[HIGH COURT OF AUSTRALIA.]

THE SOUTH-EASTERN DRAINAGE BOARD (SOUTH AUSTRALIA) . . . . . Appellant;
Defendant,

AND

THE SAVINGS BANK OF SOUTH AUSTRALIA Respondent.
Plaintiff,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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Melbourne, *Oct.* 23, 24.

Sydney, *Dec.* 19.

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

Torrens System—Priority—Registered mortgage—Statutory first charge—Colonial Laws Validity Act 1865 (28 & 29 *Vict. c.* 63), *sec.* 5—*Real Property Act* 1886 (*S.A.*) (*No.* 380), *secs.* 6, 69, 70—*South-Eastern Drainage Amendment Act* 1900 (*S.A.*) (*No.* 737), *sec.* 14—*South-Eastern Drainage Act* 1931 (*S.A.*) (*No.* 2062), *sec.* 66.

Although not notified on the certificate of title, the first charges on Torrens-system land created by the *South-Eastern Drainage Acts* (S.A.) in respect of construction costs and maintenance rates take priority over a mortgage granted by the registered proprietor and registered on the certificate of title, whether the mortgage was granted and registered before or after the charges came into existence, and notwithstanding that the mortgagee took the mortgage bona fide on the faith of the register.

Hence, where a holder of land under the Torrens system which was benefited by a drainage scheme duly undertaken by the South-Eastern Drainage Board, and its predecessor, owed money to the board for construction costs and annual rates which by the *South-Eastern Drainage Acts* are made first charges on the land and, after the creation of the charge in respect of construction costs but prior to that in respect of annual rates, granted a mortgage which was duly registered upon the certificate of title: *Held* that the statutory charges were on the totality of interests in the land and took priority over the registered mortgage.

Sec. 6 of the *Real Property Act* 1886 (S.A.) provides: "No law, so far as inconsistent with this Act, shall apply to land subject to the provisions of this Act—nor shall any future law, so far as inconsistent with this Act, so apply

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unless it shall be expressly enacted that it shall so apply "notwithstanding the provisions of '*The Real Property Act* 1886'." The sections of the *South-Eastern Drainage Acts* creating first charges did not contain the expression, "notwithstanding the provisions of '*The Real Property Act* 1886'."

Held that, despite this omission, the *South-Eastern Drainage Acts* applied to land under the *Real Property Act* 1886 :—

By *Latham* C.J., *Starke*, *Dixon* and *McTiernan* JJ., because sec. 6, not being a law respecting the constitution, powers or procedure of the legislature, sec. 5 of the *Colonial Laws Validity Act* 1865 did not require the use of the expression, and, as it was passed only to aid in the interpretation of subsequent legislation, if the legislature manifested clearly its intention to make statutory provisions apply to land under the *Real Property Act*, then the omission to use the form did not prevent the provisions so applying. The legislature had clearly shown an intention that the *South-Eastern Drainage Acts* should apply to all land benefited by drainage schemes, including land under the *Real Property Act*, and that the construction costs and rates should form a first unregistered charge, and therefore the absence of the form was immaterial.

By *Evatt* J., because, as there was no inconsistency between the provisions creating the charges and the *Real Property Act* 1886, sec. 6 did not apply, but, if it were sought to apply sec. 6, then it was inoperative and ineffectual, because it purported to lay down a rigid rule binding all future parliaments that, however clearly their intention might be expressed, it would not be given effect to unless it was in the prescribed literary form.

Decision of the Supreme Court of South Australia (Full Court) varied.

APPEAL from the Supreme Court of South Australia.

The Savings Bank of South Australia brought an action in the Supreme Court of South Australia against the South-Eastern Drainage Board and the Registrar-General of South Australia. The statement of claim was substantially as follows :—

1. On 8th June 1912 Archibald Neil McArthur was the registered proprietor of Crown lease (Right of purchase) numbered 3380 in the Register Book of Crown Leases, vol. 163, fol. 24, free of any encumbrances, liens or interests indorsed thereon.

2. On 8th June 1912 the said Archibald Neil McArthur executed a memorandum of mortgage over the said Crown lease to the plaintiff to secure the repayment of the sum of £1,300 then lent by the plaintiff to the said Archibald Neil McArthur.

3. Between the 8th June 1912 and 30th August 1912 the said Archibald Neil McArthur completed the purchase of the lands comprised in the Crown lease and in pursuance of such purchase

became the registered proprietor of the land comprised in Land Grant Register Book, vol. 928, fol. 93, and Certificate of Title Register Book, vol. 928, fol. 94.

4. On 20th September 1912 the said memorandum of mortgage was registered on the said land grant and certificate of title and was numbered 571248.

5. The plaintiff took the said memorandum of mortgage and became the registered proprietor thereof bona fide for valuable consideration.

6. By a transfer which was registered on 30th June 1922 the said Archibald Neil McArthur transferred the said land grant and certificate of title to William John McArthur, subject to the said memorandum of mortgage.

7. On 21st November 1922, the said William John McArthur was registered as the proprietor of an estate in fee simple of the land comprised in the said Land Grant Register Book, vol. 928, fol. 93, and Certificate of Title Register Book, vol. 928, fol. 94, and also in the land comprised in Land Grant Register Book, vol. 933, fol. 34.

8. On 21st November 1922, the said William John McArthur executed a memorandum of mortgage over the said land grants and certificate of title to the plaintiff to secure the repayment of the sum of £1,000 then lent by the plaintiff to the said William John McArthur.

9. The said memorandum of mortgage was registered on 27th November 1922 and is numbered 835330.

10. The plaintiff took the said memorandum of mortgage and became the registered proprietor thereof bona fide for valuable consideration.

11. On 6th December 1934 the defendant South-Eastern Drainage Board gave notice in writing to the defendant the Registrar-General that it claimed a charge under the *South-Eastern Drainage Acts* 1931 and 1933 on the land comprised in the said land grants and certificate of title for arrears of drainage rates and for moneys due to the defendant South-Eastern Drainage Board in respect of the cost of the construction of the drain known as the Mount Hope Petition drain.

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12. On 24th January 1935 the Registrar-General made an entry upon the folios of the register book relating to the said land grants and certificate of title as follows :—

"Charge No. 1179601. The within land is charged with arrears of drainage rates and proportion of costs of drain construction under *South-Eastern Drainage Acts* 1931-1933. Produced for registration 6/12/34."

13. On 16th July 1935 the plaintiff lodged a caveat at the Land Titles Registration Office forbidding the registration of any dealing with any estate or interest of the said William John McArthur in the said land by the South-Eastern Drainage Board unless such dealing was expressed to be subject to the plaintiff's said memoranda of mortgage. The said caveat was noted on the said land grants and certificate of title and is numbered 1193575.

14. On or about 20th February 1936 the South-Eastern Drainage Board purported to apply in writing to the Registrar-General under subdivision V. of sec. 191 of the *Real Property Act* 1886 to remove the said caveat.

15. On 20th February 1936 the Registrar-General gave notice in writing to the plaintiff requiring the plaintiff to withdraw the said caveat and intimating to the plaintiff that otherwise after the expiration of twenty-one days he the Registrar-General would remove the said caveat.

16. The plaintiff claims :—

(1) A declaration that the plaintiff's title to the said memoranda of mortgage is absolute and indefeasible.

(2) A declaration that the plaintiff's said memorandum of mortgage registered No. 571248 over the land comprised in and described by the said land grant, register book, vol. 928, fol. 93, and certificate of title, register book, vol. 928, fol. 94, takes priority over the said charge No. 1179601 claimed by the defendant South-Eastern Drainage Board over the said land.

(3) A declaration that the plaintiff's said memorandum of mortgage registered No. 835330 registered over the land comprised in and described by the said Land Grants Register Book, vol. 928, fol. 93, and vol. 933, fol. 34, and Certificate of Title Register Book, vol. 928, fol. 94, takes priority over the said charge No. 1179601

claimed by the defendant South-Eastern Drainage Board over the said land.

(4) A declaration that the plaintiff is entitled to maintain upon the said land grants and certificate of title the said caveat No. 1193575 lodged by the plaintiff in respect of the said charge No. 1179601 claimed by the defendant South-Eastern Drainage Board.

