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The Irish Mortgage in Nova Scotia

by
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I Introduction

There is one major defect in the Nova Scotia mortgage practice of foreclosure and sale. The procedure fails to produce a sale price at anything like fair market value. That this should be so is hardly surprising. The advertisements are legalistic in nature, and fail to mention any of the features that one normally expects to find in real estate advertisements.

As well, the practice of allowing the mortgagee to bid at the sheriff's sale usually has a depressing effect on any bidding that does take place. A mortgagee who bids on the property is clearly in conflict of interest. In most other areas of the law such a conflict is frowned upon; in Nova Scotia it is almost relished. Hence the Bar Admission Materials for Real Estate (N.S. Barristers' Society, 1989), vol. I, has this to say at p.209:

> "Accordingly, it may be necessary for the mortgagee to bid up the maximum amount [i.e. the mortgage debt], 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 quite easily done in the absence of any other bidders."

When this feature is remarked upon the usual response is to say that the Nova Scotia practice is based upon the Irish mortgage practice of the nineteenth century: see, for example, Coffin, "Mortgage -- Foreclosure -- Nova Scotia" (1932) 10 CBR 487.

It is submitted that rather than adopting the Irish mortgage practice, Nova Scotia has neglected it. The Irish practice had as its foundation a concern that the mortgage sale be so organized and conducted as to insure that the best possible price was obtained at the sale. Anything which distorted the process (such as faulty advertising, or the presence of the mortgagee as a bidder at the sale) was rigorously checked.

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WORKERS' COMPENSATION - Benefits - delay in seeking medical attention

Hubley v. Nova Scotia (Workers' Compensation Board), S.H. 74919, Glube, C.J.T.D., 19 April 1991. **S309/24**

This was an application for *certiorari* to quash two decisions of the Workers' Compensation Board dismissing the applicant's claims for compensation. In May 1989, the applicant filed a claim arising from an accident occurring in December 1987. The applicant was injured in a fall on the last day of seasonal work. He recuperated at home, and returned to work 6 months later. A year and a half later he stopped work due to a back and hip problem and consulted a doctor. Medical evidence indicated the applicant's symptoms arose from the fall. The Adjudication Assistant denied the claim on the basis, *inter alia*, that the incident was not reported right away, medical treatment was delayed and she was unable to reasonably associate the present problem to the fall. The applicant returned to work three months later with a different employer. A week later he twisted his lower back while on the job. A second claim was filed. The employer's position was that the applicant suffered a recurrence of an existing injury and that responsibility for the injury was with the former employer. There was conflicting medical evidence. The employer in the second claim gave evidence that no accident occurred and the Board so found and dismissed the applicant's claim. The first claim was also disallowed as the Board found the applicant's condition could not be associated with the accident at work and did not arise from employment. *Held*, dismissing the application on the first claim but allowing the application on the second. With respect to the second claim, the Court concluded that the Board made an error in law in interpreting the word "accident"; or, if not, that the interpretation of "accident" was patently unreasonable. The use of the word "accident" in the Act only requires the claimant to show that the disablement arose out of and in the course of employment. The Board had relied on the employer's interpretation of the Act that no accident had occurred, and should not have done so. The Court did not agree that the only inference to be drawn was that the applicant's condition resulted from the first accident. The claim was returned to the Commission for a determination of compensation. On the first claim, the Board's decision was held to be within its jurisdiction and not patently unreasonable.

On appeal

WORKERS' COMPENSATION - Benefits - meaning of "accident"

Hubley v. *Nova Scotia (Workers' Compensation Board), S.H. 74919, Glube, C.J.T.D., 19 April 1991. S309/24*

See WORKERS' COMPENSATION, Benefits, delay in seeking medical attention, *herein*

WORKERS' COMPENSATION - Workers' Compensation Appeal Board - failure to give reasons

Muise v. *Nova Scotia (Workers' Compensation Appeal Board)*, S.C.A. 02431, Clarke, C.J.N.S., 6 June 1991. **S313/8**

Where the respondent Board dismissed the appellant's appeal from a decision which denied her claim as a widow of a worker suffering from industrial lung disease, having provided no reasons for its conclusions except that there was "insufficient evidence", the appeal was allowed and the matter remitted to the Board for its review and reconsideration.

