

[HIGH COURT OF AUSTRALIA.]

THE CITY MUTUAL LIFE ASSURANCE }  
SOCIETY LIMITED . . . . . } APPELLANT ;  
PLAINTIFF,

AND

SIR JAMES JOYNTON SMITH . . . . . RESPONDENT.  
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF  
NEW SOUTH WALES.

H. C. OF A. *Moratorium—Mortgage—Land under Real Property Act (N.S.W.)—Debt secured by*  
1932. *mortgage under that Act—Sub-mortgage—Deed of agreement—Transfer by*  
SYDNEY, *mortgagee of mortgage to sub-mortgagor—Loan by mortgagee to sub-mortgagor—*  
*Retransfer of mortgage to mortgagee to secure loan—Covenant by sub-mortgagor*  
Nov. 8, 9 ; *to repay loan—“ Mortgage of real property ”—“ Land forms part of the security ”—*  
Dec. 8. *“ Land ”—Moratorium Act 1930-1931 (N.S.W.) (No. 48 of 1930—No. 43 of 1931),*  
Starke, Dixon *secs. 2, 25 (1), (4), (7), (8)\*—Moratorium and Interest Reduction (Amendment)*  
and Evatt J.J. *Act 1931 (N.S.W.) (No. 66 of 1931), sec. 4\*—Real Property Act 1900 (N.S.W.)*  
*(No. 25 of 1900), secs. 51, 52, 56 (1), 57 ; Scheds. 7 and 9\*—Interpretation Act*  
*1897 (N.S.W.) (No. 4 of 1897), sec. 21 (e), (f)\*.*

The *Moratorium Act 1930-1931 (N.S.W.)* as amended by the *Moratorium and Interest Reduction (Amendment) Act 1931 (N.S.W.)* provides, by sec. 25, sub-sec. 8, that for the purposes of the section the expression “a mortgage of real property” includes any mortgage where land forms part of the security.

\*The *Moratorium Act 1930-1931 (N.S.W.)* as amended by the *Moratorium and Interest Reduction (Amendment) Act 1931 (N.S.W.)* provides :—By sec. 2 : “In this Act, unless the context or subject matter otherwise indicates or requires, . . . ‘mortgage’ means any deed, memorandum of mortgage, instrument, or agreement whereby security for payment of moneys or for the performance of any contract is granted over land or chattels or any interest therein respectively and

includes . . . any document by which the duration of a mortgage is extended or by which any provision of the mortgage is varied.” By sec. 25 : “(1) After the commencement of the *Moratorium (Amendment) Act 1931*, no action, suit, or proceeding shall be commenced . . . for breach of any covenant, agreement, or condition expressed or implied in any mortgage of real property, except as hereinafter provided . . . (4) Nothing contained in this section shall alter or



A sub-mortgage, by deed of agreement or transfer, of a registered mortgage over the fee simple of land under the *Real Property Act* 1900 (N.S.W.) is a "mortgage of real property" within the meaning of sec. 25 (8) of the *Moratorium Act* 1930-1931 (N.S.W.) as amended, and, whether the security consists wholly of such land or with the addition thereto of personalty, the sub-mortgagee is prevented by that section from having recourse to the personal covenant of the sub-mortgagor.

So held by *Starke* and *Evatt JJ.* (*Dixon J.* dissenting).

*Per Starke J.*: The definition of mortgage in sec. 2 of the *Moratorium Act* and the provisions of sec. 25 (8) do not enlarge the content of the expression "any mortgage of real property" in sec. 25, or introduce into that expression the definition of land contained in the *Interpretation Act* 1897 (N.S.W.), sec. 21 (e).

*Per Evatt J.*: The purpose of sec. 25 (8) was to make it clear that the mere possession of a right of recourse against land in the event of a mortgagor's default was sufficient to disqualify the mortgagee from having recourse to the personal covenant.

The meaning of the word "land" discussed.

Decision of the Supreme Court of New South Wales (Full Court): *City Mutual Life Assurance Society Ltd. v. Smith*, (1932) 32 S.R. (N.S.W.) 332, affirmed.

