MANITOBA

LAW REFORM COMMISSION

COMMISSION DE RÉFORME DU DROIT

REPORT

ON

SECTION 110 OF *"THE REAL PROPERTY ACT"*

Report #12

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The Manitoba Law Reform Commission was established by "*The Law Reform Commission Act*" in 1970 and began functioning in 1971.

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The subject of this Report is Section 110 of "*The Real Property Act*", Cap. R30, R.S.M. 1970, which accords an element of immortality to otherwise moribund Manitoba mortgages made pursuant to that Act. Section 110 provides:

> In so far as a limitation is imposed by The Limitation of Actions Act, on the rights, remedies, or powers, of mortgagees and encumbrancers, the limitation shall be held not to apply in the case of mortgages or encumbrances made under this Act, except as to the liability under covenants for the payment of moneys secured thereby.

The provisions of "*The Limitation of Actions Act*", Cap. L150, R.S.M. 1970, which are accordingly suppressed in the case of mortgages made under the real property statute are the following:

> 22(1) No proceedings shall be taken to recover any rent charge or any sum of money secured by any mortgage or otherwise charged upon or payable out of any land or rent charge but within ten years next after a present right to recover it accrued to some person capable of giving a discharge therefor or a release thereof, unless, prior to the expiry of that ten years, some part of the rent charge or sum of money or some interest thereon has been paid by a person bound or entitled to make a payment thereof, or his agent in that behalf, to a person entitled to receive it, or his agent, or some acknowledgment in writing of the right to the rent charge or sum of money signed by any person so bound or entitled, or his agent in that behalf, has been given to a person entitled to receive it, or his agent and in that case no action shall be brought but within ten years after that payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was made or given.
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> 22(2) In the case of a reversionary interest in land, no right to recover the sum of money charged thereon shall be deemed to accrue until the interest has fallen into possession.
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> 22(3) Notwithstanding the provisions of this Act, no payment hereafter made or acknowledgment hereafter given to a mortgagee or to a vendor of land, of or in respect of moneys payable under the mortgage or agreement of sale, has the effect of extending the time within which an action on the personal covenant for payment in the mortgage or agreement must be commenced by the mortgagee or vendor, except as against the person by whom the payment is made or the acknowledgment is given.

22(4) This section applies with respect to all mortgages and agreements of sale whether given or made before or after this section comes into force.

26 No person shall take proceedings to recover any land but within ten years next after the time at which the right to do so first accrued to some person through whom he claims (hereinafter called "predecessor") or if such right did not accrue to a predecessor, then within ten years next after the time at which such right first accrued to the person taking proceedings (hereinafter called "claimant").

41(1) Where a mortgagee has obtained the possession of any property, real or personal, comprised in his mortgage or is in receipt of the profits of any land therein comprised, the mortgagor or any person claiming through him shall not bring any action to redeem the mortgage but within ten years next after the time at which the mortgagee obtained such possession or first received any profits, unless, prior to the expiry of ten years, an acknowledgment in writing of title of the mortgagor or of his right to redeem is given to the mortgagor or some person claiming his estate or interest or to the agent of the mortgagor or person, signed by the mortgagee or the person claiming through him or the duly authorized agent or either of them; and in such case, no action shall be brought but within ten years next after the time at which such acknowledgment or the last of such acknowledgments, if more than one, was given.

41(2) Where there is more than one mortgage or more than one person claiming through the mortgagor or mortgagors, an acknowledgment, if given to any of the mortgagors or persons or his or their agent, is as effectual as if it had been given to all such mortgagors or persons.

41(3) Where there is more than one mortgagee or more than one person claiming the estate or interest of the mortgagee or mortgagees, an acknowledgment, signed by one or more of such mortgagees or persons or his or their duly authorized agent, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage money or property by, through or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any undivided or divided part of the money or property.

41(4) Where such of the mortgagees or persons aforesaid as have given the acknowledgment are entitled to a divided part of the property comprised in the mortgage or some estate or interest therein, and not to any ascertained part of the mortgage money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the property on payment with interest of the part of the mortgage money which bears the same proportion to the whole of the mortgage money as the value of the divided part of the property bears to the value of the whole of the property comprised in the mortgage.

42 No mortgagee or person claiming through a mortgagee shall take any proceedings for foreclosure or sale under any mortgage of real or personal property or to recover the property mortgaged but within ten years next after the right to take the proceedings first accrued to the mortgagee, or if the right did not accrue to the mortgagee, then within ten years after the right first accrued to a person claiming through the mortgagee.

54 At the determination of the period limited by this Act, to any person for taking proceedings to recover any land, rent charge, or money charged on land, the right and title of that person to the land, or rent charge, or the recovery of the money out of the land, is extinguished.