The Irish Mortgage in Nova Scotia *Continued*

This equitable jurisdiction still exists in Nova Scotia. The practice should be changed so as to provide that the mortgagee (rather than the sheriff) be required to sell the property in the open market, by listing the property with a real estate broker on the multiple listing system; and that the mortgagee should in the ordinary course be

prevented from bidding on the property.

The Case of Kinny v. Chisolm

Kinny v. Chisholm (1883) 19 NSR 497 is the case most often cited as having established as law the "Irish practice" in Nova Scotia. The issue raised in that case was whether the mortgagee, having conveyed the property away from him (hence having foreclosed entirely the mortgagor's equity of redemption), was now barred from suing for the deficiency. In the English practice, the mortgagee was taken in equity as having accepted the property in full satisfaction of the debt, and was hence barred from suing for a deficiency on the covenant. In the Irish practice, on the other hand, a mortgagee who had obtained an order for sale, and had sold the property thereunder, was still entitled to sue for any deficiency that arose on the sale.

Mr. Justice Rigby opted for the latter. However, the decision cannot be taken as authority for the proposition that it was ordinarily proper for the mortgagee to bid at such a sale. There are two reasons for saying this.

First, the two decisions Rigby, J. refers to in the course of his discussion of the Irish practice do not deal with the issue. In *Perry v. Barker* (1806), 13 Ves. 198, 33 ER 269 the mortgagee had sold the property to a third party. *Wilson v. Lady Dunseny* (1854) 18 Beav. 293, 52 ER 115 is to the same effect.

Second, the defendant had not attacked the sale itself: see Cassel's Digest of Cases in the Supreme Court, *Chisholm v. Kenny* (1885) p.539.

Hence the decision proceeded simply on the basis that the sale, even though it was to the mortgagee, had produced the best possible price (i.e. fair market value) for the property. That foundation is crucial to the decision, because it is clear on the law of *both* Ireland and England that the result in *Kinny* -- that is, the sanctioning of the mortgagee's right to sue for a deficiency -- could only have been reached on the basis that the original sale *had* produced the best possible price.

Irish Mortgage Practice in the Nineteenth Century: Purchase by the Mortgagee

The general rule in Irish equity was that the mortgagee, who as plaintiff usually had conduct of the sale, could not purchase the property at the sale without the leave of the court. The rule was rigorously enforced. *Popham v. Exham* (1860) 10 Ir. Ch. Rep. 440 is an example. There the Master of the Rolls set aside a sale by a mortgagee that was in effect to himself, even though the sale had been at market value: see p.446.

In granting the order the Master of the Rolls first observed that it was a well-settled principle of equity that "the same person is not to be permitted to fill the double character of vendor and purchaser:" p.451. A person in such a position was in a conflict, the effect of which would be to depress the sale price:

> "A party who has the carriage of proceedings in a cause stands in a fiduciary position to all the parties and encumbrancers in the cause. ... The plaintiff's solicitor prepares conditions of sale. He is bound to see that these conditions are not of such a character as to deter parties from bidding. It is the duty of the plaintiff, acting through his solicitor, to see that the intended sale shall be duly advertised, and hand-bills posted and circulated, *so as to give publicity to the sale.* ... The plaintiff and his solicitor, in their character of vendors, have a duty imposed on them *to sell for the best price that can be obtained*:" p.451 (emphasis added)

If the plaintiff as vendor were permitted to bid, his interest as a purchaser in obtaining the lowest price would conflict with his duty as vendor, and the result could be a price at less than fair market value: p.451. While a court *upon application* might in a suitable case permit the plaintiff to bid, carriage of the action would normally be transferred to another: p.451; see also *Byrne v Lafferty* (1845) 8 Ir. Eq. Rep. 47 to the same effect.

Leave would be granted, but only where the mortgagee was experiencing difficulty in obtaining reasonable bids on the property, or where the debt so far exceeded the value of the land that the ill-effects of the resulting conflict of interest were minimized: *Spaight v Patterson* (1846) 9 Ir. Eq. Rep. 149; *Steele v. Devonport* (1847) 11 Ir. Eq. Rep 339.

