[HIGH COURT OF AUSTRALIA.]

FINK . . . . . APPELLANT;
DEFENDANT,

AND

ROBERTSON AND ANOTHER . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *March* 8, 11, 12, 13, 14, 15, 28.

Griffith C.J., Barton, O'Connor, and Higgins JJ.

*Transfer of Land Act* 1890 (*No.* 1149), *secs.* 74, 89, 95, 121, 124, 129, 130, 230—*Mortgage—Foreclosure—Subsequent right of mortgagee to sue on covenant in mortgage—Extinguishment of mortgage debt.*

On foreclosure under secs. 129 and 130 of the *Transfer of Land Act* 1890, the title of the mortgagee, when, pursuant to sec. 130, he is registered as proprietor of the mortgaged land, is, in the absence of fraud, absolute and unimpeachable, and, by reason of the provision in sec. 130 that the mortgagee shall be deemed a transferree of the mortgaged land, and of the other provisions of the Act as defining the obligations incurred by a transferree of mortgaged land, with respect to the mortgage debt, the mortgage debt is extinguished, and, therefore, no action will lie subsequently by the mortgagee upon the covenant in the mortgage to repay the mortgage debt.

So *held*, by *Griffith* C.J., and *Barton* and *O'Connor* JJ. (*Higgins* J. dissenting as to extinguishment of the mortgage debt).

*In re Premier Permanent Building Land and Investment Association*; *Ex parte Lyell*, 25 V.L.R., 77; 21 A.L.T., 67, overruled.

Judgment of Supreme Court (*Robertson* v. *Fink*, (1906) V.L.R., 554; 28 A.L.T., 27), reversed.

APPEAL from the Supreme Court of Victoria.

By an instrument of mortgage under the provisions of the *Transfer of Land Act* 1890, dated 18th March 1891, Catherine Fink mortgaged a certain house and land in St. Kilda-road,

Melbourne, and known as "The Grange," of which she was the registered proprietor, to one James Robertson to secure payment of the sum of £17,000. The mortgage instrument, which was duly registered, was not in fact under seal. By the mortgage the mortgagor covenanted to pay to the mortgagee, his executors or transferrees the principal sum of £17,000 on the 18th March 1894, and, so long as the principal sum or any part thereof remained unpaid, to pay interest on such amount as remained unpaid at the rate of seven per cent. per annum by equal half-yearly payments on the 18th September and 18th March in each and every year, the first of such payments to be made on the 18th September 1891, and also to pay all land tax and other taxes, charges, assessments, impositions, and outgoings whatsoever becoming payable in respect of the land comprised in the mortgage. Default having been made in payment of interest, the principal was, under a power contained in the mortgage instrument, called in, but was not paid. Thereupon the mortgagee, after due compliance with the provisions of the Act, procured an order for foreclosure, which was duly entered in the Register Book on the 1st November 1893, and on the 30th December 1893 received a certificate of title in his own name to the property. James Robertson died on the 11th June 1895, and, the principal sum and interest and certain taxes, charges and assessments still remaining unpaid, an action was brought by his executors against Catherine Fink to recover the principal sum of £17,000, together with interest from the 18th September 1892, and the rates, taxes, and assessments, the whole amount claimed amounting to £28,754 17s. 11d.

The only defence material to this report was a contention that, by reason of the order for foreclosure procured by James Robertson, and of the registration of him as proprietor under the *Transfer of Land Act* 1890 of land, the mortgage and any obligations thereunder ceased to be of any operation, and the defendant ceased to be liable in respect of the provisions for payment contained in the mortgage.

The action was heard by *Chomley* J., who gave judgment for the plaintiffs: *Robertson* v. *Fink* (1).

(1) (1906) V.L.R., 554; 28 A.L.T., 27.

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The defendant now appealed to the High Court.

*Weigall* K.C. and *Starke*, for the appellant. The right which, under the law existing prior to the Transfer of Land Acts, a mortgagee had after foreclosure to sue on the covenants in the mortgage, and thus to re-open the mortgage is inconsistent with the provisions of those Acts, and, as to land under those Acts, does not exist. As to the rights of the mortgagor and the mortgagee after foreclosure, see *Lockhart* v. *Hardy* (1); *Campbell* v. *Holyland* (2); *Kinnaird* v. *Trollope* (3). The intention of the Transfer of Land Acts is by foreclosure to put the mortgagor and mortgagee in the same position as if the mortgagor had conveyed the land and the equity of redemption to the mortgagee. Since under those Acts the legal estate does not pass to the mortgagee, there is in fact no such thing as an equity of redemption. By sec. 130 of the *Transfer of Land Act* 1890 the mortgagee, upon foreclosure, is to be deemed to be the transferree of the mortgaged land, that is, the transferree from the mortgagor, and by virtue of sec. 95, the transferree of mortgaged land is bound to indemnify the transferror against all liability in respect of the mortgage debt. Foreclosure under the Act therefore operates as an extinguishment of the debt. The same result follows if the mortgagee after foreclosure is to be treated as a transferree of the land free from the mortgage, for by sec. 89 the transferree is to be liable for all the liabilities to which he would have been liable if he had been the former proprietor. So under sec. 121 a covenant is implied in the mortgage that the transferree of the mortgagor will pay the mortgage debt. That covenant runs with the land: *In re Burton*; *Ex parte Union Bank of Australia Ltd.* (4), disapproving of *Australian Deposit and Mortgage Bank* v. *Lord* (5). So that, in any one of those views, as soon as Robertson became registered proprietor of the land, the mortgage debt became extinguished.

[HIGGINS J.—What more does sec. 130 provide as to a foreclosure than was provided by a decree in equity for foreclosure?]

The decree did not mean what it said, but the words of the

(1) 9 Beav., 349.
(2) 7 Ch. D., 166.
(3) 39 Ch. D., 636.
(4) 27 V.L.R., 437. at p. 442; 23 A.L.T., 114, *per Holroyd* J.
(5) 2 V.L.R. (L.), 31.

section must be interpreted to mean what they say. No machinery is provided by the Act for re-opening a foreclosure. Under the Real Property Acts of New South Wales it has been held that there is no power to re-open a foreclosure: *Campbell* v. *Bank of New South Wales* (1); *Matton* v. *Lipscomb* (2). The words of sec. 114 of the *Real Property Act* 1863 of New South Wales are not so strong as those of sec. 130 of the *Transfer of Land Act* 1890. A foreclosure order under sec. 130 operates as a vesting order which vests in the mortgagee the land of the mortgagor as if it had been transferred by the mortgagor to the mortgagee, and it vests the land as it existed at the date of the mortgage. Thus, in the case of a second mortgage, on a foreclosure order, the second mortgagee would be registered as having the estate of the mortgagor as at the time the second mortgage was granted, and the second mortgagee would therefore have to indemnify the mortgagor against the first mortgage debt. Similar words to the words "shall be deemed a transferree" in sec. 130, are used in other sections with a similar object: See secs. 118 and 188. If the view is taken that a mortgagee who forecloses takes the land with the burdens which existed at the time of the registration of the mortgage, the Act works out scientifically. Sec. 124 also bears out this view. The first part of it provides for the somewhat anomalous position into which mortgagor and mortgagee have been put by the Act, giving certain rights and remedies to the mortgagee, and then the second part is a proviso that, when after foreclosure the mortgagee has become proprietor of the land, none of his rights or liabilities incident to his new ownership are to be affected by the previous part of the section.