APPEAL from the Supreme Court of New South Wales.

In 1928 Harry Rickards Tivoli Theatres Ltd., registered under the *Real Property Act* 1900 (N.S.W.) as the proprietor in fee simple of certain land in Sydney, by a memorandum of mortgage under the provisions of that Act mortgaged the land to the City Mutual Life Assurance Society Ltd. to secure payment of certain principal moneys and interest. In pursuance of a deed of agreement dated 20th April 1931 between the respondent, Sir James Joynton Smith, and the Society, this mortgage was transferred to the respondent.

abridge any of the rights or remedies of a mortgagee to sell the mortgaged real property or any easement, right, or privilege of any kind over or in relation thereto, or to obtain foreclosure or possession . . . (7) That subject to sub-section four hereof, notwithstanding anything in this or in any other Act contained, all covenants, agreements, or stipulations by a mortgagor for the payment or repayment of any mortgage moneys secured by a mortgage of real property shall, except for the purpose of enabling a mortgagee to exercise all or any of his rights against the mortgaged property, be void and of

no effect for any purpose whatsoever. (8) For the purposes of this section the expression "a mortgage of real property" includes any mortgage where land forms part of the security."

The *Interpretation Act* 1897 (N.S.W.) provides, by sec. 21:— "In all Acts the following words shall, unless the contrary intention appears, have the meanings hereby respectively assigned to them . . . (e) The word 'land' shall include messuages, tenements, and hereditaments, corporeal and incorporeal of any tenure or description, and whatever may be the estate or interest therein . . . (f)

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Pursuant to the same agreement, the Society agreed to advance certain moneys to the respondent, who covenanted to pay the same, with interest thereon, to execute a mortgage with respect thereto (which, as to the memorandum of mortgage, should take the form of (1) an absolute transfer by him to the Society, and (2) the execution of the deed of agreement) and to transfer the mortgage transferred to him back to the Society, but as security only for payment of moneys advanced by the Society to him and interest thereon. These arrangements were carried out. The agreement contained a stipulation that the Society would at any time, upon payment of the sum so advanced and interest thereon, retransfer to the respondent the mortgage first above mentioned.

On 25th February 1932 the Society commenced an action in the Supreme Court against Sir James Joynton Smith in respect of sums claimed to be instalments of interest due and payable under the agreement of 20th April 1931. The defendant relied upon the provisions of sec. 25 of the *Moratorium Act* 1930-1931 (N.S.W.) as amended by the *Moratorium and Interest Reduction (Amendment) Act* 1931 (N.S.W.); and, under sec. 55 of the *Common Law Procedure Act* 1899 (N.S.W.), a special case was stated for the opinion of the Supreme Court, the principal question arising therefrom being whether the defendant's covenant in the deed of agreement to repay to the plaintiff moneys lent, with interest, was a covenant in a mortgage of real property within the meaning of sec. 25 of the *Moratorium Act* 1930-1931, amended as above.

The Full Court of the Supreme Court held that the transaction was caught by the *Moratorium Act* as amended, and that the

The word 'estate' shall include any estate, or interest, charge, right, title, claim, demand, lien, or incumbrance at law or in equity."

The *Real Property Act* 1900 (N.S.W.) provides:—By sec. 51: "Upon the registration of any transfer, the estate or interest of the transferor as set forth in such instrument, with all rights, powers and privileges thereto belonging or appertaining, shall pass to the transferee, and such transferee shall thereupon become subject to and liable for all and every the same requirements and liabilities to which he would have been subject and liable if named

in such instrument originally as mortgagee, incumbrancee, or lessee of such land, estate, or interest." By sec. 52 (1): "By virtue of every such transfer, the right to sue upon any memorandum of mortgage or other instrument and to recover any debt," or "sum of money . . . thereunder (notwithstanding the same may be deemed or held to constitute a chose in action), and all interest in any such debt," or "sum of money . . . shall be transferred so as to vest the same at law as well as in equity in the transferee thereof." By sec. 56 (1): "Whenever any land or estate or interest in land under the provisions of



Society was not entitled to recover any sum from the defendant: *H. C. OF A. City Mutual Life Assurance Society Ltd. v. Smith* (1). 1932.

