

MORTGAGEES' RIGHTS RESTRICTION.

22° GEO. V., No. XIX.

No. 19 of 1931.

AN ACT to make provision for the temporary restriction in certain cases of the rights of Mortgagees, Vendors, Creditors, and others, and for other purposes connected therewith.

[Assented to 18th August, 1931.]

BE it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of Western Australia, in this present Parliament assembled, and by the authority of the same, as follows:—

Preliminary.

Short title and commencement.

1. This Act may be cited as the *Mortgagees' Rights Restriction Act*, 1931, and shall come into operation on a date to be fixed by proclamation.*

Interpretation.

2. (1.) In this Act, subject to the context—

“Judgment” includes order;

“Land” includes any estate or interest in land;

“Lease” includes an agreement for a lease or tenancy;

“Mortgage” includes any deed, memorandum of mortgage, instrument or agreement whereby security for payment of money is granted over any land, and an equitable mortgage by deposit of title deeds, and any document whereby the duration of a mortgage is extended, and includes also an agreement for the sale of land which has not been completed by conveyance or transfer under which the purchase money is payable by instalments or otherwise, whether such instalments are described as rent or otherwise;

*19th August, 1931: See *Gazette* of that date.

“Mortgagee” means the person entitled to the benefit of the security of any mortgage, and includes the vendor under such an agreement for sale as aforesaid;

“Mortgagor” means the person who is liable under the provisions of a mortgage, or entitled to redeem it, or is the purchaser under such an agreement for sale as aforesaid;

“Supreme Court” includes a judge.

(2.) For the purposes of this Act, such an agreement for sale as aforesaid shall be deemed to be a mortgage of the land to secure payment of the unpaid purchase money and interest thereon and the fulfilment of the conditions set forth in the agreement, and the word “foreclosure” in this Act shall be deemed to include the cancellation or rescission by the vendor of any such agreement as aforesaid by reason of the purchaser’s default and the determination or forfeiture for such reason of the purchaser’s rights to or in any land comprised therein.

3. This Act shall not bind the Crown, or any person or incorporated body representing the Crown, or any instrumentality of the Government of the State.

Application of Act.
Crown not bound.

4. (1.) The provisions of this Act extend to leases of land containing optional or compulsory purchasing clauses.

Application to
leases containing
purchasing clauses.

(2.) For the purposes of this Act every such lease shall be deemed to be an agreement for sale, and shall be dealt with in all respects as if the lessee had already notified his exercise of an option to purchase under an optional purchasing clause and as if the lessor were mortgagee and the lessee mortgagor of the land and as if the rent reserved by the lease were interest and the agreed purchase money were principal moneys secured.

(3.) The term of any such lease may, if necessary, be extended by the Supreme Court at any time for the purpose of enabling any of the provisions of this Act to be effectively applied thereto.

5. Where by the terms of a mortgage payment is provided by a series of regular instalments, and the rate of interest is not fixed in the mortgage, or the instalments are expressed to be for principal only, and interest is stated not to be payable, the instalments shall, for the purposes of this Act, be deemed to include interest at such rate and payable at such

Provision in case
money repayable
by instalments and
rate of interest not
stated.

times as the court shall, on the hearing of any application under this Act, determine.

Application of Act.

6. (1.) This Act shall, save as hereinafter otherwise provided, apply and have effect to and in respect of all mortgages and leases current or in operation at the commencement of this Act, and to and in respect of any mortgage hereafter executed which is security for any moneys which were or are secured by any mortgage so current or in operation as aforesaid; but this Act shall not apply or have effect to or in respect of any other mortgage or lease hereafter executed or entered into.

(2.) Nothing in this Act contained shall in any way invalidate or otherwise affect any order obtained by any mortgagor or tenant under the Tenants, Purchasers, and Mortgagors' Relief Act, 1930.

(3.) Any contract or agreement made or entered into or to be made or entered into by any mortgagor or lessee shall, in so far as it purports to annul or vary any of the provisions of this Act or to deprive the mortgagor or lessee of the benefit thereof, be null and void, without prejudice, however, to any provisions of the contract or agreement which are distinct and severable from the provisions hereby annulled.

Restrictions on Rights of Mortgagees and others.

