[HIGH COURT OF AUSTRALIA.]

HEDGES . . . . APPELLANT;
PLAINTIFF,

AND

HALLIDAY . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Oct.* 22, 23;

SYDNEY, *Nov.* 14.

Latham C.J., Rich and Dixon JJ.

Financial Emergency (Vict.)—Statute—" Contracting out "—Policy of Act—Mortgages in existence at date of Act to be construed as if rate of interest reduced—Act to take effect notwithstanding any prior agreement to the contrary—No similar provision as to subsequent agreements—" Expressio unius "—Financial Emergency Acts 1931-1940 (*Vict.*) (*No.* 3961—4788), *Part* III., *Div.* 1.

The *Financial Emergency Act* 1931 (Vict.), in Part III., Div. 1, provided as follows:—By s. 17 (1), that Div. 1 should apply " (*a*) to all mortgages . . . existing at the coming into operation of this Part." By s. 19 (1), that, subject to certain exceptions, every mortgage to which Div. 1 applied " shall . . . be construed and take effect as if it were a term of the mortgage that on and from the coming into operation of this Part . . . the interest payable under the mortgage should be reduced " as prescribed. By s. 22 (3): " Every reduction of interest made by this Division . . . shall continue in force during the continuance of the mortgage in respect of which the reduction is made." In Part III., Div. 6, the Act provided, by s. 36: " The provisions of this Part shall take effect notwithstanding any agreement to the contrary made prior to the passing of this Act."

Held, by *Latham* C.J. and *Dixon* J. (*Rich* J. dissenting), that Part III., Div. 1, did not, on its proper construction, disclose an intention to interfere with the freedom of the parties to a mortgage to which the Division applied to contract as they chose, after the legislation took effect, as to the rate of interest to be paid on the money secured; accordingly, an agreement between the parties to a mortgage to which the Division applied, made after the coming into operation of the Division, that the rate of interest should not be reduced as prescribed by s. 19 (1), was not invalid as being contrary to the policy of the legislation.

Decision of the Supreme Court of Victoria (*Gavan Duffy* J.) affirmed.

Appeal from the Supreme Court of Victoria.

In an action in the Supreme Court of Victoria in which the plaintiff was Gilbert Charles Hedges and the defendant was Eileen Beryl Halliday, the parties agreed on a special case which was substantially as follows:—

This action was commenced on 5th December 1946 by a writ of summons whereby the plaintiff claimed redemption of certain mortgaged lands and the taking of accounts. The parties have concurred in stating the question of law arising herein in the following case for the opinion of the court pursuant to the *Rules of the Supreme Court*, Order XXXIV., rule 1:—

(1) On 9th October 1924 the defendant lent to the plaintiff the sum of £8,000.

(2) This sum was secured by two instruments of mortgage executed by the parties herein and each bearing date 9th October 1924 over certain lands in Lonsdale Street, Bourke Street and Punch's Lane, Melbourne, in the State of Victoria.

(3) One of the two instruments of mortgage was of land under the general law and one of land under the *Transfer of Land Acts* (Vict.), and both secured the same sum of £8,000 and were over the same lands.

(4) The interest payable under each of the two instruments of mortgage was £10 per centum per annum, reducible to £8 per centum per annum for due and punctual payment and due observance of the covenants thereof.

(5) By proclamation published in the Government *Gazette* No. 223, dated 28th September 1931, the Governor-in-Council fixed 1st October 1931 as the date on which Part III. of the *Financial Emergency Act* 1931 (Vict.) should come into operation.

(6) By an indenture dated 12th November 1931 made between the defendant of the one part and the plaintiff of the other part the plaintiff agreed with the defendant for the considerations therein appearing that no reduction pursuant to the *Financial Emergency Acts* of the interest payable by the plaintiff to the defendant under the two instruments of mortgage should be made.

(7) The plaintiff now seeks to redeem the mortgaged lands and to have accounts taken on the footing that the interest payable since 1st October 1931 should be computed at the rate of £6.2 per centum per annum.

(8) The defendant contends that the interest payable since 1st October 1931 should be computed at the rate of £8 per centum per annum.

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The question for the opinion of the court is :—

Should the interest payable under the said mortgages since 1st October 1931 be computed at the rate of £6.2 per centum per annum by reason of the provisions of the *Financial Emergency Acts* notwithstanding the terms of the indenture of 12th November 1931 ?