(5) A declaration that the defendant the Registrar-General was not entitled to note upon the said land grants and certificate of title the said charge No. 1179601.

(6) An order requiring the defendant, the Registrar-General, to remove from the said land grants and certificate of title the memorandum made by him on 24th January 1935 noting the charge.

(7) A declaration that the defendant South-Eastern Drainage Board is not entitled to dispose of or deal with the lands comprised in the said land grants and certificate of title under the charges claimed to be given to the defendant South-Eastern Drainage Board by the *South-Eastern Drainage Acts* 1931 and 1933, unless such disposition or dealing is expressed to be subject to the plaintiff's memoranda of mortgage respectively registered upon the said land grants and certificate of title.

(8) A declaration that the defendant South-Eastern Drainage Board was not entitled to give notice to the defendant the Registrar-General applying for the removal of the said caveat from the said land grants and certificate of title and that the defendant the Registrar-General was not entitled to give notice to the plaintiff requiring the said caveat to be withdrawn and that the defendant the Registrar-General is not entitled to remove the said caveat.

(9) A declaration as to the respective rights of the parties under the Acts of Parliament and documents hereinbefore referred to.

By pars. 1 and 3 of its defence the defendants admitted pars. 1 to 11 inclusive and 13 to 15 inclusive of the statement of claim. Otherwise the defence was, in substance, as follows :—

2. The defendants admit that on 24th January 1935 the Registrar-General made an entry upon the register book, vol. 928, fol. 93, in the form set out in par. 12 of the statement of claim but the entry made upon the register books, vol. 928, fol. 94, and vol. 933,

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fol. 34, on 24th January 1935 was not as stated as in par. 12 but was as follows :—

"Charge No. 1179601. The within land is charged with arrears of drainage rates under the *South-Eastern Drainage Acts* 1931-1933. Produced for registration 6/12/34."

4. The arrears of drainage rates due and payable in respect of the land comprised in certificate of title, vol. 933, fol. 34, have been paid since 24th January 1935 and there are now no drainage rates due and payable in respect of the said land or in respect of the land comprised in certificate of title, vol. 928, fol. 94, and the said lands are therefore not subject to any charge for drainage rates and the charge noted on the said certificate of title has been withdrawn.

5. The land comprised in certificate of title, register book, vol. 928, fol. 93, is part block 7 S, Hundred of Rivoli Bay, and has at all material times been land subject to the provisions of the *Real Property Act* 1886.

6. In or about the year 1902 the requisite majority of landholders duly requested the Commissioner of Public Works (hereinafter called "the commissioner") pursuant to sec. 3 of the *South-Eastern Drainage Amendment Act* 1900 to construct a drain known as the Mount Hope drain.

7. Among the landholders who signed the said request was one Peter McArthur of Millicent, farmer. At the time when he signed the said request the said Peter McArthur was the registered proprietor of the Crown lease referred to in par. 1 of the statement of claim.

8. The commissioner approved of the construction of the said drain and pursuant to sec. 5 of the said Act gave notice of such approval in the *Government Gazette* of the 13th November 1902, at p. 953, and set out in such notice a definition of the land to be benefited ; the said definition included the said part block 7 S.

9. The commissioner subsequently constructed the said drain pursuant to the said Act and an assessment was duly made in accordance with sec. 9 of the said Act and notice thereof was duly published in the *Government Gazette* of 27th June 1907, at p. 1184. The cost of the said drain was in accordance with the provisions of

the said Act duly apportioned amongst all landholders whose lands had been benefited by such construction and notice of such apportionment was duly published in the *Government Gazette* of 30th July 1908, at p. 217. The said part block 7 S was included in such benefited land, and one Archibald Neil McArthur of Millicent farmer (the then registered proprietor of the Crown lease referred to in par. 1 of the statement of claim) was included as the landholder of the said part block 7 S.

10. The amount of such cost so apportioned to the said Archibald Neil McArthur in respect of the said part block 7 S was £970 11s. 4d., and the interest thereon for three years at 4 per cent amounted to £116 9s. 4d. The said sum of £116 9s. 4d. was capitalized as directed by the said Act and added to the sum so apportioned, making a total liability of £1,087 0s. 8d. The said sum of £1,087 0s. 8d. together with interest thereon at the rate of 4 per cent per annum was, pursuant to sec. 14 of the said Act a first charge upon the said part block 7 S and was payable by the said Archibald Neil McArthur and by the landholder for the time being of the said part block 7 S in forty-two annual instalments of £51 16s. 4d. each, the first of which became due on 1st July 1908.

11. As from 15th November 1917 (the date of coming into operation of the *South-Eastern Drainage Act Further Amendment Act* 1917) interest at the rate of 4 per cent per annum (herein referred to as " penalty interest ") has become due and has been charged pursuant to sec. 31 of the said Act upon all such instalments as aforesaid which remained unpaid for more than six months after the same respectively fell due.

12. By virtue of sec. 14 of the *South-Eastern Drainage Amendment Act* 1900 and the Acts from time to time amending or substituted for the same and the Acts incorporated with such Acts the said sum of £1,087 0s. 8d. and interest thereon as aforesaid became and was as from 27th July 1908 and has been at all material times a first charge upon the said part block 7 S payable by the holder thereof for the time being and such first charge has and at all material times had priority over the mortgages to the plaintiff registered on the certificate of title for the said land.

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13. The amount of such first charge on 24th January 1935 (the date when the said first charge was noted on the certificate of title for the said land) was as follows :—

Amount due but unpaid :—

	£ s. d.	£ s. d.
Principal	304 16 3	
Interest	351 19 2	
Penalty interest	135 18 9	
		792 14 2
Future Instalments—		
15 further instalments of £51 16s. 4d. each becoming due on 1st July in each of the succeeding fifteen years		777 5 0
		£1,569 19 2

14. Two further instalments of £51 16s. 4d. each fell due on 1st July 1935 and 1936 respectively and no payment either of principal or interest has been made between the 24th January 1935 and the filing of this defence in respect of the first charge imposed and subsisting on the said part block 7 S by virtue of the Acts aforesaid.

15. In addition to the matters mentioned above drainage-maintenance rates were duly proclaimed pursuant to the *South-Eastern Drainage Act* 1926 and the Acts amending the same in respect of the said part block 7 S for the years ending 30th June 1930 and 1931. The said rates were not paid and a fine of 10 per cent was added thereto pursuant to the provisions of the said Acts.

16. Drainage-maintenance rates were duly declared pursuant to the *South-Eastern Drainage Act* 1931 in respect of the said part block 7 S for the years ending the 30th days of June 1932, 1933, 1934 and 1935. The said rates have not been paid and a fine of 5 per cent was added thereto pursuant to the said Act and interest at the prescribed rate has also become due and payable pursuant to the said Act on the unpaid rates for the year ending 30th June 1933 and the succeeding years.

17. Particulars of the said drainage rates, fines and interest in respect of the said land and charged thereon on 24th January 1935 aforesaid are as follows :—

Rate for year ending	Amount of Rate	Fine	Interest to 24/1/35	Total
	£ s. d.	s. d.	s. d.	£ s. d.
30/6/30	7 18 0	15 10	— —	8 13 10
30/6/31	7 18 0	15 10	— —	8 13 10
30/6/32	7 18 0	7 11	— —	8 5 11
30/6/33	11 16 3	11 10	19 0	13 7 1
30/6/34	11 16 3	11 10	10 1	12 18 2
30/6/35	11 16 3	11 10	3 6	12 11 7
				£64 10 5

18. Since 24th January 1935 aforesaid a further year's rates, amounting to £11 16s. 3d. have been duly declared in respect of the said part block 7 S pursuant to the *South-Eastern Drainage Act* 1931, and further interest has accrued due on the unpaid rates for the years ending the 30th days of June 1933, 1934 and 1935 respectively.

19. No payment has been made to the defendant board in respect of the said drainage-maintenance rates, fines and interest between the 24th January 1935 and the filing of this defence.

