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SOUTH AUSTRALIA

SEVENTEENTH REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

—

CONCERNING THE LAW RELATING TO MORTGAGES AND THE RIGHTS OF MORTGAGEES

1971

The Law Reform Committee of South Australia was established by Proclamation which appeared in the *South Australian Government Gazette* of 19th September, 1968. The present Members are:

THE HONOURABLE MR. JUSTICE ZELLING, C.B.E., *Chairman.*
B. R. COX, Q.C., S.-G.
K. P. LYNCH.
JOHN KEELER.

The Secretary of the Committee is Miss J. L. Hill, c/o Supreme Court, Victoria Square, Adelaide 5000.

SEVENTEENTH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA CONCERNING THE LAW RELATING TO MORTGAGES AND THE RIGHTS OF MORTGAGEES

To:

The Honourable L. J. King, Q.C., M.P.,
Attorney-General for South Australia.

Sir,

We have the honour to report on a reference from you on reforms in the law relating to mortgages and in particular in relation to the exercise of mortgagee's powers.

The reference arose out of a case in which (without giving names, dates or places) the mortgagor, a woman, had a nervous breakdown and fell behind with two one-monthly mortgage payments. She had a default notice served on her whilst under medical care in Glenside Hospital. An immediate offer was made on her behalf to pay the arrears and to maintain payments. This offer was refused and the mortgagee demanded payment of the principal and interest monies secured by the mortgage in the very short time provided by the mortgage. In fact, the mortgagor was unable to do so and had to obtain mortgage finance at very disadvantageous terms, in fact 13 per cent simple interest, and suffered a very substantial financial loss.

It should be said at the outset that the experience of the Committee is that mortgagees do not in general behave in this unconscientious manner but nevertheless conscientious mortgagees will not be affected by the reforms which we discuss in this Report and unconscientious ones will be restrained from behaving as this one did.

At common law a legal mortgagee of land had a right to go into possession by virtue of the legal estate conveyed to him by the mortgage and that right came into existence at the moment the mortgage was created irrespective of any default and that seems to be the position still in England now that the mortgage is created by a legal demise or sub-demise or legal charge under the Law of Property Act, 1925. As Harman J. (as he then was) said in *Four-Maids Ltd.* v. *Dudley Marshall (Properties) Ltd.* 1957 *Ch.* 317 *at* 320—

> "The right of the mortgagee to possession in the absence of some specific contract has nothing to do with default on the part of the mortgagor. The mortgagee may go into possession before the ink is dry on the mortgage."

This would appear to be still the position in South Australia in relation to all mortgages of land under the general law except, of course, where the mortgagee has deprived himself of the right so to do by contract, and in relation to all mortgages under the Real Property Act where an immediate right to possession irrespective of default is given contractually by the mortgage.

In the case of other mortgages under the Real Property Act default has to be established before one of the various procedures for possession which we discuss later can be instituted. In the case of the exercise of powers of sale, some default is necessary although that default can be reduced contractually to a very minimal default and this again is dealt with later in this paper.

The common law was amended in 1743 by the Statute 7 Geo. II c. 20 which is still in force in South Australia. The Statute is a short one and as it is not easy to obtain a copy of it, except by reference to one of the major libraries, a copy of the Statute is annexed to this Report. In essence, the Statute provided that if a mortgagee took an action in ejectment to recover possession of the mortgaged premises and no redemption suit was then pending, the mortgagor could by force of the Statute pay all monies secured by the mortgage either to the mortgagee or into Court as a defence to the mortgagee's action for ejectment. Prior to the enactment of the Statute the mortgagor would have had to commence a separate suit for redemption in equity and then apply for an injunction to stop the common law proceedings taken by the mortgagee. This, however, only applies in the two cases where the mortgagor is willing forthwith to redeem and is faced either with proceedings in ejectment or proceedings for foreclosure.

Most mortgagors today are home buyers who hold on long term mortgages at rates of interest for which they have budgeted in their budget over a period of years and are completely unable either to repay the mortgage forthwith on minor default or to alter their budget to provide for the much higher rate of interest charged by finance companies on their mortgages and that, in the case of immediate need of money is usually in the case of old houses particularly, the only source of mortgage finance available in practice to the ordinary person.

A mortgagee who has an immediate right to possession either under a general law mortgage or under a Real Property Act mortgage with a personal covenant giving an immediate right to possession can take proceedings by writ of possession to enforce that right or he may take proceedings under the summary procedure by originating summons provided in Order 55A of the Rules of Court. The latter is the normal procedure used in such cases.

