[HIGH COURT OF AUSTRALIA.]

THE ENGLISH SCOTTISH AND AUSTRALIAN BANK LIMITED . . . . . } APPELLANT;
PLAINTIFF,

AND

PHILLIPS . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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ADELAIDE, 1936, *Sept.* 30; *Oct.* 1, 2.

MELBOURNE, 1937, *Mar.* 1.

Latham C.J., Starke, Dixon, Evatt and McTiernan JJ.

Torrens System—Mortgage of fee simple—Transfer of fee simple subject to mortgage—Payment off of mortgage by original mortgagor—Transfer of mortgage to original mortgagor—Further transfers of mortgage—Personal covenant—Effect of original mortgagor being registered as mortgagee—Merger—Whether original mortgagor liable to ultimate transferee of mortgage—Real Property Act 1886 (*S.A.*) (*No.* 380), *secs.* 57, 97, 143, 150, 151.

After giving a mortgage securing principal and interest, a registered proprietor of land under the *Real Property Act* 1886 (S.A.) transferred the land subject to the mortgage to a purchaser, and the land was thus transferred several times in succession. By reason of sec. 97 of the Act the person in whom the land was vested subject to the mortgage became in respect of the mortgage moneys liable directly to the mortgagee as well as to indemnify the mortgagor. The mortgagee having called up the mortgage moneys and the registered proprietor for the time being having failed to pay them, the mortgagor took a transfer of the mortgage in consideration of a sum equivalent to the mortgage moneys and became registered proprietor of the mortgage. He afterwards transferred the mortgage to a stranger, who in turn transferred it to a bank. The bank brought an action against the original mortgagor to recover the mortgage moneys.

Held, by *Dixon*, *Evatt* and *McTiernan* JJ. (*Latham* C.J. and *Starke* J. dissenting), that the mortgagor was liable notwithstanding that for a time the mortgage had vested in him so that the benefit of the personal covenant had resided

in the covenantor, because under the *Real Property Act* system the mortgage was transferable to and by the mortgagor himself as a registered interest in land and it would be inconsistent with the statute to treat the vesting of the mortgage in the mortgagor as destroying the covenant as against subsequent transferees of the mortgage.

Per Latham C.J. and *Starke* J.: In such a case the mortgage is not merged in the fee simple, though the personal covenant is extinguished.

Decision of the Supreme Court of South Australia (*Angas Parsons* A.C.J.): *English Scottish and Australian Bank Ltd.* v. *Phillips*, (1935) S.A.S.R. 303, reversed.

APPEAL from the Supreme Court of South Australia.

George Phillips was the registered proprietor of an estate in fee simple in land subject to the provisions of the *Real Property Act* 1886 (S.A.). He executed a mortgage of this land to Robert Jones to secure payment of the sum of £782 10s. and interest thereon. Subsequently he transferred the land, subject to this mortgage, to Charlotte Mary Harry. Charlotte Mary Harry executed a second mortgage over the land. The land was transferred, subject to these mortgages, several times until ultimately it was transferred to Edward William Brown. Edward William Brown executed a third mortgage over the land. Brown, who under sec. 97 of the *Real Property Act* became liable to pay the mortgage moneys, did not pay the amount due to Robert Jones, the first mortgagee. Phillips paid to Robert Jones an amount equal to the mortgage moneys. The mortgage, however, was not discharged but was transferred from Robert Jones to Phillips, who thus became registered proprietor of an estate as mortgagee under the first mortgage under which he was also the mortgagor. After holding the mortgage for some time, Phillips entered into a transaction with Randell Rowlands Jones by which, in consideration of a transfer of four blocks of land and payment of £20, he agreed to transfer the mortgage to R. R. Jones. He executed a transfer of the mortgage to the latter. The nature of the transaction suggested that it was not supposed that Phillips would become liable to R. R. Jones under the mortgage. R. R. Jones was a customer of the English Scottish and Australian Bank Ltd. By a transfer dated as on the day following the date borne by Phillips' transfer to R. R. Jones, the latter transferred the mortgage to the bank. All the

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transfers and mortgages above referred to were duly registered. The transactions between Phillips and R. R. Jones and between R. R. Jones and the bank were completed at the bank. Among those present at the settlement were Phillips' solicitor, the accountant of the bank and an officer of its securities department. These officers were aware that the mortgage was vested in Phillips and that he was the original mortgagor. The securities clerk gave evidence that he thought the defendant had bought the mortgage and that he asked if the mortgage were still good and that Phillips' solicitor answered that it was. The solicitor deposed to his belief that either he or one of the bank officers had said that Phillips would not be liable on his personal covenant. This was not denied by the securities clerk, and the accountant was not called as a witness.

The bank brought an action in the Supreme Court of South Australia claiming payment of principal and interest secured by the first mortgage. The defendants were Phillips as signatory to the mortgage and Edward William Brown as the registered proprietor of the land subject to the mortgage. The bank elected to be non-suited as against Brown, who was not served with the writ. The action was tried by *Angas Parsons* A.C.J., who dismissed the claim against Phillips: *English Scottish and Australian Bank Ltd.* v. *Phillips* (1).

From this decision the bank appealed to the High Court.

Mayo K.C. (with him *Abbott*), for the appellant. Sec. 97 of the *Real Property Act* 1886 (S.A.) establishes a direct liability to the mortgagee by the transferee of land subject to the mortgage (*Hogg* on *The Australian Torrens System*, p. 920; *Kerr* on *The Australian Lands Titles* (*Torrens*) *System* (1927), pp. 665, 666; *Hogg* on *Registration of Title to Land throughout the Empire* (1920), p. 242). Sec. 3 of the *Mercantile Law Amendment Act* 1861 (S.A.), which confers on a surety who discharges a liability a right to an assignment of all securities held by the creditor, applies. Had Phillips paid off the mortgage debt before the mortgage was transferred to him, he would, by subrogation, have taken over the mortgagee's rights (*A. M. Spicer & Son Pty. Ltd.* v. *Spicer* (2)). Whether Phillips purported to buy

(1) (1935) S.A.S.R. 303.