If the court shall be of the opinion in the affirmative of the said question then judgment shall be entered for the plaintiff and an order shall be made for the taking of accounts on the footing set out in par. 7 of the special case and costs of action.

If the court shall be of opinion in the negative of the said question then judgment shall be entered for the defendant and an order shall be made for the taking of accounts on the footing set out in par. 8 of the special case, with the costs of defence.

Gavan Duffy J., answered the question : " No " ; he gave judgment for the defendant and ordered that accounts be taken on the footing that the interest in question was to be computed at the rate of £8 per centum per annum.

From this decision the plaintiff appealed to the High Court.

Reynolds K.C. (with him *J. E. Starke*), for the appellant. The preamble to the *Financial Emergency Act* 1931 and the provisions generally of the legislation show that, although it had the effect of conferring private benefits, its main purpose was a general public purpose. It is not competent for persons by contract to circumvent the provisions of legislation of this character. Such a contract would be contrary to the policy of the Acts and, on that account, invalid (*Lieberman* v. *Morris* (1) ; *Admiralty Commissioners* v. *Valverda* (*Owners*) (2) ; *Soho Square Syndicate Ltd.* v. *E. Pollard & Co.* (3) ; *Bowmaker Ltd.* v. *Tabor* (4)). Even apart from the general purpose shown in the Act, the provisions of Part III., Div. 1, are sufficient to show the intention of the legislature that, after the legislation came into operation, its provisions were to be paramount and parties to mortgages were not to be permitted to make by agreement what in effect would be a rule for their particular case to the contrary of the express provisions of the Act. Section 19 (1) is mandatory : every mortgage to which Div. 1 applies *shall* be construed and take effect as if it contained a term providing for the prescribed reduction of interest. It is reinforced by s. 22 (3), which is likewise mandatory : every reduction of interest made by the Division *shall* continue in

(1) (1944) 69 C.L.R. 69.
(2) (1938) A.C. 173.
(3) (1940) Ch. 638.
(4) (1941) 2 K.B. 1.

force during the continuance of the mortgage. Agreements such as that now in question disregard the command in ss. 19 (1) and 22 (3); to allow such agreements to have effect would, or could, nullify the purpose of the legislation. The absolute terms of the provisions mentioned are not cut down by anything else in the Act. On the contrary, s. 19 (3) shows that those terms are not to be qualified. It enables the mortgagee in a proper case to obtain relief from the reduction of interest; this would have little or no effect if the parties were free to disregard the mandate of s. 19 (1). Section 36 does not weaken the appellant's contention. It was necessary (or at least desirable) to make it clear that agreements made in anticipation of the Act, with a view to excluding its operation, were not to be allowed to prevail; there was not the same need as regards subsequent agreements, because of the positive provisions of ss. 19 (1) and 22 (3). No inference detracting from those provisions can be drawn from the express reference in s. 36 to agreements made prior to the Act, and no room is left for the application of the *expressio unius* maxim (as to which, see *Tasmania* v. *The Commonwealth* (1); *Colquhoun* v. *Brooks* (2)). Similar considerations preclude the drawing of such an inference from the *Financial Emergency (Mortgages) Act* 1932. In general it is on the same lines as the Principal Act of 1931. Section 9 of the 1932 Act, referring to mortgages "(whether entered into before or after the coming into operation of this Act)," is not concerned with the same subject matter as s. 36 of the 1931 Act, and throws no light on its construction.

Dean K.C. (with him *J. G. Norris*), for the respondent. If it had been intended, when s. 36 of the 1931 Act was drafted, that agreements made after the Act contracting out of it were not to be permitted, it would have been a simple matter to say so, as was done in s. 26 of the *Financial Emergency Act* 1931-1936 (S.A.). It is not suggested for the appellant (and it seems highly improbable) that the matter was overlooked. The assumption must be that it was thought unnecessary to make express reference to it because it might be inferred from s. 19 (1) that contracting out was not to be permitted after the Act operated. As s. 19 did not say so in so many words, it could only be an inference. It seems curious that such a matter should be left to depend on inference, particularly when it is seen that, in s. 9 of the 1932 Act, in dealing with a similar matter, it was considered necessary to use express words. Moreover, s. 7 (7) of the 1932 Act amounts to an interpretation by the legislature itself

(1) (1904) 1 C.L.R. 329, at p. 343.

(2) (1887) 19 Q.B.D. 400, at p. 406; (1888) 21 Q.B.D. 52, at p. 65.