20. By virtue of sec. 65 of the *South-Eastern Drainage Act* 1926 and sec. 66 of the *South-Eastern Drainage Act* 1931 the said drainage-maintenance rates, fines and interest are and at all material times have been a first charge upon the said part block 7 S and such charge has and at all material times had priority over the mortgages to the plaintiff registered on the certificate of title for the said land.

21. The memorandum of mortgage registered No. 835330 was duly discharged by the plaintiff by memorandum indorsed thereon and duly registered on 3rd June 1936.

The plaintiff by its reply admitted pars. 2, 4, 5 and 21 of the defence but did not admit any of the other allegations and further objected in point of law that the allegations contained in pars. 5 to 20 afforded no answer to the plaintiff's claim. By consent this point was set down for argument before the Full Court of the Supreme Court of South Australia, which unanimously held that the plaintiff's registered mortgage took priority over the charge of the defendant board for construction costs and which by a majority (*Napier* and

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Richards JJ., *Cleland* J. dissenting) held that the charge of the defendant board in respect of maintenance rates took priority over the registered mortgage of the plaintiff.

The defendant board now appealed to the High Court against so much of the decision of the Supreme Court as was adverse to it and the plaintiff cross-appealed against so much of the decision as was adverse to it.

Hannan K.C. (with him *Pickering*), for the appellant. The charge given by sec. 14 of the *South-Eastern Drainage Amendment Act* 1900 does not depend on registration for its efficacy. There is no instrument or document that can be registered, and there is no registrable interest, for the *Real Property Act* 1886 makes no provision for such interests. The only instruments that can be registered are those executed by the registered proprietor. There is no difficulty in noting the charge or lodging a caveat, but neither method gives priority over registered instruments. The board is still thrown back on its statutory rights. A caveat, if assailed, would have to be removed. Sec. 6 of the *Real Property Act* 1886 does not affect the board's rights under the *South-Eastern Drainage Acts*. It is at the most an interpretation section and means that legislation will apply only to land under the general law unless it is expressly provided that it shall apply to land under the *Real Property Act*. But sec. 6 can be overridden or disregarded by the legislature in subsequent statutes, and, the *South-Eastern Drainage Acts* being later in time and giving paramount statutory provision to charges under the Acts, it must be taken that sec. 6 has been disregarded by the legislature. The whole tenor of the *South-Eastern Drainage Acts* shows that those Acts apply to all lands which are benefited thereby, whether they are under the *Real Property Act* or not. Secs. 133, 134 and 135 of the *Real Property Act* give power of sale on default under a mortgage and define the distribution of the proceeds. Sec. 14 of the *South-Eastern Drainage Amendment Act* 1900 provides for a different distribution.

[McTIERNAN J. referred to *In re Mercantile Building Land and Investment Co. Ltd.* (1).]

(1) (1898) 19 L.R. (N.S.W.) (Eq.) 230.

In sec. 71 of the *Real Property Act* there must be the implied exception that the indefeasibility of title under the Act is always subject to the power of parliament to legislate otherwise.

[DIXON J. referred to sec. 72 of the *Transfer of Land Act* 1928 (Vict.).]

[Counsel referred to *Hogg, Australian Torrens System* (1905), p. 804.]

The charge of the board depends on the statute, not registration (*Waimiha Sawmilling Co.* v. *Waione Timber Co.* (1)). If there are more than one statutory "first" charge, then they rank *pari passu* and in the event of sale, the chargees take rateably. [Counsel referred to *Hogg, Australian Torrens System* (1905), pp. 802, 804, 894, 895, 900.]

Ligertwood K.C. (with him *McEwin*), for the respondent. (1) The provisions of the *South-Eastern Drainage Acts* are not effectual to impose charges on land under the *Real Property Act* 1886 either for construction costs or rates, because they are not expressed to be "notwithstanding the provisions of 'The *Real Property Act* 1886'." (2) The *South-Eastern Drainage Acts* properly construed do not impose charges on land in priority to existing registered charges at the time the statutory charge attaches. (3) If the *South-Eastern Drainage Acts* do confer a charge, then the charge should be registered or noted on title, otherwise it cannot prevail against a subsequent registered mortgage given bona fide for a valuable consideration. (4) If the *South-Eastern Drainage Acts* were effectual to impose a charge, it was a charge on the Crown lease and disappears with the lease on the grant by the Crown of a clear certificate of title. As to the first proposition.—Sec. 5 of the *Colonial Laws Validity Act* 1865 deals with laws regarding procedure of parliament and powers of legislature, and the South-Australian Parliament, having set out a formula, should have followed it in subsequent legislation. Unless it is followed, then it is not a law at all. Parliament can repeal sec. 6 of the *Real Property Act* 1886, but, until it does so, it must be obeyed, for statutes to apply to land under the *Real Property Act*. [He referred to *Ellen Street Estates Ltd.* v. *Minister of Health* (2),

(1) (1926) A.C. 101, at p. 106.

(2) (1934) 1 K.B. 590, at p. 597.

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per *Maugham* L.J. ; *Attorney-General for New South Wales* v. *Trethowan* (1).] There is a conflict between the *Real Property Act* and the *South-Eastern Drainage Acts*, as the latter attacks the indefeasibility of title set up by the *Real Property Act* 1886, secs. 69 et seq. Sec. 6 of the *Real Property Act* must be obeyed; it cannot be repealed partially by later inconsistent legislation. The only exceptions to indefeasibility are those set out in sec. 71 of the *Real Property Act*.

[STARKE J. referred to *Gibbs* v. *Messer* (2).]

In that case the Privy Council stated that the transferee was not dealing with the registered proprietor and, therefore, obtained no title by transfer. Other South-Australian Acts might be contrasted with the *South-Eastern Drainage Acts*. They are the only Acts where the form required by sec. 6 is left out, and therefore it must be assumed that the legislature did not intend the charges to apply to land under the *Real Property Act*. As to the second proposition.—(*a*) The statutory provisions do not contain the form required by sec. 6 of the *Real Property Act*; therefore, the *South-Eastern Drainage Acts* do not create any charge on land under the *Real Property Act* 1886. (*b*) It is not enacted that the charge is to take priority over registered mortgages. (*c*) There is no provision for a public notice of the exercise of the power of sale. (*d*) There is no provision for sale by the court. (*e*) There is no provision for notice to the registered proprietor. (*f*) There is no provision that if the land is sold by the board, the transferee will take the land free of all encumbrances. What is then to happen to other statutory first charges and registered encumbrances ?

[LATHAM C.J. referred to sec. 135 of the *Real Property Act* 1886.]

As to the third proposition, there is authority for registration of the charge by the Registrar-General and in fact he has registered it.

[DIXON J. referred to *Assets Co. Ltd.* v. *Mere Roihi* (3).]

What right has the board to sign a transfer on a sale by it ? It is not registered proprietor, and some implication in its power is necessary. Why should it not be implied that some notification be given on the title ? The implication in sec. 14 of the *South-Eastern*

(1) (1932) A.C. 526.
(2) (1891) A.C. 248.
(3) (1905) A.C. 176, at pp. 205, 206.

Drainage Amendment Act 1900 requires registration of the charge. As to the fourth proposition, the title of the landholder is a different grant after the extinction of the lease and the grant of a clear certificate.

Pickering, in reply. (*a*) Sec. 5 of the *Colonial Laws Validity Act* 1865 is limited to constitutional powers and procedure of parliament. Sec. 6 of the *Real Property Act* is not a constitutional limitation and may be impliedly repealed by subsequent legislation (*Attorney-General for New South Wales* v. *Trethowan* (1)). (*b*) As to the second proposition, the *South-Eastern Drainage Amendment Act* 1900, sec. 14, shows the board has all the powers of a registered mortgagee. (*c*) As to the third proposition, there is nothing to register. There is no instrument other than statute which creates the charge. (*d*) As to the fourth proposition, the charge attaches to the totality of the landholder's interest whatever it is or may become.

Cur. adv. vult.

Dec. 19.