(2) (1931) 47 C.L.R. 151.

or to pay off the mortgage he was entitled to a charge over the land and to his remedy against Brown, no matter whether he took a transfer or not (*In re M'Myn*; *Lightbown* v. *M'Myn* (1)). Brown was principal debtor, Phillips a quasi-surety, and suretyship depends on notice, not contract (*Rowlatt* on *Principal and Surety*, 2nd ed. (1926), p. 4). On the transfer of the mortgage to Phillips the covenants were merely suspended and are now enforceable. The covenant in the mortgage is with the person for the time being the registered proprietor of the security (*Real Property Act* 1886, secs. 3, 67, 150, 151, 143). Though the transfer of the mortgage in terms only transfers the charge, by sec. 151 it includes all rights, powers etc. thereto appertaining (See also secs. 175-178). Alternatively, if the covenant were extinguished and Phillips personally released when the mortgage was transferred to him, the subsequent transfer by him operates either as re-execution and redelivery of the mortgage or else as a representation amounting to estoppel (*Hooper* v. *Williams* (2); *In re Seymour*; *Fielding* v. *Seymour* (3)). [Counsel also referred to sec. 57 of the *Real Property Act* 1886 and *Fink* v. *Robertson* (4).]

Ligertwood K.C. (with him *E. Millhouse*), for the respondent. A charge over property can, and here does, exist, although the personal liability is discharged (*Halsbury*, 1st ed., vol. 21, p. 171). A mortgagee of old-system land had no right to sue the assignee of the equity of redemption, although, if he sued the original mortgagor, the latter could be indemnified by the assignee (*Waring* v. *Ward* (5); *Re Law Courts Chambers Co. Ltd.* (6)). Sec. 97 of the *Real Property Act* 1886 recognizes that right and creates further rights of indemnity, while sec. 249 also preserves the old right of indemnity. An original mortgagor called on to pay off the debt has a right of indemnity in equity against the registered proprietor and can sue him in equity for the debt. A mortgagor who has parted with the equity of redemption and is compelled to pay the debt is entitled to have the charge kept alive for his benefit (*Hargrave* v. *Carey* (7), which is

(1) (1886) 33 Ch. D. 575.
(2) (1848) 2 Ex. 13; 154 E.R. 385.
(3) (1913) 1 Ch. 475.
(4) (1907) 4 C.L.R. 864, at p. 877.
(5) (1802) 7 Ves. 332, at p. 337; 32 E.R. 136, at p. 137.
(6) (1889) 61 L.T. 669.
(7) (1933) S.A.S.R. 386.

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the converse of *Adams* v. *Angell* (1)). Phillips paid off the mortgage in accordance with his covenant and took a transfer to preserve his rights. The payment and the transfer discharged him, and the mortgage was paid off, not purchased. To take a transfer of a mortgage is a well recognized method of preserving the security (*Thorne* v. *Cann* (2)). The security persisted for the purpose of preserving Phillips' demand against Brown either under his indemnity or by virtue of sec. 97. Randall Rowlands Jones, who was the predecessor in title of the bank, knew the position when he agreed to take the mortgage ; he did not intend to, nor did he, get a debt from Phillips, and therefore he could not transfer a debt to the bank. The element of intention is important, because there is no re-delivery if there is no intention of re-delivery. If no debt is owing under the mortgage, no debt passes by reason of the transfer. The transferee gets only the estate or interest of the transferor, that is, a charge over the land (sec. 151). A transferee of a mortgage who takes his transfer without the concurrence of the mortgagor is bound by the position of accounts between the mortgagor and the transferor as they existed at the moment of the transfer (*Halsbury*, 1st ed., vol. 21, p. 177 ; *Parker* v. *Jackson* (3) ; *Turner* v. *Smith* (4)). There is nothing in the *Real Property Act* to abrogate that principle. Sec. 151 recognizes it and sec. 249 preserves it. The Act confers only indefeasibility as to title, not as to debt. Where by assignment a debt becomes vested in the debtor, that is the end of it for all time, and it cannot be revived. Estoppel is founded on representations by the person sought to be estopped. Phillips never dealt with the bank, and there is no proof that Randell Rowlands Jones ever represented that Phillips was liable on the personal covenant. The bank knew of the position or was at least put on inquiry. [Counsel also referred to *Rowlatt* on *Principal and Surety*, 2nd ed. (1926), p. 181, and to sec. 186 of the *Real Property Act* 1886.]

Mayo K.C., in reply. Phillips' intention will be judged by what he did, and, in equity, an intention to sustain the charge will be

(1) (1877) 5 Ch. D. 634.
(2) (1895) A.C. 11.
(3) (1936) 2 All E.R. 281, at p. 288.
(4) (1901) 1 Ch. 213.

imputed to him because he took a transfer instead of a discharge (secs. 69 and 80). He could have registered a discharge of his personal covenant.

[EVATT J. referred to *Currey* v. *Federal Building Society* (1).]

Unless there is something in the register book to negative the personal covenant, the mortgagor is liable thereon. Each entry in the register book is conclusive, and it is unnecessary to go behind the entry.

Cur. adv. vult.

1937, Mar. 1.

The following written judgments were delivered :—

LATHAM C.J. Phillips was mortgagor under a mortgage to Robert Jones of land under the *Real Property Act* 1886 of South Australia. After the mortgage was given, Phillips transferred the land subject to this mortgage. A second mortgage was given by his transferee. The land was transferred, subject to these mortgages, several times, the last transfer being from one Daly to one Brown. Brown gave a third mortgage, which still exists. In this state of the title, Phillips paid to the first mortgagee a sum of £782 10s., which was the amount owing on the first mortgage, and that mortgage was transferred to him. Thus Phillips became the owner of the mortgage which he had originally given to Robert Jones. Phillips then transferred the mortgage for value to Randell Rowlands Jones who in turn transferred it for value to the plaintiff bank. All the transactions mentioned were duly registered. The plaintiff now sues Phillips and Brown, the present registered proprietor of the land, for principal and interest secured by the mortgage. Brown was not served with the writ and the plaintiff elected to be non-suited as against him.