Formerly a mortgagee could obtain an order for possession in England in the Queen's Bench Division and here in Chambers without the matter coming before a Judge or Master (see *Redditch Benefit Building Society* v. *Roberts* 1940 *Ch.* 415 *at* 420) but in 1936 the jurisdiction to hear mortgagee's claims for possession was transferred to the Chancery Division and the Court for a number of years exercised a discretionary power which was somewhat dubious in law to give time to pay and to refuse an immediate order for possession, whether the proceedings were by writ or by originating summons. The jurisdiction to do this, however, was criticized by Mr. Justice Russell (as he then was) in *Birmingham Citizens Permanent Building Society* v. *Caunt and Another* 1962 *Ch.* 883 and he held that except for the inherent power of a Judge to adjourn any proceedings for the purpose of doing justice, such as was adverted to by Mr. Justice Upjohn (as he then was) in *Robertson* v. *Cilia* 1956 3 *All E.R.* 651 a Judge or Master has no power to refuse an order for possession and certainly not unless the whole amount is to be paid. His Lordship said at page 912—

"Accordingly, in my judgment, where (as here) the legal mortgagee under an instalment mortgage under which by reason of default the whole money has become payable, is entitled to possession, the court has no jurisdiction to decline the order or to adjourn the hearing whether on terms of keeping up payments or paying arrears, if the mortgagee cannot be persuaded to agree to this course. To this the *sole exception* is that the application may be adjourned for a short time to afford to the mortgagor a chance of paying off the mortgagee in full or otherwise satisfying him; but this should not be done if there is no reasonable prospect of this occurring. When I say the sole exception, I do not, of course, intend to exclude adjournments which in the ordinary course of procedure may be desirable in circumstances such as temporary inability of a party to attend, and so forth. The Practice Direction upon which the district registrar (very understandably) relied does not assume such a jurisdiction, and if it had it would have been an erroneous assumption."

The alternative procedure which is perhaps more frequently used in South Australia because most land in this State is under the Real Property Act is to proceed in ejectment under Part XVII of the Real Property Act, 1886-1967 under which by section 192 any registered mortgagee whether the person in possession is a mortgagor in default or a person claiming under such mortgagor may cause any person in possession of land under the provisions of the Act to be summoned to appear before a Judge in Chambers to show cause why the person summoned should not give up possession to the claimant. Under this Part by section 194 the Judge has a discretion as to whether or not immediate possession is to be given to a claimant but by Section 195 there is a proviso that in the case of a lessor against a lessee if the lessee before or at the hearing pay or tender all rent due and all costs incurred by the lessor the Judge may dismiss the summons. Applying the expressio unius rule this would apparently mean that in the case of mortgagor and mortgagee the Judge has no such right and can only make an order subject to such terms as he may think fit as to postponement of possession pursuant to the opening words of section 195. It is probable, although it has never been decided, that section 6 of the Real Property Act excludes the application of the Imperial Statute 7 Geo. II c. 20 to land under the Real Property Act but this would raise a very difficult question of the possibility of the co-existence of the two Statutes and it is not necessary to consider it further in this Report.

A partial attempt to deal with this problem and one which in effect takes the law back to the practice prior to Birmingham Citizens Permanent Building Society *v.* Caunt is contained in section 36 of the Administration of Justice Act 1970 of the Imperial Parliament which reads as follows:—

"Section 36 provides as follows:—

(1) Where the mortgagee under a mortgage of land which consists of or includes a dwellinghouse brings an action in which he claims possession of the mortgaged property, not being an action for foreclosure in which a claim for possession of the mortgaged property is also made, the court may exercise any of the powers conferred on it by subsection (2) below if it appears to the court that in the event of its exercising the power the mortgagor is likely

to be able within a reasonable period to pay any sums due under the mortgage or to remedy a default consisting of a breach of any other obligation arising under or by virtue of the mortgage.

(2) The Court—(*a*) may adjourn the proceedings, or (*b*) on giving judgment, or making an order, for delivery of possession of the mortgaged property, or at any time before the execution of such judgment or order, may (i) stay or suspend execution of the judgment or order, or (ii) postpone the date for delivery of possession, for such period or periods as the court thinks reasonable.

