[HIGH COURT OF AUSTRALIA.]

CITY MUTUAL LIFE ASSURANCE SOCIETY LIMITED . . . . . } APPELLANT;

AND

THE FEDERAL COMMISSIONER OF LAND TAX . . . . . } RESPONDENT.

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SYDNEY, *Sept.* 20; *Dec.* 13.

Williams J.

Land Tax (Cth.)—Land owned by mutual life assurance society—Land acquired under or by virtue of mortgage—Mortgagee in possession—Use or occupation of building erected on land—Hotel and shops—Shops let to tenants—Liability to tax—Part or whole of land—Land Tax Assessment Act 1910-1940 (*No.* 22 *of* 1910—*No.* 15 *of* 1940), *ss.* 3, 10, 32, 41 (1), (2).

Section 41 of the *Land Tax Assessment Act* 1910-1940 provides:

"(1) Land owned and solely occupied by a Mutual Life Assurance Society (not being land of which the Society is mortgagee in possession, or which the Society has acquired under or by virtue of a mortgage) shall not be liable . . . to assessment of taxation under this Act. (2) Where a building erected on land owned by" such a society "is partly used or occupied . . . by persons other than the Society, the unimproved value of that land shall . . . be reduced to an amount which bears the same proportion to that unimproved value as the rental value of the part so used or occupied . . . by those other persons bears to the total rental value of the building."

Held that s. 41 (2) applies only to a building erected on land of which a mutual life assurance society is not mortgagee in possession or which it has not acquired under or by virtue of a mortgage.

Land held under *The Real Property Acts* 1861 *to* 1942 (Q.), on which was erected a hotel and three shops, was mortgaged by K, to a mutual life assurance society. Subsequently the society purchased K.'s equity of redemption. The society later entered into an agreement with B. under which B., who became licensee of the hotel, agreed to manage it on certain terms. On 30th June 1944 the whole building was in use as a hotel, except the shops, which were let to tenants.

Held that the land had been acquired by the society "under or by virtue of a mortgage" within the meaning of s. 41 (1) and, further, that, on the facts, B. and not the society was in occupation of the hotel on 30th June 1944.

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APPEAL under *Land Tax Assessment Act.*

The City Mutual Life Assurance Society Ltd. appealed to the High Court against an assessment by the Commissioner of Land Tax under the *Land Tax Assessment Act* 1910-1940 by which the company was assessed as owner of certain land at 30th June 1944, on the whole of the unimproved value.

The appeal was heard by *Williams* J., in whose judgment the facts and relevant statutory provisions are sufficiently set forth.

Mason K.C. and *O'Meally*, for the appellant.

A. R. Taylor K.C. and *E. J. Hooke*, for the respondent.

Cur. adv. vult.

Dec. 13.

WILLIAMS J. delivered the following written judgment :—

The question at issue on this appeal is the extent to which the appellant is liable to pay land tax on the unimproved value of land in Brisbane on which is erected Lennon's Hotel. The material year is that which ended at midnight on 30th June 1944, and it is admitted that the appellant was the owner in fee simple of the land at that time. The appellant became the owner of the land in fee simple in the following manner. The previous absolute owner of the land, which is held under the provisions of *The Real Property Act* (Q.), was one, J. Kouvelis. He mortgaged the land to the appellant by a registered bill of mortgage dated 2nd September 1938 to secure the sum of £104,500 and further advances. The terms of the mortgage were subsequently varied in certain respects to which it is unnecessary to refer. On 19th November 1941, the mortgage debt having then increased to about £344,441, the appellant and Kouvelis made an agreement in writing whereby, in consideration of the appellant releasing Kouvelis from his personal liability to repay the mortgage debt and certain other considerations, Kouvelis agreed to the appellant entering into possession of the mortgaged premises, to waive his rights to mortgagee's accounts, and to release and discharge the appellant from all liability to account as mortgagee in possession in respect of the rents and profits and of the proceeds of sale of the mortgaged premises.

