J. (as he then was) held that default in payment of any installment of principle or interest payable under a mortgage entitles the mortgagee to an order for foreclosure for the whole balance of the sum secured by the mortgage, even though the mortgage does not contain an acceleration clause. In reaching this conclusion the court applied the following principle, which has been established by a long line of authorities:

A mortgagor conveys the legal title to the mortgagee subject to the condition that the legal title would be reconveyed to the mortgagor if the mortgage money is repaid in accordance with the terms of the mortgage; a default amounts to a breach of this condition and therefore, when it occurs the estate of the mortgagee becomes absolute at law giving him the right to foreclose the equitable right of redemption.

Accordingly, a mortgagee has the right, after default, to commence foreclosure proceedings and, subject to statute, has the right to continue with the proceedings unless a defence has been filed or unless the full amount secured by the mortgage, together with costs, has been paid. The right to continue the proceedings, however, has been somewhat abridged by the following statutory provisions:

(a) Section 49 of the Bankruptcy Act, R.S.C., 1970, c. B-3 permits a court to postpone the right of a secured creditor to realize on his security. The court has the power, however, to postpone the exercise of this right for no longer than six months after the debt is due or for a longer period only when all arrears are, paid and all other defaults are cured.

(b) Section 38A of the Judicature Act, Stats. N.S., 1972, c. 2 permits the court to discontinue foreclosure proceedings. This Section provides, however, that such an order may only be made once with respect to the same mortgage and only before an order for foreclosure and sale is granted and only on condition that the arrears and costs are paid and any default on a covenant in default is cured.

Therefore, if, after such an order is made, there is a fresh default, and a second proceeding based on the fresh default is commenced, the court has no power, pursuant to Section 38A, to discontinue the second proceeding.

PARTIES TO PROCEEDING

The mortgagee or the present holder of the mortgage, if the mortgage has been assigned, must, of course, be the plaintiff.

In considering what parties should be made defendants it must be remembered that a mortgage consists of two elements:

(a) a promise to pay;

(b) a conveyance of the legal estate, subject to the equity of redemption: the right of the **owner** of the property to have the legal title reconveyed upon performance of the covenants contained in the mortgage.

The mortgagee, therefore, has two remedies: an action on the covenant to pay the mortgage money and an action for foreclosure and sale to extinguish the equity of redemption. The mortgagee may pursue these remedies at the same time in one proceeding: Gordon Grant & Co.

v. Boos [1926] A.C. 781.

Where the owner of the mortgaged property is the same person who made the mortgage, then only that person is the defendant in the foreclosure proceeding; the holder of the mortgage can claim against him for foreclosure and sale, for payment of the amount secured by the mortgage, and **for any** deficiency resulting from the property selling for less than what is outstanding on the mortgage.

If, however, at the time the foreclosure proceeding is commenced, the maker of the mortgage is no longer the owner of the mortgaged property, and if both remedies are to be pursued, then it is necessary to join the owner of the mortgaged property, to foreclose the equity of redemption, and also to join the original maker of the mortgage, and to claim against him payment or any deficiency on a sale. If the original maker of the mortgage is not joined as a defendant, any right to claim payment of the deficiency against the original mortgagor is lost. This was the case in Ryan v. Caldwell (1900) 32 N.S.R. 458. At the time the foreclosure proceeding in that case was commenced the property was owned by a person other than the mortgagor. The mortgagee foreclosed, bought the property at the Sheriff's sale and then sold it. The mortgagee then commenced a separate action against the original maker of the mortgage for the deficiency he suffered as a result of the amount realized on the sale being less than the amount of the mortgage. The Nova Scotia Supreme Court in banco held that no action on the covenant in the mortgage could be maintained since the bringing of this action gave the defendant a new right to redeem, which he could not do because the plaintiff had previously sold the property and was therefore not in a position to reconvey it to the defendant. The court said that if the defendant had been joined as a defendant in the foreclosure action his right to redeem would have been extinguished by the foreclosure sale and that if this had been the case, an action on the covenants could have been maintained, notwithstanding that the plaintiff was not in a position to reconvey the property. to the defendant.

In any event, Rule 47.10 of the Civil Procedure Rules provides as follows:

"Where the purchase money is insufficient to pay what is found to be due to a plaintiff for principal and interest and costs, the plaintiff shall be entitled, when the mortgagor is a defendant and such relief has been claimed, to an order for the payment of the deficiency."

In Almon v. Busch (1979) R.E.D. 362 and Kenn v. Chisholm (1883) 19 U.S.R. it was held that the original mortgagor would be liable for a deficiency claim if he was not joined in the foreclosure proceeding, if at the time the action for deficiency was brought, the holder of the mortgage had title to the mortgaged property, thereby permitting redemption. However, Rule 47.10 overrules both these cases and therefore the original mortgagor is free from liability if he is not joined as a defendant, even if the mortgagee can reconvey title to him.

Accordingly, when commencing foreclosure proceedings where the owner of the mortgaged property and the original maker of the mortgage are two different persons, instructions should be sought on whether or not to claim payment and a deficiency judgment against the original mortgagor. If he is not joined in the foreclosure proceeding, then any right of action for a deficiency is lost.

When considering the proper defendants in a claim on the covenants in such situations, instructions should also be sought as to whether or not the present owner of the property signed an agreement whereby he agreed to make the mortgage payments. If he did, then the claim not only for foreclosure, but also on the covenants can be made against him. Again, instructions on whether to make such a claim should be sought before commencing the foreclosure proceedings.

