[HIGH COURT OF AUSTRALIA.]

FALK . . . . . APPELLANT;
APPLICANT,

AND

HAUGH . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1935.

MELBOURNE, *May* 5, 9.

SYDNEY, *June* 4.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Financial Emergency — Mortgage — Foreclosure — Restriction of mortgagee's right —Interest paid to a date within twelve months—Mortgagee in possession—Receipt of rents—Right of mortgagor to an account—Financial Emergency Act 1931-1934 (*Vict.*) (*No.* 3961—*No.* 4249), *sec.* 28.

When payments are received generally on account of a debt, which is in part interest and in part principal and no specific appropriation is made, they are treated as applicable to interest in priority to principal. The rule applies to the net rents and profits received by a mortgagee in possession.

Sec. 28 of the *Financial Emergency Act* 1931-1934 (Vict.) makes it one alternative condition of a mortgagor's title to apply for relief that interest has been paid to a date within a prescribed period immediately preceding the date of application.

Held that this does not require actual payment by or on behalf of the mortgagor himself, but is satisfied if the interest is obtained by the mortgagee so that either at law or in equity the mortgagor's obligation to pay it would be discharged.

Another condition requires that the mortgagor's covenants shall have been performed.

Held that punctual exact and faithful performance by the mortgagor himself is not necessary, but such performance as would be an answer to an action for breach, except as to nominal damages.

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A mortgagor applied under the *inancial Emergency Acts* 1931-1934 (Vict.) for an order that the mortgagee should not exercise his power of foreclosure, and alleged that interest had been paid to a date within the immediately preceding period prescribed. There had been no actual payment of interest by the mortgagor during that period, but the mortgagee had entered into possession of the mortgaged property and was in receipt of the rents and profits.

Held that the mortgagor was entitled to have an account taken for the purpose of showing that interest had been satisfied to a date within the prescribed period.

Decision of the Supreme Court of Victoria (*Mann* J.) reversed.

APPEAL from the Supreme Court of Victoria.

By an instrument of mortgage dated 15th May 1929 Harry Falk mortgaged to Edwin Haugh, to secure the repayment of £5,500, certain land upon which was a mansion which had been divided into flats. Payment of interest under the mortgage fell into arrears, and the mortgagee went into possession of the property on 20th October 1930. He employed an estate agent to manage the property and to collect the rents. From the rents received the agent, from time to time, deducted rates and taxes which were in arrear at the date of going into possession, current rates and taxes, amounts for repairs, expenses incidental to the management of the property, expenses of minor alterations and improvements, advertising and auction expenses incurred in connection with an attempted sale of the property, and amounts for agent's commission, and remitted the balance of such rents to the mortgagee.

On 19th September 1933 the mortgagor took out a summons in the County Court at Melbourne under sec. 28 (1) of the *Financial Emergency Act* (Vict.), asking for an order that the mortgagee should not before 1st October 1934 exercise any power of foreclosure in respect of the mortgaged property, or any remedy other than any power of sale. The mortgagor alleged (*inter alia*) that the interest payable under the mortgage, being payable quarterly, had been paid to a date within the period of twelve months immediately preceding the date of the summons. On the hearing of the summons this allegation was the substance of the dispute. The Judge directed an inquiry before the Registrar, analogous to an inquiry on the taking of accounts. An inquiry was held, and the Registrar certified as to the result. When the matter came on for further hearing the Judge

reserved for the opinion of the Full Court of the Supreme Court a number of questions concerning the way in which the rents and profits received by the mortgagee in possession should be treated as having been applied.

The instrument of mortgage provided that all costs, charges, expenses and payments incurred or made by the mortgagee in the exercise or enforcement of any of his powers, rights or remedies, or in any way incurred owing to default in payment of any money thereby secured or the breach of any express or implied covenant by the mortgagor, should be deemed part of the principal money owing on the mortgage and should carry interest; and provided that the mortgagee might pay any moneys, such as rates and taxes, payable in respect of the land, in the event of the mortgagor's failing to do so.

The above facts appear in *Falk* v. *Haugh* (1) where the Supreme Court held that the mortgagor was not entitled to have an account taken for the purpose of showing that interest had been satisfied to a date within the preceding period of twelve months. The summons, coming on again before the County Court, was dismissed upon the ground that interest had not been paid to a date within twelve months of the summons. The mortgagor appealed against this order to the Supreme Court. That appeal was pending at the time of the High Court appeal.

On 21st December 1934 the mortgagor issued another summons, this time in the Supreme Court, for an order that the mortgagee should not exercise any power of foreclosure in respect of the property comprised in the mortgage on the ground that the interest had been paid to a date within the period of twelve months preceding the date of the summons. The summons was heard by *Mann* J., and an adjournment was sought for the purpose of enabling an appeal to be brought to the High Court from the decision of the Supreme Court in *Falk* v. *Haugh* (1). *Mann* J. refused the application for an adjournment, as he considered that he should not adjourn the matter "until after an appeal not yet instituted was made to the High Court in another matter," and dismissed the summons.

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

(1) (1935) V.L.R. 20.

