IN THE HIGH COURT OF AUSTRALIA.

Glosheen

v.

Taylor

original

REASONS FOR JUDGMENT.

Cdm 21.14.

Judgment delivered at Adelaide

on 26 Sept 1949

H. J. GREEN, Government Printer, Melbourne.
C.5060.

GLASHEEN v. TAYLOR

APPEALS 7 1949

ORDER

Appeal dismissed with costs. Cross-appeal allowed with costs. Order of Supreme Court varied by adding thereto an order that plaintiff pay to defendant the costs of the summons and of the appeal to the Full Court.

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3 Folau C.J. - 17-6
Full 9.0
6 Dixon 12.0
24 McTiernan 2.0
4 34-6

GLASHEEN v. TAYLOR.

REASONS FOR JUDGMENT. LATHAM C.J.

REASONS FOR JUDGMENT. LATHAM C.J.

This appeal raises the question of the true interpretation of a provision in a mortgage of land under the Transfer of Land Act 1893 the parties to which were Arthur Muggleton and Ernest Kimberley Bridge. The mortgage was executed on 10th December 1943. It contained provisions ordinarily to be found in mortgages under the Act. It was provided that the expression "the mortgagor , where the context so admits or requires," shall extend to and include the mortgagor and the executors administrators and transferees of the mortgagor and that the expression "the mortgagee , where the context so admits," shall include his successors and assigns. The mortgagor covenanted with the mortgagee, first, "To pay to the mortgagee or his transferees the sum of three hundred pounds (£300) annually in reduction of the principal sum the first of such payments to be made on the 30th day of June 1944 and on the 30th day of June in each and every year the last payment to be on the 30th June 1953." There was no provision for the payment of interest. The mortgage provided that "for better securing the payment in manner aforesaid of the said principal sum and the observance and performance of the covenants herein contained and implied herein under 'The Transfer of Land Act 1893'" the said Bridge did mortgage his estate in the land. It will be observed that the mortgage is for the purpose of securing the payment in manner aforesaid of the principal sum, that is the payment according to the first covenant contained in the mortgage.

Clause 12 in relation to which the questions in this appeal arise is in the following terms:-

> "It is hereby further agreed and declared that in the event of the mortgagee dying before the 30th June 1953 the balance of the principal sum still due and owing at the date of death shall be forfeited to the mortgagor and the mortgage be discharged - such sum to be regarded as a gift to the mortgagor."

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On 3rd September 1947 the mortgagee Muggleton transferred the mortgage to the plaintiff Martin Michael Glasheen and one McIntyre. McIntyre subsequently transferred his interest to Glasheen. On 5th January 1948 the mortgagor Bridge transferred the land, subject to the mortgage, to the respondent Taylor. On 16th May 1948 the mortgagee Muggleton died. By this time five instalments of £300 had been paid under the mortgage. The appellant Glasheen contends that the balance of £1500 is still a charge upon the land. The respondent Taylor, on the other hand, contends that by reason of Muggleton's death the balance of the mortgage money was forfeited to him and that the land is held by him free from the mortgage. In proceedings by way of originating summons Wolff J. made a declaration in accordance with the last-stated contention. Upon appeal to the Full Court the learned judges (Dwyer C.J. and Walker J.) were divided in opinion and accordingly, under the Supreme Court Act 1935, sec. 62(2) the order of Wolff J. "remained unaltered".

The appellant contends that clause 12 is quite separate from clause 7, that it was a personal agreement between Muggleton and Bridge that if Muggleton died while he was still mortgagee - or possibly if any successor in title to Muggleton died while that successor was the mortgagee - Muggleton (or his successor) would not sue Bridge for the mortgage money. This, it is contended, was an agreement operating entirely in favour of Bridge, and not in favour of any transferee from Bridge. The argument is that no-one but Bridge can obtain the advantage of clause 12. It is obvious that if that advantage disappeared if Bridge sold the land, the advantage given to him by clause 12 would be much less than it would be if his transferee also could claim it.

The argument on the other side is that clause 12 qualifies the first covenant in the mortgage so that when the event of Muggleton's death took place no further payments were due under that covenant.

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The reference in clause 12 to the death of "the mortgagee" should in my opinion be read as relating to a particular individual, namely the mortgagee Muggleton. The nature of clause 12 is such that it not only admits, but requires this construction, because it must be admitted that there would at all times be a mortgagee or a successor of the mortgagee in relation to the land (as long as there was a mortgage) who would not be dead. Accordingly if the term "mortgagee" was interpreted as including "successors" the clause would never have any operation.