The form of the transaction is important. When Phillips paid to Robert Jones the amount owing on the mortgage he obtained a transfer, and not a discharge, of the mortgage. The *Real Property Act* 1886, sec. 143, deals with the registration of a discharge of a mortgage. It provides that when a mortgage, together with a receipt or memorandum discharging the land from the moneys

(1) (1929) 42 C.L.R. 421.

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secured, is produced, the registrar shall register it, and that upon registration the land shall cease to be subject to or liable for the said moneys. This provision does not apply to this case. The register still shows the land as subject to the mortgage in question and to two subsequent mortgages.

In order to ascertain the effect of a registered transfer of a mortgage it is necessary to consider sec. 151, which is as follows:—"Upon such transfer" (of a mortgage) "being registered, the estate or interest of the transferor, as set forth in the instrument transferred, with all rights, powers, and privileges thereto belonging or appertaining, including the right to sue upon and recover in his own name any debt, sum of money, annuity, or damages, under such transferred instrument, shall pass to the transferee."

Thus, if the transfer to Phillips was effectual to transfer the mortgage, he obtained the rights, powers and privileges which had belonged to Robert Jones in his capacity as mortgagee. These rights included rights, when default should occur, to enter into possession of the land (secs. 137 et seq.), to sell the land (secs. 132 et seq.) or to foreclose (secs. 140 et seq.).

The mortgage contained a covenant by Phillips to pay principal and interest to the mortgagee and his assigns. Phillips became an assign of the mortgagee by virtue of the transfer. Thus, in words, Phillips obtained the right to compel himself to pay himself. But a man cannot be an assignee of his own debt. He cannot be under an obligation to pay himself: "A right to bring a personal action once existing and by act of the party suspended for ever so short a time, is extinguished and discharged, and can never revive" (*Ford* v. *Beech* (1)); "Where the party to pay and to receive have become identical there is no debt" (2). Thus, when Phillips became the transferee of the mortgage his covenant to pay was extinguished.

This extinguishment of the covenant to pay does not result in the extinguishment of the mortgage. A mortgage, as a security over and a charge upon land or other property, can quite well exist without any covenant to pay. See *Fink* v. *Robertson* (3), per *Griffith*

(1) (1847) 11 Q.B. 852, at p. 867; 116 E.R. 693, at p. 698.

(2) (1847) 11 Q.B. at p. 870; 116 E.R., at p. 699.

(3) (1907) 4 C.L.R. 864, at pp. 871, 872.

C.J.—a mortgage at common law was a conveyance of the legal estate subject to a condition, and in a court of law, when the condition had happened, the estate became absolute ; usually there was also a covenant for repayment, and of late years the covenant was contained in the same instrument. See also *Halsbury, Laws of England*, 1st ed., vol. 21, p. 171, and *Groongal Pastoral Co. Ltd.* v. *Falkiner* (1)). It is thus clear that a mortgage can exist without such a covenant, and, in my opinion, it is equally clear that a mortgage can continue to exist as a mortgage though a covenant to pay contained in the mortgage has been extinguished.

When Phillips transferred the mortgage to Randell Rowlands Jones the latter became entitled under sec. 151 to the rights &c. of Phillips, including the rights against the land already mentioned. He also became entitled to any right to sue for the mortgage debt which belonged or appertained to the estate or interest of Phillips. Phillips, however, as already explained, had no such right to sue, because he could not sue himself ; therefore sec. 151 cannot operate to give to R. R. Jones any right to sue for the mortgage debt.

For similar reasons the transfer of the mortgage by R. R. Jones to the plaintiff bank did not confer on the bank the right to sue Phillips for the mortgage debt. Thus, in my opinion, the plaintiff's claim against Phillips, based as it is upon the personal liability of Phillips under the covenant to pay, should fail.

Angas Parsons A.C.J. held that, as soon as the mortgagor (Phillips) became the transferee of the mortgage, the debt was extinguished and the mortgage was extinguished so that no transferee from Phillips could treat the debt as a subsisting charge upon the property. The result would be that, the first mortgage having disappeared, the subsequent mortgagees would be promoted in their rights, so that the second mortgagee would become a first mortgagee although he did not provide any of the money with which Phillips purchased the first mortgage. Brown, the registered proprietor of the land, would also receive an uncovenanted benefit by reason of the disappearance of the first mortgage. In my opinion this is not the true result. Phillips did not pay off the mortgage. He purchased it. It is true that, under the general law, the prima facie result would be that

(1) (1924) 35 C.L.R. 157, at p. 163.

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the mortgage debt and the mortgage itself as a security would be extinguished. See *In re George Routledge & Sons Ltd.*; *Hummel* v. *George Routledge & Sons Ltd.* (1):—"The company had become the assignee of its own debt, and become bound to pay itself £100 and interest. It had also become the assignee of its own undertaking by way of charge to secure the payment. The result to my mind is that the debt and the security were both absolutely gone. A man cannot be the assignee of his own debt and cannot be the mortgagee of property of which he is also mortgagor. The debt was gone, and the security was also gone. Subsequently the company transferred these debentures. The transfer was in common form, and the debenture was stamped on the back with a note of the transfer, and the names of the transferees were put on the register in respect of the debenture. To my mind that transaction had no effect. The purchasers were transferees of nothing. There was no debt in existence; there was no security in existence at the date of the transfer to them." But this prima facie result does not follow in all cases. The law has been worked out in relation to cases where a mortgagee purchases an equity of redemption and there are encumbrances subsequent to the mortgage (See *Adams* v. *Angell* (2), and in relation to cases where the owner of an equity of redemption pays off a mortgage and takes an assignment of the mortgage *Thorne* v. *Cann* (3)). A recent case illustrating the principle is *In re Chesters*; *Whittingham* v. *Chesters* (4). In such cases the rule is established that if it is shown that there was an intention to keep the security alive, the mortgage is not extinguished, but is kept alive for the benefit of the purchaser of the equity of redemption, or for the benefit of the mortgagor, as the case may be. The same principle appears to me to be applicable in a case such as the present where a person who became liable as mortgagor purchases a mortgage from the mortgagee. An evident reason for keeping the mortgage alive is to be found in the fact that a subsequent encumbrance exists. In such a case equity will not destroy the security. The intention of the person concerned is ascertained by looking at the facts. Thus "if a charge is paid off by a tenant for life, without any expression of