Since the action includes a claim for foreclosure of the **equity of redemption**, it must be remembered that there may be parties, other than the owner of the mortgaged property, who have an interest in the equity of redemption. Such persons would include any parties who have a mortgage on the property subsequent to the mortgage being foreclosed. The holders of mortgages made after the mortgage being foreclosed, and judgment creditors, are among

those who fall within this class of persons called "subsequent encumbrancers" and they must be joined in foreclosure proceedings.

It will be recalled that under the English practice subsequent encumbrancers were joined as defendants. However, it is not necessary to join subsequent encumbrancers as defendants in Nova Scotia. Rule 5.13(4) of the Civil Procedure Rules provides that it is not necessary to join subsequent encumbrancers as defendants and empowers the court to order that notice of the sale be sent to each of them, and subsection 24(1) of the Real Property Act provides that when such a rule of court is in existence a foreclosure sale will extinguish the rights of such encumbrancers even if they were not joined as defendants in the foreclosure proceeding.

Since the coming into force of the Matrimonial Property Act, Stats. N.S., 1980, it is necessary, when commencing foreclosure proceedings with respect to a matrimonial home, to join as defendants both spouses, notwithstanding that title to the property is registered in the name of only one of them. This is so because subsection 9(1) of that Act gives a right of redemption in a matrimonial home to both spouses. This subsection reads as follows:

"Where a person is proceeding to realize upon a lien, encumbrance or execution or exercises a forfeiture against property that is a matrimonial home, the spouse who has a right of possession by virtue of this Act has the same right of redemption or relief against forfeiture as the other spouse has and is entitled to any notice respecting the claim and its enforcement or realization to which the other spouse is entitled."

There is some doubt as to whether a person who has guaranteed a mortgage debt but who never was a mortgagor, is liable for a deficiency claim if he is not joined as a defendant in the foreclosure proceedings. In MacDonald v. Hirsch (1932) 5 M.P.R. 469 the holder of a mortgage conducted a foreclosure sale, suffered a deficiency and then sued the bondsmen, who had guaranteed the mortgage debt, for the deficiency. Chisholm C.J. in the **course of delivering** his judgment made the following distinction:

"The status of the defendants is not that of mortgagors or persons having an interest in the real property, who have a right to redeem. The status is that of sureties .•.. What the sureties, upon payment of the creditor of the amount remaining due upon the original loan, would acquire, is not the right to redeem, but the right to receive the securities and to foreclose or otherwise realize upon them; and the creditor, while entitled to enforce his securities, if he is not paid, is obliged in equity to realize upon them in the manner most likely to produce the best possible sale. If the creditor enforces his remedies with due regard to the interest of the sureties in this respect the sureties cannot have any well grounded complaint."

And at page 497, Hall, J. said this:

""he learned trial judge based his decision upon the judgment of this court in Miller v. Thompson which is unreported, but is cited with approval in Kenn v. Chisholm (1883), 19 N.S.R. 497 and followed in Ryan v. Caldwell (1899), 32 N.S.R. 458. I find difficulty in bringing this case within the rule there laid down. The defendants here were not parties to the mortgageand never had the right to redeem, and no demand had been made on them prior to the enforcement of the mortgages. Finding as I do that the plaintiff has failed to prove a deficiency it is not necessary to decide whether Miller v. Thompson applies".

However, the court based its conclusion on a finding that the sale was really a sale by the plaintiff to himself and invalid and therefore there was no deficiency.

Since, therefore, the question is somewhat in doubt, the better course is to join a guarantor, who was never a mortgagor, as a defendant in the proceeding, claiming against him payment or a deficiency judgment.

Does a change in ownership in the mortgaged property make it necessary to add the new owner as a party if the change in ownership takes place before the Sheriff's sale? In Stubbings v. Umlah (1900) 40 N.S.R. 269 the defendant, who was the owner of the mortgaged property, died after the order for foreclosure and sale was issued, but before the

sheriff's sale. The defendant's successor in title contended that the proceeding thereby became defective for want of parties and that the sale should therefore not be confirmed. Meagher, J. held that an order for foreclosure and sale is a final adjudication of foreclosure which bars the right of redemption, subject only to the right of the owner of that right to redeem at any time before the sale. He. concluded, therefore, that the death of the defendant after the order for foreclosure and sale did not make the proceeding invalid for lack of parties because the order, being a final adjudication of foreclosure, took effect from the time it was pronounced; the Sheriff's power to sell, which he derived from it, related back to the day it was made, and that being prior to the death, the sale was therefore valid.

Consequently, a search should be made in the Registry of Deeds just before the application for the order is made. If the title to the mortgaged property has been conveyed then the new owner of the mortgaged property should be joined as a defendant. If the owner of the mortgaged property at the time the proceeding commenced has died **before the order for** foreclosure and sale is issued, then his heirs at law or those entitled to the property under his will may be joined, or in the alternative, his personal representatives may be joined, since Rule 5.13(2) of the Civil Procedure Rules provides that the personal representatives of a deceased mortgagor may be joined in place of the heirs at law or devisees. In any event one or the other should be joined.

If, however, the transfer of title, or death, occurs after the order for foreclosure and sale is issued, no change in parties is necessary.