This general aversion to allowing the mortgagee to bid at the sale was also present in Canada, and for the same reason. The Supreme Court of Canada adopted the Irish approach shortly after the decision in *Kinny*, in *Faulds v. Harper* (1886) 11 SCR 639, on appeal from the

Ontario Court of Appeal. Mr Justice Strong stated at p.648:

> "Authorities of the greatest weight show conclusively that the court will, always, at the option of the party standing in the position of *cestui que* trust, as the heirs of the mortgagee in the case did, set aside ... [a purchase by a mortgagee at the sale] as conflicting with the duty of the vendor to obtain the very best price attainable for the property to be sold, and as having a tendency, if done openly, to damp the sale."

This concern with the sale process also permeated the English Chancery practice.

The Nineteenth Century English Chancery Practice

The usual practice was for an order directing a sale in the event of the mortgagor's defaulting in paying the debt due: Daniell's Chancery Practice (5th ed., London, 1871), v.II, pp.1151-52. The property had to be sold with the approval of the judge seized of the action to the best purchaser that could be obtained: p.1152. The sale was usually conducted by the mortgagee's solicitor at a public auction, under particulars and conditions approved by the court. Neither the person having conduct of the sale nor his solicitor were entitled, without leave of the court, to bid at the auction: pp.1159-60. It was usually thought prudent to fix a reserve bid, and for this purpose the person having carriage of the sale "causes a valuation of the estate to be made by the intended auctioneer, or by some skillful land valuer, surveyor, or other competent person; and obtains his opinion as to the sum at which each lot ought to be sold:" p.1158. This valuation and opinion had to be verified by affidavit and filed with the court. The solicitor having carriage of the proceedings would then prepare and distribute post-bills setting out the particulars of the property and the sale, "so as to give publicity to the sale:" p.1159. Once the sale was completed, an affidavit setting out the results of the sale would be filed with the court. The material would then be reviewed on the day for certification (which had earlier been set). Anyone wishing to challenge the sale could attend then. Failing that, the judge would in due course sign and approve the sale, which at that point became final and binding: p.1162.

Equity Practice in Nova Scotia Prior to Kinny

None of these concerns were foreign to Nova Scotia's courts of equity in the decades before *Kinny*. The Nova Scotia Supreme Court had been given by statute the same powers as those of the English chancery court; and the practice was essentially the same as well: RSNS 1859, c.117, s.8, s.4. Essentially the same provisions were carried through in 1864: see RSNS 1864, c.114; and 1873: see RSNS 1873, c.103. It should be noted, however, that there was no provision in all this time allowing the mortgagee to bid at the sale.

Perhaps the best example of a parallel concern in Nova Scotia is found in the decision of Ritchie, E.J. in *Bigelow v. Blaiklock* (decided between July 1873 and December 1877) Russell's Eq. Cas. 23. In this case the defendant mortgagor sought an order for re-sale of property that had been sold by the sheriff under foreclosure process and bought by the plaintiff mortgagee. The property was composed of a number of parcels of land, some of which were in the City of Halifax, while others were on the peninsula. The plaintiff advertised the sale in such a way that any interested purchaser would conclude (erroneously) that only the peninsula parcels were up for sale. And this, noted Ritchie, E.J., at p.24, was wrong:

> "And I cannot help saying that setting up together different properties of a different character in different localities was calculated injuriously to affect the sale by destroying competition. The effect of such a course would be to throw the property into the hands of a plaintiff at a low price, or otherwise to occasion a sacrifice, as few persons would be likely to desire to purchase both classes of properties, while many might desire to compete for them separately. *I am convinced that no owner of property would pursue such a course who desired to obtain the best price for his land.*" (emphasis added)

Under these circumstances, with the plaintiff himself being the purchaser, "it would be most unjust to refuse a re-sale:" p.25. Mr Justice Ritchie observed that since the mortgagee was interested only in obtaining the amount due on his mortgage, he had no reason "to complain that he has not, in addition to the payment of the amount due him on the mortgage, made a profit by a sacrifice of the mortgagor's property." A re-sale was ordered.

The case is interesting for two reasons. First, it recognises that the mortgagee's only valid interest, and the only rationale for the mortgage sale, was to realise upon the security in order to reduce if not eliminate the mortgage debt. Implicit in the decision is the recognition that the interests of both the mortgagee and the mortgagor could best be met by conducting the sale in the same way that any "owner of property would pursue ... who desired to obtain the best price for his land." Second, it established that the court would intervene in an appropriate case to protect those interests by ordering a re-sale.