The following written judgments were delivered :—

LATHAM C.J. *The Real Property Act* 1886 is the Torrens statute of South Australia. It provides that the title of every registered proprietor of land shall be indefeasible subject to encumbrances &c. notified on the original certificate of title and to certain qualifications set out in sec. 69 of the Act. Sec. 70 provides that in all other cases the title of the registered proprietor of the land shall prevail notwithstanding the existence in Her Majesty or in any person of any estate or interest whatever whether derived by grant from the Crown or otherwise which but for the Act might be held to be paramount or to have priority. Secs. 71 and 249 refer to other qualifications of or limitations upon the rights of a registered proprietor. Land is defined in sec. 3 to include interests in land and includes therefore the interest of a mortgagee, which is an interest by way of security (sec. 132). Therefore the registered proprietor of a first mortgage takes priority over all other estates and interests in the land not notified on the certificate of title save in the exceptional cases mentioned in the sections to which I have referred.

(1) (1932) A.C. 526 ; 44 C.L.R. 394, at pp. 418, 421, 424, 431, 436.

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Latham C.J.

The *South-Eastern Drainage Amendment Act* 1900 provides, in sec. 14, that the amount of drainage-construction costs apportioned to a landowner under the Act shall be a first charge on the land of the landholder and that the charge upon the land may be enforced by the Commissioner of Crown Lands (to which the South-Eastern Drainage Board has succeeded under the *South-Eastern Drainage Act* 1931) as if he were a mortgagee under the *Real Property Act* 1886. Other statutory provisions make drainage-maintenance rates a first charge on the land. There is no provision in the *Real Property Act* relating to charges of this character.

In the present case a mortgage was given in 1912 by the registered proprietor of the land to the plaintiff bank. The mortgage was duly registered under the *Real Property Act*. In 1908 a charge for construction costs had attached to the land under sec. 14 of the *South-Eastern Drainage Amendment Act* 1900. In and after 1930 maintenance rates were declared and were not paid. These rates, under sec. 65 of the *South-Eastern Drainage Act* 1926 and sec. 66 of the *South-Eastern Drainage Act* 1931, also became a first charge upon the land. The Supreme Court of South Australia has held that the mortgage takes priority over the former charge, but not over the latter charge. The board appeals upon the first question, and the bank cross-appeals upon the second question.

The *Drainage Acts* are subsequent to the *Real Property Act* 1886, and, according to ordinary principles of construction, effect must be given to their provisions, notwithstanding any contrary provisions in the *Real Property Act* 1886. If there is an inconsistency between one statute and a later statute, the later statute prevails. In the present case it is plain that the *Drainage Acts* were intended to apply to all the lands which were improved by drainage schemes under the *Drainage Acts*. There is nothing to support an argument that lands under the *Real Property Act* 1886 were excluded. The result, therefore, is that the charges imposed by the later Acts take priority over the mortgages registered under the *Real Property Act*, whenever those mortgages were so registered. In no other way can effect be given to the clear enactments that the amount of construction costs and maintenance rates is to be a first charge upon the land.

It was argued, however, that it was possible to give effect to the provisions of the *Drainage Acts* by recognizing that they resulted in a first charge being imposed upon the land under the *Real Property Act*, but only if such charges were registered under that Act. There is, however, no provision in the *Drainage Acts* requiring registration of such charges. The charge is created quite independently of registration. Further, sec. 54 of the *Real Property Act* provides that "the Registrar-General shall not, except as herein otherwise provided, register any instrument purporting to transfer or otherwise deal with or affect any estate or interest in land under the provisions of this Act except in the manner herein provided, nor unless such instrument be in accordance with the provisions hereof." The charge is not created by or dependent upon the existence of any instrument. No form of instrument is provided for the registration of a statutory charge. Such a charge, in my opinion, is not capable of registration under the South-Australian *Real Property Act*, though it could be the ground of a caveat. To require registration before giving effect to the charge would be to defeat the provisions of the *Drainage Acts*.

The mortgagee further contended that sec. 6 of the *Real Property Act* 1886 prevented the application of the *Drainage Acts* to land which was under the *Real Property Act*. Sec. 6 is as follows: No law, so far as inconsistent with this Act, shall apply to land subject to the provisions of this Act, nor shall any future law, so far as inconsistent with this Act, so apply unless it shall be expressly enacted that it shall so apply "notwithstanding the provisions of '*The Real Property Act* 1886'."

The first part of this section plainly operates to prevent the application of any earlier statute to land under the Act so far as it was inconsistent with the Act. It was argued that the latter part, relating to future laws, prevented any later Act from applying to land under the *Real Property Act*, even if inconsistent with that Act, unless the later Act expressly enacted that it should so apply "notwithstanding the provisions of '*The Real Property Act* 1886'." It is recognized as a general principle of English constitutional law that one parliament cannot bind its successors, and it was conceded that the Parliament of South Australia could, after the passing of the

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Real Property Act, enact provisions inconsistent with that Act, but it was argued that, by reason of sec. 5 of the *Colonial Laws Validity Act* 1865, subsequent parliaments could not so legislate unless the words prescribed by sec. 6—"notwithstanding the provisions of 'the *Real Property Act* 1886'"—were included in the subsequent Act.

The *Colonial Laws Validity Act* 1865, sec. 5, provides: "Every representative legislature shall, in respect to the colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting the constitution, powers, and procedure of such legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of parliament, letters patent, Order in Council, or colonial law for the time being in force in the said colony."

It was urged that sec. 6 of the *Real Property Act* was a law which prescribed a manner and form for the passing of Acts of parliament and that therefore an Act passed not in such manner and form was not valid. But the proviso with respect to manner and form applies only to laws respecting the constitution of the legislature, the powers of the legislature, and the procedure of the legislature. Sec. 6 is plainly not a provision affecting in any way the constitution of the legislature. Nor does it affect the powers of the legislature. It only purports to prescribe the contents of an Act which the legislature has power to pass. Nor does the section relate to any part of the procedure of the legislature in passing statutes. Accordingly, in my opinion, sec. 6 of the *Real Property Act* cannot operate to deprive of effect any subsequent legislation of the South-Australian Parliament which, upon the natural construction of its terms, enacts a provision which is inconsistent with the *Real Property Act* 1886.

The attention of the court was called to many South-Australian statutes which provided that certain moneys due to public bodies should be a first charge upon land. In the present case it is not necessary to attempt to reconcile all these provisions, or to consider what the result would be if three or four charges upon the same land all enjoyed the position of a statutory first charge. I give no opinion upon this question.

The Full Court of the Supreme Court of South Australia decided that the drainage-maintenance rates were a first charge upon the

land, taking priority over the mortgage, but that the charge for construction costs did not take such priority. For the reasons which I have given, I am of opinion that the second decision was wrong.

Accordingly, in my opinion, the appeal should be allowed and the cross-appeal should be dismissed. The parties agreed that there should be no order as to costs.

STARKE J. Some time before 1902 a Crown lease of certain lands with a right of purchase had been granted to Peter McArthur. It was issued under the *Crown Lands Act* of 1888 (51 & 52 Vict. No. 444) or some corresponding prior enactment. A lease with a right of purchase appears to have been a lease for a term with a right of renewal and a right of purchase of the leased land exercisable after a certain period of time at a price fixed by the land board of the district. Upon payment of the purchase money, I gather that the lessee was entitled to a Crown grant of the lands: Cf. *Crown Lands Act* of 1888, secs. 6, 7, 24, 29, 177. Later *Crown Lands Acts* have recognized Crown leases with a right of purchase (*Crown Lands Act* 1903, Part V.; *Crown Lands Act* 1915, Part VII.; *Crown Lands Act* 1929-1936, Part VII.). The lease to Peter McArthur had prior to 1907 been transferred or assigned to Archibald Neil McArthur. On 8th June 1912 Archibald Neil McArthur executed a memorandum of mortgage over the lands comprised in the Crown lease to the Savings Bank of South Australia. The purchase of the lands comprised in the Crown lease was completed between 8th June 1912 and 30th August 1912. A Crown grant issued in the name of A. N. McArthur in respect of the lands, and he became the registered proprietor of the lands for the purpose of and within the meaning of the *Real Property Act* 1886. On 20th September 1912 the mortgage was entered upon the Crown grant in the register book.