THE PROCEEDING

Before commencing a foreclosure proceeding the following steps should be taken:

(a) instructions should be **sought from the holder** of the mortgage on how many payments are in default or whether there has been a breach of any covenant;

(b) the mortgage document should be obtained from the holder of the mortgage in order to determine that there has, in fact, been a default, according to the terms of the mortgage;

(c) a calculation should be made, based on the information received from the holder of the mortgage, of the amount of principle and interest outstanding on the mortgage, unless the holder of the mortgage is capable of making that calculation himself.

Since most mortgage documents provide that the mortgagee may pay insurance premiums, taxes and other expenditures with respect to the property, including repairs, and add these amounts to the mortgage, instructions should be obtained from the holder of the mortgage as to whether any such expenditures were made by him. If they were, and if the mortgage document permits these amounts to be added to the principal claimed, then these amounts should be added and interest can be charged on these amounts from the time the expenses were incurred, if the mortgage document says that this may be done.

However, even if taxes on the mortgaged property were paid by the holder of the mortgage, and the mortgage does not contain a clause permitting these payments to be added to the mortgage debt, such payments can be added to the mortgage debt and can form part of the claim in the proceeding. This is so because Section 159 of the Assessment Act, R.S.N.S., 1967, c. 14, gives every mortgagee holding a mortgage on land liable to be sold for taxes the right to pay the taxes, and provides that if the mortgagee does so he may add the amount so paid to the mortgage and shall have in respect thereto the same rights, remedies, and privileges against such land as he has by virtue of or under the security held by him.

(d) A search should be made in the Registry of Deeds in order to determine who the present owner of the mortgaged property is so that the person presently entitled to redeem the property is joined as a defendant and that therefore the equity of redemption can be extinguished in the proceeding.

Once the foregoing matters have been attended to, the proceeding may be commenced.

The proceeding is commenced in the same manner as most other proceedings, that is, by originating notice (Action) and Statement of Claim.

The statement of claim alleges the date of the mortgage, the registration particulars of the mortgage, the land subject to the mortgage, particulars of the default which has occurred and in the statement of claim payment of the amount outstanding on the mortgage or in fault of payment, foreclosure and sale is claimed. If a deficiency judgment is being claimed, the statement of claim must say so and should specify against which defendant deficiency claim is being made.

The following description of the proceedings is based on the assumption that none of the defendants files a defence.

After the time limited for filing a defence has passed, an application can be made to the Judge in Chambers for an **order for foreclosure** and sale. It is not possible in a **foreclosure proceeding** to enter a default judgment without making an application to court. Rule 12.04 of the Civil Procedure Rules describes what material must be before the Chamber Judge on the application and provides, in effect, that the court must check the computation of the amount alleged to be due. Accordingly, the application is roughly equivalent to an assessment of damages where a claim is for unliquidated damages only. It is useful, therefore, to reproduce here Rule 12.04(1) which provides as follows:

"Where an originating notice contains a claim in respect of a mortgage and a defendant fails to file a defence, the plaintiff on the application for foreclosure or foreclosure and sale, shall

(a) produce a certificate of the Registrar of Deeds for the registration district in which the mortgaged property lies, or a certificate of a solicitor setting forth all the encumbrances registered against the property after the date of execution of the mortgage sought to be foreclosed;

(b) establish the following facts by affidavit to the satisfaction of the court,

(i) that the originating notice has been served upon the defendant, or substituted service effected;

(ii) that the defendant has not filed a defence within the time limited for filing it; and

(iii) that the allegations contained in the originating notice are true;

(c) produce a statement, verified by the affidavit of himself or some person having a personal knowledge of the facts, showing in sufficient detail all payments which have been made on account of principle and interest of the mortgage and the dates of the payments so as to enable the court to check the computation of the amount alleged to be due, and containing such other proof as the circumstances of the proceeding require to entitle him to the order applied for; provided that

(i) where an account stated or a settlement agreed to in writing of any person then liable on the mortgage is produced, it shall not be necessary to go further back than the apparent date thereof in making up the mortgage accounts;

(ii) where the mortgage has been transmitted to an executor, administrator, or assignee of the mortgagee, the mortgage account up to the date of the transmission may be proof by information and belief on oath or by other proof to the satisfaction of the court, and an affadavit or oath shall not be required from the mortgagee or any intermediate assignee denying any payment to him of the principle or interest."

Subsection 2 of Rule 12.04 provides that the court may, with such material before it, do the following things:

(a) require further and better proof of the mortgage account when the mortgagor or the

party entitled to redeem denies the correctness of the statement of account;

(b)ascertain and determine the amount due to the plaintiff or refer the matter to a referee to take an account;

(c)order notice to be given to other persons where it appears that persons other than the defendant, such as subsequent encumbrancers have an interest in the property;

(d)direct the sale of the mortgaged property on such terms as the court thinks fit without previously determining the priorties of encumbrancers or the amount due on their encumbrances;

(e)give such directions as **are necessary with** respect to continuing the **proceeding against any** defendant who has filed a defence in the **proceeding**;

(f)make such all other order as is just.

On a normal foreclosure application, therefore, the court, in exercising the discretion given to it by Rule 12.04, makes an order

(a)declaring the amount due on the mortgage, and the amount of interest to which the plaintiff is entitled;

(b)barring and extinguishing the equity of redemption in the property of the original mortgagor and all persons claiming through or under him (this would include all subsequent encumbrancers or any persons having an interest in the property which is junior in priority to the interest of the holder of the mortgage);

providing for a sale of all the interest of the mortgagor in the property at the time the mortgage was made or at any time since, and of all persons claiming by, through or under the mortgagor by the Sheriff of the County in which the mortgaged property lies, after newspaper advertising;

(d)providing for notice to subsequent encumbrancers. It will be recalled that because of the combined effect of subsection 24(1) of the Real Property Act and Civil Procedure Rule 5.13(4) the interests of the subsequent encumbrancers may be extinguished in this way without joining them as defendants in the first instance.