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Ashkanasy (with him *Dethridge*), for the appellant. The mortgagor is entitled to an account. If the mortgagee brought an action on a covenant claiming more than he was entitled to, a Court of equity would intervene to prevent him from claiming more than was due to him, e.g., if he sued for the whole principal without making any allowance for rents and profits received. The mortgagor was not bound to commence redemption proceedings to enable him to support such claim. No interest was paid directly since 29th October 1930, when the mortgagee went into possession. Since that date the mortgagee has collected the rents and profits which were more than sufficient to pay both outgoings and some interest. The mortgagee has all the rights of an owner at law under sec. 156 of the *Transfer of Land Act* 1928 (Vict.), but only for the purpose of securing payment. Under the general law the mortgagor would have been in a very much better position (*Partridge* v. *McIntosh & Sons Ltd.* (1); *Groongal Pastoral Co.* (*in Liquidation*) v. *Falkiner* (2); *Kerr* on *Australian Lands Titles* (*Torrens*) *System* (1927), pp. 21, 355-357). There is no such thing as a redemption action for land under the *Transfer of Land Act* (*Greig* v. *Watson* (3)). The mortgagee going into possession under the general law goes into possession as owner and, therefore, is not liable to account. This cannot obtain under the *Transfer of Land Act* where he goes into possession as creditor. It is sufficient for the purpose of this appeal for the mortgagor to show that there was payment (*Trust and Agency Co.* v. *Markwell* [*No.* 2] (4); *Long* v. *Town* (5)). There is no provision for account upon foreclosure under the *Transfer of Land Act*. The Full Court did not allow any inquiry to be made as to the state of the accounts at all (*Cockburn* v. *Edwards* (6)). The mortgagee should apply the income in the first instance to the keeping down of interest in the absence of any express appropriation (*Chase* v. *Box* (7); *Wrigley* v. *Gill* (8)). That the mortgagor is entitled to an account without offering to redeem is supported by *Bradshaw* v. *Widdrington* (9) and *Harlock* v. *Ashberry* (10). Under the *Transfer of Land Act* the

(1) (1933) 49 C.L.R. 453.
(2) (1924) 35 C.L.R. 157.
(3) (1881) 7 V.L.R. (E.) 79; 3 A.L.T. 13.
(4) (1874) 4 Q.S.C.R. 50.
(5) (1889) 10 L.R. (N.S.W.) (Eq.) 253.
(6) (1881) 18 Ch. D. 449, at p. 461.
(7) (1702) Freem. Ch. 261; 22 E.R. 1197.
(8) (1906) 1 Ch. 165, at pp. 170, 174.
(9) (1902) 2 Ch. 430.
(10) (1882) 19 Ch. D. 539, at p. 544.

mortgagee never receives payment except as a creditor. The method of taking accounts is set out in *Fisher and Lightwood's Law of Mortgages*, 7th ed. (1931), p. 733 ; *Halsbury, Laws of England*, 1st ed. (1912), vol. 21, p. 219 ; *Lindley* on *Partnership*, 9th ed. (1924), p. 298 ; *Noyes* v. *Pollock* (1). *Mann* J. says the mortgagee has no rights whatever unless he redeems. It is desired to show that rents and profits have been applied in payment of interest so as to extinguish the whole of it, and that therefore (*a*) no interest is in arrears, or (*b*) that interest has been paid up to within twelve months. The irreducible minimum to which we are entitled is to have a finding as to whether or not there has been an appropriation made. Sec. 76 of the *County Court Act* 1928 (Vict,) says that the Full Court must answer questions submitted to them by the County Court. In *Falk* v. *Haugh* (2) they refused to do so. The Court should send the case back to *Mann* J. for the purpose of having the case heard.

Adam, for the respondent. On the material before him *Mann* J. should have dismissed the summons, but he was asked for an adjournment to obtain evidence of further facts, and *Mann* J. refused the adjournment and dismissed the summons in view of the Full Court decision in *Falk* v. *Haugh* (2). The decision of the Full Court was right. No inquiries or accounts should have been directed. The summons is under sec. 28 (1) (*b*) of the Act, and the word " paid " there means paid in the ordinary legal sense, a physical payment of money or something agreed upon by the mortgagee as payment. It approximates to the old plea of payment. The alternative to this would involve taking accounts. It is improbable that accounts between mortgagor and mortgagee were intended to be taken for the purpose of this section. The only known form of accounts are inapplicable to this form of proceeding, and could not have been contemplated by the Legislature. Compare *Increase of Rents Act* (England), 5 & 6 Geo. V. c. 7, sec. 4, which was considered in *Walters* v. *White* (3). *Wrigley* v. *Gill* (4) is distinguishable on several grounds. The mortgagor has no rights after the mortgagee

(1) (1886) 32 Ch. D. 53.
(2) (1935) V.L.R. 20.
(3) (1917) 116 L.T. 377 ; 33 T.L.R. 154.
(4) (1906) 1 Ch. 165.

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has entered into possession, unless he offers to redeem (*Harlock* v. *Ashberry* (1); *Union Bank of London* v. *Ingram* (2); *Gaskell* v. *Gosling* (3)). "Payment" in sec. 28 should not be given a wider meaning than at common law. There is no obligation either at law or in equity to apply profits to payment of interest. There is no difference in operation whether the mortgage is under the Act or not (sec. 156 of *Transfer of Land Act* 1928; *Wiseman* on *The Transfer of Land*, 2nd ed. (1931), p. 257; *Farrington* v. *Smith* (4)). Sec. 151 of the *Transfer of Land Act* gives a statutory right to enter into possession of rents and profits. *Greig* v. *Watson* (5) decides that in foreclosure proceedings the special provisions of the Act must be followed. The New South Wales and Queensland cases are not relevant, as provisions corresponding to sec. 156 are not contained in those Acts. The mortgagee is not obliged to apply rents first to the payment of interest (*Ex parte Harrison*; *In re Betts* (6); *Parr's Banking Co.* v. *Yates* (7)). In any event the principle of the rule is one intended to favour the creditor and not the debtor (*Fulthrope* v. *Foster* (8); *Richards* v. *Morgan* (9)). What rules as to accounts should be applied? Redemption accounts cannot apply. An account taken at an artificial date chosen arbitrarily might work injustice, that is, taking the date as that of the summons. The mortgagee always had to account at the end, but not at any time. The mortgagor is also out of Court on the footing that the Act not only requires him to pay the interest, but to have complied with all the other covenants, other than for the payment of principal moneys. No rates or taxes have been paid on this property by the mortgagor since the execution of the mortgage. Such a breach is not of a minor or techn ical nature.