The *South-Eastern Drainage Amendment Act* 1900 (63 & 64 Vict. No. 737) enabled certain drains to be constructed and the cost apportioned among the landholders benefited by the drains. Landholders include lessees of any land held under lease from the Crown. Under this Act a drain known as the Mount Hope drain was constructed and the cost of construction was apportioned among the landholders

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whose land was benefited by the drain. Amongst these landholders was Archibald Neil McArthur in respect of the land held by him under the lease from the Crown already mentioned. The apportionment was made in the year 1908. The fourteenth section of the Act provides that the proportion of the cost apportioned to each landholder shall be a debt due from each such landholder to the Crown and shall be a first charge upon the land of such landholder benefited by the drain and shall be repaid by such landholder with the interest thereon in equal instalments according to the scale set out in the schedule. The charge upon the land may be enforced by the drainage authority as if it were a mortgagee under the *Real Property Act*. The appellant is the authority in which the rights and powers under the Act are now vested: See Acts 1926 No. 1781, sec. 8; 1931 No. 2000, sec. 3; 1931 No. 2062, sec. 8. In addition, the *South-Eastern Drainage Act* of 1931 (22 Geo. V. No. 2062) also provided for certain drainage rates sufficient to pay for the cost of cleaning and maintaining them in a proper state of efficiency and for expenses connected with the care, control and management of the drains and drainage work (sec. 48). "All rates," it is provided by sec. 66, "shall be a first charge upon the land in respect of which they are due, and such charge may be enforced by the board as if it were a mortgagee under the *Real Property Act* 1886."

Drainage-maintenance rates were declared and levied on all lands within the area called in the Act the South East benefited by drains and drainage works constructed under the Acts for the years 1932 to 1935. The land granted to McArthur and in respect of which he was the registered proprietor was within the South-East area. The rates were, therefore, by force of the Act, a first charge upon the land.

It is well enough settled that the statutory first charge so created is upon "the land—that is, on all the interests of the owners of the land," upon "the entirety of the interests in the premises, the whole of the proprietary interests in the premises": "Such a charge has priority over all other charges on the property" (*Birmingham Corporation* v. *Baker* (1); *Paddington Borough Council* v. *Finucane* (2); *Guardians of Tendring Union* v. *Dowton* (3)). But these statutory

(1) (1881) 17 Ch. D. 782.
(2) (1928) Ch. 567.
(3) (1891) 3 Ch. 265.

charges were not created by instruments in the form contemplated by the *Real Property Act* 1886 : See secs. 3, "Instrument," 54, 56, 128. On 6th December 1934 the appellant, however, gave notice to the Registrar-General that it claimed a charge under the *Drainage Act* on the land comprised in the Crown grant already mentioned for arrears of drainage rates and for the cost of construction of the drain known as the Mount Hope drain. On 24th January 1935 the Registrar-General made an entry upon the folio of the register book relating to the land comprised in the Crown grant as follows :— "Charge No. 1179601. The within land is charged with the arrears of drainage rates and proportion of costs of drain construction under the *South-Eastern Drainage Acts* 1931-1933. Produced for registration 6/12/34."

The question for determination is whether these statutory charges or any of them have priority over the mortgage of 8th June 1912 given by A. N. McArthur to the respondent and registered on 20th September 1912. A suggestion was heard during argument that the charges operated only upon the interest created by the Crown lease and not upon any interest created by the subsequent grant from the Crown of the fee simple of the land. It is not necessary to consider how far, if at all, a statutory charge could be enforced against the land in case of forfeiture or surrender of the lease to the Crown, because neither event happened. The Crown lease in the present case had incident to it a statutory right to purchase. Subject to any special provision of the *Crown Lands Act*, the lease with the right incident to it would form part of the estate of the lessee ; it would be assignable and also the subject of disposition by will. It may be compared to a contract for the purchase of land which, we are told, in general terms, makes the purchaser the owner in equity of the land. The statutory charge is upon the land and upon the whole of the proprietary interests in the land. The conversion of the leasehold interest into a fee-simple interest, pursuant to the statutory right, enlarges, no doubt, the interest of the landholder in the land but it does not extinguish the charge.

The claim of the respondent that its mortgage had priority over the statutory charges was based, however, upon the well-known

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provisions of the *Real Property Act* 1886, which embodies the Torrens system of registration of title to land. One of the objects of the Act, declared in sec. 10, was to secure indefeasibility of title to all registered proprietors except in certain specified cases. So it is enacted that the title of every registered proprietor of land, which includes a mortgage security, shall be absolute and indefeasible subject to certain qualifications, that no instrument shall be effectual to pass any land or to render any land liable as security for the payment of money unless registered as prescribed by the Act, that no unregistered estate, interest, right, power, contract or trust shall prevail against the title of a registered proprietor taking bona fide for valuable consideration or of any person bona fide claiming through or under him: See secs. 3, 69, 67, 70, 71. But the charges in the present case are created by and take their force and effect from the statutes creating them. They are not in the form required by the *Real Property Act* 1886, sec. 128. It is true that the South-Eastern Drainage Board might lodge a caveat pursuant to sec. 191 of the *Real Property Act* to protect their charges, and so, perhaps, might the Registrar-General under the power given to him under sec. 220 (5) to enter caveats to prevent improper dealings. The entry of a caveat is to protect the rights of a caveator. But the failure to enter a caveat cannot cut down or interfere with the statutory charges created by the *South-Eastern Drainage Acts*, whatever effect such a failure may have as between competing equities: Cf. *Lapin* v. *Abigail* (1).

Charges are created which depend for their efficacy upon the provisions of the *South-Eastern Drainage Acts*. The statute declares that the apportioned costs and rates shall be first charges. The charges do not depend upon registration nor upon the execution or entry of any instrument. They are complete and effective by reason of the provisions of the Acts creating them. No room so far is left for the operation of the *Real Property Act* 1886, and the explicit and express provisions of the *Drainage Acts* must prevail. The charges are made first charges over the land and all interest therein and have priority over all other charges.

(1) (1930) 44 C.L.R. 166, at p. 205.

But there is a special provision in sec. 6 of the *Real Property Act* 1886 which was much relied upon. It is as follows: No law, so far as inconsistent with this Act, shall apply to land subject to the provisions of this Act, nor shall any future law, so far as inconsistent with this Act, so apply unless it shall be expressly enacted that it shall so apply "notwithstanding the provisions of '*The Real Property Act* 1886'." Legislation in this form was justified, so it was argued, by the *Colonial Laws Validity Act* 1865, sec. 5 (*Attorney-General for New South Wales* v. *Trethowan* (1)). But sec. 5 has nothing to do with ordinary legislation such as is the subject of sec. 6 of the *Real Property Act* 1886; it deals with laws respecting the constitution, powers and procedure of representative legislative bodies. The argument, however, that sec. 6 of the *Real Property Act* 1886 is in substance an interpretation section deserves consideration. "The clause, so to speak, should be written into every statute" (*In re Silver Brothers Ltd.* (2)). Even so, if a subsequent Act chooses to make it plain that the provision of sec. 6 is being ignored or repealed to some extent, then effect must be given "to that intention just because it is the will of the legislature" (*Ellen Street Estates Ltd.* v. *Minister of Health* (3)). In the present case, it is plain, I think, that the *South-Eastern Drainage Act* creates a charge upon all lands benefited by the construction and maintenance of the works mentioned in the Act, whether the lands are subject to the provisions of the *Real Property Act* 1886 or not and whether the charge is registered under the Act or not. The Act is explicit, and it must prevail. It was suggested that this view is in direct conflict with the provisions of sec. 14 of the *South-Eastern Drainage Amendment Act* of 1900 and sec. 66 of the *Drainage Act* of 1931 enabling the statutory charge to be enforced by the board as if it were a mortgagee under the *Real Property Act* 1886. But these Acts do not constitute the board a mortgagee under the *Real Property Act* but only confer on it the powers that a mortgagee has under the *Real Property Act* 1886. Some difficulty may arise in applying the provisions of sec. 135 of that Act, if first charges are created also by various other statutes, as was said to be the case. Counsel for the appellant suggested they would rank *pari passu*, but we are not called upon to express any concluded opinion upon this matter in the present case.

(1) (1932) A.C. 526. (2) (1932) A.C., 514 at p. 523.
(3) (1934) 1 K.B., at p. 597.

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The result is that the mortgage to the respondent, the Savings Bank, does not take priority over the statutory charges created by the *South-Eastern Drainage Act*.