The practice of permitting a foreclosing mortgagee to sue on the deficiency, which had been planted in Nova Scotia by *Kinny*, must have been sanctioned on the assumption that the mortgagor's interests had been adequately protected by ensuring that the sale price was the best that could be obtained. If there was a deficiency it was not unfair to allow the mortgagor to sue on the personal covenant. This is certainly the rationale for the practice which was offered in *Gordon Grant & Company Limited v Boos* [1926] AC 781, which is often said to support the practice in Nova Scotia.

In *Boos* the mortgagee obtained an order for foreclosure and sale, and purchased the property at a price less than the mortgage debt. About a year later the mortgagee sold the property to a third party at a "great increase in price:" p.783. It then launched an action against the mortgagor for the deficiency. The mortgagor responded with an action against the mortgagee to enjoin the mortgagee's action, arguing that by commencing its action the mortgagee had re-opened the foreclosure -- but being unable to reconvey the property it was estopped from proceeding.

The mortgagor was successful at trial and on appeal. However, the mortgagee's appeal was allowed by the Privy Council.

Lord Phillimore delivered the judgment. He observed that a mortgagee was generally allowed to pursue all the remedies available to him or her under the contract, though "care has to be taken that he is not overpaid:" p.784. He noted the doubt in the caselaw over the proper procedure to employ where a mortgagee had foreclosed and then sold the property. Was he to be allowed to "put a value on the foreclosed property" and sue for the balance of the debt; or was he to be stopped from suing "on the assumption that he must be held to have taken the property, *which cannot now be valued*, as the complete satisfaction of the debt:" p.785 (emphasis added). The difficulty arose because generally, once a mortgagee foreclosed no one could tell what the property was really worth; and it is for that reason that "he is precluded from suing in law, *because it cannot be ascertained that there is any residue due to him.* The estate which he has taken ... may be equal in value to or even greater in value than his debt:" p.786 (emphasis added).

By way of contrast, when a mortgagee sold under a power of sale, the value of the property could be readily ascertained. If the mortgagee received more than his debt, he paid the surplus to the mortgagor; if less, he sued for the deficiency: p.786. That being the case, his Lordship saw no reason why it should be any different where the mortgagee, instead of selling the land himself, asked the court to do it for him: p.786. As his Lordship noted at p.786:

> "The sale *ascertains the value of the property*, the mortgagee gets no more from the property than what the sale brings to him. If the property realizes more than what is due to him, the mortgagor gets the balance. If the property realizes less, the mortgagee is pro tanto unpaid and should be allowed to sue on the personal covenant." (emphasis added)

Lord Phillimore then referred to the Irish practice, stating that it "seems consonant with reason:" p.787. He recommended that the appeal be allowed.

There are a number of points to make about this decision. First, it is clear that it was premised upon the assumption that the original sale to the mortgagee had been conducted fairly: "it was a judicial sale which is not impeached:" p.787.

Second, because the sale had not been impeached he did not have to deal with the fact that the mortgagee had himself purchased the property at the sale. This fact is of some importance, especially given Lord Phillimore's reliance upon the analogy to the power of sale. As a rule a mortgagee is *not* permitted to purchase the property under its power of sale. A sale to oneself is not a sale. And to permit a mortgagee to purchase from itself is to place it in a fundamental conflict of interest: *Farrar v Farrar Limited* (1888) 40 Ch. D. 395 (C.A.) at 409.

One is hence drawn to the conclusion that *Boos* had approved what has come to be the practice in Nova Scotia *only* on the basis that the sale had produced a fair market value for the property.

This kind of reasoning has also been applied in Nova Scotia. In *De Witt v. Simms* (1923) 56 NSR 515 Russell, J. noted at p.523 that the Irish rule could be supported on the basis that the mortgage sale had produced the best price for the mortgagor:

> "When the mortgagee simply forecloses the equity of redemption and then, being clothed with the equitable as well as the legal estate, sells the property, there is no assurance that he has obtained its full value and there is good reason for saying that he should not have recourse to any other securities for his debt unless he can surrender the pledge, and that if he still retains the property, his recourse to other securities opens up the foreclosure giving the mortgagor the right to redeem. Under the practice of this province the sale is made by the sheriff under notice to the public, *which should be a guarantee that the mortgagor has got the benefit of an advantageous sale or, at all events, a sale with notice in the open market.* I therefore do not think that, under our practice, the recourse to collateral securities is barred by the foreclosure and sale, or that such recourse ipso facto opens up the foreclosure." (emphasis added)

There can be no other conclusion but that the Irish practice was grounded upon the assumption that the procedures created by the court and the forces of the open market had combined to ensure that the sale produced a price that could be said to be fair market value.

