[HIGH COURT OF AUSTRALIA.]

CAIRNS . . . . . APPELLANT;
DEFENDANT,

AND

BURGESS AND OTHERS . . . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

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HOBART, *Feb.* 27, 28; *Mar.* 4.

Griffith C.J., Barton and O'Connor JJ.

Lease—Condition of forfeiture—Mortgage—Rights of Equitable Mortgagee as against lessor to Mortgagor—Estoppel—Fraud—Lying-by — Practice — Jurisdiction—Originating Summons—Equity Procedure Act (*No.* 4) (*Tasmania*), (57 *Vict., No.* 13), *secs.* 3, 4.

In pursuance of a prior agreement, appellant in consideration of a sum of £600 paid in advance to her by S., granted a lease of an hotel to S. for four years at a rent reserved. According to the agreement, the lease was to contain the usual covenants and provisoes in leases of public houses. The lease contained a covenant by S. not to assign or sublet without leave and a proviso for re-entry on default in payment of rent, or on the bankruptcy of the lessee, but there was no evidence whether or not such covenants or provisoes were usual in leases of public houses in Tasmania. In order to enable S. to make the payment of £600 to the appellant, he to the knowledge of the appellant borrowed £400 from respondents, and in consideration thereof agreed to execute a mortgage to the respondents of the lease when executed. No legal mortgage of the lease was executed, but respondents became equitable mortgagees by deposit of the lease with a memorandum. Subsequently S. made default both in payment of his rent under the lease, and in repayment of the £400 and interest due to respondents. Appellant refused to accept rent from respondents, and S. was adjudicated bankrupt. On an originating summons taken out by respondents and directed to S. and appellant, asking for an order for possession of the hotel:

Held, reversing the decision of the Supreme Court of Tasmania, that on the bankruptcy of S. the appellant was entitled to enforce the proviso for forfeiture not only as against S. the lessee, but also as against respondents the equitable mortgagees, and that the mere fact of knowledge by the appellant

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that the lessee intended to mortgage the term when created did not of itself impose any obligation upon her to protect the future mortgagee's interests, nor act by way of estoppel to prevent the operation of any proviso for forfeiture to their prejudice.

Held further:—That the *Equity Procedure Act* (*No. 4*) (Tasmania), (57 Vict., No. 13) applies only to cases where the rights of the parties, or of those in possession under them, are regulated by a mortgage either legal or equitable, and, therefore, that the legal right of a lessor to re-enter under the conditions of a lease cannot be litigated either on equitable or legal grounds on an originating summons by a mortgagee of the term for foreclosure against the lessee.

APPEAL from an order of the Supreme Court of Tasmania.

On 7th December, 1903, the respondents took out an originating summons for a declaration that they were entitled to possession of a hotel at Queenstown, in Tasmania, known as the Metropole Hotel, and the hall adjoining, known as Cairns' Hall, and also for general relief. The appellant and one Sibley were made defendants.

The facts of the case are fully stated in the judgment of GRIFFITH C.J.

On 11th January, 1904, the respondents obtained the order asked for in the summons. This order was affirmed on appeal by the Full Court of Tasmania; and the present appeal was made on the grounds:—(i.) That the Supreme Court was wrong in law in holding that the Judge in Chambers had jurisdiction under the *Equity Procedure Act* (*No. 4*) (57 Vict., No. 13) to make the order dated 5th January, 1904, and (ii.) that the Supreme Court was wrong in deciding that the respondents were entitled to equitable relief against a legal forfeiture of the term of years granted to Sibley and mortgaged by him to the respondents.

Lodge, for the respondents, moved that the appeal be dismissed. The mortgage by the appellant has been foreclosed, and therefore she has no interest in the subject-matter of the appeal. The circumstance that a person has been made a party to a suit in the Court below, if improperly so made, will not entitle him to appeal against a decree made in that suit: *Rochfort* v. *Battersby* (1).

[O'CONNOR J.—There is a time, viz., between Sibley's insolvency

(1) 2 H.L.C., 388.

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and the foreclosure, during which the appellant was entitled to possession.]

That is so.

GRIFFITH C.J.—It is clear that the appellant retains an interest, and the question is one of amount.]

Per Curiam.—The appealable interest remains, and the appeal must therefore be heard.

