THE RICE ORDER — IS SIXTY YEARS OF PRACTICE WRONG?

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I. INTRODUCTION

As Alberta has found itself plunged into the most difficult financial times since the 20's and 30's and foreclosure actions have inundated the Courts, lawyers have turned ever increasingly to the law of these earlier decades. Perhaps, no case has left a greater imprint than that of *Trusts and Guarantee Company, Limited* v. *Rice* [1], which gave rise to the famous (or infamous) "Rice Order".

The Rice Order is an order in a foreclosure action whereby the mortgagee is permitted to purchase the property forming the mortgage security at its appraised value — usually the forced sale on terms value — and typically enables the mortgagee to proceed with a deficiency judgment against the mortgagor where such is permitted by section 43 of the Law of Property Act.[2] Where there is a dispute over the appraised value an occasional adjunct to the order is a stay for a period of time, often 30 days, to permit the mortgagor to bring in a better offer.

II. VALIDITY OF THE RICE ORDER

A question arises as to the validity of the Rice Order. Is 60 years of practice in Alberta right or wrong? There is reason, if one steps back in history, to doubt the propriety of the practice.

The touchstone case in the review of this matter is *The Security Trust Company, Limited* v. *Sayre*. [3] In 1916 the Legislature passed section 62(2) of the Land Titles Act which provided that, where personal judgment had been obtained[4]

> . . . no execution shall issue thereon until sale of the land mortgaged or encumbered or agreed to be sold has been had or foreclosure ordered and levy shall then be made only for the amount of the judgment or mortgage debt remaining unsatisfied with costs.

This provision gave rise to the dilemma referred to by Stuart J. in the *Sayre* case:[5]

> Following this legislation the problem arose as to how any deficiency could be arrived at after foreclosure. The solution adopted was, as I think well known, to permit the plaintiff to take the property at a valuation, to treat this as a sale at that amount, and thus have a definite amount 'remaining unsatisfied'.

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1. *Trusts and Guarantee Company, Limited* v. *Rice* [1924] 2 W.W.R. 691 (Alta. S.C.A.D.).
2. R.S.A. 1980, C. L-8, s. 43.
3. *The Security Trust Company, Limited* v. *Sayre* [1919] 2 W.W.R. 863 (Alta. Chambr.).
4. S.A. 1916, C. 3, s. 15.
5. *Supra* n. 3 at 865.

In 1919 the Legislature made two more legislative changes. The first was a new section 62(2) which read:[6]

> No execution to enforce a judgment upon the personal covenant contained in a mortgage, encumbrance or agreement of sale on or of land or on any security therefor shall issue or be proceeded with until sale of land, and levy shall then only be made for the amount of the said moneys remaining unpaid after the due application of the purchase moneys received at the said sale.

Note that the reference to a sale or foreclosure has disappeared. At the same time section 62(b) was added:[7]

> The effect of an order for foreclosure of a mortgage or encumbrance . . . made by any court or judge or by any registrar shall be to vest the title of the land affected thereby in the mortgagee or encumbrancer free from all right and equity of redemption on the part of the owner, mortgagor or encumbrancer or any person claiming through or under him subsequently to the mortgage or encumbrance, and shall from and after the date of the passing of this section operate as full satisfaction of the debt secured by such mortgage or encumbrance. . . .

These provisions have continued into our present sections 40(2) and 44(1) of the Law of Property Act.[8] Unfortunately, while the effect of section 62(b) was considered by the various judges in *Sayre*, the cumulative effect with section 62(2) seems to have been for the most part overlooked.

Section 62(b) was apparently enacted in response to the Supreme Court decision in *Mutual Life Assurance Company of Canada* v. *Douglas*[9] which held that a right of redemption continued after a final order of foreclosure as long as the mortgagee held the property and hence it was still possible to proceed on the covenant or realize on collateral security. As Harvey, C.J. commented in the *Sayre* case:[10]

> The Supreme Court of Canada reversed our decision on October 8, 1918. In March following at the next session of the Alberta Legislature, the 1919 amendment referred to was passed. It seems abundantly clear that it was intended to declare the law of this province to be henceforth what the provincial court had held it to be, and what the Supreme Court of Canada declared it was not.