(3) Any such adjournment, stay, suspension or postponement as is referred to in subsection (2) above may be made subject to such conditions with regard to payment by the mortgagor of any sum secured by the mortgage or the remedying of any default as the court thinks fit."

We think, however, that this provision does not go far enough and is too timid and that what is required is that mortgagors should get the same protection in relation to defaults as tenants now get in relation to their landlords under the Landlord and Tenant Act, 1936. It is true that Mr. Justice Hardie Boys held in *Clark* v. *The National Mutual Life Association of Australasia Limited* 1966 *N.Z.L.R.* 196 that the Court has an inherent jurisdiction to restrain both the improper and in certain circumstances, the harsh or oppressive exercise of a mortgagee's power of sale. This, however, does not apply to a mortgagee's right to possession and in any case is based on analogies with other exercises of inherent power which are referred to by His Honour at pages 197 and 198 of his judgment. Whilst drawing your attention to it, we would not feel it safe to rely on it as being necessarily correct as an exposition of the law in Australia and in any case it, like the English provision, does not go far enough for these purposes. We think that whether the claim is a claim for possession, for sale or for foreclosure, the law should be amended to give a mortgagor a right in the same terms *mutatis mutandis,* as are contained in sections 5, 9, 10, 11 and 12 of the Landlord and Tenant Act 1936 that is that on tender of sufficient amends to bring the mortgage up to date and to pay the mortgagee's proper legal costs the mortgagor should be reinstated in his mortgage as if the default had not occurred and that this should be the position notwithstanding any clause in the mortgage which makes the whole of the principal sum and interest then due payable immediately on any default.

Whilst we are on the subject of legal costs it has been noted by one member of the Committee that "costs and expenses" in a mortgage have recently been interpreted by some mortgagees as including the cost of a collection agency in whose hands the mortgage monies had been placed for collection thus increasing very considerably the amount which a mortgagor has to repay. In equity a mortgagee was not permitted as it was said to improve a mortgagor out of his security (see *Sandon* v. *Hooper* 6 *Beaven* 246: 49 *E.R.* 829), that is by spending money on the property cause the amount under the mortgage to increase so much that it could not be redeemed. We think that "costs and expenses" under a mortgage, whether under the general law or under the Real Property

Act, should be defined by Statute to include only the mortgagee's legal costs of preparation, stamping and registration of the mortgage, and of any attempt properly made to enforce his security together with proper disbursements such as bailiff's fees and advertising charges.

We also think that it is time that the continued existence of personal covenants imposed solely by the mortgage and not by the Law of Property Act on the Real Property Act should be reviewed. In particular we recommend four amendments which should be expressed in such a form that they cannot be ousted by contract:—

1. That there should be a statutory minimum period of notice required in order to make the principal sum fall due and in order to enable default proceedings to be brought. By analogy to the Hire Purchase Agreements Act, 1960-1962 we think that period should be twenty-one days but this is a matter of policy for the Government. At the moment it is probable that some period of notice has to be given and that it is impossible to eliminate notice altogether (*see Hall* v. *Hall* 1956 *Q.W.N.* 39) but Baalman in his *Commentary on the Torrens System in New South Wales* at page 255 clearly believes that it is possible to eliminate the period for which default must continue after service of notice or to dispense with service altogether. We think, as we have said, that there should be a minimum provision of twenty-one days default which cannot be reduced by contract between the parties and this will involve an amendment not only onto the Real Property Act but to Section 48 (*a*) of the Law of Property Act 1936 and we further think that Section 112 of the Law of Property Act 1936 and Section 276 of the Real Property Act should be modified to provide that a mortgagor seeking to enforce the covenants of his mortgage must show that all reasonable efforts have been made to bring the notice of default to the attention of the mortgagor.

2. The second alteration to covenants which we recommend is in the commonly found covenant that a certificate by the mortgagee of the amount due and owing is conclusive evidence of the amount due. We think that such a certificate should never be more than *prima facie* evidence and that where a mortgagee intends to rely on such a certificate he should be required on demand by the mortgagor to furnish to the mortgagor a statement of how the amount stated in such certificate has been computed.

