LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON

SECURITY INTERESTS IN REAL PROPERTY: REMEDIES ON DEFAULT

LRC 24

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The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning in 1970.

The Commissioners are:

Leon Getz, Chairman
Ronald C. Bray
Paul D.K. Fraser
Peter Fraser
Allen A. Zysblat

Keith B. Farquhar is Director of Research to the Commission.
Arthur L. Close is Counsel to the Commission.

David Cohen is Legal Research Officer to the Commission.
Patricia Thorpe is Secretary to the Commission.

The Commission offices are located on the 10th Floor, 1055 West Hastings Street, Vancouver, B.C. V6E 2E9.

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TO THE HONOURABLE ALEX B. MACDONALD, Q.C.
ATTORNEYGENERAL FOR BRITISH COLUMBIA:

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON SECURITY INTERESTS IN
REAL PROPERTY: REMEDIES ON DEFAULT

In British Columbia there are two principal devices used for the creation of consensual security interests in real property the mortgage and the agreement for sale. The law and practice surrounding them diverges on a number of points of detail, and in view of the fact that the two devices are functionally identical, that divergence seems difficult to justify.

This Report is devoted to an examination of one important aspect of that divergence the remedies available to the parties on default. A number of recommendations are made aimed at introducing a measure of uniformity.

CHAPTER I INTRODUCTION

Although a debt may be secured in a number of different ways, large debts and debts arising through the purchase of land are frequently secured by the taking of some kind of security interest in real property. The security interest may be created in real property already owned by the debtor to secure a debt unrelated to the property, or it may be created at the time the debtor acquired the property to secure the purchase price.

In the Province of British Columbia these consensual security interests in land are most commonly taken in the form of a "mortgage" or an "agreement for sale."

2. The various rights and remedies available are the subject of detailed analysis in Chapters II and III.

At present there are substantive and procedural differences between the rights and remedies on default under mortgages and on default under agreements for sale, which were the subject of a working paper which we circulated earlier this year. In that working paper we stated:

> We believe ... that it is common ground, that whatever the extent of those disparities and dissimilarities, the mortgage and the agreement for sale in British Columbia are functionally identical. Both devices involve the taking or retaining of an interest in land for the purpose of securing payment of a debt. This functional equivalence is most vividly seen in vendor financed purchase of real property where choosing between a deed and mortgage back and an agreement for a sale is often no more than a matter of chance.
>
> ... Our research has revealed to us that the disparities are explicable in terms of history, but has not shown us a justification for their continued existence.

That view led us to adopt a tentative policy that, as far as possible, the rights and remedies on default should be made uniform. The working paper went on to set out specific proposals for reform which would implement that policy. Those proposals involved amendments and additions to the *Laws Declaratory Act* and to the *Land Registry Act*.

The working paper was circulated to a large number of interested persons and bodies including all Registrars of Title in the Province, all Supreme and County Court Judges, a number of Supreme Court Registrars, a number of financial institutions, and to the appropriate subsections of the British Columbia Branch of the Canadian Bar Association. Comment was solicited on the underlying policy of uniformity of rights and remedies, and on the specific way in which we proposed that the policy should be implemented.

The response which we received, while not large, was exceedingly helpful. There was almost unanimous approval of the basic policy of the proposal, although opinions diverged on points of detail. Needless to say, we are fortified by the response received and adhere to the basic policy set out in the working paper. Our specific proposals have been modified in the light of the comment and our final recommendations for reform are set out in Chapter IV.

Before proceeding to those recommendations, it is necessary to describe and analyze the existing legal position of mortgages and agreements for sale to clarify the context within which the recommendations will operate. The following Chapters are devoted to this exercise.

CHAPTER II REMEDIES ON DEFAULT: MORTGAGES

A. What is a Mortgage?

The term "mortgage" was defined in 1899 by Lindley M.R. as:

> ... a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given ... and the security is redeemable on the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding.

In other words, a mortgage is a transfer of property passing conditionally as security for a debt. Subject to the debtor's (mortgagor's) contractual right to redeem upon the repayment of the debt and subject to a further equitable right of redemption given by the courts of equity, the title to the property, at common law, passed absolutely to the mortgagee (lender).

Over the years the form, and in some provinces the substance, of the mortgage has been altered by various statutes. In British Columbia the *Land Registry Act* gives procedural effect to the equitable view that the mortgagor (borrower) remains the true owner of the land and that the mortgagee is the holder of a registrable security interest only. Hence, under the Torrens System of land registration in this Province, the mortgagor is set out on the certificate of title as the registered owner and the mortgagee's security interest is merely noted on the title as a charge or encumbrance. In spite of their form, however, mortgages in British Columbia have long been held to transfer the legal estate in the mortgaged property to the mortgagee.

5. *Cordon Grant & Co.* v. *Boos*, [1926] 3 W.W.R. 57; [1926] A.C. 781; *Moose Jaw Industrialization Fund Committee Ltd.* v. *Chadwick*, [1943] 2 W.W.R. 219; *Forster* v. *Ivey*, (1901) 2 D.L.R. 480.

If title did not pass to the mortgagee at law, he would be placed in a difficult position. The British Columbia *Land Registry Act*, unlike equivalent statutes in other Torrens System jurisdictions, currently provides no remedies to replace those which the mortgagee received at common law by virtue of his acquisition of legal title. A mortgagee has a number of remedies which he may pursue concurrently upon the default of the mortgagor. These are effectively divided into a personal action against the mortgagor, and remedies against the property mortgaged. There is no obligation on the part of the mortgagee to proceed with one remedy before another.

B. __Action on the Personal Covenant of the Mortgagor

By its very nature, a mortgage implies a debt and a personal obligation on the part of the mortgagor to repay it. Although most modern mortgages contain express covenants for repayment, such a covenant may be implied at law from the promise which is presumed when a loan is accepted. On the other hand, it is possible for a mortgagor to restrict his liability or to make his liability conditional by an express covenant to that effect in the mortgage.

A mortgagor will remain liable to the mortgagee on his personal covenant notwithstanding a transfer of his interest in the property (equity of redemption) and the execution of an "assumption agreement" by the transferee in favour of the mortgagee. In fact the mortgagor remains the primary debtor and continues to be liable until either he receives a release from the mortgagee, the *Limitations Act* intervenes to prevent the mortgagee's action or the mortgagee disables himself from restoring the property unimpaired to the mortgagor.

C. Action for Possession of the Property

At common law, in the absence of any express or implied provision to the contrary, the mortgagee is entitled to take possession of the mortgaged lands at any time. For this reason it is common practice to include a specific provision in the mortgage that the mortgagor shall have "quiet enjoyment" of the mortgaged property until default. Upon default, a mortgagee may simply decide to go into possession where he wishes to keep the mortgage alive and where the property in question is generating substantial rents or profits. Upon taking possession, however, the mortgagee assumes a positive responsibility to manage the property actively, and he became accountable for all receipts and for any loss of profit caused by his wilful neglect, carelessness, or fraud.

Actions for possession only are rare. A claim for possession is normally sought in connection with a claim for other relief such as foreclosure. If the property involved is one which produces revenue, such as an apartment block, the mortgagee may also seek an order for the appointment of a Receiver.

D. ___Action for Foreclosure

At common law the mortgagee became the absolute owner of the mortgaged property immediately after the day contractually fixed for redemption if the conditions of the mortgage had not been satisfied. The English courts of equity took a somewhat different view and extended to the mortgagor an additional period within which he might redeem his secured property. This became known as an equitable redemption period. Equitable limits were, however, imposed upon the granting of this additional period of redemption. It was thought only fair that there be some final point after which the mortgagee could confidently treat the mortgagee's interest as terminated. Hence, there developed an action known as "foreclosure" by which "the court simply removed the stop it had itself put on" and the mortgagor's equitable right to redeem was declared to be extinguished.

Foreclosure proceedings in British Columbia follow much the same procedure as that used in the early English courts of equity. The action is usually brought concurrently with a claim for an accounting of the amount due under the mortgage, proof of accounts, a claim for personal judgment on any covenants in the mortgage for the amount found due, a claim for possession or for the appointment of a receiver, an order for sale, a *lis pendens*, and costs.