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of the 1931 Act; that sub-section could have had no effect if contracting out of the earlier Act had not been permissible. Section 10 of the 1932 Act supports this view. It is true that s. 19 (1) of the 1931 Act is peremptorily expressed, but any inference that might have been founded on this form of expression is countered by the express avoidances in s. 36 of that Act and in the 1932 Act. In this view s. 22 (3) of the 1931 Act takes the matter no further than s. 19 (1); it merely uses the same peremptory form of expression. No violence is done to the language of s. 19 (1) (and, likewise, s. 22 (3)) if it is construed as establishing the rule which is to prevail until the parties in a particular case shall agree otherwise, and the Act shows no general policy which is inconsistent with this view. Section 19 (3) does not assist the appellant. If the Act had expressly allowed contracting out, this sub-section would still have been appropriate to meet cases where no agreement had been reached.

Reynolds K.C., in reply.

Cur. adv. vult.

Nov. 14.

The following written judgments were delivered:—

Latham C.J. This is an appeal from an order of the Supreme Court of Victoria (*Gavan Duffy* J.) which was made upon the basis that parties to mortgages were at liberty to "contract out" of the provisions of the Victorian *Financial Emergency Act* 1931 relating to mortgages. The appellant contends that an arrangement which the parties made after the passing of the Act is void because it is contrary to the policy of the Act, though it is not prohibited by any express provision of the Act.

In 1924 the appellant, Gilbert Charles Hedges, mortgaged to the respondent, Mrs. Halliday, two pieces of land, one under the general law and the other under the *Transfer of Land Act*, for £8,000. The interest payable under the mortgages was ten per cent per annum, reducible to eight per cent upon prompt payment. The *Financial Emergency Act* came into operation on 1st October 1931. On 12th November 1931 the parties executed an indenture whereby the mortgagee agreed that he would not make application under the Act for any modification or exclusion of the operation of the provisions of the Act, and the mortgagor, in consideration of a release from an obligation to erect a building on certain land, agreed that no reduction should be made by the mortgagee of the interest payable by the mortgagor under the mortgages. The question submitted to the court by originating summons was whether the interest payable under the mortgages since the coming into operation of the *Financial*

Emergency Act should be computed in accordance with the actual terms of the mortgages or at the rate to which the interest would be reduced if the Act applied to the mortgages.

The Act is prefaced by a preamble referring to the grave financial emergency which existed in Australia in 1931 and to the desirability of taking steps to re-establish financial stability and restore industrial and general prosperity. The Act deals with reduction of salaries, pensions and other remuneration paid by the Government of Victoria, reduction of interest on mortgages and other securities, and reduction of certain public expenditure. Part III. of the Act relates to the reduction of interest on mortgages and other securities. Section 17 provides that Div. 1 of Part III. of the Act (the Division which contains s. 19, which provides for reduction of interest) shall apply to mortgages existing at the coming into operation of Part III. of the Act. There is no provision in the Act which makes it possible to regard the Act as applying to any mortgage made after the coming into operation of the Act. Section 19 (1) of the Act provides that, except as otherwise provided, "every mortgage shall for a period of three years from the date of the coming into operation of this Division be construed and take effect as if it were a term of the mortgage that on and from the coming into operation of this Part . . . the interest payable under the mortgage should be reduced at a rate equivalent to four shillings and sixpence for every pound of such interest." Section 19 (3) provides that a mortgagee may within three months after the coming into operation of Part III. make an application to a court upon specified grounds for an order modifying or excluding the operation of the provisions effecting the reduction of interest. Under this provision a mortgagee may, notwithstanding the opposition of his mortgagor, obtain an order modifying or excluding the application of the Act. Section 22 (3) provides that every reduction of interest made by Div. 1 of Part III. "shall continue in force during the continuance of the mortgage in respect of which the reduction is made: Provided that no such reduction shall in any case continue in force for a period of more than three years after the coming into operation of this Division."