But the same considerations do not in my opinion apply to the term "mortgagor" in clause 12. I first consider what the position would have been between an original party and a transferee of the other party and between possible transferees of both parties if the mortgage had not contained clause 12. I this had been the case the mortgagor Bridge would be bound by the first covenant to pay £3000 in yearly instalments of £300. Upon a transfer of the land the mortgagor would continue to be bound by his covenant. A mortgagor cannot release himself from a covenant to pay money under a mortgage by the device of transferring his land to a person who may be a man of straw. Under sec. 113 of the Transfer of Land Act 1893 a covenant is implied in the mortgage with the mortgagee and his transferees by the mortgagor binding the mortgagor and his heirs administrators executors and transferees that they or he will, inter alia, pay the principal money on the due date. Thus Bridge was bound not only by his original covenant but by an implied covenant that any transferee from him would pay the principal. Sec. 228 provides that a transferee of land is subject to the same engagements, obligations and liabilities and may be sued at law and in equity in respect thereof in like manner as if he had been the original proprietor of the land by whom the engagement etc. was entered into. In

Australian /

Australian Deposit & Mortgage Bank v. Lord, 2 V.L.R. 31, it was held that, notwithstanding such provisions, the transferee of mortgaged land did not by reason of the transfer incur any personal liability in the first instance to the mortgagee, though the land remained subject to the charge created by the mortgage. The fact that part only of mortgaged land may be transferred shows the difficulty of construing the section literally. This decision was followed in Hall v. Hubbard, 1931 V.L.R. 197. (A different view was suggested in In re Burton, 27 V.L.R. 437, and see Fink v. Robertson, 4 C.L.R. 864, at p. 880.) These decisions, however, do not throw any doubt upon the proposition that under sec. 113 there is implied in a mortgage a covenant with the mortgagee by the mortgagor that any transferee of the mortgagor will pay the principal money when it becomes due. If the transferee did not pay there would be a breach by the mortgagor of the implied covenant. Under sec. 82 of the Act the transferee of land is subject to the same liabilities as if he had been the former proprietor and the transferee of a mortgage is entitled to all rights, powers and privileges belonging or appertaining to the interest of the mortgagee. Under sec. 83 the transferee of a mortgage acquires the right to sue for moneys due under the mortgage. Sec. 88 provides that if there is a transfer of land subject to a mortgage a covenant with the transferor by the transferee is implied binding the transferee and his heirs, executors, administrators and transferees that they will pay the interest secured by the mortgage. This provision is not material in the present case because the mortgage does not provide for the payment of interest. But sec.88 also provides that a covenant is implied in a mortgage that the transferee of land subject to a mortgage, his heirs etc., will indemnify the transferor and his representatives against all liability in respect of any of the covenants contained or implied therein. This indemnity applies to the liability to pay the principal sum secured by a mortgage, i.e. in this case the money which Bridge covenanted to pay. If, however, the transferee of land subject to a mortgage is impecunious or insolvent the indemnity may be worthless, with the result that the original mortgagor (in the (5)

present case Bridge) might have to pay the mortgage moneys himself

On the contention of the appellant clause 12 does not affect in any way the other provisions of the mortgage. Thus the position of Bridge in relation to any other person than Muggleton would be exactly as above described, that is, it would be the same as if clause 12 had not been in existence. The result would be that a transferee from Muggleton, not being bound by what is alleged to be merely a personal agreement between Muggleton and Bridge, could sue Bridge upon his covenant to pay £3000 in ten annual instalments and recover. Bridge could claim an indemnity against the transferee of the land and the worth of that indemnity would depend upon the solvency of the person who happened to be the transferee of the land at the time. The consequence, therefore, of the view submitted by the appellant is that clause 12 might prove to be of no significance or value to Bridge as well as of no significance or value to any person who succeeded him as owner of the land. Such a conclusion should not be adopted unless there is no alternative view.

There is an alternative view, namely that taken by Wolff J. and Walker J. - that clause 12 qualifies the initial covenant to pay the principal and that that obligation comes to an end with the death of Muggleton. Only by this construction (of which the words are readily capable) can any effective operation be given to clause 12 and, accordingly, in my opinion, that construction should be adopted.