[Counsel also referred to *Bridgman* v. *Daw* (3); *Adair* v. *Carden* (4); *Ashburner on Mortgages*, p. 374; *Ex parte National Trustees, Executors and Agency Co. of Australia Ltd.* (5); *Registrar of Titles* v. *Paterson* (6); *Trust and Agency Co.* v. *Markwell* (7); *Greig* v. *Watson* (8); *Canaway's Real Property Act*, p. 99; *In re Premier Permanent Building, Land and*

(1) 16 N.S.W. L.R. (Eq.), 285; 11 App. Cas., 192.
(2) 16 N.S.W. L.R. (Eq.), 142.
(3) 40 W.R., 253.
(4) 29 L.R. Ir., 469.
(5) 19 A.L.T., 222.
(6) 2 App. Cas., 110.
(7) 4 Qd. S.C.R., 50.
(8) 7 V.L.R. (Eq.), 79; 3 A.L.T., 13.

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*Investment Association, Ex parte Lyell* (1); *Waring* v. *Ward* (2); *Bell* v. *Rowe* (3); *Weigall* v. *Gascon* (4); *Conveyancing Act* 1905, sec. 36.]

As to the question of the limitation of the action by reason of the *Transfer of Land Act* 1890, sec. 92, and the *Real Property Act* 1890, secs. 47, 49, counsel referred to 3 & 4 Will. IV. c. 83; 21 Jac. I. c. 63; *Kelly* v. *Fuller* (5); *Payne* v. *The King* (6); *In re Currie* (7); *Cooper* v. *Cooper* (8); *Carson's Real Property Statutes*, p. 211; *Hunter* v. *Nockolds* (9); *Sutton* v. *Sutton* (10); *In re Frisby*; *Allison* v. *Frisby* (11); *Kirkland* v. *Peatfield* (12).

*Mitchell* K.C. and *Guest*, for the respondents. The *Transfer of Land Act* makes no alteration in the law of foreclosure. Sec. 130 merely provides a simple and expeditious way of giving to the mortgagee the same right to obtain which, without the section, he would have had to bring a suit: *In re Premier Permanent Building, Land and Investment Association*; *Ex parte Lyell* (1). The legislature has, in sec. 130, followed very closely the ordinary form of a decree for foreclosure: *Seton on Decrees*, 1st ed., p. 211; *Frail* v. *Ellis* (13); *Seton on Decrees*, 6th ed., vol. III., p. 1992. The ordinary position of a mortgagee is that, notwithstanding he has foreclosed, he can still pursue his personal remedy against his debtor, subject only to this, that he must be in a position to give back the whole property mortgaged: *Perry* v. *Barker* (14). Secs. 129 and 130 are merely machinery sections, and are not intended to alter the law, except so far as it is inconsistent with that machinery. They are skeleton sections, and the Court must fill them in so as to provide for cases that may arise under them. *Ex parte National Trustees Executors and Agency Co. of Australia Ltd.* (15). Sec. 124 is very strong to show that sec. 130 was not intended to take away the right of a mortgagee after foreclosure to sue on the covenants, for after providing that a mortgagee is to have certain rights, lest it should be con-

(1) 25 V.L.R., 77; 21 A.L.T., 67.
(2) 7 Ves., 332.
(3) 26 V.L.R., 511; 22 A.L.T., 156.
(4) 3 V.L.R. (L.), 294.
(5) 1 S.A. L.R., 15.
(6) (1902) A.C., 552.
(7) 25 V.L.R., 224, at p. 227; 21 A.L.T., 127.
(8) 26 V.L.R., 649; 22 A.L.T., 215.
(9) 1 Mac. & G., 640, at p. 650.
(10) 22 Ch. D., 511.
(11) 43 Ch. D., 106, at p. 110.
(12) (1903) 1 K.B., 756,
(13) 16 Beav., 350.
(14) 8 Ves., 527; 13 Ves., 198.
(15) 19 A.L.T., 222.

tended that the giving of those rights until foreclosure was intended to mean that the mortgagee was not to have any rights against the mortgagor after foreclosure, the proviso was put in that the rights of the mortgagee after foreclosure were not to be affected.

[HIGGINS J. as to those rights referred to *Farrington* v. *Smith* (1); *Commercial Bank* v. *Breen* (2).]

One result of the contrary view would be that, if to secure a large debt several mortgages over different pieces of land were given, if the mortgagee foreclosed one of the mortgages the whole debt would be gone. In that view sec. 130 would be a trap for mortgagees. There was no intention to put mortgagees to their election. The provisions in secs. 113 to 130 relating to mortgages contain inherent evidence that the remedies of the mortgagee are cumulative and independent, and are not to be exclusive of one another. Those remedies may be pursued until the debt is paid. There are cases in which the foreclosure must be re-opened, *e.g.*, in case of fraud, and means must be found for re-opening it.

[Counsel also referred on this point to *James* v. *James* (3); *Pryce* v. *Bury* (4); *Lees* v. *Fisher* (5); *Sadler* v. *Worley* (6); *In re Kelday*; *Ex parte Meston* (7); *Real Property Act* 1861 (Queensland) sec. 60; *Power's Real Property Acts of Queensland*, p. 86; *Hogg's Australian Torrens Acts*, p. 942; *Bucknall* v. *Reid* (8); *Seton on Decrees*, 6th ed., pp. 1,912, 1,996, 2,042; *Kinnaird* v. *Trollope* (9); *Dixon* v. *Wigram* (10); *Stevens* v. *Theatres Limited* (11); *British South Africa Co.* v. *Companhia de Moçambique* (12). As to the question of limitation they referred to *Torrens Australasian Digest*, col. 206; *Kelly* v. *Fuller* (13); *Sinclair* v. *Gumpertz* (14); *Flanagan* v. *Bladen* (15); *In re Currie* (16); *Payne* v. *The Queen* (17); *Cork and Bandon Railway Co.* v. *Goode* (18); *In re Cornwall Minerals Railway Co.*

(1) 20 V.L.R., 90; 15 A.L.T., 218.
(2) 15 V.L.R., 572; 11 A.L.T., 92.
(3) L.R., 16 Eq., 153.
(4) 2 Drew., 41.
(5) 22 Ch. D., 283.
(6) (1894), 2 Ch., 170.
(7) 36 W.R., 585.
(8) 10 S.A. L.R., 188.
(9) 39 Ch. D., 636, at p. 649.
(10) 2 Cr. & J., 613.
(11) (1903), 1 Ch. 857.
(12) (1893) A.C., 602, at p. 628.
(13) 1 S.A. L.R., 15.
(14) 15 W.N. N.S.W., 125.
(15) 17 A.L.T., 69.
(16) 25 V.L.R., 224, at p. 233; 21 A.L.T., 127.
(17) 26 V.L.R., 705, at pp. 714, 715.
(18) 13 C.B., 826.

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(1); *Paget* v. *Foley* (2); *Sims* v. *Thomas* (3); *Coote on Mortgages*, 7th ed., p. 9.]

*Weigall* K.C., in reply. Apart from the *Transfer of Land Act*, there was much complicated law as to foreclosure and much authority to the effect that after foreclosure a mortgagee could sue upon the covenants, though there was much question as to the terms upon which he could sue. The Act should therefore be treated apart from that law and those authorities. The Act contemplates that upon foreclosure of a particular instrument the rights under it are gone. It is also the policy of the Act to keep each title separate from all others.

[HIGGINS J.—Is there anything in the Act which is inconsistent with the mortgagee suing on the covenants after foreclosure ?]

Sec. 121 provides that the burden of a mortgage is to be borne by the mortgagor's transferree, and sec. 130 makes the mortgagee after foreclosure the owner as transferree. The burden created by the registered instrument always runs with the land, and when the instrument is removed, the burden is removed.

[He also referred to *Williams* v. *Hunt* (4); *Company of Tobacco-Pipe Makers* v. *Loder* (5); *Dyson* v. *Morris* (6); *Robbins on Mortgages*, p. 1,003.]