(1) (1904) 2 Ch. D. 474, at p. 479.
(2) (1877) 5 Ch. D. 634.
(3) (1895) A.C. 11.
(4) (1935) Ch. 77.

his intention, it is well established that he retains the benefit of it against the inheritance. Although he has not declared his intention of keeping it alive, it is presumed that his intention was to keep it alive, because it is manifestly for his benefit" (See *Adams* v. *Angell* (1), per *Jessel* M.R.). The Master of the Rolls adds that it would be a most extraordinary hypothesis to suppose that a person paying the money due under a first mortgage should have intended to make a second mortgagee into a first mortgagee without any explicit arrangement to that effect, thus possibly making a substantial present to the second mortgagee (2). These considerations appear to me to apply to this case. It would be an extraordinary hypothesis to suppose that Phillips intended, by spending £782 10s. in purchasing the mortgage from Robert Jones, to extinguish that mortgage and to promote the second mortgagee into the position of a first mortgagee. This view is confirmed by the fact that Phillips dealt with the mortgage as a subsisting interest in the land, and that he sold it to R. R. Jones, obviously treating it as an existing security. Thus, in my opinion, although the covenant by Phillips to pay the principal and interest has necessarily disappeared, the mortgage still exists as a security over and a charge upon the land, and the present holder of the mortgage, the plaintiff bank, has a full right to exercise all the remedies against the land which are given to it by the Act.

It may be added that under sec. 97 Brown, the present proprietor of the land, is bound, so long as he remains transferee of the land, by an implied covenant with "the mortgagee" in the following terms: That he, the transferee, will pay the principal, interest and other moneys secured by the mortgage, after the rate and at the time or times specified thereon. Sec. 3 of the Act provides that the description of any person as mortgagee shall be deemed to extend to and include the assigns of such person. Thus the plaintiff bank is entitled to the benefit of the implied covenant mentioned, and can therefore recover the mortgage debt from Brown, as transferee of the land, as well as exercise in respect of the land the remedies already mentioned.

(1) (1877) 5 Ch. D., at p. 645.

(2) (1877) 5 Ch. D., at pp. 646, 647.

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Sec. 97 also provides for an implied covenant to pay (or indemnify against payment of) the mortgage debt by the transferee of mortgaged land (such as Brown) with the transferor (such as his immediate predecessor Daly), and by each transferee in turn with his transferor, and so ultimately by Phillips' transferee with Phillips. Phillips did not transfer the mortgaged land to R. R. Jones, nor did R. R. Jones transfer the mortgaged land to the bank. Thus this part of sec. 97 has no direct bearing upon the question under consideration. But it is said that this provision gives some support to the view that Phillips is still personally liable on the covenant to pay, because it provides for working out the liabilities of the persons concerned on a just basis. It is said that if Phillips pays the mortgage debt to the bank, he can recover upon the covenant of indemnity from his transferee, and each transferor along the line can eventually recover it from his transferee, so that ultimately the debt will be recoverable from Brown. This would be the case if the debt were recoverable from and were recovered from Phillips, but sec. 97 has no bearing upon the question whether Phillips is still liable upon the covenant to pay contained in the mortgage. It leaves untouched the argument based upon the fundamental rule that a man cannot be a debtor to himself. It has been argued that when Phillips transferred this mortgage to R. R. Jones he, in effect, redelivered the mortgage as a deed so that all its provisions again became effectual, and reference is made to *In re Seymour*; *Fielding* v. *Seymour* (1) and to sec. 57 of the Act, which provides that an instrument when registered shall have the effect of and be deemed and taken to be a deed duly executed by the parties who have signed it. Cases such as *In re Seymour* (1) relate to a deed, originally invalid, being subsequently acknowledged and recognized as the deed of the grantor. Apart from the subsequent circumstances relied upon as constituting a redelivery, the document in question would have had no effect at all. The present case is very different. There is no question of redelivery or re-execution of an invalid document. A new document, a transfer of the mortgage, was definitely executed by Phillips and registered, and the only question which arises is as to the effect of that transaction. In my opinion,

(1) (1913) 1 Ch. 475.

the principles of law and the provisions of the Act to which I have referred, give a definite answer to that question.

The parties all acted with knowledge of the facts as disclosed by the register. These are all the relevant facts, and in the view which I take of the legal effect of those facts no question of estoppel can arise.

For the reasons stated I am of opinion that Phillips is not liable to the defendant upon the covenant to pay contained in the mortgage or upon any implied covenant.

The appeal should be dismissed.

STARKE J. The respondent Phillips was the registered proprietor of certain land under *The Real Property Act* 1886 of South Australia. He executed a mortgage of this land to Robert Jones to secure the sum of £782 10s. and interest thereon, and this mortgage was duly registered under the Act. Phillips subsequently transferred the land, subject to this mortgage, to Charlotte Mary Harry, who became registered as the proprietor thereof. Ultimately, by a series of transfers, Edward William Brown became the registered proprietor of the land. After the transfer of the land by Phillips, two further mortgages or encumbrances over it were executed, one by Charlotte Mary Harry whilst she was registered as the proprietor, and the other by Edward William Brown himself. And after Brown had been registered as the proprietor of the land, the mortgage from Phillips to Robert Jones was transferred by Jones to Phillips. The transfer, which was duly registered, set forth that it was "in consideration of the sum of £782 10s." paid by Phillips to Jones. Phillips, for valuable consideration, subsequently transferred the mortgage to Randell Rowlands Jones, who, in turn for valuable consideration, transferred it to the bank, the appellant here. Both these transfers were duly registered. The bank sued Phillips and Brown for the sum of £841 (or thereabouts) and interest. The statement of claim alleged that the bank's claim was against Phillips as signatory to the mortgage from himself to Robert Jones, and against Brown as the registered proprietor of the land subject to the mortgage. The mortgage, I should add, contained covenants on the part of the mortgagor Phillips for himself, his heirs, executors, administrators

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and assigns, to pay to the mortgagee Robert Jones, his executors, administrators and assigns, the sum of £782 10s. lent to him by the mortgagee, and interest thereon. The bank at the trial accepted a nonsuit in the case of Brown, and *Angas Parsons* A.C.J., who heard the action, dismissed the claim against Phillips. An appeal is now brought by the bank against this judgment.

