been left behind to regenerate the areas. It is an ideal area for regeneration by seed trees, and an excellent pine forest could be made of it.

Savernake forest in Wiltshire was a Royal Forest created during Saxon times. It was first administered by wardens who in the time of Henry II acquired hereditary rights and finally came to own the forest. Recently it has been leased to the Forestry Commission. It is a most delightful park-land area, highly typical of a "Royal Forest," having been developed as a park and hunting ground with some forestry and farming activities. There are consequently many famous historical trees, mainly oaks, and a renowned avenue of beech trees running for four miles through the forest.

Most of the trees are very poor from the timber point of view, and are usually overmature. The beech has, in the main, been lopped to provide deer fodder, so that barrels are short and this timber is unworkable. The oaks are somewhat better and produce good though somewhat short timber. A small herd of deer is confined to one area of the forest and the poaching tradition is carried on by the Dominion troops.

SOME ASPECTS OF THE LEGAL POSITION OF FORESTS UPON MORTGAGED LAND IN NEW ZEALAND.

By A. F. CLARK.

While the course in forest law taken by University forestry students in the Dominion was extensive, it did not deal with the important question of the legal position of forests standing upon land subject to mortgage. With the continued depletion of forests owned by the Crown there is no doubt that greater attention will be paid in future to privately owned forests, and their legal position when the land is subject to mortgage is worthy of examination.

Definitions and Intentions.

When a person wishes to borrow money and in support of his promise of repayment tenders by way of security his interest in land, he does so by offering to the lender a mortgage over his land. Again, when wishing to acquire land, a purchaser may not be able or willing to pay the whole amount of the purchase price at once and he therefore arranges with the vendor for a proportion of the purchase money to remain as a debt and gives as security a mortgage over the land purchased. The person who receives the accommodation and gives
the mortgage is known as the *mortgagor*, while the person who makes the advance and receives the mortgage is known as the *mortgagee*.

A mortgage is a security created by contract covering an interest in property, which interest, however, may be extinguished upon the performance of the condition of paying a certain stated sum of money with or without interest or on performing some other condition. A registered mortgage over land is essentially in three parts: the first is the caption asserting proprietorship; the second is the contractual part which sets out the amount to be paid and the terms which are to govern the relations of the parties in regard thereto; and the third, the conclusion, by which the charge is created for securing payment in the manner set out. The first and third parts are common in form to all formal mortgages of land, but the contents of the second, or contractual part, may vary. The contractual part is composed of a number of clauses containing covenants, conditions and powers. The covenants, conditions and powers constitute the agreement between the parties and will vary very largely according to the type of property forming the security. The covenants which are set out in the mortgage are the expressed covenants, but there are a number of covenants which, in the absence of expressed covenants, may be implied in any contract which takes the form of a mortgage. These covenants are statutory and so far as they affect this question are set out in the Fourth Schedule of the Property Law Act, 1908, and in the Fourth and Sixth Schedules of the Land Transfer Act, 1915. Their contents will not be examined here, it being sufficient to say that in the absence of expressed covenants they provide a substantial framework of agreement between the parties.

Since the Court in deciding matters which are in dispute between parties to a contract will consider the intentions of the parties when entering into such a contract, the intentions of the mortgagor and the mortgagee are of importance. The intention of a mortgagor is to obtain an advance or some other consideration which he applies to the purpose which he has in view, and while so doing, he wishes to continue to enjoy possession of his property and, by making repayment, free it from debt. The mortgagee in making the advance or in extending some other consideration regards the matter as an investment. He is concerned in securing the return of his advance together with the agreed interest, if any, and ensuring that during the period of repayment the property to which the mortgage refers does not deteriorate dangerously in value. In the event of default by the mortgagor in payment of the principal sum or interest or in the performance or observance of any expressed or implied covenant, the mortgagee may enter into possession of the property himself in which case he becomes a *mortgagee in possession*. The position of a mortgagee in possession is often one of some difficulty and most mortgagees will, if possible, avoid taking possession. The duties of a mortgagee in possession place him in a position analogous to
that of a trustee, and he is responsible in his administration to the mortgagor (whose right to redeem his property still exists) and to any subsequent mortgagee. The duty of a mortgagee in possession is to administer the property as would a prudent owner and to apply the returns secured from the property to the reduction of his debt.

**Rights of the Mortgagor.**

The mortgagor in entering into the contract of mortgage pledges his interest in the land for the purpose of providing further security for the debt. "Security" is a comprehensive term and includes everything which is affixed to the land; thus forests until actually cut and removed are part of the land itself. In the Land Transfer Act, 1915, land, by definition, extends to and includes, plantations and all trees and timber thereon, thereunder, lying or being, unless specially excepted.