It has been argued that clause 12, providing for the cessation of payments in the event of the death of Muggleton, is repugnant to the first covenant providing for the payment of the full amount of £3000. It appears to me to be obvious that clause 12 is a qualification of the first covenant and should be so regarded.

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It has also been argued that because clause 12 contains the words "such sum to be regarded as a gift to the mortgagor" it amounts to an imperfect gift and that the court will not aid a volunteer by lending its assistance to complete the gift. It is true that the words used include the word "gift", but the substance of the matter should be considered. Clause 12 is only part of the whole arrangement between the parties and Bridge gave consideration for any undertaking by the mortgagee contained or to be implied in clause 12 by assuming the obligations which fell upon him under the other clauses of the mortgage. Further, clause 12 is not a disposition of property by way of gift or otherwise. It is a provision limiting the liability of the mortgagor under the mortgage.

For these reasons the appeal should be dismissed.

Questions are raised with respect to costs by a cross-appeal of the defendant whereby the defendant asks that he be awarded the costs of the proceedings before Wolff J. and before the Full Court of the Supreme Court.

The decision of Wolff J. was in favour of the defendant upon the substance of the controversy between the parties but no order was made as to costs, though no reason was stated for depriving the defendant of costs. Sec. 27 of the Judiciary Act 1903-1948 provides that there shall be no appeal except by leave as to costs which are in the discretion of the Court where the appeal is from a Justice of the High Court or from a Supreme Court of a State exercising federal jurisdiction. This section has no application in the present case.

The Full Court consisted of two judges who were divided in opinion. The Supreme Court Act 1935, sec. 62(2), provides that in such a case, unless a party requires a rehearing, "the judgment or order against which the appeal was taken shall remain

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unaltered". Thus the Full Court of the Supreme Court acted rightly in affirming the judgment of Wolff J. as it then stood, that is, with no order as to costs. In an appeal to this Court from a decision of a State Court this Court must apply any relevant provisions of the State law with respect to costs; for example, if a State law provides that no costs shall be awarded in certain proceedings in State courts it is not within the power of this Court upon appeal to make an order for payment of costs of those proceedings: O'Mara v. Harris, 1948 2 A.L.R. 403, and see Finnegan v. Elton, 1948 A.L.R. 120, as to proceedings under landlord and tenant legislation. So also if a State law provides that in a certain event a particular order as to costs shall be made by a State court, this court upon appeal mustgive full effect to that law. In the present case this Court is affirming the order of the Full Court of the Supreme Court, but whether such an order is affirmed or set aside this Courtcannot by its decision turn a divided court into a unanimous court. Thus it has been argued that, the Supreme Court being equally divided, it necessarily followed that the order of Wolff J. should remain unchanged. But it is the duty of this Court upon an appeal to make the order which in its opinion ought to have been made in the first instance: Judiciary Act 1903-1948, sec. 37. Accordingly this Court has power to alter the order of Wolff J. with respect to costs and to direct that the defendant should pay the costs of the proceedings before the primary judge. If such an order is made the foundation for the application of sec. 62(2) of the Supreme Court Act is changed and the order which should remain unaltered becomes an order in favour of the defendant on the substance of the case with a proper order as to costs.

The costs of the proceedings before Wolff J. were in the discretion of the court: Supreme Court Act 1935, sec. 37: Rules of the Supreme Court, Order LXV, Rule 1. A Court of Appeal does not substitute its discretion for that of a primary judge where a

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discretion is committed to the primary judge if there was no error in law, no injustice to a party, and there were materials in relation to which the discretion could properly be exercised, even though in the latter case the Court of Appeal might have exercised the discretion in a different manner: Evans v. Bartlam, 1937 A.C.473. But the discretion to be exercised is a judicial discretion, as Lord Atkinson said with reference to Order LXV in Donald Campbell & Co. v. Pollak, 1927 A.C. 732, at p. 776 - "...it should always be remembered that the discretion which is to be exercised under this Order and Rule is a judicial discretion. It is not a judicial exercise of this discretion to order a litigant who has been completely successful in a suit and against whom no misconduct is alleged to pay the costs of the proceeding: Kierson v. Joseph L. Thompson & Sons, 1913 1 K.B. 587." No reason appears or has been suggested why the defendant who succeeded in the proceedings before Wolff J. should have been deprived of his costs and this court should now order that the plaintiff pay the costs of those proceedings.