So far as the judgment declares such a priority, the appeal should be allowed, but otherwise the judgment of the Supreme Court of South Australia should be affirmed.

DIXON J. The question for decision in this appeal and cross-appeal is whether certain statutory charges have priority over a first mortgage registered under the *Real Property Act* 1886 of South Australia. The charges are for drainage rates imposed from time to time by the South-Eastern Drainage Board for the purpose of cleaning, repairing and managing a drain called the Mount Hope drain and for, what is a much heavier burden, the unpaid instalments of a due proportion of the cost of constructing the drain.

The statutory provisions by which the land in question is encumbered with these impositions declare them to be a first charge. The mortgagee, however, claims that, as the land is under the *Real Property Act* and the charges at best are unregistered interests, they cannot prevail against his mortgage which he took bona fide upon the faith of a clean certificate of title. In point of date the charge for construction costs is prior to his mortgage, but the rates for maintenance were declared afterwards and did not form a charge earlier. It will be necessary to examine the statutory provisions creating the charges, which are later enactments than the *Real Property Act*, but the question how they affect the land and whether they mean to override the priorities established by that Act as between registered and unregistered interests must be determined with reference to the *Real Property Act* itself. The latter contains a section which provides in advance against the application to land under the Act of future inconsistent legislation of a general nature. It is sec. 6, which is expressed as follows: No law, so far as inconsistent with this Act, shall apply to land subject to the provisions of this Act, nor shall any future law, so far as inconsistent with this Act, so apply unless it shall be expressly enacted that it shall so apply "notwithstanding the provisions of '*The Real Property Act* 1886'."

Sec. 5 of the *Colonial Laws Validity Act* 1865 enacts that such a legislature as the Parliament of South Australia shall have, and be deemed at all times to have had, full power to make laws respecting the constitution, powers and procedure of such legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by (amongst other things) any colonial law for the time being in force in the colony. Sec. 6 of the *Real Property Act* is, in my opinion, not a law respecting the constitution, powers or procedure of the South-Australian legislature. It is scarcely necessary to say that it has nothing to do with the constitution of the legislature. That it is not a law respecting its powers seems to me to appear clearly enough from its content. It does not profess to limit or qualify the power of the legislature in any way. Nor is it concerned with the procedure of the legislature. Sec. 6 has, I think, neither the purpose nor the effect of limiting the power of the Parliament of South Australia to make laws which, though they do not contain the words "notwithstanding the provisions of '*The Real Property Act* 1886'," nevertheless do, according to an intention sufficiently appearing, apply to land under that Act and make provisions inconsistent with it. The section is a declaration as to what meaning and operation are to be given to future enactments, not a definition or restriction of the powers of the legislature.

In interpreting any later enactment which might otherwise be construed as affecting land under the Act in a manner inconsistent with the *Real Property Act*, in order to give effect to sec. 6 the court should, in the absence from the enactment of the prescribed words, treat the general expressions as not including land under the Act. But, if the later enactment contains clear language from which it is plain that its provisions were intended to apply to land under the Act and to apply in a manner inconsistent with the *Real Property Act*, then they must operate according to their meaning. For the later enactment of the legislature must be given effect at the expense of the earlier. But, unless it is found impossible to reconcile the later statute with sec. 6, there is no room for the conclusion that the later Act must be regarded as meaning to operate upon land under the earlier Act and to do so inconsistently therewith. *In re Silver*

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Brothers Ltd. (1) supplies an example of the control which a provision like sec. 6 has upon the interpretation of a later enactment which might be considered inconsistent with the earlier provision. A Quebec statute imposing a tax for commercial purposes gave to sums due for tax to the Crown in right of the Province a first priority in bankruptcy. A Dominion statute imposing an excise tax for war purposes gave first priority in bankruptcy to the excise tax due to the Crown in right of the Dominion. In a conflict such as these provisions appeared to exhibit, the Dominion statute would prevail. But it was discovered that the *Dominion Interpretation Act*, an earlier statute, contained a section providing that no provision or enactment in any Act shall affect in any manner whatsoever the rights of His Majesty, his heirs and successors, unless it is expressly stated therein that His Majesty shall be bound thereby. The section was treated as protecting the rights of His Majesty in right of the Provinces as well as in right of the Dominion, and the Privy Council applied it to the Dominion taxing statute so as to control its operation where the priority it gave would conflict with that given by the Provincial statute. In answer to an argument that, to the later Dominion taxing Act, the provision of the earlier *Dominion Interpretation Act* must give way, in view of the maxim, *posteriora prioribus derogant*, Lord *Dunedin*, giving the opinion of the board, said :—" This entirely misses the point that the maxim only applies when the two statutes cannot live together. There is no difficulty in the statute that enacts " the section giving preference to Dominion tax " living with the *Interpretation Act*. The clause of the *Interpretation Act* is, so to speak, written into every statute. Thus the later statute gives perfectly good priority against all and sundry, but says that this priority does not affect the Crown right in the Province " (2).

Notionally to write the earlier provision into the later may be a useful way of testing the consistency of the two provisions, but in its application it must be remembered that, when two apparently inconsistent provisions occur in one Act of Parliament, to reconcile them by interpretation is the only course open. They cannot both receive their full meaning as it is expressed. In other words no-one can say that two provisions cannot live together when the legislature

(1) (1932) A.C. 514.

(2) (1932) A.C., at p. 523.

which gave them life found room for them in the one enactment. But, subject to this observation, what Lord *Dunedin* says represents the principle governing the application of sec. 6 of the *Real Property Act* to later enactments. It therefore becomes necessary to consider whether, in statutes creating the charge for construction costs and for rates, there is an irreconcilable intention to include land under the Act and to give priority to the charges notwithstanding that the registration system would produce a contrary effect. That the registration system would in the present case produce an effect contrary to that for which the South-Eastern Drainage Board contends, at all events in the case of construction costs, is, I think, quite clear, that is, if the registration system is given full operation on the footing that the statutory charge creates no more than an unregistered interest.

As in all legislation giving effect to the Torrens system, a fundamental provision of the *Real Property Act* 1886, South Australia, is that which makes the title of every registered proprietor of land absolute and indefeasible, subject to the encumbrances, estates and interests notified on the certificate of title and subject to certain specified exceptions. In the South-Australian Act statutory charges are not included among the specified exceptions: See sec. 69. After this provision comes the emphatic declaration that in all other cases than those specified the title of the registered proprietor of land shall prevail, notwithstanding the existence in the Crown or in any person of any estate or interest whatever derived by grant from the Crown or otherwise, which but for the Act might be held paramount or to have priority (sec. 70).

The unregistered charge for construction costs existed at the time when the appellant bank took its registered first mortgage, and to give it a priority over that security is, I think, in plain opposition to these provisions.

It follows, therefore, that the question upon which our decision must turn is whether in the enactments creating the statutory charges such a clear intention is expressed to include land under the *Real Property Act* and to give to the charges an absolute and indefeasible priority over all other interests that, notwithstanding sec. 6 of that

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Act, no course is open but to allow the intention so expressed in the later enactments to be paramount over the earlier *Real Property Act*.

In my opinion this question ought to be answered that such an intention so plainly appears that no other course is open. This answer depends upon provisions which, as to construction costs, are to be found in the *South-Eastern Drainage Amendment Act* 1900, an Act which, although repealed, governs the rights and liabilities of the parties in this case: Cf. sec. 16 (1) of the *Acts Interpretation Act* 1915-1936 of South Australia. The purpose of that statute was to authorize, on the request of a preponderance of the landholders affected, the construction of certain drains for the improvement of land and to apportion the cost among them. The Mount Hope drain was specifically mentioned in a schedule to the Act. The principle, which other provisions develop, was expressed in sec. 7, which provided that the cost of constructing the drain should be deemed to be an advance from the Irrigation Commissioner, whose place is now taken by the board, to all landholders of land to be benefited by the construction of the drain and that such advance should be repaid to him by the landholders with interest.