The effect and inter-action of the cited statutory provisions were considered by Mr. Justice C. Rhodes Smith in the Court of Queen's Bench in the 1966 case of *Re Puhacz (Pukacz) and Wyrzykowski.* [1] Some extracts from Mr. Justice Smith's reasons for judgment, with statutory quotations abridged, and updated in regard to intervening revisions, tell the story.

SMITH, J.:— From the affidavit of the applicant (filed) it appears that she is the widow of the deceased Wladyslaw Pukacz, and that her late husband died on October 2, 1963. Her affidavit also deposes that the said mortgage No. 643981 was made by the deceased to the respondent for the sum of $284 and was registered in the Winnipeg Land Titles Office on December 1, 1931, at 12:27 p.m.

. . .

The notice of motion in this application was never served on the respondent. The applicant's affidavit deposes that his whereabouts are unknown to her.

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[1] (1967) 61 D.L.R. (2d) 172.

The *Limitation of Actions Act* sets out the general limitation rule for proceedings to recover land, in s. 16, as follows:

16. *[now. s. 26, quoted above]*

The Act contains separate limitation provisions for proceedings to recover money secured by mortgage (s. 12(1)) and for proceedings for foreclosure or sale (s. 32). These provisions are as follows:

12(1) *[now s. 22(1), quoted above]*

32. *[now s. 42, quoted above]*

Finally we have s. 44, as follows:

44 *[now s. 54, quoted above]*

Section 44 *[now s. 54]*, just quoted is, as Williams, C.J.Q.B., said in *Re Zurbyk and Orloff*, 19 D.L.R. (2d) 770 at p. 774, 28 W.W.R. 584, based upon s. 34 of the English *Real Property Limitation Act*, 1833 (U.K. c. 27). That section enacted that:

> At the determination of the period limited by this Act to any person for making an entry or distress, or bringing any writ of quare impedit or other action or suit, the right and title of such person to the land, rent, or advowson, for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period, shall be extinguished.
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> . . .

The authorities are quite uniform as to the effect of s. 34 of the English Act of 1833, and if s. 44 of the Manitoba *[Limitation of Actions]* Act, was not affected by any other statutory provision, I should have no doubt what the effect of said s. 44 would be, *viz.:* to extinguish the right and title of a mortgagee to the mortgaged land and also to the recovery of the mortgage money out of the land, when the statutory period has expired. In other words the mortgaged land would become free from the mortgage.

But regard must be had to s. 115 *[now s. 110]* of the *Real Property Act*, which to my mind greatly alters the effect of said s. 44, in respect of mortgages made under that Act. Said s. 115 reads as follows:

115. *[now s. 110, quoted above]*

The meaning of this section is in my opinion quite clear and it should therefore be given effect according to its terms. I find no ambiguity in its terms, nor anything that requires interpretation.

A mortgagee has several remedies when default occurs. He may bring an action on the covenant to pay the moneys secured by the mortgage. He may enter into possession and take the rents and profits. He may take proceedings for the sale of the mortgaged land and finally he may apply for foreclosure. Section 44 *[now s. 54]* of the *Limitation of Actions Act* would apply so as to extinguish all these rights, but s. 115 *[now s. 110]* of the *Real Property Act* expressly states that for mortgages under that Act the limitation imposed by the *Limitation of Actions Act* has no application except as to the liability under covenants for the payment of moneys secured thereby. This can only mean that the other rights and remedies of a mortgagee of land under the *Real Property Act*, often called new system land, are not extinguished but are preserved. The mortgage continues to be a charge upon the land.

The provisions of s. 115 *[now s. 110]* of the *Real Property Act* first appeared in s. 6 of c. 52 of the Manitoba Statutes of 1908, *An Act to amend "The Real Property Act"*. . .

. . .

Throughout all the years since 1908, while minor changes in wording have occurred, the provisions of the section have remained unaltered in purpose or effect.

I have found nothing which would indicate what led to the first enactment in 1908. I suspect it may have been related to the principle of the *Real Property Act* that reliance may be placed on the register. Under a system of guaranteed titles, where mortgages are registered, the theory of the English rule, that where no payment is made or acknowledgment given for the requisite period of years a presumption of payment arises, may have been considered too severe against a mortgagee who relies on his registered mortgage.

Whatever the reason for its first enactment the section has been re-enacted time and again, as outlined above.

In the circumstances of this application, if the facts are as stated in the applicant's affidavit, it would appear that some modification of the section, if not its repeal, is desirable. In this connection I understand there is no corresponding provision in the statutes of any other Province where the Torrens System of land titles operates. Williams, C.J.Q.B., said, at p. 775, of *Re Zubyk*

and Orloff, that he had not found any similar provision in the legislation of New Zealand or the Australian states.