From this decision the Society now appealed to the High Court.

*Windeyer* K.C. (with him *Bradley*), for the appellant. An interest in a mortgage is a chose in action, and is wholly personalty, and, as such, does not come within the ordinary meaning of the word "land"; therefore, the provisions of the Moratorium Acts do not affect the matter. Apart from the meaning of the word "land," the Moratorium Acts were intended to apply to cases where the security is partly land and partly personalty, which is not the case here. The Acts do not void personal covenants solely relied upon by lenders for the repayment of moneys advanced. As used throughout the Moratorium Acts, the word "land" has a meaning different from the definition given to it in sec. 21 of the *Interpretation Act* of 1897, which only connotes estates and interests in messuages, tenements and hereditaments; therefore, as a contrary intention appears in the Moratorium Acts, such definition does not apply here. This is a mortgage of a mortgage debt, and therefore is not "a mortgage of real property," that is, "land" within the meaning of sec. 25 (8) of the *Moratorium Act* 1930-1931 as amended. The mere fact that the mortgage debt is itself secured on land is immaterial. The Supreme Court based its decision on *Gibbs v. Messer* (2), *Robert Reid & Co. v. Minister for Public Works* (3), *Re Livi and the Real Property Act* (4) and *Credland v. Potter* (5), which decide that a mortgagee's

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this Act is intended to be charged or made security in favour of any mortgagee the mortgagor shall execute a memorandum of mortgage in the form of the Ninth Schedule hereto." By sec. 57: "Any mortgage or incumbrance under this Act shall have effect as a security but shall not operate as a transfer of the land thereby charged," &c. The Seventh Schedule, so far as material, is as follows:—"I . . . being the registered proprietor as mortgagee . . . do hereby transfer to . . . all the estate and interest of which I am registered proprietor, together with all rights and powers in respect thereof, as comprised and set forth in memorandum of mortgage

. . . registered number . . . of the land comprised in (Crown Grant or Certificate of Title) registered volume . . . folio . . ." The Ninth Schedule, so far as material, is as follows:—"I . . . being registered as the proprietor of an estate in fee simple in the land hereinafter described . . . do, for the purpose of securing to (him) the payment . . . of the said principal sum and interest thereon, hereby mortgage to the said . . . all my estate and interest, as such registered proprietor aforesaid, in . . . the land comprised in (Crown Grant or Certificate of Title) . . . registered volume . . . folio . . ."

(1) (1932) 32 S.R. (N.S.W.) 332. (3) (1932) 2 S.R. (N.S.W.) (L.) 405.  
(2) (1891) A.C. 248. (4) (1930) 30 S.R. (N.S.W.) 447.  
(5) (1874) L.R. 10 Ch. 8.



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interest is an interest in land; but the whole question still remains, does "land" include this interest in land? Pre-existing rights cannot be taken away unless the intention of the Legislature to that effect is expressed in plain words (*Beal's Cardinal Rules of Legal Interpretation*, 2nd ed. (1908), pp. 338 *et seqq.*; 3rd ed. (1924), pp. 385 *et seqq.*). The provisions of the *Moratorium Acts* were intended to apply to the ordinary case of mortgagor and mortgagee. In a case, such as the present, where there is an instrument in the nature of a mortgage, which deals not only with the indebtedness covered by the original mortgage but with other indebtedness, the Legislature did not intend that the mortgagee's right of recourse to the personal covenant should be taken away.

