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POWERS OF SALE IN CHATTEL MORTGAGORS

By ELVIN H. HEWINS*

It is not unusual to find included in a chattel mortgage a provision giving the mortgagor a right to sell the mortgaged property under certain conditions or with certain duties enjoined upon him with respect to proceeds of sales. Such provisions are more generally used in mortgages covering chattels acquired by the mortgagor for the purpose of resale in the usual course of his business or chattels which he has prepared for sale.

The advantage to the mortgagor from the use of this device is apparent: He is enabled to continue his business or occupation in the usual way and yet get credit on the security of assets, the sale of which constitutes his business activity and furnishes his income. As to the mortgagee, he will usually grant only short term credit on this security, and such credit must be profitable considering the large number of concerns offering it which have sprung up in the past few years. Leisurely sales in the regular course of business bring better prices than forced ones and so the financial position of the mortgagor may be strengthened and going concern and goodwill values conserved, and the mortgage debt discharged more easily, all of which will benefit general creditors.¹

But since such a security device is usually necessary only in cases of bare solvency, it must be closely scrutinized in its operation; for if the mortgagor, hiding under this umbrella held by the mortgagee, appropriates proceeds of sales to his own use which should go to general creditors a fraud is worked on the latter.² Similarly, purchasers of the mortgaged chattels

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¹ "The law looks with favor on such an arrangement * * * if fairly made with the purpose of honestly carrying it out." *Vermillion v. National Bank of Greencastle*, 59 Ind. App. 35, 105 N. E. 530 (1915).

² Particularly may the mortgagee be less diligent in holding the mortgagor to his duties to apply proceeds properly where the credit is extended under a revolving fund arrangement in connection with which the mortgagee has other

occasionally run afoul of these provisions and at times have suffered where the conditions of the power have not been complied with by the mortgagor or where there has been a general default under the mortgage.

Problems involving such powers of sale have been before the courts of this state a number of times. Some of them were determined under certain of the statutes relating to fraudulent conveyances and others were solved by applying common law and equitable principles.³ In 1935 the legislature dealt explicitly with chattel mortgages in the Chattel Mortgage Act,⁴ and in Section 6 attempted to cope specifically with the power of sale in the mortgagor.

This Act in its general scope is sufficiently interesting to merit a paragraph of digression before considering the manner in which Section 6 deals with the matter under discussion. The statute is obviously designed especially to serve the purposes of the various federal agencies lending to farmers for agricultural purposes. In Section 1 it is deemed desirable to name these several agencies although they, like other persons and concerns having money to lend, would be among those "allowed by law to loan money" who are also given the benefit of the Act. And after going into detail in ten subsections to specify numerous agricultural products and personal property of an agricultural nature which are eligible for mortgaging under the Act, a single subsection is added covering other chattels and also goods which may be acquired "for the purpose of resale in the regular course of the business of the mortgagor." A federal judge construing a similar statute in Kentucky was so much impressed with its evident purpose to serve these federal agricultural lending agencies that he concluded it did not apply to non-agricultural chattel mortgages.⁵ At any rate it can be said, if the intention of the legislature is taken as that of the farmers of the Act, that

security than where the short term credit scheme is used. In any case fraud will be very difficult to detect and an insolvency proceeding may be necessary to determine it and protect against it.

³ Notes 23, 25, 8, 9, 10, *infra*.

⁴ Burns Ind. Stats. Ann. (1933) § 51-501 et seq. (Supp.).

⁵ Miller, J. in *In re Ciabattari* (W. Dist. Ky. 1939) 29 F. Supp. 573.

the legislature was thinking mostly of farmers rather than merchants. These facts are pointed out merely as matters of interest, not that they may help in construing the Act, and not in a spirit of criticism. Nor is it thought desirable that the view of the federal judge be adopted. Except for language difficulties, the Act will be useful in its general application. In other sections it covers such things as additional loans under the mortgage security and replacements and increase of mortgaged property, matters with which the Common Law at various times had difficulty because of the possibilities of fraud and the transitory nature or non-existence of the property and impossibility of accurate description. Recordation is provided for and fees of the Recorder are reduced in accordance with the purpose to make recordings simple and inexpensive.