7. (1.) A mortgagee shall not, without the leave of the Supreme Court—

- (a) call up or demand payment from the mortgagor of the whole or any part of the principal moneys secured by the mortgage;
- (b) commence or continue any action or proceeding for the recovery of any principal moneys due under the mortgage, or the enforcement of any judgment for any such moneys;
- (c) exercise any power of sale;
- (d) subject as hereinafter provided, obtain, take, or keep possession of any land comprised in the mortgage, or commence, continue, or enforce any action, proceeding, or judgment for the recovery of possession of any such land;
- (e) issue or be concerned in the issue or enforcement of any process of execution against any land comprised in the mortgage;

Mortgagees not to enforce security without leave of court.

- (f) subject as hereinafter provided, appoint or procure the appointment of a receiver of the rents and profits of any land comprised in the mortgage, or be party or privy to the continuance of such a receiver's authority;
- (g) commence or continue any action, proceeding, or application for foreclosure, or exercise or attempt to exercise, any right or power of foreclosure.

(2.) In the case of any agreement of sale to which this Act applies if the vendor, without the leave of the court and contrary to this Act, has, by reason of the purchaser's default, taken any action to the prejudice of the purchaser's rights under the agreement, the court may order the vendor to do all such acts and things as may be necessary to re-establish such rights.

(3.) The authority of a receiver appointed before the first day of June, nineteen hundred and thirty-one, shall continue notwithstanding this section, unless the Supreme Court, on the application of the mortgagor, otherwise directs.

(4.) Notwithstanding anything in this section, a mortgagee may enter into possession of any property which has been abandoned by the mortgagor, and any mortgagee who has entered into possession of an abandoned property, or who has, before the first day of June, nineteen hundred and thirty-one, entered into possession of any other property, may continue in possession thereof unless the Supreme Court, on the application of the mortgagor, otherwise orders.

8. (1.) Applications for leave to take any of the measures or proceedings mentioned in the last preceding section shall be made in the manner prescribed by rules of court, and in dealing with any such application the court shall consider—

Applications for
leave to proceed.

- (a) whether by reason of the wasting nature of the security the mortgagee is likely to be seriously prejudiced by the continuance of the mortgage;
- (b) whether the mortgagor is able to redeem the mortgaged property from his own moneys or by borrowing at a reasonable rate of interest;
- (c) whether the conduct of the mortgagor in respect of the breach by him of any of the covenants in the mortgage has been such as to render him undeserving of the benefit of this Act;

- (d) whether the refusal of the leave asked for would inflict great hardship on the mortgagee, and where the money secured by the mortgage is the whole or part of moneys belonging to a trust fund, whether such refusal would unreasonably delay the mortgagee or trustee of such fund from distributing same amongst the beneficiaries or persons entitled thereto;
- (e) whether the granting of the leave asked for would inflict great hardship on the mortgagor;
- (f) whether the default of the mortgagor has been caused or contributed to by economic or financial conditions affecting trade or industry in the State;
- (g) whether the refusal of the leave asked for would be reasonably likely to enable the mortgagor, having regard to his circumstances and to the economic and financial conditions aforesaid, to meet his liabilities under the mortgage within a reasonable time.

(2.) The court shall not grant the leave applied for unless, having regard to the conclusions arrived at on the questions aforesaid and any other relevant circumstances, the court shall be satisfied that it would be unjust and inequitable not to grant it; and in case the court decides to grant the leave, it may impose any terms and conditions which in the circumstances may appear to be right and fair.

Powers of courts in actions for recovery of interest secured by mortgage.

9. (1.) In every action or proceeding by a mortgagee for the recovery of any sum for interest secured by a mortgage, the court in which the action or proceeding has been instituted may, if in its discretion and in the circumstances of the case it deems it just and expedient, in lieu of giving judgment for immediate payment, give judgment for payment at a date to be fixed, or by instalments payable at such times as the court in its discretion determines, and for this purpose the court shall have jurisdiction to cause judgment to be entered in such form as it deems fit and to direct the method of the enforcement of the judgment.

(2.) The powers given by this section may be exercised in respect of a judgment which has been already given or entered up, whether on default of appearance or defence or otherwise, and notwithstanding that by such judgment immediate payment is ordered.

10. (1.) Notwithstanding anything contained in this Act, if the purchaser under any agreement for sale of land—

Power of vendor to proceed after notice.

(a) is in arrear for a period of twelve months in respect of any payment of principal or interest due by him under the agreement; and

(b) has made, during any period of six months, no payment in respect of any portion of the amount due by him under the agreement,

the vendor may serve on the purchaser a notice intimating that he proposes after the expiry of one month from the service of the notice to exercise all or any of his rights under the agreement.