*Jordan K.C.* and *Weston* (with them *Gain*), for the respondent. The expression "real property" in sec. 25 of the *Moratorium Acts* means "land," and in the sense that that word is defined in sec. 21 (e), (f), of the *Interpretation Act* of 1897. The object of the words "forms part of the security" in sec. 25 (8) of the *Moratorium Act* 1930-1931 as amended is to show that the operation of the section is not to be restricted to cases where land forms the whole security, but is to include also cases where land forms part only of the security. A registered mortgagee is a registered proprietor of land under the *Real Property Act* (*Campbell v. District Land Registrar of Auckland* (1)). That the principal security is an inadequate security is irrelevant. Sub-sec. 8 of sec. 25 of the *Moratorium Act* 1930-1931 as amended did not alter the law: it was merely declaratory. The anomalous result of the appellant's contention, if successful, would be that although a sub-mortgage of land under the general law is affected by the provisions of the *Moratorium Acts*, a sub-mortgage of land under the *Real Property Act* is exempt therefrom. It is obvious that the Legislature could not have intended such a distinction. In the sense of the security he holds, the interest of both a mortgagee and a sub-mortgagee is real estate. Sub-sec. 8 of sec. 25 supplies the interpretation of "real property" not only for sub-sec. 7 but also for the whole section.

(1) (1910) 29 N.Z.L.R. 332.



*Windeyer* K.C., in reply. Although sub-sec. 8 was, perhaps, intended to give the phrase "mortgage of real property" a wider meaning, the phrase "forms part of" shows that it is to apply only to cases where there is a mixed security, that is, where the security consists partly of real property and partly of personalty. Where land or an interest in land forms the whole security, the avoidance of the personal covenant by sec. 25 of the *Moratorium Act* 1930-1931 does not apply. For the meaning of "real property," see *Halsbury's Laws of England*, vol. xxiv., p. 137, par. 277; and as to sub-mortgages, see *Halsbury's Laws of England*, vol. xxi., p. 132, par. 253. "Land" does not include a mortgage over a lease for a term of years.

[*Jordan* K.C. referred to *Davies v. Littlejohn* (1).]

The definition of "mortgage" as appearing in the Act affords no assistance in ascertaining what is meant by "land." The *Interpretation Act* of 1897 does not apply, because the word "land" here is used not including interest in land.

*Cur. adv. vult.*

The following written judgments were delivered:—

STARKE J. The special case sets forth the facts in detail, but those essential for the determination of this appeal can thus be stated:—In 1928, Harry Rickards Tivoli Theatres Ltd., registered under the *Real Property Act* 1900 of New South Wales as the proprietor in fee simple of certain land, mortgaged the same to the City Mutual Life Assurance Society Ltd. to secure payment of certain principal and interest moneys. Pursuant to an agreement dated 20th April 1931 between Joynton Smith and the Society, this mortgage was transferred to Joynton Smith. Pursuant to the same agreement, the Society agreed to advance certain moneys to Joynton Smith, who covenanted to pay the same, with interest thereon, and to transfer the mortgage back to the Society, but as security only for payment of moneys advanced by the Society to him, and interest thereon. A transfer of the mortgage was accordingly made to the Society, but the agreement contained a stipulation that the Society would at any time upon payment of

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the sum so advanced and interest thereon retransfer the mortgage to Joynton Smith.

The mortgage from the Harry Rickards Company to the Society had effect as a security, but did not operate as a transfer of the land charged (*Real Property Act*, sec. 57). The transfer of the mortgage from the Society to Joynton Smith operated to transfer all the "estate or interest" of the Society in the security created by the mortgage, and the right to sue upon the mortgage and recover any debt thereunder. (See *Real Property Act*, secs. 51, 52, and form of transfer in the Seventh Schedule.) The transfer by Joynton Smith of the mortgage back to the Society, coupled with the agreement, operated as a sub-mortgage. It comprised not only the personal covenant of Joynton Smith, but the transfer of the original mortgage debt, and the security created by the original mortgage, subject to redemption, with the benefit of all rights, powers and privileges thereto belonging or appertaining (secs. 51, 52). In 1932, the Society commenced an action against Joynton Smith in respect of various sums of money claimed to be due and payable under the agreement of 20th April 1931, but he relies upon the following remarkable provisions of the *Moratorium Act 1930-1931* of New South Wales :—" 25. (1) After the commencement of the *Moratorium (Amendment) Act 1931* no action, suit, or proceeding shall be commenced . . . for breach of any covenant, agreement, or condition expressed or implied in any mortgage of real property . . . (4) Nothing contained in this section shall alter or abridge any of the rights or remedies of a mortgagee to sell the mortgaged real property. . . . (7) That subject to sub-section four hereof, notwithstanding anything in this or in any other Act contained, all covenants, agreements, or stipulations by a mortgagor for the payment or repayment of any mortgage moneys secured by a mortgage of real property shall, except for the purpose of enabling a mortgagee to exercise all or any of his rights against the mortgaged property, be void and of no effect for any purpose whatsoever. (8) For the purposes of this section the expression ' a mortgage of real property ' includes any mortgage where land forms part of the security." " Mortgage " is thus defined in sec. 2 : " any deed, memorandum of mortgage, instrument, or agreement whereby security for payment