Section 19 (1) provides that mortgages to which the Act applies shall be construed as if it were a term of the mortgage that interest should be paid at a reduced rate. There is no provision in the Act that the parties are not to be at liberty to alter a mortgage into which they have entered and to which the Act applies. There is nothing in the Act which prevents a variation by agreement of the amount of the principal sum owed or of the rate of interest to be paid, or of

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any other terms of a mortgage. The Act produces its effect completely and fully by giving relief to a debtor by reducing the interest payable by him. There is nothing in the Act which prevents him from agreeing to a cancellation of the mortgage and entering into a fresh arrangement in respect of his mortgage debt on any terms agreed by the parties. He might pay off the mortgage and arrange for a new mortgage over the same or part of the same property, or over entirely different or partly different property, with the same mortgagee or with a different mortgagee. The new mortgage might provide for a rate of interest either higher or lower than the rate specified in the original mortgage. There is nothing in the Act which would invalidate such a transaction. The express provision in s. 17 limiting the application of the Act to existing mortgages prevents it from applying to any other mortgages or to any arrangements made between the parties after the Act.

The appellant emphasized the provision contained in s. 22 (3) that every reduction of interest shall continue in force during the continuance of a mortgage in respect of which the reduction is made, with a time limit of three years. This legislation produces its full effect when it alters the terms of a mortgage. The mortgage then continues as altered, but the statutory alteration is not to continue for more than three years. There is nothing in this provision which prevents the parties from varying the rate of interest by increasing it or by reducing it.

It has been argued that the Act should be interpreted as implying a declaration of public policy involving a reduction of interest upon all mortgages and that, accordingly, parties are not at liberty to make a contract which prevents that reduction of interest from taking place. The Act, it is true, does not so provide, but the Court is invited to treat the Act as involving by implication some general principle of the character indicated. In my opinion the most effective and shortest answer to this argument is to be found in the terms of s. 36 of the Act, which provides that the provisions of Part III. of the Act shall take effect "notwithstanding any agreement to the contrary made prior to the passing of this Act." The argument for the appellant really asks the Court to insert after the words "prior to" the words "or subsequent to." Where the legislature has gone out of its way to deal expressly with the subject matter of the avoidance of contracts, there can in my opinion be no justification for a court extending those provisions (not interpreting and applying them), by adding to them a new and quite different provision.

Gavan Duffy J. relied upon the foregoing considerations and added that the *Financial Emergency (Mortgages) Act* 1932 supported the conclusion which he had reached. Certain provisions were introduced by this Act in order to deal with the renewal of mortgages. Section 7 contained a provision which produced the result that the expression " renewed mortgage " included a new mortgage entered into by the same parties over the same security upon the expiration of a mortgage to which the original Act applied if the new mortgage secured the repayment of moneys not greater than the total sum secured upon all accounts under the former mortgage. Section 7 (1) provides that where a mortgage to which the original Act applied (that is a mortgage existing on 1st October 1931) had been renewed, the renewed mortgage should take effect as if it were a term thereof that the rate of interest should be reduced in accordance with Part III. of the Principal Act. This legislation recognizes that new arrangements between the parties to a mortgage which were made after the passing of the Act of 1931 were not affected by that Act. When it was desired to affect some, but some only, of those arrangements, a specific provision relating to the renewal of mortgages was introduced by the 1932 Act. The arrangement made by the parties in the present case was not a " renewed mortgage."

Section 10 of the 1932 Act contains an express provision avoiding certain provisions in mortgages or agreements relating to mortgages. These provisions admittedly do not apply to the arrangement made in the present case. They are very precise and detailed. They, together with s. 36 of the 1931 Act, show that the legislature desired explicitly to define the extent to which the legislation was to be regarded as avoiding transactions relating to mortgages. Where the legislature has gone out of its way to be so explicit in its expression of intention there is, in my opinion, no justification or excuse for a court to introduce and impose its own ideas of policy by adding by a process of judicial interpretation some general principle relating to avoidance of transactions which the legislature has itself abstained from adopting and which, it may be added, it would not be easy to state with any real precision. If the arguments relied upon by the appellant in this case are accepted, then s. 36 of the 1931 Act and s. 10 of the 1932 Act, and possibly s. 7 of the latter Act, were quite unnecessary.

I therefore agree with *Gavan Duffy* J. that the arrangement made by the parties does not conflict in any respect with any of the provisions of the *Financial Emergency Acts*. Section 19 of the Act of 1931 has no greater effect than inserting a provision for reduced interest in certain mortgages. If such a provision is regarded as

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inserted in the mortgages, then there is no reason why the mortgagor cannot by another instrument validly agree for consideration to pay a higher rate of interest.

In my opinion the appeal should be dismissed.