In the *Sayre* case, since foreclosure negated the possibility of a deficiency judgment, Security Trust came up with the ingenious idea of purchasing the property itself when no bids were received and then sought a deficiency judgment. The presiding Master L.F. Clarry, K.C. gave the plaintiffs leave to issue execution for the deficiency. On appeal, Stuart, J. held the practice to be improper and allowed the appeal. The matter then went to the Appellate Division where the Master's judgment was upheld by Harvey, C.J. and Simmons, J. with McCarthy, J. dissenting. A further appeal to the Supreme Court of Canada split evenly. Davies, C.J., Idington and Brodeur J.J. refused the appeal, Anglin, Mignault and Duff J.J. would have allowed the appeal. Overall, the decisions favored the plaintiff six to five but it is interesting to note that the judges denying the appeal in the Supreme Court did so principally on the basis of non-interference with provincial practice whereas the justices who based their

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6. S.A. 1919, C. 37, s. 1.
7. *Id.* s. 4.
8. *Supra* n. 2 at s. 40(2) and s. 44(1).
9. *Mutual Life Assurance Company of Canada* v. *Douglas* (1918) 57 S.C.R. 243.
10. *The Security Trust Company, Limited* v. *Sayre* [1919] 3 W.W.R. 634 (Alta. S.C.A.D.).

decisions on the merits, would have allowed the appeal. What decision would the Court reach today?

It is submitted that, regardless of which of the various approaches to statutory interpretation is adopted, it seems clear that when the two provisions are read together it was the intent of the Legislature that the mortgagee not be permitted to obtain both the land and a judgment. It was intended that the mortgagee either sell and obtain judgment or foreclose and take the security. Currently, however, the practice is for the mortgagee to obtain the land at the valuation. This is not unlike the 1916-19 practice of taking the land and crediting the appraised value against the balance and obtaining judgment for the difference; the exact thing the Legislature moved to prevent.

It is submitted that section 43 of the Law of Property Act[11] has no effect on the above comments. A 1939 amendment[12] to the Judicature Act reinforced the Legislature's disproval of the mortgagor losing the land which the mortgagee agreed to accept as security and still having a possible judgment against him, by limiting mortgage remedies to foreclosure. A 1964 amendment[13] removed this protection for corporations which merely brought a return to the pre-1939 situation whereby a corporation as mortgagee could either sell and obtain a deficiency judgment or foreclose but it could not take the land at a valuation (under any guise, it is submitted) and still pursue a judgment remedy. Further, in obtaining title in its own name with the rights of the mortgagor extinguished the effect is exactly that set out in section 44(1) of the Law of Property Act in that it:[14]

> vest[s] the title of the land affected thereby in the mortgagee or encumbrancer free from all right and equity of remedemption on the part of the owner, mortgagor or encumbrancer or any person claiming through or under him subsequently to the mortgage or encumbrance,

and therefore the same consequences should flow and the order should operate

> as full satisfaction of the debt secured by the mortgage.

Finally on this point, it should be pointed out that the mortgagee has no *right* to purchase. The words of Stuart, J. in *Gunn* v. *Johnson and McDougal & Forester, Ltd.* are illustrative in this matter:[15]

> It is only the mortgagor who may be over-ruled in the face of his opposition. The question is how far and upon what conditions he can be made to submit to a sale of the property by the Court to the Plaintiff. On the other hand it cannot be said, I think, that the Plaintiff has any *right* to buy at all. The Court in its discretion and under proper conditions may permit him to buy. The question is should the Court permit him to buy in the face of the mortgagor's opposition. The mortgagor or owner is really presented with an alternative. He may consent to a sale to the Plaintiff at what the Plaintiff is willing to give, in which case the contractual nature of the matter at once appears, or take the alternative consequences, namely, either a sale by auction or tender duly advertised . . . or to submit to foreclosure.

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11. *Supra* n. 2, s. 43.
12. S.A. 1939, C. 85, s. 2.
13. S.A. 1964, C. 40, s. 4.
14. *Supra* n. 2, s. 44(1).
15. *Gunn* v. *Johnson and McDougall & Forester, Ltd.* [1919] 1 W.W.R. 698 at 702-3 (Alta. S.C.A.D.).

This leads into some additional issues raised by the Supreme Court of Canada Justices considering the *Sayre* case.