The Effect of Kinny

It seems that the decision in *Kinny*, or perhaps simply the doubts of Weatherbe, J. (who had doubted the mortgagee's right to bid at the sale: see p.504), alarmed the Legislature. In 1883 the Act was amended, to provide and confirm that a sheriff's deed under a court-ordered sale was sufficient "to convey to the purchaser all the interest of the judgment debtor:" SNS 1883, c.12, s.2. In April 1885, the Act was amended once again, to provide as follows:

> "On sale of mortgaged premises under foreclosure and sale, it is hereby declared and enacted that *it has been* and shall be lawful for the mortgagee to purchase:" An Act to Confirm Sales of Land under Order of Supreme or Equity Courts, SNS 1885, c.31, s.3.

This is the first appearance of any express statutory provision dealing with the practice of permitting mortgagees to bid at the sale. But it did not change the law. It was still open to the court to refuse the mortgagee the opportunity to bid if it felt that such would not be conducive to obtaining the best price.

The court was still concerned to obtain the best price. Under Order LI of the Rules of the Supreme Court, 1884, enacted under the *Judicature Act*, 1884, RSNS 1884, c.104 (for which see pp.820-1144), Rule 7 provided that before any sale could be made, a certificate or abstract of title had to be laid before the court "to enable proper directions to be given respecting the conditions of sale, and other matters connected with the sale." Rule 9 provided for the filing of affidavits containing evidence of the value of the property to permit the fixing of a reserve bid. Finally, Rule 8 provided that once an order for sale had been made, "... the same shall be sold, with the approbation of the court or a judge, *to the best purchaser that can be got*, the same to be allowed by the judge...." (emphasis added).

In 1890 the Legislature enacted much of the wording that now exists in the *Real Property Act*. By s.1 of SNS 1890, c.14, the Supreme Court was confirmed in its equitable jurisdiction. Pursuant to s.5, where a judgment or order was given "... directing any lands to be sold, the same shall be sold, *unless the court or a judge shall otherwise order*, by the sheriff of the county in which the lands ... lie." (emphasis added).

Insofar as purchasers were concerned, s.8 provided that "Any of the parties to the suit or proceeding upon which the judgment or order of sale is founded may purchase at such sale, *unless the court or judge shall otherwise order.*" (emphasis added).

In my view, the italicised words, when placed in their historic context, evince an intention to preserve rather than repeal the court's equitable jurisdiction to supervise the sale of land under its orders.

The Continuing Concern of Equity

In the years since *Kinny*, equity has risen from time to time from its slumbers. *Briand v. Carver* (1967) 66 DLR (2d) 169 (NSSC,TD) is one such occasion. This decision came out of an application by the mortgagee for an order to confirm the sale of certain property in Dartmouth, and for leave to enter judgment against the mortgagor for the deficiency.

The mortgage debt, originally $5,400, was by the time of the mortgagor's default $4,200. A writ of foreclosure and sale was issued. No defence was entered. The order was obtained, and the sale by the sheriff conducted. The mortgagee's solicitor was the only bidder. The sheriff knocked it down to him for $50: p.172.

Mr. Justice Cowan, on his own motion, made inquiries of the assessment office. He concluded that market value for the property as of the date of the application was somewhat in excess of $5,500: p.173. Yet the plaintiff in his application claimed as deficiency the difference between the sale price of $50 and the debt of $4,800. His Lordship noted that if he granted the order the defendants would not only be subject to a judgment against them for $4,150, but "they will also have lost any equity they may have had in the mortgaged property:" p.174.

His Lordship canvassed the law, noting that the Nova Scotian practice of permitting the mortgagee to purchase at the sale had been strongly doubted by Anglin, J. in *Sayre v Security Trust Co. (1920)* 56 DLR 463 (SCC), at p.469. He suggested that the decision in *Gordon Grant v. Boos* lent some support to the Nova Scotian practice: see pp.174-75. His Lordship cited a long passage from *Boos*, and then concluded at p.177 that

> "... it would appear that there is no discretion in the court to refuse the mortgagee a judgment or a deficiency after a judicial sale at which the mortgagee has purchased the property for less than its apparent value, provided the mortgagor has been made a party defendant in the foreclosure proceedings and is shown to have covenanted to pay the amount secured by the mortgage."