On 5th November 1942 the Full Supreme Court of Queensland held that the effect of this agreement was that the mortgagor had lost his right of redemption, and that, having regard to the real nature of the transaction, the agreement was a conveyance within the meaning of s. 49 of *The Stamp Acts* 1894 *to* 1940 (Q.). On 2nd

December 1942 Kouvelis in consideration of this agreement executed a memorandum of transfer of the land to the appellant and the appellant became the registered proprietor of the land for an estate in fee simple. On 25th September 1942 the appellant made an agreement with Mrs. Byrne, which was still current on 30th June 1944, whereby Mrs. Byrne, who became the licensee of the hotel under *The Liquor Act* (Q.), agreed to manage the hotel on the terms and conditions therein contained. On 30th June 1944 the whole of the building erected on the land was being used for the purposes of the hotel except three shops which were let to tenants. The respondent assessed the appellant for land tax upon the whole of the unimproved value of the land.

The appellant contends that the unimproved value of the land should, for the purposes of assessment, be reduced to an amount which bears the same proportion to that unimproved value as the rental of the three shops bears to the total rental value of the building. The question at issue centres round the true construction of s. 41 of the *Land Tax Assessment Act* 1910-1940. The text of that section so far as material is as follows:—"41. (1) Land owned and solely occupied by a Mutual Life Assurance Society (not being land of which the Society is mortgagee in possession, or which the Society has acquired under or by virtue of a mortgage) shall not be liable as against the Society or its policy-holders, to assessment or taxation under this Act. (2) Where a building erected on land owned by a Mutual Life Assurance Society is partly used or occupied, or is intended to be partly used or occupied, by persons other than the Society, the unimproved value of that land shall, for the purposes of the assessment of that Society, be reduced to an amount which bears the same proportion to that unimproved value as the rental value of the part so used or occupied, or intended to be so used or occupied, by those other persons bears to the total rental value of the building."

It is admitted that the appellant is a mutual life assurance society within the meaning of the section, but the respondent contends that the appellant cannot rely upon the section because the subject land is land which the appellant acquired under or by virtue of a mortgage. The appellant contends that the subject land is not land which it acquired under or by virtue of a mortgage. It also contends that, if it is such land, the words in brackets in s. 41 (1) have no application to s. 41 (2). Section 10 of the Act provides that, subject to the provisions of the Act, land tax shall be levied and paid upon the unimproved value of all lands within the Commonwealth which are owned by taxpayers, and which are

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not exempt from taxation under the Act. Section 3, which is the definition section, provides that, unless the contrary intention appears, " owner " includes every person who, whether at law or in equity, is entitled to receive the rents and profits of land including, *inter alia*, a mortgagee in possession. Section 32 provides that a mortgagee in possession shall not be liable to pay tax until a period of three years after he has entered into possession.

It is clear from the words in brackets in s. 41 (1) that a society which is a mortgagee in possession of land for more than three years is liable to pay land tax as the owner on its unimproved value with a right under s. 32 to recover the amount paid from the mortgagor. Section 3 of the Act contains definitions of mortgage and mortgagee. " Mortgage " includes any charge whatever upon land, or interest therein, howsoever created, for the securing of money. " Mortgagee " includes every person entitled at law or in equity to a mortgage or any part thereof. The words in brackets in s. 41 (1) are therefore intended to apply to a large variety of mortgages.

The two ordinary kinds of mortgage are legal mortgages of land held under common law title and of land held under the Real Property Acts of the States. The ordinary common law mortgage provides for a conveyance of the legal estate in the land to the mortgagee subject to a proviso for redemption. If the mortgagor performs his contract, he is entitled at law to have the land re-conveyed to him. If he fails to do so he loses his legal right to redeem. But equity regards a mortgage as nothing more than a security for the moneys lent, so that, although the mortgagor may have lost his legal right of redemption, he still has an equity of redemption. Apart from the sale of the land under a power of sale a mortgagor who retains possession can only lose his equity of redemption if it is foreclosed by the mortgagee. Foreclosure is an equitable remedy whereby a mortgagee may obtain an order that the mortgagor must repay the mortgage debt within a given time, and upon default forfeit his equitable right to redeem. The land will then become the absolute property of the mortgagee both at law and in equity. The ordinary incidents of a common law mortgage have been supplemented and regulated in many directions by statute, but it is still in essence a conveyance of the land to the mortgagee which becomes absolute at law upon the failure of the mortgagor to exercise his contractual right to redeem and absolute in equity after an order absolute for foreclosure. Such a mortgage usually provides that the mortgagor shall be entitled to retain

possession of the land until default in the performance of his covenants, particularly the covenants for payment of interest and principal, and that upon failure to perform these covenants the mortgagee shall become entitled to enter into possession of the land. A mortgage of land held under the Real Property Acts of the States is, on the other hand, usually a statutory charge on the land to which are added statutory rights of possession, sale and foreclosure. But it is to be noted that in Queensland s. 60 of *The Real Property Act* provides that the registered mortgagee shall be entitled by suit or other proceedings in equity to foreclose the right of the mortgagor to redeem the mortgaged lands.