Several sections deal generally with the extent of the lien of the mortgage; but its extent as affected by a power of sale in the mortgagor is dealt with in Section 6; and under the familiar rule of statutory construction this specific provision governs this subject to the exclusion of the general ones. Section 6 reads as follows:

“Any mortgage executed under and pursuant to this act may validly provide that the mortgagor shall, as the agent or trustee for the mortgagee or lender or owner or holder of the secured debt, have the right to sell or exchange any of the mortgaged chattels under the conditions stated in said mortgage, if the proceeds of such sale or exchange are applied upon the mortgage debt or subjected to the lien of said mortgage, or are used solely for the purpose of paying the expenses of cultivating, harvesting, preparing for market, processing, marketing, or otherwise preserving or rendering merchantable or salable the remaining property covered by said mortgage, and such provision shall not in any way render invalid the lien of said mortgage or its preference or priority as herein stated. Said mortgage may validly provide that purchasers need not be required to see as to the proper application of the proceeds of the sale. Any such sales or exchange may be made in accordance with the provisions in the mortgage without notice to or consent of any person claiming any right in or to the mortgaged property, and such property received in exchange shall be as validly covered by the mortgage as the original property.”⁶

⁶ Burns Ind. Stats. Ann. (1933) § 51-506 (Supp.).

This section was construed for the first time in the case of *Helms v. American Security Company*.⁷ In this case the court was confronted with a controversy between a purchaser of mortgaged chattels and a mortgagee, a situation found less frequently in the cases than those involving creditors and mortgagees. The parties to the mortgage had sought to avail themselves fully of the benefits of Section 6. A power was given the mortgagor to sell for cash in the regular course of business providing the proceeds of such sales of mortgaged property were held by the mortgagor in trust for the mortgagee and applied on the mortgage debt. And if the mortgagor should sell for other than cash the mortgagee could elect to accept these proceeds in lieu of the lien; but until such proceeds were actually received by the mortgagor, and even then only after he had elected to accept them in lieu of the lien apparently, the lien was intended to continue in full force and effect. A hard case was presented: A woman purchased one of the several automobiles comprising the mortgaged property from the mortgagor-dealer who maintained a sales room where the cars were exhibited for sale. She had no actual knowledge of the recorded mortgage containing the provision above-described. Another automobile was given in exchange and the additional purchase price was represented by a conditional sale contract which was immediately assigned by the dealer to a finance company for the full amount. Upon default of the mortgage, the mortgagee sought to replevy this automobile, joining the purchaser and the finance company as parties defendant. The court came to the aid of the innocent feminine purchaser and the finance company and held that the mortgagee had no right of replevin against them.

As is indicated in the *Helms case*, it was the law prior to the Act of 1935 that the lien of a mortgage on goods or merchandise was invalid as against an innocent purchaser where the mortgagor was given a power of sale. Supporting this proposition, the court cites two cases, the first of which, *Indiana etc. Securities Co. v. Whisman*,⁸ seems indistinguish-

⁷ (Ind. 1939) 22 N. E. (2d) 822.

⁸ 85 Ind. App. 109, 138 N. E. 512 (1926).

able from the case before the court, and protects such a purchaser.⁹ In one of the best expositions of the effect of such a power of sale to be found in Indiana cases this proposition is assumed.¹⁰ And this seems to be the generally accepted view elsewhere.¹¹

Considering the problem on its merits, it would seem to distort this whole scheme of credit on the security of chattels to be sold by the mortgagor to permit the purchaser to suffer by the default of his seller. The purchaser furnishes the means which makes possible the operation of this credit device. To cause him to suffer would be to kill the goose that lays the golden eggs because an egg is lost. As between the purchaser and the parties to the mortgage the device is profitable and beneficial mostly to the latter.¹² It is a cardinal principle in the law that one who stands most to profit should bear the risk and burden of loss. Another principle frequently invoked for determining where fault and consequent liability should lie is that one who can best avoid the loss should bear