Since forests are part of the security the mortgagor is required to observe any covenants in the mortgage dealing with them. The question which most frequently arises concerns the right of the mortgagor to cut and dispose of the forests upon the security. If an agreement exists between the mortgagor and mortgagee concerning the forests and this agreement has been embodied in a covenant in the mortgage then the parties are required to observe the terms of such covenant. In this matter the practice of the State Advances Corporation, the largest mortgagee in the Dominion, is instructive. Since 1935 the Corporation's memorandum of mortgage quotes substantially the covenants set out in the Land Transfer Act, 1915, and states that the words "will not cut timber" imply that the covenantor will not cut down, fell, injure or destroy any growing or living timber or timber-like trees standing and being upon the hereditaments and premises mentioned in the instrument without the consent in writing of the covenantee. Thus in all mortgages executed since 1935, the mortgagor is required, irrespective of the position of the security, to obtain the Corporation's consent before disposing in any way of the forests.

When, however, no agreement between the mortgagor and mortgagor concerning the forests exists and in consequence the mortgage does not contain a covenant dealing with the forests, then the question of whether or not the mortgagor may safely exercise the right of cutting and disposing of the forests depends upon the value of the security both before and after the forests have been removed, in relation to the amount of the debt. If the value of the security after the removal of the forests is still sufficient to secure the debt then the mortgagee may not restrain the mortgagor, who may dispose of the forests as he sees fit. On the other hand since the mortgagee is entitled to have his security preserved from deterioration at the hands of the mortgagor, if the security is insufficient or the removal of forests will so lower its value that the security is rendered insufficient to secure the debt, then he may restrain the mortgagor
from cutting and removing the forests. When, in such cases, the mortgagee wishes to exercise his powers of restraint he relies upon his remedy at common law and is required to prove that the security is insufficient or would be rendered so by the removal of the forests.

There is, of course, no hindrance to the mortgagor and the mortgagee, provided they are the only parties concerned, entering into any arrangement for the disposal of the forests which they consider to be mutually beneficial. Thus, where the forests represent a large proportion of the value of the security and the security will be of little value after their removal, the parties concerned may agree that the forests be cut and removed, and the revenue obtained therefrom applied to their mutual benefit. The object of the mortgagee in such cases is to ensure that the returns which he secures from the cutting of the forests are so arranged that his advance is repaid during the process of cutting.

By English law the mortgagor is entitled, irrespective of the position of the security, to cut underwood provided such underwood is regarded as the ordinary fruit of the land and that the operations are carried out in a husbandlike manner and at seasonable times. While there do not appear to be any cases in New Zealand dealing with this matter it would seem that there is little doubt that the mortgagor could carry out all normal silvicultural operations designed to improve the condition of the forests (e.g. thinnings and improvement fellings) and that he would be entitled to possession of the yield so obtained.

Rights of the Mortgagee.

The question of the mortgagee’s power of restraint where the security is insufficient has been previously discussed, and it has been stated that the mortgagor could probably carry out all normal silvicultural operations and secure the yield therefrom. If, however, the mortgagee expressly wishes the mortgagor to carry out certain silvicultural operations then such operations should be made the subject of a special covenant. In such covenant the extent and nature of the operations to be performed should be set out. The importance of silviculture is so little realised that care should be exercised to see that the required operations are detailed fully and that they are understood by the mortgagor.

In England and in most British possessions the mortgagee is, in the event of default, entitled to foreclose the mortgaged property, but this right of foreclosure does not exist in New Zealand. The mortgagee has, however, powers of sale over the property. The mortgagee’s powers of sale are implied in all registered mortgages of land unless modified or negatived. They are exerciseable* where the mortgagor makes default for the space of two months in payment

* See however, Mortgagors Emergency Extension Regulations, 1940, and Debtors Emergency Regulations, 1940.
of the principal sum and interest or any part thereof or in the performance or observance of any other covenant expressed or implied in the mortgage and thereafter the mortgagee gives the mortgagor one month's notice of his intention to sell the property. In selling the property the mortgagee is required to exercise the usual care of a prudent vendor, but if he wishes to buy and obtain title to the property himself, the sale must be under conduct of the Registrar of the Supreme Court.

While the mortgagee may sell the land in lots, he may not sell the timber and the land separately or at a valuation. Section 4 of the Property Law Amendment Act, 1939, provides that a mortgagee in exercising his powers of sale may, upon application to the Court, be authorised to dispose of the land separately from any mines or minerals on the land. Similarly, he may reserve the mines or minerals with or without rights of working. It appears to the writer to be a pity that this section of the Act did not make some provision whereby the mortgagee could dispose of the timber separately from the land. It is true that minerals or mines are not wholly comparable with timber, nevertheless the advantage of providing such a right appears to be obvious and since it could only be obtained by application to the Court, there would be little fear that the mortgagor's interests would suffer.

In exercising his powers of sale the mortgagee may dispose of the whole security, which includes the land and everything affixed to the land. Thus if the mortgagor had entered into a contract whereby the rights to cut timber had been let to a sawmiller and the sawmiller had erected a sawmill and installed other equipment upon the property, the buildings and equipment where such are fixtures, are liable to be sold by the mortgagee. The position would not be safeguarded if, as is sometimes the practice, the mortgagor had given the sawmiller a lease of the sawmill site, unless the mortgagee had previously consented to the lease. It would appear wise in all cases where a sawmill and similar buildings and equipment are erected that the sawmiller take steps to ensure that the consent of the mortgagee is obtained to his lease or license or to his right to remove the buildings.