One is that an action on the covenant is triggered by a "sale" and a sale to the mortgagee is not the type of sale contemplated by the legislation. This was the position of Anglin, J. when he stated:[16]

> The appeal, in my opinion, should also succeed on the ground that there has not been a sale of the land within the meaning of sub-sec. 2 of sec. 62 of the Land Titles Act . . . Sale in English law generally imports an exchange of some article of property for money. *Coats* v. *Inland Revenue Commissioners*, (1897) 1 Q.B. 778, at p. 783; *Benjamin on Sale*, 5th ed., at pp 2, 3. Here the transaction is not of that character. It is an exchange or barter of the mortgaged property for the release or extinguishment by the mortgagee of a portion of the debt owed him by the mortgagor. That, in my opinion, is not a 'sale' within the meaning of that word as used in sub-sec. 2 of sec. 62. It is there used in its general meaning in English law. Moreover, I am satisfied that the sale contemplated by the statute is a sale to a stranger not the mortgagee.

Further, there is the issue that the granting or fixing of a deficiency is contrary to the laws of equity. The Court's position as a court of equity is well established by the Judicature Act.[17] Judges have the powers, right, incidents, privileges and immunities of judges of the Superior Courts of Law or Equity.[18] The Court has the jurisdiction of the High Court of Chancery.[19] It has the jurisdiction and powers possessed and exercised by the Court of Chancery in respect of all matters relating to mortgages and to the administration of justice where there exists no adequate remedy at law.[20] The provisions of sections 10,16, and 17(1) of the Act seem particularly *a propos*. In Anglin, J's reasons in the *Sayre* case he states:[21]

> But no case is reported, so far as I have been able to discover, where a mortgagee has been allowed to acquire an absolute title to the land as purchaser and thereafter maintain an action on the personal covenant of his mortgagor for the amount by which his mortgage claim exceeded the price at which he purchased.

and again:[22]

> While the mortgagor's covenant for payment of the mortgage debt may be absolute at law, in equity the right to enforce it is subject to the condition that the mortgagee shall not be disabled through any act of his own . . . not authorized by the mortgagor from restoring the estate. *Palmer* v. *Hendrie* (1860), 27 Beav. 349, at p. 351, 54 E.R. 397: *Kinnaird* v. *Trollope* (1888), 39 Ch.D. 636, at pp. 641-2. A mortgagee asserting absolute ownership of the mortgaged property cannot sue on the mortgagor's covenant.

and[23]

> I find nothing in the Alberta statutory law which warrants ascribing to the Legislature the intention of making such a substantial further inroad upon the system of mortgage law which has grown up under the fostering care of the Chancery Courts, as the order of the Master in Chambers implies. Moreover, that order seems to involve an evasion of sub-sec. 2 of sec. 62 and probably also of sec. 62(b) of the Land Titles Act.

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16. *The Security Trust Company, Limited* v. *Sayre* (1921) 56 D.L.R. 463 (S.C.C.).
17. R.S.A. 1980, C. J-1.
18. *Id.* s. 4.
19. *Id.* s. 5(1)(a).
20. *Id.* s. 5(3)(b) and s. 5(3)(i).
21. *Supra* n. 16 at 469.
22. *Supra* n. 16 at 470.
23. *Supra* n. 16 at 470-1.

Mignault, J. adds:[24]

> . . . for it is an undoubted rule of equity that the mortgagee cannot have both the mortgaged property and the mortgage debt. While no doubt the mortgagee, in a proper case and with sufficient safeguards, may be allowed to bid at a Court sale of the mortgaged property . . . I can find no authority for the proposition that after buying in the property himself, he can, while retaining it, sue for the balance of the mortgage debt. There is authority to the contrary, in the judgment of Hagerty, C.J. in *Parkinson* v. *Higgins*, 37 U.C.Q.B. 308, at p. 318, cited by my brother Anglin, where the chief Justice says: "On the whole, my conclusion, is that the mortgagee cannot sue for his mortgage money, while in the same breath he asserts that the estate is wholly his own, and that he holds it by title paramount, and wholly independent of any title derived from the mortgagor.
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> The new legislation of Alberta does not, reasonably construed, contradict this statement of law. On the contrary, sec. 62(b) shows that the mortgagee cannot sue on the covenant when he has obtained an order for foreclosure against the mortgagor, and this provision would be easily evaded if the mortgagee who has bought the property even with the leave of the Court could retain it and sue for the balance of the mortgage debt. In the absence of any authority I would not now say that he can do so.

The comments of Mignault, J. take on added significance when one is cognizant of the fact that not only does the mortgagee purchaser obtain the money already paid and the land, but also is able to terminate the mortgagor's equity of redemption which would otherwise survive the foreclosure until disposition.[25]

The *Rice* case[26] was decided by Stuart, J., the judge overruled by the Appellate Division in the *Sayre* case.[27] It would appear that the course taken in his decision was an attempt to introduce some principles of equity into the *Sayre* result by insuring the equity of redemption ran somewhat longer.