Hudson (with him *Banks Smith*), for appellant. Under their mortgage from Sibley, the respondents acquired no rights as against the appellant. The agreement for a loan of £400 from respondents to Sibley was an independent transaction to which appellant was not a party. The lease from appellant to Sibley contained a covenant not to sublet without leave in writing and a proviso for re-entry on the bankruptcy of the lessee; and was prepared by a solicitor acting for both parties. The respondents cannot now be heard to say that the lease was not in accordance with their agreement with Sibley after allowing him to remain in possession under it for more than eighteen months. This summons was taken out under the *Equity Procedure Act* (57 Vict., No. 13), sec. 3, under which only the mortgagor and mortgagee and those claiming under them can be made parties. The appellant being the lessor to the mortgagor held a superior title, and being no party to the mortgage transaction, could not be bound by the order of *Clark* J.

[GRIFFITH C.J.—Has not the Court a general power to order service of the summons on any parties interested in the subject-matter?]

The Court must first have jurisdiction to hear the case on originating summons. The only order which could have been made here was for delivery of possession by the mortgagor. This order could not bind the appellant. The originating summons sets out no case against the appellant, and any order made on it, if binding on the appellant, would be a hardship.

The *Conveyancing and Law of Property Act* (Tasmania) (47 Vict., No. 19), sec. 16 (2) enacts: "Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture" (*i.e.*, under any proviso or stipulation in a lease) "the

lessee may, in the lessor's action if any, or in any action brought by himself apply to the Court for relief," and the Court may grant such relief, having regard to the proceedings and conduct of the parties as it thinks fit. This section does not extend to a condition for forfeiture on the bankruptcy of the lessee. It has been held that an originating summons is not an action or proceeding within its meaning: *Lock* v. *Pearce* (1). That was a decision under the *Conveyancing Act*, and this is an *à fortiori* case, being an action founded on a mere personal equity. There is no equity against the appellant and, therefore, even if she had been rightly joined, no order could have been made against her. Relief against forfeiture of a lease has never been granted on originating summons.

Lodge, for respondents. *Lock* v. *Pearce* (1) decided that what was really equivalent to an injunction could not be granted on originating summons. That was in accordance with the English practice. The Tasmanian Statute gives more extensive powers of relief. If appellant had been in possession, no order could have been made against her, as she held under a superior title to that of the mortgagor. The *Equity Procedure Act (No. 4)* (57 Vict., No. 13) enables the Judge to make an order affecting third parties. Persons having distinct and separate titles can be brought before the Court by orginating summons: *Triffett* v. *Union Bank of Australia* (2).

[GRIFFITH C.J.—In that case the other persons joined as defendants were persons entitled to redeem. They were therefore properly brought before the Court.]

The question in this case is, not who is entitled as between mortgagor and mortgagee, but whether the respondents are entitled as against the appellant and Sibley. A Court of Appeal is slow to depart from the ordinary procedure of the Court below: *Waggoner* v. *Flack* (3). If appellant had given her consent to the assignment there could have been no forfeiture. The respondents have a right to an injunction to prevent her from enforcing a forfeiture which in equity she could not enforce. The equitable

(1) (1893) 2 Ch., 271; 68 L.T., 569. (2) Tasmanian Digest, col. 84.
(3) 188 U.S.R., 595.

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mortgagees were really assignees of the lessee. The appellant had notice through her husband that the respondents were to have a security over the lease in consideration of £400 to be advanced by them. This security was worthless with a condition of forfeiture in the event of bankruptcy in the lease.

[BARTON J.—Are we not brought back to the question whether it is a usual covenant or not?]

Whether that be so or not, the respondents were at least entitled to a modified form of the covenant, giving the lessee a right to propose a suitable assignee at any time, and then the respondents would have been protected: *Hampshire* v. *Wickens* (1). The solicitor who drew up the lease acted for both parties, and the appellant consented to the instructions given him by Sibley to protect the rights of the mortgagee.

[GRIFFITH C.J.—If you are treating this as a promise, it must be remembered that the money had been already advanced and the hotel completed before it was given.]

The appellant consented to the equitable mortgage being given, and is therefore in the position of one who encouraged another in the belief that he was to have an interest in the land.

[GRIFFITH C.J.—Do you put your case on the ground of fraud?]