Rich J. The central facts in this appeal are that the parties thereto executed two mortgages dated 9th October 1924 to secure the sum of £8,000. The interest payable under the mortgages was £10 per cent per annum reducible to £8 per cent per annum for due and punctual payment and due observance of the covenants contained in the mortgages. At a later date—1931, 1932 and 1939—the *Financial Emergency Acts* (Vict.) were passed and by the Act of 1931 the interest was reduced to £6.2 per cent per annum. In consequence of the Act of 1931 the parties executed an indenture dated 12th November 1931 by which they agreed that no reduction should be made by the mortgagee and that the exclusion of s. 19, Div. 1, Part III., of the *Financial Emergency Act* 1931 was fit and proper and did and allowed justice to both the mortgagor and the mortgagee having regard to all the factors and circumstances generally and generally pertaining to the mortgagor and the mortgagee respectively and to all the factors and circumstances in the particular case. The Acts in question were part of "a plan agreed upon by the Commonwealth and the States for meeting the grave financial emergency then existing in Australia, re-establishing financial stability and restoring industrial and general prosperity." (See the preamble to the several Acts in question). These Acts laid down rules of public policy which affected all society. They were "dictated by public policy, and are not imposed for the benefit of any individuals or body of individuals, but for considerations of State. . . . Wherever there is a question whether there can be contracting out or waiver of statutory provisions, the problem must be solved on a consideration of the scope and policy of the particular statute": per Lord *Wright*, *Admiralty Commissioners* v. *Valverda* (*Owners*) (1); and cf. *Equitable Life Assurance Society of the United States* v. *Reed* (2). Sections 19 and 22 of the 1931 Act are peremptory and imperative and cannot, in my opinion, be the subject of contracting out or waiver. It was, however, contended by counsel for the respondent that, as there is no section in the Acts which expressly prohibits contracting out, if the legislature had so intended a section would have been inserted in the Act to forbid it, as was done by s. 26 of the *Financial Emergency Act*, 1931-1936 (S.A.). In these circumstances it was said that the proper inference to be drawn is that it

(1) (1938) A.C. 173, at p. 185.

(2) (1914) A.C. 587, at p. 595.

was not intended to prevent parties from escaping by agreement from the obligations imposed by the Act. A similar argument was submitted to *Farwell* J. in *Soho Square Syndicate Ltd.* v. *E. Pollard & Co.* (1), but his Lordship considered that on the ground of public policy the Act in question was intended to have a more extensive operation. Similarly in the instant case, the agreement relied upon if allowed to stand would frustrate the intention of the legislature and conflict with its obvious policy: cf. *Bowmaker Ltd.* v. *Tabor* (2). It cannot be overlooked that the mortgage under the *Transfer of Land Act* contains the following provision:—

"And further it is hereby declared that any provisions by way of any moratorium contained in any future Federal or State Act of Parliament or any rule or regulation to be made thereunder shall not apply to this instrument or any covenant or agreement therein contained."

It would be a curious result if an agreement in a mortgage executed prior to the coming into operation of the Act can have no effect, whereas an agreement made subsequent to the Act and intended to achieve a similar purpose could operate to nullify the mandatory provisions of the Act. It was further contended by counsel for the respondent that s. 7, sub-s. (7), of the Act of 1932 gave rise to an implication that an agreement could be entered into contrary to the provisions of the Acts. Section 7 applies expressly to renewed mortgages as defined in this section. In the result, I cannot agree with counsel's contention that s. 19 of the 1931 Act can be nullified by any agreement which runs counter to its expressed imperative purpose.

Similar observations apply to s. 10 of the Act of 1932. A mosaic of mere implications cannot displace the solid foundation of express enactments.

I now refer to s. 36, which was inserted in the Act to anticipate the operation of agreements intended to avoid the effect of such emergency legislation. But any implications which may be derived from this section do not, in my opinion, avail against the imperative public enactment of s. 19, *privatorum conventio juri publico non derogat*. Section 17 applies to the mortgages now in question as they were mortgages existing at the coming into operation of Part III. of the Act of 1931, and s. 19 thereof expressly provides that these mortgages shall for a period of three years from the coming into operation of Part III. of the Act be construed and take effect as if it were a term of these mortgages that on and after the coming into operation of this Part the interest payable under these mortgages

(1) (1940) Ch. 638, at p. 645. (2) (1941) 2 K.B. 1, at pp. 6, 7.

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should be reduced to a rate equivalent to 4s. 6d. for every pound of such interest. Even if the question for our determination were to be decided on implications alone, I should find myself compelled to decide in favour of the mortgagor, not only on account of the strong implication arising from the national and social purposes of the legislation, but also by reason of the further implication arising from the provisions of s. 19 itself. This section provides machinery for the purpose of enabling a mortgagee to apply to the court for relief against the operation of the Act. Such a provision is otiose and unnecessary when the mortgagee can obtain this relief by a mere agreement with the mortgagor.