*Cur. adv. vult.*

March 28. The judgment of GRIFFITH C.J., BARTON and O'CONNOR JJ., was read by

GRIFFITH C.J. This was an action upon the covenants contained in an instrument of mortgage dated 18th March 1891, and duly registered pursuant to the *Transfer of Land Act* 1890. The defendant, with other defences, pleaded that the mortgagee obtained under the provisions of that Act an order for foreclosure, in pursuance of which he was registered as proprietor of the mortgaged land, and thereupon became the transferree thereof, and that a certificate of title was issued to him, and contended that thereupon her obligations under the instrument of mortgage

(1) (1897), 2 Ch., 74.
(2) 2 Bing. N.C., 679.
(3) 12 A. & E., 536.
(4) (1905) 1 K.B., 572.
(5) 20 L.J. (N.S.) Q.B., 414, at p. 416.
(6) 1 Hare, 413, at p. 418.

were extinguished. The facts were proved as alleged, but *Chomley* J., following, as he was bound to do, the decision of the Full Court in *In re Premier Permanent Building &c. Association, Ex parte Lyell* (1), overruled this defence, and, holding that none of the other defences were established, gave judgment for the plaintiffs.

The *Transfer of Land Act*, first passed in Victoria in 1864, established, as is well known, a new mode of conveyancing, the fundamental principle of which was that title to land and interests in land should depend upon registration, and not upon instruments *inter partes*. Such instruments were to be used as means for obtaining registration, but did not affect the land itself until registered. By sec. 3 all laws, Statutes, Acts, and rules whatsoever, so far as inconsistent with the Act, were not to apply or be deemed to apply to land under the operation of the Act. The order for foreclosure relied upon by the appellant was issued by the Commissioner of Titles under the provisions of sec. 130, which describes the order by that name. The respondents contend that the use of the term "order for foreclosure" imports the general law as to foreclosure of mortgages as it existed before the Act, except so far as that law is inconsistent with the Act. They say that it was part of the law of mortgages as regards foreclosure that a mortgagee could after foreclosure sue upon the covenants in the mortgage, and that the bringing of the action by him had the effect of opening the foreclosure. And they say that there is nothing in the Act inconsistent with this law. On the other hand the appellant contends that foreclosure under the Act cannot be opened, and that consequently, as that relief cannot be given to the mortgagor, an action for the mortgage debt will no longer lie.

It will be convenient to consider in the first place what really were the principles of law and equity to which appeal is thus made. A mortgage of land was in form a conveyance of the legal estate subject to a condition, and a Court of Law regarded it merely as such, so that when the condition had happened the estate became absolute. The mortgagor, besides conveying the land, usually entered into a covenant for repayment of the mortgage debt, and this covenant was of late years generally contained

(1) 25 V.L.R., 77; 21 A.L.T., 67.

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in the same instrument. Courts of Equity had no jurisdiction to enforce the covenant, but they asserted jurisdiction to grant relief against the consequences of the breach of condition. This was done in a procceding called a suit for redemption. They also asserted jurisdiction to put an end to the mortgagor's right to redeem. This was done in a proceeding called a suit for foreclosure, the effect of which in the case of a legal mortgage was merely to bar the personal right of the mortgagor to ask for redemption. The covenant to pay, however, was not affected by the foreclosure, and if the mortgagee brought an action upon it in a Court of Law the defendant, unless he could prove payment or release or something equivalent, had no defence. But a Court of Equity would not allow the mortgagee to proceed with the action unless he was both able and willing to reconvey the land to the mortgagor on payment of the debt. In this sense, and this sense only, the foreclosure was opened, or rather was liable to be opened. If the mortgagee had after foreclosure parted with the land so that redemption was impossible, the Court would restrain the action absolutely: *Palmer* v. *Hendrie* (1). So much was settled. There is no reported case showing the conditions on which the Court would have allowed the mortgagee to enforce his judgment under the circumstances—whether they would have allowed the mortgagor at his option to treat the foreclosure as a satisfaction of the debt *pro tanto* at the date of the decree, or whether they would have regarded the liability for interest as continuing after the decree, and treated the mortgagee as a mortgagee in possession and liable to account on that basis. But it is inconceivable that, if the mortgagor was unable to redeem, the Court would have allowed the mortgagee to issue execution for the whole amount of the debt and also to retain the land.

It follows from what has been said that it is inaccurate to say that a mortgagee by suing upon the covenant in the mortgage opened the foreclosure. His title to the land was, and remained absolute, but the Court of Equity would not allow him to recover the whole amount of the debt without reconveying the land.

In the case of an equitable mortgage without an agreement to give a legal mortgage a Court of Law recognized no title in the

(1) 27 Beav., 349.

mortgagee. On the other hand a Court of Equity had no jurisdiction to enforce payment of the debt. The remedy of the mortgagee, if he desired to make the land available in satisfaction (or perhaps in reduction) of the debt, was to institute a suit in a Court of Equity, in which suit the appropriate relief was a decree for foreclosure and not for sale: *James* v. *James* (1). The decree went on to direct that on failure to pay the debt on the appointed day the defendant should convey the land to the plaintiff. There is no instance reported in which a conveyance made in obedience to such a decree has been set aside on the ground of a subsequent action having been brought by the mortgagee to recover the debt, or in which the mortgagee has afterwards sued to recover the debt or any part of it, although, if the debt were also secured by some other instrument upon which an action could be brought, the same doctrines would probably have been applied. Since the *Judicature Act*, however, it seems clear that after a judgment for foreclosure a separate action for the debt could not be brought upon the instrument by which the equitable mortgage was created, if it was created otherwise than by mere deposit of the deeds. And we doubt if it could be brought at all: *Williams* v. *Hunt* (2).

This, then, being the previous law, how far is it inconsistent with the *Transfer of Land Act* 1890? It is necessary to refer to some of the sections of that Act in detail. It has been already pointed out that the fundamental principle of the Act is title by registration (sec. 63). The registered proprietor, except in case of fraud, has an absolute and unchallengeable title (sec. 74).

Sec. 89 provides that a proprietor of land, or of a lease, mortgage, charge, or of any estate, right or interest in land, may transfer it by a transfer in one of the prescribed forms, and that, upon registration of the transfer, the estate or interest of the proprietor shall pass to the transferree, and proceeds:—"And such transferree shall thereupon become the proprietor thereof, and whilst continuing such shall be subject to and liable for all and every the same requirements and liabilities to which he would have been subject and liable if he had been the former proprietor or the original lessee mortgagee or annuitant."

(1) L.R. 16 Eq., 153. (2) (1905) 1 K.B., 512.

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Sec. 95 is as follows:—"In every transfer of land under the operation of this Act subject to a mortgage or charge, there shall be implied a covenant with the transferror by the transferree, binding the latter and his heirs executors administrators and transferrees that he or they will pay the interest secured by such mortgage after the rate and at the times and in the manner therein specified, and will pay the annuity at the times and in the manner specified in the charge, and will indemnify and keep harmless the transferror and his representatives from and against the principal sum secured by the mortgage and from and against all liability in respect of any of the covenants therein contained or by this Act declared to be implied therein on the part of the transferror."

Sec. 113 provides that a proprietor of land may mortgage it "by signing a mortgage" in the prescribed form. Sec. 114 declares that a mortgage shall, when registered, have effect as a security, but shall not operate as a transfer of the land mortgaged. It has, therefore, some of the characteristics of an equitable mortgage apart from the Statute.