Under the general law, a security is discharged by payment of what is due to the holder of the security ; it not only discharges the debt, but determines the rights of the encumbrancer over the encumbered property (See *Otter* v. *Lord Vaux* (1)). But "nothing . . . is better settled than this, that when the owner of an estate pays charges on the estate which he is not personally liable to pay, the question whether those charges are to be considered as extinguished or as kept alive for his benefit is simply a question of intention" (*Thorne* v. *Cann* (2) ; *Adams* v. *Angell* (3)). Under the general law, therefore, the payment by the mortgagor Phillips of what he was personally liable to pay and was due to Jones under the mortgage, discharged the debt due to Jones, and it may be that under the general law the payment would have enured for the benefit of the inheritance. But in the present case the land was under the *Real Property Act* of South Australia, and the mortgage operated by force of the provisions of that Act. No instrument under the Act is effective to pass any land or to render any land liable as security until registered (sec. 67). But upon registration, the person named in, or appearing by any certificate or other registered instrument as seized of, or taking any estate or interest in, land, is the registered proprietor thereof (sec. 68). The title of every registered proprietor of land is absolute and indefeasible, subject to encumbrances notified on the certificate of title, and subject to certain qualifications (sec. 69). Land may be transferred by an instrument of transfer (sec. 96). In every instrument purporting to transfer land mortgaged or encumbered, there is implied the following covenant by the transferee with the transferor, and so long as such transferee shall remain the registered proprietor, with the mortgagee or encumbrancee : that the transferee will pay the

(1) (1856) 2 K. & J. 650 ; 6 DeG.M. & G. 638 ; 43 E.R. 1381.

(2) (1895) A.C. at pp. 18, 19.

(3) (1877) 5 Ch. D. 634.

principal, interest and other moneys secured by such mortgage or encumbrance after the rate and at the time specified therein, and will indemnify and keep harmless the transferor from and against such principal, interest and other moneys, and from and against all liability in respect of any of the covenants contained in such mortgage or encumbrance, or by the Act implied, on the part of the transferor (sec. 97). Again, a mortgage or encumbrance under the Act does not operate as a transfer of the land, but has effect as a security (sec. 132). Upon the production of any duplicate mortgage or encumbrance, together with a memorandum signed by the mortgagee or encumbrancee discharging the land or any part thereof from the whole or part of the moneys secured, the Registrar-General shall make an entry in the register book and on the mortgage or encumbrance, noting that such mortgage or encumbrance is discharged wholly or partially, or that part of the land is wholly or partially discharged, as the case may require, and upon such entry being so made in the register book, the land or the said part thereof shall cease to be subject to or liable for the said moneys noted in such entry as discharged, as the case may be (sec. 143). A registered mortgage or encumbrance may be transferred to any person in the form allowed by the Act (sec. 150). Upon such transfer being registered, the estate or interest of the transferor as set forth in the instrument transferred, with all rights, powers and privileges thereto belonging or appertaining, including the right to sue upon and recover in his own name any debt, sum of money, annuity or damages under such transferred instrument, shall pass to the transferee, and such transferee shall, while he remains the registered proprietor of such estate or interest, be 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 the transferred instrument originally as mortgagee or encumbrancee (sec. 151). The Act, it may be observed, is not a code, and land subject to its provisions is "subject to the same general law as land not under it," except where otherwise provided by it. "The general tendency of the courts in construing the Act" is "to assimilate rights and liabilities under it to those existing under the general law, and to alter previous law as little as

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possible " (*Groongal Pastoral Co. Ltd.* v. *Falkiner* (1) ; *Guest, Transfer of Land Act*, pp. 3 and 215). There are decisions of the Supreme Court of Victoria, under a section which is not precisely in the same terms as sec. 97, that the transfer of mortgaged property does not create a direct liability between the transferee and the mortgagee, though the transferee is liable to indemnify the mortgagor (*Australian Deposit and Mortgage Bank* v. *Lord* (2) ; *Hall* v. *Hubbard* (3)). But it should be observed that sec. 97 in the South Australian Act provides that the covenant shall be implied, " and so long as such transferee shall remain the registered proprietor, with the mortgagee and encumbrancee." It is unnecessary, however, in the present case, to consider the precise obligation thrown by sec. 97 of the Act upon the transferee of land subject to a mortgage, for the personal liability of the original mortgagor arising on the covenants of the mortgage remains unimpaired, notwithstanding the fact that he has conveyed the land to a purchaser : in other words, Phillips, though he had transferred the land, remained liable to Robert Jones on his covenant in the mortgage to him for the principal sum thereby secured and interest thereon. But he paid these moneys to Jones, and thereby discharged the obligation of his covenant in the mortgage. He might have required and registered a memorandum of the discharge of the mortgage, pursuant to sec. 143. He took, however, a transfer of the mortgage to himself. He could not himself sue himself on the covenant to pay, and further, his payment to Jones had discharged, so far as he was concerned, the obligation of that covenant ; though the person to whom he had transferred the land was bound to indemnify him. But I do not think that the security was also discharged, whatever the position might have been under the general law. There was no merger, for Phillips, at the time of the transfer of the mortgage to him, was not the registered proprietor of the land, nor had he any estate or interest therein. Further, the Act itself allows the transfer of a registered mortgage to any person (sec. 150), and prescribes how a security is to be discharged (sec. 143). Phillips might have taken a transfer of the mortgage in the name of a nominee to preserve the security, in aid

(1) (1924) 35 C.L.R., at p. 163. (2) (1876) 2 V.L.R. (L.) 31.
(3) (1931) V.L.R. 197.

of his right to indemnity, and there is nothing in the Act which forbids such a transfer to himself (Cf. *Stevenson* v. *Byrne* (1)). This leads to a consideration of the effect of the transfer of the mortgage from Phillips to Randell Rowlands Jones.