Yes; the respondents were led to believe that they were to have an assignment of the lease. The appellant was privy to the arrangement between Sibley and the respondents, and by her conduct has precluded herself from disputing the respondents' rights under their mortgage: *Willmott* v. *Barber* (2). A mutual understanding between parties forms the foundation of an equitable right where one party has knowledge that the other had incurred expense on the faith of that understanding: *Bankart* v. *Tennant* (3); *Sutherland* v. *Briggs* (4); *Helling* v. *Lumley* (5); *Plimmer* v. *Mayor, &c., of Wellington* (6).

Hudson, in reply. Under the *Conveyancing Act* 1892 (55 & 56 Vict., c. 13) the lessee, before asking for relief against for-

(1) 7 Ch. D., 555.
(2) 15 Ch. D., 96.
(3) L.R., 10 Eq., 141.
(4) 1 Hare, 26.
(5) 3 De G. & J., 493.
(6) 9 App. Cas., 699.

feiture, ought to be in a position to prove he is blameless, and that he exercised all those precautions which a reasonably cautious and careful person would use: *Imray* v. *Oakshette* (1). The only difference between that and the present case is that here the application is made by a mortgagee.

Hobart, March 4.

GRIFFITH C.J. This is an appeal from an order of the Full Court of Tasmania, affirming an order of *Clark* J. in Chambers, by which the appellant and another were ordered to deliver possession of an hotel at Queenstown known as the Metropole Hotel, and of a hall known as "Cairns' Hall," to the respondents "as the persons entitled to an assignment of the lease of the said hotel and of the agreement for the tenancy of the said hall." The order purports to be made under the *Equity Procedure Act* (*No. 4*) (57 Vict. No. 13), which provides (sec. 3) that any mortgagee or mortgagor may take out, as of course, an originating summons returnable before a Judge sitting in Chambers for such relief of any of the natures or kinds following as may by the summons be specified or as the circumstances of the case may require, that is to say :—

"Sale, foreclosure, delivery of possession by the mortgagor, redemption, reconveyance, or delivery of possession by the mortgagee, or account of rents and profits by the mortgagee."

Sec. 4 provides that the persons to be served with any summons under the last preceding section shall be such persons as under the existing practice for the time being of the Supreme Court in its Equity jurisdiction would be the proper defendants to a suit or action for the like relief as that specified by the summons. The section also provides that the Judge may direct such other persons to be served with the summons as he may think fit.

The respondents were equitable mortgagees by deposit, with a written memorandum, of a lease of the hotel in question which is dated 19th December, 1901, and was granted by the appellant to one Sibley for a term of four years from 1st November, 1901, and of an agreement dated 18th November, 1901, by which she agreed to grant to Sibley a lease of the Cairns' Hall, which was on an adjoining piece of land, for a term of five years from 1st November. On 7th December, 1903, the respondents took out their originating

(1) (1897) 2 Q.B., 218; 76 L.T., 632.

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summons, asking for a declaration that they were entitled to possession of the Metropole Hotel and the hall adjoining known as the Cairns' Hall, and such further and other relief as they might be entitled to. The summons was addressed to Sibley the mortgagor and to the appellant.

On 21st December an affidavit was filed by the respondents in support of the summons, setting out that before August, 1901, the appellant had begun the erection of an hotel, but was unable to complete it, and that thereupon it was agreed between her and Sibley that the latter should advance to her £600 to enable her to complete the hotel; that in consideration of the advance the appellant was to grant to Sibley a lease of the hotel for four years at a rental of £100 a year with an option of renewal; that Sibley, being unable to provide the whole of the £600, applied to the respondents for an advance of £400, which they agreed to make upon an agreement that, as soon as the lease was granted, Sibley should give them a mortgage of the hotel for the term to secure his advance; and that the appellant was aware of that agreement. The agreement between the appellant and Sibley for the lease of the hotel, which was dated 31st August, 1901, and the agreement between Sibley and the respondents, which was dated 22nd October, were exhibited to the affidavit.

The agreement for the lease stipulated that it should contain all usual covenants and provisoes inserted in leases of public houses.