of moneys or for the performance of any contract is granted over land or chattels or any interest therein respectively, and includes an equitable mortgage by deposit of title deeds. . . .” The agreement of April 1931 and the transfer of mortgage from Joynton Smith to the Society constitute a security for payment of moneys, and therefore a mortgage, but the critical question is whether they constitute a mortgage of real property.

Lands, tenements and hereditaments are at common law subjects in which estates may subsist, and “it was not until the feudal system had lost its hold that lands and tenements were called real property and goods and chattels personal property.” (*Williams*, on *Real Property*, 14th ed. (1882), p. 7; *Challis*, *Real Property*, 2nd ed. (1892), pp. 41 *et seqq.*) Consequently, the expressions real property, real estate, land, had in common (subject to any special context) a technical meaning in the law, and all denoted rights in property that could be recovered by real actions, long since abolished. These actions were applicable only to land, and only to such interests in land as carried seisin or the possession of freeholders. (*Rose v. Bartlett* (1); *Butler v. Butler* (2); *Cavendish v. Cavendish* (3); *Leach v. Jay* (4); *Challis*, *Real Property*, 2nd ed. (1892), pp. 53 *et seqq.*) A mortgage of real property was therefore a conveyance of land as a security for the payment of a debt or the discharge of some other obligation. (*Santley v. Wilde* (5).) “It consists of two things; it is a personal contract for a debt secured by an estate, and in equity, the estate is no more than a pledge or security for the debt.” (*Quarrell v. Beckford* (6).) A sub-mortgage, in its usual form, transferred the original mortgage debt and mortgaged property subject to redemption, with the benefit of the power of sale and other powers and remedial clauses contained in the original mortgage, and also contained the personal covenant of the mortgagor (see *Coote*, *Law of Mortgages*, 8th ed. (1912), vol. 2, p. 857). If the mortgaged property transferred or conveyed consisted of land, then the transaction in my opinion constituted a mortgage of the real property. Under the *Real Property Act* 1900, No. 25, of New South

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(1) (1633) Cro. Car. 292; 79 E.R. 856.

(2) (1884) 28 Ch. D. 66.

(3) (1885) 30 Ch. D. 227.

(4) (1878) 9 Ch. D. 42.

(5) (1899) 2 Ch. 474.

(6) (1816) 1 Madd. 269, at p. 278; 56 E.R. 100, at p. 103.



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Wales, a mortgage, as already noticed, does not operate as a conveyance of land, but has the effect of a security over the land. But though the form of the security is altered, the substance of the transaction is not changed, and a mortgage under that Act of freehold land remains as much a mortgage of real property as a conveyance by way of security under the general law. The title of the Act —“Real Property Act 1900”—and the provisions of sec. 56 *et seqq.* establish this conclusion. And again, the provisions of sec. 51 and sec. 52, and the Seventh Schedule to the Act, establish sub-mortgages under that Act in the same position as sub-mortgages of land under the general law. The debt and the security or charge on and over the land are transferred and vested in the transferee, subject to redemption. In my opinion, such a transfer constitutes a mortgage of real property. The definition of mortgage in sec. 2 of the *Moratorium Act* and the provisions of sec. 25 (8) do not, to my mind, enlarge the content of the expression “any mortgage of real property” in sec. 25, or introduce into that expression the definition of land contained in the *Interpretation Act* 1897 (N.S.W.), sec. 21 (e). But, for the reasons stated, the decision of the learned Judges of the Supreme Court was, in my opinion, right, and should be affirmed.

