INSTITUTE OF LAW RESEARCH AND REFORM

LAND TITLES PROJECT

SECTION 61: IMPLIED COVENANTS OF TRANSFEREE OF LAND SUBJECT TO MORTGAGE OR ENCUMBRANCE

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I. INTRODUCTION

The purpose of this memorandum is to examine the effect of the provisions of section 61 and 62 of The Land Titles Act.[1] These provide:

> "61.(1) In every instrument transferring land for which a certificate of title has been granted, subject to mortgage or encumbrance, there shall be implied the following covenant by the transferee both with the transferor and the mortgagee, that is to say: That the transferee will pay the principal money, interest, annuity or rent charge secured by the mortgage or encumbrance, after the rate and at the time specified in the instrument creating it, and will indemnify and keep harmless the transferor from and against the principal sum or other money secured by the instrument and from and against the liability in respect of any of the covenants therein contained or under this Act implied on the part of the transferor.
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> (2) Where a transferee declines to register any such transfer the transferor or the mortgagee may by notice call upon the transferee or such other person or persons as the judge may direct to show cause why it should not be registered, and upon the return thereof the judge may order the registration of the transfer within a time named or make such further or other order and on such terms as to costs and otherwise as to him seems proper.
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> 62.(1) Every covenant and power declared to be implied in any instrument by virtue of this Act may be negatived or modified by express declaration in the instrument.

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[1] R.S.A. 1970, c. 198.

(2) In any action for a supposed breach of any such covenant the covenant alleged to be broken may be set forth and it may be alleged that the party against whom the action is brought did so covenant precisely in the same manner as if the covenant had been expressed in words in the transfer or other instrument, any law or practice to the contrary notwithstanding.

(3) Every such implied covenant has the same force and effect and is enforceable in the same manner as if it had been set out at length in the transfer or other instrument.

(4) When any transfer or other instrument in accordance this Act is executed by more parties than one, such covenants as are by this Act to be implied in instruments of a like nature shall be construed to be several and not to bind the parties jointly."

A mortgage creates both privity of estate and privity of contract between the mortgagor and the mortgagee. When the mortgagor sells the property subject to the mortgage to a transferee, privity of estate is created at common law between the mortgagee and the transferee. In addition to this privity of estate, section 61 creates privity of contract between the transferee and the mortgagee. After selling the mortgaged property, the transferor-mortgagor remains liable on his original privity of contract with the mortgagee. Section 61 further provides that the transferee shall indemnify and keep harmless the transferor from and against any liability he may incur with respect to his continuing privity of contract with the mortgagee.

This memorandum will review and analyze the case law on the section to determine how it has been interpreted and applied, whether there are any problems with respect to the same and whether any changes should be made.

II. EXPOSITION

A. The Position at Common Law

An examination of the position at common law is instructive in interpreting the effect of section 61. At common law, where property was transferred subject to mortgage, the transferee was held in equity bound to indemnify his transferor against his personal liability to the mortgagee under his covenant to pay contained in the mortgage.[2] The only way by which the mortgageee could avail himself of this equitable obligation on the part of the transferee to the transferor was to obtain an assignment of the rights of the transferor to himself, and then, having obtained this, he could sue the transferee directly for personal judgment.[3] Unless the mortgagee was fortunate enough to be able to obtain such an assignment of the transferor's equitable right of indemnity, he could not sue directly the transferee for the amount due on the mortgage for there was no privity of contract between them. If the transferor was dead, undiscoverable or unwilling the mortgagee could do nothing against the transferee except take the land itself. If the transferor was available, the mortgagee could sue him and he, in turn, would third-party the transferee for indemnity.

The implied contract of indemnity created between a transferor and a transferee by a conveyance of property is based on the consideration that in equity and justice such obligation should subsist. At common law it was always open to the parties to show facts to negative the existence of such

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[2]This is the doctrine of Waring v. Ward (1802) 32 E.R. 136.

[3]Maloney v. Campbell 28 S.C.R.228.

obligation. For example, it has been held that in the absence of express stipulation on the subject, the right to indemnification against a mortgage arises from the facts established in evidence and that evidence is admissible to show that it was not the intention of the parties that the transferee should assume liability for the mortgage.[4]

Again, when a conveyance is taken merely as security for a debt, no right of indemnity arises: it is only as between a real vendor and a real purchaser, in the ordinary sense of the words, that such right of indemnity arises.[5] Similarly, when the transfer is to a nominal purchaser or only of a portion of the property secured by the mortgage, no implied right of indemnity arises. In such situations, the transferor had no rights assignable to the mortgagee.[6]

B. Legislative History and Intention of Section 61

In The Great West Lumber Co. Ltd. v. Murrin and Gray,[7] Stuart, J. outlined the legislative history and intention of section 61:[8]

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[4] Beatty v. Fitzsimmons (1893) 23 O.R. 245.

[5] Fullerton v. Brydges (1885) 10 Man. R. 431; Walker v. Dickson (1892) 20 O.A.R. 96; Fraser v. Fairbanks and Coombs (1894) 23 S.C.R. 79.

[6] An excellent discussion of the applicable common law is found in Fullerton, J.A.'s judgment in Sokolov v. Kachmark [1929] 1 W.W.R. 353 (Man. C.A.).

[7] (1916) 11 A.L.R. 173 (Alta. S.C.A.D.).

[8] Id. at 180-182.

"In the Land Titles Act of 1894, sec. 52 of the present Act appeared as sec. 65. From 1894 to 1906, when the present Act was passed by the provincial legislature, the section read as follows:

'In every instrument transferring land for which a certificate of title has been granted subject to mortgage or encumbrance there shall be implied the following covenant by the transferee: that the transferee will pay the principal money, interest, annuity or rent charge secured by the mortgage or encumbrance after the rate and at the time specified in the instrument creating the same and will indemnify and keep harmless the transferor from and against the principal sum or other moneys secured by such instrument and from and against the liability in respect of any of the covenants therein contained or under this Act implied on the part of the transferor.'

This enactment was obviously merely declaratory. The rule of equity has always been such in the case of a grant of land subject to an encumbrance. Unless a contrary intention appeared the grantee was bound to indemnify the grantor against his liability, under his covenant, to the mortgagee. This right in the grantor to force the grantee to pay the mortgage debt was assignable by the grantor and the assignment could be made even before he had suffered damage be being himself obliged to pay. Maloney v. Campbell, 28 S.C.R. 228. But any such assignment was of course subject to all equities existing or arising as between the grantor and the grantee prior to notice of the assignment. There was nothing in the statutes of 1894 which impaired these very just principles of law.

But the legislature of Alberta in 1906 when in its first session it proceeded to pass a Land Titles Act ventured to attempt an improvement upon the section above quoted.

> After the words 'there shall be implied the following covenant by the transferee' there were inserted the words 'both with the transferor and the mortgagee.'
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> What was ventured upon was, therefore, the creation by statute of a privity of contract between parties who had otherwise no privity with each other at all, who had not, indeed, any dealings with each other, at all of any kind. More than this, the statute created in favour of the mortgagee a species of security, in the shape of the covenant of the transferee, which he had not relied upon at all when advancing the money and which was then not even in existence."

Section 61 contains two separate and distinct covenants on the part of the transferee of property subject to a mortgage or encumbrance. The first is with the mortgagee that the transferee will pay the principal money, interest, annuity or rent charge secured by the mortgage or encumbrance, after the rate and at the time specified in the instrument creating it. The second is with the transferor-mortgagor and provides that the transferee will indemnify and keep harmless the transferor from and against the principal sum or other moneys secured by the instrument and from and against the liability in respect of any of the covenants therein contained or under the Land Titles Act implied on the part of the transferor. In Trust and Guarantee Co. Ltd. v. Monk,[9] Walsh, J. interpreted the two covenants as follows:[10]

> "Though this is described in the section as but one covenant, it is really two or at least it has two distinct branches. One of them is that the transferee will pay the principal

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[9] (1923) 21 A.L.R. 151 (Alta. S.C.A.D.).

[10] Id. at 153.

> money and interest secured by the mortgage. That is simply a covenant to pay under which the liability is limited to the principal and interest. The other is to indemnify and keep harmless the transferor not only against the principal sum but also against liability under any of the covenants of the mortgage. If that is a covenant with the mortgagee, the breach of which gives him the right to exact payment from the transferee, the measure of the transferee's liability to the mortgagee is, of course, that of the mortgagor under any and all of his covenants. I am of the opinion that his second covenant enures to the benefit of the transferor alone. It is obviously meant only for his protection. It is absurd to involve the transferee in a covenant with the mortgagee that he will indemnify and save harmless a third party, the transferor, from liability under the mortgage. It is a contract of indemnity pure and simple in which no person but he who is indemnified can have any possible interest."

The transferee's implied covenant of indemnity with the transferor is merely a declaration of the position at common law. Its purpose is to protect the transferor. Dealing with a similar covenant in the Saskatchewan Land Titles Act, Johnstone, J. stated in Reeves v. Konschur[11] that very clearly the intention of the legislature was to protect the transferor from any covenants that might be contained in any mortgage or encumbrance upon the land existing at the time of the transfer. On appeal, Lamont, J. stated:[12]

> " With this interpretation of the section, if I may be allowed to say so, I entirely agree. In the ordinary case where a purchaser

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[11] (1908) 8 W.L.R. 346 at 349.

[12] (1909 10 W.L.R. 680 at 690-691.

> buys land subject to a mortgage, he assumes the mortgage and retains the amount of the same out of the purchase money, and the statute contemplates that he should pay the mortgage and save the transferor harmless. If it were not so, the purchaser would be defrauding the vendor by casting on him the burden of paying off the mortgage after having retained the same out of the purchase money. This section seems to me equivalent to an express covenant in the transfer that the purchaser will pay off the mortgage and interest and will indemnify and save harmless the vendor therefrom."

The transferee's implied covenant with the mortgagee, however, does not exist at common law. This portion of the section enures to the benefit of the mortgagee by removing the common law procedural difficulty--namely, that the mortgagee had to obtain an assignment of the mortgagor-transferor's rights under the implied covenant of indemnity before being able to proceed against the transferee for the amount due on the mortgage. In Short v. Graham, Stuart, J. interpreted the purpose of the section as follows:[13]

> " In my opinion, the section in question was passed to relieve the mortgagee from his difficulty, and, as said by Maclennan, T. A. [in Maloney v. Campbell in the Court below, 24 A.R. 224], to 'give a direct right of suit between the party to receive and the proper party to pay', and to 'create the privity which alone was wanting to make such a suit maintainable', this being done by the mere operation of the statute, instead of as formerly, by means of the vendor's assignment of his rights."

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[13] (1908) 7 W.L.R. 787 (Alta. S.C.) at 790.

And further:

> " The law formerly was that the purchaser, taking finally the whole interest in property subject to an encumbrance, was bound to pay off that encumbrance and could be sued by the vendor and made to pay the money, not to the vendor himself but to the mortgagee; and I think the statute was merely intended to make that obligation enforceable by the mortgagee directly against the purchaser, without any circuity of procedure."

C. The Effect and Application of Section 61

The question now arises as to the extent to which the provisions of section 61 alter the position that exists at common law. It is clear that the transferee's statutory implied covenant of indemnity with the transferor is merely a declaration of the common law.[14] Further, as at common law, this statutory covenant of indemnity has been held not to arise where the circumstances render it inequitable for it to be enforced.[15] The transferee's implied covenant with the mortgagee does, however, alter the position at common law. In dealing with the application of the section, Stuart, J. stated in Short v. Graham:[16]

> " I am very strongly of the opinion that the application of the statute should, therefore, be restricted entirely to the case where there has been a real purchase by the transferee and a complete parting with all his

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[14] Such statutory implied covenant of indemnity is assignable: Glenn v. Scott (1898) 2 Terr. L.R. 339.

[15] Sokolov v. Kachmark [1929] 1 W.W.R. 353 (Man. C.A.).

[16] (1908) 7 W.L.R. 787 (Alta. S.C.) at 792.

> interest on the part of the transferor, and that whenever it is impossible for the vendor, the transferor, to take advantage of the covenant declared to be implied in his favour, that is, whenever he would have had, before the statute, no right against the purchaser capable of assignment to the mortgagee, which is admittedly the case here, then the covenant should not be implied in favour of the mortgagee either." [author's italics]

Again, in Great West Lumber Co. Ltd. v. Murrin and Gray, Stuart, J. stated:[17]

> " Under the law as it stood before the amendment, the transferee, the purchaser of the land, could rely upon any agreement or equity existing as between himself and the transferor if the mortgagee should secure an assignment of the transferor's rights and attempt to enforce them. In my opinion any statute which appears to alter this common law right--really an equitable right, but I speak of common law as opposed to statute law,--ought to be very carefully and exactly construed. I do not mean that the Court should, on account of its view of the injustice or bad policy of a statute which changes the common law, attempt to whittle down its plain meaning and so override the expressed will of the legislature. But certainly before allowing a purchaser to be deprived of the rights which the ordinary law gives him, the Court ought to be satisfied that the words of the statute do really and inevitably deprive him of those rights. Though it may seem that it was the intention to do so, yet, if the words of the statute, taken in their ordinary meaning without straining either one way or the other, do not affect that result then clearly the rights of the purchaser should stand as before.

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[17](1916) 11 A.L.R. 173 (Alta. S.C.A.D.) at 181-182.

> For myself I doubt very much if the legislature intended to create a new absolute right in the mortgagee which could not be affected in any way at all by any agreement or contrary evident intention as between the parties to the sale and transfer of the land."

Ives, J. stated:[18]

> " Sec. 52 of The Land Titles Act establishes by implication the relationship of mortgagor and mortgagee between the mortgagee and the purchaser of mortgaged lands. As the relationship is but an implied one it may be rebutted by evidence that one of the terms of the purchase was that the liability, presumed by virtue of the statute, would not be assumed by the purchaser."

Beck, J. A., in Trusts and Guarantee Co. Ltd. v. Landreville and Singer,[19] stated that the said section, in declaring an implied covenant on the part of the transferee to pay the mortgage debt, is merely declaring the well-established previously existing implied obligation of the purchaser of an equity of redemption--an obligation implied in equity, but always subject to be modified or negatived by proof of the real intention either by evidence of expressed intention or by evidence of all the facts and circumstances of the transfer; and, the existence and effect of the implied covenant in favour of the mortgagee is wholly dependent upon the existence of the implied covenant in favour of the transferor.[20]

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[18] Id. at 174.

[19] [1922] 2 W.W.R. 586 (Alta. S.C.A.D.) at 589.

[20] See also the dicta of Harvey, C. J. in Trusts and Guarantee Co. Ltd. v. Monk (1923) 21 A.L.R. 151 (Alta. S.C.A.D.) at 158-159.

The implied covenant in favour of the transferor (and, therefore, the implied covenant in favour of the mortgagee) arises only in the case of a real purchase and sale of property subject to a mortgage or encumbrance. Thus, evidence is admissible to show that property was transferred by way of security only,[21] even though the transfer was absolute in form;[22] or was transferred to a nominal purchaser acting as trustee;[23] or that only a portion of the mortgaged property was transferred;[24] or was purchased from a sale by a sheriff under a writ of execution.[25]

Even if there has been a real purchase and sale of property, where there is an agreement, even though not in writing, between the transferor and the transferee that the transferor is not to call upon the purchaser to indemnify him against payment of the mortgage money, the covenant of indemnity implied by section 61 between the transferor and

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[21] Short v. Graham (1908) 7 W.L.R. 787 (Alta S.C.).

[22] Welsh v. Popham [1924] 2 W.W.R. 1193 (Alta. S.C.A.D.).

[23] Evans, Johnstone & Naismith v. Ashcroft & The British Canadian Trust Co. (1915) 8 W.W.R. 899 (Alta S.C.).

[24] Inre Macdonald Estate (1925) 21 Alta. L.R. 66 (Alta S.C.A.D.); Montreal Trust Co. v. Boggs and Beresford (1915) 31 W.L.R. 914 (Sask.); The Dominion of Canada Investment and Debenture Co. Ltd. v. Carstens [1917] 3 W.W.R. 153 (Sask. S.C.).

[25] Anderson v. Stasiuk [1927] 1 W.W.R. 49 (Sask. C.A.).

and the transferor is rebutted. As a result, the transferee's implied covenant with the mortgagee does not arise.[26] However, the existence of an express covenant of indemnity between the transferor and the transferee does not prevent the implied covenant between the transferee and the mortgagee from arising.[27]

Thus it is quite clear that the effect of section 61 is merely to correct a common law procedural defect by providing the mortgagee with a direct right of suit for the principal money and interest against the transferee without the necessity of first obtaining an assignment of the transferor's rights. By removing the requirement of suing the mortgagor who would, in turn, third party the transferee, the section, in effect, gives the mortgagee two separate and distinct sources to look to for payment of the mortgage money.

Although the transfer need not be executed by the transferee,[28] it must be registered in order for the statutory implied covenants to arise.[29] Harvey, C. J. interpreted the effect and application of the present section 61(2)

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[26] Great West Lumber Co. Ltd. v. Murrin and Gray (1916) 11 A.L.R. 173 (Alta. S.C.A.D.).

[27] Trusts and Guarantee Co Ltd. v. Landreville and Singer [1922] 2 W.W.R. 586 (Alta. S.C.A.D.).

[28] The accepted view is that of Beck, J. A.'s in both the Murrin and Landreville cases where he states that the transfer should be read as if the implied covenant were expressed therein and signed by the transferee subject to the right of rectification if the document as so construed does not express the real agreement between the parties: see Welsh v. Popham [1924] 2 W.W.R. 1193 (Alta S.C.A.D.).

[29] Trusts and Guarantee Co. Ltd. v. Monk (1923) 21 A.L.R. 151 (Alta. S.C.A.D.).

in Re Land Titles Act and Re Ronald and Summers:[30]

> " 'Transfer' is defined in the Act as 'the passing of any estate or interest in land under the Act'. The provisions of the Act make it clear that the estate passes not by the execution or delivery of the transfer but by its registration. Therefore the implied covenant only comes into existence upon registration, and if a transferee does not wish to assume the burden of the covenant he need only refrain from registering the transfer. This anomaly was met by an amendment to the section in 1916[31] by which it is provided that when a transferee declines to register a transfer, the transferor or the mortgagee may by notice call upon the transferee 'to show cause why the same should not be registered, and upon the return thereof the Judge may order the registration of the said transfer within a time named or make such further or other order and on such terms as to costs and otherwise as to him shall seem meet.'"

It was held in that case that the fact that a transferee, who has taken no steps to enforce his claim, asserts that he has a right to repudiate the transfer is not a justification within the meaning of section 61(2) for refusing to register the transfer. Where a transferor or mortgagee proceeds under section 61(2) to require the transferee to register his transfer, and the latter alleges that he has good cause for not registering it, he should be to take within a reasonable time and duly prosecute proper steps to enforce his claim. Harvey, C. J. stated:[32]

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[30](1917) 13 A.L.R. 209 (Alta. S.C.A.D.) at 209-210.

[31]S.A. 1916, c.3, s.15 (1).

[32]Id. at 210-211

" In my opinion the cause which the transferee is called on to show is good cause, in other words, something that really justifies his refusal to register, for the amendment certainly implies that the transferrer and the mortgagee have a right to have the transfer registered in the absence of some justification for its non-registration though such a right, without such a provision, would probably not exist, it being a matter for the transferee's consideration only. Now the fact that the respondent claims that he has a right to repudiate, which claim he does nothing to enforce, appears to me not to be justification."

D. Negativing the Implied Covenant

Section 62(1) provides that any covenant implied in any instrument may be negatived or modified "by express declaration in the instrument." This would appear to suggest negation of the covenant only by express declaration in the registered transfer transferring the land to the transferee. This is further emphasized by the concluding phrase in the subsection, "any law or practice to the contrary notwithstanding. However, in Great West Lumber Co. Ltd. v. Murrin and Gray[33] the majority of the court held that the implied covenant could be negatived otherwise.