Mention should be made of the decision in *Dent* v. *Hutton*. [28] While this case involved an agreement for sale, the argument was raised that the vendor, by purchasing at sale, had effectively determined the agreement and could not pursue a deficiency. The vendor had obtained a deficiency judgment in Saskatchewan and was attempting to sue in Ontario on the personal judgment or alternatively on the covenant to pay. The *Sayre* case was raised by the defendant and it is interesting to note the comment of Ferguson, J.A. in the Court of Appeal:[29]

> In the reported opinions of the learned judges of the Supreme Court of Canada, there are several statements that indicate that, had the defendant appealed, it would have been held that a judgment allowing the plaintiff to purchase at less than his claim was not in accordance with the laws of Saskatchewan.

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24. *Supra* n. 16 at 475.
25. *Morguard Mortgage Investments Limited* v. *Faro Development Corporation Ltd.* [1975] 1 W.W.R. 737 (Alta. S.C.A.D.).
26. *Supra* n. 1.
27. *Supra* n. 10.
28. *Dent* v. *Hutton* (1923) S.C.R. 716.
29. *Dent* v. *Hutton* (1922) 53 O.L.R. 105 at 111 (C.A.).

Unfortunately, the appeal was not taken and the Ontario Court took the position that it was not the forum to deal with it. On appeal the Supreme Court also seemed inclined to leave the issue in doubt. Idington, J. states:[30]

> In my personal view as to the desirability of sanctioning such a system, without the most stringent provisions relative to upset or reserved bids, and the appearance at all of a party concerned appearing on the scene as an actor therein, is quite repugnant to what I hold as desirable. Perhaps we could not have a better illustration of the undesirability of having that done, than is to be got by looking at the results presented herein.
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> The respondent gets thereby the equity in a property he had, a year or so before, evidently deemed worth at least six or seven times what he bid for it.
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> It is, however, entirely another question that is raised as to the legality thereof. I cannot say it is entirely illegal.

and Duff, J. leaves matters in doubt:[31]

> I have come to the conclusion that this appeal should be dismissed, but before explaining the grounds upon which I think the respondent Hutton is entitled, with a modification to be stated presently, to maintain the judgment in his favour in the courts below, it is important to make it quite clear that this conclusion does not involve any decision upon either of two points, one of great general importance and the other of some difficulty, which were rather elaborately argued. The first of these is the question whether an unpaid vendor who has, in proceedings to enforce his lien for the purchase money, obtained leave to bid and, pursuant to that leave, purchased the property, can after the property has passed out of his possession and power proceed to enforce the judgment for the unpaid residue. Whether the vendor in such circumstances is in the same position as a mortgagee is a question of general importance, and before deciding it adversely to the view advanced on behalf of the appellant, the weighty considerations which were urged and might be urged in support of that view would require the most careful examination . . . .

Academics writing on the subject also appear to be uncertain as to the proper resolution of the issue. DiCastri states:[32]

> However, the point is not free from doubt and the prudent vendor will avoid a course of action which will result in his being tainted with the stigma attaching to the vendor who re-asserts full ownership of the land and yet seeks to recover purchase moneys.

The concerns raised by Idington, J. in the *Dent* case were echoed with much less reservation by Archibald, J. in *Re Buckley* :[33]

> It is clear, however, that if this claim for deficiency is allowed the result will be that the vendor, having already received from the purchaser a sum in excess of $13,000.00 on account of the agreed purchase-price of $35,000.00 and having recovered the lands from the purchaser at the Sheriff's sale for the price of $5,000.00 and the costs of the foreclosure and sale proceedings, will have a claim for the balance of the purchase-price, namely $16,155.88. In short, as a result of the foreclosure and sale proceedings, the vendor will have his lands and the purchase-price as well. Such a result is obviously unjust and inequitable.

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30. *Supra* n. 28 at 719-20.
31. *Id.* at 722-23.
32. V. DiCastri, *Law of Vendor and Purchaser* (2nd ed. 1976) 696.
33. *Re Buckley* [1941] 2 D.L.R. 44 at 53 (N.S.S.C.).

