

MORTGAGORS RELIEF ACT, 1931-1936.

BEING

MORTGAGORS RELIEF ACT, 1931, No. 2046 OF 1931
[ASSENTED TO 2ND DECEMBER, 1931.]

AS AMENDED BY

MORTGAGORS RELIEF (EXTENSION) ACT, 1933, No. 2112 OF 1933
[ASSENTED TO 31ST AUGUST, 1933.]

MORTGAGORS RELIEF (EXTENSION) ACT, 1934, No. 2145 OF 1934
[ASSENTED TO 30TH AUGUST, 1934.]

MORTGAGORS RELIEF (EXTENSION) ACT, 1935, No. 2197 OF 1935
[ASSENTED TO 7TH MARCH, 1935.]

AND

MORTGAGORS RELIEF (EXTENSION) ACT, 1936, No. 2277 OF 1936
[ASSENTED TO 27TH AUGUST, 1936.]

**An Act to afford relief to mortgagors of land, and for
purposes incidental thereto.**

BE IT ENACTED by the Governor of the State of South Australia, with the advice and consent of the Parliament thereof, as follows:

1. This Act may be cited as the "Mortgagors Relief Act, 1931-1936," and shall come into operation on a day to be fixed by proclamation.

Short title
and com-
mencement.
Of U.K.
10 & 11
Geo. 5 c. 17;
21 & 22
Geo. 5 c. 48.
23 & 24
Geo. 5 c. 32.

2. (1) In this Act, unless inconsistent with the context— Interpretation.

"court" means local court of full jurisdiction:

"mortgage" means any deed, memorandum of mortgage, instrument, or agreement, whether in writing or not, whereby security for payment of moneys is granted over land or any interest therein, and includes an equitable mortgage by deposit of title deeds, and any document or agreement by which the duration of a mortgage is extended:

s. 1. This Act was proclaimed to commence on 5th December, 1931: *Gazette* 5th December, 1931, p. 1065.

s. 2. *VERCO AND OTHERS V. MORPHETT* (1935) S.A.S.R. 306. An encumbrance, charging land with the payment of money on the death of the tenant for life, but making no provision for interest, and containing no express covenant to pay the sum secured, is not a mortgage within the meaning of the Act.

“mortgagor” means the mortgagor or the person liable under the provisions of a mortgage, or to repay the moneys secured by a mortgage, and includes any person who has guaranteed the performance by the mortgagor of any covenant, condition, or agreement expressed or implied in the mortgage, whether such guarantee is expressed in the mortgage or in any other instrument, and any second or subsequent mortgagee or other person having any interest, legal or equitable, in the mortgaged land, which interest is subject to the interest of a prior mortgagee:

“mortgagee” means the person entitled to the benefit of the security of any mortgage:

“proceedings” means any legal proceedings or other means whatsoever for the recovery of any debt due under or the enforcement of any right arising out of a mortgage including proceedings for the enforcement of any judgment obtained for any debt due under a mortgage:

“trade mortgage” means—

- (a) any mortgage securing to a bank the repayment of moneys lent by the bank on overdraft; and
- (b) any mortgage securing to a merchant, manufacturer, or mercantile, manufacturing, or trading company the balance of any moneys due to him or it by a customer for goods sold or services rendered or in repayment of money lent to a customer or interest on such money.

The term shall apply to any such mortgage as aforesaid, whether granted by the borrower or customer or by any surety on his behalf.

Application of
Act.

3. (1) This Act does not apply to—

- (a) any mortgage entered into by a mortgagor with the Crown or any person or body representing the Crown:
- (b) any trade mortgage:
- (c) any mortgage entered into by a member of a building society, Starr-Bowkett Society, or other society of the like kind with the society of which he is a member:
- (d) any mortgage entered into after the commencement of this Act.

(2) This Act applies notwithstanding the provisions of The Real Property Act, 1886, and notwithstanding any agreement or term of an agreement which apart from this subsection would prevent a mortgagor from taking the benefit of this Act.

(3) Subject to the foregoing provisions of this section, this Act applies to all mortgages existing at the commencement of this Act.

(4) This Act shall be construed subject to the Debt Adjustment Act, 1929, the Farmers Relief Act, 1931, and the Financial Emergency Act, 1931.

4. Where the mortgagor has transferred the mortgaged land or, as the case may be, the equity of redemption, and the remedies of the mortgagee for recovery of the interest or principal secured by the mortgage from the successor in title of the mortgagor have been suspended or postponed by or under the Debt Adjustment Act, 1929, or the Farmers Relief Act, 1931, the mortgagor shall be entitled to a suspension and postponement for the same period of his liabilities under the mortgage, and to all the rights and immunities of the said successor in respect of such suspension and postponement.

Suspension of rights against certain mortgagors.

5. (1) Any mortgagor if all the terms and conditions of his mortgage, or all such terms and conditions other than those relating to payment of principal have been complied with, may apply not later than the thirtieth day of June, nineteen hundred and thirty-seven, to the court for an order—

Applications for relief.