For these reasons I would allow the appeal and answer the question in the case stated in the affirmative.

Dixon J. The question for our decision is whether, after Div. I of Part III. of the *Financial Emergency Act* 1931 (No. 3961) (Vict.) came into operation, it was competent for a mortgagor by an agreement for valuable consideration to waive the benefit of the provisions of that Division reducing the rate of interest payable under the mortgage by twenty-two and one half per cent.

The legislation contains no express provision that a mortgagor may not incur, if he so chooses, a fresh liability to the old higher rate of interest which the Division reduced by the prescribed percentage. There is no express invalidation of a contract, made after the reduction of interest has come into effect, that the rate of interest should be put up again. The question must be answered upon a consideration of the legislation as a whole according to the intent and purpose which may be collected from the provisions it makes and the scope and policy they disclose. Unfortunately the indications which it is possible to find in the legislation do not all point in the one direction. By concentrating in turn upon one set of considerations to the exclusion of the other, the mind may conceivably be led to either conclusion. The difficulty is to reach a just balance between them.

"Everyone may waive the advantage of a law made solely for the benefit or protection of him as an individual in his private capacity, but this cannot be done if the waiver would infringe a public right or public policy" (per *Goddard* L.J., *Bowmaker* v. *Tabor* (1)). Did the *Financial Emergency Act* in reducing interest rates on then existing mortgages proceed upon the principle that it was enough if current obligations to pay interest were cut down, borrower and lender being thus left with a new starting point?

(1) (1941) 2 K.B. 1, at p. 6.

Or was it the policy of the Act to establish the reduced interest rate as a maximum for each respective mortgage debt so that, while the mortgage debt remained unpaid and the legislation continued to operate, no liability for a higher rate could be incurred by the mortgagor ?

There can be no doubt that the reduction of interest had a public purpose much wider than the relief of borrowers and of debtors. The preamble to the statute recites the conference of Ministers convened on 25th May 1931 to devise measures for meeting the grave financial emergency and it recites that a plan was agreed for re-establishing the financial stability of the governments and restoring industrial and general prosperity by means involving a common sacrifice. The plan itself gave the financial and economic reasons why a general reduction in interest rates was considered imperative and added that this reduction of interest would be supplemented by legislation giving relief to mortgagors, legislation which formed part of the plan (*Shann and Copland*, *Battle of the Plans*, pp. 130-131 ; *Commonwealth Year Book* 1932 pp. 848-849). But the fact that the legislation in the Division expresses but a part of a general plan for reducing interest rates as an economic remedy in which the whole community has an interest does not necessarily show that the Division intended to do more than vary the existing contracts for the payment of mortgage interest, leaving the parties free thereafter to contract as they might think fit. No doubt it does show that the legislation was the outcome of a policy concerned with the interest burden on the whole community and not upon mortgagors as a separate class, and concerned broadly with the restoration of economic prosperity rather than the plight of mortgagors in particular. But the subject with which the legislature was dealing was a delicate one and it necessitated a careful choice of means as well as of ends. The consequences of an attempt to control interest rates would be widely different from those that might be expected to ensue from reducing current obligations by varying existing contracts. At all events, the legislature did not undertake the task of a general control of interest rates or the setting of a maximum rate. Nor did it attempt in any way to restrict the freedom of contract between borrower and lender in respect of private loans made after the legislation took effect. Its intervention was limited and, with reference to mortgage interest, it was confined to existing loans secured by mortgage.

The exact point upon which this case turns is whether, with respect to existing mortgages, the intervention was limited to the variation of the contract as it existed when the Division took effect or extended further and disabled the mortgagor from afterwards exercising his general freedom of contract to undertake a liability to pay interest on the mortgage debt at the former rate or any rate above the new or reduced rate. Upon this exact point little help is to be obtained from the general consideration that the scope and purpose of the legislation involved a public interest in the financial remedies expressed in the statute, going beyond mere private right. What is perhaps of more significance is the fact that the protection of mortgagors from themselves was no part of the avowed or ostensible policy of the legislature or the planners.