A foreclosure action is commenced by writ of summons, and the next step is usually a notice of motion before a Supreme Court Judge in Chambers. If satisfied as to the propriety of the action, he will grant an order *nisi* direct-

ing that an account be taken before the Registrar to determine the amount due and fixing a date by which any of the defendants may redeem the mortgage by paying that determined amount into Court. It is the practice in British Columbia for the redemption period fixed by the order *nisi* to be six months from the date of accounting. This period may be shortened under exceptional circumstances, and immediate foreclosures have been granted. Conversely, where unusual circumstances can be shown the court may likewise grant a longer than normal redemption period.

The redemption period specified in the order *nisi* can, at this stage, be extended at the discretion of the Court upon application by any party to the action. Where there is a real likelihood that the mortgagor will soon be able to pay off the arrears and where his conduct has not been unreasonable it is not unusual for at least one extension to be granted.

Where no payment has been made during the period of redemption the mortgagee may apply for an order *absolute*. This is the final order for foreclosure. Although it is the order *nisi* which is really the judgment of the court, with the order absolute merely being ancillary thereto, it is only after securing the final order of foreclosure that the mortgagee may take advantage of the provisions of section 199 of the *Land Registry Act*, and perfect his title to the property.

Of course, if the mortgagee wishes to proceed to execution on his personal judgment against the mortgagor, he need neither acquire nor register a final order. He can, however, obtain a final order and keep his execution rights alive at the same time.

According to section 199 of the *Land Registry Act*, the mortgagee, having obtained a final order, may either apply for an "interim certificate of title" (under subsection (2)) or a "certificate of indefeasible title" (under subsection (1)). The first option might be taken where the value of the security is less than the mortgage debt. Unlike registration of the indefeasible certificate, registration of the interim certificate does not extinguish the mortgagee's right to enforce any personal covenant in the mortgage for the balance. However, in the event of any subsequent recovery on the personal covenant, the foreclosure is considered to be reopened and the mortgagor's right to redeem is revived.

Notwithstanding the seeming finality of the order absolute, and the rationale behind the foreclosure action, there is still a discretion in the court to reopen the foreclosure and to provide the mortgagor with yet another right of redemption. The case law makes it clear, however, that this discretion is one which will be exercised only in exceptional circumstances:

> there must be a good reason for it and a strong case must be made to show it is equitable so to do.

The mortgagor must seek this relief promptly, and the reopening of the final order should not be granted if that would unfairly prejudice a third party who may have acquired an interest in the property. It seems that the court will also weigh the value of the mortgagor's equity being foreclosed as against the amount owing on the mortgage in determining whether or not to exercise this discretion.

E. ___The Contractual Power of Sale

The practice of providing in the mortgage that the mortgagee should have a contractual power of sale upon the mortgagor's default developed early in the 16th century as a reaction against the then tedious and often cumbersome foreclosure action. Naturally, the courts of equity were displeased with the development of this contractual power, which was viewed as circumventing the equitable right to redeem which they had given the mortgagor. It is not surprising, therefore, to find that in 1738 one mortgagor was apparently allowed to redeem his property some years after the exercise of a contractual power of sale. In a later case, *The King* v. *Parish of Edington*, Lord Kenyon C.J. confirmed the proprietory of this course by stating:

> In mortgage deeds there is sometimes introduced a clause that the mortgagee may repay himself by sale of the mortgaged premises *but a court of equity would I believe, control the exercise of that power.*

Nevertheless, by 1802 the validity of the power of sale had been expressly affirmed in a number of cases and the inclusion of such a clause became a common and well entrenched practice in England and in British Columbia.

Subject to the express terms of any particular power of sale clause, the power is usually exercisable upon a default (one to three months) in any payment of principal or interest and after giving notice (usually thirty days) of the intention to sell.

The mortgagee may proceed to sell the property either by public auction or by private sale but he may not sell to himself either directly or indirectly (unless he has the express permission of the court) since he is, in this transaction, a trustee for the mortgagor. The mortgagee must not only comply strictly with the terms of the contractual power where he chooses to exercise it,

37. *See Cuckmere Brick Co. Ltd.* v. *Mutual Finance Ltd.*, [1971] 1 Ch. 949 for a discussion on the nature of this fiduciary relationship.

but must also satisfy the fiduciary obligation to act prudently and in good faith. It seems that a sale may be set aside on equitable principles even where the conduct of the mortgagee does not amount to fraud, bad faith or collusion.

The exercise of a contractual power of sale can be combined with an action on the covenant, in which any deficiency in the debt after the sale is claimed. The sale may take place before or after the issue of execution on a judgment on the mortgagor's covenant. The power of sale given in a mortgage is in fact the power to sell the mortgagor's equity of redemption and the mere exercise of the power extinguishes the equitable right of the mortgagor, giving the purchaser the estate free from all subsequent encumbrances.

While this remedy would seem to have obvious advantages in terms of cost and time involved, in fact it seldom appears to be used. We are told that applications based on the exercise by a mortgagee of his contractual power of sale are infrequently encountered in Land Registry Offices.

F. Sale under Court Order

Section 13(c) of the *Laws Declaratory Act* provides:

> Upon the application of a mortgagee, a subsequent encumbrancer, a mortgagor, or any person claiming under either of them, the Court, in any action for the foreclosure of the equity of redemption in any mortgaged property, may, either before or after judgment, direct a sale of the property on such terms, including costs, as the Court sees fit.

It is clear that no party has an absolute right to this remedy of sale. It is discretionary. It can be requested at any stage (prior to order absolute) in a foreclosure action, and it is not affected by the presence of an unexercised contractual power of sale.

There are three basic types of sale orders which may be made. First, there is the so called "judicial sale" by the Sheriff under the Court's supervision with a specified upset price. This type of sale is rather expensive and cumbersome and requires a formal appraisal. The party requesting the sale must deposit sufficient funds with the Sheriff to cover his costs. If the upset price is not reached the sale must be adjourned.

The second alternative is simply to approach the court with an offer for a private sale in hand. If the court believes the offer to be adequate it may approve that specific sale.

Finally, and most common, is an order that the property be listed for sale. This order will specify *inter alia* who is to have conduct of the sale, the time period of the listing and the percentage of commission to be allowed. The specification of an upset price may be required by the court but there is authority to discourage its inclusion.

Where a sale has taken place under a court order and a deficiency still exists, the mortgagee is free to proceed on the mortgagor's personal covenant to satisfy the mortgage debt. Conversely, if a surplus is recovered on the sale the mortgagee must account for this amount to the mortgagor. It is settled that a court has no jurisdiction to allow a mortgagor to redeem after a sale where the sale order requires no further confirmation and where it provides for a vesting in the purchaser.

G. The Right to Compel an Assignment

There is one additional statutory alternative for a mortgagor in a foreclosure action. This is found in section 13(b) of the *Laws Declaratory Act* and it allows the mortgagor to require the mortgagee to assign the mortgage debt to a third party where one is found who is willing to step into the shoes of the existing mortgagee. The section provides:

> (b) Notwithstanding any stipulation to the contrary, where a mortgagor is entitled to redeem, he may require the mortgagee, his executors, administrators, or assigns, instead of giving a certificate of payment or reconveying and on the terms on which he would be bound to reconvey to assign the mortgage debt and convey the mortgaged property to any third person as the mortgagor directs; and the mortgagee is bound to assign and convey accordingly. Any mortgagee in possession so required to assign, transfer, and convey shall incur no legal liability thereby which he would not have incurred if he had then executed a release of the mortgage.

H. The Right of Reinstatement

In many cases a mortgagee who is in default may have a right to reinstatement that is, at any time before judgment, to put the mortgage back into good standing irrespective of the operation of an acceleration clause, by paying arrears only together with costs and charges. This right arises out of the construction which has been placed on clause 15 of Schedule II of the *Short Form of Mortgages Act*.