The affidavit proceeded to set out that the lease was granted by the appellant to Sibley on 19th December, 1901, and was deposited with the respondent as security for the advance of £400, but that no legal mortgage of the term was given; that the lease was not submitted to the respondents for approval, and they did not admit that it was in all respects in accordance with the agreement of 31st August. It then set out the agreement of 18th November, 1901, by which the appellant agreed to grant to Sibley a lease for five years of Cairns' Hall at a rental of £3 a week, and alleged that this agreement was deposited with the respondents about 22nd June, 1903, as security for money owing, and to become owing, by Sibley to them. The affidavit proceeded to show that Sibley had made default in payment of the rent

under the lease of the hotel; that the appellant had refused to accept the rent from the respondents; that Sibley had made default in payment of the £400 and interest; that on 24th November, 1901, he had filed a petition for liquidation of his affairs by arrangement, and that the first meeting of creditors had been held, but no trustee had been appointed; that the appellant had since the 1st December sought to obtain possession of the hotel and the contents of the hall; that Sibley had since that day been selling liquor in the hotel, ostensibly on his own behalf, but really on behalf of the appellant; that the respondents were in possession of part of the hotel by their bailiff, but that the appellant threatened to eject them; and that Sibley had refused to give up possession of either the hotel or hall. It concluded with the following statement:—"My said firm are willing to accept an assignment of the said lease for the residue of the term thereby granted."

The lease was not exhibited to the respondents' affidavit, but was produced by the appellant at the hearing of the summons It contained a covenant not to assign or sub-let without the written assent of the lessor, and a proviso for re-entry in case of the lessee making default in payment of rent, becoming bankrupt or filing a petition for liquidation. No evidence was offered to show whether these were usual covenants and provisoes to be inserted in leases of public houses in Tasmania, the only reference to the subject being that already stated—that the respondents did not admit that the lease was in all respects in accordance with the agreement of 31st August. The agreement for a lease of Cairns' Hall contained an express stipulation that the lease to be granted should contain a similar covenant and proviso.

The appellant's solicitor made an affidavit, which was not contradicted, in which he deposed that Sibley was adjudicated bankrupt on 21st December, and that the appellant had on 27th November taken possession of the hotel and hall under the provisoes for forfeiture contained in the lease and agreement.

It is apparent on these facts that the appellant had a legal right to re-enter under the lease, and a corresponding right under the agreement of 18th November.

At the hearing of the summons it was objected for the appel-

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lant that the Court had no jurisdiction in that proceeding to require her to give up possession of the land to the mortgagees. It was contended that the jurisdiction extended only to make an order against the mortgagor and persons claiming under him, and not to persons claiming possession of the land under a superior title. The learned Judge of first instance held that he had jurisdiction, and the Full Court, with some doubt on this point, affirmed his decision. I will deal first with the objection to the jurisdiction, and will afterwards consider the nature of the case set up against the appellant.

The Act directs that the originating summons shall be served on the persons who would be the proper defendants to a suit for the like relief. Now the proper defendants to a suit by an equitable mortgagee for foreclosure are the mortgagor and all other persons having a right to redeem. The appellant is the lessor of the mortgagor. The dealings of a lessee with other persons cannot prejudice the lessor's rights reserved under the lease. If they bring about a forfeiture of the lease he can take advantage of it. If they do not, he is not affected. An equitable mortgage of a lease is not of itself a breach of a covenant not to assign without leave, although an order for foreclosure has that effect. The lessor can therefore look with tranquillity upon the litigation, and is free to take advantage of the order of foreclosure or not, as he may think fit. It cannot be suggested that the lessor is a necessary and proper party to a suit for foreclosure of a term. It may be, indeed, that a bill for foreclosure which joined the lessor as defendant, and claimed possession of the land as against him on equitable grounds, would be bad for multifariousness. How then can the appellant be made the respondent to an originating summons for the same purpose? For the respondents it is contended that the words of sec. 4 of the Act, which empower the Judge to direct the summons to be served on such other persons as he may think fit, confer a general jurisdiction on the Court in these proceedings to determine the right of possession against any person on any ground. In my opinion this power is given in aid of the jurisdiction conferred by sec. 3, and does not extend that jurisdiction, which is confined to making an order for possession against the mortgagor and persons claiming under him. We were referred

to the case of *Triffett* v. *Union Bank of Australia*, decided by the late Chief Justice *Sir W. L. Dobson* in 1895 (1), in which he is said to have exercised jurisdiction under the *Equity Procedure Act* No. 4 against claimants of the mortgaged land not claiming through the mortgagor. On examination of that case, however, it will be found that no objection was taken to the jurisdiction, and further that, in the view which the learned Chief Justice took of the facts, the claimants derived title from the mortgagor, and were clearly persons entitled to redeem against the mortgagees.

In my opinion the objection to the jurisdiction was well founded. I think that the legal right of a lessor to re-enter under the conditions of a lease cannot be litigated on a summons by a mortgagee of the term for foreclosure, either on equitable or legal grounds.

