

the power of sale contained in said decree, mortgage, or bill of sale, unless the right, or power or consent to decree shall be waived in writing by the mortgagee or his proper representatives, and in all such cases, in the absence of waiver of right by the mortgagee or his proper representatives, as hereinbefore provided, the trustee in insolvency shall only be authorized to sell the equity of redemption of the insolvent in all such property by decree, mortgage or bill of sale as aforesaid.

This section is not retrospective, and has no application to proceedings commenced before it was passed. *Gable v. Scott*, 56 Md. 182; *Mackubin v. Boardman*, 54 Md. 384.

Prior to the adoption of this section a non-resident mortgagee was held to have a right of sale paramount to that of the insolvent trustee. *Ensor v. Lewis*, 54 Md. 397.

Prior to the adoption of this section, the law (subject to certain conditions), was to contrary. *Ensor v. Keech*, 64 Md. 381; *Mackubin v. Boardman*, 54 Md. 384; *Zeigler v. King*, 9 Md. 332; *Bank of Westminster v. Whyte*, 3 Md. Ch. 512; *Alexander v. Ghiselin*, 5 Gill, 178. See also *Gable v. Scott*, 56 Md. 184.

Cited but not construed in *Crocker v. Hopps*, 78 Md. 265 (involving a chattel mortgage); *Buschman v. Hanna*, 72 Md. 4.

An. Code, sec. 26. 1904, sec. 26. 1888, sec. 26. 1880, ch. 172, sec. 27.

26. It shall be the duty of the several clerks of the courts of this State, wherein any proceedings in insolvency may be pending under any of the provisions of this article, to have and keep a book to be called "insolvent record" in addition to the book in which he may keep docket entries of said proceedings, in which book of "insolvent record," whenever any real estate shall have been sold by said trustee, the said clerk shall record the petition of insolvent or creditors, as the case may be, all conveyances relating to said insolvent estate, to the preliminary or permanent trustee, and the trustee's report of the sale of said real estate, together with all orders of the clerk or court, giving efficacy thereto, for which said record the said clerk shall receive such fees as are now allowed for recording sales of real estate under decrees of courts of equity in this State; and in all sales of real or leasehold estate to be made by the permanent trustee under the provisions of this article, the same shall be made in the county or city wherever the said real or leasehold estate is situated, and after due advertisement of such sales in at least one newspaper published in such county or city.

An. Code, sec. 27. 1904, sec. 27. 1888, sec. 27. 1880, ch. 172, sec. 28.

27. A discharge duly granted under this article may be pleaded by a simple averment that, on the day of its date, such discharge was granted to the party, and setting the same forth in its exact words or according to legal effect; and a certified copy of said discharge shall be sufficient evidence of the fact of said discharge.

Where to a plea of discharge, the plaintiff replied "*nul tiel record*," the issue is solely for the court. If the court determines that there has been a discharge, an unqualified judgment for the defendant should be entered. *Becker v. Whitehill*, 55 Md. 573. See also *State v. Culler*, 18 Md. 419.

To a plea of discharge, a replication to the effect that the defendant was not in fact insolvent when he applied, is bad. *State v. Culler*, 18 Md. 419.

If a defendant fails to plead a discharge to a suit resulting in a judgment against him, he cannot plead it to a *sci. fa.* to revive the judgment. *Moore v. Garrettson*, 6 Md. 447.