Any mortgagor under a mortgage which is currently drawn pursuant to that Act and which includes clause 15, will have the right to "be relieved from the consequences of nonpayment," provided that he pays all arrears plus costs and charges at any time before judgment, "or within such time as by the practice of equity relief therein could be obtained." This has been held to give the mortgagor the right of reinstatement described above. Even when mortgages are not drawn pursuant to that Act, or when section 15 is omitted, mortgagors are apparently, in practice, afforded this relief. Reinstatement under these mortgages can occur through negotiation between the parties or, arguably, through the court's jurisdiction to relieve against forefeiture, although there is considerable doubt that the court's inherent jurisdiction or section 15 of the *Laws Declaratory Act* are broad enough to encompass this type of order.

CHAPTER III REMEDIES ON DEFAULT: AGREEMENTS FOR SALE

A. What is an Agreement For Sale?

In British Columbia an agreement for sale is regarded as a common and effective security device which may be used as an alternative to a sale with a mortgage back to the vendor. It may be defined as a contract between a vendor and purchaser whereby the vendor agrees to sell, and the purchaser agrees to buy, the vendor's interest in the property for a certain sum payable over a specified period of time and, upon payment of the full purchase price in the manner stated, to convey legal title to the purchaser. Under an agreement for sale, therefore, the legal title remains with the vendor until the full purchase price is paid and the conveyance is effected. Up to that time, all the purchaser has is a right to obtain the legal title by fulfilling the terms of the agreement. In British Columbia this right of the purchaser is noted on the vendor's certificate of title as a charge or encumbrance in favour of the purchaser, in the same manner as the interest of a mortgagee is registered.

It is worth noting that the agreement for sale is becoming less important as a security device with respect to home purchases. This is largely due to the effect of the *Provincial Home Acquisition Act*[5] which provides for the making of loans by the government, on generous terms, to eligible persons purchasing homes. The legislation specifies that the loans be secured by a second mortgage. The effect of this is to make registered ownership by the buyer a virtual necessity. This precludes the agreement for sale as a security device, and compels the use of a deed and mortgage back in vendor financed purchases if additional financing is to be sought under the Act.

5. *Standard Trust Co*. v. *Little*, (1915) 8 W.W.R. 1112, 24 D.L.R. 713 (Sask. C.A.); *Davidson* v. *Sharpe*, (1920) 60 S.C.R. 72, [1920] 1 W.W.R. 888, 52 D.L.R. 186.

B. The Basic Remedies

Where a purchaser under an agreement for sale defaults, the vendor has two basic courses of action available. He may *affirm* the contract, treat it as subsisting and sue for specific performance, or he may *disaffirm* the contract, treat it as at an end and seek an order for cancellation. The current market value of the property involved will often determine which course of action is followed, but once the vendor has made his election he cannot reelect. If he chooses to disaffirm the contract and cancel the purchaser's interest in his land then he is precluded from enforcing a personal judgment for any part of the amount found owing on the agreement. The vendor's election need not be made in the statement of claim and, in fact, he may seek two inconsistent remedies and postpone his irrevocable election until he asks for his judgment or order *nisi*.

Often an agreement for sale will contain an express term allowing the vendor, upon default, to determine the agreement by giving an appropriate notice to the purchaser, and to retain any purchase moneys paid to date. When a vendor purports to determine the agreement pursuant to that clause he may seek a declaratory judgment affirming that he has validly determined the agreement and that his title to the land is no longer affected by it. Determination, as opposed to cancellation, indicates an affirmation of the contract by the vendor and an election to hold the purchaser to its express or implied terms.

The action based on a default under an agreement for sale is brought by writ of summons and the statement of claim usually calls for:

(a) specific performance of the agreement;

(b) an order that an account be taken of all moneys owing pursuant to the agreement;

(c) judgment against the defendants for the amount found due and owing on the taking of the account;

(d) an order that, unless the amount found due and owing on taking the said accounts be paid, the agreement for sale be cancelled, and all moneys paid thereunder to the plaintiff be retained by

him; that the respective interests of the defendants in the lands under the agreement for sale be cancelled, and that the registrations of any relevant agreements and judgments be cancelled;

(e) possession;

(f) the appointment of a receiver;

(g) a *lis pendens*; and

(h) costs.

The plaintiff will then apply for an order *nisi* by notice of motion. The usual time fixed for payment in the standard order *nisi* is three months after the date of the Registrar's certificate of account. This period of time is commonly referred to as the "redemption period." The standard order nisi will then go on to state that in default of the purchaser so paying:

(a) the purchaser will henceforth stand absolutely debarred and foreclosed of and from all right, title and interest to the lands; and

(b) the agreement for sale will be cancelled, all payments forefeited, and possession delivered to the plaintiff.

C. Extension of the "Period of Redemption"

Although it is well settled in mortgage foreclosure proceedings that a court has equitable jurisdiction to grant a mortgagor extensions and reextensions of the period of redemption, even after an order absolute has been made, it is open to argument whether or not this equitable prerogative extends to the so called "period for redemption" in an action for specific performance or cancellation of an agreement for sale.

The decisive and automatic effect of the order *nisi* in such an action has been discussed in numerous decided cases. On the basis of the Canadian authorities it would appear that, subject to certain exceptions, and given the standard form of the order *nisi* currently in use in this Province in actions for cancellation of agreements for sale, the Court has no jurisdiction to allow the purchaser to redeem once the redemption period given in the order nisi has expired and further, that the Court has no jurisdiction to extend the period for redemption set out in the order *nisi* either before or after its expiration.

CHAPTER IV RECOMMENDATIONS FOR REFORM

A. Introduction

Our research into the remedies available under mortgages and agreements for sale has isolated six areas of inconsistency.

1. Inconsistent application of statutory rights under the *Laws Declaratory Act*.

2. Inconsistent rights of reinstatement.

3. Inconsistent redemption periods.

4. Inconsistent rights relating to the extension of redemption periods.

5. Inconsistent rights relating to proceedings the personal covenant of the debtor.

6. Inconsistent rights under the *Land Registry Act*.

All but the last of those have been discussed in previous chapters, and in accordance with the view set out in the first chapter, we will explore the elimination of the inconsistencies. There are, however, three preliminary matters which deserve we turn to the consideration and comment before substance of our recommendations.

B. Should the Agreement for Sale Be Retained?

In our working paper we raised the possibility that the agreement for sale might be totally eliminated as a registrable security device, but it was our tentative conclusion that it should be retained. Only one submission which we received took issue with that conclusion. It was suggested that the elimination of the agreement for sale was desirable for the following reasons:

> The burdensome and unnecessary legal and administrative (Land Registry Office) complexities involved with Agreements for Sale; Sub-Agreements for Sale and SubSubAgreements for Sale and the mortgaging thereof would be removed.
>
> Conveyancing in British Columbia can be carried on efficiently by means of Deed of Land and Mortgage without the Agreement for Sale.
>
> Abolition of the Agreement for Sale would be a reform of the existing law that would result in a simplification of that law.

It is our view that the "burdensome ... complexities" referred to are overstated. A recent survey of a large number of titles in Land Registry offices throughout the Province indicated that only 5% of the titles examined had an agreement for sale as a registered charge. In only 7 per cent of those cases in which an agreement for sale was so registered had any subagreement or other derivative change been created. We are not, therefore, persuaded that existence of the agreement for sale places an undue burden on the Land Registry system or on the legal profession.

The other reasons advanced for abolition relate to broader questions of policy. The deed and mortgage back may be more efficient, but if that is so why do some conveyancers continue to use the agreement for sale? In many cases there may be defensible commercial reasons for continuing to use the agreement for sale. For example, as we pointed out in the working paper:

3. The interim agreement (which is used in almost every real estate and purchase transaction) is, of course, in no sense an interim document, but rather the final and binding contract between the vendor and purchaser. The Commission recognizes this fact, but uses the term for the sake of convenience.

> [The] agreement for sale is not without its advantages. For example, a vendor may possess an existing long term mortgage at a favourable interest rate over which he does not wish to lose control, or a subdivision developer may wish to sell a few lots in the subdivision without disturbing the existing financing he may have on the total development.