According to the documents in evidence, Randell Rowlands Jones agreed to purchase the mortgage, and to pay for it by the transfer of four blocks of land and £20. And he agreed to indemnify Phillips against any liabilities attached to the property, and to pay all rates, taxes and insurance owing on it. Sec. 151 of the Act provides, as above stated, that upon registration of the transfer, the estate and interest of the transferor in the mortgage and all rights thereto belonging or appertaining, including the right to sue upon and recover in his own name any debt sum of money &c. under the mortgage shall pass to the transferee, and he shall be subject to and liable for the same requirements and liabilities as if he had been the original mortgagee. But the very nature of the transaction precluded Randell Rowlands Jones from suing Phillips for the debt, either under the covenants contained in the mortgage or otherwise. Apart from the fact that Phillips had discharged his obligation under the covenants in the mortgage by payment to the original mortgagee (Robert Jones), the answer to any such claim by Randell Rowlands Jones would be his own indemnity to Phillips, and that in substance, he would be reclaiming the consideration given for the transfer. The provision in sec. 151 does not preclude the parties from carrying out their agreement (*Groongal Pastoral Co. Ltd.* v. *Falkiner* (2)).

The critical transaction must now be considered—the transfer of the mortgage from Randell Rowlands Jones to the bank. The personal liability under the covenants in the mortgage, and the rights given by the security itself, are not coincident. No doubt sec. 151 passes to the transferee the right to sue upon and recover in his own name any debt or sum of money under the mortgage. A covenant, however, in a mortgage to pay principal and interest does not establish that the full extent of the sum named in the covenant is due and owing: it may have been paid off wholly or in part. Under the general law, an assignee takes subject to the

(1) (1897) 19 A.L.T. 47.

(2) (1924) 35 C.L.R., at p. 163.

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state of accounts between his assignor and the mortgagor at the date of the assignment or transfer of the mortgage (*Matthews* v. *Wallwyn* (1); *Mangles* v. *Dixon* (2)). There is nothing in the Act, or in the nature of things, to preclude the operation of that principle in relation to the transfer or assignment of a mortgage under the Act. But if that is so, then, as already stated, Phillips had discharged his obligation under the covenant, and was in any case under no obligation to Randell Rowlands Jones, the assignor to the bank, for any debt upon the covenants in the mortgage. Estoppel was relied upon, but cannot be supported. The bank took a transfer, and took its chance as to the exact position in which Phillips and Randell Rowlands Jones stood to one another. It actually knew the state of the title, and its officers commented upon it.

The result, in my opinion, is that the bank establishes no right against Phillips under the covenant in the mortgage, whatever may be its remedy in respect of the security over the land, or its right to any indemnity to which Phillips may be entitled (Cf. *Beyer* v. *Hingley and Guest and Keyes* (3)).

The appeal should be dismissed.

DIXON, EVATT AND MCTIERNAN JJ. The appeal arises out of an action by the transferee of a mortgage against the mortgagor to recover the mortgage money under the mortgagor's personal covenant. The mortgagor's answer to the action is that after the mortgage was given and before the transfer to the plaintiff, the personal covenant was discharged by payment or was extinguished.

The land is under the *Real Property Act*, and the covenant is contained in a duly registered mortgage given in conformity with that Act.

The defendant was registered proprietor of an estate in fee simple. After mortgaging it to secure the principal sum for which he is sued, he transferred the land by a duly registered instrument of transfer. The new registered proprietor in turn transferred the land, and it is now vested in the sixth successive transferee.

(1) (1798) 4 Ves. 118, at p. 127; 31 E.R. 62, at p. 66.

(2) (1852) 3 H.L.C. 702, at p. 735; 10 E.R. 278, at p. 292.

(3) (1929) N.Z.L.R 18.

Under sec. 97 of the *Real Property Act* 1886 (S.A.), in each instrument transferring the land, a covenant was implied by the transferee with the transferor and, so long as the transferee should remain the registered proprietor, with the mortgagee. This implied covenant required the transferee to pay the principal, interest and other moneys secured by the mortgage, and to indemnify the transferor against the same and against all liability in respect of any covenants contained or implied in the mortgage.

After the sixth and last transfer of the land was registered, the mortgagee appears to have called up the mortgage moneys. The registered proprietor of the land did not pay any part of the amount owing, and the defendant's liability as original mortgagor and covenantor was left undischarged. The statutory liability of the registered proprietor constituted the principal or primary liability, and the defendant's liability on his covenant was accessory or secondary (*Devenish* v. *Connacher* (1)). But, of course, the mortgagee had a direct and unconditional demand upon the defendant as mortgagor. The defendant paid over to the mortgagee an amount equal to the mortgage moneys. If he chose, he might have discharged the mortgage. But if he took that course, the mortgage would be discharged for all purposes, and in that case it would have been at least difficult to obtain any recourse against the land. He, therefore, took a transfer of the mortgage from the mortgagee. It is this transaction which he relies upon as amounting to a discharge by payment of his liability on his personal covenant or as an extinguishment of it. He contends that, in his hands, the mortgage of which he became registered proprietor was a security over the land for the mortgage moneys, but that the only debt or personal liability for the mortgage moneys was that of the registered proprietor implied by sec. 97 of the *Real Property Act* 1886 (S.A.).

After holding the mortgage for some time, the defendant entered into a transaction with one R. R. Jones, by which, in consideration of a transfer of four blocks of land and payment of £20, he agreed to transfer the mortgage to Jones. He executed a transfer of the mortgage in the latter's favour. The nature of the transaction suggests that it was not supposed that the defendant would become

(1) (1930) 3 D.L.R. 977.

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liable to Jones under the mortgage. There is some evidence supporting this conclusion, but the mode of proof adopted seems inadmissible.