The order further provides that the Sheriff pay out of the proceeds of the sale to the plaintiff or its solicitor the amount due to it for principle and interest on the mortgage together with tax costs, and the balance, if any, to the Accountant General of the Supreme Court.

If a deficiency judgment is claimed the order also gives the plaintiff leave to apply for permission to enter deficiency judgment for the difference, if any, between the the amount realized on the sale and the amount due to the plaintiff for principal, interest and costs when taxed.

It is apparent, therefore, that the Civil Procedure Rules give the Chambers Judge a very broad discretion on the form of order to be granted. For example the Chambers Judge is given the discretion to direct the sale of the mortgaged property "on such terms as the court thinks fit" and Rule 5.13(4) simply provides that the court <u>may</u> direct notice to be given. In theory, therefore, the Chamber Judge could grant a foreclosure order without providing for notice to subsequent encumbrancers, or providing for any form of advertising. However, the form of order which is now generally in use is a form which has been settled by the Judges and, as a matter of practice, the court would not grant a foreclosure order which would provide, for example, a different form of advertising or which did not provide for notices to subsequent encumbrancers.

It is important to remember, however, that the form of order is largely at the discretion of the Chambers Judge, since variations of, or additions to, the settled form may be required, from time to time, to meet special circumstances in a particular case. For

example, where the plaintiff and a subsequent encumbrancer have a dispute as to their respective priorities, but serious harm would be done to all parties if the sale was postponed, the court would be free, under Rule 12.04, to order that the proceeds of the sale be held by the Sheriff until the priorities between the two parties have been determined.

The effect of the order, therefore, as was pointed out in **Stubbings** v. Umlah (Supra) is a formal adjudication of foreclosure subject to the right of redemption up to the time of sale. In that case, the court indicated that the right of redemption existed up to the granting of the final order of confirmation. However, in Pew v. Zinck [1953] S.C.R. 285 the Supreme Court of Canada held the right of redemption exists only up to the time of sale.

THE SALE

The order for foreclosure and sale having been granted, the next step in the proceedings is to arrange for the newspaper advertising and the notices to subsequent encumbrancers as prescribed by the order.

For the sale, the solicitor for the mortgagee must calculate the amount of his maximum bid at the sale.

The order declares the amount outstanding on the mortgage, and also declares the interest to which the mortgagee is entitled, this amount, with interest should be included in the claim. However, care should be taken when calculating the interest, to add interest for thirty days after the sale. This is necessary because the order for foreclosure and sale provides that the balance of the purchase price, over and above the deposit, need not be paid until thirty days after the sale, and that interest may be claimed at the rate specified in the order on the **amount** outstanding of the mortgagee "until the same be paid to the plaintiff together with the costs to be taxed".

An estimate should also be made of the amount of costs which can be taxed and this amount should be added to the principal and interest outstanding on the mortgage.

Finally, all outstanding real property taxes should be added to the bid. The reason taxes should be added is because Section 139 of the Assessment Act, R.S.N.S., 1967, c. 14 provides as follows:

"If property is taken or sold under execution or other legal process, or sold under any order of a court for the sale thereof, the proceeds of such sale shall be first liable for any rates which are due and payable in respect to such property, and the sheriff or other officer who conducts the sale shall pay such rates to the treasurer out of the proceeds of the sale."

It follows, therefore, that if the taxes are not included in the maximum bid, and the property is bid in at the sheriff's sale by another party, the sheriff is obliged, by the Assessment Act, to pay the taxes from the proceeds and therefore after receiving payment of the balance from the sheriff, the mortgagee would be short in an amount equal to the taxes. For this reason, local improvement charges, such as sewer and paving charges should be checked and if they are due should be included in the maximum bid. Having arrived at the amount of his maximum bid, therefore, the mortgagee will attend the sale and normally, if the bidding goes higher than that amount, the mortgagee will stop bidding since the total amount due to him, provided by the order, will, in effect be paid to the sheriff by the successful purchaser.

Care should be taken by a mortgagee, however, when bidding at a sale to avoid, if he can, bidding the property in himself, in the absence of other bidders, for the maximum bid. If he does so, then he is liable to pay deed transfer tax for the full amount of his bid. This is the case in Burnac Realty Investors Ltd. v. City of Dartmouth (1979) 5R.P.R. 293. There, the mortgagee bid the property in for $5,900,000.00 (the total amount owing on the mortgage being $8,478,100.93) and Cowan, C. J. T. D. held that the amount of the deed transfer tax was 1% of the sale price of $5,900,000.00) or $59,000.00 must be paid by the

mortgagee. In reaching this conclusion, Cowan, C. J. T. D. observed, (at p.299), that

"The by-law, in defining "sale price" specifically provides that the gross sale price of the real property transferred is the sum of the actual cash paid, property exchanged, given or bartered, passed obligations cancelled or satisfied, purchased money obligations given, if any, and the real amount of all liens, mortgages and other encumbrances under and subject to which the sale is made. In the present case, the past obligation of the mortgagor is cancelled or satisfied, to the extent of that portion of the amount bid by it to which it is entitled as money owing to it by the mortgagor on the mortgage. It is immaterial, in my view, whether that part of the amount bid is paid to the sheriff and then repaid to the mortgagee, or whether it is, as authorized by the terms of the order, merely deducted from the amount of the bid."