Another aspect of the sale to the mortgagee or vendor problem was clearly pointed out by Harvey, C.J.A. in *Crown Life Insurance Co.* v. *Clark* :[34]

> . . . There is also another reason besides that mentioned in the cases referred to why in most cases leave to bid should not be given to a mortgagee or other person selling land to realize the lien and that the competion (sic) between him and a stranger would not be a fair one. The usual terms are cash within a comparatively short time. The stranger must find the money while the mortgagee or other lien holder has his already in the land and either is not required to pay according to the general conditions, as in the present case, or if compelled to pay, would have it paid back forthwith in satisfaction of his lien. The affidavit of value in the present case shows clearly this difference. It is stated that the land is worth $2,500.00, but, that at a forced cash sale, it would not bring more than $1,800.00. Now it was not a cash sale to the plaintiff. He had no money to raise but he takes the land at a price which will enable him to realize a profit of $700.00 by selling it at its real value and giving easy terms of payment.

It is interesting to speculate with figures. In his thorough analysis in *Lennie* v. *L.D.M. Holdings Ltd.*, Funduk, M. puts forth this scenario:[35]

> The vendor sells the land to the purchaser for $600,000.00. The purchaser pays $100,000.00 nothing further. The vendor takes the usual proceedings. The land is worth $400,000.00. There are no tenders or no satisfactory tenders by strangers. The vendor is prepared to purchase the land for $400,000.00. If he can do so only by abandoning any claim for a deficiency the court is altering the purchase price the purchaser had agreed to pay to $500,000.00. Logically, why should that be done? If the purchaser performs his part of the bargain the vendor would receive $600,000.00. If the purchaser does not perform his part of the bargain why should the vendor be penalized by being required to take a lesser amount, in cash and in value, than he was otherwise entitled to?

But let us consider the alternative. The vendor would get back his land, would have $100,000.00 and would have a judgment for $100,000.00. The abortive sale would have gained him $200,000.00. And as far as altering the contract is concerned, the obligee has said, and the obligor has agreed, "I will pay you $X. If I do not you may keep such amount as I have already paid you and you may take the land to keep or sell as you choose."

While Funduk, M. goes on to observe that "[t]he vendor or mortgagee does not compete with others who might tender or do tender",[36] this is not really so. He knows the tenders received by those who must produce cash or find financing to purchase. He can then submit a higher offer, secure in the advantages referred to by Harvey C.J.A. and obtain the property at a depressed value (at best forced sale for terms) and obtain a deficiency judgment. The tenderer does not know the other bids, must find the money and of course will not have a judgment to sweeten the pot.

III. CONCLUSION

These matters have been raised in a number of recent cases which have been settled before reaching the Court of Appeal. However, the matter finally has reached that level in the case of *Morguard Trust Company* v. *K. Group Holdings Inc. and Kanke.*[37] The case was argued October 5,

34. *Crown Life Insurance Co.* v. *Clark* [1915] 9 W.W.R. 333 at 338-39 (Alta. S.C.A.D.).

35. *Lennie* v. *L.D.M. Holdings Ltd.* (1983) 40 A.R. 87 at 121 (Q.B.).

36. *Id.* at 127.

37. *Morguard Trust Company* v. *K. Group Holdings Inc. and Kanke*, undecided, October 5, 1983, J.D. of Calgary, C.A. 15557 (Alta. C.A.).

1983, but a decision as of the date of this article is still pending. Will the Court of Appeal be persuaded by the Anglin-Mignault approach? It is a difficult question to answer as the argument has met very diverse reactions from the judiciary in the lower courts, although they have all properly held themselves bound by the *Rice* case. It is asking a lot to expect a court to over-rule 60 years of practice but it appears that the matter has not seriously been raised until recent times and as the courts have tended to become more responsive to the context of society one must concede the chance of change to be stronger. The length of time in considering the matter makes it obvious that the court is at least willing to carefully consider this important matter on its merits rather than to take the easy path of blandly adopting its early decision. Hopefully a definitive statement will emerge for it may be the last word. While a reversal of the existing practice might create an opportunity for future appeal on the basis of conflicting decisions of the same court, a result affirming the practice could well preclude an appeal on the basis that it is a unique Alberta problem arising from our particular legislation, the affirmative position 60 years ago. The only slim thread then would be that the Supreme Court might be willing to determine the issue it left undecided so many years ago, an unlikely possibility.

And so the legal fraternity awaits with great interest the Court's decision. For the first time in 60 years there is a real possibility that lenders may find themselves in the position, it is submitted, the Legislature intended in long-ago but similar times — sell the security you agreed to take and pocket the proceeds or keep the money you've been paid, keep the security you took and go your way in peace. The writer's personal opinion? To quote Hamlet, "Tis a consummation devoutly to be wished".