The rights and remedies of the mortgagee on default are declared by secs. 116 and the following sections. Sec. 116 confers a power of sale on default in payment or performance of covenants. Sec. 117 provides for the appropriation of the purchase money on sale. Sec. 118 provides that, upon registration of a transfer signed by the mortgagee for the purpose of such sale, the estate of the mortgagor shall pass to the purchaser free from all charges subsequent to the date of the mortgage, and that the purchaser when registered as proprietor "shall be deemed a transferree of such land." Sec. 119 enumerates certain remedies to which the mortgagee is entitled, including a right to take possession or distrain on tenants, and a right "to foreclose the right of the mortgagor or his transferrees to redeem the mortgaged land in manner hereinafter provided." Sec. 121 provides that in every mortgage there shall be implied covenants with the mortgagee and his transferrees by the mortgagor binding the latter and his heirs, executors, administrators, and transferrees that he or they will pay the principal money mentioned in the mortgage on the appointed day, and pay interest so long as the

principal remains unpaid, and will repair and keep in repair all buildings upon the mortgaged land. Sec. 123 provides that a covenant to insure in the prescribed form shall be binding on the transferrees of the mortgagor.

Sec. 124 confers on the mortgagee, in addition to all other rights and powers, all the rights and remedies to which he would have been entitled if he were the owner of the legal estate, but imposes no liabilities. Secs. 125 and 126 provide for the case of certain actions brought by a mortgagee under this power. Secs. 129 and 130 deal with the right now particularly in question. A special procedure is prescribed which must be followed. After default in payment has continued for six months the mortgagee may make a written application to the Commissioner for foreclosure, but before doing so the land must have been offered for sale by public auction by a licensed auctioneer after a prescribed notice to the mortgagor. The application to the Commissioner must state this fact, and the further fact that the amount of the highest bidding was not sufficient to satisfy the mortgage debt, and that notice of the application has been given to all persons interested in the land subsequent to the mortgage, and these statements are required to be verified by statutory declaration. The Commissioner is thereupon to offer the land by advertisement for private sale, and after the expiration of a month he may issue to the applicant, *i.e.*, the mortgagee, "an order for foreclosure," unless in the interval a sufficient sum has been realized by sale of the land to satisfy the principal, interest, and expenses. Sec. 130 then proceeds :—"Every such order for foreclosure under the hand of the Registrar when entered in the register book shall have the effect of vesting in the mortgagee or his transferree the land mentioned in such order, free from all right and equity of redemption on the part of the mortgagor or of any person claiming through or under him subsequently to the mortgage : and such mortgagee or his transferree shall upon such entry being made be deemed a transferree of the mortgaged land, and become the proprietor thereof, and be entitled to receive a certificate of title to the same."

In our opinion the title of the mortgagee, when so registered as proprietor, is absolute and unimpeachable except on the ground

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of fraud. This is the plain meaning of the words of secs. 74 and 130 when read together. We entirely concur in the reasoning of *Faucett* J. in the case of *Campbell* v. *Bank of New South Wales* (1), whose judgment, after being reversed by the Full Court of New South Wales, was restored by the Privy Council (2), who, however, decided the case on another ground and expressed no opinion on this point. Besides the reasons given by that learned Judge there is a further reason: if such an action could be brought, it would, in a case in which there were subsequent incumbrances, involve the re-opening of the register and its restoration to its original condition. Such a proceeding is, we think, wholly inconsistent with the scheme of the Act, and the Court has no jurisdiction to order it.

But, except so far as regards the exclusion of the asserted jurisdiction of Courts of Equity to re-open a foreclosure in any case in which it might be just to do so (*see Campbell* v. *Holyland* (3)), there is no necessary inconsistency between the old law and the new, so far as regards the mere effect of the order of foreclosure. If, notwithstanding such an order under the Act, the mortgagee can still sue on his covenant, we have no doubt that the Court would not allow him to recover the whole debt by execution unless he is both able and willing to restore the land on payment, nor in any event to issue execution for the whole debt and also retain the land. But this does not dispose of the question whether an action on the covenant will lie after foreclosure. The reasoning on each side involves a fallacy:—Thus:—"At common law a mortgagee could sue on his covenant after foreclosure, but a Court of Equity would impose conditions upon him: Under the Act, if a mortgagee can sue on his covenant after foreclosure the Court will in a proper case impose conditions: Therefore there is no reason why he should not sue on the covenant." Such is the argument on one side. On the other side it is said:—"The Court cannot impose the same conditions as before: therefore the action will no longer lie." The only legitimate conclusion that can be drawn from the premises is that the right to sue on the covenant is not conclusively negatived by the mere

(1) 16 N.S.W. L.R. (Eq.), 285. (2) 11 App. Cas., 192.
(3) 7 Ch. D., 166.

circumstance that the mortgagor is no longer entitled to have the foreclosure opened on any other ground than fraud. But this leaves the question whether the continuance of the right to sue is consistent with the provisions of the Act entirely untouched.

We agree that in considering this question regard must be had to the law as it existed before the Act. Now, it was a settled rule that the assignee of an equity of redemption was, in the absence of agreement to the contrary, bound to indemnify the mortgagor against the mortgage debt: *Waring* v. *Ward* (1); *Dodson* v. *Downey* (2). This obligation was generally regarded as arising from an implied contract. It followed from this doctrine, and also from the doctrine that, when land and a charge upon it are vested in the same person in the same right, the charge is extinguished unless a contrary intention is shown, that if the mortgagor assigned his equity of redemption to the mortgagee simpliciter, the mortgage debt became extinguished so far as it was created by and enforceable under the mortgage deed, for, as *Buckley* J. said:—"A man cannot be the assignee of his own debt and cannot be mortgagee of property of which he is also mortgagor": *In re George Routledge & Sons Ltd.*; *Hummel* v. *George Routledge & Sons Ltd.* (3); although, if by other agreement between the parties it appeared that it was intended to keep the charge alive, effect would be given to that intention. (See *per Cozens-Hardy* L.J. in *Capital and Counties Bank Ltd.* v. *Rhodes* (4).

Bearing this rule of law in mind, and regarding it as still in force except so far as it is inconsistent with the provisions of the Act, we proceed to consider the relevant provisions. It follows from the provisions of sec. 95, which has been already read, that if a mortgagor transfers the mortgaged land to the mortgagee the mortgage is extinguished. The Act does not make express provision to that effect, for it was obviously unnecessary to do so. But the mortgagee would, of course, in such a case be entitled to a certificate of title subject only to incumbrances created by the mortgagor in favour of other persons. We have already referred to sec. 118. By sec. 188 provision is made for obtaining a vesting

(1) 7 Ves., 332, at p. 337.
(2) (1901) 2 Ch., 620.
(3) (1904) 2 Ch., 474, at p. 479.
(4) (1903) 1 Ch., 631, at pp. 652-3.

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order under the Trustee Acts in respect of land subject to the Act, and it is enacted that upon entry in the register book of an order vesting the land in any person, such person "shall become the transferree and be deemed to be the proprietor thereof." By sec. 225 persons entitled to an estate of freehold in possession on transmission by devise may apply to be registered as proprietors. Sec. 226 provides that if the application is granted the applicant shall be registered as proprietor by entry in the register, and that upon such entry being made the applicant "shall become the transferree of such land or estate, and be deemed to be the proprietor thereof." Sec. 227 contains similar provisions, and uses similar language with respect to persons becoming entitled in remainder or reversion on transmission. Sec. 228 provides in like language for the registration of the husband of a female proprietor upon her marriage. Sec. 229 provides for the registration of the survivor of joint proprietors. Sec. 230 is as follows:— "Without lessening or prejudicing any of the other rights powers and remedies hereby given and conferred, every proprietor and every transferree when registered of any land lease mortgage or charge shall whilst continuing so registered have the same estates rights powers and remedies and be subject to the same engagements obligations and liabilities and may sue and be sued in his own name at law and in equity in respect thereof or thereupon, in like manner as if he had been the original proprietor of the land by or with whom the engagement obligation or liability sued upon was entered into or incurred, or the original lessee mortgagee or annuitant."