Accordingly, it may be necessary for the mortgagee to bid up to the maximum amount, if there are competing bids, but a mortgagee, when bidding, should minimize the amount of his bid as far as is possible. This can be done quite easily in the absence of any other bidders.

The form of foreclosure order provides that the successful bidder shall pay 10% of the amount of his purchase money to the sheriff at the time of the sale and the remainder no later than thirty days after the sale.

EFFECT OF SALE

The successful bidder at the sale, upon payment of the balance of the purchase price, is entitled to receive from the sheriff a deed and the order provides that the deed shall be effective to

> "convey all the estate, right, title, interest, claim, property and demand of the mortgagors at the time of the making of the said mortgage foreclosed in this action, or at any time since, and of all persons claiming or entitled by, from or under the **mortgagors** of, in and to the lands respectively purchased at such sale ..."

The foreclosure order provides that if the holder of the mortgage is the successful bidder, and his bid is equal to or less than the amount outstanding on the mortgage he is entitled to the conveyance upon payment by him to the sheriff of

> "an amount equal to the aggregate of the sheriff's fee on such sale, all real property taxes on the mortgaged property which are due at the time of such sale and the capital, if any, and interest, if any, which may be due and payable at the time of such sale on any local improvement charges on the said mortgaged property".

However, it must be remembered that a successful purchaser does not necessarily receive full title. The order is clear that all the purchaser receives is all the interest which the maker of the mortgage had in the property at the time the mortgage was made. It is settled that the Court cannot grant an order which authorizes a conveyance, by the sheriff, of full title to the property: Mortgage Corporation v. Allen [1930] S.C.R. 16; Burnac Realty Investors Ltd. v. City of Dartmouth (supra).

Therefore, if the mortgage foreclosed is subject to any prior mortgage, or, at the time the mortgage was made, the mortgaged property was subject to any other encumbrance, an easement or any title defect, or, if the mortgagor had no title at all at the time the mortgage was made, then the sheriff's deed would be effective to convey title to the property, subject to the first mortgage or prior encumbrance or easement or, in the second case would convey absolutely nothing.

It follows, therefore, that a person proposing to bid at a sheriff's sale should conduct a title search before the sale in order to determine just what title the maker of the mortgage foreclosed had at the time the mortgage was made.

When is the equity of redemption extinguished? In Stubbings v. Umlah (supra), the Court indicated, by way of dicta, that the right to redeem is not extinguished until the

sheriff's report has been confirmed by the Court. However, it has subsequently been settled in _Pew v. Zinck (supra) by the Supreme Court of Canada that the right to redeem is lost the moment the property is knocked down to the successful purchaser at a sheriff's sale.

Therefore, once the sheriff's deed has been delivered, the successful purchaser receives whatever property was mortgaged by the mortgage, freed from the equity of redemption which has been extinguished by the sale.

Following the sale, the sheriff and the successful bidder are in the same position as if they had entered into a contract for the sale of the interest foreclosed. This was the conclusion reached by Rand, J. speaking for himself, and the majority of the Supreme Court of Canada in Pew v. Zinck (supra) when he said, at page 289 [S.C.R.]:

"The conclusion from this is that on the acceptance of a bid either a contract is entered into by the purchaser with the Court in its own capacity or as representing the parties in interest, or in the case of Nova Scotia, conceivably with the sheriff, that the one will buy and the other sell the land, subject only to the approval of the report; or the purchaser submits to the jurisdiction of the Court on those contractual terms. The obligations are reciprocal and from them neither the Court nor the purchaser can withdraw except upon the failure of the condition; but, apart from consent, only by its operation, which is determined by rules of law, can the obligation and correlative right of the purchaser be destroyed."

It follows, therefore, that subject only to the sheriff's report being confirmed, if a purchaser defaults the sheriff may bring proceedings for specific performance, or damages, or may terminate the agreement, forfeit the deposit with the approval of the Court, and readvertise and resell the interest being foreclosed.

In Reyes v. Saranic (1979) 6R.P.R. 272, the Appeal Division of the Nova Scotia Supreme Court had to consider the position of the parties when a purchaser at a sale held pursuant to the Sale of Land under Execution Act had defaulted. Speaking for the Court, Hart, J. A. concluded that a sheriff is acting as an officer of the Court when following his statutory duty to sell land of an execution debtor and that he does have a responsibility to see that all matters connected with the sale are fair to all parties concerned; that the contract is between the sheriff and the purchaser and that the sheriff, as an officer of the Court should, independently of the plaintiff, choose the most **appropriate remedy** in the event of a default.

If these principles can be extended to a sheriff's sale held pursuant to an order for foreclosure and sale, then after the sheriff's report has been confirmed, and the purchaser defaults, the sheriff should take independent advice and based on that advice, pursue, in his capacity as Sheriff, the most appropriate remedy (specific performance, damages or forfeiture of deposit and resale) under the circumstances.