Ashkanasy, in reply. The authorities show that the order in which appropriations are to be made by a mortgagee are, first, interest, secondly, outgoings, and thirdly, capital. *Walters* v. *White* (10) was not a considered judgment and was decided without any

(1) (1882) 19 Ch. D. 539.
(2) (1880) 16 Ch. D. 53.
(3) (1896) 1 Q.B. 669, at p. 691.
(4) (1894) 20 V.L.R. 90, at p. 92; 15 A.L.T. 218, at p. 219.
(5) (1881) 7 V.L.R. (E.) 79; 3 A.L.T. 13.
(6) (1881) 18 Ch. D. 127.
(7) (1898) 2 Q.B. 460.
(8) (1858) 1 Vern. 476; 23 E.R. 602.
(9) (1753) 4 Y. & C. (Ex.) 570; 160 E.R. 1136.
(10) (1917) 116 L.T. 377; 33 T.L.R. 154.

reference to authorities; also, the Act upon which it was decided differs materially from the present Act.

Cur. adv. vult.

The following written judgments were delivered:—

RICH, DIXON, EVATT AND MCTIERNAN JJ. This is an appeal from an order of *Mann* J. dismissing an application under sec. 28 of the Victorian *Financial Emergency Act* 1931 as amended: Act No. 3961, sec. 28, as amended by No. 3970, sec. 5; No. 4047, sec. 2; No. 4064, sec. 2; No. 4106, secs. 5 and 6; and No. 4249, sec. 3 (1). That provision enables a mortgagor, if certain conditions are fulfilled, to apply upon summons for an order that the mortgagee shall not before 1st October 1935 exercise any power of sale or foreclosure or repossession in respect of the property comprised in the mortgage, or any other remedy for enforcing payment of the principal moneys thereby secured, or interest (if any) in arrear at the time of the application.

The prescribed conditions are two. The first is that under the mortgage, (*a*) any interest accrued due and payable is not in arrear, or (*b*) interest has been paid to a date within a specified period immediately preceding the date of the application. The specified period is twelve months if interest is payable quarterly or more frequently, fifteen months, if half-yearly, and eighteen months, if yearly or less frequently. Interest for this purpose accrues from day to day, and a tender of interest if refused is equivalent to payment.

The second condition is that, apart from the non-payment of principal and interest, the mortgagor has performed his covenants or, if there has been a breach of covenant, it is in the opinion of the Court of a minor or technical character. The mortgagor is entitled to such an order if he establishes that he is unable to redeem, either from his own moneys or by borrowing at a rate of interest not exceeding the mortgage rate as reduced by the statute, and that there is no serious diminution in the value of the property and that the mortgagee's security is not otherwise in jeopardy. The power of sale of a mortgagee in possession is not affected if he took possession before the provision came into force.

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The mortgagor applied in the present case for an order that the mortgagee should not exercise his power of foreclosure or any other remedy except his power of sale for enforcing payment of principal and interest. The mortgage was given on 15th May 1929 to secure repayment of £5,500 and interest payable quarterly at ten per cent per annum reducible to eight per cent per annum on payment within fourteen days of the quarterly dates. It is a mortgage under the *Transfer of Land Act*. The land is situated at East St. Kilda, and is the site of a building divided into a number of flats. The mortgagee went into possession on 29th October 1930, interest being then in arrear. Ever since he has remained in receipt of rents and profits. In September 1933 the mortgagor applied under sec. 28 to the County Court at Melbourne. To establish fulfilment of the condition that interest had been paid to a date within twelve months, he relied upon the mortgagee's receipt of the rents and profits which, he said, were more than sufficient to keep down the interest after defraying all lawful outgoings. The County Court directed an inquiry before the Registrar. When his certificate came before the Judge some questions arose which were reserved pursuant to sec. 76 of the *County Court Act* 1928. The stated case was heard by the Full Court, consisting of *Irvine* C.J., *Mann* and *Macfarlan* JJ., who refused to answer the questions upon the ground that no occasion had arisen for an account or inquiry between the mortgagor and the mortgagee, as the mortgagor did not seek to redeem, and there had been no sale by the mortgagee. The reasons of the Court, which were given by *Mann* J., are to the effect that the mortgagor cannot rely upon the receipt of the rents and profits by the mortgagee in possession to establish fulfilment of the condition that interest has been paid to a date within the specified period immediately preceding the mortgagor's application (*Falk* v. *Haugh* (1)).

The County Court then dismissed the application upon the ground that interest had not been paid to a date within twelve months preceding September 1933, when the application then under consideration was made.