⁹ Other cases have protected the purchaser by raising an estoppel against the mortgagee based on his acts other than including a power of sale in his mortgage. *Hillgoss v. Thorpe*, 80 Ind. App. 614, 141 N. E. 797 (1923); *Benedict v. Farlow*, 1 Ind. App. 160, 27 N. E. 307 (1891); *Carter v. Fately*, 67 Ind. 427 (1879); *Duncan v. Kimbrel*, 93 Ind. App. 454, 176 N. E. 25 (1931). Similar in principle are the cases which even before the Uniform Conditional Sales Act, see note 17 *infra*, protected the purchaser from the conditional vendee as against the conditional vendor where the sale to the conditional vendee was for the purpose of resale in the regular course of the latter's business or where the property sold on condition was of a kind sold by the vendee in his business. *Winchester Wagon Works & Mfg. Co. v. Carman*, 109 Ind. 31, 9 N. E. 707 (1887); *La Porte Discount Corp. v. Bessinger*, 91 Ind. App. 635, 171 N. E. 323 (1930); *American Aggregates Corp. v. Wentz*, 100 Ind. App. 59, 190 N. E. 552 (1934).

¹⁰ *Irwins Bank v. Fletcher Sav. & Trust Co.*, 195 Ind. 669, 145 N. E. 869 at 878.

¹¹ 10 *Am. Jur.*, *Chattel Mortgages*, § 193; 14 *C. J. S.*, *Chattel Mortgages*, § 262; Note (1935) 97 *A. L. R.* 646, 650, 660, 665 (*Chattel Mortgagee's consent to sale of mortgaged property as waiver of lien*).

¹² The benefit which the purchaser receives from the exchange of his money or property for the chattel can hardly be attributed to the presence of this credit arrangement; in these days he can usually purchase the same or a similar chattel, with little or no inconvenience, from another seller who does not find it necessary to have the use of such a credit device in order to offer for sale his goods or chattels.

its risk and burden. The mortgagee, having actual knowledge of the facts, clearly is in a better position to avoid the loss resulting from the mortgagor's defalcation than is the innocent purchaser. Still another principle, seldom articulated, which the judicial process obviously utilizes for dumping liability and loss at some point, irrespective of fault, is that the entity concerned which can best distribute the loss should bear it. The mortgagee who has dealt generally with the mortgagor's credit and usually with several chattels and other property attracts the loss under this principle rather than the purchaser. The latter would usually be unable to recoup any portion of his loss if he were denied rights in the chattel. Commercial convenience and custom is still another principle of commanding importance; and the court in the *Helms* case applies it, pointing out the practical difficulties in requiring casual purchasers of articles in retail establishments to make a search of the county records before buying, or in seeing that the proceeds of purchases are properly applied.

However, since the legislature has entered the field, these observations concerning the "merits" of the problem may not serve as bases for deciding the matter but are useful only insofar as they may aid in resolving the probable intention of the legislature in a case of ambiguity. If we are to avoid judicial anarchy a court may not substitute its ideas of sound legal principle in place of that clearly expressed by the legislature unless it first find that the principle adopted by the legislature runs afoul of the basic law as laid down in the Constitution.

If the legislature by Section 6 of the Act of 1935 intended to protect the mortgagee as against an innocent purchaser of chattels from a defalcating mortgagor with a power of sale, there is probably no basis for a constitutional objection. It may be more than mere words, however, to point out that such a purpose is contrary to the usual ideas behind the recording acts of permitting a person to hold an interest in *property* by notice through public records—here it appears to be essentially an attempt to attach a condition subsequent to a *power of agency* through public notice, and this in a

situation where even a normal agency relationship would be little suspected.¹³ This does seem somewhat capricious and arbitrary, but probably does not exceed legislative bounds.