(2.) After the expiry of such period of one month the vendor may, unless the purchaser has paid every amount in arrear at the date of the service of the notice, or the Supreme Court, upon the application of the purchaser made within such period, otherwise directs, exercise all or any of his said rights as if this Act did not apply to the said agreement.

11. (1.) No judgment creditor shall be entitled, except by leave of the Supreme Court, to issue any process of execution for the recovery of a sum of fifty pounds or upwards against the lands of the judgment debtor.

Restriction on rights of creditors to issue execution against land.

(2.) In dealing with any application for leave for the purposes of this section the Court shall take into consideration such matters as are mentioned in section eight, so far as they are relevant to the case of a judgment creditor desirous of proceeding against a judgment debtor, and the provisions of that section shall, *mutatis mutandis*, apply to applications under this section.

(3.) Such alterations may be made, by the registrar or clerk of any court, in the forms of its writs, warrants, or process, as may be necessary to give effect to this section and to ensure that no judgment for fifty pounds or upwards shall, without such leave as aforesaid, be enforced by process of execution against land.

(4.) Notwithstanding the foregoing provisions of this section, any such process as aforesaid may be issued in any proceeding in the ordinary form, provided it is endorsed with the words "not to be executed against land except by

leave of the Supreme Court," and such process may be registered, as against land under the Transfer of Land Act, 1893, by entry made in the register book after lodgment of a copy of the process as provided in section one hundred and thirty-three of the said Act, and, as to land not under the said Act, by registration of such process in manner provided by the Ordinance 19, Victoriae No. 14.

(5.) For the purpose of calculating any period of time fixed by section ninety or one hundred and thirty-three of the Transfer of Land Act, 1893, or fixed by Statute or otherwise as the period after the expiry of which a writ cannot be enforced against land or any particular piece of land, any period during which such writ has been prevented by this Act from being so enforced shall not be taken into account.

Miscellaneous.

Relief may be granted to mortgagees in certain cases.

12. When any judgment has been heretofore or hereafter entered up, or ordered to be entered up against any person in any court, and such court is satisfied that immediate payment of the amount of such judgment would inflict great hardship on such person by reason of the operation of this Act on his property or investments, or the realisation thereof, the court may, upon the application of such person, if in its discretion it thinks fit, order that payment of the whole or any part of the amount of the judgment shall be deferred until such time and upon such conditions as the court in the circumstances considers right.

Period of suspension of rights not to be taken into account in computing time.

13. No period of time during which the enforcement of any right or claim is prevented by this Act shall be taken into account in computing the time limited, by any statute of limitations or otherwise, for the enforcement of such right or claim.

No costs.

14. No costs shall be awarded against any party to an application under this Act; provided that the Court shall have discretionary power to award costs against a party who has unsuccessfully and unreasonably made an application after the refusal of a previous application for substantially the same object or purpose.

Rules of court.

15. (1.) Rules of court may be made for regulating the practice and procedure to be followed and observed in proceedings under this Act.

(2.) Such rules shall provide for reasonable notice of any proceeding being given to all parties directly interested therein, and for all such parties being given the opportunity of attending the hearing and of being represented, if they so desire, by solicitors or counsel.

(3.) Substituted service of notices, or substitution of notice for service may, however, be prescribed in cases in which it is impracticable, or would cause undue delay, to effect actual service on any party.

16. Orders made under this Act shall be final and conclusive and shall not be liable to be reviewed on appeal.

Finality of orders made under this Act.

17. (1.) Any person contravening any provision of this Act, by act or omission, shall be guilty of an offence and liable on summary conviction to a penalty not exceeding twenty pounds.

Infractions of Act.

(2.) Any act, measure, or proceeding done or taken in contravention of this Act shall be deemed to be invalid and illegal.

18. (1.) The Registrar of Titles may, upon the submission to him for registration of a transfer of land on sale by the mortgagee thereof, require such evidence as he deems necessary that the sale sought to be given effect to by the transfer was not effected contrary to any provision of this Act.

No transfer of land or foreclosure of mortgage to be registered if contrary to this Act.

(2.) No application for foreclosure shall be entertained by the Commissioner of Titles until he has been satisfied that the applicant is not precluded from making the application by any provision of this Act.

19. No person shall be prevented by this Act from continuing any action or proceeding which he has commenced before the first day of June, one thousand nine hundred and thirty-one.

Action or proceeding commenced before 1st June, 1931.

20. This Act shall remain in force till the end of the month of December, nineteen hundred and thirty-two, and no longer.

Duration of.