The present application to the Supreme Court was made on 21st December 1934. *Mann* J. dismissed it, following the reasons he had

(1) (1935) V.L.R. 20.

given in the Full Court. Counsel for the mortgagee expressly refrained from taking the point that the question whether the interest had been paid to a date within twelve months preceding 21st December 1934 is concluded. The contention is open that this question is decided already, and the applicant is precluded by issue estoppel. The respondent's refusal to raise it makes it unnecessary to discuss the matter. But it may be remarked that the present application raises a different issue from that determined by the County Court. The reasons of the Full Court for refusing to determine the questions reserved may be taken to be the basis of the decision by the County Court that interest had not been paid. The decision in the County Court was that interest had not at that time been paid up to a given date. The question at issue here is whether it has now been paid up to another and later date. An affirmative answer to that question involves no necessary contradiction of the County Court decision. The issues are not the same; but the decision of each issue involves a common question, namely, what, in the case of a mortgagee in possession, amounts to payment. It is this question with which the reasons of the Full Court deal. It may, therefore, be right to regard those reasons as forming only a subsidiary ground leading to the decision of the issue between the parties, and not as constituting the decision of an issue. An estoppel of this kind arises from the decision *inter partes* of an ultimate issue identical with one of the ultimate issues that are again raised. But it does not arise from the adoption of a process of reasoning in the decision of the issue, although the same process may be applicable in the decision of a second and different issue. It is upon this ground, if at all, that the decision of the Privy Council in *Broken Hill Pty. Co.* v. *Broken Hill Municipal Council* (1) is to be reconciled with its decision in *Hoystead* v. *Commissioner of Taxation* (2).

The materials before us on the present appeal do not include, unfortunately, the actual accounts brought in by the mortgagee as a result of the direction of the County Court Judge. The mortgagor has appealed to the Supreme Court against the order of the County Court dismissing his application to the latter Court. That appeal,

(1) (1926) A.C. 94.

(2) (1926) A.C. 155.

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which appears to have been instituted with a view of an appeal to this Court, was pending at the time the present application came before *Mann* J., and is still pending. The mortgagor applied on this occasion to the Supreme Court in order to preserve his rights under the Act, and sought an adjournment which, however, was refused upon the ground that, in view of the decision of the Full Court, on no materials could the application succeed, and an adjournment would be useless. Perhaps the matter might have been disposed of on grounds depending upon the character and amount of the actual receipts and expenditure, and the manner or order in which the mortgagee has appropriated receipts against expenditure and interest, if an appropriation has been made by him. As it is, the appeal must be decided upon the assumption that, if an account were taken, it might appear that, after the deduction of all allowable outgoings, the receipts of the mortgagee from the mortgaged premises have been sufficient to answer arrears of interest, and to keep down accruing interest. But, in making this assumption, the possibility of the mortgagee's having made an appropriation of receipts against outgoings in priority to interest cannot be neglected. For, according to the respondent's counsel, the net residue does not suffice to keep down the interest. Whether, when the receipts of a mortgagee in possession are sufficient, after the deduction of all prior charges, fully to answer the interest payable under the mortgage, the interest is to be considered paid, is a question which, as appears from the decided cases, depends more on the meaning with which the word "payment" is used than upon any obscurity in the relations of the mortgagor and mortgagee. Under the operation of secs. 156 and 157 of the *Transfer of Land Act* 1928, the mortgagee in possession of land under the Act occupies a situation analogous to that of the mortgagee in possession of land under the general law. He enjoys possession in his own right, and not as an agent. But he enjoys it as mortgagee, that is, for the purpose of securing payment of the mortgage moneys. He is, therefore, accountable for what he receives and for what he ought to receive. If a mortgagee's receipts are thrown against principal, they reduce *pro tanto* the amount upon which interest is chargeable. It is not to the mortgagee's advantage, therefore, to attempt to appropriate to principal his receipts from

the mortgaged premises. When interest is owing, it is scarcely to be supposed that, instead of utilizing the receipts to keep it down, he would throw them against principal. Indeed, the contest which has most often arisen, is whether the surplus receipts after interest has been answered ought in the hands of the mortgagee to be treated as partly paying off principal: whether, in other words, an account between mortgagee in possession and mortgagor must be taken with yearly or periodical rests. It has long been a rule that when payments are received generally on account of a debt, which is in part interest and in part principal, they are treated as applicable to interest in priority to principal. In *Crisp* v. *Bluck* (1) a bond creditor received some payments, and afterwards recovered judgment. It was decreed that the payments ought to go in discharge of the interest first. The rule was again enunciated by Lord Keeper *Wright* in *Chase* v. *Box* (2). It has, however, been little discussed. The most recent statement of the rule is contained in *Venkatadri Appa Row* v. *Parthasarthi Appa Row* (3). There Lord *Buckmaster* said (4):— "There is a debt due that carries interest. There are moneys that are received without a definite appropriation on the one side or the other, and the rule which is well established in ordinary cases is that in those circumstances the money is first applied in payment of interest and then when that is satisfied in payment of capital. That rule is referred to by *Rigby* L.J. in the case of *Parr's Banking Co.* v. *Yates* (5) in these words:—'The defendant's counsel relied on the old rule that does, no doubt, apply to many cases, namely, that, where both principal and interest are due, the sums paid on account must be applied first to interest. That rule, where it is applicable, is only common justice. To apply the sums paid to principal where interest has accrued upon the debt, and is not paid, would be depriving the creditor of the benefit to which he is entitled under his contract.'" (See too *Bamundoss Mookerjea* v. *Omeish Chunder Raee* (6).) The rule affords only a presumption in the absence of any actual or express appropriation by the debtor or the creditor.