The costs of the proceedings before the Full Court were in the discretion of that court, but once again no reason appears or is suggested why the defendant should have been deprived of his costs and, in accordance with the principles already stated, an order should be made for costs in his favour.

Accordingly I am of opinion that the appeal should be dismissed with costs, that the cross-appeal should be allowed with costs, and that it should be ordered that the plaintiff pay to the defendant the costs of all proceedings in the Supreme Court.

GLASHEEN v. TAYLOR.

JUDGMENT. RICH J.

GLASHEEN v. TAYLOR

JUDGMENT. RICH J.

The argument in this case centred on the interpretation of clause 12 of the instrument of mortgage the subject of this appeal. The sum of £3000 advanced by the mortgagee was repayable without interest in ten instalments of £300. The first instalment was payable on the 30th June 1944. But a clause was added to the instrument in the nature of a condition which provided that if the mortgagee Muggleton died before the date of the last instalment any balance payable by the mortgagor Bridge was to be "forfeited" by the former to the latter such balance being "regarded" - deemed - "to be a gift". This is an artificial definition. It was intended to be applied whenever the conditions existed which it contemplated: cf. International Hotel Ltd. v. McNally, 64 C.L.R. 24, at p. 28. But as the mortgagee died before the 30th June 1953 the contingency on which its operation depended occurred. The question, however, is whether the verba subaudita of the clause require that in order to enjoy the remission of the instalment of the mortgage moneys resulting from the clause it is necessary that the mortgagor Bridge should have retained his interest in the land. Speculation may suggest that neither Bridge nor his friend and mortgagee Muggleton contemplated the disposal by either of them of their respective interests in the land and the mortgage. But Courts cannot construe documents by speculation or intuition. They must be guided by the words and by logical deductions establishing necessary implications. I can see no ground on which can be built any compelling inference that continued ownership of the land was intended to be the sine qua non of the enjoyment by the mortgagor of the benefit of the occurrence of the contingency mentioned in clause 12. The gallant effort of Mr. Seaton to convince us that clause 12 is an independent

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collateral covenant by the mortgagee with Bridge cannot succeed. Although the word "gift" is used there is nothing imperfect or inchoate about it. In my opinion the appeal should f a i l . As to costs here or below I am never in favour of lightly departing from the salutary rule vae victis. Why Wolff J. did so I do not know. The Full Court did so only because they were evenly divided as to the disposal of the appeal. An appeal clearly lies to us from both orders because they are the result of exercises of discretion within the limits conferred by law. In my opinion the appeal should be dismissed with costs, the cross-appeal allowed with costs and an order made in favour of the defendant for the costs of the summons and of the appeal to the Full Court.

GLASHEEN v. TAYLOR

JUDGMENT. DIXON J.

GLASHEEN v. TAYLOR.

JUDGMENT. DIXON J.

This is an appeal from an order of the Full Court of the Supreme Court of Western Australia pronounced upon an appeal from an order of Wolff J. The appeal was heard by Dwyer C.J. and Walker J. who were equally divided in opinion. As a result an order was made by the Full Court, as in pursuance of sec. 62(2) of the Supreme Court Act 1935 (W.A.) that the order of Wolff J. should stand. No order was made as to the costs of the appeal. The proceeding before Wolff J. was an originating summons seeking the interpretation of a mortgage under the Transfer of Land Act 1893 (W.A.). The plaintiff who is the appellant is the transferee of the mortgage and the defendant who is the respondent is the transferee of the mortgaged land. The question submitted for determination was whether in certain events that have happened the defendant is entitled to hold the land freed from the mortgage moneys. Upon this question Wolff J. made a declaration in favour of the defendant. But His Honour made no order as to the costs of the summons. The defendant gave a notice of cross appeal to the Full Court against the learned judge's decision as to costs. As a result of the equal division of opinion in the Full Court the decision of Wolff J. as to costs stood. In this court the defendant has filed a notice of cross appeal from the order of the Full Court in respect of costs. The notice seeks a variation ordering that the plaintiff pay the defendant's costs of the proceedings before Wolff J. and in the Full Court.