> I feel I have no alternative, as the law of Manitoba stands, but to reject the application.
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> *Application dismissed.*

If Section 110 of "*The Real Property Act*" were repealed, then the cited provisions of the limitations statute would apply fully to real property mortgages. The section applies as well to encumbrances. For brevity we include these in the term: mortgages. In addition to the mortgagor's liability under covenants for the payment of money secured, which is presently limited to ten years, the mortgagee's right to enforced sale and foreclosure would also be extinguished after 10 years. A decade of doing nothing should surely put an end to a mortgagee's right. To sell, or foreclose the equity of redemption on, land upon which another person has been paying taxes after 10 years, during which time the mortgagee has exacted neither a payment nor a promise is difficult to support as public policy. Whether one draws the line at 10 years, as "*The Limitation of Actions Act*" does, or at some other time, is not so important. The difficulty resides in public policy's declaring the right to sell or to foreclose as never-ending.

It may be argued, as Mr. Justice Smith noted in the *Puhacz* case, that Manitoba law accords the element of immortality to real property mortgages so that the mortgagee, in common with anyone else who may be interested, can rely on the state of the real property register which is maintained as a public record in our Land Titles offices. If such be the principle upon which Section 110 of "*The Real Property Act*" was founded, then it is curious that many other jurisdictions which have adopted the Torrens System of land registration have not also enacted a provision like Section 110.

Jeremy S. Williams, LL.M., B.C.L. in his work *Limitation of Actions in Canada* [2] observes:

> Thus mortgages of land under the Torrens system in Manitoba are unaffected by the expiry of the limitation period. . . . *[T]* he position in Manitoba relating to mortgages is the reverse of that applicable in the other common law provinces.

In considering this matter, we were accorded help by Mr. Donald M. Lamont, Registrar General of the land titles system of this province. He stated in part:

> I can see no cogent reason for retaining the section in The Real Property Act because it is very unlikely that a mortgagee

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[2] Butterworth & Co. (Canada) Ltd., Toronto, 1972, at 129.

could successfully sell a mortgage under which no payment had been made for more than ten years. There is an onus on a purchaser of a mortgage to obtain an acknowledgment from the mortgagor of the state of the mortgage account.

We think it wrong in principle that a mortgagee who has slept on his or his predecessor's rights for a decade should be legally able to have land and buildings offered for sale or to have title placed in his name through a Final Order of Foreclosure. Not infrequently, too, the positions of mortgagor and mortgagee after a lapse of years will not be occupied by the original parties to the mortgage transaction. This, in our opinion, is a reasonable case in which to invoke the theory that if no payment be proved or acknowledgment given during the stated limitation period, a presumption of payment arises by law. We therefore recommend that Section 110 of "*The Real Property Act*" be repealed.

The only social ramifications of our recommendations which, we perceive, might be said to be less than ideal are two in number.

1) It may be said that repealing the everlasting quality of real property mortgages panders to a spirit of larceny which will induce mortgagors to 'play possum' and to wait and see if they cannot go along for 10 years without paying. It might do so, but that is a risky game for a mortgagor whose right of redemption *before* the period expires would arise only upon the paying of all arrears, interest and legitimate costs of the mortgagee's taking proceedings to enforce his undoubted rights. Sale and foreclosure proceedings in our Land Titles offices in Manitoba are so readily available to the mortgagee whose mortgage is truly in default, that the repeal of Section 110 could hardly be seen as a pandering or even a mild encouragement to a spirit of larceny.

2) It is to be hoped that a mortgagee's willingness to 'go easy' on a poor mortgagor by simply letting the limitation period run out, would not be warped by the operation of Section 4(1) and (2) of "*The Gift Tax Act*" *(Manitoba)*. Section 4(1) of that tax statute provides that if a debt or other right becomes unenforceable, because of the operation of a limitation of actions statute, against any property of a person, or against a person, with whom the creditor is not dealing at arm's length then the value of the debt or right shall be deemed an immediate gift at the time it became unenforceable, unless it be acknowledged before or within 90 days after the sending of a notice of gift tax assessment. Section 4(2)(b) makes a like provision in relation to the extinguishment by an individual, or with his consent, of a debt or right enforceable by him. It would be anomalous that the acceptance of our recommendations to relieve mortgagors and their successors of eternal liability to sale and foreclosure would have the effect of ensuring that

every defaulting mortgagor in straitened circumstances would have to suffer sale of foreclosure so that an otherwise softhearted mortgagee could avoid paying a gift tax on generosity, either toward the original debtor or the widow of that debtor. The logic of tax equality is an expression of social, public policy in Canada. Occasionally, one observes, it can be carried to absurd and inhumane lengths prior to remedial legislative intervention. One can only hope that those charged with the administration of the taxing laws would be given statutory or discretionary powers in the kind of situation envisioned to avoid sacrificing common humanity on the altar of rigid logic. It may be that such generosity is so infrequent as to constitute only an illusory problem. It may be that a mortgagee who is willing to allow his right to lapse rather than destroy a poor mortgagor would nevertheless be considered to be dealing at arm's length.