The validity of that point was conceded in the submission quoted above.

Finally, we are cautious about recommending reform for its own sake. There does not seem to be any pressing need for abolition. There undoubtedly are situations in which it is necessary to limit freedom of contract where that freedom may lead to abuse or socially undesirable consequences, but while the agreement for sale does give rise

to certain difficulties in some circumstances we do not feel they are sufficiently serious to warrant the total abolition of the agreement for sale as a security device.

C. The Definition of Agreement for Sale

The discussion in Chapter III was restricted to cases where the agreement for sale is used as a security device, but not all such agreements serve that function. Often an agreement for purchase and sale will be entered into to establish the rights of the parties until the formal "closing" and conveyance. This is the socalled "interim agreement" for the sale of land which differs markedly in its purpose from the longterm agreement for sale.

Although it is possible to provide in an "interim agreement" for the payment of portions of the purchase price over a short period up to and including the completion date, it is not usually intended that this document operate as a security device in the sense that a registrable mortgage does. It is not unusual in large real estate transactions for the purchaser to register the agreement or lodge a caveat against the property (together with the interim agreement) as a precaution, to thwart potential intervening interests. Such agreements should not be affected by laws drawn to apply to "security agreements." To accommodate business practice and the realities of real estate transactions it is the Commission's view that, for the purposes of recommendations for reform, agreements for sale should be distinguished from "interim agreements" so as to exclude the latter.

This is not, however, an easy task. The difficulty is that, in terms of technical legal analysis, there is no distinction to be drawn between the "interim agreement" and the "security agreement." The difference is functional. One might develop a purely functional definition along the following lines:

> An agreement for sale of land is one in which the seller reserves an interest in the land to secure all or part of its sale price.

This, however, is vague and imprecise and would introduce an undesirable element of uncertainty into real estate transactions.

It was our view in the working paper that clarity could be achieved by defining the "security agreement" in terms of time and possession. We suggested that the "security agreement" might be defined in a manner similar to the following:

> An agreement for sale is a contract between a vendor and purchaser whereby the vendor agrees to sell his interest in the property to the purchaser for a certain amount payable over a specified period of time, and upon payment of the full purchase price in the stated manner, to convey legal title to the purchaser, but this does not include such a contract where the specified period of time is six months or less and where the purchaser is not possession during that period.

The six month period was admittedly arbitrary but was selected early in the study after consultation with a number of persons practising in the field.

Two submissions which we received questioned our approach to the definition issue. As one stated:

> Also, the Working Group discussed actual instances in which completion pursuant to an "interim" agreement did not take place for more that six months. On the other hand, there are instances in which an Agreement for Sale has a three month term. In view of this the Working Group is not certain if the use of time is the proper basis for distinguishing an "interim" agreement from an Agreement for Sale.

The working group did not advance any alternative basis for the distinction.

We are still unable to find any definition which meets these objections but which has an acceptable degree of clarity and precision. We are not, therefore, inclined to depart from the approach taken in the working paper. It is worth noting that most of the submissions received were silent on this aspect of our proposals and we suspect that most found our approach acceptable.

The Commission recommends:

For the purposes of other recommendations made in this Report "agreement for sale" means a contract between a vendor and purchaser for the sale of an interest in land under which the purchase price is payable over a specified period of time, and upon payment of the full purchase price in the stated manner, the vendor shall convey all his estate and interest in the land to the purchaser; but a contract under which the specified period of time is six months or less and the purchaser is not let into possession during that period, is not an agreement for sale.

D. Some Policy Considerations

Our view that mortgages and agreements for sale are functionally identical, and that remedies on default should be made uniform, was one which was supported by most respondents to the working paper. That support, however, does not imply unanimity as to where the proper "balance point" of uniformity lies.

Where the remedies diverge, it is inevitable that, with respect to a particular remedy, a party will be in a more favourable position under one security device than under the other. For example, with respect to an extension of the redemption period, the borrower would seem to be much better off under a mortgage than an agreement for sale. Under a mortgage, his redemption
rights may, in some cases, remain alive even after the final order. Under an agreement for sale his rights seem to be extinguished on the expiration of the redemption period set in the order *nisi*.

Conversely, the lender who is concerned with his right to proceed to execution on the borrower's covenant will be in a better position if he is foreclosing a mortgage than applying for the cancellation of an agreement for sale. In the former case his execution rights remain alive indefinitely if he chooses to obtain an "interim certificate of title," while in the latter case those rights appear to die when the order *nisi* is granted.

The question is: what should be made uniform with what? The proposals set out in the working paper, by and large, accepted the mortgage remedies as setting the appropriate standard. Most of our proposals were directed at modifying the remedies available under an agreement for sale to make them conform to those available under a mortgage.

This choice was to a large extent instinctive. The wider range of mortgage remedies seemed attractive and the law which had developed under mortgages had been infused with a greater proportion of equitable principles. One effect of this choice is that, while in some respects the position of lenders would be improved, our proposals had the overall effect of improving the position of borrowers at the expense of lenders. This is particularly true with respect to agreements for sale, and was the subject of comment by one respondent, a secured lender, on the working paper:

> We wish to express our reservations in respect to the damaging effects of certain recommendations. We are concerned that the equation of remedies may result in a shrinkage of the total availability of funds to purchasers of real property. In many cases the vendor under an Agreement for Sale is an individual of limited resources. This type of vendor is often willing to accept a purchaser with a limited downpayment and a limited income source because of the prompt remedies available under an Agreement for Sale. It is our opinion the equating of remedies

> may in fact serve to reduce the total pool of financing available to home purchasers, especially those of limited means.

The response went on to predict an increase in the cost of mortgage credit as a result of our proposals.

This economic issue is one which this Commission has had to face in the past and which, no doubt, will continue to arise in the future. Arguments similar to that cited above were advanced in the course of our projects on *Debt Collection and Collection Agents*

5. LRC 8 (1972). *and Deficiency Claims and Repossessions*. In each case we were told by the lending community that any limitation on creditors' remedies would have the inevitable result of increasing the cost of credit and decreasing its availability. Generally, however, such predictions are not borne out by the experience of other jurisdictions which have instituted like reforms, and their implementation in British Columbia has not had any marked impact.

The "economic impact" argument is based on a view that the availability of certain creditors' remedies play a vital role in shaping credit granting practices. We do not believe this to be the case. It is our view that most responsible lenders shape their credit granting practices to minimize default. When deciding whether or not to extend credit the primary question is whether a default is likely rather than whether, if a default occurs, certain remedies will be available. This is true whether the credit is secured or unsecured. In secured transactions the next relevant question should be, and for a responsible credit grantor indeed is, whether the property is sufficient to satisfy the debt secured, rather than how speedily and efficiently that property can be realized upon if a default should occur.

It is also worth reiterating that the agreement for sale is becoming less important as a purchasemoney security device. As we pointed out in the previous Chapter, the effect of the *Provincial Home Acquisition Act* has been to increase the use of the deed and mortgage back in vendor financed purchases of homes. Since mortgages are used in the vast majority of financed real estate transactions, and as our recommendations have a significantly smaller impact on mortgage remedies, we have difficulty seeing how the implementation of the reforms we suggest would affect the availability and cost of landsecured credit in any material way.

While a number of the proposals which were set out in the working paper have been modified in the light of the comment received, the previous views of the Commission retain their force on this question of policy.