This is sufficient to dispose of the case. But, as the merits of the case were argued before us, I will proceed to deal with them. It will then become apparent that the objection to the jurisdiction is not a mere question of form or procedure, but involves important principles affecting the administration of justice.

As presented to us, the respondents' case may be shortly stated thus:—The lessor before the execution of the lease was aware that the respondents were about to advance to the lessee on the security of the lease a sum of money to enable him to pay to her an agreed sum of larger amount by way of foregift, which was to be applied by her in erecting buildings on the land. This knowledge, it was contended, imposed upon the lessor an equitable obligation to grant the lease in such a form that the intending mortgagees would be protected against any possible forfeiture of the lease to their prejudice, or else an equitable obligation not to take advantage of any covenant or condition in the lease which might have that effect. It is clear that the mere fact of knowledge by a lessor that the lessee intends to mortgage the term when created does not, of itself, impose any obligation upon the lessor to protect the future mortgagee's interests. The suggested equity must therefore be founded upon some dealings, contractual or other, between the appellant and the respondents. No evidence whatever was offered of any contractual relationship between them. The respondents' case must then rest upon the doctrine of estoppel by conduct, and this

(1) Tasmanian Digest, col. 84.

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is the view which the Supreme Court apparently took of it. The evidence relied upon by them was a passage in the evidence of Sibley, which, as recorded in the Judge's notes, is as follows :—"I told Mr. Cairns (appellant's husband) before I paid the £600 that Burgess Bros. (respondents) had supplied £400 of it, and that I found the balance, £200, myself. The lease was prepared by Mr. Cruickshank. I told Mr. Cairns that Burgess Bros. were to have the lease for security. This was told by me to him before the lease was executed. I told Mr. Cruickshank that Burgess Bros. were finding £400, and urged him to be careful in drawing the lease so as to protect us." The learned Chief Justice, who delivered the judgment of the Court, referring to this last piece of evidence, said :— "She" (the appellant) "must be held to have consented to the instructions given by Sibley to the solicitor that the lease was to be so drafted that the respondents, as equitable mortgagees, should be protected by it." I do not read the evidence as disclosing any such instructions, but, if they were given by the lessee, I fail to see any evidence of authority in Sibley or Cairns to bind the appellant to any departure from the terms of the agreement of 31st August. The learned Chief Justice proceeded: —"She allowed the respondents to advance their money upon these conditions, and she received that money as part of the £600. There is an equitable obligation on the part of the appellant to the respondents not to enforce the condition of forfeiture upon the bankruptcy of Sibley, so long as the respondents are prepared to comply with all the provisions of the lease. This obligation is clearly enforceable against the appellant." He then quoted from the language of Lord Chancellor *Campbell* in *Cairncross* v. *Lorimer* (1) which was a case of equitable estoppel. It has been often pointed out that the basis of the doctrine of equitable estoppel is fraud. The rules of law governing it are clearly stated by *Fry* J. in *Willmott* v. *Barber* (2). Upon these facts I am quite unable to see how it can be contended either that the appellant owed any duty to the respondents, or that she made any representation of an existing fact to them, or that any representation made was untrue. The appellant and the respondents had no dealings with one another. The respondents advanced

(1) 3 Macq. H.L. Cas., 827, at p. 830. (2) 15 Ch. D., 96.

their money on the security of a deposit of the agreement of 31st August, to be followed by deposit of the lease. The agreement to give the security, which was in writing, is dated 22nd October, and recites the agreement of 31st August. The respondents must therefore be taken to have been aware of its terms, which, so far as the evidence shows, were not departed from. If the respondents had preferred to take a legal mortgage by assignment or underlease, the consent in writing of the lessor would have been necessary to its validity. If they doubted whether this assent could be obtained, they might have protected themselves by obtaining a promise of consent from the appellant before advancing their money. They, however, preferred to take an equitable mortgage, which did not impose on them any liability to the lessor, as an assignment would have done. How then is it fraudulent for the lessor to take advantage of her legal rights under the lease? It is not unimportant to observe that when the respondents obtained the lease itself, apparently soon after it was executed, and when they must be taken to have known its terms, they made no objection to them. The delay was not explained. The summons was to obtain delivery of possession of the land. But the respondents could not ask for possession of more than was comprised in their mortgage, that is, the term created by the lease, which was the foundation of their title, and they were only entitled to it subject to its conditions. It was suggested that the lease was wrongly drawn, and ought to be treated as if rectified, by omitting the covenant not to assign or sublet without leave, and the proviso for re-entry on bankruptcy. This suggestion, however, has no application to the agreement for a lease of the Cairns' Hall, which contained express stipulations on both points. If a bill had been filed against the appellant for the relief given by the Court, it would have been necessary to set out plainly the nature of the representations of fact alleged to have been made by her upon which the claim to relief was founded, and, if rectification was prayed, to set out the grounds for, and nature of, the rectification asked for. Mr. Lodge was unable to distinctly formulate the supposed representations. The respondents, as already pointed out, had, when they made their advances, full knowledge of the actual agreement between the