We are unable to see any reason for limiting the plain meaning of the words "shall be deemed to be the transferree" (secs. 118, 130, 188) or "shall become the transferree and be deemed to be the proprietor" (secs. 226, 227, 228, 229), or the words "shall have the same estates . . . and be subject to the same engagements obligations and liabilities" (sec. 230), at any rate as between the person from whom the estate is transferred and the person who becomes the transferree or proprietor. We are of opinion that when the Statute says in express terms that a person with respect to whom certain facts can be predicated shall be deemed to be the transferree of land the meaning is that he shall be the transferree

to the same intent and with the same consequences as if he had become a transferree by registration of an instrument called an instrument of transfer, and executed by the person whose interest is transferred.

The language of secs. 118 and 130 is identical in this respect. It is not suggested that a person registered as proprietor upon purchase from a mortgagor is not a transferree in the ordinary sense of the term, and we are unable to see any intelligible distinction between his case and that of a mortgagee becoming transferree by virtue of an order for foreclosure.

Nor is any hardship involved in this construction, for the exercise by the mortgagee of his rights under sec. 130 is entirely optional on his part. If he desires to escape the obligations of a transferree, and to keep the mortgage alive, he can do so under the other provisions in his favour.

In our opinion the effect of sec. 230 is that, when a person voluntarily takes advantage of the provisions of the Act to become a transferree of land, he undertakes, upon becoming transferree, all the obligations attached to the ownership of the land in the hands of the person from whom it is transferred, and we think that the statutory charge created by a registered mortgage is such an obligation, at least as between him and the person from whom the land is transferred.

We think, therefore, that, when a mortgagee becomes transferree of the mortgaged land under an order for foreclosure, the same consequences follow as if he had taken a transfer from the mortgagor under the provisions of sec. 95. It follows that, as the mortgagor would be entitled to be indemnified by the mortgagee from any claims under the mortgage, the latter cannot enforce it by action against the former. The further rule that when property and the benefit of a charge upon it are vested in the same person the charge is extinguished unless a contrary intention is shown, which may be called a rule of commonsense, would also of itself dispose of the question. So far from finding any such contrary intention in the Act, to which alone in the absence of express agreement reference must be made, we find an intention plainly expressed in conformity with the general rule. We think also that the same consequences follow from sec. 89,

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when properly construed, both for the reasons already given as to the meaning of the words "deemed to be a transferree," and also for the more technical reason that, although that section in terms relates only to instruments of transfer strictly so called, yet, as every mortgage carries *in gremio* the capacity of being used by the mortgagee to enable him to become a transferree under sec. 130, there is no reason why a mortgagee who uses it for the purpose of enabling himself to become a transferree should be in any better position than if he had taken his transfer in another form.

If a second mortgagee obtains an order for foreclosure under the Act, all subsequent mortgages are removed from the register, and he is entitled to a certificate of title subject to the prior mortgage. But his own mortgage will not appear on the register. This is precisely what would have happened if he had obtained a transfer of the land from the mortgagor subject to the prior mortgage, and illustrates the complete analogy between the two modes of transfer, so far as regards their effect upon the title.

From this point of view it is not necessary to call in aid sec. 121, or to decide whether by the effect of that section the mortgagor's covenants run with the land, so as to create a direct liability as between a mortgagee and the transferree of the mortgagor. *Fellows* and *Stephen* JJ. in the case of *Australian Deposit and Mortgage Bank* v. *Lord* (1), held that it did not, while *Holroyd* J. in *In re Burton*; *Ex parte The Union Bank of Australia Ltd.* (2), expressed a contrary opinion.

The conclusion at which we have thus arrived upon the express language of the Statute is confirmed by some other considerations. The procedure prescribed under the Statute is, in effect, an offer of the property for sale to all the world by public auction and private contract at a reserved price, and it is not until after this offer has been made and has been ineffectual that the mortgagee is allowed to become the transferree. The proceeding is, in some respects, analogous to the case of a trustee for sale being allowed to buy for himself. In that view the question arises:—"What is the consideration for the purchase?" Only

(1) 2 V.L.R. (L.), 31.

(2) 27 V.L.R., 437, at p. 442; 23 A.L.T., 114.

two answers seem to be possible—either the price at which the property was offered to others, *i.e.*, the mortgage debt, or the then value of the land. The latter answer is not supported by anything in the Act itself, and would give rise to possible, and indeed probable, injustice. Suppose, for a moment, that an action on the express or implied covenants in the mortgage is not taken away, and that the Court if such an action is brought can impose terms on the mortgagee plaintiff. In such an event what terms would do justice as between the parties? The Court could, no doubt, order the plaintiff to transfer the land to the defendant on payment of the mortgage debt and interest. But the defendant may be unwilling to take it or to pay the necessary amount. He has by the mortgagee's election been deprived of the land and of all right to obtain it, and it would be impossible to put him in the same position as if the mortgagee had elected to take advantage of some other provision of the Act in his favour. It is a general rule that when a party is entitled to elect between two inconsistent rights against another, and has done so, he cannot afterwards alter his election without the consent of the other party: *Clough* v. *London and North Western Railway Co.* (1). In the case supposed the mortgagor has, perhaps for some years, been in the position of having no right cognizable in a Court of Justice in respect of the land, but according to the argument he has, all that time, been a debtor for the full amount of the debt. But he was a debtor who would acquire no rights to the land by payment of the debt. The mortgagee was under no obligation to receive it. If the mortgagor tendered the money he would be in no better position, for he could not afterwards plead the tender unless he was still ready to pay the money tendered. Ordinarily rights and obligations are mutual. In the case supposed the rights are entirely on one side—the mortgagee is entitled to keep the land, and is also entitled, at his option, until the *Statute of Limitations* has run, to the whole of the debt with accruing interest. The mortgagor, on the other hand, owes the money and has no right capable of enforcement. His only escape from the difficulty would be by taking advantage of the insolvency laws.

(1) L.R., 7 Ex., 26.

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Again, if the Court could require the mortgagor to pay the debt and to accept a transfer of the land, this would not do justice in the case of puisne mortgages which could not be restored to the register. And, if the mortgagor could not pay all the debt, it would be obviously unjust to allow the mortgagee to levy the whole debt by execution without giving credit for an amount equal to the value of that which he has already. Since, then, credit must be given for some sum, how is that sum to be arrived at? If credit is to be given for a sum equal to the value of the land at the date of the foreclosure, the mortgagee might, if the property has risen in value, have a property worth much more than the amount of the debt, and would still be entitled to recover a portion of the debt in addition. If credit is to be given for a sum equal to the value of the land at the date of the action, then, if the property has fallen in value, the mortgagor would be prejudiced by the mortgagee's delay. A third measure of value might indeed, be suggested—the highest value of the land between the date of the foreclosure and the date of the action. Or the Court might direct the land to be sold, and the proceeds applied in payment. There is no decided case, and no principle has been cited, which offers a solution of these difficulties, and we see no satisfactory solution. The doctrine that a surety who pays the debt is entitled to the benefit of securities held by the principal debtor is not applicable. If it were, the mortgagor would be entitled to have the land sold as soon as the obligation to pay attached, which is inconsistent with the absolute title of the mortgagee. Nor can the doctrine of marshalling be called in aid as between a mortgagor and mortgagee. We think that the legislature intended that none of these questions should arise.