E. Statutory Rights and Remedies

The *Laws Declaratory Act* contains a number of provisions that currently relate to default under mortgages. Section 13 permits a mortgagor to sue for possession, for rents and profits or for damages for trespass, in the absence of notice of entry by the mortgagee; to require the mortgagee to assign his mortgage where the mortgagor is entitled to redeem; and to apply to court (along with any mortgagee, subsequent encumbrancer or a person claiming under either of them) to have the property sold on such terms as the court sees fit. That provision reads as follows:

> (a) A mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land, as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof has been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person:
>
> (b) Notwithstanding any stipulation to the contrary, where a mortgagor is entitled to redeem, he may require the mortgagee, his executors, administrators, or assigns, instead of giving a certificate of payment or reconveying, and on the terms on which he would be bound to reconvey, to assign the mortgage debt and convey the mortgaged property to any third person as the mortga-

gor directs; and the mortgagee is bound to assign and convey accordingly. Any mortgagee in possession so required to assign, transfer, and convey shall incur no legal liability thereby which he would not have incurred if he had then executed a release of the mortgage:

(c) Upon the application of a mortgagee, a subsequent encumbrancer, a mortgagor, or a person claiming under either of them, the Court, in any action for the foreclosure of the equity of redemption in any mortgaged property, may, either before or after judgment, direct a sale of the property on such terms, including costs, as the Court sees fit:

(d) Section 48 of the *Chancery Procedure Amendment Act, 1852*, 15 and 16 Vict., chapter 86, is hereby repealed.

By its terms, section 13 applies only to mortgages but be made we see no reason why it should not also applicable to agreements for sale.

In our view, any redrafting of the existing portion of section 13 should be kept to a minimum, and we would prefer to see uniformity achieved through the addition of a subsection which contains appropriate definitions. The development of a consistent set of definitions would also assist in formulating the language of other provisions which may be drawn to implement our recommendations.

Essentially, one might give an extended definition to "mortgage" as including an agreement for sale (as defined earlier in this Chapter) with "mortgagee," " mortgagor" and "mortgaged property" bearing corresponding meanings. "Foreclosure" would have to be defined with some care to ensure that it encompassed all the various foreclosure-like applications which may be made in an action on an agreement for sale. Some minor modification of the substantive text of section 13 would also be necessary.

The Commission recommends:

The remedies available to mortgagors, mortgagees, and other persons under section 13 of the Laws Declaratory Act *should also be available to parties whose rights arise under an agreement for sale.*

F. ___Reinstatement

As we pointed out in Chapter II a mortgagor in default has a right of reinstatement if his mortgage is one drawn pursuant to the *Short Form of Mortgages Act* and contains clause 15. We are told that in practice it seems that this right is given with respect to *all* mortgages, often at any time up to the making of the final order, although the authority for such relief is questionable.

The right of reinstatement available in mortgage actions seem to have no analogue in actions under agreements for sale, although the courts may, in practice, grant such relief in the exercise of their discretion to adjourn applications from time to time.

In our working paper we proposed that the right to reinstatement should be made explicit in the *Laws Declaratory Act*, be available at any time up to the pronouncement of the final order, and be uniformly available to both mortgagors and purchasers.

We saw reinstatement as a salutary move which would give legal blessing to what seems to be an existing practice. In doing so we were following the lead of other jurisdictions such as Manitoba which has enacted the following provision:

> Where default occurs in making a payment due under a mortgage or in the observance of a covenant contained therein, and under the terms of the mortgage, by reason of such a default, the whole principal and interest secured thereby has become due and payable, the mortgagor may, notwithstanding a provision in the mortgage to the contrary, and at any time prior to sale or foreclosure, perform the covenant or pay the district registrar, and he is thereupon relieved from the consequences of nonpayment of so much of the mortgage money as has not become payable by reason of lapse of time.

One response directed at that proposal stated:

> We are concerned that the proposal could effectively remove the acceleration clause from all Mortgage and Agreement for Sale documents, particularly as the court ... could permit the reinstatement of a delinquent loan many times over its life. While the proposed clause will require payment of all arrears and costs prior to reinstatement, such costs do not include the additional administrative costs incurred in monitoring and administering a habitually delinquent loan. If the court were to permit continued reinstatement of delinquent loans this would have an effect on the cost of the mortgagee's operations and could lead to a general increase in the cost of mortgages. More important however is the area of Agreements for Sale which are held, we understand, primarily by individuals who generally require a continuity of cash flow. If the proposed clause is implemented, it could potentially remove the possibility of continuity of income from the Agreement for Sale and could therefore remove from the market a portion of the funding available for housing.
>
> We believe the courts have been equitable in their decisions on reinstatement and their present powers are sufficient. We do not believe the mortgagee or vendor under an Agreement for Sale should be burdened with the additional cost of administering habitually delinquent loans and further they should continue to have the right to require such loans be paid in full, once the acceleration clause becomes operative.

That response raises two issues. The first is that the lender will never be adequately compensated for the cost of "administering habitually delinquent loans." This, it seems to us, is in reality a complaint against the court practice in awarding costs and the inadequacy of whatever tariff may be available. We have no quarrel with the proposition that the lender should be adequately compensated for any additional costs arising out of the default. To the extent that such compensation may be inadequate under the existing rules, that is a problem beyond the scope of this Report. We understand that there are several current studies of the costs system in British Columbia and that there may ultimately be recommendations which, if implemented, will make reinstatement less objectionable on economic grounds.

The second issue is that a right of reinstatement will inhibit a continuity of cash flow. We have difficulty seeing how that can be the case. It is a default, not the existence of a remedy, which causes cash flow to cease, unless the suggestion (which we reject) is that the existence of the remedy will *encourage* default.

Let us assume that for some reason a default has occurred and both parties wish to restore the previous *status quo*. It seems to us that this is likely to be achieved sooner through a law which permits reinstatement by payment of arrears only, than one which requires the borrower to procure an accelerated amount. Thus it might be argued that reinstatement encourages a continuity of cash flow. In fact, reinstatement would seem to be the rule in most cases of default through an informal agreement between the parties.

In our view a right of reinstatement is one which is fundamentally fair and we adhere to the proposal set out in the working paper. At the same time we recognize that permitting the debtor to obtain reinstatement more than once might be thought to work an abuse on the creditor. To guard against such possible abuse, we would confer upon the court a discretion to deny reinstatement in an appropriate case.

The Commission recommends:

A provision be added to the Laws Declaratory Act *which incorporates the following principles:*

(a) At any time before the pronouncement of an order absolute in any foreclosure action brought on a mortgage or any action brought on an agreement for sale, the mortgagor, the purchaser, or any party claiming through them, may reinstate the mortgage or agreement by tendering the sums actually in arrear, exclusive of the operation of any acceleration clause, and by curing any other default upon which the claim of the mortgagee or vendor is based, together with a sum equal to

(i) all expenses or disbursements reasonably made or incurred by the mortgagee or vendor in respect of the property mortgaged or sold including taxes, repairs, and payments in respect of other encumbrances, and

(ii) reasonable solicitor's costs and legal expenses to the extent provided for in the mortgage or agreement and the rules of court;

and, if the mortgage or agreement is reinstated as provided for, the mortgagor or purchaser is relieved from the consequences of the breach or default.

(b) The court should have jurisdiction to declare that an acceleration clause is effective and that a mortgage or agreement for sale should not be reinstated

(i) in cases where repeated default has occurred and that default has visited an unjustified hardship on the mortgagee or vendor, or

(ii) in cases where, in all the circumstances, it is inappropriate or inequitable to permit the mortgagor or purchaser to reinstate.

G. Redemption Rights

There are three areas in which the redemption rights of a mortgagor diverge from the so-called redemption rights of the purchaser under an agreement for sale. We say "socalled" because, although the functional similarity between mortgages and agreements for sale, and the outward similarity of proceedings on default has led to the purchaser being regarded as having something akin to the equitable right of redemption enjoyed by a mortgagor, the purchaser's rights arise under different rules of law, and somewhat different rules apply.

The end result sought by the lender is the same in both cases: the termination of the borrower's interest in the property unless the default is remedied. In more technical terms, the relief normally sought by the vendor is an order for specific performance of the agreement for sale, or an order for the cancellation of the agreement for sale, or both. When such an order is made it normally includes a provision which allows the purchaser to "redeem" the property within a specified period of time. By "redeem" we mean the right of the purchaser to free the property of the vendor's interest by paying the entire amount secured and costs.