It is useful, at this point, to determine the effect of failing to give notice to all the subsequent encumbrancers. It will be recalled that the combined effect of subsection 24 (1) of the Real Property Act, and Civil Procedure Rule 5.14 is that the sheriff's sale will extinguish the rights of all subsequent encumbrancers in the equity of redemption even if they are not joined as defendants. It will also be recalled that Civil Procedure Rule 5.14 gives the Court a discretion to order that notice of the sale be given to subsequent encumbrancers, and that in the exercise of this jurisdiction the Court invariably orders that notice of the sale be sent to all subsequent encumbrancers. However, the order provides that the subsequent encumbrancers entitled to receive notice are only those appearing on the abstract of title filed when the application for the order for foreclosure and sale is made.

U.S. Savings & Loan Company v. Corcoran (1979) 5R.P.R. 223, Cowan, C. J. T. D. had to consider the effect on a sheriff's sale of the failure to give notice to a subsequent encumbrancer. There the abstract of title filed in support of the application **for the order for foreclosure** and sale did not disclose the registration of a subsequent mortgage and, as a result the sale was held without notice to the holder of that mortgage. In

dismissing an application to have the sale set aside, Cowan, C. J. T. D. concluded that the purchaser at the sale was entitled to have the sale confirmed. He pointed out that there had been no fraud and that the order for foreclosure and sale had been complied with because notices had gone to all the subsequent encumbrancers appearing on the certificate of the plaintiff's solicitor and that there is no implication, in the foreclosure order, that subsequent encumbrancers, whose names do not appear on the certificate, are to be notified. It should be noted, however, that during the course of his judgment, **Cowan**, C.J.T.D. distinguished Kaulback v. Taylor (1880), R.E.D. 400. There the certificate on file omitted all reference to a judgment entered by the plaintiff and the Court set the sale aside. However, in that case, the successful bidder knew about the plaintiff's judgment and therefore the sale could be set aside on equitable grounds. In M.S. Savings & Loan Company v. Corcoran, Supra, the Court suggested that the subsequent mortgagee could maintain an action for damages against the foreclosing mortgagee and its solicitor.

SETTING SALE ASIDE

The sale extinguishes the equity of redemption. However, it does not follow that the purchaser always receives indefeasible title. The Court has jurisdiction, in certain cases, to set a foreclosure sale aside. This jurisdiction was described by Rand, J. in Pew v. Zinck, supra at page 340 [D.L.R.] as follows:

"On what grounds, then, may the Court refuse to confirm? Although it would be impossible to enumerate them all, fraud, mistake, misconduct by the purchaser, error or default in the proceedings are well established. But the controlling fact to which these grounds give emphasis is that the purchase can be defeated only by juridical action. To hold, on the other hand, that the Court, acting otherwise and in setting aside the sale, can destroy such right would be to attribute to it the repudiation of its own contract without proper cause."

If the notice in 11. S. Savings and Loan v. Corcoran, supra had not been given to an encumbrancer shown on the abstract filed in support of the application for the foreclosure order, the sale probably would have been set aside because the directions in the foreclosure order were not followed, and this would have amounted to an error or default in the proceedings.

Can a sale be set aside if there has been an error or default which is not apparent on the face of the documents on file? Cowan, C.J.T.D. had this question before him in C.M.H.C. v. Farrell (1980) 11 R.P.R. 73. There, notice of the commencement of the foreclosure proceedings had been advertised pursuant to an order for substituted service, which had been granted because the Plaintiff alleged that the owner of the mortgaged property could not be served personally. A subsequent mortgagee purchased the property at the sale and there was no evidence that it had any notice of any error or defect in the proceeding leading up to the granting of the order for substituted service. Apparently, all documents were regular on their face. However, Cowan, C.J.T.D. set the sale aside, having found that the Defendant was not made aware of the sale until shortly before it was held. He found that the Defendant had lived on the mortgaged property, that this fact was not disclosed to the Judge who granted the order for substituted service and that if the-order for substituted service had provided service by mail to the mortgaged premises, the proceeding would have been brought to the Defendant's attention. Cowan, C.J.T.D. remarked that all future orders for substituted service must include a provision that the document be served by ordinary mail, addressed to the party to be served at his last known address, and in the case of foreclosure proceedings, in addition, at the address of the mortgaged property if that address should be different from the last known address of the party. He also remarked that in all future orders for foreclosure and sale there must be a provision that notice of the sale and a copy of the advertisement for sale be mailed by ordinary mail to the Defendant at the address of the mortgaged property, and also, where the last known address is different from the address of the mortgaged premises, at the last known address.

It appears, therefore, that in a proper case, the Court can set aside a sale even if the error or defect in the proceedings is not apparent from an inspection of the documents on file.

It will be recalled that in Kalbauck v. Taylor, supra ra, a sale was set aside because notice of the sale was not sent to a subsequent encumbrancer and the subsequent encumbrancer was not shown on the abstract file in support of the application for the foreclosure order. Although the **order** had, apparently, been complied with, the **Court found that** the Plaintiff in the proceeding and the purchaser at the Sheriff's sale knew of the existence and registration of the encumbrance. It is submitted, however, that the **grounds for** setting aside the sale in that case were general equitable principles since the plaintiff and the purchaser both knew of the encumbrance and chose to ignore it.

There are two recent cases where a sale was set aside on general equitable principles without any evidence of fraud or misconduct. In Atlantic Trust Company v. H. & E. General Stores Limited (1978) 3 R.P.R. 176 the plaintiff's solicitor did not arrive at the sale until after the bidding was concluded because his car had broken down. The mortgaged property, worth approximately $19,000.00, was bid in by the second mortgagee for $1,000.00. Hallett, J. set the sale aside. He held that it would be unconscionable to permit the sale to stand because this would

(a) Give the second mortgage an unconscionable profit, having bid the property in at a grossly inadequate price;

(b) Deprive the first mortgagee of the benefit of its security under circumstances which are unfair, since it was not the fault of the mortgagee or its solicitor that the first mortgagee did not bid at the sale;

(c) Leave the mortgagor open to a claim by the mortgagee for a very large deficiency judgement in addition to the loss of the property.