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appellant and Sibley, and there is no suggestion on the evidence that the appellant made any representation to the contrary.

It is contrary to natural justice to decide a cause against a party without giving him a proper opportunity of knowing the case intended to be made against him. This rule is especially applicable when the case rests on fraud. In *Wallingford* v. *Mutual Society* (1), Lord *Selborne* said:—"With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice. And here I find nothing but perfectly general and vague allegations of fraud. No single material fact is condescended upon, in a manner which would enable any Court to understand what it was that was alleged to be fraudulent. These allegations, I think, must be entirely disregarded."

The case made by the affidavit filed in support of the summons in this case does not even contain an allegation of fraud or of any facts suggesting fraud, nor does it set up any case for rectification of the lease. If it had done so, the appellant would, at any rate, have had an opportunity of defending herself against the charge of fraud, and of adducing evidence on the question whether the covenant and proviso now objected to are usual in leases of public houses in Tasmania. With regard to the hall, no case of any sort is made against the appellant. With regard to the hotel, it was not, in my opinion, open to the respondents, even if the Court had had jurisdiction to entertain the question upon the summons, to set up without proper warning to the appellant such a case as that upon which they now rely. I think also that there was no evidence to support that case. The appeal must therefore be allowed. The orders appealed from will be discharged and the summons will be dismissed as against the appellant with costs in both Courts including costs of Counsel in Chambers. The respondents must pay the costs of the appeal.

BARTON J. I concur.

(1) 5 App. Cas., 685, at p. 697.

O'CONNOR J. The facts which raise the question of jurisdiction are simple and beyond dispute. Sibley and Mrs. Cairns were both actually living on the premises when the proceedings before Mr. Justice *Clark* began. Whether Sibley was there as a lessee under an existing lease, or merely as servant of Mrs. Cairns, it is clear that Burgess Bros. were equitable mortgagees of the lease under which he originally entered, and he was their mortgagor and in default. Mrs. Cairns on the other hand was no party to the mortgage, did not claim under the mortgage, nor did there exist any contractual relation between her and Burgess Bros. Her position was simply that of an owner of the fee simple entering into possession of her land on the determination of the lease. Sibley's lease contained a condition for forfeiture if he should seek the aid of the Bankruptcy Court during the term. It was admitted that Sibley had broken that condition; but it was contended by the respondents that, as against Burgess Bros., Mrs. Cairns was not entitled to enter and take possession, and could not take advantage of the forfeiture, because to do so under the circumstances alleged by the plaintiffs would be to act in fraud of Burgess Bros., and contrary to the duty which in equity she owed them. Assuming for the moment that Burgess Bros. have established a case which in an ordinary equity suit would justify an order for possession against Mrs. Cairns, I am unable to see that such an order could be made upon an originating summons under the jurisdiction conferred by the *Equity Procedure Act*, No. 4.

It is only a mortgagor or a mortgagee who can take out an originating summons under the Act, and the relief which can be obtained under the summons is defined and limited by sec. 3. That is the section which gives jurisdiction—the rest of the Act is nothing more than ancillary. The limits of the jurisdiction are set out in these words "sale, foreclosure, delivery of possession by the mortgagor." That is the relief which the mortgagee can obtain against the mortgagor. The section then goes on to define the relief which can be obtained by the mortgagor against the mortgagee—"redemption, reconveyance or delivery of possession by the mortgagee or accounts of rents and profits against the mortgagee." The next section then directs that the persons to