The first way in the borrower's "redemption" right differs from that of the mortgagor is that the usual period specified is shorter. At present, the usual redemption period granted in a mortgage foreclosure action is six months, as opposed to three months in an action for cancellation or specific performance of an agreement for sale. This divergence is apparently based on custom alone. The Commission appreciates the need for wide judicial flexibility in the setting of just redemption periods (or in the granting of immediate foreclosure or cancellation without any re-

demption period) and has no desire to restrict this essential aspect of the appropriate court orders. Nevertheless, we cannot discern a justification for the apparently arbitrary disparity which now exists.

It is therefore our view that the redemption periods should be made uniform, and that the period should be set at six months. At the same time we believe that there should be a retention of such judicial flexibility so that the courts can meet the circumstances of each case.

The second area of divergence relates to the granting of extensions of the redemption periods specified by the courts in orders *nisi*. Although the law may be clear for mortgages, this is not so in the case of agreements for sale. There are cases in British Columbia which appear to prohibit such extensions,

11. [1974] 1 W.L.R. 816. but the recent decision of the English Court of Appeal in *Starside Property Ltd*. v. *Mustapha* may well support the proposition that extensions may be granted. In any event, this uncertainty should be explicitly rectified by statute. Inasmuch as there is an unquestionable power in the courts to grant extensions of redemption periods in mortgage foreclosure actions, it is the view of this Commission that an identical power should exist with respect to actions on agreements for sale for cancellation or specific performance.

Finally, as we pointed out in Chapter II, in exceptional circumstances a mortgage foreclosure action can be reopened, even after a final order has been perfected, and the mortgagor allowed to redeem. This right seems to have no analogy in an action brought on an agreement for sale. This too should be rectified.

The Commission recommends:

1. When an action is brought on an agreement for sale by a vendor in which the relief claimed is an order for specific performance of the agreement for sale, or an order for the cancellation of the agreement for sale or both, and an order is made which gives the purchaser the right to free the property of the vendor's interest by repaying the entire amount secured and costs within a specified period of time, then

(a) the period of time specified should be six months unless the court in its discretion determines there should be a shorter or longer period of time, and

(b) the court should, upon the application of the vendor, the purchaser or any person claiming through them made before the pronouncement of an order absolute have the power to extend the period of time specified upon sufficient cause being shown; and

(c) notwithstanding the perfection of an order absolute the court should have the same discretion to reopen the proceedings and allow the purchaser to redeem the property as it would have if the action was for the foreclosure of a mortgage, and the exercise of that discretion should have the same effect as the exercise of the like discretion has in the case of a mortgage.

The focus of the foregoing recommendation is the action brought by a vendor claiming cancellation or specific performance. An order in such an action normally gives the purchaser a right of redemption to which the recommendation will apply. We turn now to a third type of relief which may be sought by a vendor and which raises different problems. That relief is a declaration of the court that an agreement for sale has been validly cancelled or terminated according to its terms. This requires further explanation.

It is not uncommon for an agreement for sale to contain an express term providing that the vendor is authorized upon default to determine the agreement by giving an appropriate notice to the purchaser and to retain any purchase moneys paid to date. When such an express term is present and the vendor determines the agreement pursuant to that clause he cannot thereafter sue for outstanding purchase money and he is not entitled to ask the court to can-

cel the contract which he has himself determined. He may, however, seek a declaratory judgment affirming that he has validly determined the agreement pursuant to his power of determination and that his title to the land is no longer affected by it. It is not clear in what circumstances a court will invoke its inherent jurisdiction, or its jurisdiction under section 15 of the *Laws Declaratory Act*, to relieve a purchaser from the effect of such a clause in his contract.

We are disturbed that the power to cancel an agreement for sale according to its terms is one which is open to abuse on the part of the vendor. In particular, it enables him to circumvent the protection which the existing law and our recommendations give the purchaser.

Superficially the contractual right to cancel the agreement resembles the contractual power of sale often reserved by a mortgagee, but the analogy cannot be carried too far. As we pointed out in Chapter II a substantial body of law has arisen to give the borrower a measure of protection. There must be a sale and the mortgagee is under a fiduciary obligation to act prudently and in good faith. The mortgagee is accountable to the borrower for any surplus generated by the sale. The law is unsettled concerning the extent to which these protective elements are present when a vendor purports to exercise his contractual power to cancel the agreement for sale. It is our view that this is a potential "loophole" which should be the subject of specific provisions to safeguard the interests of the purchaser.

In our working paper we proposed that this be achieved through the enactment of a provision in the following terms:

> [I]n an action for a declaration that an agreement for sale has been validly cancelled or terminated according to its terms, the Court may specify a period of redemption as a condition of any declaration granted.

It may be, however, that the desired result could be achieved more simply and clearly by a statutory nullification of such cancellation clauses and a general statement that only a court ordered cancellation is effective. This solution has been suggested by legislation in Saskatchewan. Section 2 of *The Agreements of Sale Cancellation Act* provides:

> 2. Notwithstanding any term or provision to the contrary in a contract or agreement for the sale of land in Saskatchewan now or hereafter entered into, all proceedings by a vendor to determine or put an end to or rescind or cancel the contract or agreement shall be had and taken by proceedings in a court of competent jurisdiction.

We agree with the approach of the Saskatchewan legislation and recommend its adoption in this Province.

The Commission recommends:

A provision be enacted which is comparable to section 2 of The Agreements of Sale Cancellation Act *of Saskatchewan.*

It follows from that recommendation that certain consequential amendments to the Land Registry Act *are necessary. Under existing law a vendor may be able to effect a cancellation of the agreement for sale without having first obtained a court order. Sections 184(1) and 185 of the* Land Registry Act *provide:*

> 184. (1) In the case of a registered charge which, by the terms of the instrument creating or evidencing the charge, is determined by the effluxion of time *or the happening of any event*, the Registrar shall cancel the registration of the charge on the effluxion of the time or the happening of the event.
>
> 185. (1) In the case of a registered lease *or agreement of sale and purchase* of land, the Registrar may,

(a) upon proof to his satisfaction of breach of covenants and re-entry and recovery of possession by the lessor or owner of the reversion *or by the vendor or owner of the lands subject to the agreement*; and

(b) upon thirty days' notice to the lessee or *purchaser*; and

(c) upon hearing all parties attending on the return of said notice, cancel the registration of the lease or *agreement* upon the register and thereupon the estate of the lessee *or purchaser* in the land described in the lease *or agreement*, and the lease *or agreement* so far as it affects the said land, shall cease and determine.

(2) Such cancellation does not release the lessee *or purchaser* from his liability, in respect of any covenant in the lease or *agreement*, expressed or implied.

(3) If any person appears on the register as holder of a derivative charge, that is to say, a sublease, *subagreement* or other charge derived through the lease *or agreement*, the Registrar may require the applicant for cancellation to give thirty days' notice to that person, and if the Registrar proceeds to cancel the registration of the lease *or agreement* he may also cancel the. derivative charge; and thereupon the estate of the holder of the derivative charge in the land described in the instrument under which the derivative charge is registered and the instrument, so far as it affects the said land, shall cease and determine; but the cancellation does not release any party to the instrument from liability in respect of any covenant therein, expressed or implied.

We are told that Registrars of Title are extremely cautious in exercising their powers of cancellation under these provisions. Nonetheless, it remains our view that where the right to cancellation is based on a default of the purchaser, a court order should be required to effect any non-consensual cancellation.

The Commission recommends:

1. *A subsection be added to section 184 of the* Land Registry Act *to the effect that nothing in subsection (1) authorizes the cancellation of an agreement for sale by reason of the purchaser's default.*

2. *Section 185 of the* Land Registry Act *be amended to remove all references to agreements for sale or parties thereto.*

H. Rights on the Personal Covenant

We now turn to the right of a mortgagee or vendor to proceed to and execute on a judgment on the mortgagor's or purchaser's personal covenant. At present, a mortgagee retains this right for an indefinite period, even after he is granted an order absolute, provided he takes only the interim certificate of title provided for in section 199(2) of the *Land Registry Act*. On the other hand, a vendor under an agreement for sale, in effect, loses this option the moment he takes an order *nisi* in his cancellation action. Our general policy of equating the remedies on default under these two security devices suggests that a vendor under an agreement for sale should be given an enlarged period in which to enforce the purchaser's personal covenant.