In N.S. Savings and Loan Company v. Hill (unreported) S.H. 30864 - 1981, Hallett, J. set aside a Sheriff's sale because the Sheriff did not conduct the sale in a reasonable manner. He found that she did not adequately indicate to the bidders that she was about to knock the property down to the defendant, with the result that a subsequent encumbrancer which was prepared to make a substantially higher bid did not have an opportunity to do so and the best possible price was, therefore, not obtained.

It would appear, therefore, that the Court has jurisdiction to set aside a foreclosure sale on general equitable principles, even in cases where there has been no fraud, if letting the sale stand would result in unfairness to any of the parties.

PROCEEDINGS FOLLOWING SALE

The form of foreclosure order settled by the judges provides that the purchaser, at the time of the sale, is to pay a deposit of ten per cent, and not later than thirty days following the date of the sale, is to pay the balance of the price, or his bid, to the sheriff, at which time the sheriff will deliver the deed to the purchaser.

Under the present procedure, when the sheriff pays that portion of the proceeds of the sale to which the mortgagee is entitled to the mortgagee, he completes a Report which states, in effect,

(a) that the sale has been held;

(b) the name of the successful bidder;

(c) the purchase price;

(d) how the purchase price has been disbursed by him;

(e) that the sheriff's deed has been executed and delivered to the purchaser.

Once this Report has been completed by the sheriff, and he has disbursed the proceeds of the sale, including payment to the mortgagee of the amount to which he is entitled, an application is made to the court for a confirmatory order. Filed in support of the application is the sheriff's report, together with an affidavit, usually completed by the mortgagee's solicitor, establishing that the advertising has been completed and that all notices have been sent to subsequent encumbrancers.

Based on this material, the court normally makes an order *which declares* that "the Sheriff's Report and all proceedings herein are hereby ratified and confirmed".

Why is it necessary to obtain a confirmatory order?

It cannot be said that the order is necessary to confirm in the purchaser whatever title is sold at the sale, since it is clear that the equity of redemption is extinguished by the sale: Pew V. Zinck, supra.

It will be recalled that the order ratifies and confirms not only the Sheriff's Report but also "all proceedings herein". It will also be recalled that the court may, on general equitable principles, set a sale aside. As far as I could determine, however, there has been no case where a court has set a sale aside after the confirmatory order has been granted.

It may very well be, therefore, that once the confirmatory order is granted, the sale cannot be set aside. In such a case, an argument could be made that the confirmatory order amounts, in effect, to a declaration by the court that there has been no error or default in the proceedings and that the sale has been fairly held. If this is so, it could be argued that the court, having made such a declaration in a proceeding, cannot set aside a sale held in the proceeding since an order made by court having jurisdiction cannot be attacked in a collateral proceeding as **long as** the order is regular on its face, and that such an order can only be attacked by an appeal: Marchand v. Hynes (1978), 3 R.P.R.1.

In the absence of authority, however, it is impossible of course to conclude that this is in fact, the purpose of applying for a confirmatory order.

If a deficiency judgment is to be sought, material in support of the application for the deficiency judgment is filed with the court at the time the application for the order is made, and the confirmatory order in such cases provides also for a deficiency judgment.

The authority for granting a deficiency judgement is found in Civil Procedure Rule 47.10, which provides that:

"where the purchase money is insufficient to pay what is found to be due to a plaintiff for principal and interest and costs, the plaintiff shall be entitled, when the mortgagor is a defendant and such relief has been claimed, to an order for a payment of the deficiency".

It will be recalled that no deficiency judgment can be granted unless the mortgagor is a defendant. This was made clear by Cowan C. J. T. D. in Briand v. Carver (1967) 4 N.S.R.(2d) 144,66 D.L.R.(2d) 169 when he said, at page 144:

"I am of the opinion that it is not necessary to insert in the order for foreclosure and sale a paragraph stating that the plaintiff shall have liberty to apply for permission to enter a deficiency judgment. If the deficiency has been claimed in the endorsement on the Writ of Summons, the application for the deficiency judgment can be made at the time of the confirmation of the sale, whether or not there is any reference to it in the order for foreclosure and sale".

In Nova Scotia the mortgagee is permitted, by Section 18 of the Real Property Act, R.S.N.S. 1967, c. 261, to bid at a sale held pursuant to a foreclosure order granted at his instance. In addition, he may claim for a deficiency judgment even where he has been the successful bidder at the sale. As a result, Cowan C. J. T. D. had to consider in

Briand v. Carver, supra, whether a mortgagee is entitled to a deficiency judgment in an amount equal to the amount, outstanding on the mortgage, and the amount of his bid, where he bid the property for a nominal amount at the sale. In that case, the property was assessed for $4,000.00, and in the court's opinion, its market value was in excess of $5,500.00. However, the mortgagee was the only bidder at the sale and bid the property in for fifty dollars and then applied for a deficiency judgment in the amount equal to the difference between the amount outstanding on the mortgage, and the amount of the bid. Cowan, C. J. T. D. concluded that he had the right to refuse confirmation of the sale unless the claim for deficiency judgment was abandoned because the price was "so obviously and grossly inadequate that it would be inequitable to permit the plaintiff to purchase the property at this price and, at the same time, to have a judgment against the defendant mortgagors for the difference between the price paid and the amount owing under the mortgage, plus the plaintiff's costs". He held that the amount of the deficiency judgment, in cases where the mortgagee bids the property in should be an amount limited to the difference between the amount owing on the mortgage, plus taxes, expenses of sale and taxed costs, and the fair market value of the mortgaged property over and above prior encumbrances, as determined by the court.