Later, in Trusts and Guarantee Co. Ltd. v. Landreville and Singer, Hyndman, J. A. stated:[34]

> " It has been held in several decisions of this Court that whilst prima facie a transferee of mortgaged property is directly liable to the mortgagee on the implied covenant, nevertheless the implication or presumption is capable of being negatived or rebutted by evidence showing the exact relationship between the mortgagor and transferee and should it appear that where before the statute the mortgagor would have no right to indemnity against the purchaser capable of assignment to the mortgagee, then the statutory implied covenant in favour of the mortgagee is negatived."

Clarke, J. A., Scott, C. J. concurring, said that he withheld assent to the proposition that, in the absence of an express declaration in the instrument negativing or modifying the implied covenant, such covenant can be negatived or modified so as to affect the mortgagee by an agreement to which he is not a party or of which he has no notice.

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[33] [1917] 1 W.W.R. 945 (Alta. S.C.A.D.).

[34] [1922] 2 W.W.R. 586 (Alta. S.C.A.D.) at 590.

Again, in Welsh v. Popham,[35] the Court held that a registered transfer should be read as if the implied covenant were expressed therein and signed by the transferee subject to the right of rectification if the document as so construed did not express the real agreement between the parties.

Although there have been other judicial statements concerning negation of the implied covenant other than by express declaration in the transfer,[36] it appears settled that it is possible to do so despite the provisions of section 62(1). In effect, the common law position as to implied covenants in transfers is maintained--therefore, parol evidence is admissible to establish circumstances surrounding the transfer, otherwise absolute in form, sufficient to negate the implied covenant. It is clear, however, that because the Act raises such a presumption of liability on the part of the transferee, he has the onus of rebutting such presumption cast upon him.[37]

E. The Relationship of the Parties

The effect of section 61 is to establish by implication the relationship of mortgagor-mortgagee between the mortgagee and the transferee with respect to the principal, interest, annuity or rent charge secured by the mortgage. In effect, the section gives the mortgagee two separate and distinct sources to look to for payment of the moneys due

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[35] [1924] 2 W.W.R. 1193 (Alta. S.C.A.D.).

[36] See, for example, the dicta of Tweedie, J. in Sanford v. Frizzle and Elliott [1925] 2 W.W.R. 601 (Alta. S.C.) at 604.

[37] Pollock v. Shapera [1938] 1 W.W.R. 10 (Man. K.B.).

on the mortgage: the original mortgagor-transferor under his express covenant to pay contained in the mortgage and the transferee under his implied covenant to pay contained in section 61. As between transferor and transferee, the one who should carry out the obligation to pay is the transferee, he having impliedly covenanted, both at common law and by virtue of the statute, to do so.

(i) Mortgagee and Transferee

As between the mortgagee and the transferee, the relationship created by section 61 has been held not to be a true contractual relationship in the ordinary sense. In Pfeifle v. Bachinsky, Harvey, C. J. stated:[38]

> "Indeed it is difficult to see how a mere statutory obligation on one party in favour of another party, who is a complete stranger, can be deemed to create a contract betweeen them. Certainly it is not a contract in the ordinary sense.
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> . . . Certainly there was no consideration given by the plaintiff to the defendant for the assumption of the obligation imposed by the statute."

It was held, however, in Trusts and Guarantee Co. Ltd. v. McLeod and Buxton[39] that where land subject to a mortgage is transferred by a transfer which is not under seal, the transferee's implied covenant with the mortgagee under section 61 is a simple contract debt, even though the mortgage itself was under seal; and, therefore, the period of

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[38] [1939] 2 W.W.R. 389 (Alta S.C.A.D.) at 392.

[39] (1928) 23 A.L.R. 565 (Alta. S.C.A.D.).

limitation applicable to an action thereon is six years. Lunney, J. A. stated:[40]

> " In Societe Belge D'Enterprises Industrielles et Immobilieres v. Webster and Mill 23 Alta. L. R. 129, the judgment of Beck, J. A. reads:
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> > 'For the reasons which I have briefly summarized, I am of the opinion that a 'covenant' in instruments made in pursuance of our Land Titles Act--at all events, if in fact not under seal--must be taken to be a contract of promise not under seal.'
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> The liability of the defendant William Buxton herein is on the implied covenant contained in the transfer; the transfer is a document not under seal. The debt, therefore, becomes a simple contract debt and comes within the decision of the Court in Societe. . . ."

The liability of a transferee of mortgaged land under his implied covenant with the mortgagee persists even after he has re-transferred it to another. In Trusts and Guarantee Co. Ltd. v. Stephens, Walsh, J. stated:[41]

> " In my opinion once the liability imposed by sec.[61] has arisen the transferee cannot by his own act put an end to it. The mortgagee is thereby given a right of action against him which persists not only during his ownership of the land but afterwards until his liability is ended by some such thing as would have ended it if his had been an express covenant to pay."

Section 62(4) provides that where a transfer is

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[40] Id. at 566-567.

[41] [1919] 3 W.W.R. 410 (Alta S.C.) at 411.

executed by more parties than one, such implied covenants arising by virtue of the Act shall be construed to be several and not bind the parties jointly. This provision has been in effect since the inception of the section in 1906. In Trusts and Guarantee Co. Ltd. v. Monk,[42] however, it was held that where mortgaged land is transferred by one transfer to a number of transferees who each take a specified undivided interest therein and there is no arrangement, agreement or covenant negativing or restricting their liability to the mortgagee under the covenant implied by section 61, their liability is a joint liability and each of the transferees is liable to the mortgagee for the whole amount payable on the mortgage. Walsh, J. stated:[43]

> " There is but one covenant with the mortgagee which arises by implication under this section and that is that the transferee will pay the principal and interest. Where there are two or more transferees, the covenant, of course, is that they will pay. It is a covenant which is restricted in extent only by the amount of principal and interest secured by the mortgage. It is not that the transferees will pay in proportion to their interest in the land but that they will pay the principal money and interest. If, instead of being left to the imagination, as it now is, it was put in the transfer in express terms, the covenant would read: 'We the transferees hereby covenant, promise and agree to and with the mortgagee that we will pay the principal money and interest secured by the said mortgage as and when the same respectively fall due thereunder.' Under such a covenant each of the transferees though taking but an undivided interest in the land, would, I think, make himself liable for all of the principal money and interest. That is exactly the covenant which the statute imposes on

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[42](1923) 21 A.L.R. 151 (Alta. S.C.A.D.).

[43]Id. at 154.

> them. While they have several interests in the land relatively to one another they are united in interest relatively to the plaintiffs. Their covenant with the plaintiffs is a joint one and so each of them is liable for the whole. In my opinion each of the transferees is liable to the plaintiffs for all of the principal and interest regardless of their rights and liabilities inter se."

While an action is brought against a transferee of registered land subject to a mortgage and personal judgment is sought against him under section 61 there should be an express claim setting forth that such transferee is so liable, as the defendant sought to be charged ought to be distinctly informed as to how and by what authority he is alleged to be personally liable. In Home Investment and Savings Ass'n. v. Middleditch, Clarry, M. stated:[44]

> " I venture to say that not one in ten registered transferees knows that he is personally liable to the mortgagee for payment of the mortgage when he registers his transfer, and I am of the opinion that when personal judgment is claimed against a transferee, under said statutory covenant, such liability should be specifically set forth in the statement of claim in order that he may know on what grounds such liability arises.
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> In the case before me there is nothing but the bold statement that defendant Rogers

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[44] (1914) 7 W.W.R. 1202 (Alta. S.C.) at 1203.

is the registered owner, which I believe is insufficient."[45]

(ii) Transferor and Transferee

As between the transferor and the transferee, section 61 merely declares the transferee's implied covenant of indemnity which exists at common law. Payment by the original mortgagor-transferor to the mortgagee is not a condition precedent to the transferor's right of action on the transferee's obligation to indemnify implied by the section.[46] Further, in an indemnity action against the transferee, the transferor is entitled to any costs which he might have to pay in connection with the action of the mortgagee against him, and for his own costs of that action as between solicitor and client.[47]

The addition of paragraph 34(17) of The Judicature Act,[48] by which the right of a mortgagee or vendor is

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[45] Clarry, M. followed the earlier Saskatchewan case of Colonial Investment and Loan Co. v. Foisie (1911) 19 W.L.R. 748. See also The Assiniboia Land Co. v. Acres and Stewart and Acres (1916) 10 W.W.R. 355 (Sask. S.C.) where the statement of claim sufficiently disclosed the nature and ground of the relief claimed by the mortgagee against the transferee.

[46] Superior Builders Ltd. v. Scott and Shore [1937] 2 W.W.R. 274 (Man. C.A.).

[47] Pollock v. Shapera [1938] 1 W.W.R. 310 (Man. K.B.).

[48] By S.A. 1939, c.85.

restricted to the land to which the mortgage or agreement for sale relates and by which the right of action on the covenant for payment contained in any mortgage or agreement for sale is abolished, does not deprive the transferor of property subject to a mortgage of his right as against the transferee to indemnity from the mortgage indebtedness under the implied covenant set out in section 61. In the case of In Re Forster Estate, O'Connor, J. stated:[49]

> " I hold that this section does not prevent an action on the implied covenant for indemnity, for two reasons: (a) It is not a covenant 'for payment'; (b) I find the object aimed at by the subsection is to limit the unpaid mortgagee or vendor to his security, and to prevent him from recovering a deficiency judgment against the mortgagor or purchaser. The subsection was passed for the relief of mortgagors. I interpret the section as confined to matters which come within the said object: Rex v. Mee Wah (1886) 3 B.C.R. 403, at 406. Whether a mortgagor who is entitled to be indemnified by a purchaser against payment of the mortgage and who has, as in this case, paid part of the mortgage and secured the balance, should also be prevented from recovering the amount of the mortgage is a question with which the legislature has not seen fit to deal. The mortgager has the right to indemnity both at common law and by statute. It would require express words to take away this right."

Finally, the liability assumed under the covenant implied by section 61 on the part of a transferee with the transferor is sufficient, in itself, to make him a bona fide purchaser for value and entitled to the protection thereof.[50]

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[49] [1941] 3 W.W.R. 449 (Alta. S.C.) at 452.

[50] Sakaliuk v. Corry [1930] 1 W.W.R. 424 (Alta. S.C.), per Walsh, J. at 426.

(iii) Transferor and Mortgagee

The transferor-mortgagor is bound to pay the mortgage debt to the mortgagee by virtue of the express covenant to pay contained in the mortgage. Since, by virtue of the covenant implied by section 61, there is a direct personal liability of the transferee to the mortgagee, the original mortgagor becomes a surety for the transferee to the mortgagee and, therefore, is entitled to pay off the mortgage money as soon as there is default without waiting until he is sued or pressed for payment, and on paying it off is entitled to require the mortgagee to transfer the mortgage to a third party as a valid security.[51] Any payments made by the transferee to the mortgagee can be said to have been made on behalf of the transferor and are sufficient to prevent the limitation period from running.[52]

F. The Scope of Section 61

The transferee's implied covenant with the mortgagor-transferor, namely to indemnify and keep him harmless not only against the principal sum and other moneys secured by the mortgage but also against liability under any of the covenants contained therein, is broader in scope than his implied covenant with the mortgagee, which is to pay the principal money, interest, annuity or rent charge secured by the mortgage. In effect, the transferee is directly liable to the transferor for whatever the transferor himself is liable for under the mortgage. The question arises, however, as to the extent of the transferee's direct liability to the mortgagee.

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[51] Devenish v. Connacher (1930) 24 A.L.R. 535 (Alta. S.C.A.D.).

[52] Ross and Phillips v. Schmitz (1913) 5 W.W.R. 399 (Sask. S.C.).

In the early case of Trusts and Guarantee Co. Ltd. v. Monk[53] it was held that where a mortgage provides that if the mortgagor defaults in payment of insurance, taxes and other charges and the mortgagee pays them they shall be added to and become part of the principal secured by the mortgage, such items do not form part of the principal for which a subsequent transferee of the land is liable under his implied covenant with the mortgagee.

In Sanford v. Frizzle and Elliott,[54] Tweedie, J. held that where a trustee under The Bulk Sales Act takes an assignment of a mortgage from the mortgagee made by the vendor-transferor-mortgagor and makes payments to the mortgagee out of the proceeds of the sale in bulk, he is entitled to recover against the vendor-transferor-mortgagor and also against the transferee of the mortgaged land, under his statutory implied covenant with the mortgagee, the whole amount due on the mortgage for principal and interest without deduction for payments made to the mortgagee.

In Central Mortgage and Housing Corporation v. Ward,[55] Riley, J. held that a mortgagee was not entitled to collect from the transferee the solicitor and client costs incurred by the mortgagee for legal services, provided prior to the commencement of foreclosure proceedings, in the collection of arrears of monthly payments owing under the mortgage nor was he entitled to recover from the transferee,

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[53] (1923) 21 A.L.R. 151 (Alta. S.C.A.D.).

[54] [1925] 2 W.W.R. 601 (Alta. S.C.).

[55] (1957-58) 23 W.W.R. 319 (Alta. S.C.).

because of the failure to pay said costs, the solicitor and client costs incurred in the subsequent foreclosure proceedings.

Dealing first with the position at common law, Riley, J. stated:[56]

> "The early law in Alberta with respect to the collection by a mortgagee from a mortgagor of solicitors' costs incurred by a mortgagee in collecting arrears of payments due and owing under a mortgage was expressed by Beck, J. of the Trial Division of the Supreme Court of Alberta, in Can. Mtge. Inv't. Co. v. Baird (1916) 10 W.W.R. 1195, where, in an action for recovery inter alia of solicitors' fees, for letters sent to the defendant mortgagors demanding payment, Beck, J. said on p. 1198:
>
> > "I think fees are not collectable except as charges included in the taxable costs of proceedings pending or subsequently commenced.'
>
> He further states on p. 1198:
>
> > "Generally speaking, items of expenses reasonably incurred in preserving the security or in efforts to realize it are allowed without any special covenant in the mortgage, and, generally speaking, a covenant will not magnify the right.'
>
> It was subsequent to this judgment that The Vendors' and Mortgagees' Costs Exaction Act was passed in this province."

That Act specifically prohibited such costs to be exacted by a mortgagee from a mortgagor even when expressly

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[56] Id. at 325.

provided for in the mortgage document. However, Riley, J. held that, even had the costs been validly exactable from the mortgagor, the transferee would not be liable for them. He stated:[57]

> " Even assuming that the charge is a permitted one against the original mortgagor, I do not think it, or any claim under the mortgage, except a claim for possession, can be enforced against the defendant purchasers with whom the mortgagee has no privity.
>
> While under their agreement for sale the defendant purchasers are no doubt liable to indemnify the mortgagors in respect of any sum recovered from them, they(the defendant purchasers) are not directly liable to the mortgagee for any sum payable under the mortgage."

As to the effect of section 61, it was apparently admitted by the mortgagee that the transferee was not liable for such costs under the statutory implied covenant.[58]

The Vendors' and Mortgagees' Costs Exaction Act was repealed in 1965.[59] In Central Mortgage and Housing Corporation v. Conaty[60] the mortgage contained a clause which provided that the mortgagor would be liable for the solicitor and client costs incurred by the mortgagee in collection of arrears and foreclosure proceedings. Kirby, J.

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[57] Id. at 328.

[58] Id. at 324.

[59] S.A. 1965, c.98.

[60] (1966) 58 W.W.R. 119 (Alta. S.C.).

held that the transferee was not liable to the mortgagee for these costs. He stated that, in the absence of any agreement between the mortgagee and transferee, the matter must be determined in the light of section 61. After quoting the section, he stated:[61]

> " It seems to me that the effect of this section is to create: (1) An implied covenant by a transferee to pay the principal money, interest, annuity or rent secured by the mortgage, in effect, establishing privity of contract between the mortgagee and the transferee as to these obligations [author's italics]; (2) An implied covenant by a transferee to indemnify the transferor from and against the principal sum or other money secured by the instrument, and from and against the liability in respect of the covenants contained in the mortgage, which does not have the effect of establishing privity of contract between the mortgagee and the transferee with respect to these obligations [author's italics].
>
> The charge on the mortgaged premises for legal costs, as between solicitor and client, created by clause 14(b) is, in my view, such a 'liability in respect of the covenants contained in the mortgage.'
>
> Therefore, in the absence of any privity of contract between the mortgagee and the transferee in fact, or implied by law, with respect to payment of these costs, the mortgagee is not entitled to payment of such costs by a transferee who has purchased the property subject to the mortgage."

The Alberta Appellate Division,[62] however, allowed

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[61] Id. at 123-124.

[62] (1967) 59 W.W.R. 11.

the appeal from Kirby, J.'s judgment. Kane, J. A. stated in dissent:[63]

> " With respect, I agree with the learned trial judge (1967) 58 WWR 119, that sec. 61 creates: (1) An implied covenant by the respondent to pay the principal money and interest secured by the mortgage, in effect, established privity of contract between the appellant and the respondent as to these obligations; (2) An implied covenant by the respondents to indemnify the Tagers, the original mortgagers from whom the respondents received transfer to the land, against the principal sum and other moneys secured by the mortgage and from and against liability in respect to the covenants contained in the mortgage, which implied covenant does not have the effect of establishing privity of contract between the appellant and the respondents with respect to these obligations.
>
> It may well be that if the present action had been brought against the original mortgagors and they had been the registered owners, then under clause 14 of the mortgage, solicitor-and-client costs could have been collected from the original mortgagors because of the agreement to pay such costs: Fleck v. Whitehead [1924] 3 WWR 470, 19 Sask. LR 64 (C.A.); Re Adelphi Hotel (Brighton) Ltd.; District Bank Ltd. v. Adelphi Hotel (Brighton) Ltd.[1942] 1 WLR 955, 97 Soc T 489, (1953) 2 Aller 498. But this action is not such an action.
>
> What the respondents must pay to the appellant under sec. 61 (1) is the principal money and interest secured by the mortgage. That in certain circumstances moneys paid out by the appellant in respect of the mortgage become principal appears clear. But I am not able to understand how solicitor-and-client costs which the respondents have not agreed to pay become principal [author's

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[63] Id. at 12-13.

> italics]. There is no agreement between the appellant and the respondents that the respondents will pay solicitor-and-client costs. Sec. 61 does not operate to supply such an agreement by implication."

Allen, J. A., for the majority, held, in effect, that: (1) The mortgagee is entitled to such costs as against the transferees; and (2) The mortgagee is entitled to a charge upon the lands to secure their payment. He stated:[64]

> It seems to me that I must therefore hold that in an action against the original mortgagor the mortgagee in this case would have been entitled to add to the amount secured by the mortgage, fair and reasonable legal costs incurred by him as between solicitor and client in exercising or enforcing or attempting to enforce his rights under the mortgage and in connection with the collection of the mortgage arrears, and it is admitted that the solicitor-and-client charges involved in this matter were so incurred and are fair and reasonable.
>
> However, this does not dispose of the case. Here the question is not whether the mortgagee is entitled to his costs as between solicitor and client as against the mortgagor, but whether he is entitled to them as against the defendants who are the transferees from the mortgagor of the mortgaged lands and this brings us, initially, to a consideration of the effect of sec. 61 (1) of *The Land Titles Act*, RSA, 1955, ch. 170, which reads as follows:
>
> > "61. (1) In every instrument transferring land for which a certificate of title has been granted, subject to mortgage or encumbrance, there shall be implied the following covenant by the transferee both wi h the transferor and the mortgagee, that is to say: That the transferee will pay the principal money, interest, annuity or rent charge secured by the mortgage or encumbrance, after the rate and at the time specified in the instrument creating it, and will indemnify and keep harmless the transferor from and against the principal sum or other moneys secured by the instrument and from and against the liability in respect of any of the covenants therein contained or under this Act implied on the part of the transferor."

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[64] Id. at 20-23

The learned trial judge considered that the effect of this section was to create: (1) An implied covenant by a transferee to pay the principal money, interest, annuity or rent charge secured by the mortgage, in effect, establishing privity of contract between the mortgagee and the transferee as to these obligations; and (2) An implied covenant by a transferee to indemnify the transferor from and against the principal sum and other moneys secured by the instrument and from and against the liability in respect of the covenants concerned in the mortgage, which does not have the effect of establishing privity of contract between the mortgagee and the transferee with respect to these obligations.