I pause here to note that, with respect, this conclusion was wrong. On the authority of Ritchie, EJ's judgment in *Bigelow v. Blaiklock*, the court did have the jurisdiction to not only refuse a judgment, but to set aside the sale, where the sale had not been properly advertised. And *Boos* had only decided that after a sale *which had not been impeached in any way* there was nothing inherently wrong with permitting a mortgagee to sue for the deficiency. This is of some importance, given the fact that historically mortgagees, under either powers of sale or foreclosures and sales, had *never* been allowed to bid at the sale without leave.

Chief Justice Cowan then concluded that the court had the right *before* the sale was confirmed to refuse to confirm the sheriff's report: p.179.

What perhaps disturbed Cowan, CJTD the most was the sense that the property had not in fact been exposed in a manner that would obtain the best possible price. As he noted at p.180,

"It is difficult to explain satisfactorily how it could happen that housing accommodation in the Halifax-Dartmouth area could, in times of housing shortages like these, be exposed for sale at public auction after advertisement over a five-week period in a newspaper published in the City of Dartmouth, without creating any real interest in the public in attending the sale and in bidding for the property."

His Lordship observed that had the defendants bid on the property, the mortgagee and the mortgagor could have competed in their bids until something approaching the fair market value of the property was reached. This observation highlights the assumption that underpinned the entire practice: that a sheriff's sale was, to use the words of Russell, J. in *De Witt v Simms*, "a sale with notice in the open market." It was here that Cowan, CJTD came close to recognising and exposing the real problem with sheriffs' sales: their increasing inability to secure that end. Indeed, he acknowledged that where a mortgagee was allowed to bid on the property in the absence of other bids, the tendency was to produce sales at less than market value. As he noted at p.181

"In cases of sales of mortgaged property on a judicial sale *to a stranger*, there is less likelihood that the mortgaged property will be sold at less than the fair market value.... [The mortgagee] will normally appear at the judicial sale and protect his interests by bidding up to the amount owing under the mortgage, plus taxes, expenses of sale and taxed costs. In order to avoid sales to persons who are apparent strangers, but actually related in interest to the mortgagee, it might be well in

any legislative change to require appraisals and other information, even where the property is sold to a person not the mortgagee."

As laudible as Cowan, CJTD's efforts on behalf of the mortgagor were, there is one significant area in which it is deficient. It is clear on the facts that there was a distinct possibility that the mortgagee got more than he was entitled to under the mortgage. The value of the property clearly exceeded the mortgage debt, yet the decision said nothing about any accounting due to the mortgagor in respect of that surplus. It is difficult to see the equity in permitting the mortgagee to keep that surplus simply because he has (on the strength of the decision in *Briand*) given up a right to sue for a deficiency (which on the facts did not exist anyway).

Nova Scotia Savings & Loan Co. v. *Hill* (1981) 126 DLR (3d) 514 (NSSC, TD) is another example of an exercise of the court's equitable jurisdiction in this area. It involved an application to set aside a judicial sale, upon the ground that the sale had not been conducted properly.

Mr Justice Hallet granted the application, reasoning that the court "has an interest in seeing that the property is sold for the best price obtainable...." As he observed at p.523:

> "*The Sheriff's sale by public auction in an action for foreclosure and sale is an essential part of the proceedings by which the mortgagee realizes on the security. It is also the method by which the court hopes to ensure that the best price is obtained.*" (emphasis in original)

The sheriff had to conduct the sale in such a way as to ensure "that the best price is obtained," and if the sale "was not conducted in the manner that was conducive to obtaining the best price" the sale could not be approved: p.524.

Summary

It is submitted that the Trial Division of the Nova Scotia Supreme Court, in the exercise of its equitable jurisdiction, has not only the power but the duty to supervise the practice of foreclosure and sale so as to insure that it achieves the best possible price on the original sale. There is no requirement in law or in the statutes that the sale *must* be carried out by the sheriff. The sales were originally so conducted because in the nineteenth century it probably was the fairest and most efficient way of achieving the best possible price. As Professor Robertson noted in his article *The Problem of Price Adequacy in Foreclosure Sales* (1987) 66 CBR 671 at p.684,

> "... the popularity of this sale mode [the public auction] during that century can be traced to the view that it represented the least objectionable mode of disposing of property. Moreover, '[w]hen the sale [was] conducted [it] was the most effectual method of ascertaining and obtaining the market value of the thing to be disposed of:' Bateman, *Law of Auctions* (3rd ed., 1846), p.3. This observation was based on the belief that advertising in public papers and the posting of informative handbills on town walls were effective marketing techniques."