The Commission recommends:

The granting of an order nisi *in an action by a vendor for the specific performance or cancellation of an agreement for sale should not affect the right of the vendor to enforce the personal covenant of the purchaser.*

What should be the extent of the right to proceed on the covenant? We are unhappy with the existing law which may permit the mortgagee's rights to remain alive indefinitely. There ought to be some point at which the

borrower knows absolutely that he is free from personal liability on his covenant. This is in fact the current result where a mortgagee takes a certificate of indefeasible title under section 199(1) of the *Land Registry Act*.

It is our conclusion that the opportunity to execute on the personal covenant ought to cease upon the pronouncement of an order absolute, whether the action be brought on a mortgage or agreement for sale. This position has been taken with these factors in mind:

(i) interim certificates are very rarely used in practice;

(ii) in practice the cutoff date established by the issue of a certificate of indefeasible title usually arrives very shortly after the granting of the order absolute;

(iii) the date of the order absolute appears to be more convenient for the purpose of equating the default under the two relevant security devices.

In Chapter II and in the previous section of this Chapter we considered the jurisdiction of the court, in exceptional circumstances, to reopen proceedings after a final order has been granted so as to give the borrower a further period of redemption. Where that jurisdiction is exercised the right of the lender to proceed on the personal covenant should be revived.

The Commission recommends:

Notwithstanding the previous recommendation, upon the pronouncement of an order absolute in an action

(a) for the foreclosure of mortgagor's interest in land, or

(b) for cancellation of an agreement for sale, the mortgagee or vendor shall thereupon be deemed to have released the mortgagor or purchaser from his personal covenant and to have irrevocably taken the property in full satisfaction of the debt secured so long as that order remains in force.

The previous recommendation necessarily raises the question of the continued existence of the interim certificate of title now available under section 199(2). In any view its continued existence would serve no useful purpose, and we recommend that it be dispensed with.

The Commission recommends:

Section 199(2) of the Land Registry Act *be repealed and consequential amendments be made to sections 15 and 162 and to section 4 of the Scale of Fees.*

I. Absent Vendor

A final area of divergence concerns the remedies available to the borrower who is entitled to obtain a discharge or conveyance from the lender but is unable to do so because the lender is missing or absent from the Province. Section 183 of the *Land Registry Act* provides:

> 183. (1) Where any mortgagor or owner of the equity of redemption becomes entitled to pay off the mortgage"money, and the registered mortgagee is absent from the Province or cannot be found, and there is no person in the Province authorized by power of attorney duly filed in the Land Registry Office where the mortgage is registered to receive payment of the mortgagemoney and execute a discharge of the mortgage,

> a Judge of the Supreme Court may, after the date appointed for redemption, on application ex parte and on proof of the facts and of the amount due for principal and interest upon and all other sums rightly payable to the mortgagee under the mortgage. direct, within a time to be limited, the payment of such amount, less the taxed costs of the application, into Court for the mortgagee or other person entitled thereto. Upon payment into Court of the amount so directed within the time limited by the Judge, all interest accruing under the mortgage shall cease.
>
> (2) Upon application for cancellation, and upon deposit of the Judge's order with proof of payment into Court in compliance therewith and of the mailing of a copy of the order to the mortgagee at his lastknown address, the Registrar shall cause an entry to be made in the register cancelling the registration of the mortgage, and such entry shall be a valid discharge of the mortgage and shall have the same force and effect as a like entry made upon an application for cancellation accompanied by the production of a discharge of mortgage.
>
> (3) The money so paid into Court shall, with the accrued interest thereon, be paid out to the person entitled thereto on application accompanied by proof of the surrender to the Registrar of any certificate of charge or duplicate certificate of title held by that person relating to the land covered by the mortgage.

There is no equivalent provision in the *Land Registry Act* governing agreements for sale, and a purchaser who seeks comparable relief must, it seems, rely on section 50 of the *Trustee Act* to obtain a vesting order. This section appears to achieve the same result as section 183 of the *Land Registry Act*, but we are told that it is not as convenient. For the sake of clarity and greater uniformity of remedies, the existing section 183 ought to be expanded to extend comparable relief to a purchaser under an agreement for sale.

The Commission recommends:

Section 183 of the Land Registry Act be amended to provide comparable relief to a purchaser under an agreement for sale.

J. Other Matters

There is one further situation which is of concern to us and that is the exercise of the right normally reserved by a lender to enter into possession of the property which secures the debt and to receive rents and profits and, in the case of a mortgage, to sell the property. That right is usually set out in a provision comparable to clause 13 of the *Short Form of Mortgages Act*. The relevant portions of clause 13 (column II) provide:

> 13. Provided always, ... that if the said mortgagor, ... shall make default in any payment of the said money or interest, ... and calendar month shall have thereafter elapsed without such payment being made, ... it shall and may be lawful to and for the said mortgagee, ... after giving written notice to the said mortgagor, ... of his intention ... not less than previous without any further consent or concurrence of the said mortgagor, ... to enter into possession of the said lands, ... and to receive and take the rents, issues, and profits thereof, and whether in or out of possession of the same, to make any lease or leases thereof, or of any part thereof, as he shall think fit, and also to sell and absolutely dispose of the said lands ...

It will be noted that the clause leaves certain matters open (presumably to be agreed upon between the parties) as indicated by the blank spaces. Those matters relate to the length of time during which default must continue before the lender's rights under the clause arise had how much notice must be given by the lender before he can validly exercise those rights.

> Such a clause confers extraordinary rights on the lender and we are not satisfied that the rights of the borrower are adequately safeguarded in all cases. our apprehension arises from the fact that it is the lender who is usually in the more powerful bargaining position and hence in a position to dictate what the notice and default periods will be. It may be open to the lender to require unreasonably short periods or dispense with notice altogether.

We do not suggest that any patterns of abuse have arisen among the major institutional lenders but we are concerned about the possible misuse of such a clause by marginal members of the lending community. Our concern is heightened by current economic uncertainty. We therefore see the need to provide some minimum periods of time to complement the existence of such clauses.

In our working paper we suggested that a provision be enacted comparable to the following:

> Notwithstanding any agreement to the contrary except as hereinafter provided, no mortgagee or vendor under an agreement for sale shall exercise a right to enter into possession of the land so secured and receive and take rents and profits thereof, unless:
>
> (i) a default under that mortgage or agreement for sale has continued for one month, or for such longer period as has been agreed on by the parties; and,
>
> (ii) the mortgagee or the vendor under the agreement for sale has, subsequent to this period of default, given his mortgagor or purchaser, as the case may be, one months notice, or such longer notice as has been agreed on by the parties, of his intention to so enter into possession and receive rents and profits.

That proposal was the subject of considerable controversy in the responses to our working paper. Those who were critical of the proposal wore mainly concerned with its impact on security given by large business concerns and undertakings. As one respondent put it:

> It is not clear whether the prohibition will apply if the mortgagee or vendor merely enters into possession without also taking rents and profits or, alternatively, whether a mortgagee or vendor may take rents and profits without entering into possession i.e. under an assignment of rents.
>
> The necessity that a total period of two months elapse from the date of default could provide an opportunity for a mortgagor or purchaser to obtain prepayment of rents for the purpose of defeating the rights of the mortgagee or vendor.
>
> The Section as drafted appears to mean that a receiver appointed by a debenture holder out of court or the debenture holder itself cannot take possession until two months after default at the earliest whether the instrument under which he is appointed or acts contains a fixed charge on land or a floating charge which crystalizes as a charge on land upon appointment of the receiver. It is not clear whether a receiver could enter for the purpose of taking possession of chattels which are specifically charged without waiting until default has continued for one month and one month's notice of intention to enter possession has been given. Furthermore, the question whether merely receiving rents and profits is permissible without notice will also arise as outlined in the preceding paragraph. As the purpose of appointing a receiver under a debenture is often to ensure the carrying on of the business of the company which gave the debenture it is essential that the debenture holder should have the right to appoint a receiver who can take possession without delay. Otherwise the position of the debenture holder and other creditors may be prejudiced in that the company will be no longer a going concern and the assets will have a mere break up value on sale.