It cannot be suggested that an independent right to sue on the express covenants in the mortgage subsists after the implied statutory covenants (sec. 121) to the same effect are discharged, any more than that, when a debtor liable upon simple contract covenants to pay the debt, he remains liable upon the simple contract after release of the covenant.

If, therefore, there were no more in the Act, than the provisions enabling a mortgagee to obtain an order for foreclosure

we should be strongly disposed to hold that, even without the other express provisions on which we rest our judgment, the same consequences would follow.

It was suggested that it would be a strange consequence if a mortgagee obtaining an order of foreclosure in respect of land of comparatively small value were thereby to debar himself from recovering any part of the mortgage debt, which might be much greater than the value of the land. We agree that it would be a very foolish thing for a mortgagee to obtain an order of foreclosure in such a case, unless he was anxious for other reasons to become the owner of the land. But the circumstance that a statutory power may be unwisely used by the donee does not in our opinion afford any reason for cutting down the plain provisions of the Statute.

A point was made of the provisions of sec. 36 of the *Conveyancing Act* 1904 (No. 1953), passed just after the present action was begun, which expressly prohibits any such action from being brought after 31st December 1904. It was suggested that this amounts to a legislative recognition of an existing right to bring such an action. The danger of such an argument was pointed out by Lord *Coke* as long ago as 1591 (*Butler and Baker's Case* (1). At best a later Act only affords an argument, and not a conclusive one. In the present case, whatever weight might otherwise be attached to the argument is much diminished by the fact that the Supreme Court of Victoria had in 1899 held that such an action would lie: *In re Premier Permanent Building &c. Association* (2), and the legislature may well have thought it desirable to prevent such actions from being brought in future, without expressing any opinion whether that case was or was not rightly decided. In the present case we are called upon to express our opinion on that question, and the interpretation of Statutes is, after all, for the Court and not for the legislature. For the reasons we have given we are of opinion that that case was wrongly decided. The question cannot hereafter arise in Victoria, where alone that case was an authority. But, the law of New South Wales being substantially the same as that of Victoria before the Act of 1904, the present decision is of more

(1) 3 Rep., 31a. (2) 25 V.L.R., 77 ; 21 A.L.T., 67.

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general Australian importance than if it were a decision upon a question which can never arise again, and would therefore be of only academic interest except to the immediate parties.

In the view which we take of this question it is unnecessary to consider the other numerous defences set up by the defendant, some, but not all, of which were argued before us.

The appeal must therefore be allowed, and judgment must be entered for the defendant.

HIGGINS J. I regret that I have to differ in opinion from the majority of the Court.

This is an action brought by a mortgagee's executors to recover principal and interest under covenants in the mortgage. The mortgaged land is under the *Transfer of Land Act* 1890, and the mortgage necessarily was framed in the form prescribed by that Act. The mortgage is dated 18th March 1891; the mortgagor failed to pay the interest due; the mortgagee foreclosed in the only form permitted by the Act; the Registrar duly issued an "order for foreclosure" under sec. 130; and the order was entered in the register book on 1st November 1893. The mortgagor contends, in the first place, that the foreclosure order operates as a release of the mortgage debt. It is not alleged that a foreclosure order under the ordinary law would so operate; but it is urged that for some reason an action on the covenant for payment after foreclosure is inconsistent with the *Transfer of Land Act*, or, in other words, that foreclosure under that Act involves a release of the debt. There is nothing in the Act expressly to this effect; and there is not, in my opinion, any necessary implication of a result so novel and so extraordinary. The nearest thing to a definition of foreclosure under the Act is in sec. 119, where it is enacted that a mortgagee "shall be entitled to foreclose the right of the mortgagor . . . to redeem the mortgaged land." This phraseology is precisely the phraseology that would be used as to mortgages under the ordinary law. "Redeem" and "foreclosure" are words which were familiar and appropriate when the Court of Chancery interposed its benevolence against the rigour of the Common Law. The old form of mortgage was a conveyance conditioned to become void if the money lent were

not repaid by a certain date. As soon as that day passed without payment, the Courts of Common Law treated the land as having passed absolutely to the mortgagee; and yet the mortgagor remained liable on his covenants to pay. The mortgagee could retain the land absolutely; and yet might recover his full debt by action. But the Court of Chancery compelled the mortgagee to reconvey, if at any time the mortgagor could find the money to pay principal, interest and costs. Then it was felt that some time limit should be imposed on the mortgagor, in order that the mortgagee might not be left indefinitely in a position of uncertainty as to his rights with regard to the land; and therefore the Court of Chancery allowed the mortgagee to bring a suit to "foreclose" the right of the mortgagor to redeem. By the decree in such a suit the mortgagor was given some time—say six months—to pay up; and if he failed to do so, an order absolute was made for foreclosure. The usual form of the order absolute was as follows:—"This Court doth order that the said defendant do from henceforth stand absolutely debarred and foreclosed of and from all right, title, interest and equity of redemption of in and to the said mortgaged hereditaments" (*Seton on Decrees*, 3rd ed., p. 1393). These words are adopted in sec. 130. There it is said that the order for foreclosure "shall have the effect of vesting in the mortgagee . . . the land mentioned in such order *free from all right and equity of redemption on the part of the mortgagor.*" It is true that under the Act there are also the words as to vesting the land in the mortgagee; but such words are necessary, because the Act provides that a mortgage shall not operate as a transfer of the land, but only as a security (sec. 114). Similar provision had to be made in a foreclosure order under the ordinary law when an equitable mortgage was the subject of the foreclosure. The equitable mortgagee had not the legal estate in the land, and so the Court used to insert a direction that the mortgagor execute a conveyance of the land. The proceedings for a foreclosure by order of the Registrar under the *Transfer of Land Act* resemble the proceedings for a foreclosure by order of the Court; but greater indulgence is shown to the mortgagor, for the order for foreclosure cannot be obtained until the land has been offered first

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for sale by auction, and secondly by advertisement for private sale, and unless a sufficient amount has not been offered to cover the debt (secs. 129 and 130). These unsuccessful attempts to sell were made in the case of this mortgage; otherwise the Registrar could not have made his order for foreclosure.

But the indulgence of Chancery followed the mortgagor even after foreclosure of his right to redeem the land. The foreclosure order, as we have seen, operated only on the land. It did not affect, or purport to affect, the debt. It said in effect, "we are not going to help you further to get the land back, whether you pay the debt or not." The debt remained. The mortgagee could sue, and often did sue, on the covenants for payment—especially when he found the land unequal in value to the debt, and found the mortgagor able to pay the debt or part of it. In such a case, Chancery would "open the foreclosure"—if the mortgagor asked for it. It would, if the mortgagor asked for it, compel the mortgagee, suing on the covenants, to reconvey the land to the mortgagor, if and when the mortgagee had been paid all that was due to him; and if the mortgagee could not reconvey the land—if he had sold it after foreclosure—the Court would even restrain him by injunction from proceeding with his action on the covenants. It is because of this practice of the Court that conveyancers have been in the habit of recommending their mortgagee clients to bring their action on the covenants first, and to bring the suit for foreclosure afterwards for any deficiency. In some cases, however, mortgagees have gone for foreclosure first, sometimes from motives of mercy to the mortgagors, sometimes from motives of business expediency. In the present case, the mortgagor has not made any claim to have the foreclosure opened, or to get back the land on full payment; but the mortgagee's counsel have intimated that their clients will retransfer on payment of the debt, and will credit the mortgagor with all sums received or that might have been received for rent or otherwise. I can see nothing in the Act which would prevent the Court from following the old practice, from ordering the mortgagee to re-transfer the land to the mortgagor after foreclosure, on being repaid his principal, interest and costs; and I can see nothing in the Act to prevent the Court from refusing to the mortgagee a judgment on the covenants for