The simple repeal of Section 110 would leave at large the question of how precisely to extinguish the moribund mortgage. Someone must determine that such a mortgage has indeed expired. In cases in which a plaintiff attempts to articulate his rights through court action beyond the limitation period, it is easy enough to determine and declare that such action is barred and the sought-after rights will never become enforceable. In the case of a mortgage, however, one notes that the mortgagee's apparent rights are simply extinguished by lapse of time, unless the mortgagee actively attempts sale and foreclosure under a barred mortgage. This latter instance is much akin to an out-of-time suit by a plaintiff. However, when no action is taken by the mortgagee, then it may well befall the mortgagor to have to get a declaration that the mortgage is extinguished. In both instances it is a matter, we think, for the courts. In his helpful communication Mr. Lamont noted:

> It should be possible to draft a provision which would make it clear that the determination of the right of a mortgagee to proceed with a mortgage sale or foreclosure which is challenged by the mortgagor on the ground that the mortgage is statute barred, is a matter for the Courts, not the District Registrar.
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> There is also the danger that individuals will expect the Registrar General to discharge mortgages on the basis that the mortgage is statute barred. There is a provision for this in the Law of Tasmania, but they are not confronted with the same restrictions on judicial appointments as we are in Canada. I would therefore suggest that if the section is repealed a provision should be made for an application to the Court for a discharge of mortgage.

We agree. If our recommended repeal of Section 110 be accepted by the Legislature, then "*The Real Property Act*" ought further to be amended to provide a means of having statute barred mortgages erased from titles. Perhaps Section 103, which comes within that part of the statute entitled MORTGAGES AND ENCUMBRANCES, could have added to it a new subsection (4) as follows:

> 103(4) Where a limitation imposed by The Limitation of Actions Act in regard to a mortgage or encumbrance made under this Act comes into effect, a mortgagor or a person whose land is charged with an encumbrance may apply to the court for a declaration and order extinguishing the mortgage or encumbrance; and the court, if satisfied that the applicant is entitled to the declaration and order, shall declare that the mortgage or encumbrance is statute barred and thereby extinguished and shall, by order, direct the District Registrar to note upon every certificate or title which was subject to such mortgage or encumbrance that the mortgage or encumbrance is statute barred and thereby extinguished and thereafter to treat such mortgage or encumbrance as if it had been wholly discharged by the person entitled by law to discharge it.

The foregoing amendment, or a provision to the same effect would, we think, serve the intended purpose.

It would be desirable to avoid the possibility of sale and foreclosure proceedings being commenced under a statute barred mortgage. When such proceedings are instituted, the District Registrar should be empowered to require production of evidence under oath as to the time at which the last payment on account of the sum secured was made and by whom it was made. In such circumstances, the District Registrar would not be determining the parties' rights. If the District Registrar declined to approve mortgage sale proceedings on the basis of the evidence, he would merely be declining to perform an administrative act and his declining to act and the validity of the mortgage in question could be adjudicated by the Court either on the mortgagee's application for *mandamus* or on the mortgagor's application under the proposed subsection (4) to Section 103 of "*The Real Property Act*".

If the recommendation for repeal of Section 110 be adopted by the Legislature, Real Property mortgages in Manitoba will be subject to "*The Limitation of Actions Act*". It would be advisable, for a time, to insert a footnote after Section 54 of the latter statute referring the reader to the proposed new provision of "*The Real Property Act*", which might be similarly cross-referenced. No such reference would be necessary in relation to "*The Registry Act*". It would be for the Attorney-General or Legislative Counsel at some future time to judge when and if such cross-references were of no continuing utility.

In summation, the Commission recommends that Section 110 of "*The Real Property Act*" be repealed, and that a new provision ought to be

enacted, as subsection (4) of Section 103 of the same Act, to enable the Court (i) to determine the matter of payment or acknowledgment, if any, in relation to time lapse, and (ii) to order the mortgage or encumbrance extinguished in a proper case.

The Commission acknowledges the interest of Peter S. Morse, Q.C., a Winnipeg lawyer who enquired of us some months ago whether the anomaly of Section 110 could not be cured, and followed up his enquiry with helpful correspondence.

This is a Report pursuant to section 5(2) of *"The Law Reform Commission Act"* dated this 11th day of April, 1973.

F. C. Muldoon

Francis C. Muldoon, Chairman

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