It is in the light of such general considerations as these that a meaning must be sought for the words in brackets in s. 41 (1). It is not contended that these words would apply to land purchased by a society at a sale of land in exercise of a power of sale in a mortgage to which the society was not a party. It is common ground that they only apply to the acquisition of land mortgaged to the society. The intention appears to be to except from the exemption in s. 41 (1) all land of which the society becomes the owner by the union of the mortgaged estate with the equity of redemption. Technically the effect in equity of an order absolute for foreclosure is to vest the ownership of and the beneficial title to the land for the first time in the person who was previously a mere encumbrancer (*Heath* v. *Pugh* (1)). Apart from foreclosure in equity and by statute, and from the operation of statutory provisions which have the same effect as foreclosure, as for instance rule 238 of the Bankruptcy Rules and the lapse of time under the Statute of Limitations where the mortgagee is in possession, the only way in which a mortgagee may produce a union of the mortgaged estate and the equity of redemption is by the purchase of the equity of redemption. Such a purchase, until the contrary is shown by the party impeaching the transaction, is regarded in equity as on the ordinary footing of a sale by a vendor to a purchaser whether the mortgagee pays a sum of money for the equity of redemption in addition to releasing the mortgage debt or simply releases the debt (*Melbourne Banking Corporation Ltd.* v. *Brougham* (2)).

Strictly speaking it is difficult to conceive how a mortgagee could acquire land from his mortgagor under or by virtue of the mortgage but the words are used in a popular rather than in a technical sense. In the case of a foreclosure of land under common

(1) (1881) 6 Q.B.D. 345, at p. 360. (2) (1882) 7 App. Cas. 307.

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law title, the land can be said to be acquired by the society under the mortgage in this sense because the legal estate is conveyed by the mortgage and the mortgagee becomes the absolute owner of the land at law and in equity when the mortgagor loses his contractual and equitable right to redeem. In the case of a foreclosure of land under the Real Property Acts, the land can be said to be acquired by the society by virtue of the mortgage in this sense because the mortgagee becomes the owner of the land by the exercise of the statutory rights which these Acts confer upon a mortgagee. It would be unreasonable to attribute to the legislature an intention to place the ownership of land acquired by the purchase of the equity of redemption in a different category to the ownership of land acquired by foreclosure. In each case the ownership has its origin in the relationship of mortgagor and mortgagee and the ownership that grows from such a root can in a popular sense be said to be acquired if not under at least by virtue of the mortgage. This is so, *a fortiori*, where as in the present case the ownership is acquired in consideration of the mortgagee releasing the mortgagor from his liability to repay the mortgage debt. The words in brackets include the case where a society is a mortgagee in possession as well as where it acquires the ownership of land under or by virtue of a mortgage. It is usual for a society to lend some of its funds at interest on the security of a mortgage of land, and I think that the legislature must have intended that societies which invested their funds in this way should be liable for land tax when they became entitled to the rents and profits of the land whether as mortgagees in possession or as owners. In my opinion the appellant acquired the ownership of Lennon's Hotel by virtue of the bill of mortgage of 2nd September 1938.

The second question is whether the words in brackets in s. 41 (1) of the Act should be imported into s. 41 (2). The exemption granted in s. 41 (1) is limited to land which is owned and solely occupied by a society not being land of which the society is mortgagee in possession or which the society has acquired under or by virtue of a mortgage. If any part of a block of land was not occupied by the society the exemption would therefore be wholly lost for the whole block unless the part of the land which was occupied by the society could be separated from the part of the land which was not so occupied. There would ordinarily be no difficulty in separating vacant land or land on which buildings suitable only for one occupation were erected. But there would be a difficulty where a building capable of being occupied by more persons than one was erected on the land. If part of this building, however small,

was occupied by a person other than the society, the exemption of the land on which the building was erected would be wholly lost but for s. 41 (2). The section must be read as a whole and s. 41 (2) must, in my opinion, be read as applicable only to a building erected on land which is not land of which the society is mortgagee in possession or which the society has acquired under or by virtue of a mortgage. It does not therefore apply to Lennon's Hotel.