Jones was a customer of the plaintiff bank. By a transfer dated as of the day following the date borne by the defendant's transfer to him, Jones transferred the mortgage to the bank. Completion of the transaction between the defendant and Jones, and of that between Jones and the plaintiff bank, took place at the latter's place of business. The defendant's solicitor attended at the bank on his behalf in order to hand over the documents and receive payment of the £20 and the transfers of some, at least, of the blocks of land. The accountant of the bank and an officer of its security department were present. They were aware, of course, that the mortgage was vested in the defendant and that he was the original mortgagor. This feature of the transaction was discussed. The securities clerk gave evidence that he thought the defendant had bought the mortgage and that he asked if the mortgage was still good. He said that the defendant's solicitor answered that it was. The solicitor deposed that it was his belief that either he or one of the two bank officers said that the defendant would not be liable on his personal covenant. The notes of the evidence given by the securities clerk contain no denial of the statement. The accountant was not called as a witness.

The first question which arises is whether the liability of the defendant on his personal covenant was extinguished by the transfer of his mortgage to himself. There can be no doubt that legally and beneficially the obligation and benefit of the covenant came to reside in one person. The transfer to the defendant operated at law, not merely in equity. Under sec. 151 of the *Real Property Act* 1886, he became entitled in point of law to all the rights conferred upon the mortgagee by the mortgage. The covenantor thus became the only person entitled either at law or in equity to the benefit of the covenant. The question is whether this involved a discharge or extinguishment of the covenant. We do not think that before the benefit of the covenant vested in the covenantor it was satisfied by the payment to the mortgagee. The defendant, as mortgagor, chose to treat

payment of the amount demanded by the mortgagee not as discharging the mortgage, but as consideration for its transfer to him. The money cannot be now regarded as paid in satisfaction of the mortgage debt. But, when the transfer of the mortgage to the defendant was registered, the statutory vesting of the obligation in the obligor might work an extinguishment of the covenant, if such extinguishment were consistent with the purposes of the statute. It was suggested, on the other hand, that the covenant might be merely suspended. The foundation for this suggestion must lie in the statute. Under the principles of the common law an attempt to suspend an obligation resulted in its discharge. "It is a very old and well established principle of law, that the right to bring a personal action, once existing and by act of the party suspended for ever so short a time, is extinguished and discharged, and can never revive" (per *Parke* B., *Ford* v. *Beech* (1)). But, apart from statute, the benefit of a covenant would not vest at law in the obligor, at any rate in the same right. The question which calls for decision arises out of the operation of the statutory provisions, and although the legal result ensuing from the situation created by those provisions must be determined by the principles of the general law where the expression of legislative intention stops short, it is necessary, before resorting to them, to obtain a complete understanding of the statute and exhaust the implications it contains.

Under the system of registration governing the present case, the statutory charge described as a mortgage is a distinct interest. It involves no ownership of the land the subject of the security. Like a lease, it is a separate interest in land which may be dealt with apart altogether from the fee simple or other estate or interest mortgaged. But, like a lease, it involves, or usually includes, personal obligations. It is impossible to treat the personal obligations in the same way entirely as the interest in land is treated by the registration system. The register cannot be made the source of information as to the fulfilment or performance of such obligations, and the question what rights they continue to confer may depend upon such matters. Thus, although a proposing transferee of a mortgage may rely upon the register for the existence and validity

(1) (1848) 11 Q.B. 852, at p. 867; 116 E.R., at p. 698.

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of the mortgage, he may be unable to depend upon anything but inquiries from the parties to ascertain how much of the principal sum secured remains unpaid (Cp. *Nioa* v. *Bell* (1)). But, nevertheless, the plan of the legislation is to enable the proprietor to transfer by registration not only the interest in the land, but all the accompanying personal obligations normally incident thereto. "The statute is concerned with dealings in land and it is because a mortgage involves such a dealing that the statute prescribes how mortgages may be transferred and with what consequences. It is concerned with the mortgage transaction in its entirety as it affects the land, and, therefore, extends to the personal liability of the mortgagor for the mortgage debt because that liability is intimately connected with the rights of property arising out of the mortgage transaction" (*Consolidated Trust Co. Ltd.* v. *Naylor* (2)).

In relation to the present case, the most important consideration arising in this plan is the failure to limit the persons who may deal in the interest created by a mortgage or a lease. The language conferring the power of transfer by registered instrument is universal. "A registered mortgage lease or encumbrance may be transferred to any person" (sec. 150 of the *Real Property Act* 1886).

The registered proprietor of the fee simple may take a transfer of that interest. He may do so although he is the very person who created it, and therefore the person who is the covenantor. But if he is capable of taking a transfer and becoming a registered proprietor, he is in that character capable in his turn of making a transfer. The question whether registered interests may without any change in the register be extinguished by merger in estates in land under the system is not necessarily involved in the decision of this appeal. But the subject is connected with the considerations upon which the survival of the covenant depends. For our part we are unable to find anything in the legislation to support the idea that when the proprietor of the estate in fee simple becomes registered proprietor of a mortgage or encumbrance subsisting over the land it is *ipso facto* sunk and merged in the estate in the land of which he is already registered proprietor. Machinery is provided for the discharge of mortgages (secs. 143, 144). None is provided for showing on the register the destruction of the mortgage by merger. When a mortgage comes into the same proprietorship as the fee simple a discharge may be executed by the proprietor in his two

(1) (1901) 7 A.L.R. 145, at p. 146. (2) (1936) 55 C.L.R. 423, at p. 434.