He went on to hold that the charge on the mortgaged premises for legal costs as between solicitor and client created by clause 14 (e) of the mortgage was a liability under the covenants contained in the mortgage in respect of which no privity of contract existed between the mortgagee and the mortgagor and that the mortgagee was not entitled to payment of these costs by the transferee who had acquired title to the property subject to the mortgage.

Although in his judgment the learned trial judge does not deal specifically with the alternative question, namely, "Is the plaintiff entitled to a charge upon the lands described in the mortgage for the said sum of $25.00 once it is paid by the plaintiff to its solicitors?" we can fairly assume from the foregoing that he would also have answered this question in the negative.

I think it is obvious, from the authorities to which I have referred, that a negative answer to the initial question does not fully dispose of the matters in issue.

I am of the opinion that the cases cited above clearly establish:

(1) That the provision for payment of legal costs on a solicitor-and-client basis is valid and binding upon the mortgagor;

(2) That while there may be no privity of contract existing between the mortgagee and the transferee which would enable the mortgagee to recover solicitor-and-client costs from the transferee in a personal action on the covenant, there is no doubt that the mortgagee is entitled to add them to the other moneys owing under the mortgage and that they constitute a charge upon the mortgaged land;

(3) That in foreclosure proceedings the mortgagee would be entitled to recover these costs from the proceeds of sale;

(4) That the transferee would be required to pay these costs as a condition of redemption.

Thus, the alternative question should be answered in the affirmative.

However, the question still remains as to whether the mortgagor is required to pay these solicitor-and-client costs as a condition of being granted relief from the consequences of non-payment of principal or interest under the mortgage by virtue of the provisions of sec. 19 of *The Judicature Act*, RSA, 1955, ch. 164, which reads as follows:

> "19. The Court has jurisdiction to grant and shall grant relief from the consequences of non-payment of principal or interest by a mortgagor or purchaser in any case in which the mortgagor or purchaser, his heir or assign, pays all the arrears due under the mortgage or agreement for sale with lawful costs and charges in that behalf
>
> "(*a*) at any time before a judgment in the premises is recovered, or
>
> "(*b*) within such time as by the practice of the Court relief therein could be obtained."

I think the use of the words "lawful costs *and charges*" [the italicizing is mine] in the section above quoted makes it clear that anything which might under the terms of the mortgage be added to the charge on the property constituted by the mortgage requires that the solicitor-and-client costs, which may be added to the amount charged on the land under clause 14 of the mortgage, must be included in the amount to be paid by the transferee as a condition of the granting of the relief provided by sec. 19 of *The Judicature Act*.

I might add that I see no reason why the word "costs" may not be interpreted to include "solicitor-and-client costs" as well as party-and-party costs. I think the word "costs" should be interpreted according to its context. In *Krook v. Yewchuk and Panas* (1962) 39 WWR 13, [1962] SCR 535, reversing (1961-62) 36 WWR 547, Martland, J., in commenting on sec. 34 (17) of *The Judicature Act*, said at p. 18:

> "It derogates from the common-law rights of a mortgagee of land and, consequently, I see no reason to read into it any intention beyond what is to be determined by a strict consideration of the words actually used."

Applying this reasoning to the word "costs" and giving effect to its ordinary meaning, I do not think the solicitor-and-client costs are necessarily excluded, particularly when the mortgage sued upon makes express provision for them to be payable.

> I have indicated that there is a question still to be resolved as to the plaintiff's right to recover these costs in a personal action against the transferee on the covenant for payment contained in the mortgage, but as this action does not come within that category it is unnecessary for me to deal with this question on this appeal.
>
> The appeal should therefore be allowed and both the initial question and the alternative question should be answered in the affirmative. As I understand that this is in the nature of a "test case," there will be no costs to either party.

It is perhaps unclear, however, the majority's decision as to the exact effect of section 61 on the transferee's liability to the mortgagee for the solicitor and client costs. At one point, Allen, J. A. states:[65]

> " (2) That while there may be no privity of contract existing between the mortgagee and the transferee which would enable the mortgagee to recover solicitor-and-client costs from the transferee in a personal action on the covenant, there is no doubt that the mortgagee is entitled to add them to the other moneys owing under the mortgage and that they constitute a charge upon the mortgaged land. . . ."

And he states further:[66]

> " I have indicated that there is a question still to be resolved as to the plaintiff's right to recover these costs in a personal action against the transferee on the covenant for payment contained in the mortgage, but as this action does not come within that category it is necessary for me to deal with this question on this appeal."

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[65] Id. at 22.

[66] Id. at 23.

In any event, the law in Alberta is settled that the transferee is liable to the mortgagee for the payment of solicitor and client costs incurred by the mortgagee in collection of arrears and foreclosure proceedings--such costs being treated as part of the principal sum secured by the mortgage and thus within the scope of the section 61 covenant.

In the later Saskatchewan case of Central Mortgage and Housing Corporation v. Johnson and Chalazan,[67] the Court of Appeal reached the same result. Culliton, C. J. S. stated:[68]

> " In Manufacturers' Life Insur. Co. v. Independent Investment Co. Ltd. et al. 54 B.C.R. 5, [19392 4 D.L.R. 811, Manson, J., of the British Columbia Supreme Court, held that a mortgagee is entitled to tax the costs of foreclosure against the mortgagor on a solicitor-and-client basis, particularly where the mortgage itself so provides.
>
> The Alberta Appellate Division in CMHC v. Conaty (1967) 59 W.W.R. 11, 61 D.L.R. (2d) 97, was faced with the same problem that is raised in this appeal, as the mortgage there considered contained a clause identical to the clause in the mortgage in this case, which I have already quoted. Allen, J. A.,in delivering the majority judgment of the Court, after a careful review of the relevant authorities, said at p. 20:
>
> > "It seems to me that I must therefore hold that in an action against the original mortgagor the mortgagee in this case would have been entitled to add to the amount secured by the mortgage, fair and reasonable legal

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[67] [1917] 5 W.W.R. 163.

[68] Id. at 167-168.

> costs incurred by him as between solicitor and client in exercising or enforcing or attempting to enforce his rights under the mortgage and in connection with the collection of the mortgage arrears, and it is admitted that the solicitor-and-client charges involved in this matter were so incurred and are fair and reasonable.'

Allen, J. A. then went on to hold that costs on a solicitor-and-client basis could be charged by the mortgagee not only against the original mortgagor, but against his transferee as well, a conclusion with which I respectfully agree."

III. ANALOGOUS PROVISIONS IN OTHER TORRENS JURISDICTIONS

A. Saskatchewan

The Lands Titles Act ss. 77(2) and 78 provide:[69]

"77.(2) Except as provided in any other Act, in every instrument transferring land for which a certificate of title has been granted subject to mortgage there shall be implied a covenant by the transferee with the transferor that the transferee will pay the principal money, interest, annuity or rent charge secured by the mortgage at the rate and at the time specified in the instrument creating the same, and will indemnify and keep harmless the transferor from and against the principal sum or other moneys secured by the instrument and from and against the liability in respect of any of the covenants therein contained or under this Act implied on the part of the transferor.

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[69] R.S.S. 1965, c.115.

> 78.(1) Every covenant and power, declared to be implied in any instrument by virtue of this Act, may be negatived or modified by express declaration in the instrument.
>
> (2) Every such implied covenant shall have the same force and effect, and be enforced in the same manner as if it had been set out at length in the transfer or other instrument.
>
> (3) When a transfer or other instrument in accordance with this Act is executed by more parties than one, such covenants as are by this Act to be implied in instruments of a like nature shall be construed to be several and not to bind the parties jointly."

Section 63, originally passed in 1906, as amended in 1909[70] to include the transferee's implied covenant with the transferor "and so long as such transferee shall remain the registered owner with the mortgagee or encumbrance." In Montreal Trust Company v. Boggs and Beresford, Lamont, J. stated:[71]

> " Section 63 of the Land Titles Act, as originally passed, did not contain the words "with the transferor and so long as such transferee shall remain the registered owner with the mortgagee or incumbrancer." These words were added by sec. 5 of Ch. 20 of the statutes of 1909. The object of adding these words, in my opinion, was to give the mortgagee the right to proceed against the purchaser directly, and thus avoid the necessity of getting an assignment of his right of indemnity from the mortgagor, who might be dead or out of the country at the time the mortgagee desired to commence proceedings in respect of the mortgage. The statute was not,

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[70] S.S. 1909, c.20, s.5.

[71] (1915) 31 W.L.R. 914 at 916-917.

> in my opinion, in any way intended a compel a transferee of mortgaged land to pay off the mortgage where, apart from the statute, equity would not have compelled him to indemnify his vendor. A mortgagee, in advancing money upon a mortgage, looks for his security to the mortgaged land and the covenant of the mortgagor. The statute was not intended to increase that security, but, where the mortgagor has sold the mortgaged premises, and the purchaser has assumed the mortgage, or retained in his possession an amount of purchase money equivalent thereto, he is now, by statute, compelled to appropriate that purchase money to the mortgage; just as formerly he was compelled to hand it over to the mortgagor if the mortgagor was compelled to pay the mortgagee."

The section was re-enacted in 1917 without the direct covenant with the mortgagee and has remained in substantially its present form.

B. Manitoba

The Real Property Act, ss. 75 and 79 provide:[72]

> "75. In every instrument transferring land for which a certificate of title has been issued subject to a mortgage or encumbrance, there shall be implied, unless otherwise expressed, the following covenant by the transferee both with the transferor and the mortgagee, that is to say: That the transferee will pay the principal money, interest, annuity, or rent charge secured by the

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[72] R.S.M. 1970, c. R-30.

> mortgage or encumbrance, at the rate and at the time specified in the instrument creating it, and will indemnify and keep harmless the transferor from and against the principal sum or other moneys secured thereby, and from and against liability in respect of any of the covenants therein contained or, under this Act, implied on the part of the transferor.
>
> 79. (1) Every covenant and power, declared to be implied in an instrument under this Act, may be negatived or modified by express declaration in the instrument or by endorsement thereon.
>
> (2) In any action for an alleged breach of such a covenant, the covenant shall be specified, and it shall be alleged that the party against whom the action is brought did so covenant.
>
> (3) Every implied covenant has the same force and effect, and may be enforced in the same manner, as if it had been set out at length in the instrument.
>
> (4) Where a memorandum of transfer, or other instrument, in accordance with this Act, is executed by more parties than one, the covenants implied therein shall be construed to be several and not to bind the parties jointly."

The transferee's direct covenant with the mortgagee was enacted in 1968.[73]

C. Federal

The Land Titles Act, section 69 provides:[74]

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[73] S.M. 1968, c.54, s.42.

[74] R.S.C. 1970, c.L-4.

> "69. In every instrument transferring land, for which a certificate of title has been granted, subject to mortgage or encumbrance, there shall be implied the covenant by the transferee, that the transferee will pay the principal money, interest, annuity or rent charge secured by the mortgage or encumbrance, at the rate and at the time specified in the instrument creating the same, and will indemnify and keep harmless the transferor from and against the principal sum or other moneys secured by the instrument creating such mortgage or encumbrance, and from and against the liability in respect of any covenant therein contained or under this Act implied, on the part of the transferor."

Although the section does not expressly state with whom the covenant is implied in the first part, in the latter part it is stated that the transferee will "indemnify and keep harmless the transferor" and presumably, therefore, is restricted to the transferor.

D. New Zealand

The Land Transfer Act, section 96 provides:[75]

> "96. (1) In every transfer of land subject to a mortgage there shall be implied a covenant on the part of the transferee to and with the transferor to pay the interest or other payments thereafter to become due by virtue of that mortgage at the time and in the manner herein specified for payment thereof, and to pay the principal sum when and as the same becomes due, and to keep harmless and indemnified

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[75] 1952 (as amended by section 10 of the Land Transfer Amendment Act, 1966).

> the transferor in respect of all such payments, and in respect of all liability on account "of the future" observance of the covenants and conditions on the part of the transferor in the mortgage express or implied.
>
> (2) Nothing in this section shall render an executor or administrator or trustee personally liable in respect of the estate of a deceased person or in respect of the property subject to a trust, as the case may be, except to the extent of the property under his control as such executor or administrator or trustee:
>
> Provided that this subsection shall not apply unless before the execution of the transfer, or, in the case of a transfer executed for the purpose of carrying into effect a contract of sale and purchase between the parties, before the execution of the contract by the transferor, the transferor receives from the transferee or some person acting in his behalf notice in writing of the capacity in which the transferee is acquiring the land."

Subsection (2) is, in effect, a statement of the common law rule that the transferor must have notice that the transferee is taking as trustee only in order that the implied covenant of indemnity is negatived.[76]

E. Australia

(i) Victoria

The Transfer of Land Act, 1958, subsection 46 (2)

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[76] See Superior Builders Ltd. v. Scott and Shore [1937] 2 W.W.R. 274 (Man. C.A.).

provides:

> "46. (2) In every such transfer of land which is subject to a mortgage or annuity there shall be implied a covenant with the transferor by the transferee binding the latter to pay the interest secured by the mortgage at the rate and times and in the manner specified in the mortgage, or to pay the annuity at the times and in the manner specified in the instrument of charge, and in the case of land subject to a mortgage to indemnify the transferor against all liability in respect of the principal sum secured by the mortgage and any of the covenants therein contained or by this Act declared to be implied therein on the part of the transferor."

(ii) New South Wales

The Real Property Act, sections 76 and 80 provide:[77]

> "76. In every instrument transferring an estate or interest in land under the provisions of this Act, subject to mortgage or encumbrance, there shall be implied the following covenant by the transferee, that is to say, that such transferee will pay the interest, or annuity, or rent-charge secured by such mortgage or encumbrance after the rate and at the times specified in the instrument creating the same, and will indemnify and keep harmless the transferor from and against the principal sum secured by such instrument, and from and against all liability in

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[77] 1900 (as amended to 1956).

respect of any of the covenants therein contained, or by this Act implied on the part of the transferor.

80. (1) Every covenant and power to be implied in any instrument by virtue of this Act may be negatived or modified by express declaration in the instrument or endorsed thereon.

(2) In any declaration in an action for a supposed breach of any such covenant, the covenant alleged to be broken may be set forth, and it shall be lawful to allege that the party against whom such action is brought did so covenant precisely in the same manner as if such covenant had been expressed in words in such memorandum of transfer or other instrument, any law or practice to the contrary notwithstanding.

(3) Every such implied covenant shall have the same force and effect, and be enforced in the same manner as if it had been set out at length in such instruments."

Baalman provides:[78]

"At common law the purchaser of an equity of redemption cannot be sued under the covenant to repay the principal sum, because he was not a party to the covenant. There is no privity of contract between him and the mortgagee. The R.P. Act does not alter that position. Section 76 implies a covenant in the instrument which transfers the onerated land, but it is a covenant with "the transferor," who may or may not be the original mortgagor or encumbrancer. The covenant is to indemnify and keep harmless "the transferor." If the transferor was personally liable as a party to the mortgage or encumbrance he will be indemnified. If

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[78]Baalman, J., The Torrens System in New South Wales, Law Book Co. of Australasia Pty. Ltd., 1951 at 292.

he was not personally liable, he will not need to be indemnified, except insofar as he may have become liable under the indemnity which he had impliedly given pursuant to s.76, when he became a transferee."

(iii) Queensland

The Real Property Act, section 68 provides:[79]

"68. In every instrument transferring an estate or interest in land under the provisions of this Act subject to a bill of mortgage or a bill of encumbrance there shall be implied the following covenant by the transferee of such estate or interest that is to say

That he will pay the interest or annuity secured by such bill of mortgage or bill of encumbrance after the note and at the times therein mentioned and will indemnify and keep harmless the transferor from and against the principal sum secured by such bill of mortgage or bill of encumbrance and from and against all liability in respect of any of the covenants therein contained or by this Act declared to be implied on the part of the transferor.

Section 76 provides:

"76. Every covenant and power to be implied in any instrument by virtue of this Act may be negatived or modified by express declaration contained in the instrument or endorsed thereon."

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[79] 1861 (as amended to 1963).

IV. GENERAL CONSIDERATIONS

This section of the memorandum will attempt to briefly highlight those areas deserving of consideration.

It has been shown that the purpose of section 61 is two-fold. The transferee's implied covenant of indemnity with the transferor is merely declaratory of the position at common law. The transferee's implied covenant with the mortgagee serves the purpose of removing the procedural difficulty that confronted the mortgagee at common law, namely that of requiring an assignment of the transferor's rights before being able to sue the transferee for payment of the amount due under the mortgage.

A. Repeal or Rentention of Section 61

There would, of course, be no basis for the repeal of the transferee's statutory implied covenant of indemnity since it is merely declaratory of the common law. As to the transferee's statutory implied covenant with the mortgagee, it has been shown that it does not increase the security of the mortgage but, rather, merely removes the existing common law procedural difficulty. The case law indicates that the covenant can be negatived, as at common law, by evidence of circumstances which would render it inequitable to be enforced.

B. The Effect of Section 61

Section 61 gives the mortgagee two separate sources to look to for payment. Further, once a transferee becomes directly liable to the mortgagee by virtue of the

statutory implied covenant, he remains so even after he has re-transferred the property to another thereby giving the mortgagee even further sources to look to. Mention should be made at this point of the former Saskatchewan provision limiting the transferee's direct liability to the mortgagee only so long as he remained registered owner of the property. It is submitted that there appears to be no reason why a transferee's liability should be so limited at the expense of the mortgagee.

It should also be pointed out that today a mortgage document may provide that the mortgagor cannot sell the property without the mortgagor's consent and upon the sale, the whole amount of the balance of the mortgage accelerates and becomes immediately due and owing. The mortgagee will then require the transferee to enter into an assumption of mortgage agreement. The result is that section 61 becomes inapplicable since the transferee then becomes directly liable to the mortgagee as an original mortgagor.

C. The Scope of Section 61

It has been shown that the transferee is directly liable to the mortgagee for the payment of solicitor and client costs incurred by the mortgagee in collection of arrears and foreclosure proceedings--such costs being treated as part of the principal sum secured by the mortgage and thus within the scope of the transferee's implied covenant. This, in effect, renders the scope of the transferee's direct liability to the mortgagee very broad. If the scope of such liability is subsequently determined to require statutory restrictions, the section could be re-worded to limit the transferee's liability to, for example, the principal money (the scope of which could be expressly defined), interest, insurance and taxes. It is perhaps

questionable, however, whether or not such liability should be limited if any additional charges could be recovered against the original mortgagor who, in turn, could third-party the transferee for indemnification thereby creating the circuity of procedure the section sought to remove. Perhaps a statutory prohibition of the exaction of certain costs altogether is required as was found in former The Vendors' and Mortgagees' Costs Exaction Act.

D. Negation of the Implied Covenant

It has been shown that despite the apparently clear provisions of section 62 (1) it is possible to negate the transferee's implied covenant with the transferor (and therefore with the mortgagee) otherwise than by express declaration in the transfer. [illegible] the two competing policies, namely the protection of the transferee by maintenance of the common law position as to negation versus protection of the mortgagee through the requirement of express notice of negation in the transfer, it is clear that the courts have, quite properly it is submitted, favoured the former.

V. CONCLUSION

It is the author's opinion that section 61, in view of its effect and application, as shown by case law, should be retained in principle with respect to the transferee's implied covenant with both the transferor and the mortgagee. As to the scope of the transferee's direct liability to the mortgagee, however, it is submitted that the section be re-worded or a new enactment passed so as to limit it to the payment of the principal, interest, insurance and taxes thereby removing the effect of CMHC v. Conaty, supra.

In closing, it is perhaps appropriate to refer back to the words of Clarry, M. in Home Investment and Savings Ass'n. v. Middleditch:[80]

> "I venture to say that not one in ten registered transferees knows that he is personally liable to the mortgagee for payment of the mortgage when he registers his transfer. . . ."

Although his statement is perhaps not so accurate today, it still bears relevance especially in light of the present scope of the transferee's liability. Public awareness of such liability is to be encouraged.

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[80](1914) 7 W.W.R. 1202 (Alta. S.C.) at 1203.

VI. APPENDIX

In light of the large number of reported cases dealing with section 61, I have attached the relevant extracts therefrom in chronological order for each province.