These grounds are sufficient to dispose of the appeal, and it is strictly unnecessary to consider the further ground that s. 41 (2) of the Act does not apply because on 30th June 1944 no part of the building on the land was being used or occupied by the appellant. But it has been argued and I shall deal with it. Admittedly the three shops leased to tenants were not being used or occupied by the appellant. But the respondent also contends that the hotel itself was being used or occupied not by the appellant but by Mrs. Byrne or alternatively by the lodgers in the hotel. The agreement of 25th September 1942 provided that Mrs. Byrne would at all times and in all respects conduct the hotel business on behalf of the appellant. She was to receive a fixed salary and a share of the net profits for doing so. Clause 2 provided that she should have the complete and absolute control of the business and of the employees with the right at all times to employ, dismiss and reduce in status any employee and to determine the tariff to be charged to guests and the duties to be carried out by all employees. She was therefore solely responsible for the carrying on of the business and had a complete discretion as to the manner in which it should be carried on subject only to the limitations imposed by the agreement. The agreement was an agreement not of service but for services (*Simmons* v. *Heath Laundry Co.* (1)). It was necessary that Mrs. Byrne should occupy the hotel premises in order to perform the agreement. The question who is in occupation of premises is mainly a question of fact and each case depends upon its own particular circumstances. A demise or in other words an exclusive possession of premises is not necessary to make a person an occupier. In *Westminster Council* v. *Southern Railway Co., &c., and W. H. Smith & Son, Ltd.* (2) Lord *Russell* of Killowen said that " the crucial question must always be what in fact is the occupation in respect of which someone is alleged to be ratable, and it is immaterial whether the title to occupy is attributable to a lease, a licence, or an easement." The meaning of occupation has been recently discussed in *Robinson* v. *Taylor* (3) and *John Laing & Son, Ltd.* v. *Assessment Committee for*

(1) (1910) 1 K.B. 543, at pp. 552, 553.
(2) (1936) A.C. 511, at p. 533.
(3) (1948) 1 K.B. 562.

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Kingswood Assessment Area (1). In these cases it was the person who was in occupation who was liable for the rates, whereas it is the owner who is liable to pay land tax. But they throw light on the meaning of "occupied" in s. 41. In *Meigh* v. *Wickenden* (2) a debenture holder appointed a receiver and manager of the business of a company. The debenture provided that the receiver and manager was to be deemed the agent of the company, and that he was to manage and carry on the business of the company and take possession of the property charged by the debenture. It was held that since it was the duty of the receiver to take possession he had presumably done so and he was therefore in occupation of the company's factory within the meaning of the English *Factories Act* 1937. In *Gyton* v. *Palmour* (3), on the other hand, it was held that a person appointed receiver and manager of the property of a company by the court was not in occupation of the company's premises. It was held that the company was still in occupation because the order did not contain a direction for delivery of possession of the land to the receiver and manager. *In the Matter of the Railways (Valuation for Rating) Act*, 1930, *and In the Matter of the Appeal by London & North Eastern Railway Co. Schedule A—Canteens* (4) was a case in which *Wrottesley* J. distinguished the decision in *Westminster Council* v. *Southern Railway Co.* (5) on the facts, but his Lordship said (6) that the caterers were given the use of the premises and the equipment for the purposes of carrying out the agreement. In my opinion Mrs. Byrne and not the appellant was in occupation of the hotel premises on 30th June 1944. If not the occupier she was at least using the premises for the purpose of carrying out her statutory duties as licensee and performing her agreement with the appellant.

For these reasons I order that the appeal be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant, *Taylor, Kearney & Reed.*

Solicitor for the respondent, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

J. B.

(1) (1948) 2 K.B. 116.
(2) (1942) 2 K.B. 160.
(3) (1945) 1 K.B. 426.
(4) (1946) 1 K.B. 13.
(5) (1936) A.C. 511.
(6) (1946) 1 K.B., at p. 26.