Thus the remaining approach to the problem is one of statutory construction. The court in the *Helms case* states that various sections of the Act "purport" to protect a mortgagee against the purchaser, but in conclusion finds that it cannot be said that this "plainly appears" to be the intention of the legislature.¹⁴

It seems possible that the legislature by Section 6 of the Act really intended the contrary, although the Section is certainly not free from ambiguity. The only mention of a purchaser in Section 6 is in the provision "Said mortgage may validly provide that purchasers need not be required to see as to the proper application of the proceeds of the sale." Had the "may" in this sentence been "shall" the problem would have been solved and the Section would have been made consistent with previous statutory law of the state such as Section 2 of the Uniform Fiduciary's Act¹⁵ which protects persons who in good faith pay money to and receive property from a fiduciary,¹⁶ and the analogous Section 8 of the Uniform

¹³ In fact it is perhaps only the legislative verbiage which would allow the concept agency to be applied to this relationship. The mortgagor's own interest is at times inconsistent with his being an agent for another. The observations of the court in the *Helms case* are pertinent: "And if a principal may renounce the authority of his agent to receive money after payment to him there is, in effect, no agency at all."

¹⁴ The court feels a responsibility to utilize the authority of a prior case for "engrafting upon the statute an exception to remove its ambiguities and avoid its absurd and unjust consequences." Literally the words are a confession of judicial anarchy. If the result is an "exception" and will "avoid * * * consequences" the court is refusing to apply the statute as the legislature intended. The court has power to do this because it stated that it did do it and no one has said or could say it nay. But had it actually done this it would be an exercise of anarchial power. Doubtless the court did not mean this literally; it was simply making sense out of ambiguity and not refusing to apply the statute.

¹⁵ Burns Ind. Stats. Ann. (1933) § 31-102.

¹⁶ The mortgagor must be made an agent or a trustee of the mortgagee under a valid power of sale as provided in the Chattel Mortgage Act and so is a fiduciary within the meaning of the Fiduciary's Act.

Conditional Sales Act¹⁷ which protects purchasers from conditional vendees. Still another statute adopting a principle of special protection to purchasers is one among those on frauds and perjuries which recognizes that while a trust for the benefit of a trustor may be void as to creditors the title of a purchaser without notice will not be affected.¹⁸ It seems a possible construction that the legislature intended by this special provision as to purchasers to make the other provisions of the section inapplicable to them and that the "may" could be construed as "shall" so as to bring it into conformity with other statutory law and the weight of judicial authority and legal principle.

One thing is clear: One purpose of the other provisions of Section 6 is to affect someone other than a purchaser in at least one situation. This may be seen by supposing a case where a mortgage provides, as the Section says it "may," that purchasers need not be required to see as to the proper application of the proceeds of the sale, and operating under it the mortgagor fails to account for the proceeds. (1) Certainly a purchaser would not suffer here, as there could be no purpose in relieving him of a possible duty to see to the application of the proceeds unless he is to be secure in his acquisition despite improper use of the proceeds. But yet the provision for sale is invalid because the statutory condition of validity of such a provision; viz., application of proceeds of the sale, has not been complied with.¹⁹ (2) As between the mortgagor and mortgagee there would be no purpose in declaring the provision invalid: Since the mortgagee would lose his right to subject the chattel to his claim because it had passed into the hands of the protected purchaser, he would have only a personal right against the mortgagor for breach of contract or trust; yet he would have this right as fully as could be given him merely by the breach of the condition of sale. Declaring the provision invalid would

¹⁷ Burns Ind. Stats. Ann. (1933) § 58-808 (Supp.).

¹⁸ Burns Ind. Stats. Ann. (1933) § 33-411. The "notice" is in fact knowledge since it is not contemplated that such trusts will be recorded.