APPENDIX A

ALBERTA CASES

Glenn v. Scott (1898) 2 Terr. L.R. 339

Transferee's implied covenant to indemnify transferor-mortgagor under section 69 of The Territories Real Property Act is a close in action assignable to the mortgagee so as to create the privity required to allow the mortgagee to sue the transferee directly on the covenant.

Short v. Graham (1908) 7 W.L.R. 787 (Alta. S.C.).

The common law position and the effect of section 61 (per Stuart, J. at 789-790).

"This section is new, and was not contained in the Dominion Act of 1894. In proceeding to construe it and to apply it to the facts of the case submitted, we should, I think, look first at the common law applicable to the circumstances as it existed prior to the enactment. Where property was sold subject to mortgage, the purchaser was held in equity to indemnify the vendor against his personal liability to the mortgagee under the covenant to pay contained in the mortgage [the doctrine of Waring v. Ward (1802) 32 E.R. 136]. The only way by which the mortgagee could avail himself of his equitable obligation was by obtaining an assignment of his rights by the vendor to himself, and then, having obtained this, he could sue the purchaser for personal judgment: Maloney v. Campbell 28 S.C.R. 228; . . . it would simplify the remedy for the recovery of the mortgage money, giving a direct right of suit between the party to receive and the proper party to

pay, and would create the privity which alone was wanting to make such a suit maintainable.

This being the state of the law before the passing of the section of the Act in question, it was evident that, unless the mortgagee was fortunate enough to be able to obtain such an assignment of the vendor's equitable right of indemnity, he could not sue the purchaser for the money due on the mortgage. The vendor might be unwilling or he might be dead or undiscoverable. In such case the mortgagee could do nothing against the purchaser except take the land itself. In my opinion, the section in question was passed to relieve the mortgagee from this difficulty, and, as said by Maclennan, J. A. [in Maloney v. Campbell in the Court below, 24 A.R. 224], to "give a direct right of suit between the party to receive and the proper party to pay," and to "create the privity which alone was wanting to make such a suit maintainable," this being done by the mere operation of the statute, instead of, as formerly, by means of the vendor's assignment of his right."

The applicability of the section where the title transferred as security for an advance only and not for purposes of purchase and sale even though transfer absolute in form (per Stuart, J. at 790):

"It is to be observed that the covenant is declared to be implied" in every instrument transferring land" etc. Now, whatever else a certificate of title may be, it is certainly not "an instrument transferring land." I cannot, therefore, see the point in the contention of the plaintiff's counsel that we cannot go behind the certificate of title, because we must go behind the it to reach the instrument in which the covenant is to be implied. The certificate of title merely expresses and certifies that a certain legal

result has followed from the execution and registration of the transfer, namely, that the legal estate in the property has passed to the transferee. . . . I am of the opinion, therefore, that evidence would have been admissible upon a trial to show that the transfer was given by way of security only. It is admitted that such is the fact, and, indeed, that, although it was intended as a security, it never really acquired even that character, because no money was ever in fact advanced. The question therefore is: Did the instrument ever transfer any interest in the land at all? In my opinion, it did not. The whole beneficial interest in the land, or at least in the equity which McDonald purported to transfer, always remained in McDonald himself, and never passed to the defendants at all. In such a case could McDonald, before the statute, have called upon the defendants to pay the mortgage moneys and brought suit to force them to do so, and could he have assigned his right to a mortgagee? Of course he could not have done so. And it was not contended or suggested on the argument that McDonald could have himself taken advantage of the statute while the legal title stood in the name of the defendants, and have compelled them to pay the plaintiff his money. Yet the statute says that the covenant is to be implied in the vendor's favour as well as in favour of the mortgagee. This in itself is sufficient to show that it is impossible to apply the statute in every case in which it is literally applicable. In my view of the case, I doubt very much whether the transfer should be considered as an instrument transferring land, within the meaning of the statute at all, because, as a matter of fact, it did not transfer any interest in the land whatever, but only the bare legal estate. It is perhaps not necessary for me to decide what would have been the position had an advance really been made by the defendants upon the security of the transfer so as to give them for the time being a real

beneficial interest, but I venture also to doubt very much whether, even in such a case, the statute could be held to apply. It seems to me that the purpose of the statute is very plain. It is clearly intended to remedy that difficulty of procedure in which a mortgagee formerly found himself, and which I have already pointed out.

I am very strongly of the opinion that the application of the statute should, therefore, be restricted entirely to the case where there has been a real purchase by the transferee and a complete parting with all his interest on the part of the transferor, and that whenever it is impossible for the vendor, the transferor, to take advantage of the covenant declared to be in his favour, that is, wherever he would have had, before the statute, no right against the purchaser capable of assignment to the mortgagee, which is admittedly the case here, then the covenant should not be implied in favour of the mortgagee either. I am speaking now, of course, without regard to the possible exception in the case of an express agreement by the vendor to waive his right of indemnity. The law formerly was that the purchaser, taking finally the whole interest in property subject to an encumbrance, was bound to pay off that encumbrance and could be sued by the vendor and made to pay the money, not to the vendor himself but to the mortgagee; and I think the statute was merely intended to make that obligation enforceable by the mortgagee directly against the purchaser, without any circuity of procedure. The statute was surely intended merely to be beneficial, to aid in the enforcement of just rights, and not to work such an injustice as would certainly be involved in applying it to the circumstances of this case."

Home Investment & Savings Ass'n. v. Middleditch et al (1914) 1 W.W.R. 1202 (Alta. S.C.).

Where an action is brought against a transferee of registered land subject to a mortgage and personal judgment is sought against him under section 61 there should be an express claim setting forth that such transferee is so liable, as the defendant sought to be charged ought to be distinctly informed as to how and by what authority he is alleged to be held personally liable. The Saskatchewan case of Colonial Investment & Loan Co. v. Foisie 1 W.W.R. 397 followed. Per Clarry, M. at 1203:

> "I venture to say that not one in ten registered transferees knows that he is personnaly liable to the mortgagee for payment of the mortgage when he registers his transfer, and I am of the opinion that when personal judgment is claimed against a transferee, under said statutory covenant, such liability should be specifically set forth in the statement of claim in order that he may know on what grounds such liability arises.
>
> In the case before me there is nothing but the bold statement that defendant Rogers is the registered owner, which I believe is sufficient."

Evans, Johnstone & Naismith v. Ashcroft & The British Canadian Trust Co. (1915) 8 W.W.R. 899 (Alta. S.C.).

When the transferee of mortgaged property takes the property as a mere trustee, he cannot be held to covenant impliedly with the mortgagee that he will pay the principal money and interest secured by the mortgage, notwithstanding section 61. Short v. Graham (1908) 7 W.L.R. (Alta S.C.) referred to with approval. Per McCarthy, J. at 901:

> "There is no doubt on the facts of this case that it was not intended that The British Canadian Trust Co. should take any beneficial interest in the lands. The Company is not in any sense a purchaser of the lands but is a trustee for the purpose of carrying out the trusts set out in the declaration. Undoubtedly the transfer to the Company was given for the reason that under the system of land titles in force in this province the only way by which the trustee could become possessed of the legal estate was by transfer under The Land Titles Act. Unless [section 61] by plain and unequivocal terms requires that the Trust Co. be held liable to pay the mortgage moneys, the Company should not, in reason and justice, be required to pay. One can hardly conceive of a stronger case for holding that the action does not apply, than the present one, and I cannot think that it was ever intended by the Legislature that where a person takes a transfer of land subject to a mortgage, under such circumstances that the transferee takes no beneficial interest in the land, and under an arrangement which clearly indicates that the transferor has no right to compel the payment of the mortgage moneys by the transferee, the transferee is bound to pay off the mortgage. To my mind the section does no more than to make it possible for a mortgagee, without circuity of action, to compel the payment of the mortgage moneys by the transferee when a transfer of the lands has been made under circumstances under which the transferee is required to indemnify the mortgagor."

The Great West Lumber Co. Ltd. v. Murrin and Gray (1916) 11 A.L.R. 173 (Alta. S.C.A.D.).

The legislative history and effect of section 61 per Stuart, J. at 180-182:

In *The Land Titles Act* of 1894, sec. 52 of the present Act appeared as sec. 65. From 1894 to 1906, when the present Act was passed by the provincial legislature, the section read as follows:

"In every instrument transferring land for which a certificate of title has been granted subject to mortgage or encumbrance there shall be implied the following covenant by the transferee: that the transferee will pay the principal money interest, annuity or rent charge secured by the mortgage or encumbrance after the rate and at the time specified in the instrument creating the same and will indemnify and keep harmless the transferrer from and against the principal sum or other moneys secured by such instrument and from and against the liability in respect of any of the covenants therein contained or under this Act implied on the part of the transferrer."

This enactment was obviously merely declaratory. The rule of equity had always been such in the case of a grant of land subject to an encumbrance. Unless a contrary intention appeared the grantee was bound to indemnify the grantor against his liability, under his covenant, to the mortgagee. This right in the grantor to force the grantee to pay the mortgage debt was assignable by the grantor and the assignment could be made even before he had suffered damage by being himself obliged to pay. *Maloney v. Campbell*, 28 S.C.R. 228. But any such assignment was of course subject to all equities existing or arising as between the grantor and the grantee prior to notice of the assignment. There was nothing in the statutes of 1894 which impaired these very just principles of law.

But the legislature of Alberta in 1906 when in its first session it proceeded to pass a *Land Titles Act* ventured to attempt an improvement upon the section above quoted. After the words "there shall be implied the following covenant by the transferee" there were inserted the words "both with the transferrer *and the mortgagee*."

What was ventured upon was, therefore, the creation by statute of a privity of contract between parties who had otherwise no privity with each other at all, who had not, indeed, any dealings with each other at all of any kind. More than this, the statute created in favour of the mortgagee a species of security, in the shape of the covenant of the transferee, which he had not relied upon at all when advancing the money and which was then not even in existence.

Under the law as it stood before the amendment, the transferee, the purchaser of the land, could rely upon any agreement or equity existing as between himself and the transferrer

> if the mortgagee should secure an assignment of the transferrer's rights and attempt to enforce them. In my opinion any statute which appears to alter this common law right—really an equitable right, but I speak of common law as opposed to statute law,—ought to be very carefully and exactly construed. I do not mean that the Court should, on account of its view of the injustice or bad policy of a statute which changes the common law, attempt to whittle down its plain meaning and so override the expressed will of the legislature. But certainly before allowing a purchaser to be deprived of the rights which the ordinary law gives him, the Court ought to be satisfied that the words of the statute do really and inexitably deprive him of those rights. Though it may seem that it was the intention to do so, yet, if the words of the statute, taken in their ordinary meaning without straining either one way or the other, do not effect that result then clearly the rights of the purchaser should stand as before.
>
> For myself I doubt very much if the legislature intended to create a new absolute right in the mortgagee which could not be affected in any way at all by any agreement or contrary evident intention as between the parties to the sale and transfer of the land.

Where there is an agreement, even though not in writing, between the transferor and the transferee of mortgaged property that the transferor is not to call upon the purchaser to indemnify him against payment of the mortgage money, the covenant implied by [section 61] between the mortgagor-transferor and transferee is rebutted. As a result, the mortgagee's right of direct suit against the transferee is lost since it depends on the existence of the transferee's covenant with the transferor. Per Ives, J. at 174:

> Sec. 52 of *The Land Titles Act* establishes by implication the relationship of mortgagor and mortgagee between the mortgagee and the purchaser of mortgaged lands. As the relationship is but an implied one it may be rebutted by evidence that one of the terms of the purchase was that the liability, presumed by virtue of the statute, would not be assumed by the purchaser. Where, therefore, the agreement between the mortgagor vendor and his purchaser was such that the vendor could not call upon his purchaser to indemnify him against payment of the mortgage money, it would seem clear that the implied relationship under sec. 52 between mortgagor and purchaser was rebutted.

Per Beck, J. (who dissented on the facts) at 189-190:

> In my opinion the framers of *The Land Titles Act* intended to do nothing more than to *declare*, with regard to the relationship between a purchaser of mortgaged property and his vendor, the then existing law, namely, that in such cases there was an implied covenant of indemnity, (Mr. Justice Stuart seems to have been of this opinion in *Short v. Graham*, 7 W.L.R. 787); that inasmuch as it was implied it might be rebutted; and that in addition to this, in order to avoid a circuity of action, they enacted what was not then the law, that the mortgagee might look to the purchaser directly; still leaving however the mortgagee dependent for his right of direct remedy on the existence of the implied covenant from the purchaser to the mortgagor.
>
> In my opinion sec. 131, which provides that an implied covenant may be negatived or modified by express declaration *in the instrument*, does not exclude the admission of other evidence to rebut the implication or to show that it does not arise.
>
> I cannot refrain from expressing the opinion that the whole provision, both that declaring an implied covenant in favour of the transferrer as well as that in favour of the mortgagee is ill-advised legislation. It would have been much better to have left the matter to be settled in each case according to the principles of equity. How, for instance, is the statutory implied covenant to be adapted to a case of a purchaser of a portion of the land? Is he liable at all? Is he liable for a portion of the mortgaged moneys? If so, is the portion to be based upon the proportion of quantity or value of the proportion purchased? Again our statute makes the implied covenant applicable to the case not only of a mortgage but of an encumbrance, but an encumbrance under the Act is a special form of security which does not ordinarily contain any covenant for payment and therefore there is no personal liability on the part of the encumbrancer; why should the purchaser become personally liable where his vendor was not so liable? The South-Australian Act and the Saskatchewan Act confines the liability under the implied covenant to the period during which the purchaser is the registered owner; does this mean that the purchaser may relieve himself of all liability whatever by transferring the land or that he is liable only for such sums as mature during his ownership? The statutory provision has created innumerable difficulties; the application of the equitable principles to the facts of any particular case were comparatively easy as applicable between the vendor and purchaser, a simpler method of avoiding circuity of action so as to enable the mortgagee to look to the purchaser directly in a proper case might have been intended. The whole section, in my humble opinion, ought to be repealed at the first opportunity. Such a provision was not thought proper in the English *Land Transfer Acts* 1875 and 1897. *Hogg's Ownership and Encumbrance of Registered Land*, p. 177.

Per Stuart, J.:

> A mortgagee is not given the right by sections [61 and 62] to enforce the covenant implied by section 61 against a transferee unless the transfer is signed by the transferee and is either under seal or with a consideration moving from the mortgagee sufficient to give the agreement a binding force and effect, and even then the agreement will operate in the same way to no greater extent than if it had been set forth at length in the transfer.

At 182-187:

> "For myself I doubt very much if the legislature intended to create a new absolute right in the mortgagee which could not be affected in anyway at all by an agreement or contrary evident intention as between the parties to the sale and transfer of land.

But before we come to that point, let us examine the words of the section. First, the word "covenant" no doubt must be taken in its general meaning of "agreement" (see *Stroud Jud. Dict.*, vol. 1, p. 429) because the form of transfer provided by the Act does not mention the necessity of a seal and only refers to the transfer as being "signed" but not being "sealed." Again though there is no mention of a seal in the form prescribed for a mortgage the word "covenant" appears in the form.

In the next place it is to be observed that the form of transfer given is not framed as a deed or agreement *inter partes*. No doubt, as the transferee is mentioned in the document and takes under it he may be treated as a party to it although he is not required to sign it. But at any rate there is nothing in the form to suggest a mortgagee as being a party to it. As a matter of fact he is never a party, in the ordinary case at least, and in the present instance was not a party to the transfer. Nor is he in any way referred to therein. Nevertheless the statute says that in the transfer there shall be implied a covenant by the transferee, who does not sign it, with the mortgagee, who neither signs it nor, at least in this present case, is mentioned in it.

Now, in the case of an ordinary contract, deed, or agreement, if a party to it, even though he signs it, expressly covenants or agrees with a person not a party to it that he will do a certain thing the latter person cannot sue upon the covenant or agreement. In *Anson on Contracts*, 13th ed., p. 267, it is said: "A party cannot acquire rights under a contract to which he is not a party." And *Leake*, 6th ed., p. 296, says: "A contract can create no right or liability in a person who is not a party to it."

But it may no doubt be answered, and I think it is, perhaps, quite a valid answer, that the effect of the section is to make the mortgagee a party by implication. He becomes impliedly mentioned as one of the persons with whom the transferee impliedly agrees that he will pay the money. And while the transferee does not sign the transfer, I suppose it might be said, (although as to this one naturally has more hesitation) that the effect of the statute is that he has impliedly signed it. There is here of course a great deal of implication. It is here, however, that we are brought to the words of sec. 131 which reads as follows:

"Every covenant and power declared to be implied in any instrument by virtue of this Act may be negatived or modified by express declaration in the instrument; and in any action for a supposed breach of any such covenant the covenant alleged to be broken may be set forth and it shall be lawful to allege that the party against whom the action is brought did so covenant, precisely in the same manner as if the covenant had been expressed in words in the transfer or other instrument, any law or practice to the contrary notwithstanding; and every such implied covenant shall have the same force and effect and be enforced in the same manner *as if it had been set out at length in the transfer or other instrument*; and when any transfer or other instrument in accordance with this Act is executed by more parties than one such covenants as are by this Act to be implied in instruments of a like nature shall be construed to be several and not to bind the parties jointly."

I leave aside the first clause at present because it affects a question to be referred to hereafter. Now, it seems to me to be clear that the succeeding words cannot be given any greater effect than this, *viz.*: the transfer is to be treated in a Court of law exactly as if it had contained the words "and I (the transferee) agree and covenant with one John Smith, who is a mortgagee of the property hereby transferred, that I will pay him the mortgage moneys." Whether, indeed, it is proper to go so far may be doubtful because if such words

were actually in the transfer it would not be possible to vary their effect by oral testimony except in case of fraud or mistake and one of the important points in this case, which however I think unnecessary to decide, is just exactly whether the implied covenant can be negatived by evidence of that kind. But at any rate I see nothing in sec. 131 which carries the matter further than would be the case if the words I have suggested were really in the transfer.

It must be remembered that the form of transfer does not permit of its being drawn as a deed *inter partes* so that John Smith could be called "the said party of the third part." True the form does provide for a memorandum of the encumbrances to which the estate of the registered owner, the transferrer, is subject and in this way the mortgagee ought to be mentioned at least by reference though generally as in the present instance, he is not.

We see here again an example of the difficulties inevitably arising when an attempt is made to ingraft upon a new statutory system of titles and conveyancing the rules which grew up under the common law system. We have a covenant by a person who does not sign the document in favour of a person who is not a party to it.

I do not think the Court is entitled to say that the real meaning and effect of the sections is that the transferee is bound in law to pay the mortgagee and that the latter may have an action of debt against him. The legislature did not adopt that simple course. If it had, it is certain that the well known phrase "unless a contrary intention appears" would have been inserted.

Instead of doing that, a pure statutory covenant or agreement is created, evidently, it seems to me, with the intention that it should be subject to the same rules of law as any other stipulation or agreement. The statute does not say that the implied covenant shall be absolutely binding at law no matter whether it is under seal or not and no matter whether there is consideration for it or not. Sec. 131 merely says that it "shall have the same force and effect and be enforced in the same manner as if it had been set out at length in the transfer or other instrument." It seems to me that this clearly means that it is not to have any greater force and effect than it would have if it were set out at length in the transfer. It is to have exactly the same force and effect and a greater effect or a greater binding force is not the same effect or the same binding force. For this reason I am unable to conclude that the word "covenant" in sec. 52 is to be read as "binding covenant" because that would be giving the covenant certainly in instances a greater force and effect than it would have if it had been set out at length in the transfer.

The proper enquiry therefore is, what remedy would the mortgagee have had if the so-called implied covenant had been set forth at length in the transfer and there had been no such provision in sec. 52 at all? Whatever remedy he would have had in such a case I think secs. 52 and 131 will give him but clearly I think they will give him no more.

If a mortgagee had attempted to proceed upon the strength of such words actually written in the transfer in my opinion he could not have succeeded. There was no consideration moving from the mortgagee for any such agreement. The agreement was not under seal. If recourse is again had here to the words "implied covenant" so as to suggest that a seal is *implicdly* there then I think that is going too far. The form plainly and with the evident purpose of simplicity omits all reference to a seal and I cannot bring myself to think that the "implication" is so pregnant a one. The extent of the implication is exactly set forth in sec. 131 and we are not entitled in my opinion to add to it.