Therefore, if the mortgagee is the successful bidder, he must, when applying for confirmation and a deficiency judgment, furnish appraisals establishing what the fair market value of the property is.

It was held in Eastern & Central Trust Company v. House (1979) 6R.P.R. 234 that if a mortgagee bids a property in at a sheriff's sale and later sells it, the value for the purposes of the deficiency judgment, should not be the price at which he sold it subsequent to getting the sheriff's deed, but rather the true market value.

Since almost all mortgages are under seal, and since a mortgage includes a covenant to pay, can an application for a deficiency judgment be made within the twenty year limitation period for a speciality debt? In Central & Eastern Trust Company v. House, supra, Sullivan, L. J. S. C. held that an application for a deficiency judgment must be made no later than at the time of the **confirmatory order** because otherwise the final determination of the obligation of the mortgagor could be delayed for an unconsionable length of time considering the fluctuations in the real estate market and the length of time that may elapse before a sale to a third party is finalized.

Accordingly, **it would** appear that if a deficiency judgment is to be claimed, it must be proved at the time of the **confirmatory order** is applied for. If a confirmatory order is granted and does not include a deficiency judgment, the right to claim a deficiency judgement is lost.

If the mortgaged property is bid in by a third party at a properly conducted sale, the deficiency judgment would be equal to the amount found to be due the plaintiff for principal and interest and costs, and the amount of the successful bid.

The other factor in the calculation, of course, is the **amount found to** be due a plaintiff for principal, interest and costs, and suggests, therefore, that any expenses or costs incurred by the mortgagee after the foreclosure order cannot be included in the calculation, even if the mortgage foreclosed gives the mortgagee the right to add such items to the amount outstanding on the mortgage. Hallett, J. had to consider this question in U.S. Savings & Loan Co. v. MacKay (1980), 9 R.P.R. 332. There, the mortgagee bid the property in and held it for more than a year after the sale and incurred substantial expenses in maintaining it and in attempting to arrange for its resale. In addition, the mortgagee was obligated to pay a real estate commission when he eventually sold the property. Hallett, J. held that the maintenance expenses, including repairs and taxes, and the commission could not be included in the claim since the words in the Rule restricted the amount to the difference between the amount found due by the Court for principal interest and costs only, and the amount of the purchase price at the Sheriff's sale where the purchase price at the Sheriff's sale is less than the amount found due to the plaintiff.

It will be recalled that the form of foreclosure order settled by the judges settles

the amount outstanding on the mortgage at the time the order is applied for, plus interest to date of payment to the plaintiff, and costs Accordingly, only the amounts claimed at the time the foreclosure order is applied for, and which are included in the final figures settled in the foreclosure order, can be included. For example, if a mortgage document permits the mortgagee to add taxes paid by him to the principal amount, then these amounts may be included in a deficiency claim, provided that they are included in the amount settled in the foreclosure order.

It is submitted, therefore, that the result of these authorities is as follows:

(a) A deficiency claim must be made before the confirmatory order is granted;

(b) If the property is purchased by the mortgagee, the amount of the deficiency judgement must be based **on the fair** market value of the property which he received and not the amount of his bid or the amount for wbich he sold the property;

(c) The amount due to the mortgagee, when making this calculation, is restricted to the amount due to him as declared in the order for foreclosure and sale.

If the purchase price is more than sufficient to satisfy the amount found due to the mortgagee under the foreclosure order, the order simply provides that the surplus, if any, be paid by the Sheriff to the Accountant General to abide further order.

The authority for distribution of surplus funds is Civil Procedure Rule 47.11 which provides that:

"Where the purchase money or a sale exceeds what is found to be due to a plaintiff, all accounts may be taken, inquiries made, costs taxed, and the necessary proceedings had to distribute the surplus among the persons entitled thereto according to their priorities."

The words "persons entitled thereto" were interpreted by the Supreme Court of Canada in Household Realty Corporation v. Attorney General of Canada (1980) 9 R.P.R. 145 and Ritchie, J, in the course of delivering the judgement of the Court said, at page 149:

"The surplus monies in the hands of the Sheriff after the first mortgage foreclosure sale were in my opinion held by him and subsequently by the Accountant General of the Supreme Court of Nova Scotia in trust for the subsequent encumbrancers..."

It follows, therefore, that a sale'is to be treated as converting the equity in the property subject to the mortgage foreclosed into money but the only persons entitled to this surplus are persons who have an encumbrance on the property, and that the priorities to be observed in paying these funds out are the same as those which existed before the property was converted into money.

The practice which has been followed by a subsequent encumbrancer in applying for payment of surplus funds is to give notice of the application to all other encumbrancers and the owner of the equity of redemption. On the application, the Court will consider the priorities of each encumbrancer and order payment of the surplus funds in accordance with the priorities. The encumbrancer making the application must, of course, present sufficient evidence to the Court of the nature of his encumbrance and the amount outstanding on it at the time of the application.