After setting up machinery for determining the proportion of the cost which each landholder must bear, the statute went on to provide that the amount apportioned should be a debt due from each such landholder to the commissioner and should be a first charge upon the land of such landholder benefited by the drain and should be repaid by such landholder to the commissioner, with interest thereon, in forty-two equal instalments (sec. 14). The same section provided that the charge upon the land might be enforced by the commissioner as if he were a mortgagee under the *Real Property Act* 1886. The personal liability imposed by this provision attaches only to the landholder in that character. Like the charge, it runs with the land, and, on a transfer of the land, it attaches to the new owner. This appears from sec. 18, a provision of great importance, which gives to the commissioner two remedies for the recovery of instalments, viz., first, a power to distrain and sell any goods and chattels on the land upon which the debt is charged, and, second, a right to sue the landholder of the land for the time being for the recovery of the

instalments. As an alternative to the commissioner, the right of suit is vested in the Minister of the Crown controlling drainage works.

From these provisions the following matters clearly appear :—

(1) The lands made the subject of the charge are selected by reason of the improvement or benefit they will obtain from the scheme independently altogether of their being under, or not being under, the *Real Property Act*. If lands were excluded on the ground that they are under that Act, the whole scheme would be defeated. Moreover, in the case of the Mount Hope drain and certain other works, the very drain is specified and the lands affected are thus indirectly indicated by the statute itself. It is therefore impossible to give effect to sec. 6 of the *Real Property Act* by excluding land under that Act from the charge.

(2) The first charge is upon the entirety of the interests making up ownership.

(3) The first charge is vested in the commissioner by force of the statute, and no instrument creates it. It is held by him on behalf of the Crown and supported by statutory remedies, all of which are confided to him in his governmental or administrative character. The charge is not an interest in land capable of alienation. It is not an interest which could be placed upon the register. It is, therefore, impossible to act upon the view for which authority may be found in *Assets Co. Ltd.* v. *Mere Roihi* (1) and regard the statutory charge as something intended to be brought into conformity with the general registration system and therefore requiring registration. When sec. 14 speaks of the commissioner enforcing the charge as if he were a mortgagee under the Act it recognizes that he will not take his position on the register as the owner of a registered charge.

(4) Even if it were possible to postpone the priority given to the charge in favour of a subsequent registered interest, it would not be possible to defeat the liability of all goods and chattels on the land to distress and sale for non-payment of the charge. For that is an independent statutory power vested in the commissioner or the board as his successor.

(5) The fact that the landholder for the time being is liable for the instalments as a debt shows that the charge cannot be over-reached by a dealing however bona fide and whatever reliance was placed upon the state of the register. For under sec. 18 a transfer operates to impose on the transferee a direct personal liability for

(1) (1905) A.C., at p. 205.

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the instalments falling due while he remains owner. The charge does no more than give an additional remedy against the land to enforce payment of the sum which in any case can be recovered by distress upon the occupier and by action against the owner. If it were true that a mortgagee might gain priority over the charge, nevertheless the following incongruous positions would remain true, viz., (i) that, if the mortgagee foreclosed, he would become personally liable in his capacity as owner for the debt for construction costs secured by the charge ; (ii) that, if he entered into possession, his goods would be liable to distress and sale to enforce payment of the debt; (iii) that, if he exercised his power of sale, his transferee would, as owner, become liable for construction costs secured by the charge.

These considerations appear to me to make it impossible to escape the conclusion that the *South-Eastern Drainage Amendment Act* 1900 created a first and paramount charge quite independently of the nature of the landholder's title, that is, whether the land was under the *Real Property Act* or under the general law, and conferred upon it such an indefeasible priority and fortified it with such remedies that it cannot be overridden or affected by the provisions of the *Real Property Act*.

The rates for maintenance, as distinguished from construction costs, were levied under sec. 48 of the *South-Eastern Drainage Act* 1931 (No. 2062). They are made a first charge by sec. 66. It is unnecessary to discuss the scope of the Act of 1931, which reproduced the substance of many of the provisions of that of 1900. It is enough to say that, as the charge for rates attached after the mortgage, no question of postponing priority arises in relation to the unpaid maintenance rates and, in my opinion, the conclusion of the Full Court was correct, namely, that the rates were charged on the entirety of the interests in the land making up full ownership and as a first charge took priority over the mortgage.

This case presents one peculiarity which struck me as curious. At the time the charge for construction costs attached, the land was held under a Crown lease with a right of purchase but no Crown grant had been made. Afterwards a Crown grant was made which contained no reference to the statutory charge, and then the mortgage

was registered. Sec. 2 of the *South-Eastern Drainage Amendment Act* 1900 makes the Commissioner of Crown Lands the landholder in the case of unleased Crown lands. But, if the Crown lands are leased, the section makes the leaseholder the landholder for the purpose of the Act. It seemed curious, if the Crown was not bound by the charge before the Crown grant, that the land should be bound in the hands of the grantee and that a mortgagee dealing on the faith of a clear Crown grant should find himself postponed to a charge arising before it issued. But the result, however curious, seems to be brought about by the combined operation of sec. 2, sec. 14 and sec. 18. Sec. 2 and sec. 14 together result in the imposition of a charge on one landowner, namely the leaseholder, and sec. 18 shows that every subsequent landholder is exposed alike to the charge and to personal liability for the debt.

For these reasons I think that the appeal should be allowed and the cross-appeal dismissed. The order of the Full Court should be discharged, and in lieu thereof it should be ordered and declared that the objection raised by par. 3 of the reply is bad and ought to be overruled. The plaintiff respondent should pay the defendant appellant's costs of the appeal and cross-appeal to this court and of the proceedings in the Full Court.

EVATT J. By virtue of sec. 14 of the *South-Eastern Drainage Amendment Act* 1900, the drainage board, which is the present appellant, claims that its statutory " first charge " over certain land " benefited by the drain " is a true first charge, and as such entitled to priority over a mortgage of the respondent bank. The land in question was under the *Real Property Act* of the State of South Australia. The charge of the drainage board was created by sec. 14 and attached in the month of July 1908 ; but the existence of the charge was not registered or recorded in any way upon the registered title. The bank's mortgage was made in 1912, and duly registered under the *Real Property Act*.

It is beyond question that the South-Eastern Drainage legislation was intended to apply to all land in the area which was benefited by the construction of the drain. Sec. 7 of the Act provided that the cost of the construction was to be deemed an advance to the landholders benefited by the construction. The proportion of the cost was to be duly apportioned to each landholder, and the advance was to be " a first charge upon the land of such landholder benefited by

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the drain" (sec. 14). This section also provided that the charge upon the land might be enforced as if, contrary to the fact, it were a mortgage under the *Real Property Act*. This last provision means only that the provisions governing the enforcement of a registered mortgage and contained in the *Real Property Act* may, so far as possible, be applied in order to enforce the statutory first charge. From first to last, everything suggests that all land benefited by the drain is to be affected by the provisions of the statutory scheme.

In my opinion the *South-Eastern Drainage Act*, having elevated the proportionate cost into a statutory loan and a statutory first charge against the land, does not authorize, still less require, the charge to be registered or noted wherever the land happens to be under the *Real Property Act*. I am also of opinion that the *Real Property Act* does not contemplate the registration or notation of such a statutory first charge as is here in question. As Lord *Buckmaster* said of the Torrens system as applied in New Zealand, "'nothing can be registered the registration of which is not expressly authorized by the statute.' ('By statute' would be more correct.) 'Everything which can be registered gives, in the absence of fraud, an indefeasible title to the estate or interest or in the cases in which registration of a right is authorized, as in the case of easements or incorporeal rights, to the right registered'" (*Waimiha Sawmilling Co.* v. *Waione Timber Co.* (1))—Cf. *The Real Property Act, New South Wales, Beckenham and Harris* (1928), p. 95.

Apart from sec. 6 of the *Real Property Act*, upon which the Full Court mainly based its judgment in favour of the bank, the case of the drainage board would seem to be unanswerable. The statute declares the priority of its charge; first means first; there is no room for a registration of the charge under the *Real Property Act*, and therefore no room for the charge being defeated by registration of a subsequent interest in the same land.

Sec. 6 of the *Real Property Act* 1886 provides as follows: No law, so far as inconsistent with this Act, shall apply to land subject to the provisions of this Act, nor shall any future law, so far as inconsistent with this Act, so apply unless it shall be expressly enacted that it shall so apply "notwithstanding the provisions of '*The Real Property Act* 1886'."