(1) (1673) Rep. temp. Finch 89; 23 E.R. 48.
(2) (1702) Freem. Ch. 261; 22 E.R. 1197.
(3) (1921) L.R. 48 Ind. App. 150.
(4) (1921) L.R. 48 Ind. App., at p. 153.
(5) (1898) 2 Q.B. 460, at p. 466.
(6) (1856) 6 Moo. Ind. App. 289, at p. 306; 19 E.R. 108, at p. 115.

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But it is treated by text writers as a rule governing the application of payments in respect of mortgage moneys (*Fisher* on *Mortgages*, 6th ed. (1910), par. 1514, p. 770 ; *Coote* on *Mortgages*, 9th ed. (1927), vol. II., ch. 54, sec. 6, p. 1237). There is also some old authority that a mortgagee in possession must after keeping down interest do necessary repairs out of the surplus rents and profits (*Richards* v. *Morgan* (1)). But, from the fact that net receipts are thrown primarily against interest, it does not necessarily follow that the interest is paid as and when the moneys in hand suffice for the purpose. In *Brocklehurst* v. *Jessop* (2), indeed, *Shadwell* V.C. held that, at any rate in the case of an equitable mortgagee who had no legal estate, the receipts amounted to payment even to defeat the Statute of Limitations. He said that the receipt of the rents and profits by an equitable mortgagee in possession ought prima facie to be taken as payment either of the principal or interest of his debt as the case might be. But in *Cockburn* v. *Edwards* (3) this view was disapproved as going too far. *Jessel* M.R., as he had done in *Union Bank of London* v. *Ingram* (4), in that case emphasized the nature of the account taken between mortgagor and mortgagee in possession ; an account where the total receipts, less expenses, are compared with the total mortgage moneys. He cited *Chinnery* v. *Evans* (5) as showing that within 3 & 4 Wm. IV. c. 27 it was no payment, because not made by the mortgagor or his agent. These views were, however, by no means shared by *Brett* and *Cotton* L.JJ. In *Union Bank of London* v. *Ingram* (4), *Jessel* M.R. had already decided that, under a proviso for reduction of interest on punctual payment, a mortgagee in possession, whose net receipts exceeded the interest, might nevertheless charge the higher rate. The case was followed with some reluctance by *Kay* J. in *Bright* v. *Campbell* (6). These decisions, however, were examined thoroughly in *Wrigley* v. *Gill* (7), first by *Warrington* J., as he then was, and then in the Court of Appeal by *Vaughan Williams*, *Stirling* and *Cozens-Hardy* L.JJ. The question there was whether under a proviso

(1) (1753) 4 Y. & C. (Ex.) 570 ; 160 E.R. 1136.
(2) (1835) 7 Sim. 438 ; 58 E.R. 906.
(3) (1881) 18 Ch. D. 449.
(4) (1880) 16 Ch. D. 53.
(5) (1864) 11 H.L. Cas. 115 ; 11 E.R. 1274.
(6) (1889) 41 Ch. D. 388.
(7) (1905) 1 Ch. 241 ; (1906) 1 Ch. 165.

for the capitalisation of interest due which should be in arrear for fourteen days, interest could be treated as capital by a mortgagee in possession who received rents and profits sufficient to keep down the interest. This question was answered that it could not be so treated. All the judges disapproved of the dicta of *Jessel* M.R. The conclusion reached was expressed as follows by *Vaughan Williams* L.J. :—" But it seems to me that we cannot support the judgment of *Warrington* J. in the present case unless we are prepared to hold that under such a proviso as we have here the mortgagee will not be entitled to say that the interest is in arrear, if while he was in possession he had in his hands on the day appointed for payment of interest, or within twenty-one days afterwards, rents received by him available for the payment of the interest. In my opinion that is the right view " (1).

The views expressed by *Mann* J. proceed very largely upon the reasoning which *Jessel* M.R. enunciated. The true view appears to be that a mortgagee in possession is treated as having satisfied the interest accruing under the mortgage when he has in his hands moneys received from the mortgaged premises which, after the deduction of expenditure allowable to him, are sufficient to keep the interest down. But, when under a provision of a statute or of the mortgage deed itself, payment by or on behalf of the mortgagor is required, the discharge of the obligation out of the receipts of the mortgagee in possession is not enough, at any rate without some active appropriation of the moneys on his part. The question then arises under which head the condition laid down by sec. 28 (1) falls. The answer depends on what the true purpose of that requirement is.

In the provisions contained in sec. 28 it is not difficult to see an attempt to balance the interests of the two parties to the mortgage transaction. The section seeks to protect the mortgagor against the remedies which the law gives to a mortgagee ; but at the same time to stop short of giving protection when to do so would inflict substantial loss upon the mortgagee. If the mortgagor can redeem out of his own moneys, or by borrowing at a proper rate of interest, he is regarded as needing no protection. If he can repay part of the principal in this manner, the question whether he needs protection,

(1) (1906) 1 Ch., at p. 174.