But again, the transfer is not signed by the transferee. Could the mortgagee come into Court and sue the transferee upon a document which had not passed between them and one which the transferee had never signed? In my opinion he could not, and the statute gives the transfer no greater force or effect.

It is true that where a grantee accepts a deed and enters into possession he agrees to do what it is stipulated in the deed he should do, although he did not sign the deed, 12 *Cyc.*, p. 555; *Halsbury*, vol. 10, p. 401. But I think this only applies in favour of the person from whom he has himself received and accepted some benefit, *i.e.*, the grantor, and cannot apply in favour of a person who was not actually a party to the transaction at all. And in any case this point would raise the question whether the defendant Gray had really accepted the transfer. It was registered apparently by the transferrer. But I do not think we need to get to that point in the present case.

Then we must observe the concluding words of sec. 131: "And when any transfer or other instrument in accordance with this Act *is executed* by more parties than one such covenants as are by this Act to be implied in instruments of a like nature shall be construed to be several and not to bind the parties jointly." It seems to me to be a fair inference from these words that a person who is to be bound by an implied covenant must be one who had *executed* the transfer. Sup-

pose there were two transferees. Would they be bound jointly or only severally? If they signed the transfer then, aside from the questions of a seal and of consideration, they would be bound severally but if they did not sign it at all what would the position be? The concluding words of sec. 131 do not cover the case. I think the obvious reason of the matter is that they must sign before they are bound at all.

For these reasons I think a mortgagee gains nothing by secs. 52 and 131 unless he has the signature of the transferee and that either under seal or with a consideration moving from himself sufficient to give the agreement a binding force and effect, and that even then the agreement will operate in the same way but to no greater extent than if it had been set forth at length in the transfer.

This is sufficient to justify a dismissal of the appeal. I prefer not to deal with the other question about rebutting the implied agreement by oral testimony because of the difficulty of applying sec. 131. But I think what I have said at least leads to this, that if the mortgagee is a party to the transfer by implication, as he must be to get any advantage from it at all, then he is a party for all purposes and whatever evidence could be adduced as against the vendor, the transferrer, could be adduced against him. Further than this I do not feel it necessary in the present case to go.

The appeal should be dismissed with costs.

BECK, J. (dissenting)—This is an appeal from Ives, J.

The defendant Murrin was never served. The appeal is by the plaintiff against the learned Judge's decision refusing to give judgment against the defendant Gray whom the plaintiff claims is directly and personally liable to it as the transferee of land subject to a mortgage to the plaintiff by reason of the provision of *The Land Titles Act* which reads as follows:

"52. In every instrument transferring land, for which a certificate of title has been granted, subject to mortgage or encumbrance, there shall be implied the following covenant by the transferee both with the transferrer and the mortgagee, [or encumbrancee?] that is to say: That the transferee will pay the principal money, interest, annuity or rent charge secured by the mortgage or encumbrance, after the rate and at the time specified in the instrument creating the same, and will indemnify and keep harmless the transferrer from and against the principal sum or other moneys secured by such instrument and from and against the liability in respect of any of the covenants therein contained or under this Act implied, on the part of the transferrer."

Per Scott, J. (dissenting) (at 179-180):

Sec. 52 of *The Land Titles Act* provides that in every instrument transferring land for which a certificate of title is granted subject to a mortgage, there shall be implied a covenant by the transferee, both with the transferrer and the mortgagee, that the transferee will pay the money secured by the mortgage and will indemnify and keep harmless the transferrer from and against his liability in respect thereof.

Sec. 131 provides that every covenant and power declared to be implied in any instrument by virtue of the Act may be negatived or modified by express declaration in the instrument.

I here point out that sec. 69 of *The Land Titles Act* (R.S.C. ch. 110) which corresponds with sec. 52 of the present Act provided that the implied covenant by the transferee should be with the transferrer alone and that sec. 172 of that Act was identical with sec. 131 of the present Act. Sec. 172 was applicable and was intended to be applicable only to cases where the parties to the instrument were the only parties interested in the implied covenant, but I doubt whether sec. 131 should be held to be applicable to cases where a person who is not a party to the instrument is interested in the covenant as it appears to me that it would be unreasonable to hold that the right which the statute gives him to such a covenant should be nullified, or the covenant negatived by others without his consent.

Even if sec. 131 should be held to be applicable to sec. 52 as amended and that the vendor and purchaser can still deprive a mortgagee of the remedy given him by sec. 52 I think that the right to negative the covenant should be exercised only in the manner provided by the section. Surely a mortgagee is entitled to be placed in a position to enable him to ascertain with reasonable certainty whether he has a right of action against a purchaser of the mortgaged premises and, if the vendor and purchaser can, by a verbal agreement between them and without such a declaration in the transfer, negative the covenant, the only means which the mortgagee would have of ascertaining with certainty whether the purchaser is liable to him would be by bringing an action against him.

Re Land Titles Act and Re Ronald and Summers (1917) 13 A.L.R. 209 (Alta.S.C.A.D.).

The effect of section 61 (2) (Per Harvey, C. J. at 209-210):

> THE CHIEF JUSTICE.—By virtue of sec. 52 of *The Land Titles Act*, in every instrument transferring land subject to mortgage, there is an implied covenant on the part of the transferee with both the transferrer and the mortgagee that he, the transferee, will pay the mortgage.
>
> "Transfer" is defined in the Act as "the passing of any estate or interest in land under the Act." The provisions of the Act make it clear that the estate passes not by the execution or delivery of the transfer but by its registration. Therefore the implied covenant only comes into existence upon registration, and if a transferee does not wish to assume the burden of the covenant he need only refrain from registering the transfer. This anomaly was met by an amendment to the section in 1916 by which it is provided that when a transferee declines to register a transfer, the transferrer or the mortgagee may by notice call upon the transferee "to show cause why the same should not be registered, and upon the return thereof the Judge may order the registration of the said transfer within a time named or make such further or other order and on such terms as to costs and otherwise as to him shall seem meet."

The fact that a transferee, who has taken no steps to enforce his claim, asserts that he has a right to repudiate the transfer is not a justification within the meaning of section 61(2) for refusing to register the transfer. Where a transferor or mortgagee proceeds under section 61(2) to require the transferee to register his transfer, and the latter alleges that he has good cause for not registering it, he should be required to take within a reasonable time and duly prosecute proper steps to enforce his claim.

The fact that a transferee, who has taken no steps to enforce his claim, asserts that he has a right to repudiate the transfer is not a justification within the meaning of section 61(2) for refusing to register the transfer. Where a transferor or mortgagee proceeds under section 61(2) to require the transferee to register his transfer, and the latter alleges that he has good cause for not registering it, he should be required to take within a reasonable time and duly prosecute proper steps to enforce his claim.

Per Harvey, C. J. (at 210-211):

> "It is clear of course that the power of the Judge must be found within the express words of the statutory provisions, but having regard to the latter portion of the amendment which authorizes the Judge to make such order as to him seems meet, I am of the opinion that it is intended not to be limited to cases where the transferee offers no excuse for his failure to register.
>
> In my opinion the cause which the transferee is called on to show is good cause, in other words, something that really justifies his refusal to register, for the amendment certainly implies that the transferor and the mortgagee have a right to have the transfer registered in the absence of some justification for its non-registration though such a right, without such a provision, would probably not exist, it being a matter for the transferee's consideration only. Now the fact that the respondent claims that he has a right to repudiate, which claim he does nothing to enforce, appears to me not to be justification. . . . In my opinion the Judge has power under the section to direct the registration of the transfer unless the transferee within a reasonable time takes the proper steps to effectively assert his claim. Even the commencement of an action might not be an effective assertion of the claim, for it might not be prosecuted and only be brought for further delay."

Trusts and Gurantee Co. Ltd. v. Stephens et al. [1919] 3 W.W.R. 410 (Alta. S.C.).

The liability of a transferee of mortgaged land under the covenant implied with the mortgagee under section 61 persists even after he has re-transferred to another. Per Walsh, J. (at 411):

> "In my opinion once the liability imposed by sec. [61] has arisen the transferee cannot by his own act put an end to it. The mortgagee is thereby given a right of action against him which persists not only during his ownership of the land but afterwards until his liability is ended by some such thing as would have ended it if his had been an express covenant to pay."

Trusts and Guarantee Co. Ltd. v. Landreville and Singer [1922] 2 W.W.R. 586 (Alta. S.C.A.D.).

A transferee of mortgaged land is personally liable to the mortgagee under the covenant implied by section 61, even though he has not executed the transfer, unless by agreement, express or implied, such implied covenant is modified or negatived. An express covenant between the transferor and the transferee whereby the latter expressly covenanted to pay the mortgage moneys and indemnify the transferor does not prevent the implied covenant in favour of the mortgagee coming into effect.

The position of Stuart, J. in Great West Lbr. Co. v. Murrin and Gray, supra, is altered by the majority (per Stuart, J.):

STUART, J.A.—I think there is no ground for this appeal except the one which was dealt with in *Great West Lumber Co. v. Murrin and Gray*, 11 Alta. L.R. 173, [1917] 1 W.W.R. 945, 32 D.L.R. 485. Upon that point I have not yet seen any real answer to the arguments I presented in that case. But as the majority of the Court have now decided that I was wrong and that the statute means that it shall be implied: (1) That the transfer is under seal (though it is not and the form does not so provide); (2) That the transferee has signed it (though he has not and the form does not so provide); (3) That the mortgagee is a party to the transfer (though he is not and the form does not so provide), in order to support the only implication expressly enacted, viz., that of the presence of a certain clause in the transfer, I, of course, shall dissent no longer and consent but with reluctance to the dismissal of the appeal. The result, of course, is impliedly either to change the whole form of the document or by a very circuitous route to create a statutory debt due from the transferee to the mortgagee. I might ask if the period of limitation would be twenty years as in a specialty? In the words of the brilliant author of the note *Great West Lumber Co. v. Murrin and Gray* in 32 D.L.R. 485, I think there is a splendid chance for the Legislature "to try again." Of course every one agrees as to what the law was before the statute with regard to the various relationships of the mortgagee, the vendor and the vendee. I think it was well settled. And having that in mind it is quite easy to declare what the Legislature meant to say by sec. 52. But that ought not to settle the matter if the language used by the Legislature is not effective for that purpose. The problem is not merely one of previous law but of the interpretation of the statute. And my difficulty was that, in view of sec. 131 and particularly the concluding clause, it was, as I thought, very obvious that the Legislature intended implied covenants to arise only as against parties who had signed the document and in favour of parties to it. But as this does not present itself to the other members of the Court as a difficulty which needs consideration, the law, as far as this Court is concerned, may now be considered settled.

Per Beck, J.:

> The first ground of appeal is in substance that there being no privity of contract between the transferee and the mortgagee the implied covenant does not arise unless the transfer is executed by the transferee.
>
> This ground is based upon some tentative observations made by Stuart, J. in the case just cited. For my part I find myself unable to concur in these observations and while I pointed out that cases as they arise may present many difficulties, yet I think all such difficulties can be decided with justice to all parties concerned, (1) If, (as I there held and still hold,) sec. 52, in declaring an implied covenant on the part of the transferee to pay the mortgage debt, is merely declaring the well-established previously existing implied obligation of the purchaser of an equity of redemption—an obligation implied in equity, but always subject to be modified or negatived by proof of the real intention either by evidence of expressed intention or by evidence of all the facts and circumstances of the transfer; and (2) If, as I also there held and still hold, the existence and effect of the implied covenant in favour of the mortgagee is wholly dependent upon the implied covenant in favour of the transferor.
>
> Another ground of appeal is that there was proved to be an express covenant between the transferor and the transferee whereby the latter expressly covenanted to pay the mortgage moneys and indemnify the transferor and that this express covenant prevented the implied covenant in favour of the ~~transferor~~ [mortgagee] coming into effect. The answer to this objection I think is that the implied covenant stands, except in so far as it is by agreement, express or implied, modified or negatived and the express agreement is to the same effect so far as it goes as the implied covenant and, therefore, does not interfere with it or displace it.

Said section 61, in declaring an implied covenant on the part of the transferee to pay the mortgage debt, is merely declaratory and the existence and effect of the implied covenant in favour of the mortgagee is wholly dependent upon the implied covenant in favour of the transferor (per Beck, J. A.). Per Hyndman, J. A.:

It has been held in several decisions of this Court that whilst *prima facie* a transferee of mortgaged property is directly liable to the mortgagee on the implied covenant, nevertheless the implication or presumption is capable of being negatived or rebutted by evidence showing the exact relationship between the mortgagor and transferee [transferee] and should it appear that where before the statute the mortgagor would have no right to indemnity against the purchaser capable of assignment to the mortgagee, then the statutory implied covenant in favour of the mortgagee is negatived. See *Short v. Graham*, 7 W.L.R. 787; *Evans et al v. Ashcroft and Br. Can. Trust Co.*, 8 W.W.R. 899; *Great West Lumber Co. v. Murrin and Gray*, 11 Alta. L.R. 173, [1917] 1 W.W.R. 945, 32 D.L.R. 485. See also *Br. Can. Loan Co. v. Tear*, 23 O.R. 664; *Assiniboia Land Co. v. Acres*, 9 Sask. L.R. 142, 10 W.W.R. 355, 34 W.L.R. 199.

All that these cases decide is that where an implied covenant *prima facie* exists the same may be negatived or rebutted by facts which show that under the arrangement between the vendor and purchaser of mortgaged lands no obligation existed requiring the purchaser to discharge the mortgage. The object of sec. 52 was no doubt to avoid the circuity of action which would result had it not been so enacted.

It seems to me a very far-fetched argument indeed to say that because an express covenant to pay was entered into as is the case here, that such could have the effect of negativing liability to the mortgagee. On the contrary, I would think it only tends to strengthen the implied covenant and ought to be so treated. It certainly does not rebut it and consequently cannot possibly have the effect contended for.

Clarke, J. A., Scott, C. J. concurring, said that he withheld assent to the proposition that, in the absence of an express declaration in the instrument negativing or modifying the implied covenant created by section 61, such covenant can be negatived or modified so as to affect the mortgagee by an agreement to which he is not a party or that the existence of the implied covenant in favour of the mortgage is dependent upon the implied covenant in favour of the transferor:

> CLARKE, J.A.—I agree with the result and in the main with the reasons for judgment of my brother Beck. I do not at present, however, assent to the proposition that, in the absence of an express declaration in the instrument negativing or modifying the implied covenant created by sec. 52, such covenant can be negatived or modified so as to affect the mortgagee by an agreement to which he is not a party or that the existence of the implied covenant in favour of the mortgagee is dependent upon the implied covenant in favour of the transferor. It is not necessary to decide that point in this action and I reserve it for further consideration when it arises.

Trusts and Guarantee Co. Ltd. v. Monk (1923) 21 A.L.R. 151 (Alta. S.C.A.D.).

A transfer is not "an instrument transferring land" within the meaning of section 61 until it is registered, and until the registration of the transfer the implied covenant does not exist (per Harvey, C. J. A. at 158).

When mortgaged land is transferred by one transfer to a number of transferees who each take a specified undivided interest therein and there is no arrangement, agreement or covenant negativing or restricting their liability to the mortgagee under the covenant implied by section 61, their liability is a joint liability and each of the transferees is liable to the mortgagee for the whole amount payable on the mortgage.

Per Walsh, J. (at 154):

> There is but one covenant with the mortgagee which arises by implication under this section and that is that the transferee will pay the principal and interest. Where there are two or more transferees the covenant, of course, is that they will pay.

It is a covenant which is restricted in extent only by the amount of principal and interest secured by the mortgage. It is not that the transferees will pay in proportion to their interest in the land but that they will pay the principal money and interest. If, instead of being left to the imagination, as it now is, it was put in the transfer in express terms, the covenant would read: "We the transferees hereby covenant, promise and agree to and with the mortgagee that we will pay the principal money and interest secured by the said mortgage as and when the same respectively fall due thereunder.' Under such a covenant each of the transferees though taking but an undivided interest in the land would, I think, make himself liable for all of the principal money and interest. That is exactly the covenant which the statute imposes on them. While they have several interests in the land relatively to one another they are united in interest relatively to the plaintiffs. Their covenant with the plaintiffs is a joint one and so each of them is liable for the whole. In my opinion each of the transferees is liable to the plaintiffs for all of the principal and interest regardless of their rights and liabilities *inter se*. The

Per Harvey, C. J. A. (at 158-159):

It is to be noted that the section does not say that the implied covenant shall arise out of a "transfer" but rather out of an "instrument transferring land." A transfer is not such an instrument until it is registered. It follows that the covenant does not exist until the transfer is registered. The second subsection was not a part of the original section but was passed several years after, apparently for the purpose of enabling the mortgagee or transferor to make it arise and become effective for his benefit.

In the *Landreville Case* it was held that the fact that there was an express covenant did not prevent the implied covenant from having effect. It is clear, therefore, that inasmuch as the vendor Monk, had expressly provided for the assumption of the mortgage by her purchasers she was entitled to the benefit of the implied covenant upon the transfer being registered, and by virtue of the section, without any assignment, the bene-

fit of the implied covenant enures to the mortgagee. It is argued, however, that the transferees should only be held bound by the covenant to the extent of their interests but there is nothing whatever in the statute to suggest any such view. It is a covenant, implied it is true, but in the express words which the statute gives and I know of no law which limits the liability of each of the joint covenantors to less than the whole obligation of the covenant unless there is something in the words of the covenant to indicate an intention to that effect and I can see nothing in the express words of the statute to indicate any such intention.

It is said that the statute is merely the expression of the equitable principle requiring the purchaser of encumbered property to protect his vendor from the encumbrance. I have no doubt the basis of this section is that principle, and that seems more apparent from the subsequent section which provides that the vendor and purchaser can, by a term of the instrument, negative the covenant, and thus deprive the mortgagee of any benefit. In other words it is the covenant in favour of the transferor of which the mortgagee gets the benefit by virtue of the statute and unless there is such covenant there is nothing for his benefit.

Where a mortgage provides that if the mortgagor defaults in payment of insurance premiums, taxes and other charges and the mortgagee pays them they shall be added to and become part of the principal secured by the mortgage, such items do not form part of the principal for which the transferee of the land is liable under the section 61 implied covenant. Per Walsh, J. (at 153):

> Though this is described in the section as but one covenant, it is really two or at least it has two distinct branches. One of them is that the transferee will pay the principal money and interest secured by the mortgage. That is simply a covenant to pay under which the liability is limited to the principal and interest. The other is to indemnify and keep harmless the transferor not only against the principal sum but also against liability under any of the covenants of the mortgage. If that is a covenant with the mortgagee, the breach of which gives him the right to exact payment from the transferee, the measure of the transferee's liability to the mortgagee is, of course, that of the mortgagor under any and all of his covenants. I am of the opinion that this second covenant enures to the benefit of the transferor alone. It is obviously meant only for his protection. It is absurd to involve the transferee in a covenant with the mortgagee that he will indemnify and same harmless a third party, the transferor, from liability under the mortgage. It is a contract of indemnity pure and simple in which no person but he who is indemnified can have any possible interest. The plaintiffs have no assignment of this covenant. Their cause of action against these defendants is under the section alone. I think that the transferee's liability to them is under the first branch of this covenant alone and is, therefore, limited to the principal money and interest.
>
> The mortgage provides that if the mortgagor makes default in payment of insurance premiums, taxes and other charges and the mortgagee pays the same the amount shall be added to and become a part of the principal money.
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> I am asked to say whether or not such items form a part of the principal money secured by the mortgage for which the transferees are liable. In my opinion they do not.

Welsh v. Popham [1924] 2 W.W.R. 1193 (Alta. S.C.A.D.).

Where a transfer of mortgaged land is given by the mortgagor as security only, section 61 does not render the "transferee" liable to the mortgagee for the amount of the mortgage, although the transfer was absolute in form and contained no declaration negativing or modifying the

implied covenant by the transferee with the transferor and mortgagor. The Court held that the transfer should be read as if the implied covenant were expressed therein and signed by the transferee (the view of Beck, J. A. in Murrin and Landreville followed) subject to the right of rectification if the document as so construed did not express the real agreement between the parties.