DIXON J. This appeal depends upon the meaning and application of sec. 25 of the *Moratorium Act* 1930-1931 of New South Wales. Sec. 25 did not form part of the *Moratorium Act* No. 48 of 1930. Part IV. comprising that section and sec. 26 were inserted by sec. 5 of Act No. 43 of 1931. Sec. 25 then consisted of six sub-sections. Sub-sec. 1 provided that “no action, suit, or proceeding shall be commenced, nor shall any action or proceeding already commenced be continued for breach of any covenant, . . . or condition expressed or implied in any mortgage of real property, except as hereinafter provided.” Sub-sec. 3 provided that the section should “apply to all mortgages of real property whether executed before or after the commencement of this Act, and notwithstanding any stipulation to the contrary.” Sub-sec. 6 provided that the section should extend to a contract of sale of real property. By sec. 2 of the Act of 1930 the word “mortgage” had been given a wide definition which included instruments giving security over land or chattels or any



interest therein. The words "of real property" which follow the word "mortgage" in sec. 25 therefore excluded or restricted the application of the definition of the word "mortgage" at any rate so far as it defines the subject matter of the security. "Real property" is an expression of known legal import equivalent to "real estate," which is a term of art. Unless the context or subject matter requires some other interpretation, it should be understood in a statute according to its legal meaning. The provisions of Part IV., as originally enacted, contained nothing which in my opinion displaces this *prima facie* meaning. But by Act No. 66 of 1931, called the *Moratorium and Interest Reduction (Amendment) Act* 1931, two further sub-sections were added to sec. 25. They are as follows:—"(7) That" (*sic*) "subject to sub-section four hereof, notwithstanding anything in this or in any other Act contained, all covenants, agreements, or stipulations by a mortgagor for the payment or repayment of any mortgage moneys secured by a mortgage of real property shall, except for the purpose of enabling a mortgagee to exercise all or any of his rights against the mortgaged property, be void and of no effect for any purpose whatsoever. (8) For the purposes of this section the expression 'a mortgage of real property' includes any mortgage where land forms part of the security." Sub-sec. 1 had barred the remedy without extinguishing the obligation, and it had been confined in its application to covenants, agreements, or conditions contained in the mortgage itself. It is, of course, evident that sub-sec. 7, besides discharging obligations as distinguished from barring the remedy as sub-sec. 1 had done, has a wider application because it affects an obligation to make payments if secured over real property, whether the obligation does or does not arise from the instrument of mortgage itself. It is also clear that a chief object of the definition in sub-sec. 8 of "a mortgage of real property" was to insure that mortgages were caught although some of the mortgaged property was not real property. But the expression "includes any mortgage where land forms part of the security" has been considered in the Supreme Court to produce a still more important consequence. The use of the word "land" has been taken to show that "real property" must be understood, not in its legal signification, but as relating to all estates and interests

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in land. The word "land" is defined in sec. 21 of the *Interpretation Act* of 1897 as including messuages, tenements and hereditaments corporeal and incorporeal of any tenure or description and whatever may be the estate or interest therein unless the contrary intention appears. This definition departs from its English prototype, and is, no doubt, very extensive. Indeed, if it includes all interests in land, it appears that a debenture secured by a floating charge over the undertaking of a company owning land would come within it (*Driver v. Broad* (1)). But the extent of the definition of land is a question which only arises if the word "land" is used in sub-sec. 8 so as to enlarge the meaning of "real property."

On the whole I have come to the conclusion that sub-sec. 8 should be interpreted as doing no more than so defining mortgage of real property that mortgages over that and other security would be included. The use of the word "land" as an equivalent to real property is not uncommon and, if the intention was to make it clear that interests in land other than real estate should be covered by the enactment, some more definite statement of that intention would be expected. I am, therefore, of opinion that the operation of sec. 25 is confined to mortgages of real property in the proper sense. For practical purposes this means securities over estates of freehold legal or equitable.