As Professor Robertson goes on to note, this observation is no longer valid. One is thus driven to ask why the court continues to adhere to it.

There is nothing in the *Real Property Act* which bars the court from altering its practice. Section 16 of the Act provides that the land "shall be sold, *unless the Court or a judge orders otherwise*, by the sheriff ...." Rules 47.08(1) and 47.16(2) contemplate the authorization of some person other than the sheriff to conduct the sale. Similarly, although s.19 of the *Real Property Act* permits the mortgagee to bid, it also permits the court to "otherwise order." These caveats, understood in their historical and legal context, were clearly intended to preserve rather than limit the jurisdiction of the court to supervise and control all aspects of the sale procedure. It is also clear that the court has from time to time intervened to correct defects in the procedures employed where those defects had the effect of producing sales at an undervalue.

Over the years the equitable jurisdiction of the court in Nova Scotia has fallen into disuse. The practice and its defects have not been examined. Its justification is said to lie in its uniqueness. But in fact, as the system has evolved, Nova Scotia has ended up with *both* the Irish *and* the English systems. If there is a profit on the re-sale, then in practice the mortgagee may elect to take the property in satisfaction of the debt so as to enable it to keep the profit, as it would under the English system;

if there is a deficiency, then the Irish system is adopted, allowing it to sue for the deficiency. This cannot be right.

Since the court has the power to effect a change, it is submitted that it should do so. In both Ontario (where the procedure of choice is the power of sale) and British Columbia (where the procedure is a court-ordered sale conducted before the court), the practice results in the mortgagee listing the property for sale with real estate brokers under multiple listing agreements: for which see generally, Professor Robertson, *The Problem* of *Price Adequacy in Foreclosure Sales*, supra. Appraisals are also part of the process whereby the mortgagee (and the court) comes to a conclusion as to what is the best price (not unlike the process employed by the chancery courts of the nineteenth century to prepare reserve bids). In both jurisdictions the effect of the procedure is to ensure that the property is exposed to the open market in a manner best calculated to secure the greatest interest. In both jurisdictions the mortgage practice has recaptured what it had lost in its development from the nineteenth century: a concern to obtain the best possible price for the property by exposing it for sale in the manner best calculated to achieve that end. It is time for Nova Scotia to follow suit.

"Substantial Risk" Provisions of the Children and Family Services Act

by
Jamie Chipman*

In Nova Scotia the *Children and Family Services Act*[1] *(CFSA)* will come into force on September 3, 1991. This Act will replace the *Children's Services Act*[2] (CSA) and it diverges in several significant ways from the earlier Act. The focus of this paper will be on the new provisions with respect to the apprehension of a child(ren) from his or her parent(s). As with the present Act, the new Act allows for removal of a child who is deemed to require protection. The *CFSA* speaks of a child being "in need of protective services" versus the *CSA* which uses the words, "in need of protection". Beyond this change in nuance, the new Act states that a child requires protective services upon certain grounds being established or upon there being a "substantial risk" of these grounds occurring. The "substantial risk" language is not found within the *CSA*, and herein lies the crux of the difference between the two Acts.

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Much of the *CFSA* has been modelled after Ontario's *Child and Family Services Act*[3], and this is particularly so with respect to protection matters. Consequently, this paper will examine Ontario jurisprudence surrounding the section of their Act outlining when a child is in "substantial risk" requiring removal from his/her home. The Ontario Act has been in effect for over five years and as a result there is a sizeable amount of case law concerning "substantial risk". An examination of the Ontario cases provides a guide to the way in which Nova Scotia's judges will likely interpret the *CFSA's* "substantial risk" sections. Indeed, commencing in September, 1991, these Ontario cases will provide fodder for Nova Scotia counsel.

Section 47(2) of Ontario's *CFSA* allows the court to make a temporary order for the care and custody of a child. Clause (2) (a) provides for the child to remain with the person (usually parent), "who had charge of the child immediately before intervention under this part." Clause (2)(b) allows for the same only with the