In Re Macdonald Estate (1925) 21 Alta. L.R. 66 (Alta. S.C.A.D.).

The implied covenant under section 61 does not arise in the case of a transfer of only part of the mortgaged land. This is so even where an agreement had been made between a mortgagor-transferor and the transferee of part of the mortgaged land providing that such part was, as between the parties, to be chargeable with the whole mortgage. Per Harvey, C. J. A. (at 71-72):

> Different aspects of sec. 54 of *The Land Titles Act* have presented themselves for consideration by the Court but prior to the present case it had not been necessary to determine whether the implied covenant arose in the case of a transfer of only a part of the mortgagor's land or of his interest in it. The question came before the Appellate Court of Saskatchewan in *Dom. of Can. Inv't. & Debenture Co. v. Carstens*, 10 Sask. L.R. 272, [1917] 3 W.W.R. 153, 36 D.L.R. 25, when it was held, confirming an earlier decision by a single Judge, *Montreal Trust Co. v. Boggs*, 8 W.W.R. 1200, 31 W.L.R. 914, 25 D.L.R. 432, that the covenant did not arise in such a case. If an owner gave a mortgage covering a large number of lots and then sold one lot the value of which was a small amount compared with the amount of the mortgage, certainly though the lot might be subject to the whole mortgage there would be no equity calling on the purchaser to discharge the whole mortgage. And the situation would be the same if it were a small undivided interest in the whole land that was sold.

> The statute says that the covenant shall be implied "in every instrument transferring land subject to mortgage." It is true that "land" includes any interest in land but it is only when the particular land which is subject to the mortgage is transferred that the covenant is to be implied. It is of course true that every part of the land and every interest in the land is subject to the mortgage and in that sense a transfer of a part or part interest is a transfer of land subject to mortgage, but having regard to the principles of equity and the law before the section was passed I think the word "land" should be construed as meaning the very land which is subject to the mortgage and not as being divisible into parts. And I would therefore agree with the Saskatchewan decisions and differ from the decision under appeal.
>
> But I have had considerable difficulty in satisfying myself that even though the covenant is not raised in the ordinary case of a transfer of part only of the mortgaged land it may not properly be held to be raised here by virtue of the express agreement between the parties that the half interest which was transferred was as between the parties to be chargeable with the whole mortgage. I have, however, come to the conclusion that as the covenant is raised by the words of the statute it must depend on those words only and that the express agreement cannot create a covenant which is not within the definite words of the statute.

Sanford v. Frizzle and Elliott [1925] 2 W.W.R. 601 (Alta. S. C. (Chambers)).

Where a trustee under The Bulk Sales Act takes an assignment of a mortgage from the mortgagee made by the vendor-transferor-mortgagor and makes payments to the mortgagee out of the proceeds of the sale in bulk, he is entitled to recover against the vendor-transferor-mortgagor and also against the transferee of the mortgaged land, where the covenant implied by section 61 has not been negatived or modified "by express declaration in the transfer" (per Tweedie, J. at 604), the whole amount due on the mortgage for principal and interest without deductions for any of

payments made to the mortgagee. Per Tweedie, J. at 604-607:

> As to his contention that he is entitled to have deducted from the amount for which he may be found to be liable certain payments amounting to $5,400 made to the Misses Hall, it is argued that his liability is for "the principal money and interest * * * secured by the mortgage," and these payments having been applied in reduction of that liability, his liability to that extent is discharged and the right of recovery on the part of the plaintiff is to that extent barred. It is admitted on behalf of Elliott that he is liable to the extent of such payments but that liability is one to Frizzle under his express agreement to assume the mortgage for the amount represented by him to be due, and also under his implied covenant pursuant to sec. 54 of *The Land Titles Act* for indemnity. As to that liability it is contended that there is no right of action in the plaintiff, the same not having been specifically assigned to him, neither is the plaintiff in the position of an "authorized trustee" under *The Bankruptcy Act*, nor that of a "trustee" or "assignee" under a general assignment for the benefit of creditors, in either of which case he might have acquired the right as an asset of the estate. The rights of Frizzle acquired by the plaintiff were limited to those in connection with the "sale in bulk" of his business, of which the mortgage formed no part.
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> The plaintiff does not, however, seek to enforce a right of Frizzle to indemnity against Elliott and it is not necessary to further consider that aspect of the case. He, as owner of the mortgage, that is, as mortgagee, seeks to enforce his rights against Elliott under the implied covenant, upon which, as already stated, he is liable. Is Elliott entitled to be credited with the payments made to the Misses Hall?
>
> It is true that there is but one amount owing for principal and interest. The plaintiff as mortgagee is entitled to receive payment of that amount from two separate sources and under two separate covenants; from Frizzle under his express covenant contained in the mortgage, which was transferred to him, and from Elliott under his implied covenant under the statute. As between Frizzle and Elliott the one who should carry out the obligation is Elliott, he having expressly and impliedly agreed with Frizzle to do so. It is also true that so far as the Misses Hall are concerned they are not entitled to payment twice. The payments in this case have been made, however, by the trustee out of property, the proceeds of the sale of the business, held by him in trust for all Frizzle's creditors. Frizzle has no further interest in that property. It is the property of the creditors and any creditor who brings

himself or herself within the terms of *The Bulk Sales Act* is entitled to share *pro rata* in the proceeds of that property as to which she has an enforceable right against the trustee. There is a statutory obligation on the trustee under sec. 8 of *The Bulk Sales Act* to so distribute and he has no option. If the defendant Elliott had discharged his obligation in connection with the mortgage the general creditors would have been further benefited to the extent of the amount paid to the Misses Hall. The creditors' money has gone to satisfy an obligation which, as between the parties, should have in all fairness been satisfied by Elliott.

The position of the trustee in regard to the mortgage debt is analagous to that of a surety, compelled to satisfy the obligation of his principal, who, upon payment, would be subrogated to the rights of, and entitled to the security held by, the creditor.

The trustee if he had paid the Misses Hall in full would be entitled to demand a transfer of the mortgage, and, upon such transfer to him and upon his being registered owner, Elliott would be liable to him under the implied covenant for the unpaid balance owing under the mortgage without deduction for any sums paid the Misses Hall. It would be inequitable to compel Frizzle's creditors to discharge Elliott's obligation and leave them without recourse against Elliott. The right to proceed against Elliott could be acquired only by acquiring the security in the hands of the Misses Hall, which has been done without the payment of the full amount due them. That, however, is a matter between them and the trustee. Their interests will be fully protected in subsequent proceedings in this action as hereinafter indicated. The plaintiff, so far as the defendants are concerned, is the mortgagee and entitled to enforce his rights as such against them.

The plaintiff, the owner of the mortgage in question in this action, having been compelled by law, as trustee for the creditors of Frizzle of the proceeds realized from the "sale in bulk" of his business, to make payments out of such proceeds to the Misses Hall on account of an obligation for which the defendant Elliott is primarily liable on his implied covenant and for which the land transferred to him by Frizzle and of which he is the registered owner, is security, is entitled to recover against the land and from Elliott on his implied covenant, the unpaid principal and interest secured by the mortgage without deduction for any of the payments made to the Misses Hall, and the learned Judge's order will be varied in so far as such

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deductions were directed to be made in calculating the amount due and recoverable against the land and the defendant Elliott.

As to the interest of the Misses Hall: They were no doubt under a misapprehension as to their position as secured creditors. They proved their claim and valued their security as such. This they need not, in my opinion, have done. Their security was not "a mortgage on or against the property of the debtor." Frizzle had no interest in the mortgaged property when he sold his business in bulk, having previously disposed of all his interest in it to Elliott. They might have kept their security and received from the trustee dividends as ordinary creditors.

The transfer of the mortgage vested in the trustee, the plaintiff, as owner, all rights under and incident to the mortgage. While the transfer was absolute on its face, it must be regarded as a transfer made for the purpose of enabling the plaintiff, the trustee, to realize on the land charged, which was the only item valued, and that in all other respects the plaintiff is a trustee of the mortgage for the benefit of the Misses Hall. The nature of the security was such as to render the transfer of all the rights necessary. The one instrument contained the personal covenant for payment and created a charge upon the land. The Misses Hall were entitled to the beneficial interest in all covenants other than those which directly affect the land, under and incidental to the mortgage which were acquired by the plaintiff upon its transfer to him. That the plaintiff so understood it is evident, as the learned Judge pointed out from the language of the pleadings and that of an affidavit filed on his behalf. The Misses Hall's interest might have been determined and protected in this action had they been parties to the proceedings. While they might even now be joined for that purpose no good purpose would be served in doing so, as the questions at issue between the plaintiff and defendant Elliott are in no way dependent upon their rights. In order that they may have an opportunity of asserting their rights against the money received by the trustee, in this action, he is hereby directed to make no distribution of the same except to the extent that may be necessary to satisfy his costs of the action, without the direction of the Court, for which purpose he has leave to apply at any time, and upon such application the necessary directions as to the representation of the Misses Hall will be made.

Trusts and Guarantee Co. Ltd. v. McLeod and Buxton (1928) 23 A.L.R. 565 (Alta. S.C.A.D).

Where land subject to a mortgage is transferred by a transfer which is not under seal the transferee's implied covenant with the mortgagee under section 61 is a simple contract debt, even though the mortgage was under

seal; and, therefore, the period of limitation applicable to an action thereon by the mortgagee is six years. Per Lunney, J. A. (at 566-567):

> "In Societe Belge d'Enterprises Industrielles et Immobilieres v. Webster and Mill 23 Alta. L. R. 129, the judgment of Beck, J. A. reads:
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> 'For the reasons which I have briefly summarized, I am of opinion that a 'covenant' in instruments made in pursuance of our Land Titles Act--at all events, if in fact not under real--must be taken to be a contract of promise not under seal.'
>
> The liability of the defendant William Buxton herein is on the implied covenant contained in the transfer; the transfer is a document not under seal. The debt, therefore, becomes a simple contract debt and comes within the decision of the Court in Societe. . . ."

Sakaliuk v. Corry [19302 1 W.W.R. 424 (Alta. S.C.).

The liability assumed under the covenant implied by section 61 on the part of the transferee of mortgaged land is sufficient to make the transferee a purchaser for value. Per Walsh, J. (at 426):

> "I think that the covenant on the wife's part implied under the Act to pay the mortgages made her a purchaser for value. There was no vendor's lien created in the plaintiff's favour by the express contract of the parties. It is an equitable right implied by the Court and which may persist though the vendor have no positive intention that it should. It cannot persist however as against a bona-fide purchaser for value without notice as I find the female defendant to be."

Devenish v. Connacher (1930) 24 A.L.R. 535 (Alta. S.C.A.D.).

Since by virtue of the covenant implied by section 61, there is a direct personal liability of the transferee of mortgaged land to the mortgagee, the original mortgagor becomes a surety for the transferee to the mortgagee and, therefore, is entitled to pay off the mortgage-money as soon as there is default without waiting till he is sued or pressed for payment, and on paying it off is entitled to require the mortgagee to transfer the mortgage to a third party as a valid security.

Pfeifle v. Bachinsky [1939] 2 W.W.R. 389 (Alta. S.C.A.D.).

The relationship arising at the implied covenant under section 61 is not a contractual relationship in the ordinary sense. Per Harvey, C. J. A. (at 392):

> "Indeed it is difficult to see how a mere statutory obligation on one part in favour of another party, who is a complete stranger, can be deemed to create a contract between them. Certainly it is not a contract in the ordinary sense.
>
> . . . Certainly there was no consideration given by the plaintiff to the defendant for the assumption of the obligation imposed by the statute."

In Re Forster Estate [1941] 3 W.W.R. 449 (Alta. S.C.).

The addition of paragraph 34 (17) of the Judicative Act by S.A. 1939, C.85 (by which the right of a mortgagee or vendor is restricted to the land to which the mortgage or agreement for sale relates and by which the right of action on the covenant for payment contained in any mortgage or agreement is abolished) does not deprive the transferor of property subject to a mortgage of his right as against

the transferee to indemnity from the mortgage indebtedness under the implied covenant set out in section 61.

The aforementioned amendment to the Judicature Act does not apply to an action on the implied covenant for indemnity because:

(1) Such covenant is not a covenant "for payment"; and

(2) The object of the amendment is the relief of the mortgagors by protecting them against deficiency judgments by their mortgagees. Per O'Connor, J. (at 452):

> (2) The answer to the claim for indemnity, which was most pressed, is however the 1939 amendment, ch. 85, to sec. 37 of *The Judicature Act*, R.S.A., 1922, ch. 72; par (*p*) which was added, is as follows:
>
> > "(*p*) In any action brought upon any mortgage of land whether legal or equitable or any agreement for the sale of land made at any time before or after this section comes into force, the right of the mortgagee or vendor respectively thereunder shall be restricted to the land to which the mortgage or agreement relates, and to foreclosure of the mortgage or cancellation of the agreement of sale as the case may be, and no action shall lie on any covenant for payment contained in any such mortgage or agreement for sale, or upon any covenant whether express or implied by or on the part of any person to whom the land comprised in the mortgage or agreement for sale has been transferred or assigned subject to such mortgage or agreement for the payment of the principal money or purchase money payable under any such mortgage or agreement or any part thereof as the case may be."
>
> The material words are "and no action shall lie on any covenant * * * whether express or implied by or on the part of any person to whom the land comprised in the mortgage * * * has been transferred or assigned subject to such mortgage * * * for the payment of the principal money * * * payable under any such mortgage * * *."

I hold that this section does not prevent an action on the implied covenant for indemnity, for two reasons: (*a*) It is not a covenant "for payment;" (*b*) I find the object aimed at by the subsection is to limit the unpaid mortgagee or vendor to his security, and to prevent him from recovering a deficiency judgment against the mortgagor or purchaser. The subsection was passed for the relief of mortgagors. I interpret the section as confined to matters which come within the said object: *Rex v. Mee Wah* (1886) 3 B.C.R. 403, at 406. Whether a mortgagor who is entitled to be indemnified by a purchaser against payment of the mortgage and who has, as in this case, paid part of the mortgage and secured the balance, should also be prevented from recovering the amount of the mortgage is a question with which the Legislature has not seen fit to deal. The mortgagor has the right to indemnity both at common law and by statute. It would require express words to take away this right.

Central Mortgage and Housing Corporation v. Ward (1957-58) 23 W.W.R. 319 (Alta. S.C.).

The questions calling for decision herein were: (*a*) Whether the Central Mortgage and Housing Corporation was entitled to collect from the defendants as purchasers of the mortgaged property the costs (solicitor and client) incurred by the corporation for legal services, provided prior to the commencement of foreclosure proceedings, in the collection of arrears of monthly payments owing under the mortgage; (*b*) Whether the corporation was entitled to recover from said defendants, because of their failure to pay said costs, the costs incurred by the corporation in said foreclosure proceedings.

Held, answering both questions in the negative:

Since the mortgage was made in pursuance of the *National Housing Act, 1944*, 1944, ch. 46, and in pursuance of the *Central Mortgage and Housing Corporation Act*, RSC. 1952, ch. 46, the loan came within the purview of sec. 2 of *The National Housing Loans Act (Alberta)*, RSA. 1955, ch. 220, and therefore sec. 4 (quoted *infra*) of the latter Act applied.

Reg. 20 (quoted *infra*) of the National Housing Loan Regulations does not change the law of Alberta with respect to the point here in issue, and does not affect the scope of the Alberta statutes, particularly *The Vendors' and Mortgagees' Costs Exaction Act*, RSA, 1955, ch. 357, respecting the exaction by vendors and mortgagees of fees, charges and costs other than the cost of any judgment or order of the court.

The whole of said reg. 20 deals with costs chargeable only at the time of the granting of the loan and such other services as are necessary to further assure to the mortgagee his security and it is not intended that the phrase "save only such charges as may be permitted by the mortgage" to be so interpreted as to give further and unlimited rights and privileges to a mortgagee to collect all or any fees for any services that may be set forth within the body of the mortgage and agreed upon between the mortgagor and mortgagee and rendered at any time during the term of the mortgage; the charges of fees to be allowed by this phrase are to be limited only to costs allowable by the terms of the mortgage and incurred at the time of and for the purpose of assuring to the mortgagee its security for the loan and advances made under the provisions of the mortgage. *Frontenac Loan and Inv't. Soc. v. Hysop* (1892) 21 OR 577, 27 Can Abr 621, does not apply.

With respect to the argument that the word "assigns" in the mortgage made the defendant purchasers directly liable: The word "assigns" as used can apply only to an assignee of the mortgagor's interest in the land. If the word "assigns" in the mortgage had the effect sought to be given it, the covenant implied by sec. 61 of *The Land Titles Act*, RSA, 1955, ch. 170, would be unnecessary and useless. Further, one cannot assign a liability although lands subject to a charge can be assigned.

Can. Permanent Trust Co. v. Eagleson [1948] 2 WWR 675, 1948 Can Abr 441 (Sask.) does not help the mortgagee.

Even assuming that the charge is a permitted one against the original mortgagee, it does not follow that it or any claim under the mortgage, except a claim for possession, can be enforced against the defendant purchasers with whom the mortgagee has no privity. While under their agreement for sale the defendant purchasers are no doubt liable to indemnify the mortgagors in respect of any sum recovered from them, they (the defendant purchasers) are not directly liable to the mortgagee for any sum payable under the mortgage.

Central Mortgage and Housing Corporation v. Conaty (1966) 58 W.W.R. 119 (Alta. S.C.).

Special case for the opinion of the court. Defendants were the transferees of lands subject to a mortgage in favour of plaintiff, and, at the time when the lands were transferred to defendants, no agreement was entered into between them and plaintiff regarding payment of principal or interest, secured by the mortgage or otherwise with respect to it. Payments fell into arrears and foreclosure proceedings were commenced in which plaintiff claimed, *inter alia*, costs of the action on a party-and-party basis and costs incurred by the plaintiff on a solicitor-and-client basis. The question before the court was whether plaintiff was entitled to legal costs, agreed at the sum of $25, incurred by it on a solicitor-and-client basis in connection with the collection of the mortgage arrears, including all steps taken in connection with proceedings apart from the present application, in addition to costs on a party-and-party basis from the defendant, a transferee who had purchased the property subject to the mortgage.

It was *held* that, in the absence of any agreement between the parties, the matter must be determined in the light of sec. 61 of *The Land Titles Act*, RSA, 1955, ch. 170, which provides in part: "61. (1) In every instrument transferring land for which a certificate of title has been granted, subject to mortgage or encumbrance, there shall be implied the following covenant by the transferee both with the transferor and the mortgagee, that is to say: That the transferee will pay the principal money, interest, annuity or rent charge secured by the mortgage or encumbrance, after the rate and at the time specified in the instrument creating it, and will indemnify and keep harmless the transferor from and against the principal sum or other moneys secured by the instrument and from and against the liability in respect of any of the covenants therein contained or under this Act implied on the part of the transferor."

The effect of this section is to establish privity of contract between the mortgagee and the transferee as to the obligation to pay the principal money, interest, annuity or rent secured by the mortgage, but, as to the transferee's liability in respect of covenants contained in the mortgage, no such privity of contract was created. The mortgagee, therefore, was not entitled to payment of the costs claimed by the transferee, who had purchased the property subject to the mortgage.

Per Kirby, J. (at 121-124):

The question to be determined is this: Is the plaintiff entitled to legal costs incurred by it on a solicitor-and-client basis in connection with the collection of the mortgage arrears, including all steps taken in connection with proceedings (but not including any steps taken in connection with this application) in addition to costs on a party-and-party basis from a transferee who has purchased the property subject to the mortgage?