¹⁹ That the condition is one restricting the validity of the provision rather than one which may be "validly" included in the provision, see note 28 *infra*.

add nothing to his right and would be idle as far as he is concerned. Also it would be a contradiction in terms, for a breach of contract does not make the contract "invalid"; indeed an action for the breach presupposes a valid contract.²⁰ The conclusion must be that in this one supposed situation at least the provision will be invalid for some reason and to some effect that does not concern a purchaser nor the parties to the mortgage. (3) The only other persons who may be involved are creditors; the provision is made invalid as against them, for some reason that affects only them. It may be that this provision as to invalidity because of misapplication of proceeds is intended only for the benefit of creditors in its general purpose and effect, as well as it clearly is in the particular situation just mentioned.

Further observation and analysis indicates that such a conclusion may be sound. In determining the intent of the legislature, that law-making body is frequently considered to have a knowledge of the previous law on a subject as announced by another law-making body, the court, in decided cases.

At the time the legislature gave birth to ambiguous Section 6, concern over application of proceeds of sales had been expressed in cases involving general creditors but not in those involving purchasers from a mortgagor with a power of sale.²¹ Thus, where the expression was used that proceeds "were regarded as applied" it was used for the purpose of protecting creditors. If property was sold by a mortgagor and the proceeds were not applied in the reduction of the mortgage debt or in strengthening the financial position of

²⁰ 5 Williston, Contracts (Rev. ed.) §§ 1301, 1302, 1303; Corbin, Discharge of Contracts, (1913) Yale L. Jour. 513, Selected Readings on the Law of Contracts (1931) p. 1165 at p. 1167.

²¹ See e. g. the two cases cited in the Helms case in connection with this idea. The first, *Indiana Investment & Securities Co. v. Whisman*, 85 Ind. App. 109, 138 N. E. 512 (1926) involves a purchaser-mortgagee controversy and does not use this language; the second, *Vermillion v. Natl. Bank of Greencastle*, 59 Ind. App. 35, 105 N. E. 530 (1915), involves creditor-mortgagee controversies and does employ the expression in determining rights. Further as to purchasers see *Hilligoss v. Thorpe*, 80 Ind. App. 614, 141 N. E. 797 (1923) and cases cited. Further as to creditors see *General Highways System, Inc. v. Thompson*, 88 Ind. App. 179, 155 N. E. 262, 156 N. E. 407 (1927) and cases cited.

the mortgagor, general creditors were injured because their equity in the assets of the mortgagor was reduced; and the mortgagee, who made this injury possible by removing this property from the reach of process, was penalized by having his debt reduced as against the creditors in the amount of the misapplied proceeds. Unless the words of the Section too clearly literally include purchasers it seems they might be thrown with their former companions, creditors, and forbade introduction to new associates.

Looking further to the case-law on this subject prior to the entrance of the legislature, it is observed that in early decisions in this state, powers of sale in chattel mortgagors were declared invalid as a fraud on creditors irrespective of their actual effect.²² The view was taken that such a device constituted a trust in favor of the trustor and so was invalid under the statute condemning such set-ups.²³ And this view was adopted in a well-reasoned opinion of the Supreme Court of the United States in determining the effect of such a power under Indiana law.²⁴ But these cases were in effect overruled later and the principle was announced as required by the statute to the effect that fraud was always a question of "fact,"²⁵ that the actual operative effect of such a provision was to be looked to in order to determine its validity.²⁶ In determining this question of "fact" the court in these later cases observed whether or not the proceeds of sales were actually applied in reduction of the preferred mortgage debt or to enhance the financial position of the mortgagor or in any other way which did not reduce the equity of general creditors in the assets of the mortgagor. If so, it was resolved that the scheme was not fraudulent and it was upheld.

²² *Mobley v. Letts*, 61 Ind. 11 (1878); *Davenport v. Foulke*, 68 Ind. 382 (1879). These cases suggest that an agreement in the mortgage to account for proceeds would have avoided this result however.

²³ Burns Ind. Stats. Ann. (1933) § 33-409.