In the present case the obligation sought to be enforced arises from a covenant for the payment of interest which together with the principal is secured by an equitable sub-mortgage of certain mortgages of terms of years and by a sub-mortgage of a registered mortgage over an estate in fee simple in land under the *Real Property Act*. Unless this registered mortgage so sub-mortgaged is "real property" the provisions of sec. 25 do not apply and the obligation sued upon is not discharged. The defendant, who is the respondent upon this appeal, became the transferee of the mortgage and transferred it to the plaintiff Society, the appellant, by a transfer absolute in form but actually by way of security for his indebtedness to it and interest thereon. The deed sued upon stated the mortgage character of the transfer. Now the property so transferred by way of security consisted of a mortgage debt and a statutory charge



upon real estate accompanied by certain powers for enforcing the security. It is, of course, an interest in land, but it is in the nature of a statutory charge. No transfer of the legal estate takes place from the mortgagor to the mortgagee as in a legal mortgage under the general law. In the case, however, of a legal mortgage of an estate in fee simple under the general law, the doctrines of the Courts of equity control and define the nature of the mortgagee's proprietary rights and make them personal assets. In *Casburne v. Scarfe* (1) Lord *Hardwicke* said :—"The person having the equity of redemption is considered as owner of the land, and the mortgagee is entitled only to retain it as a security or a pledge for a debt. For this reason a mortgage, though in fee, is considered in this Court as personal assets, and shall go to the executor, notwithstanding that the legal estate vests in the heir in point of law. The husband of a *feme* mortgagee shall not be tenant by the curtesy of the mortgage, unless the mortgage be foreclosed, by which it ceases to be a pledge. It shall not pass by a devise of all his lands, tenements, and hereditaments . . . now if this be the nature of the mortgagee's interest in the eye of this Court, it will follow necessarily from hence that the nature of the interest of the person who has the equity of redemption must, in the eye of this Court, be a real estate; for otherwise the ownership of the land, the real property in equity, will be sunk and vested nowhere, which is not to be admitted, and therefore if it be not in the mortgagee, it must remain in the mortgagor. . . . To say this" (the equity of redemption) "is a mere right of action in equity, will be to fall under the difficulty which I just now took notice of, that then the estate in the land will be in nobody; for it has been determined in this Court, that the mortgage is only in nature of a chose in action, and the objection which I am now considering affirms the equity of redemption to be a chose in action also. It has also been objected that a mortgagee is not a bare trustee for the mortgagor. It is true that a mortgagee is not barely a trustee; but it is sufficient for this purpose that he is in fact a trustee. He is owner of the charge or incumbrance upon the mortgaged premises, and is entitled, in his own right, to hold the same as a pledge for his debt; but as to the

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(1) (1738) 2 Jac. & W. 194, at pp. 195-196; 37 E.R. 600, at pp. 600-601.



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inheritance descendible, the real estate in the land, he is a trustee for the mortgagor till the equity of redemption is foreclosed, either by decree or by such a length of time as Courts of equity allow to bar a redemption."

In applying a statute which uses the words "real property" in reference to the security given by a borrower, it is difficult to believe that the description of the property mortgaged must not be determined by the equitable considerations which govern the true character of the beneficial interest pledged. In an enactment relating to securities it cannot be supposed that the definition fastens upon the possession of a legal estate unaccompanied by beneficial enjoyment. Mortgagor and mortgagee are considered in equity the owners of real estate and personalty respectively, whether a conveyance of the legal estate has or has not been made to the mortgagee. It would be odd, therefore, if in the case of a second mortgage or of a sub-mortgage the operation of this statute should depend upon the accident that the first mortgage was a legal or an equitable mortgage as the case might be, that is, upon the accident that the legal estate had or had not been conveyed to the mortgagee. Yet this would be the result if the description "mortgage of real estate" depended upon legal to the exclusion of equitable property. For in the case of a second mortgage, if the first were a legal mortgage the second would be a security over the equity of redemption and not over a legal estate or interest, whereas if the first mortgage were equitable the legal estate or interest might reside in the mortgagor who would be giving a second security over it. In the case of a sub-mortgage, if the mortgagee had a legal mortgage he would be affecting the legal estate, but, if his mortgage were equitable, he would not be doing so. But these considerations relating to mortgages under the general law for present purposes are important only indirectly as showing that the statute may have a like operation in the case of sub-mortgages of land under either system. In any case the statutory charge constituted by a registered mortgage of land under the *Real Property Act* cannot, in my opinion, be considered more than an interest in land. It confers no estate legal or equitable. It merely provides a security consisting of a number of rights in