The leading provision of the Division is, however, possibly capable of an interpretation which might carry the consequence that it was not competent for a mortgagor to renounce by contract the benefit of the reduction in interest rates he had obtained by the legislation. It is s. 19 (1), which in its first form enacted, so far as material, that every mortgage should for a period of three years from the date of the coming into operation of the Division be construed and take effect as if it were a term of the mortgage that, on and from the coming into operation of the Part, the interest payable under the mortgage should be reduced at a rate equivalent to four shillings and six pence for every pound of such interest. Subsequent Acts year by year enlarged the period of three years until it reached eight and then, in 1939 by Act No. 4646 s. 2, the limitation of time was removed altogether. But the words directing that for a period the mortgage should be construed and take effect as if it were a term thereof that the interest should be reduced might perhaps be patient of an interpretation excluding the capacity of the mortgagor during that period to assume by contract a greater liability. Further support for such an interpretation may be found in the language of another provision, which appears to be directed against the possibility of s. 19 (1) by itself proving insufficient to carry the reduction of interest past the due date of the mortgage or into a period when the mortgage remains on foot only in consequence of the moratorium provisions of the statute (Div. 2). It is sub-s. (3) of s. 22 which must be read with sub-s. (5), where will be seen the reference to the moratorium provision which lends sub-s. (3) much of its significance. Sub-section (3) provides that every reduction made by the Division shall continue in force during the continuance of the mortgage in respect of which the reduction is made, an expression that by sub-s. (5) covers the period during which the mortgagee is precluded from exercising his remedies. The words "shall continue in force" might possibly be read as excluding the contractual incurring of a liability to a higher rate. Sub-section (5) seems to have caused at a late stage misgivings, probably unfounded and fortunately irrelevant, which were removed by Act No. 4788, s. 2.

Another consideration upon which the mortgagor relies consists in the right given by s. 19 (3), whether in its original form or as amended by Act No. 4106, s. 3, to a mortgagee to apply to a court to modify or exclude the reduction of interest. It is suggested that this provision implies that by no other means can the application of s. 19 (1) be excluded or modified. I do not think that such an inference can be drawn from the provision. It might be expressed in exactly the same form and without any inconsistency if the statute were to proceed expressly to authorize the parties to contract out of the Act. This is well illustrated by s. 7 (1), (2) and (7) of Act No. 4106 of which it will be necessary to speak again.

The considerations which I have examined up to this point may be said rather to tend against the conclusion that a mortgagor, by a contract made after Div. 1 came into operation, might assume a liability for interest upon the mortgage debt at a greater rate than the reduced rate. But for the reasons I have suggested I do not think the tendency is really very strong. However that may be, the considerations in favour of the conclusion that a contractual liability to a higher rate of interest might voluntarily be incurred by a mortgagor after the reduction became effective appear to me to outweigh those I have mentioned and to be sufficiently cogent to justify its acceptance. They arise from two provisions in the Principal Act of 1931 (No. 3961) and two in the Act of 1932 (No. 4106) which deal very specifically and in a considered manner with the invalidity of attempts to exclude the operation of certain provisions reducing interest. In my opinion they disclose a policy of invalidating all clauses or stipulations made before and in anticipation of the enactment or the coming into operation of the statutory provisions reducing interest on mortgages, renewals of mortgages or agreements to renew mortgages but, after the coming into operation of those provisions, leaving unimpaired the freedom of contract of the parties.

I shall now state their effect more particularly :—(i) Section 17 of Act No. 3961 deals with the application of Div. 1 to different classes of mortgages existing on what was called the appointed day given to a bank to secure an overdraft, and mortgages existing on what was called the prescribed day given to a pastoral company for a like purpose. Sub-section (2) of s. 17 then specifically provides that a mortgage existing on 1st August 1931 shall be deemed to be a mortgage existing on the prescribed or appointed day, notwithstanding that the overdraft has been called up or that it has been secured by a new mortgage and notwithstanding any agreement to the contrary *made before the appointed day or the prescribed day*, as the case may be. It is of course of no significance that an express provision against contracting out should be made in relation to the particular matter. But what is significant is that the provision when made should be so specifically and pointedly limited to agreements made before the operation of the Division upon the kinds of mortgages in question should commence.

(ii) Division 6 of Part III. is entitled "General" and affects the other Divisions of the Part. It begins with s. 36, which is as follows: "The provisions of this Part shall take effect notwithstanding any agreement to the contrary made prior to the passing of the Act." Here the time chosen is the passing of the Act, but the section discloses the most definite intention to restrict the invalidation of agreements to prior inconsistent provisions. It is of course general and that explains why the passing of the Act and not the coming into operation of the particular provisions of the Act was selected. But I find it hard to believe that a draftsman who intended subsequent contracts to be treated as void would adopt this restriction and make no affirmative provision to give effect to his intention.