3. The third alteration is in relation to clogs on the equity. The law on this subject is in a state of some confusion but it seems possible that some parts at least of the doctrine in *Kreglinger* v. *New Patagonia Meat & Cold Storage Company Limited* 1914 *A.C.* 25 which allows collateral stipulations to remain binding even after redemption are still law. There are some fine distinctions between that case and the previous case of *Bradley* v. *Carritt* 1903 *A.C.* 253 a decision of a divided House of Lords and the severability test in Kreglinger is extremely difficult in any case to apply in practice. We think that it should not be possible for collateral stipulations to remain binding after redemption. We realize that this has some bearing in other fields such as tied houses and it may be necessary to provide for exceptions to the rule, but in the case of the ordinary form of mortgage and in particular the elaborate form of mortgages and leases in relation

to petrol stations we see no justification for the retention of the older rule. It may be, although this is a matter of policy for the Government, that this amendment should not apply to very large commercial mortgages—say in excess of $250,000—when the parties are on much more of an equality as to bargaining power.

4. The next personal covenant to which we draw attention is one which is peculiar to the Real Property Act in relation to the recovery of the balance from a mortgagor after foreclosure. In equity this was not possible. On a decree for foreclosure the mortgagee took the land and the debt was not enforceable except on terms of re-opening the foreclosure and the liability of any surety was extinguished. It is probable that the entry of the foreclosure in the Register Book would operate to discharge a surety for the payment of the mortgage debt (see *Kerr on the Australian Lands Titles Torrens System page* 439) although no doubt this could also be modified by covenant at present and normally would be so done. We think that if a mortgagee takes foreclosure proceedings then he should be in no better position than he was in equity, that is, that if he takes the land he takes the risk of re-opening the foreclosure. If a mortgagee sued in equity for the recovery of the excess of the loan not covered by the value of the land he automatically re-opened the foreclosure and the mortgagor had a further opportunity in which to redeem. See *Perry v. Barker* 13 *Ves. Jr.* 198.

We think at some time there should be a general consideration of whether standard form clauses in relation to personal covenants other than those now contained in the two Statutes to which we have referred should not be stipulated by Statute as minimum clauses to protect a mortgagee's rights. We have not dealt with the subject in this paper as we think it does not fall within the terms of the reference and in addition may well involve questions of Government policy.

As an addendum to this Report we draw attention to a matter which the research for this paper disclosed namely that a mortgagor can under the Real Property Act distrain upon occupiers as well as tenants by Section 138 of that Act. As the Excessive Rents Act 1962 does not in terms amend the Real Property Act and by its whole tenor applies only to the relationship of landlord and tenant it is probable that Section 16 of the Excessive Rents Act which only prohibits "distress for rent" does not apply to prevent the levying or distress under Section 138 of the Real Property Act against an occupier. As it was the obvious intention of Parliament to abolish all distress within dwelling houses we suggest that consideration might be given to an amendment of Section 16 to cover this situation.

We desire to express our appreciation to the Honourable Mr. Justice Bright and to Mr. N. W. Lowrie for their comments in relation to this paper.

We have the honour to be

HOWARD ZELLING
B. R. COX
K. P. LYNCH
JOHN KEELER

The Law Reform Committee of South Australia

STATUTE 7 GEORGE II

CAP XX

An Act for the more easy Redemption and Foreclosure of Mortgages

"Whereas Mortgages frequently bring Actions of Ejectment for the Recovery of Lands and Estates to them mortgaged, and bring Actions on Bonds given by Mortgagors to pay the money secured by such Mortgages, and for performing the Covenants therein contained, and likewise commence Suits in his Majesty's Courts of Equity, to foreclose their Mortgagors from redeeming their Estates; and the Courts of Law, where such Ejectments are brought, have not Power to compel such Mortgagees to accept the principal Monies and Interests due on such Mortgages, and Costs, or to stay such Mortgagees from proceeding to Judgment and Execution in such Actions; but such Mortgagors must have Recourse to a Court of Equity for that Purpose; in which Case likewise the Courts of Equity do not give Relief until the Hearing of the Cause:" for Remedy thereof, and to obviate all Objections relating to the same; Be it enacted by the King's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That from and after the first Day of Easter Term one thousand seven hundred and thirty-four, where any Action shall be brought on any Bond for Payment of the Money secured by such Mortgage, or Performance of the Covenants therein contained, or where any Action of Ejectment shall be brought in any of his Majesty's Courts of Record at Westminster, or in the Court of Great Sessions in Wales, or in any of the superior Courts in the Counties Palatine of Chester, Lancaster or Durham, by any Mortgagee or Mortgagees, his, her or their Heirs, Executors, Administrators or Assigns, for the Recovery of the Possession of any mortgaged Lands, Tenements, or Hereditaments, and no Suit shall be then depending in any of his Majesty's Courts of Equity, in that Part of Great Britain called England, for or touching the foreclosing or redeeming of such mortgaged Lands, Tenements, or Hereditaments; if the Person or Persons having Right to redeem such mortgaged Lands, Tenements or Hereditaments, and who shall appear and become Defendant or Defendants in such Action, shall at any Time, pending such Action, pay unto such Mortgagee or Mortgagees, or, in case of his, her or their Refusal, shall bring into Court, where such Action shall be depending, all the Principal Monies and Interest due on such Mortgage, and also all such Costs as have been expended in any Suit or Suits at Law or in Equity upon such mortgage (such Money for Principal, Interest, and Costs to be ascertained and computed by the Court where such Action is or shall be depending, or by the proper Officer by such Court to be appointed for that Purpose) the Monies so paid to such Mortgagee or Mortgagees, or brought into such Court, shall be deemed and taken to be in full Satisfaction and Discharge of such Mortgage, and the Court shall and may discharge every such Mortgagor, or Defendant, of and from the same accordingly; and shall and may, by Rule or Rules of the same Court, compel such Mortgagee or Mortgagees, at the Costs and Charges of such Mortgagor or Mortgagors, to assign, surrender, or re-convey such mortgaged Lands, Tenements, and Hereditaments, and such Estate and Interest, as such Mortgagee or Mortgagees have or hath herein, and deliver up all Deeds, Evidences, and Writings, in his, her or their Custody, relating to the Title of such