²⁴ *Robinson v. Elliott*, 22 Wall. 513, 22 L. Ed. 758 (1874). Sufficient facts as to operative effect were discussed however that the arrangement could have been condemned as fraudulent on this basis.

²⁵ Burns Ind. Stats. Ann. (1933) § 33-412.

²⁶ For this development see *Irwins Bank v. Fletcher Sav. & Trust Co.*, 195 Ind. 669, 145 N. E. 869, 878 (1924).

The wording and punctuation of Section 6 is capable of the interpretation that the legislature was really cognizant of this historical development and intended to provide in relation to it. Probably the purpose was simply to prevent any possible reversion to the old rule which struck down these powers of sale without inquiring into their operative effect, or as was often said, as fraudulent per se or fraudulent as a matter of "law."²⁷ It seems that it was merely desired to insure that a pragmatic view would be taken in regard to these powers when provided for in a mortgage. Thus, Section 6 directs that (the mere presence of) "such provision shall not in any way render invalid the lien of said mortgage or its preference or priority as herein stated." But the provision itself may be invalid if it does not work right: The mortgage may "validly provide" for a power of sale in the mortgagor (only) "if," (1) the

²⁷ Doubtless everyone versed in legal lingo knows what a court means by using such expressions, but analysis and thought will show that they are not accurate to describe the meaning. Nothing is fraudulent "in itself"; there is a *fact* to which the *law* attaches the label and legal consequences of "fraud." And we are dealing in this field of law only with things which are fraudulent as a matter of law; there is nothing to compare with this description of the result; i. e. no alternative from fraud as a matter of law. Thus when the statute (see note 25, *supra*) says fraud shall be a question of "fact" it has little meaning. Its purpose doubtless was to prevent the attaching of the label and legal consequences of "fraud" to slight facts capable as well of being part of a factual situation which if relatively more fully known the law would not call "fraud," as of being part of a fraudulent one. It seems on this analysis that all that is meant is that for the law to attach the legal consequences of fraud to one of these credit arrangements more facts must be shown than the single fact that the parties have included in their mortgage a provision giving a power of sale to the chattel mortgagor.

²⁸ Issue will be taken with this construction of the Section. In answer, consider the effect of the comma before the word "if" as compared with its omission.

With the comma out, the clause following "if" describes what the provision for the power of sale may "validly provide." Such a provision containing all these conditions (which may be validly included in it) would not render the lien of the mortgage invalid nor affect its priority according to the last clause of the sentence. This would mean that a breach of one of these conditions in the power would give rise to a right to assert the lien of the mortgage in the goods whatever had happened to them. The conditions of the power would be terms of the lien, binding all persons claiming rights in the goods. The power would be coextensive with the lien. Doubtless the appellee in the Helms case attached this meaning to the Section and the court could not positively refute it.

proceeds of sales are applied on the mortgage debt or (2) subjected to the lien of the mortgage or (3) used solely for rendering salable the remaining property covered by the mortgage. In order to determine whether or not these conditions are complied with obviously the power must be observed in operation; and thus the pragmatic view of the later cases is compelled.

If it be true that the legislature was merely covering this previous case-law development, these provisions apply only to mortgagee-creditor controversies, since the case-law development concerned only these controversies and not those between mortgagees and purchasers.²⁰ Furthermore, a fair inference from the obvious effect of compliance with the three conditions to validity of the powers of sale is that the purpose of the legislature was to protect the equity of general creditors in the assets of the mortgagor from possible injurious effects from the operation of this device rather than to give any rights to the mortgagee against purchasers. The emphasis seems to be upon financial status of the mortgagor rather than upon rights for the mortgagee. Certainly the latter has no sacred claim on proceeds of sales and his rights do not ripen

The writer has reason to believe that the framers of the Act intended it to be this way but it is not their intention but the fictitious one of the legislature which controls, this intention being determined if possible from the ordinary meaning of words and symbols employed.