relation to land. I think that the transfer of such an interest by way of security was not a mortgage of "real property."

For these reasons I am of opinion that the appeal should be allowed and the judgment of the Supreme Court set aside and the demurrer to the pleas allowed.

EVATT J. The appellant and the respondent entered into a transaction of mortgage, the respondent transferring to the appellant, by way of security for the advance and the agreed interest, a registered mortgage over the fee simple of certain land under the *Real Property Act* 1900.

The question which now arises is whether the transaction between the parties was a "mortgage of real property" within the meaning of sec. 25 of the New South Wales *Moratorium Act* 1930-1931. No definition of "real property" was included in the 1930 Act, but, by an amending Act of 1931, it was expressly provided, by adding a new sub-section (sub-sec. 8) to sec. 25, that a "mortgage of real property" should include any mortgage "where land forms part of the security."

It was contended on behalf of the appellant that this sub-section must be limited to cases where the security consisted of something in addition to land, and that it has no application to cases where the security consisted entirely of land. I disagree with this contention, and think that the word "any" must be understood before the word "part," the intention being that, if land forms *any* part of the security, the mortgage is dealt with by sec. 25.

That still leaves for consideration the main question, which is whether a mortgage of land is itself to be regarded as real property for the purpose of sec. 25. In this case the mortgage is of land under the *Real Property Act* and the legal fee of the mortgaged land never reached the respondent when he became registered proprietor of the first mortgage. But it is impossible to suppose that sec. 25 varies in application according to whether a security is given over a mortgage of land (1) under the old system, where the legal fee is vested in the mortgagee, or (2) under the *Real Property Act*, where it is not.

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In my opinion the learned Judges of the Supreme Court who are well acquainted with the Legislature's emergency decree for the benefit of mortgagors, which is embodied in the *Moratorium Act*, were right in ascertaining the scope of sec. 25 by reliance upon sub-sec. 8 of it. If so, the question for determination is : did land form any part of the appellant's security for repayment of the moneys advanced ?

Where the term " land " is used in a New South Wales enactment, the Courts are commanded to assign to it the meaning set out in sec. 21 (e) of the *Interpretation Act* of 1897. " Land " includes tenements and hereditaments, " whatever may be the estate or interest therein." The word " estate " in sec. 21 (e) is also defined by sec. 21 (f) of the *Interpretation Act*, which applies to the *Interpretation Act* itself, sec. 2 (III.). As " estate " includes " any . . . interest, charge . . . or incumbrance at law or in equity," a registered mortgage of land under the *Real Property Act*, which constitutes a charge or incumbrance upon the land, is included in the phrase " land."

I see no indication in sec. 25 of the *Moratorium Act* of any intention contrary to that of the *Interpretation Act*'s definition of the word " land." It is quite improbable that the Legislature ever intended the words " real property " to be used in their strict technical sense. Any doubt, however, has been resolved by the added sub-section, which makes it clear that the possession of a right of recourse against the land, in the event of default, is, of itself, sufficient to disqualify the mortgagee from having recourse to the personal covenant of the mortgagor.

In my opinion, therefore, the judgment of *Street C.J.* in the Supreme Court was right, and the appeal should be dismissed.

*Appeal dismissed with costs.*

Solicitors for the appellant, *Barry, Norris & Wildes.*  
 Solicitor for the respondent, *F. P. Donohoe.*

J. B.