The substantive question in the case depends upon an unusual provision in a mortgage. The mortgage arose out of the purchase by Bridge the mortgagor of a station property from Muggleton the mortgagee. The land, a leasehold, was transferred to the purchaser and he gave the mortgage to secure an unpaid balance of purchase money of £3000. The parties appear to have been friends. The mortgage, up to the clause in question, is in the usual form

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except that the principal amount secured is free of interest. The first covenant by the mortgagor with the mortgagee is that the former will pay £300 annually in reduction of the principal sum on 30th June 1944 and on each 30th June until 30th June 1953. At the end of the instrument after the provision mortgaging the land to secure the money and the performance of the covenants there is added a twelfth and final clause, which is that creating the difficulty. It is in the following terms:-

> "Twelfthly: It is hereby further agreed and declared that in the event of the mortgagee dying before the 30th June 1953 the balance of the principal sum still due and owing at the date of death shall be forfeited to the mortgagor and the mortgage be discharged - such sum to be regarded as a gift to the mortgagor."

Muggleton, the mortgagee, died on 16th May 1948. Four annual instalments had by that time been paid. But eight months before his death Muggleton had transferred the mortgage to the plaintiff appellant and another person as tenants in common. Shortly after the transfer that other person transferred his share to the appellant. On his side Bridge, the mortgagor, had transferred the land to the defendant respondent subject to the mortgage. This transfer was made on 5th January 1948, four months before Muggleton's death.

The question for decision is whether, having regard to these dealings, the twelfth clause of the mortgage operated on Muggleton's death to discharge the balance of the mortgage moneys. The contention is that once the land had been transferred by Bridge it could no longer have that operation. The contention is reinforced with the further contention that upon the transfer of the mortgage by Muggleton clause 12 would cease to operate to release the unpaid mortgage moneys on the death of Muggleton.

The question is in my opinion entirely one of interpretation. So far as the transfer of the mortgage is concerned it appears to me to be clear that it can make no difference to the operation of the clause. The expression "in the event of the mortgagee dying" refers to the death of Muggleton. At the beginning of the mortgage, when Muggleton is first referred to, his name

and description are followed by the words "hereinafter called the mortgagee". It is true that after these words there occurs the statement "which expression where the context so admits shall include his successors and assigns". But the subject matter of clause 12 is enough to show that it is the death of Muggleton as a natural person that forms the contingency on which the unpaid balance of purchase money is to be forgone, not on the death of any person who for the time being occupies the situation of the mortgagee.

The question upon which more difficulty has been felt is whether the transfer of the land by Bridge deprived the clause of further operation. I think that it did not because I find nothing in the clause, the subject matter or the context which would warrant placing upon the clause a meaning which would thus limit its effect. I repeat that it is a question of interpretation. To limit the effect of the clause so that the discharge of the unpaid balance takes effect only if Bridge remains the owner of the land and Muggleton dies before the specified date, it would be necessary to read into the clause a condition to that effect. There is insufficient justification for making such an implication. It may be conceded that the description of the relinquishment of the unpaid mortgage moneys as a gift, and perhaps the peculiar use of the words "forfeited to the mortgagor" as if the moneys would be taken into his hands, coupled with the general tendency of the clause show that the clause was intended to confer a benefit upon Bridge prompted by the good will of Muggleton. But that is very far from establishing an intention that the clause should only enure to his advantage, if he should retain the land. Bridge as covenantor would remain liable upon the personal covenant upon the mortgage notwithstanding that he transferred the land subject to the mortgage. It is true that he would be entitled to an indemnity from the transferees: sec. 88 of the

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Transfer of Land Act 1893. But in selling or disposing of the land Bridge might well take into account the contingent operation of the clause in discharging instalments unpaid at Muggleton's death. It might affect the amount of the purchase money or Bridge might by contract with the purchaser of the land reserve the benefit of the contingency, should it happen, to himself. I think that clause 12 ought to be read as a qualification upon the first covenant, the personal covenant to pay instalments. There is nothing in the use of the words "it is further agreed" which militates against this view. They are words of mutual contract. The clause deals with a special case in which the general and otherwise absolute obligation of the covenant to pay is to be modified. The language in which the qualification is expressed by the clause contains no reference to the requirement that Bridge should remain the owner of the land. Nothing short of the implication of a condition to that effect will result in the first covenant remaining in full force and absolute operation, notwithstanding the death of Muggleton before 30th June 1953. The argument for the appellant sought to give to clause 12 the effect of a cross-covenant by Muggleton with Bridge which could operate only as a covenant not to sue him. On this basis it could not operate, it was said, in favour of the transferees of the land. In their hands the land would remain a security for the full amount of the unpaid mortgage moneys. It was of course also contended that, considered in this way, it was to be interpreted as a donation for his personal benefit only, taking effect on the occurrence of the future contingency on which it depends. The fact that the word "agree" is or may be a word of covenant was laid hold of in aid of the contention.