The right of the mortgagee to such additional costs as against the original mortgagor was upheld by the Saskatchewan court of appeal in *Flock v. Whitehead* [1924] 3 WWR 470, 19 Sask LR 64, in which Lamont, J.A., delivering the judgment of the court, said at p. 471:

> "The costs therefore which a mortgagee in a mortgage action may tax as the costs of action, are limited to those properly taxable as between party and party, unless in the mortgage the mortgagor has expressly covenanted to pay additional charges. (*Cotterell v. Stratton* [1872] 8 Ch App 295, 42 LJ Ch 417.)
>
> "In addition, however, to the costs of action taxed as between party and party a mortgagee is allowed in an action for foreclosure, or redemption, on the taking of accounts between himself and the mortgagor, to add to the mortgage debt (which consists of principal, interest and the costs of action allowed by the Court) certain other costs, charges and expenses, not recoverable at common law, but which, in a proper case, a Court of Equity will impose on the mortgagor as a term of redemption. These costs are those properly incurred by the mortgagee in preserving the mortgaged property and protecting the mortgage security."

But the learned justice points out that they cannot be added to the mortgage account unless the mortgagor has expressly agreed to pay them, or if it is otherwise provided by statute.

They were expressly barred by the provisions of *The Vendors' and Mortgagees' Costs Exaction Act*, RSA, 1955, ch. 357, but this Act was repealed in 1965, ch. 98.

The mortgage contains an express covenant by the mortgagor to pay such costs, clause 14, which provides:

"(14) I Also Covenant And Agree With The Mortgagee That:

"(e) All solicitor's, inspector's, valuator's and surveyor's fees and expenses for drawing and registering this mortgage and for examining the mortgaged premises and the title thereto, and for making or maintaining this mortgage a first charge on the mortgaged premises, together with all sums which the Mortgagee may and does from time to time advance, expend or incur hereunder as principal, insurance premiums, taxes or rates, or in or toward payment of prior liens, charges, encumbrances or claims charged or to be charged against the mortgaged premises or on this mortgage or on the Mortgagee in respect of this mortgage, and in maintaining, repairing, restoring or completing the mortgaged premises, and in inspecting, leasing, managing, or improving the mortgaged premises, including the price or value of any goods of any sort or description supplied to be used on the mortgaged premises, and in exercising or enforcing or attempting to enforce or in pursuance of any right, power, remedy or purpose hereunder or subsisting, and legal costs, as between solicitor and client, and an allowance for the time, work and expenses of the Mortgagee, or of any agent, solicitor or employee of the Mortgagee, for any purpose herein provided for and whether such sums are advanced or incurred with the knowledge, consent, concurrence or acquiescence of the Mortgagor or otherwise, are to be secured hereby and shall be a charge on the mortgaged premises, together with interest thereon at the said rate, and all such moneys shall be repayable to the Mortgagee on demand, or if not demanded then with the next ensuing instalment, except as herein otherwise provided, and all such sums together with interest thereon are included in the expression 'the mortgage moneys.'"

Does this covenant bind the transferee who purchased the property subject to the mortgage?

This point was considered in *Central Mtge. & Housing Corpn. v. Ward* (1957-58) 23 WWR 319 (Alta.) which dealt with the questions: (1) Whether the Central Mortgage and Housing Corporation was entitled to collect from the defendants, as purchasers of the mortgaged property, the costs (solicitor-and-client) incurred by the corporation for legal services, provided prior to the commencement of foreclosure proceedings, in the collection of arrears of monthly payments owing under the mortgage; and (2) Whether the corporation was entitled to recover from said defendants, because of their failure to pay said costs, the costs incurred by the corporation in said foreclosure proceedings.

Both questions were answered in the negative. This case, however, was decided on the basis of the various federal statutory provisions applicable and *The Vendors' and Mortgagees' Costs Exaction Act.*

Sec. 61 of *The Land Titles Act*, RSA, 1955, ch. 170, provides in part:

> "61 (1) In every instrument transferring land for which a certificate of title has been granted, subject to mortgage or encumbrance, there shall be implied the following covenant by the transferee both with the transferor and the mortgagee, that is to say: That the transferee will pay the principal money, interest, annuity or rent charge secured by the mortgage or encumbrance, after the rate and at the time specified in the instrument creating it, and will indemnify and keep harmless the transferor from and against the principal sum or other moneys secured by the instrument and from and against the liability in respect of any of the covenants therein contained or under this Act implied on the part of the transferor."

It seems to me that the effect of this section is to create: (1) An implied covenant by a transferee to pay the principal money, interest, annuity or rent secured by the mortgage, in effect, establishing privity of contract between the mortgagee and the transferee as to these obligations; (2) An implied covenant by a transferee to indemnify the transferor from and against the principal sum or other moneys secured by the instrument, and from and against the liability in respect of the covenants contained in the mortgage, which does not have the effect of establishing privity of contract between the mortgagee and the transferee with respect to these obligations.

The charge on the mortgaged premises for legal costs, as between solicitor and client, created by clause 14 (b) is, in my view, such a "liability in respect of the covenants contained in the mortgage."

Therefore, in the absence of any privity of contract between the mortgagee and the transferee in fact, or implied by law, with respect to payment of these costs, the mortgagee is not entitled to payment of such costs by a transferee who has purchased the property subject to the mortgage.

Central Mortgage and Housing Corporation v. Conaty (1967) 59 W.W.R. 11 (Alta. S.C.A.D.).

Appeal from the judgment of Kirby, J. (1967) 58 WWR 119. Appeal allowed.

Defendants were transferees of lands subject to a mortgage in favour of plaintiff; when the transfer took place, no agreement was made between the parties regarding the repayment of the moneys secured by the mortgage, costs or otherwise. Payments fell into arrears and foreclosure proceedings were commenced but arrested when the defendant paid the arrears and costs of the foreclosure proceedings as taxed on a party-and-party basis; plaintiff claimed the further sum of $25 (an agreed amount) incurred by it on a solicitor-and-client basis in connection with the collection of the mortgage arrears. Kirby, J. *held*, on a special case stated for his opinion, that the plaintiff was not entitled to the further sum claimed.

It was *held*, *per* Allen, J.A., McDermid, J.A. concurring, Kane, J.A. dissenting, that the appeal must be allowed: the authorities are to the effect that: (1) A provision for payment of a mortgagee's legal costs on a solicitor-and-client basis is valid and binding upon the mortgagor; (2) While there may be no privity of contract existing between the mortgagee and the transferee which would enable the mortgagee to recover solicitor-and-client costs from the transferee in a personal action on the covenant, there is no doubt that the mortgagee is entitled to add them to the other moneys owing under the mortgage and that they constitute a charge upon the mortgaged land; (3) In foreclosure proceedings the mortgagee would be entitled to recover these costs from the proceeds of sale; (4) The transferee would be required to pay these costs as a condition of redemption: *Fleck v. Whitehead* [1924] 3 WWR 470, at 471, 472, 19 Sask LR 64, 27 Can Abr 888 (C.A.); *Secord v. Tessier* (1910-11) 3 Alta LR 56, at 58, 27 Can Abr 889: *Can. Mtge. Invt. Co. v. Baird* (1916) 10 WWR 1195, at 1197, 34 WLR 985, 27 Can Abr 890 (Alta.) applied.

The word "costs" as used in sec. 19 of *The Judicature Act*, RSA, 1955, ch. 164, (which gives the court jurisdiction to grant relief from the consequences of non-payment of principal or interest upon payment by the mortgagor of all arrears "with lawful costs and charges") can be interpreted to include solicitor-and-client costs as well as party-and-party costs: *Krook v. Yewchuk and Panas* (1962) 39 WWR 13, at 18, [1962] SCR 535, reversing (1961-62) 36 WWR 547, 1962 Can Abr 179, applied.

Per Kane, J. A. (dissenting at 12-13):

KANE, J.A. (dissenting) — The facts are set out in the judgment of my brother Allen. The respondents are not the original mortgagors. They received and registered a transfer of the mortgaged land from the original mortgagors and they are the registered owners subject to the mortgage: Sec. 63 of *The Land Titles Act*, RSA, 1955, ch. 170.

The respondents did not enter into any agreement with the appellant so there is no privity of contract between the respondents and the appellant and sec. 61 of *The Land Titles Act* applies.

With respect, I agree with the learned trial judge (1967) 58 WWR 119, that sec. 61 creates: (1) An implied covenant by the respondent to pay the principal money and interest secured by the mortgage, in effect, established privity of contract between the appellant and the respondent as to these obligations; (2) An implied covenant by the respondents to indemnify the Jagers, the original mortgagors from whom the respondents received transfer to the land, against the principal sum and other moneys secured by the mortgage and from and against liability in respect of the covenants contained in the mortgage, which implied covenant does not have the effect of establishing privity of contract between the appellant and the respondents with respect to these obligations.

It may well be that if the present action had been brought against the original mortgagors and they had been the registered owners, then under clause 14 of the mortgage, solicitor-and-client costs could have been collected from the original mortgagors because of the agreement to pay such costs: *Fleck v. Whitehead* [1924] 3 WWR 470, 19 Sask LR 64 (C.A.); *Re Adelphi Hotel (Brighton) Ltd.; District Bank Ltd. v. Adelphi Hotel (Brighton) Ltd.* [1953] 1 WLR 955, 97 Sol J 489, [1953] 2 All ER 498. But this action is not such an action.

What the respondents must pay to the appellant under sec. 61 (1) is the principal money and interest secured by the mortgage. That in certain circumstances moneys paid out by the appellant in respect of the mortgage become principal appears clear. But I am not able to understand how solicitor-and-client costs which the respondents have not agreed to pay become principal. There is no agreement between the appellant and the respondents that the respondents will pay solicitor-and-client costs. Sec. 61 does not operate to supply such an agreement by implication.

What the appellant is entitled to recover by way of costs is the amount of the costs taxed under R. 1061 and these have been tendered to it. If I am correct in my view above expressed, solicitor-and-client costs are not "other charges" of the nature referred to in the order *nisi;* nor are they "lawful costs and charges" to which sec. 19 of *The Judicature Act*, RSA, 1955, ch. 164, refers.

I would dismiss the appeal without costs.

Per Allen, J. A. (at 20-23):

"It seems to me that I must therefore hold that in an action against the original mortgagor the mortgagee in this case would have been entitled to add to the amount secured by the mortgage, fair and reasonable legal costs incurred by him as between solicitor and client in exercising or enforcing or attempting to enforce his rights under the mortgage and in connection with the collection of the mortgage arrears, and it is admitted that the solicitor-and-client charges involved in this matter were so incurred and are fair and reasonable.

However, this does not dispose of the case. Here the question is not whether the mortgagee is entitled to his costs as between solicitor and client as against the mortgagor, but whether he is entitled to them as against the defendants who are the transferees from the mortgagor of the mortgaged lands and this brings us, initially, to a consideration of the effect of sec. 61 (1) of *The Land Titles Act*, RSA, 1955, ch. 170, which reads as follows:

> "61. (1) In every instrument transferring land for which a certificate of title has been granted, subject to mortgage or encumbrance, there shall be implied the following covenant by the transferee both with the transferor and the mortgagee, that is to say: That the transferee will pay the principal money, interest, annuity or rent charge secured by the mortgage or encumbrance, after the rate and at the time specified in the instrument creating it, and will indemnify and keep harmless the transferor from and against the principal sum or other moneys secured by the instrument and from and against the liability in respect of any of the covenants therein contained or under this Act implied on the part of the transferor."

The learned trial judge considered that the effect of this section was to create: (1) An implied covenant by a transferee to pay the principal money, interest, annuity or rent charge secured by the mortgage, in effect, establishing privity of contract between the mortgagee and the transferee as to these obligations; and (2) An implied covenant by a transferee to indemnify the transferor from and against the principal sum and other moneys secured by the instrument and from and against the liability in respect of the covenants concerned in the mortgage, which does not have the effect of establishing privity of contract between the mortgagee and the transferee with respect to these obligations.

He went on to hold that the charge on the mortgaged premises for legal costs as between solicitor and client created by clause 14 (e) of the mortgage was a liability under the covenants contained in the mortgage in respect of which no privity of contract existed between the mortgagee and the mortgagor and that the mortgagee was not entitled to payment of these costs by the transferee who had acquired title to the property subject to the mortgage.

Although in his judgment the learned trial judge does not deal specifically with the alternative question, namely, "Is the plaintiff entitled to a charge upon the lands described in the mortgage for the said sum of $25.00 once it is paid by the plaintiff to its solicitors?" we can fairly assume from the foregoing that he would also have answered this question in the negative.

I think it is obvious, from the authorities to which I have referred, that a negative answer to the initial question does not fully dispose of the matters in issue.

I am of the opinion that the cases cited above clearly establish:

(1) That the provision for payment of legal costs on a solicitor-and-client basis is valid and binding upon the mortgagor;

(2) That while there may be no privity of contract existing between the mortgagee and the transferee which would enable the mortgagee to recover solicitor-and-client costs from the transferee in a personal action on the covenant, there is no doubt that the mortgagee is entitled to add them to the other moneys owing under the mortgage and that they constitute a charge upon the mortgaged land;

(3) That in foreclosure proceedings the mortgagee would be entitled to recover these costs from the proceeds of sale;

(4) That the transferee would be required to pay these costs as a condition of redemption.

Thus, the alternative question should be answered in the affirmative.

However, the question still remains as to whether the mortgagor is required to pay these solicitor-and-client costs as a condition of being granted relief from the consequences of non-payment of principal or interest under the mortgage by virtue of the provisions of sec. 19 of *The Judicature Act*, RSA, 1955, ch. 164, which reads as follows:

> "19. The Court has jurisdiction to grant and shall grant relief from the consequences of non-payment of principal or interest by a mortgagor or purchaser in any case in which the mortgagor or purchaser, his heir or assign, pays all the arrears due under the mortgage or agreement for sale with lawful costs and charges in that behalf
>
> "(*a*) at any time before a judgment in the premises is recovered, or
>
> "(*b*) within such time as by the practice of the Court relief therein could be obtained."

I think the use of the words "lawful costs *and charges*" [the italicizing is mine] in the section above quoted makes it clear that anything which might under the terms of the mortgage be added to the charge on the property constituted by the mortgage requires that the solicitor-and-client costs, which may be added to the amount charged on the land under clause 14 of the mortgage, must be included in the amount to be paid by the transferee as a condition of the granting of the relief provided by sec. 19 of *The Judicature Act*.

I might add that I see no reason why the word "costs" may not be interpreted to include "solicitor-and-client costs" as well as party-and-party costs. I think the word "costs" should be interpreted according to its context. In *Krook v. Yewchuk and Panas* (1962) 39 WWR 13, [1962] SCR 535, reversing (1961-62) 36 WWR 547, Martland, J., in commenting on sec. 34 (17) of *The Judicature Act*, said at p. 18:

> "It derogates from the common-law rights of a mortgagee of land and, consequently, I see no reason to read into it any intention beyond what is to be determined by a strict consideration of the words actually used."

Applying this reasoning to the word "costs" and giving effect to its ordinary meaning, I do not think the solicitor-and-client costs are necessarily excluded, particularly when the mortgage sued upon makes express provision for them to be payable.

I have indicated that there is a question still to be resolved as to the plaintiff's right to recover these costs in a personal action against the transferee on the covenant for payment contained in the mortgage, but as this action does not come within that category it is unnecessary for me to deal with this question on this appeal.

The appeal should therefore be allowed and both the initial question and the alternative question should be answered in the affirmative. As I understand that this is in the nature of a "test case," there will be no costs to either party.

APPENDIX B

SASKATCHEWAN CASES

Reeves v. Konschur (1908) 8 W.L.R. 346 (Sask.).

Section 77 shows very clearly that the intentions of the legislature was to protect the transferor from any covenants that might be contained in any mortgage or encumbrance upon the land existing at the time of the transfer (per Johnstone, J. at 349).

Reeves v. Konschur (1909) 10 W.L.R. 680 (Sask.).

Per Lamont. J. referring to Johnston, J.'s interpretation of section 77 (at 690-691):

> "With this interpretation of the section, if I may be allowed to say so, I entirely agree. In the ordinary case where a purchaser buys land subject to a mortgage, he assumes the mortgage and retains the amount of the same out of the purchase money, and the statute contemplates that he should pay the mortgage and save the transferor harmless. If it were not so, the purchaser would be defrauding the vendor by casting on him the burden of paying off the mortgage after having retained the same out of the pruchase money. This section seems to me equivalent to an express covenant in the transfer that the purchaser will pay off the mortgage and interest and will indemnify and save harmless the vendor therefrom."

Colonial Investment and Loan Co. v. Foisie (1911) 19 W.L.R. 748 (Sask.).

Section 63 of The Land Titles Act provided at that time:

> "In every instrument transferring land for which a certificate of title has been granted subject to mortgage or encumbrance, there shall be implied a covenant by the transferee with the transferor, and so long as such transferee shall remain the registered owner with the mortgagee or encumbrancee, that the transferee will pay the principal money, interest, annuity, or rent charge secured by the mortgage or encumbrance, at the rate and at the time specified in the instrument creating the same . . . ."

Per Wetmore, C. J. (at 749-750):

> "There is nothing in the statement of claim to show, except, it may be, inferentially, that Clark is a transferee from Foisie, the mortgagor, or how he became registered owner; and it is not set forth in the statement of claim that personal liability is claimed against Clark or Lutz by reason of any implied covenant, statutory or otherwise.
>
> I am of opinion that, where a proceeding is taken against a transferee of land subject to a mortgage, and it is sought to hold him liable personally under sec. 63 of The Land Titles Act, there should be an express claim setting forth that such transferee is so liable. I think this is especially true, as the liability is statutory and new; but, under any circumstances, the defendant sought to be charged ought to be distinctly informed as to how or by what authority he is alleged to be held personally liable."

Ross and Phillips v. Schmitz (1913) 5 W.W.R. 399 (Sask. S.C.).

Where in a transfer there is a covenant by the transferee (express or implied) for payment of principal and interest on a mortgage upon the lands transferred and for indemnifying the transferor from and against the same, all payments made by the transferee can be said to be made on the behalf of the transferor and are sufficient to prevent the Statute of Limitations from running.

Montreal Trust Company v. Boggs and Beresford (1915) 31 W.L.R. 914 (Sask.).

The effect of section 63 of the Land Titles Act, as amended by Ch. 20, sec. 5 of the Statutes of 1909, is to give a mortgage of lands the right to proceed against a purchaser from the mortgagor, directly, thus avoiding the necessity of obtaining an assignment from the mortgagor of his right of indemnity--but the statute is not intended to compel a transferee of mortgaged land to pay off the mortgage, where, apart from the statute, equity would not have compelled him to indemnify his vendor.

Per Lamont, J. (at 915-917):

> Boggs transferred to the defendant Beresford an undivided five-fourteenth interest in the said lands, which transfer was registered, and Beresford thus became the registered owner of said interest. The instalment of principal and interest which fell due April 1st, 1913, was not paid, and the plaintiff company brought this action to enforce payment thereof, and they ask for personal judgment against Boggs on his covenant to pay, and also against Beresford on the ground that, by sec. 63 of the Land Titles Act, there is an implied covenant between Beresford and the plaintiff company that he will pay the mortgage and interest. That section reads as follows:—

"63. In every instrument transferring land for which a certificate of title has been granted subject to mortgage or incumbrance, there shall be implied a covenant by the transferee with the transferor and so long as such transferee shall remain the registered owner with the mortgagee or incumbrancee that the transferee will pay the principal money, interest, annuity or rent charge secured by the mortgage or incumbrance at the rate and at the time specified in the instrument creating the same, and will indemnify and keep harmless the transferor from and against the principal sum or other moneys secured by such instrument and from and against the liability in respect of any of the covenants therein contained or under this Act implied on the part of the transferor."

Prior to this statutory provision, as was pointed out by Mr. Justice Stewart, in Short v. Graham, 7 W. L. R. 181, a purchaser of mortgaged property was in equity held bound to indemnify the vendor against his personal liability to the mortgagee under the covenant to pay contained in the mortgage. This was because the purchaser assumed the mortgage and retained in his possession the amount of purchase money represented by it, and equity compelled him to appropriate such purchase money to the mortgage, or to hand it over to the mortgagor if he had to pay under his covenant. But it was always open to the purchaser to shew, by parol evidence or otherwise, that, on the facts of his particular case, no implication arose that he would indemnify the vendor: Beatty v. Fitzsimmons, 23 O. R. 245.

A presumption to indemnify would be rebutted where the purchaser paid the full purchase price to the vendor on the understanding that the vendor would have the mortgage discharged; also where he took title as transferee for the real purchaser.