capacities and registered. But otherwise the presence on the register of a mortgage is conclusive that the registered proprietor thereof may transfer it free from all encumbrances or matters of defeasance, with certain well-known specified exceptions none of which includes destruction of the interest by merger. A mortgage under the system is the creature of statute and its incidents depend upon the provisions of the statute and so much of the general law as is availed of by or under those provisions. Destruction by merger does not appear to us to be a part of the general law which the provision relating to registered mortgages should be understood as invoking. The person proposing to deal with such an interest is not expected to satisfy himself that neither the present registered proprietor nor any person preceding him was not proprietor of the estate encumbered or of the reversion. Although what authority there is cannot be said to be uniform, we think the weight of opinion is against the view that the transfer of a registered mortgage or encumbrance to the registered proprietor of the estate encumbered destroys the mortgage or encumbrance (See *Kerr, Australian Lands Titles (Torrens) System* (1927), pp. 29 and 251 and notes ; *Stevenson* v. *Byrne* (1)). In the argument of that case counsel said : " There is nothing in the Act which enables a man to be both mortgagor and mortgagee." *Holroyd* J. answered : " It does not say that he shall not be, and if the circumstances lead to a man coming into that position legally, why should you introduce a doctrine of merger to prevent him having his rights." But cp. *In re Victorian Farmers Loan and Agency Co. Ltd.* (2), decided earlier in the same year and leaving the question open. Recently *Maughan* A.J. decided that a term of years registered under the system, but in land the title to which otherwise had not been brought under the system, might be extinguished by merger in the reversion (*Lewis* v. *Keene* (3)). The special problem raised by the circumstance that the reversion was not under the Act does not, of course, arise in the present case. But neither does the question how leases may be affected by merger. A term of years is an interest existing apart from the provisions of the statute and its qualities are defined by the general law, subject however to the statute. The system does not make the determination of the term dependent, in all cases, on registration, and it is possible that its determination by merger remains allowable. Upon

(1) (1897) 19 A.L.T. 47.
(2) (1897) 22 V.L.R. 629; 18 A.L.T. 204.
(3) (1936) 36 S.R. (N.S.W.), 493 ; 53 W.N. (N.S.W.) 177.

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this we express no opinion. But we do not think that it is the case with mortgages.

It appears to us that the plan of the legislation is to treat mortgages as distinct and persisting interests capable of the same ready transfer by registration as estates in fee simple and without any discrimination or concern as to the relation of the transferee or transferor thereof to any other estate or interest in land. Such a legislative plan is, we think, inconsistent with the application of general doctrines of law under which the final extinguishment of obligations results from the benefit of the obligation coming to reside in the obligor. It must, of course, be true that where the person under a liability to another acquires the other's correlative right he cannot thus incur or come under a liability to himself. But the legislature is not obliged to respect theories of jurisprudence and, when it proceeds to deal with obligations on the analogy of property, it is not likely to do so. When sec. 151 of the *Real Property Act* 1886 says that upon registration of a transfer of a mortgage, lease or encumbrance, the estate or interest of the transferor, as set forth in the instrument transferred, with all rights, powers and privileges thereto belonging, including the right to sue upon and recover in his own name any debt, sum of money, annuity or damages under such transferred instrument, shall pass to the transferee, it means, we think, that they shall pass and be enjoyed as a congeries of separate and distinct rights which in turn may be alienated by him by means of a registered transfer. Thus, we think that in accordance with the general intent of the statutory provisions, a mortgagor who acquires the mortgage by subsequent transfer may himself transfer it in turn just as if he were a stranger to the original transaction by which it came into existence. When he does so the transferee takes it in the same way as if there never had been a coincidence of the obligation and benefit of the covenant in the same person. Where the transferor not only is the original mortgagor, but also remains the registered proprietor of the estate mortgaged, and is therefore primarily liable, this view may result in difficulties in ascertaining the amount which should be regarded as unpaid on the mortgage. These difficulties do not arise where, as in the present case, the mortgagor at the time of transfer is secondarily liable. But it may be suggested that while the mortgagor who is solely liable may be considered as keeping down interest, he cannot be treated as having paid off principal. For he himself has transferred the mortgage as and for

a security for the principal moneys. We are, therefore, of opinion that the plaintiff bank acquired a mortgage the covenants of which remain enforceable against the mortgagor, the defendant.

The conversations between his solicitor and the officers of the bank might have been material if the defendant's liability depended on common-law estoppel. But, under the registration system, such an exchange of opinions cannot affect the rights and liabilities of the parties to the transaction.

It follows, from the views we have expressed, that the plaintiff bank was entitled to recover judgment against the defendant Phillips upon the personal covenant in the mortgage. Prima facie it is entitled to recover the full amount of principal and interest now unpaid. It is said, however, that as between the plaintiff bank and R. R. Jones, the immediate transferor, the bank holds the mortgage only as security for advances made by it to him and as security for a less sum than the amount of the mortgage moneys. If this be so and if, as a result, any surplus recovered over the amount owing to the plaintiff bank by R. R. Jones would be held by the bank as trustee for him, a further question might arise. The true nature of the transaction between the defendant Phillips and R. R. Jones has not been considered in these proceedings, to which the latter is not a party. But the conditions of the transaction may have been such as now to entitle Phillips to recover over against R. R. Jones the amount of the liability to the bank imposed upon the former under his covenant. In that case it might, perhaps, be possible to avoid circuity, at any rate if R. R. Jones were joined as a party, by confining the judgment in favour of the plaintiff bank to the amount owing to it by R. R. Jones. In his defence the defendant Phillips does suggest that the plaintiff bank ought not to recover more than is due to it by R. R. Jones, but the grounds for this contention are not stated. Possibly all the parties can now agree upon the matter. In the meantime it is enough for this court to declare that the liability of the defendant George Phillips upon the personal covenant contained in the mortgage has not been satisfied or otherwise discharged or extinguished, and that the right to enforce the covenant is vested in the plaintiff, and with that declaration to remit the cause to the Supreme Court. If the parties are unable to agree, that court

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may then enter judgment or otherwise deal with the matter consistently with the declaration made in this court as may appear just.

Appeal allowed with costs. Judgment of Supreme Court set aside. In lieu thereof declare that the liability of the defendant George Phillips upon the covenants contained in the mortgage and expressed to be firstly and secondly made by him as mortgagor with the mortgagee has not been satisfied or otherwise discharged or extinguished and that the right to enforce the same is vested in the plaintiff. Remit the cause to Supreme Court to be further dealt with according to law. Order that the defendant George Phillips pay the costs of the action up to this date.

Solicitor for the appellant, *W. A. Thornton.*

Solicitors for the respondent, *Baker, McEwin, Ligertwood & Millhouse.*

C. C. B.