mortgaged Lands, Tenements, and Hereditaments, unto such Mortgagor or Mortgagors, who shall have paid or brought such Monies into the Court, his, her or their Heirs, Executors, or Administrators, or to such other Person or Persons, as he, she or they, shall for that Purpose nominate or appoint.

II. And be it further enacted by the Authority aforesaid, That from and after the said first Day of Easter Term, one thousand seven hundred and thirty-four, where any Bill or Bills, Suit or Suits, shall be filed, commenced or brought in any of His Majesty's Courts of Equity, in that Part of Great Britain called England, by any Person or Persons having or claiming any Estate, Right or Interest, in any Lands, Tenements or Hereditaments, under or by virtue of any Mortgage or Mortgages thereof, to compel the Defendant or Defendants in such Suit or Suits (having or claiming a Right to redeem the same) to pay the Plaintiff or Plaintiffs in such Suit or Suits, the Principal Money and Interest due on any such Mortgage, or the Principal Money and Interest due on such Mortgage, together with any Sum or Sums of Money due on any Incumbrance or Specialty, charged or chargeable on the Equity of Redemption thereof, and in Default of Payment thereof, to foreclose such Defendant or Defendants of His, her or their Right or Equity of redeeming such mortgaged Lands, Tenements, or Hereditaments; such Court or Courts of Equity, where such Suit or Suits shall be depending upon Application made to such Court by the Defendant or Defendants in such Suit, having a Right to redeem such mortgaged Lands, Tenements, or Hereditaments, and upon his or their admitting the Right and Title of the Plaintiff or Plaintiffs in such Suit, may and shall at any Time or Times, before such Suit or Cause shall be brought to Hearing, make such Order or Decree therein, as such Court or Courts might or could have made therein, in case such Suit or Cause had then been regularly brought to Hearing before such Courts or Courts; and all Parties to such Suit or Suits shall be bound by such Order or Decree so made, to all Intents and Purposes, as if such Order or Decree had been made by such Court, at or subsequent to the Hearing of such Cause or Suit; any Usage to the contrary thereof in any wise notwithstanding.

III. Provided always, That this Act, or any Thing herein contained, shall not extend to any Case where the Person or Persons, against whom the Redemption is or shall be prayed, shall (by Writing under his, her or their Hands, or the Hand of his, her or their Attorney, Agent or Solicitor, to be delivered before the Money shall be brought in such Court of law, to the Attorney or Solicitor for the other side) insist, either that the Party praying a Redemption has not a Right to redeem, or that the Premises are chargeable with other or different principal Sums, than what appear on the Face of the Mortgage, or shall be admitted on the other side; nor to any Case where the Right of Redemption to the morgaged Lands and Premises in Question in any Cause or Suit shall be controverted or questioned by or between different Defendants in the same Cause or Suit; nor shall be any Prejudice to any subsequent Mortgagee or Mortgagees, or subsequent Incumbrancer; any Thing in this Act contained to the contrary thereof in any wise notwithstanding.