It was only where the mortgage formed part of the purchase price of land, that equity fastened upon the purchaser's conscience the obligation of indemnifying the vendor. Even when the purchaser was bound to make good the purchase money, the mortgagee could not sue him direct, as there was no privity of contract between them. But if the mortgagee obtained an assignment from the mortgagor of his right of indemnity, he could then sue the purchaser direct: Malone v. Campbell, 28 S. C. R. 822.

Section 63 of the Land Titles Act, as originally passed, did not contain the words "with the transferor and so long as such transferee shall remain the registered owner with the mortgagee or incumbrancee." These words were added by sec. 5 of ch. 20 of the statutes of 1909. The object of adding these words, in my opinion, was to give the mortgagee the right to proceed against the purchaser directly, and thus avoid the necessity of getting an assignment of his right of indemnity from the mortgagor, who might be dead or out of the country at the time the mortgagee desired to commence proceedings in respect of the mortgage. The statute was not, in my opinion, in any way intended to compel a transferee of

> mortgaged land to pay off the mortgage where, apart from the statute, equity would not have compelled him to indemnify his vendor. A mortgagee, in advancing money upon a mortgage, looks for his security to the mortgaged land and the covenant of the mortgagor. The statute was not intended to increase that security, but, where the mortgagor has sold the mortgaged premises and the purchaser has assumed the mortgage, or retained in his possession an amount of purchase money equivalent thereto, he is now, by statute, compelled to appropriate that purchase money to the mortgage; just as formerly he was compelled in equity to hand it over to the mortgagor if the mortgagor was compelled to pay the mortgagee.
>
> The question then arises: Has the section any application where the purchaser acquires only a portion of the mortgagor's interest in the mortgaged premises? I agree with the conclusion reached by Mr. Justice Stewart in Short v. Graham, supra, where he says:—
>
> "I am very strongly of opinion that the application of the statute should, therefore, be restricted entirely to the case where there has been a real purchase by the transferee and a complete parting with all his interest on the part of the transferor."
>
> As the covenant implied is that the transferee will pay the principal money and interest secured by the mortgage, it would seem to clearly contemplate being applied only where the purchaser would have, prior to the statute, been liable in equity to indemnify the vendor for the whole amount. This he would not have been called upon to do on the purchase of an interest merely.

The Dominion of Canada Investment and Debenture Co. Ltd. v. Carstens et al [1917] 3 W.W.R. 153 (Sask. S.C. en banc).

Section 63 of The Land Titles Act does not apply where the registered owner of mortgaged premises transfers a part only of his interest. Per Lamont. J. (at 155-157):

This brings us to the question, does sec. 63 of *The Land Titles Act* apply where the registered owner of mortgaged premises transfers a part only of his interest?

This question came squarely before me in *Montreal Trust Co. v. Boggs*, 8 W.W.R. 1200; 25 D.L.R. 432, and I there held that the section applied only where there had been a complete parting with all his interest on the part of the transferor. Nothing was presented in argument to cause me to alter the view I there expressed. The implied covenant is that the transferee will pay the mortgage money and interest—not that he will pay a part thereof proportionate to his registered interest—but that he will pay the entire amount due under the mortgage. I cannot see anything in the language of the section to support the argument that the covenant implied is that the transferee will pay a portion only of the mortgage moneys and interest. If such had been the intention of the legislature I would have expected it to say so, and to have made provision as to how the proportionate amount to be paid by the transferee would be arrived at.

As Mr. Justice Beck says in *Great West Lumber Co. v. Murrin & Gray*, [1917] 1 W.W.R. 945; 32 D.L.R. 485, at p. 496:

> Is the proportion to be based upon the proportion of quantity or value of the proportion purchased?

In that case the same learned Judge also said:

> An implied contract is one which the law raises on the ground that in equity and justice the obligation ought to subsist (*Moses v. Macferlan*, 2 Burr. 1005; *Leake on Contracts*, 6 ed. at p. 42; 9 *Cyc.* tit. "Contract," p. 243).

Can it be said that equity or justice require a purchaser of an interest in mortgaged property to pay the whole of the mortgage moneys and interest? Take for instance the facts of the *Boggs case, supra*. There, Boggs had mortgaged a quarter-section for $150,000. He then subdivided the quarter and sold a five-fourteenth interest. The principle governing the liability of the transferee of an undivided interest in my opinion must be the same as that applicable to the transferee of an individual portion of the property. Suppose in that case a purchaser had purchased an individual lot valued at $100, and obtained a certificate of title therefor, subject to the mortgage. Is it reasonable to suppose that the legislature intended to saddle the purchaser, through the implied covenant, with the payment of the whole mortgage, *i.e.*, $150,000? Neither justice nor equity require that he should do so. Yet that would be the legal right of the mortgagee if the section applied on the sale of a portion of the mortgaged property. To my mind, it is equity to compel a transferee to pay the entire mortgage money only where he has purchased the whole of the mortgaged property, and where—as between himself and his transferor—he should in good conscience pay it.

A consideration of the state of the law prior to the enactment throws light, in my opinion, upon the intention of the legislature. Prior to the statutory provision when a mortgagor conveyed his land subject to a mortgage there was an implied obligation on the part of the purchaser to indemnify the mortgagor against the mortgage debt, but as there was no privity of contract between the purchaser and the mortgagee, the latter could not sue the purchaser direct unless he obtained from the mortgagor an assignment of his right of indemnity. If he obtained that assignment, he could sue the purchaser. *Maloney v. Campbell*, 28 S.C.R. 228. But it was always open to a purchaser to show that by express agreement he was not to indemnify the mortgagor. *British Canadian Loan Co. v. Tear* (1893) 23 O.R. 667.

The statute gives to this mortgagee the right, so long as the transferee remains the registered owner, of suing him direct, without the necessity of obtaining an assignment of the mortgagor's right of indemnity.

As in my opinion the implied covenant is only applicable where, as between the transferor and the transferee, the transferee assumes the whole of the mortgaged indebtedness, which in this case he did not do, the plaintiffs did not have a good cause of action against Gelhorn when they issued their writ; in which case, upon discontinuing the action, Gelhorn became entitled to his costs.

Anderson v. Stasiuk [1927] 1 W.W.R. 49 (Sask. C.A.).

The implied covenant between transferor and transferee under section 64 (2) does not arise where land is transferred by a sheriff pursuant to a sale under a writ of execution. Per McKay, J. A. (at 52):

> "This is not the case of a sale by the defendant to the plaintiff, wherein the defendant is transferor and the plaintiff transferee of the defendant. And there is no privity of contract between the plaintiff and defendant, as the relationship of vendor and purchaser did not exist between them; and the implied covenants, which may exist between vendor and purchaser, including that referred to by sec. 64, subsec. 2 of The Land Titles Act, in my opinion do not come into operation under the facts of this case."

Central Mortgage and Housing Corp'n. v. Johnson and Chalazan et ux. [1971] 5 W.W.R. 163 (Sask. C.A.).

In an action to foreclose a mortgage the mortgagee is entitled to costs on a solicitor-client basis against both the mortgagor and the transferee, especially where the mortgage itself so provides. (Conaty (Alta. S.C.A.D.) applied.) Per Culliton, C. J. S. (at 167-168):

> "In Manufacturers' Life Insur. Co. v. Independent Investment Co. Ltd. et al 54 B.C.R. 5, [1939] 4 D.L.R. 811, Manson, T., of the British Columbia Supreme Court, held that a mortgagee is entitled to tax the costs of foreclosure against the mortgagor on a solicitor-and-client basis, particularly where the mortgage itself so provides.
>
> The Alberta Appellate Division in Central Mortgage & Housing Corp'n. v. Conaty (1967) 59 W.W.R. 11, 61 D.L.R. (2d) 97, was faced with the same problem that is raised in this appeal, as the mortgage there considered contained a clause identical to the clause in the mortgage in this case, which I have already quoted. Allen, J. A., in delivering the majority judgment of the Court, after a careful review of the relevant authorities, said at p.20:
>
> "It seems to me that I must therefore hold that in an action against the original mortgagor the mortgagee in this case would have been entitled to add to the amount secured by the mortgage, fair and reasonable legal costs incurred by him as between solicitor and client in exercising or enforcing or attempting to enforce his rights under the mortgage and in connection with the collection of the mortgage arrears, and it is admitted that the solicitor-and-client charges involved in this matter were so incurred and are fair and reasonable."

Allen, J. A. then went on to hold that costs on a solicitor-and-client basis could be charged by the mortgagee not only against the original mortgagor, but against his transferee as well, a conclusion with which I respectfully agree."

APPENDIX C:

MANITOBA CASES

Sokolov v. Kachmark [1929] 1 W.W.R. 353 (Man. C.A.).

The covenant which is implied by sec. 97 of The Real Property Act on the part of the transferee of mortgaged land with the transferor is one which can be rebutted by evidence of circumstances which make it inequitable that it should be enforced. The section, therefore, leaves the law for all practical purposes the same as it was before the section was enacted. Per Fullerton, J. A. (at 354-358):

> The plaintiff's whole case hangs on sec. 97 of *The Real Property Act*, which reads as follows:
>
> In every instrument transferring an estate or interest in land under the new system, subject to mortgage or encumbrance, there shall be implied, unless otherwise expressed, the following covenant by the transferee with the transferor, that is to say, that such transferee shall pay the interest, annuity or rent charge secured by such mortgage or encumbrance, after the rate and at the time specified in the instrument creating the same, and shall indemnify and keep harmless the transferor from and against the principal sum or other moneys secured by such instrument, and from and against all liability in respect of any of the covenants therein contained or under this Act implied, on the part of the transferor.
>
> On the reading of this section one would think that the plaintiff's right to recover under the implied covenant was very plain indeed, but an examination of the authorities shows that the question is not so simple as at first appears.
>
> We have no decision of our own Courts directly in point but in other provinces very similar sections have been interpreted by their Courts to be nothing more than statutory declarations of the common law.
>
> Before the passing of this section the law in force in Manitoba relating to implied covenants created by conveyances is well stated by Lord Eldon in the old case of *Waring v. Ward* (1800) 7 Ves. 332, at 336, 32 E.R. 136, as follows:
>
> The same principle applies to the purchase of an equity of redemption: for the party means at the time of the contract to buy the estate subject
>
> that mortgage * * * If he enters into no obligation with the party, from whom he purchases, neither by bond or covenant of indemnity to save him harmless from the mortgage, yet this Court, if he receives possession, and has the profits, would, independent of contract, raise upon his conscience an obligation to indemnify the vendor against the personal obligation to pay the money due upon the vendor's transaction of mortgage; for, being become owner of the estate, he must be supposed to intend to indemnify the vendor against the mortgagor.

The broad proposition thus stated is subject to certain qualifications. For example, it has been held that in the absence of express stipulation on the subject the right to indemnification against a mortgage arises from the facts established in evidence and that evidence is admissible to show that it was not the intention of the parties that the transferee should assume liability for the mortgage: *Beatty v. Fitzsimmons* (1893) 23 O.R. 245.

Again, when a conveyance is taken merely as security for a debt no right of indemnity arises; it is only as between a real vendor and a real purchaser, in the ordinary sense of the words, that such right of indemnity arises: *Fullerton v. Brydges* (1885) 10 Man. R. 431; *Walker v. Dickson* (1892) 20 O.A.R. 96.

In *Fraser v. Fairbanks and Coombs* (1894) 23 S.C.R. 79, Sedgewick, J., at p. 90, said:

> The right to indemnity, which as a general rule a mortgagor who has sold his equity of redemption has against the purchaser, is an equity only; it is in no sense a legal liability; if enforceable at all it cannot be enforced except against one who in equity is a real purchaser.

Again, when the transfer is to a nominal purchaser or only of a portion of the property covered by the mortgage, no implied right of indemnity arises.

The implied contract of indemnity created by a conveyance of property is based on the consideration that in equity and justice such obligation should subsist. At common law it was always open to the parties to show facts to negative the existence of such obligation.

In the present case there is no evidence to show that Nellie Kachmark had anything to do with the purchase and the learned trial Judge has found,

> That the defendant Nellie Kachmark was not shown to be a party to that agreement of purchase entered into between the plaintiff and Louis Kachmark.

It is perfectly clear, therefore, that before the passing of the statute, the defendant Nellie Kachmark could not have been held liable on an implied covenant of indemnity.

The question then is whether sec. 97 of *The Real Property Act* creates such a liability.

In Alberta the corresponding section of their *Land Titles Act*, R.S.A., 1922, ch. 133, reads as follows:

> 54. (1) In every instrument transferring land, for which a certificate of title has been granted, subject to mortgage or incumbrance, there shall be implied the following covenant by the transferee both with the transferor and the mortgagee, that is to say: That the transferee will pay the principal money, interest, annuity or rent charge secured by the mortgage or incumbrance, after the rate and at the time specified in the instrument creating the same, and will indemnify and keep harmless the transferor from and against the principal sum or other moneys secured by such instrument and from and against the liability in respect of any of the covenants therein contained or under this Act implied, on the part of the transferor.

It will be noticed that this section, unlike our own section, gives a right of action to the mortgagee against the transferee.

In *Short v. Graham* (1908) 7 W.L.R. 787, the plaintiff was the holder of a mortgage on land belonging to one McDonald. The latter transferred the land to the defendant by a transfer absolute in form but given as security for a prospective advance which in fact was never made. Stuart, J., dismissed the action. In his opinion the section in question was passed to create a privity between the mortgagee and the transferee. At p. 792, he said:

> I am very strongly of opinion that the application of the statute should, therefore, be restricted entirely to the case where there has been a real purchase by the transferee and a complete parting with all his interest on the part of the transferor, and that whenever it is impossible for the vendor, the transferor, to take advantage of the covenant declared to be implied in his favour, that is, wherever he would have had, before the statute, no right against the purchaser capable of assignment to the mortgagee, which is admittedly the case here, then the covenant should not be implied in favour of the mortgagee either.

In *Evans, Johnstone & Naismith v. Ashcroft & Br. Can. Trust Co.* (1915) 8 W.W.R. 899, mortgaged land was transferred to the defendant The British Canadian Trust Company on certain trusts. The mortgagee brought action to recover the amount secured by the mortgage relying on the implied covenant created by sec. 52 of the Alberta *Land Titles Act*. McCarthy, J., who tried the case, held the defendant not liable.

G.W. Lbr. Co. Ltd. v. Murrin and Gray [1917] 1 W.W.R. 945, 11 Alta. L.R. 173. In this case the defendant purchased the equity in land mortgaged to the plaintiff. The trial Judge found that there was an agreement between the defendant and the vendor that the vendor should not assume the mort-

gage. In this case Scott, J., held that the right to negative the implied covenant could only be exercised in the manner provided by the statute. The other members of the Court held that the implied covenant could be negatived otherwise.

Sec. 63 of *The Land Titles Act of Saskatchewan*, 1906, ch. 24, as amended by ch. 20, sec. 5, of the statutes of 1909, is almost word for word the same as the section above quoted from the Alberta *Land Titles Act*.

The effect of the section was considered by Lamont, J. in *Montreal Trust Co. v. Boggs and Beresford* (1915) 8 W.W.R. 1200, 31 W.L.R. 914. In that case Boggs mortgaged the east half of a section to the plaintiff and later transferred to the defendant Beresford an undivided 5/14 interest. The plaintiff brought action for the amount of an overdue instalment of principal and interest against Beresford on the ground that by sec. 63 of *The Land Titles Act* there was an implied covenant between Beresford and the plaintiff that he will pay the mortgage and interest. At p. 916, Lamont, J., said:

> The statute was not, in my opinion, in any way intended to compel a transferee of mortgaged land to pay off the mortgage where, apart from the statute, equity would not have compelled him to indemnify his vendor.

At p. 917, he discusses the question of the application of the section to the case of a purchaser acquiring only a portion of the mortgagor's interest in the mortgaged premises. He says:

> I agree with the conclusion reached by Mr. Justice Stuart in *Short v. Graham, supra,* where he says: "I am very strongly of opinion that the application of the statute should, therefore, be restricted entirely to the case where there has been a real purchase by the transferee and a complete parting with all his interest on the part of the transferor." As the covenant implied is that the transferee will pay the principal money and interest secured by the mortgage, it would seem to clearly contemplate being applied only where the purchaser would have, prior to the statute, been liable in equity to indemnify the vendor for the whole amount. This he would not have been called upon to do on the purchase of an interest merely.

In *Dominion of Canada Inv't. and Debenture Co. v. Carstens* [1917] 3 W.W.R. 153, 10 Sask. L.R. 272, the Supreme Court of Saskatchewan *en banc* dealt with the construction of sec. 63 of the Saskatchewan *Land Titles Act*. There, Carstens had first mortgaged to the plaintiff and the defendants Miller and Gilborn respectively 15/16 and 5/6 of the land. Lamont, J., delivered the judgment of the Court and at p. 155, considers the question: Does sec. 63 of *The Land Titles Act* apply where the registered owner of mortgaged premises transfers a part only of his interest? and arrives at the same conclusion he did in *Montreal Trust Co. v. Boggs, supra*. Referring to the latter case, he said, at p. 156:

> Suppose in that case a purchaser had purchased an individual valued at $100, and obtained a certificate of title therefor, subject to a mortgage [for $150,000] is it reasonable to suppose that the legislature intended to saddle the purchaser, through the implied covenant, with the payment of the whole mortgage, *i.e.*, $150,000? Neither justice nor equity required that he should do so. Yet this would be the legal right of the mortgagee if the section applied on the sale of a portion of the mortgaged property.

This case was followed by the Appellate Division of the Supreme Court of Alberta in *In re Macdonald* [1925] 1 W.W.R. 1031, 21 Alta. L.R. 66, [1925] 2 D.L.R. 748.

Welsh v. Popham [1925] S.C.R. 549, was an appeal from the Appellate Division of the Supreme Court of Alberta ([1924] 2 W.W.R. 1193, 20 Alta. L.R. 449). In this case the transfer of mortgaged land was given by the mortgagor as security only, but was absolute in form and contained no declaration negativing or modifying the covenant by the transferee with the transferor and mortgagee for payment of the mortgage, declared by sec. 54 (formerly 52) of *The Land Titles Act* to be implied in the transfer. Held that the transferee was not liable. Duff, J., who delivered the judgment of the Supreme Court, said, at p. 553:

> In the circumstances of this case, therefore, s. 54 (1) did not create any covenant for indemnity in favour of the transferor; and since the terms of that section leave no doubt that the transferee's obligation to the mortgagee is only to arise in circumstances in which the transferee is, by virtue of the statute, under an obligation to indemnify the transferor, it follows that the appellant must fail. This view is in harmony with the course of decision in Alberta and Saskatchewan. *Short v. Graham; Evans v. Ashcroft and The Br. Can. Trust Co.; G. W. Mtge. Co. v. Murrin and Gray; Montreal Trust Co. v. Boggs and Beresford. Dominion of Canada Inv't and Debenture Co. v. Carstens; In re Macdonald Estate, supra.*
>
> To hold that sec. 97 of our Act creates an irrebutable presumption in favour of the existence of a contract for indemnity would work such great injustice in so many cases that it is impossible to hold that the Legislature intended such a result.
>
> The result of the cases appears to me to hold that the statute *prima facie* creates a covenant of indemnity which may be rebutted. This leaves the law for all practical purposes the same as it was before the passing of the section.

Superior Builders Ltd. v. Scott and Shore [1937] 2 W.W.R. 274 (Man. C.A.).

Payment by the original mortgagor-transferor to the mortgagee is not a condition precedent to the transferor's right of action on the transferee's obligation to indemnify implied by sec. 97 of The Real Property Act (implied with transferor only at this point--transferor 'third partied' transferee in original action).

Pollock v. Shapera [1938] 1 W.W.R. 310 (Man. K.B.).

In an action based on the covenant implied by sec. 97 of The Real Property Act on the part of the transferee of mortgaged land with the transferor only, the transferee is under the onus of rebutting the presumption which the Act raises in favour of the transferor.

In the indemnity action against the transferee, the transferor is entitled to any costs which he might have to pay in connection with the action of the mortgagee against him, and for his own costs of that action as between solicitor and client.