We concede the legitimacy of the concerns set out above. When the proposal in the working paper was developed our focus was on security given on residential premises and it was not our intention to impede commercial financing.

Some of the difficulties raised, such as the status of an assignment of rent taken as collateral security, can be met by careful drafting of the final legislation. Other problems, however, are not amenable to an easy solution short of a full retreat from the proposal. It would, of course, be possible to restrict the effect of the proposal to residential property occupied by the borrower, but that would leave the small businessman unprotected, something we would be

loath to do. Any attempt to distinguish between "small business" and "big business" is, we think, an exercise foredoomed to futility.

We adhere to the substance of the proposal made in the working paper but, at the same time, recognize a need for some flexibility. In our view the necessary flexibility is only to be found in the courts and, therefore, we believe that the most appropriate solution lies in allowing the lender to make a summary application to a court of competent jurisdiction to abridge the minimum statutory default and notice periods. We would also make special provision preserving the rights relating to the appointment of a receiver.

We adhere to the one month period with respect to possession and the receipt of rents and profits which we proposed in the working paper. A respect to the notice period which should precede the longer period of time, however, seems desirable with exercise of the right of sale.

In Ontario such rights are regulated by statute and notice periods of 45 days and 35 days respectively are specified for the exercise of statutory and contractual rights of sale. Other statutes have required as much as six months notice. On the whole we think three months notice is sufficient.

The Commission recommends:

Legislation be enacted to provide that when a mortgage or agreement for sale contains a provision under which, upon the default of the mortgagor or purchaser, the mortgagee or vendor may enter into possession of, sell, or receive the rents and profits of the land, the rights under that provision shall not be exercised unless:

(a) a default under that mortgage or agreement for sale has continued for one month, or for such longer period as has been agreed on by the parties; and,

(b) the mortgagee or the vendor under the agreement for sale has, subsequent to this period of default, given his mortgagor or purchaser

(i) one months notice, or such longer notice as has been agreed on by the parties, of his intention to so enter into possession or receive the rents and profits of the land, or

(ii) three months notice, or such longer notice as has been agreed on by the parties, of his intention to sell the land,

but the court should have the jurisdiction to abridge the time limits set out above upon a summary application by the mortgagee or vendor and upon sufficient cause being shown and the legislation should not limit the right of a party to apply for the appointment of a receiver.

CHAPTER V CONCLUSION

A. Summary of Recommendations

The Commission recommends:

1. *For the purposes of other recommendations made in this Report "agreement for sale" means a contract between a vendor and purchaser for the sale of an interest in land under which the purchase price is payable over a specified period of time, and upon payment of the full purchase price in the stated manner, the vendor shall convey all his estate and interest in the land to the purchaser; but a contract under which the specified period of time is six months or less and the purchaser is not let into possession during that period, is not an agreement for sale. The remedies available to mortgagors, mortgagees, and other persons under section 13 of the* Laws Declaratory Act *should also be available to parties whose rights arise under an agreement for sale.*

2. *The remedies available to mortgagors, mortgagees, and other persons under section 13 of the* Law Declaratory Act *should also be available to parties whose rights arise under an agreement for sale.*

3. *A provision be added to the* Laws Declaratory Act *which incorporates the following principles:*

   (a) *At any time before the pronouncement of an order absolute in any foreclosure action brought on a mortgage, or any action brought on an agreement for sale, the mortgagor, the purchaser, or any party claiming through them, may reinstate the mortgage or agreement by tendering the sums actually in arrear, exclusive of the operation of any acceleration clause, and by curing any other default upon which the claim of the mortgagee or vendor is based, together with a sum equal to*

      (i) *all expenses or disbursements reasonably made or incurred by the mortgagee or vendor in respect of the property mortgaged or sold including taxes, repairs, and payments in respect of other encumbrances, and all*

      (ii) *reasonable solicitor's costs and legal expenses to the extent provided for in the mortgage or agreement and the rules of court and, if the mortgage or agreement is reinstated as provided for, the mortgagor or purchaser is relieved from the consequences of the breach or default.*

   (b) *The court should have jurisdiction to declare that an acceleration clause is effective and that a mortgage or agreement for sale should not be reinstated*

      (i) *in cases where repeated default has occurred and that default has visited an unjustified hardship on the mortgagee or vendor, or*

         (ii) *in cases where, in all the circumstances, it is inappropriate or inequitable to permit the mortgagor or purchaser to reinstate.*

4. *When an action is brought on an agreement for sale by a vendor in which the relief claimed is an order for specific performance of the agreement for sale, or an order for the cancellation of the agreement for sale or both, and an order is made which gives the purchaser the right to free the property of the vendors interest by repaying the entire amount secured and costs within a specified period of time, then*

   (a) *the period of time specified should be six months unless the court in its discretion determines there should be a shorter or longer period of time, and*

(b) *the court should, upon the application of the vendor, the purchaser or any person claiming through them made before the pronouncement of an order absolute, have the power to extend the period of time specified upon sufficient cause being shown; and*

(c) *notwithstanding the perfection of an order absolute the court should have the same discretion to reopen the proceedings and allow the purchaser to redeem the property as it would have if the action was for the foreclosure of a mortgage, and the exercise of that discretion should have the same effect as the exercise of the like discretion has in the case of a mortgage.*

5. *A provision be enacted which is comparable to section 2 of* The Agreements of Sale Cancellation Act *of Saskatchewan.*

6. *A subsection be added to section 184 of the* Land Registry Act *to the effect that nothing in subsection (1) authorizes the cancellation of an agreement for sale by reason of the purchaser's default,*

7. *Section 185 of the* Land Registry Act *be amended to remove all references to agreements for sale or parties thereto.*

8. *The granting of an order* nisi *in an action by a vendor for the specific performance or cancellation of an agreement for sale should not affect the right of the vendor to enforce the personal covenant of the purchaser.*

9. *Notwithstanding the previous recommendation, upon the pronouncement of an order absolute in an action*

(a) *for the foreclosure of mortgagor's interest in land, or*

(b) *for cancellation of an agreement for sale, the mortgagee or vendor shall thereupon be deemed to have released the mortgagor or purchaser from his personal covenant and to have irrevocably taken the property in full satisfaction of the debt secured so long as that order remains in force.*

10. *Section 199(2) of the* Land Registry Act *be repealed and consequential amendments be made to sections 15 and 162 and to section 4 of the Scale of Fees.*

11. *Section 183 of the* Land Registry Act *be amended to provide comparable relief to a purchaser under an agreement for sale.*

12. *Legislation be enacted to provide that when a mortgage or agreement for sale contains a provision under which, upon the default of the mortgagor or purchaser, the mortgagee or vendor may enter into possession of, sell, or receive the rents and profits of the land, the rights under that provision shall not be exercised unless:*

(a) *a default under that mortgage or agreement for sale has continued for one month, or for such longer period as has been agreed on by the parties; and,*

(b) *the mortgagee or the vendor under the agreement for sale has, subsequent to this period of default, given his mortgagor or purchaser*

(i) one months notice, or such longer notice as has been agreed on by the parties, of his intention to so enter into possession or receive the rents and profits of the land, or

(ii) three months notice, or such longer notice as has been agreed on by the parties, of his intention to sell the land,

but the court should have the jurisdiction to abridge the time limits set out above upon a summary application by the mortgagee or vendor and upon sufficient cause being shown and the legislation should not limit the right of a party to apply for the appointment of a receiver.

B. Acknowledgements

The Commission wishes to acknowledge the very important contributions which have been made to this project by a number of persons. First we wish to express our gratitude to an ad hoc committee of practising solicitors who advised us during the formative states of the study. They gave generously of their time and in putting their considerable experience in this area at our disposal assisted us significantly. The responsibility for the final recommendations made is, of course, the Commission's own.

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LEON GETZ, *Chairman*
RONALD C. BRAY
PAUL D.K. FRASER
PETER FRASER
ALLEN A. ZYSBLAT

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