(iii) Act No. 4106 contains two sections dealing with renewals of mortgages, a matter perhaps more or less overlooked in the Principal Act of the previous year. They are ss. 7 and 10. Section 7 is cast in somewhat the same general form as s. 19 of the earlier Act. It imports a term reducing interest and it authorizes exclusion or modification of the term by a court. It applies to mortgages existing on 1st October 1931 which between that time and the coming into operation of the Act No. 4106 have been renewed. Sub-section (1) provides that, from the coming into operation of the latter Act, the renewal shall be construed and take effect as if it were a term in the renewed mortgage that therefrom and thereafter the rate of interest, briefly stating it, should be reduced to the rate to which the Principal Act reduced the interest of the mortgage that has been renewed. Then sub-s. (7) contains the significant enactment that the provisions of the section shall not affect any agreement to the contrary made after the coming into operation of the Act, scil. No. 4106. Here, in the later counterpart of s. 19, an express provision is found confirming the freedom of the parties to make a subsequent contract to the contrary of the section. How incongruous it would be to hold that this was the law as to renewals governed by Act No. 4106 but the opposite principle applied under s. 19 of Act No. 3961. Moreover, it is to be noticed that in the interval of time between the renewal and the coming into operation of Act No. 4106 the interest is not reduced, that is to say, the adoption of a higher interest rate in the renewal is treated as allowable under Act No. 3961. As if to confirm this view of s. 7 of Act No. 4106, s. 10 makes a complementary provision specifically invalidating as and from the coming into operation of that Act certain provisions in mortgages made after 1st October 1931 and before the coming into operation of that Act and in agreements made in the same period renewing mortgages that expired or would have expired before the coming into operation of such Act.

The stipulations invalidated include those negativing or excluding any of the provisions of the *Financial Emergency Acts* in the event of the passing or coming into operation of the Principal Act or any amending Act. The fact that such stipulations, though made after 1st October 1931, are invalidated as and from the coming into operation of the later Act shows that the earlier Act allowed them; and the fact that the invalidation is restricted to mortgages and agreements made before the coming into operation of the later Act is another strong confirmation of the view that the general policy of the legislation was to leave the parties to contract as they please once the statutory reduction has taken effect.

(iv) Section 9 of Act No. 4106 is directed against the device of attempting to throw some responsibility for income tax upon the mortgagor or of taking income tax into account in ascertaining the rate of interest. Here again the invalidation is only from and after the coming into operation of the Act No. 4106, a further indication of the view held by the legislature of the ineffectiveness of Act No. 3961 to avoid such provisions. But in s. 9 there is an express statement that the section applies to agreements whether entered into before or after the coming into operation of the Act No. 4106. In this may be seen a notable contrast with the absence from all the legislation of any provision affecting the validity of any other kind of contract affecting interest made after the coming into operation of the Acts.

The argument from the foregoing provision is much more than an application of the maxim *expressio unius exclusio alterius*. It is an inference of a very plain nature as to the policy of the legislature with respect to the subject matter.

"The onus is always on those who assert that the Court is not to enforce a contract which is ex facie good, save on grounds of law substantial enough to outweigh the paramount policy of the law that people should keep faith and fulfil their promises. *Pacta sunt servanda*" (per Lord *Wright*, *Fender* v. *St. John Mildmay* (1)).

(1) (1938) A.C. 1, at pp. 37-38.

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In the present case the indications in the statute are far from discharging that onus. Indeed in my opinion, balancing the evidence afforded by the legislation, there is a satisfactory preponderance in favour of the conclusion that the legislature did not intend to interfere with the freedom of the parties to contract as they chose after the legislative provisions took effect.

The agreement in the present case is in a curious form. The consideration stated for it is perhaps narrower than the consideration its clauses disclose. The most material covenant is that no reduction of the interest shall be made by the mortgagee of the interest payable by the mortgagor. But no attack has been made upon the agreement, and none perhaps could be made upon it, except on the ground that contracting out of Part III., Div. 1, of Act No. 3961 is not possible.

In my opinion the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Abbott, Beckett, Stillman & Gray.*
Solicitors for the respondent: *Norris & Norris.*

E. F. H.