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except as to the balance, is regarded as one for decision on the facts of the particular case. But, if he cannot so repay any part of the mortgage moneys, he is to get protection provided that certain conditions are fulfilled. These conditions are introduced for the purpose of safeguarding the mortgagee. They do not appear to be concerned so much with the deserts of the mortgagor as with the measure of security which must be preserved to the mortgagee. If the value of the property is diminishing seriously, or the mortgagee's security is otherwise in jeopardy, protection is to be withheld or withdrawn. The covenants of the mortgagor must have been fulfilled except for breaches of a minor or technical nature. The interest must not be in arrear for too great a time. The original provision was that not more than six months' interest due and payable should be in arrear. This has been replaced with the provision which governs the present appeal. It requires that interest shall have been paid to a date within the specified period, in this case twelve months, preceding the date of the application. It is possible to construe the language in which this provision is expressed as requiring that the mortgagor or some one on his behalf shall have paid the interest to the mortgagee. It is possible, on the other hand, to construe it as requiring no more than that the mortgagee shall have obtained payment of his interest, shall have received or derived the amount of interest in question. In favour of the former view is the fact that *Sargant* J. so construed the phrase " so long as interest at the standard rate is paid and is not more than twenty-one days in arrear " in sec. 1 (4) of the English *Increase of Rent and Mortgage Interest (War Restrictions) Act* 1915, which is said to be the source of all such legislation (*Walters* v. *White* (1)). But the decision is explained by the context and restricted purpose of that statute (cf. *Wallace* v. *Fogarty* (2)). It imposed upon the mortgagor the necessity of doing other acts and paying other moneys as a condition of the protection it gave. Among other things, the provision required that the covenants by the mortgagor should be performed and observed, and *Russell* J., as he then was, has held that this means punctually performed according to their tenor (*Evans* v. *Horner* (3)).

(1) (1917) 116 L.T. 377; 33 T.L.R. 154.
(2) (1926) I.R. 255.
(3) (1925) Ch. 177.

In favour of the second construction of sec. 28 of the Victorian Act is the fact that sub-sec. 7 expressly provides that the section shall not affect any power of sale of a mortgagee in possession where possession was taken before the provision began to operate. In the case of pastoral companies that time was to be fixed by proclamation, and accordingly sub-sec. 7 refers specifically to them. Clearly this provision contemplates a mortgagor's obtaining protection notwithstanding that the mortgagee has been in possession. The possession of a mortgagee, particularly a pastoral company, would in practice mean a complete suspension of actual payments by the mortgagor. Interest would be kept down by the rents and profits and not otherwise. It is to be noticed that the first of the alternative conditions is that interest should not be in *arrear*; the second, as amended, is that it should be *paid* up to a date within the specified period preceding the application. The language in which the first condition is expressed suggests that it is satisfied if the interest is kept down from whatever source the mortgagee may receive it. It is scarcely credible that the second alternative was intended in this respect to have a different meaning from that of the first.

All these considerations support the conclusion that the conditions precedent laid down by sec. 28 (1) do not require actual payment of interest by or on behalf of the mortgagor himself, but are satisfied if the interest is obtained by the mortgagee so that, either at law or in equity, the mortgagor's obligation to pay it would be discharged. In the same way the condition expressed by the requirement that the mortgagor's covenants shall have been performed should be understood as requiring not punctual, exact and faithful performance by the mortgagor himself according to the tenor of the covenants. It refers to such a discharge of the obligation of the covenant as would be an answer to an action for breach, at any rate except as to nominal damages. Thus a condition precedent to a right to renew a lease, requiring that the covenants on the part of the tenant shall have been duly observed and performed, does not mean that the tenant must have strictly observed and performed the covenants all through the term; it is satisfied if the covenants have been so observed and performed that there is no existing right of action

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under them at the time when the lease is applied for (per *Mellish* L.J., *Finch* v. *Underwood* (1)). In *Starkey* v. *Barton* (2) a condition of a tenant's option of purchase was that the tenant should in the meantime have duly paid the rent. It was interpreted by *Parker* J., as he then was, as requiring not strict and punctual payment, but that the rent should be paid up before the expiry of the option. *Parker* J. referred to the decision of *Farwell* J. in *Benabo* v. *James* (3) and said :—" In that case there was a covenant not to call in a mortgage on leasehold hereditaments if the ground rent was duly paid. There were special circumstances in the case, but it was held that if the ground rent was paid in time to prevent the exercise of the right of the lessor to re-enter, that was due payment within the exercise of the right of the lessor to re-enter, that was due payment within the meaning of the covenant " (4).

The purpose and effect of the conditions precedent to a mortgagor's application for relief, which sub-sec. 1 imposes, may be summed up as requiring that at the date of the application the mortgagee shall have received interest up to a time within the specified period, in this case twelve months, and that no breach of covenant shall be unremedied except it be of a minor or technical nature. It is consistent with this view of the provision that by reason of the amount and application of the rents and profits received by the mortgagee, the mortgagor may not be disqualified from relief by his failure personally to pay interest to the mortgagee and his failure to pay rates and taxes to the rating and taxing authorities.

The mortgage contains a covenant by the mortgagor that he will bear, pay, satisfy and discharge all taxes, rates, charges, impositions and assessments on the mortgaged premises. The mortgagor has left it to the mortgagee in possession to pay rates and taxes. But apparently the mortgagee has been able to pay them out of the receipts. If the rates and taxes have been paid out of the rents and profits, the breach of covenant may be so far remedied as to be considered performed within the meaning of the section. The failure in the mode of performance, if any longer of importance, might be regarded as a breach of a minor or technical nature. The requirement

(1) (1876) 2 Ch. D. 310, at p. 316.
(2) (1909) 1 Ch. 284.
(3) (1900) 109 L.T. Jo. 408.
(4) (1909) 1 Ch., at p. 289.

that interest shall be paid up to a date within twelve months may be satisfied if the rents and profits have been sufficient, and have not been required for some other purpose.

Counsel for the mortgagee stated that it would be found that in fact his client had appropriated the receipts primarily to expenditure and outgoings in connexion with the maintenance and management of the mortgaged premises, and that the residue was insufficient to keep down the interest to the extent necessary to enable the mortgagor to succeed in his application.