Rights of the Mortgagee in Possession.

Upon default by the mortgagor, the mortgagee may enter into possession of the property when, as stated above, he is required to act towards the security as would a prudent owner and he is accountable to any subsequent mortgagee and to the mortgagor. Power to dispose of the forests has lately been given to the mortgagee in possession by Section 6 of the Property Law Amendment Act, 1939. Under this section the mortgagee is empowered to cut and sell timber and other trees on the land ripe for cutting and not required or left for shelter or ornament, or to contract for such cutting and sale to be
completed within any time not exceeding twelve months from the making of the contract. This power applies only to mortgages of land executed since the passing of the Act.

During his occupancy the mortgagee in possession is entitled to carry out reasonable improvements to the property, and in the event of sale or of redemption to recover his costs in respect of such improvements. The improvements must be reasonable having regard to their cost in relation to the value of the security. It would seem that while the mortgagee in possession might carry out small afforestation operations where such were designed to assist farming practice (e.g. the planting of noxious weed infested gullies) he could not safely embark upon extensive afforestation projects. He can, however, cut underwood and there is little doubt that he could carry out all normal silvicultural operations and would be entitled to secure the yield therefrom. It should be remembered, however, that in all his actions he is accountable both to any subsequent mortgagee and to the mortgagor so that the purpose of his actions should, wherever necessary, be made clear to these parties and their consent obtained.

When taking possession of the security the mortgagee is entitled to all buildings and fixtures upon the land and thus a sawmill and similar equipment would, if fixtures and irrespective of whether owned by the mortgagor or not, pass into possession of the mortgagee. This matter was discussed in connection with the mortgagee’s powers of sale.

**Forests on Leasehold Land.**

The mortgagee of a leasehold obtains no better title than the lessee who gives the mortgage. The lessee (who is also the mortgagor) is bound by the terms of the lease and thus the intending mortgagee of a leasehold should satisfy himself that its terms are acceptable. The lessee may not offer more than his interest in a leasehold as security, the basis of determination of his interest and that of the lessor being set out in Sections 54 and 55 of the Valuation of Land Act, 1925.

Since the termination of the lease generally terminates the title of the mortgagee, the question of the unexpired term of the lease and the terms of its renewal, if any, are of particular importance to the mortgagee. It should, however, be realised that the termination of the lease does not release the mortgagor from his liability to repay the debt under the personal covenant, and also that, in the event of default, the mortgagee may exercise his powers of sale or may enter into possession in the usual way. Short term leases are not favoured as mortgage securities, those usually considered being Glasgow leases.

† Some degree of protection is given to the mortgagee in this connection by the Property Law Act, 1908, and the Land Transfer Act, 1915. This protection does not, however, extend to mortgagees of Crown leases.
(21 years with a right of renewal) or long term Crown leases, *i.e.*, renewable leases.

The disposal of forests upon a leasehold is governed by the conditions of the lease, and subject to these conditions arrangements may be made between the lessor, lessee and mortgagee which are mutually agreeable when a transaction affecting the forests is contemplated.

In the absence of expressed provisions in the lease the rights of the lessor and lessee regarding forests are determined at common law. These common law rights will not be discussed here, but the general property in timber trees is in the lessor subject to the right of the lessee to fell timber for the purpose of repairing buildings and fences, mending implements, and for the purposes of fuel if sufficient dead trees are not available. There is a considerable amount of case law dealing with the rights of the lessor and lessee in respect of timber both abroad and in New Zealand. The New Zealand case law includes some difficult judgments which appear to the writer to conflict in some cases, and which need interpretation.

**Acknowledgments.**

The writer wishes to acknowledge with thanks the assistance and encouragement given by Mr. C. E. H. Ball, Office Solicitor, State Advances Corporation, author of "The Law of Mortgages of Land in New Zealand," "The Rural Mortgagors Adjustment Legislation" etc. Thanks are also extended to those other legal members of the staff of the Corporation who have been subjected to the writer's importunities from time to time.

---

**PLYWOOD**

By J. L. HARRISON-SMITH.

**Introduction.**

The history of plywood and veneer can be traced back to about 2000 B.C., for articles so constructed have been found in the tombs of ancient Egypt.

In the modern sense, plywood is the term given to a panel made up from a number of thin sheets of wood glued together with the grain of adjacent layers at right angles, while veneer is usually understood to mean an outer sheet of valuable wood glued to a backing of wood of a commoner sort. The backing may be either one board or plywood. However, the term veneer is also used in plywood factories to denote the single thickness of wood before it is made up into plywood.

In Europe absurd prices are paid for logs that will produce the very highest classes of veneer and the writer has been told of a log