I do not think that clause 12 ought to be construed as an independent cross-covenant. It is evidently intended to control the operation of the covenant creating the debt and its meaning is that the debt should be reduced or discharged on the

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occurrence of the event specified. It should therefore be treated as a qualification having the operation of a proviso. The suggestion that it is a voluntary promise of a future gift and is inchoate, appears to me for this as well as other reasons, to lack foundation. Nor is it possible to treat the clause as repugnant to the covenant and to reject it as the later of two incompatible provisions of a deed. It is only when the later of two clauses would destroy altogether the operation of the earlier and by no process of construction or interpretation can a reconciliation be effected, that recourse should be had to the mechanical rule by which the later of two wholly inconsistent provisions in a deed is rejected as repugnant, and then only as a last resort.

In my opinion the decision of Wolff J. is right.

I do not think, however, that His Honour should have deprived the plaintiff of the costs of the summons. Counsel were unable to inform us of the reason upon which the learned judge proceeded. I can find no ground upon which His Honour's discretion could be exercised. The cross-appeal does not, I think, come within sec. 60(1)(e) as an appeal as to costs only which by law are left to the discretion of the judge. Having regard to the interpretation that has been placed upon the corresponding provision and recognised by the House of Lords in Donald Campbell & Co. v. Pollak, 1927 A.C. 732, the case does not fall within sec. 60(1)(e).

The decision of the Full Court not to interfere with the decision of Wolff J. as to costs and not to give any costs of the appeal rests upon the provision of sec. 62(2) of the Supreme Court Act 1935 that in an equal division of opinion the order appealed from shall remain unaltered unless a rehearing of the appeal is applied for. We are concerned with the order: it is from that that an appeal to this Court lies, not from the reasons or decision behind it. I cannot agree in the suggestion that because the proper thing for the Supreme Court to do in an equal division of opinion is to make no order as to costs therefore that order is correct. We are to make the order which according to our view of the matter ought to have been made. Just as

as well might it be said that because subsec.(1) of sec. 62 says that the decision shall be given according to the opinion of the majority, where there is a majority, the correct course has been taken by the Supreme Court in any case where the judgment accords with the opinion of a majority and so is unappealable.

In my opinion the appeal should be dismissed with costs and the cross appeal should be allowed with costs and an order should be made that the costs of the summons and of the appeal to the Full Court be paid by the plaintiff.

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JUDGMENT. McTIERNAN J.

GLASHEEN v. TAYLOR.

JUDGMENT. McTIERNAN J.

I agree that the appeal should be dismissed and the cross appeal as to costs should be allowed. Clause 12 must be read as part of the mortgage for it is introduced into it as the twelfth covenant and begins with the words "It is hereby agreed and declared", which mean that it is agreed and declared by the memorandum of mortgage.

The contingency in the twelfth clause is obviously the death before 30th June 1953 of the mortgagor named in the mortgage. The context would not admit of the word "mortgagee" including the successors and assigns of the mortgagee.

The mortgagor mentioned in clause 12 also means the mortgagor named in the mortgage. But that interpretation of the word "mortgagor" does not assist the transferee of the mortgage to deprive the transferee of the land of the benefit of clause 12. This clause qualifies the covenant by the mortgagor to pay the principal sum and he mortgaged the land to secure the performance of the covenant to pay to the extent only of his obligation thus qualified.

The transferee of the land took it with the identical encumbrance to which it was subject in the hands of the mortgagor at the time he transferred it. The mortgagor was entitled to hold the land free from the burden of the principal sum in the event of the mortgagee's death before 30th June 1953. As that event occurred, the transferee of the land is entitled to hold it free from the mortgage moneys.

The respondent succeeded before the learned trial judge. The appellant failed in the Full Court to reverse the judgment. There is no apparent reason connected with the case why the

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respondent should have been deprived of his costs of the original hearing or of the appeal to the Full Court. In my opinion he should have those costs and the costs of this appeal.