This section addresses itself to the application of certain laws to land under the *Real Property Act*. Wherever sec. 6, if valid, is to

(1) (1926) A.C., at p. 106.

be given an operation, the result must be that some statute passed by the South-Australian Parliament will not apply to land under the *Real Property Act*. But the statute which will not so apply must be inconsistent with the *Real Property Act* itself. In the present case, it is said that there is an inconsistency between sec. 14 of the *South-Eastern Drainage Amendment Act* and the *Real Property Act*. By virtue of the former Act, the first charge of the board would prevail over the subsequent registered mortgage of the bank. It is said that, although the title conferred on the bank by registration of its mortgage is made indefeasible by virtue of the provisions of Part VI. of the *Real Property Act*, sec. 14 of the *South-Eastern Drainage Amendment Act* destroys such indefeasibility in the case of land under the Act.

But inconsistency only arises upon the prior assumption that, on the true construction of the *Real Property Act*, it is intended that the title of the registered proprietor of a mortgage should prevail over special statutory first charges such as those created by sec. 14. In my opinion, this assumption is erroneous. The " first charge " created by sec. 14 is not created by an " instrument " within the meaning of sec. 67 of the *Real Property Act*, nor is such " first charge " an encumbrance which is required or permitted to be registered, recorded or notified under the Act: Cf. *Beckenham and Harris* (*supra*): note on sec. 42 of the New-South-Wales *Real Property Act*.

If this is so, sec. 6 of the *Real Property Act* need not be considered much further. But it is worth while to note what that section purports to do. It purports to control future parliaments of South Australia in any legislation affecting land under the *Real Property Act* by requiring that unless such legislation is couched in a certain literary form (i.e., containing the words " notwithstanding the provisions of ' *The Real Property Act* 1886 ' ") it cannot affect land under the Act. For instance, it would not be sufficient if the Parliament used the phrase " *In spite of* the provisions of the *Real Property Act* 1886."

In my opinion the legislature of South Australia has plenary power to couch its enactments in such literary form as it may choose. It cannot be effectively commanded by a prior legislature to express its intention in a particular way. *Maugham* L.J. has, I think, said something to this substantial effect in *Ellen Street Estates Ltd.* v. *Minister of Health* (1). But this is an even clearer case. In my

(1) (1934) 1 K.B., at p. 597.

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opinion the decision in *Attorney-General for New South Wales* v. *Trethowan* (1) has nothing to do with the matter. Sec. 6 is not a mere interpretation section, for it is not expressed to operate only so far as the contrary intention does not appear. It purports to lay down a rigid rule binding upon all future parliaments. It declares that, however clearly the intention of such parliaments may be expressed in an enactment, that intention shall not be given effect to unless it contains the magic formula. I think that the command in sec. 6 was quite ineffective and inoperative.

The conclusion is that the statutory first charge of the board prevails over the subsequently registered mortgage of the bank. The Full Court of South Australia found it easier to concede priority to the board's charge for maintenance rates in respect of which the board also possesses a " first charge " by virtue of sec. 66 of the Act of 1931. I should have thought it more difficult because it is possible to argue that a " first charge " prevailing over charges subsequently created does not necessarily prevail over charges previously created. However that may be, I agree with the conclusion of the majority of the Full Court that the " first charge " in respect of rates is intended to prevail over existing registered mortgages in the case where the land happens to be under the *Real Property Act*.

In my opinion the appeal should be allowed and the cross-appeal dismissed.

McTIERNAN J. In my opinion the appeal should be allowed and the cross-appeal dismissed.

The moneys which the appellant claims to recover out of the land with which this case is concerned became debts due to it and, if sec. 6 of the *Real Property Act* 1886 does not affect its rights, a " first charge " on the land by the operation of the *Drainage Acts*. The land is subject to the provisions of the *Real Property Act*. The respondent is the registered proprietor of a mortgage over the land. The question for decision is which of these securities, namely, the appellant's charge and the respondent's mortgage respectively, has priority over the other.

The land is directly charged by the *Drainage Acts* with the debts made payable to the appellant without any reference to the *Real Property Act*; they enact that the debts are to be a first charge on the land. It would be inconsistent with the provisions of the

(1) (1932) A.C. 526.

Drainage Acts imposing this first charge on the land to say that the respondent's mortgage has by virtue of its registration under the provisions of the *Real Property Act* priority over the charge. The result is that the provisions of the *Drainage Acts*, which were passed subsequently to the *Real Property Act*, prevail against that Act and give the appellant's charge priority over the respondent's mortgage unless the operation of these provisions on the respondent's rights as a registered mortgagee is affected by the omission of the legislature to employ the form prescribed by sec. 6 of the *Real Property Act* in enacting the *Drainage Acts*.

One view on which the appellant's charge would not take priority is that it is to be presumed from the omission that parliament did not intend that the *Drainage Acts* and the *Real Property Act* should be inconsistent with each other, and that the provisions requiring registration of the charge imposed by the *Drainage Acts* should be implied in them in order to make these Acts march with the *Real Property Act*. The provisions of the *Drainage Acts* do not supply any reason for presuming that Parliament intended that the security of a first charge on land—the security with which it armed the drainage authority for the recovery of public money which it expended under the Acts—was to be rendered completely effectual by some other action supplemental to those provisions, these being sufficient by themselves to perfect the charge and to establish unconditionally its priority. Besides, it is difficult to see how the charge could retain its priority in all circumstances (and it is the obvious intention of the legislation that it should) if the priority of the charge were dependent on the provisions of the *Real Property Act* determining the conditions under which instruments dependent upon that Act for their complete legal effect take priority over one another. If the charge lost its priority as a first charge for any reason based on the provisions of the *Real Property Act*, the clear intention of the legislature that the appellant's charge should be an absolute first charge would be defeated. In my opinion, the omission of the legislature to use the form prescribed by sec. 6 of the *Real Property Act* in framing the *Drainage Acts* does not raise any presumption of a legislative intention that those provisions of these Acts which are now material should be reconciled with the *Real Property Act* by implying such other things in the *Drainage Acts* as would be necessary to make the two sets of provisions work together.

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The other view upon which the appellant's statutory first charge does not take priority is that, because of the supposed inconsistency between the provisions of the *Drainage Acts* and the *Real Property Act* and the omission to employ the form prescribed by sec. 6 in enacting the former, they cannot validly apply to any land which is subject to the provisions of the *Real Property Act*. This view is based on sec. 5 of the *Colonial Laws Validity Act* 1865. The argument in support of it is that sec. 6 of the *Real Property Act* prescribes a manner and form, which was not observed in the case of the drainage legislation, for passing laws inconsistent with the *Real Property Act*. The argument fails, in my opinion, because sec. 6 is not a law respecting the constitution, powers or procedure of the legislature. The section enacts a rule of interpretation for Acts which are not cast in the form which it prescribes. But, if a future Act was not cast in that form, yet the Act clearly manifested an intention different from the presumption which sec. 6 intended to supply for the purpose of ascertaining its meaning and effect, the presumption would be displaced by the expression of legislative intention: Cf. *Ellen Street Estates Ltd.* v. *Minister of Health* (1). It is clear that the *Drainage Acts* were intended to apply to any land, whether it was subject to the provisions of the *Real Property Act* or not, if the land came within the operation of the Acts because steps authorized by the Act were taken in relation to the land. The land with which this case is concerned was brought within the operation of these Acts, and there can be no doubt that, although the legislature did omit the form prescribed by sec. 6, the provisions of the Acts applied at all material times to the land.

In my opinion the appellant is entitled to enforce in priority to the respondent's mortgage its charge on the land for drainage rates and for so much of the cost of construction apportioned to the land as is due.

Appeal allowed. Cross-appeal dismissed. Order of Supreme Court set aside. Declare that the matters alleged in pars. 5 to 20 of the defence do, in point of law, afford an answer to the plaintiff's claims.

Solicitor for the appellant, *A. J. Hannan*, Crown Solicitor for South Australia.

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

O.J.G.

(1) (1934) 1 K.B. 590.