On the other hand with the comma present, the clause following "if" sets up conditions to the validity of the power itself instead of conditions which may be validly included in the power. And it is only a provision setting up the power, so conditioned, which does not render the lien invalid nor affect its priority. If these restrictive conditions are not complied with the provision is invalid and the lien is lost to that extent. This result is not spelled out in the Section but that can be its only meaning. The legislature says to parties, "You may include in your mortgage lien a term or provision giving the mortgagor a power to sell the goods, but your provision will be valid only if these three conditions are complied with." Surely the legislature did not mean that if the mortgagor failed to comply with the conditions thus making the provision invalid the mortgagee could call the goods back under the lien and try it again.

Had the legislature intended the lien to follow the goods passing under the power where the conditions had been violated the simple expedient of omitting the comma before "if" instead of putting one there would have accomplished this purpose clearly.

²⁰ See note 21 supra.

simply because proceeds are misapplied, as the last two conditions are satisfied and the provision is valid³⁰ though the proceeds do not reach his hands.³¹

As has been previously indicated,³² inapt language was used if the purpose was to give any rights to the mortgagee other than not to have his provision stricken as fraudulent on its face. Instead of providing conditions to the validity of the provision for a power of sale, the extent of the mortgagee's lien should have been described. When the provision is declared invalid upon non-compliance with the conditions it must mean that the lien and the debt it secures is invalid as to third parties to the extent it is affected by the power wrongly used.³³

Such a phrase as "the remaining property covered by said mortgage" used in Section 6 certainly gives the inference that

³⁰ Probably the mortgagee can take away these last two conditions by so providing in the mortgage, and the mortgagor could not claim a right so to use the proceeds without being in default. But such a situation would not harm general creditors and the purpose of the section would be served. Nor would the principle gathered from the three conditions be diminished by this right of the mortgagee.

³¹ It is extremely interesting in this connection that it does not appear in the Helms case that the proceeds of the sale of the automobile sought to be replevied were not applied on the mortgage debt. The case so far as it can be determined proceeds upon the assumption that the mortgagee's rights are the same irrespective of the application of these particular proceeds. There were several vehicles under the mortgage and "upon default of its mortgage" the mortgagee sued.

³² Text preceding note 20 *supra*.

³³ See note 28 *supra*. The Act does not prescribe in detail the effect of this invalidity. But if the intention is as claimed, that the doctrine of the more recent cases dealing with these powers is implicit in the Section, then the manner in which those cases work out the details is adopted. Goods sold are freed of the lien but the lien is not impaired as to the remaining chattels except in an insolvency proceeding. In such a proceeding, gathering the mortgagor's assets into a single fund, the preferred mortgage debt is reduced as against creditors in an amount equal to the value of chattels sold for which proceeds have been misapplied. Any proceeds still held by the mortgagor should perhaps be given to the mortgagee if he can trace them into the debtor's estate using the rules for tracing trust funds such as these are. As to proceeds used to render salable the remainder of the property under the mortgage only expenditures reasonably necessary and those having an ascertainable relation to the purpose are proper. For these principles see *Vermillion v. Natl. Bank of Greencastle*, 59 Ind. App. 35, 105 N. E. 530 (1915).

as property is sold under the power of sale it passes out from under the lien of the mortgage leaving "remaining property" under it. Also, under the last sentence of the Section, when the sale is made in exchange for other property, and this property is to be "as validly covered by the mortgage as the original property," certainly, as the court states in the *Helms* case, it was not intended that both that sold and that received should continue under the lien.

Assembling all these ideas, the conclusion must be that the legislature by the words used in Section 6, fairly construed in themselves and in the light of their previous use, intended only to protect a power of sale device when it was used properly, and instead of giving a mortgagee rights upon its misuse, he was to lose thereby to the extent general creditors were injured by his "expression of confidence"³⁴ in the mortgagor. It was never once contemplated or intended that a purchaser should suffer from its wrongful operation.

³⁴ So termed in *Robinson v. Elliott* supra note 24.