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be served with the summons are to be those who in accordance with the existing equity practice "would be the proper defendants to a suit or action for the like relief as that specified by the summons," thus giving the Court power to bring in persons claiming under mortgagor or mortgagee, or having such interests in the mortgage as the Court would deem necessary to consider and protect in making the order. Then follow at the end of the section these words:—"The Judge may direct such other persons to be served with the summons as he may think fit." It is contended that these words are wide enough to justify making Mrs. Cairns a party to these proceedings and giving to Burgess Bros. the relief of an award of possession as against her. I am unable to assent to that contention. The words no doubt give the Judge an uncontrolled discretion as to the persons who may be served with the summons and who thereby may get notice of the proceedings. It is necessary that he should have wide powers of bringing before him all those persons whose interests must be considered in making the order. But these powers are in aid of the relief which the Judge is authorized to give. The scope of the relief itself is not extended. That is confined by the terms of the summons. The Judge cannot give relief beyond that claimed in the summons, and the summons can only claim the relief defined in sec. 3, namely relief by a mortgagor against a mortgagee or by a mortgagee against a mortgagor. There was nothing to prevent the Judge directing Mrs. Cairns to be served with the summons at the risk of costs to Burgess Bros. if the Judge should think fit so to order. But bringing her before the Court could not give the Court jurisdiction to make an order against her when she was neither the mortgagor nor claimed under him. If the interpretation contended for by the respondent were adopted, it would be always in the power of the Judge to turn an originating summons under the Act into a suit for summary ejectment as against any person in possession of the mortgaged land, no matter how the possession arose, or upon what ground an order for possession was sought against him. Taking the ordinary grammatical meaning of the words of the Act, no such jurisdiction is given. But assuming that the general words of the last part of sec. 4 which I have quoted were grammatically capable of being con-

strued so as to give the jurisdiction claimed, a consideration of the scope and purpose of the Act itself will show that such a construction would be contrary to the intention of the legislature. From beginning to end of it the Act expressly deals only with the rights of mortgagors and mortgagees. The form of proceeding, by originating summons which, as in this instance, gives no notice to the defendant of the case which is to be made against him may probably work no injustice in cases where the rights in controversy are those of mortgagor and mortgagee or of persons claiming under them—rights in most cases determined by deed, or by agreement, or by consideration of the conditions of an equitable deposit. But where the Judge has to go outside the deed or agreement, or the circumstances of the equitable deposit, and has to investigate the rights of parties who are strangers to the deed or agreement and whose right to possession depends upon entirely different considerations, there is danger of injustice being worked by the application of a summary procedure which gives the party in possession no notice of the case against which he has to defend himself. Perhaps no stronger illustration of the unfairness of applying this summary procedure against a defendant in possession not a party to the mortgage could be given than is afforded by this case itself. One can well understand that the legislature might have seen good reason for establishing a cheap and summary method of proceeding in cases between mortgagor and mortgagee. But taking the whole scope and purpose of the Act I can see no indication of an intention on the part of the legislature to extend the jurisdiction of the Act beyond those cases where the rights of the parties, or of those in possession under them, are regulated by a mortgage whether legal or equitable. If the objection now under consideration involved merely a question of practice or procedure, as has been urged by the respondents, this Court would not interfere if the practice or procedure were well-established, even though the Court might think the practice or procedure irregular or inconvenient. But the question is one of jurisdiction, substantive jurisdiction, and not merely of practice or procedure. Besides, the practice or procedure, which the respondents claim they were right in following, has not been by any means established. I agree with my learned brother the

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Chief Justice that the case of *Triffett* v. *Union Bank of Australia* (1) does not decide the question, and the judgment of the Supreme Court of Tasmania in the present case, although affirming Mr. Justice *Clark's* decision does so on this point with some doubt. On this part of the case therefore I have come to the conclusion that Mr. Justice *Clark* had no jurisdiction to make the order appealed against, and that the Supreme Court of Tasmania ought to have so held. As to the rest of the case I entirely agree with my learned brother the Chief Justice that no reason has been shown why Mrs Cairns should not as against Burgess Bros. take advantage of the forfeiture of Sibley's lease and re-enter into possession of her land. I concur with him in holding, for the reasons which he has fully stated, that the appeal on both grounds must be sustained.

Appeal allowed with costs. Order appealed from and ancillary order of 29th February, 1904, *discharged. Summons dismissed as against appellant with costs in both Courts.*

Solicitor for appellant, *J. W. Hudson.*

Solicitors for respondents, *Roberts & Allport.*

(1) Tasmanian Digest, col. 84.