payment if, by reason of a sale effected after the foreclosure, he can no longer retransfer the land on full payment. In the present case, it is not pretended that the mortgagee cannot retransfer the land. The executors of the mortgagee are the registered proprietors. A retransfer of the land to the mortgagor would not involve a re-opening or disturbance of the register. All the registered transactions up to date would remain. There would be merely a registration of certain new instruments executed under the order of the Court. But even if it should be thought that the mortgagor can no longer demand an opening of the foreclosure, it by no means follows necessarily that the covenants have been released. I have asked counsel for the mortgagor to point out, if they could, any single point in which the machinery of the *Transfer of Land Act* clashes, or is inconsistent with the right of the mortgagee to sue on his covenants after foreclosure; and they have been unable to indicate any such point. They merely rely on certain phrases, and inferences from phrases. By sec. 3:—"All laws Statutes Acts and rules whatsoever, so far as inconsistent with this Act, shall not apply . . . . to land under the operation of this Act." But the inconsistency must be demonstrated. *Primâ facie*, when technical words are used in an Act, they are to be given their technical meaning, and to be treated as involving the usual consequences; and the general policy of the law is not to be treated as altered unless you cannot give sense to the words of the Act otherwise (*per Jessel* M.R., *Laird* v. *Briggs* (1); *Minet* v. *Leman* (2); *Jay* v. *Johnstone* (3)). But it is not necessary to go even so far as this principle. It is sufficient to say that the mortgagee holds an unsatisfied covenant for payment, and there is nothing to be found in the *Transfer of Land Act* enacting that the covenant is to be deemed satisfied. This is an action of debt on covenant. The usual pleas used to be payment (there has been no payment), release (there has been no release), accord and satisfaction (there has been some land acquired by the mortgagee, but there has been no accord, no agreement that the land shall be taken in satisfaction of the debt). I know of no

(1) 19 Ch. D., 22, at p. 34.
(2) 20 Beav., 269, at p. 278; 24 L.J. Ch., 545.
(3) (1893) 1 Q.B., 25, at p. 28.

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equitable principle, nor can I find anything in the Act, that would compel a mortgagee who has lent £1,000, and holds as security land worth £10, to take the land as a satisfaction of the debt, or else abstain from foreclosure. Why should foreclosure under the Act be treated as involving a release of the mortgage debt, when it does not involve it under the ordinary law? It is said that under this Act, as soon as a foreclosure order is made, the mortgage is treated as cancelled, is even marked "cancelled," and ceases to exist for all purposes. There is no authority given by the Act for any such marking or treatment. On the contrary, the Registrar has to keep the mortgage bound up in the register book (sec. 55); and he has to make such notes in the book and on the instruments as will allow the title to be traced downwards from or upwards to the original grant (secs. 50, 78). Contrast secs. 93, 206, cases where cancellation of a instrument or a certificate is allowable, and sec. 106 where provision is made for endorsing the word "surrendered." But it is said also that, under sec. 130, the mortgagee shall upon entry of the order for foreclosure "be deemed a transferree of the mortgaged land," and become the proprietor, and receive a certificate of title; that under certain other sections a transferree of land takes on him all the burdens of his transferror as to the land, and that therefore the mortgagee takes on himself the burden of his own debt, and the debt is merged. On this narrow plank of reasoning rests the whole of the doctrine that foreclosure operates as a release. If the Act did not say that on foreclosure the mortgagee is to be deemed a transferree of the land, the case for the defendant would not be arguable. If the defendant's argument is sound, it is extraordinary that no one ever discovered such a result in the foreclosure of land under the ordinary law. Under the ordinary law foreclosure operated as a transfer of all the interest of the mortgagor to the mortgagee: *Heath* v. *Pugh* (1); and under the ordinary law the purchaser of an equity of redemption, unless there be an express agreement to the contrary, becomes liable to indemnify the mortgagor against the mortgage debt: *Waring* v. *Ward* (2); *Bridgman* v. *Daw* (3). *Ergo*, according to the

(1) 6 Q.B.D., 345, at p. 360, *per* Lord *Selborne* L.C.

(2) 7 Ves., 332, at p. 337.

(3) 40 W.R., 253.

defendant's argument, under the ordinary law the mortgage debt was released. Yet under the ordinary law the mortgagee has always been able to recover on the covenants after foreclosure. It is obvious, to my mind, that no such implication of a promise to indemnify can be deduced from an order of the Court which merely gives effect to the rights of the parties, as from a transfer *inter partes* which rests on agreement. The mortgagor does not, on foreclosure, transfer the land to the mortgagee. It is the registration order which transfers it. It is at this point that I find what seems to me to be the fundamental fallacy of the defendant's contention. In other words, the presumption as to the intention of parties which arises in the case of documents made between the parties, documents which may be moulded by the parties so as to negative the presumption, cannot be applied to orders made by the Court, or by the Registrar of Titles as substituted for the Court. Moreover, it is to be noticed that according to sec. 130 the mortgagee, on foreclosure, is to be deemed a transferree of the mortgaged land—not a transferree of "the estate and interest" of the mortgagor (as in sec. 89), or of the land "subject to the mortgage" (as in sec. 95). The distinction between "land" and estates and interests in land is clearly marked throughout the Act (see, for instance, sec. 4 "land"; secs. 63, 69, 73, 74). In ordinary transfers—instruments of transfer—the land is expressed to be transferred "subject to the encumbrances notified hereunder." The encumbrances are notified on the face of the instrument (sec. 89 and 6th Schedule); the certificate of title issued to the transferree shows the encumbrances on its face; and the transferree knows what incumbrances he has to meet. But the order for foreclosure issued by the Registrar to the mortgagee does not show the mortgage as an encumbrance. It is a clean, absolute, unimpeachable title; and if the mortgagee after foreclosure sell the land, the purchaser from him does not by becoming registered come under any obligation to pay the mortgage debt. Sec. 89 relates merely to written instruments called "transfers" prescribing that the "estate and interest of the proprietor as set forth in such instrument" shall pass, &c.; and the instrument would set forth any existing encumbrances. Sec. 95 likewise relates merely to the written

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instruments called "transfers," in cases where they are "subject to a mortgage." In such cases there is implied a covenant with the transferror to indemnify him; and this implied covenant may be negatived—it is a matter for agreement between the parties (sec. 137). Sec. 118 relates to a sale under a power in a mortgage. The purchaser takes the "estate and interest of the mortgagor," and when registered is to be "deemed a transferree," but the section is express to the effect that he is freed from all liability on account of the mortgage. Sec. 188 merely provides for the registration of vesting orders. If, for instance, a trustee is out of the jurisdiction, or cannot be found, the Court or Commissioner can make an order vesting the "land, estate or interest" of the absent trustee in the new trustee; and the new trustee is to get just what the old trustee held, and no more. If in the name of the old trustee the land was stated to be subject to an encumbrance, the certificate of title issued to the new trustee would show that encumbrance. Secs. 225 and 226 provide machinery whereby a devisee of lands, under a will made before 1873, can become registered as proprietor, become the transferree of such land or estate. Here again the new certificate of title would show any encumbrance which the old certificate showed. Secs. 228 and 229 are to the same effect in the analogous cases. Sec. 230 is a drag-net section, obviously intended to provide that whatever burden the land was subject to in the hands of a transferror it shall be subject to in the hands of the transferree. The words used are vague and wide, and it may not be easy to estimate their precise effect; but it is clear they refer to cases where the encumbrance appears on the title, not to cases where, as under an order for foreclosure, the encumbrance no longer exists, and no longer appears on the face of the title. Under sec. 74 the mortgagee having become the proprietor is to hold the land under such encumbrances as may be notified on the certificate of title "but absolutely free from all other encumbrances whatsoever." The land is no longer under any liability to the mortgage debt; and there is no liability to indemnify against a debt which is not an encumbrance against the land. There is no need to imply an indemnity to the mortgagor; for if the mortgagee do not sue, the mortgagor is not hurt; and if he do sue, the

Court will treat the case as if there had been no foreclosure, as if the mortgagee were not freed from the mortgagor's right to redeem.