Counsel for the mortgagor said that he did not concede that all the mortgagee's expenditure was proper and could be debited against the receipts, but that, in any event, under a covenant given by the mortgagor all such expenditure by the mortgagee was to be deemed capital. He contended that as the outgoings, if allowable, were capitalised, rents and profits could be applied in discharging them only after the interest was satisfied.

This last contention is erroneous. The rule that rents and profits are applicable to interest before principal operates in the absence of express appropriation. It is unnecessary to consider whether a mortgagee in possession is at liberty to apply the receipts from the mortgaged premises primarily in discharge of the principal of the loan. Apart from such legislation as that now under consideration, it is difficult to suppose that it would ever be to his advantage to do so. But the fact that the mortgagee's expenses are capitalised cannot prevent him applying current revenue to discharge the expenditure and thus intercept capitalisation. These are questions which can arise only on the taking of accounts, but, in the circumstances of the case, it seems undesirable to allow this contention of the mortgagor to pass unnoticed. Once a construction is adopted of sec. 28 (1) which makes it possible that the net revenue coming to the hands of the mortgagee may constitute or provide a payment up of interest to the date that provision requires, the question whether the interest has in fact been kept down in this matter must be determined by the Court to which the application is made. Then is there any reason why an account should not be taken to ascertain whether the receipts do or do not suffice for the purpose ?

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"When a question is stated to be referred to an established Court without more, it, in my opinion, imports that the ordinary incidents of the procedure of that Court are to attach" (per Viscount *Haldane* L.C., *National Telephone Co.* v. *Postmaster-General* (1)).

The application may be made in the County Court and in the Supreme Court, which have ample powers of taking accounts. Why should they not be invoked? It is true that, when the principal secured is not more than £1,000, a Court of Petty Sessions may be applied to. But the provision implies nothing more than that the Legislature contemplated cases of little complication arising out of comparatively small loans. To say that the mortgagor is not entitled to an account unless he offer to redeem is to apply a general rule of equity to this special enactment. The purpose of the statute is to afford a protection against the mortgagee's legal and equitable remedies. The account sought is required only to decide whether the case is within or outside the provision. If it is an appropriate means of deciding that question, it is a proceeding to which the applicant is entitled to resort.

The appeal should be allowed. The matter should be remitted to the Supreme Court for hearing or rehearing.

STARKE J. The *Financial Emergency Act* 1931-1934 (Vict.), sec. 28 (1), provides:—"Where under a mortgage—(*a*) any interest accrued due and payable is not in arrear; or (*b*) interest has been paid (i.) in the case where interest under the mortgage is to be paid quarterly . . . to a date within the period of twelve months immediately preceding the date of application . . . but otherwise the mortgagor's covenants other than for payment of the principal moneys have been performed, such mortgagor may apply to the Court upon summons for an order that the mortgagee shall not . . . exercise any power of sale or foreclosure or repossession in respect of the property comprised in the mortgage or any other remedy for enforcing payment of the principal moneys thereby secured or interest (if any) in arrear at the time of such application." The application may be made to the Supreme Court, the County Court, or, in cases where the principal money secured by the mortgage

(1) (1913) A.C. 546, at p. 552.

does not exceed £1,000, to a Court of Petty Sessions consisting of a Police Magistrate (sec. 14). If possession has been taken by a mortgagee before the coming into operation of the Act, the provisions of the section do not affect any power of sale of any mortgagee in possession (sec. 28 (7)).

Falk had given a first mortgage to Haugh over certain lands under the *Transfer of Land Act*, to secure £5,500 with interest payable quarterly at the rate of ten per cent per annum reducible to eight per cent per annum on punctual payment. The mortgagor made default in payment of the interest due under the mortgage, and the mortgagee took possession of the mortgaged property about the end of October 1930, and received the rents and profits therefrom. In 1933 the mortgagor applied on summons to the County Court at Melbourne for an order that the mortgagee should not exercise any power of foreclosure in respect of the property. But the Act, as already stated, requires that interest should have been paid to a date within twelve months of the summons. The mortgagor suggested that if accounts were taken, it would be found that the rents and profits received by the mortgagee were sufficient to sink the interest payable under the mortgage. A case was stated for the opinion of the Supreme Court upon a number of questions concerning the manner in which the rents and profits received by the mortgagee should be applied, but the Supreme Court thought the questions did not call for solution. The Court observed that an account as between mortgagor and mortgagee in possession was familiar enough, but that such accounts were "ordered when, and only when, the occasion for them arises—that is to say, when the mortgagor desires to redeem or the mortgagee desires to terminate the option of redemption by foreclosure, or after a sale by a mortgagee" (1). And such an occasion had not arisen (*Falk* v. *Haugh* (2)). The summons, coming again before the County Court, was dismissed upon the ground that interest had not been paid to a date within twelve months of the summons. An appeal, it was stated, is pending in the Supreme Court against this order. In December 1934, the mortgagor issued another summons, but this time in the Supreme Court for an order that the mortgagee should not exercise

(1) (1935) V.L.R., at p. 23. (2) (1935) V.L.R. 20.

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any power of foreclosure in respect of the property comprised in the mortgage. It came before *Mann* J., and an adjournment was applied for, but refused, because it was inevitable that the summons should be dismissed, having regard to the decision already given by the Supreme Court. We need not consider whether the decision on the former summons operated as an estoppel, for the learned counsel for the mortgagee waived the contention, so that the construction of the Act and the position of the parties might be here determined.