If it was the intention of the legislature to create by the *Transfer of Land Act* an absolutely new and complete code of law with regard to land under its provisions, or, as to land foreclosed, to prevent the mortgagee from suing on the covenants after foreclosure, it is hardly likely that it would have trusted to inference from the meaning of the phrases which are relied on by the appellant. It is to be presumed rather that the legislature knew of the rule established by the long course of practice in England and Victoria, and did not intend to disturb it: *Rolfe* v. *Flower* (1). This view is confirmed by the expression used in sec. 124 saving the rights and liabilities of mortgagees after entry on the register of an order for foreclosure. But I do not wish to base my judgment on this clause, as possibly it is susceptible of a narrower meaning. It is, moreover, clear that this Act was not intended to be a complete self-sufficing code of law for land under its operation. The old law as to land and as to contracts was to remain except so far as inconsistent with this Act (sec. 3). The words of the Act assume that the law as to a husband's rights in his wife's land would remain, and merely regulate procedure for registration (secs. 228 and 229). They assume that the *Statute of Uses* would apply, and therefore negative it (sec. 91). They assume that the law as to conveyances by married women would apply, and regulate it (sec. 92). They assume, without saying it, that the Courts will enforce equitable mortgages by deposit: *London Chartered Bank of Australia* v. *Hayes* (2). They assume that equity will interfere with registered proprietors by enforcing a trust or a contract, or by rectifying the consequences of fraud or mistake. There is no enactment that a mortgagee in possession shall be liable for wilful default; for it is assumed that the ordinary equitable rule will apply. The purpose of the Act is well expressed in the preamble:—"Whereas it is expedient to give certainty to the title to estates in land and to facilitate the proof thereof and also to render dealings with land more simple and less expensive." There is no indication of any intention to alter the obligation of contract.

(1) L.R., 1 P.C., 27, at p. 48. (2) 2 V.R. (Eq.), 104.

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In my opinion, also, if the Victorian legislature in the *Transfer of Land Act* left it at all doubtful whether a mortgagee could sue on his covenants after foreclosure, it has now made it perfectly clear that he could, by the form in which it has enacted sec. 36 of the *Conveyancing Act* 1904, taking away such a power. For by sec. 36 the legislature has taken away this right of the mortgagee for the then future time; it has taken the power away as to mortgages under the *Transfer of Land Act*, as well as to mortgages under the ordinary law: it has taken them away with the same breath, treating past foreclosures as not involving an extinguishment of the debt. If the legislature has at any time been misunderstood by the Court, there are many ways, such as declaratory Acts, by means of which it can indicate what its intention was in the previous Act. But after more than forty years of the *Transfer of Land Act*, Parliament merely enacts that mortgagees may no longer start actions on the covenants after foreclosure. It is not for this Court to dictate to the legislature on questions of policy. But I may point out that sec. 36 was not only a violent interference with vested rights, for instance, of mortgagees who have forborne from suing in order to give mortgagors time to recover themselves financially, but that it also will force mortgagees to press mortgagors to extremity before foreclosing.

The case of *Campbell* v. *Bank of New South Wales* (1) does not, in my opinion, affect the question. After a foreclosure by the Registrar, under the Act which corresponds to the Victorian *Transfer of Land Act*, the mortgagor brought a suit to redeem. He relied on an ancient practice of the Court of Equity to allow redemption even after foreclosure absolute (and even though no actions were brought on the covenants), on some very exceptional cause being shown, and *Faucett* J. said that that practice could not exist in the face of the express words of the Act to the effect that the estate of the mortgagor was to vest in the mortgagee *freed from all rights and equity of redemption on the part of the mortgagor*. The learned Judge in noway says, or even hints, that the mortgagee's right to sue on a covenant has gone. He also held that the Acts incorporating the Bank (which was mortgagee)

(1) 16 N.S.W. L.R. (Eq.), 285; 11 App. Cas., 192.

did not render the foreclosure of the mortgage invalid, and he dismissed the plaintiff's suit. The Privy Council held that his decision dismissing the suit was right. Lord *Blackburn*, in expressing the view of the Judicial Committee, said (1):—"It is unnecessary to inquire into a great many of the matters that have been referred to in the course of the argument;" apparently referring to the contention that it was just and equitable, apart from the Bank's Act, to allow redemption after foreclosure. Lord *Blackburn* then deals with the difficulties arising under the Bank's Act. There is nothing in the case as reported in New South Wales or before the Privy Council, to show any grounds, either exceptional or commonplace, on which the Courts could be asked to allow redemption after foreclosure; and I should infer that the Lords of the Privy Council simply ignored this claim as not resting on any relevant facts. *Faucett* J. applied his mind to the question of law, assuming that there were facts. He laid stress on the words "freed from all rights and equity of redemption," &c.; but he does not appear to have noticed that these are the same words that are used in a foreclosure order absolute under the ordinary law. However, there is not from first to last in his judgment, or in the opinion of the Judicial Committee, any expression tending to favour the view that foreclosure operates as a release of the debt.

I should add that I cannot see any justification for treating the order for foreclosure as a purchase of the land in any sense —at the value of the land, or at the amount of the mortgage debt, or on any other basis. Nothing is further from the minds of the parties than a purchase. The offering of the land for sale before foreclosing is simply a device to protect the mortgagor from the disaster of losing his land while still remaining liable for the debt. The land is offered for sale, by auction and by private contract, in order to test the market, and see whether enough cannot be obtained by sale to discharge the debt.

As the Chief Justice has intimated, the decision in this case will probably have an important effect in other States than Victoria, and possibly in other countries in which the Torrens system of title to land has been adopted. I have made up my own mind

(1) 11 App. Cas., 192, at p. 194.

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on the subject, as in duty bound; but I am relieved from the unpleasant sense of solitude in a matter of opinion when I find that in another case—*In re Premier Permanent Building &c. Association* (1)—three learned Judges of the Supreme Court of Victoria came to the same conclusion. It is impossible to forecast the indirect results of the present decision. One curious result of holding that the foreclosure of a mortgage involves the release of the debt is that a mortgagee who has foreclosed one mortgage must discharge, unconditionally, all the securities for the same debt. For instance, if he have a mortgage over Blackacre for £1,000, and if he take an additional security over Whiteacre, worth £200, for the same debt; then, if he foreclose the mortgage over Whiteacre, he can be forced to discharge the mortgage over Blackacre, without any further payment. In Victoria, the legislature made provision against this result by the 3rd sub-section of sec. 36 of the *Conveyancing Act* 1904; but this provision would seem to be futile, in view of the principle on which this Court has decided this case. Inasmuch as the decision of the majority of the Court on this one point disposes of the case, it is not necessary for me to consider the questions raised as to the Statutes of Limitation, and other matters. I can only say that on this point I regard the judgment of *Chomley* J. as right, and that if his judgment rested on this point alone the appeal ought to be dismissed.

*Appeal allowed. Judgment to be entered for the defendant.*

Solicitors, for the appellant, *Fink, Best & Hall.*

Solicitors, for the respondents, *Hedderwick, Fookes & Hedderwick.*

(1) 25 V.L.R., 77; 21 A.L.T., 67.