The first question is the meaning of the words " interest has been paid," which condition the mortgagor's right to make application under the Act. It is contended that the mortgagor must himself have paid the interest (cf. *Walters* v. *White* (1)), or discharged it in some manner equivalent in law to payment. But there seems no reason for so restricting the Act if rents and profits are in hand sufficient and applicable for sinking or keeping down the interest. Technically the mortgagor would not pay the interest, for the mortgagee receives the rents and profits in his own right, though accountable to the mortgagor, but the result would be the same. Under clause (*a*), where interest is not in arrear a mortgagee would not be allowed to say that interest was in arrear if he had in his hands rents applicable for its payment (*Wrigley* v. *Gill* (2)). The change of words in clause (*b*) is relied upon in support of the argument, but little reason can be found for any distinction. The purpose of the Act is to relieve impecunious mortgagors, and the payment of interest required by the Act is the receipt of moneys satisfying and applicable to payment of interest, and not the precise legal effect of that receipt. No doubt the ordinary rule of equity was that a mortgagor, or anyone claiming under him, could not make the mortgagee party to any suit without offering to redeem. Indemnity of the mortgagee was the condition of redemption, and accounts were taken for the purpose of ascertaining the amount owing to him. But unless otherwise directed the practice in England is that the accounts are taken as a whole, and the mortgagee is not treated as repaid until the account is taken (*Nelson* v. *Booth* (3) ; *Union Bank of London* v. *Ingram* (4) ; see *Fisher and Lightwood's Law of*

(1) (1917) 116 L.T. 377 ; 33 T.L.R. 154.
(2) (1906) 1 Ch., at p. 179.
(3) (1858) 3 DeG. & J. 119 ; 44 E.R. 1214.
(4) (1880) 16 Ch. D. 53.

Mortgage, 7th ed. (1931), p. 734). Such a practice cannot determine the proper construction of the *Financial Emergency Act*, nor, indeed, that of any other instrument. So much is recognized in cases such as *Wrigley* v. *Gill* (1), by *Cotton* L.J. in *Cockburn* v. *Edwards* (2), and in *Chinnery* v. *Evans* (3). If the statute only requires the receipt of moneys satisfying and applicable for payment of interest, then the statute prevails, whatever the practice be in redemption and other actions. It must be remembered, however, that a mortgagee who enters into possession of the mortgaged estate enters for the purpose of recovering his principal, interest, and any other moneys secured by the mortgage (*Lord Kensington* v. *Bouverie* (4)). The mere collection, therefore, of the rents and profits does not establish that they have been applied in reduction or satisfaction of interest; something more must appear. It is said that where the mortgagor claims to be discharged by the receipt of rents and profits, the general rule is that they are deemed to have been applied in sinking the interest before any part of the principal or other moneys due under the mortgage is discharged (*Chase* v. *Box* (5); *Wrigley* v. *Gill* (1); *Venkatadri Appa Row* v. *Parthasarathi Appa Row* (6)). That may be so if the mortgagee does not show that he applied the moneys in payment of anything else under the mortgage (cf. *Wrigley* v. *Gill* (7)). But if he receives the money in his own right, and for payment of what may be due to him under the mortgage, then he may appropriate and apply it in satisfaction of such part of the mortgage debt as is most advantageous to himself—principal, interest, and costs. The right to appropriate may be exercised, I should say, in accordance with the general principles relating to appropriation, at any time after receipt of the rents and profits, and certainly before the settlement of any account between the mortgagor and mortgagee or proceedings taken under the *Financial Emergency Act*. We have been informed that the rents and profits in the present case have actually been applied in and towards recouping the mortgagee various expenses incurred by him

(1) (1906) 1 Ch. 165.
(2) (1881) 18 Ch. D., at p. 463.
(3) (1864) 11 H.L. Cas. 115; 11 E.R. 1274.
(4) (1855) 7 DeG.M. & G. 134, at p. 157; 44 E.R. 53, at p. 62.
(5) (1702) Freem. Ch. 261; 22 E.R. 1197.
(6) (1921) L.R. 48 Ind. App. 150.
(7) (1906) 1 Ch., at p. 177.

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in relation to the mortgage security, and that the balance is insufficient to sink the interest. Unfortunately the facts have not been ascertained, by reason of the decision of the Supreme Court in *Falk* v. *Haugh* (1), and the case should therefore go back to the Supreme Court so that they may be determined. The provision of the 6th clause enables the mortgagee to capitalise costs, charges and expenses under the mortgage, but it does not compel him so to capitalise them, and in any case does not preclude him from appropriating the rents and profits in and towards satisfaction of any moneys due under the mortgage.

The difficulties suggested during argument in the case of proceedings under the Act before the Police Court are more apparent than real. The Police Court must mould its procedure so as to carry out the jurisdiction conferred upon it by the Act.

The result, in my opinion, is that the appeal should be allowed, and the summons remitted to the Supreme Court.

PER CURIAM. In the circumstances of this case, which is an appeal *in formâ pauperis*, the Court thinks no order as to the costs of the appeal should be made.

Appeal allowed. Order of Mann J. set aside. Matter remitted to the Supreme Court for rehearing. Costs of first hearing to be in the discretion of the Supreme Court. No order as to costs of the appeal.

Solicitors for the appellant, *Walter Kemp & Townsend.*
Solicitor for the respondent, *David Thomas.*

H. D. W.

(1) (1935) V.L.R. 20.