Amended by 2112, 1933, s. 2; 2145, 1934, s. 3; 2197, 1935, s. 3; 2277, 1936, s. 3.

i. postponing until any date not later than the thirtieth day of June, nineteen hundred and thirty-eight, the date for repayment of any principal moneys payable under the mortgage:

ii. where the principal moneys due under a mortgage are payable in periodical instalments (whether including interest or not), ordering that no principal moneys shall be payable before the thirtieth day of June, nineteen hundred and thirty-eight, or such earlier date as the court deems just, and making any consequential alteration to the amount, number, and due date of the subsequent instalments payable under the mortgage which the court deems just.

(2) If a mortgage provides that interest is to be at a reduced rate if paid punctually or within some specified

number of days from the due date, and the court orders postponement of the time for payment of any principal under that mortgage, the court may order that interest on the postponed amount shall be payable at the reduced rate but shall not in any other case reduce any interest below the rate fixed by the mortgage.

(3) Where the rate of interest fixed by any mortgage is less than five per cent. the court may, as a condition of granting relief, order that the mortgagor shall pay interest at a rate higher than that fixed by the mortgage, but not exceeding five per cent.

(4) If at the date of instituting an application under this section the mortgagor has paid all the interest payable under the mortgage before that date, he shall be deemed to have complied with all the terms and conditions of his mortgage relating to payment of interest, notwithstanding that all or any of the said interest was not paid within the time fixed by the mortgage.

Inserted by
2112, 1933,
s. 3;
re-enacted by
2146, 1934,
s. 4; 2197,
1935, s. 3;
2277, 1936,
s. 4.

(5) Every order made pursuant to any application made on or before the first day of January, nineteen hundred and thirty-three, whereby the date for the repayment of any principal moneys payable under any mortgage is postponed to any date fixed in the order, shall be deemed to be an order postponing the date of the said repayment until three years and ten months after the date fixed in the order; and every order made after the first day of January, nineteen hundred and thirty-three, but before the passing of the Mortgagors Relief (Extension) Act, 1934, whereby the date for the repayment of any principal moneys payable under any mortgage is postponed to any date fixed in the order, shall be deemed to be an order postponing the date of the said repayment until two years and ten months after the date fixed in the order; and every order made after the passing of the Mortgagors Relief (Extension) Act, 1934, but before the passing of the Mortgagors Relief (Extension) Act, 1935, whereby the date for the repayment of any principal moneys payable under any mortgage is postponed to any date fixed in the order, shall be deemed to be an order postponing the date of the said repayment until one year and ten months after the date fixed in the order; and every order made after the passing of the Mortgagors Relief (Extension) Act, 1935, but before the passing of the Mortgagors Relief (Extension) Act, 1936, whereby the date for the repayment of any principal moneys payable under any mortgage is postponed to any date fixed in the order, shall be deemed to be an order

postponing the date of the said repayment until ten months after the date fixed in the order.

Every order as aforesaid shall continue in force until the expiration of the period extended as aforesaid.

All the provisions of this Act shall apply to orders as aforesaid as if the date fixed pursuant to this subsection were the date fixed by the order at the time of the making thereof.

5a. (1) An application may be made under section 5 by any mortgagor and an order under section 5 may be made on such application notwithstanding that before the passing of the Mortgagors Relief (Extension) Act, 1933, the mortgagee has commenced any proceedings, judicial or extra-judicial, to put into operation any of the powers which under the mortgage or by law he is entitled to use on default made by the mortgagor in repayment of principal, but no such order shall be made, if prior to the making of the application, the mortgagee has, in pursuance of the said powers, sold or let the whole of the land comprised in the mortgage.

Applications for relief where proceedings have been instituted by mortgagee.

Inserted by 2112, 1933, s. 4.

(2) If prior to the making of the application part of the said land has been sold or let as aforesaid the court may make an order extending the time for payment of any balance of principal owing; but no such order shall affect the right of the mortgagee to recover any rent from any land let as aforesaid, and no such rent or any part thereof shall be deemed to be in payment of interest in respect of any such balance of principal.

(3) The court may, as a condition of making any order pursuant to this section, require the mortgagor to pay to the mortgagee any costs incurred by the mortgagee before the making of the application with respect to any such proceedings as aforesaid.

(4) For the purposes of any application pursuant to this section the mortgagor shall be deemed to have complied with all the terms and conditions of the mortgage other than those relating to repayment of principal, if he complied with all of such terms and conditions up to the time proceedings as aforesaid were taken by the mortgagee.

(5) If any application as aforesaid is made the mortgagee shall not continue the said proceedings until the court finally disposes of the application, and if any order is made as aforesaid, the order shall be deemed to be and shall have effect as a stay of any such proceedings as aforesaid, and all proceedings, judicial or extra-judicial, continued after the

making of the order and in contravention of the order or any provision of this Act shall be void.

Duty of court
in applications.

6. (1) On an application under this Act if the court is satisfied that the applicant is unable without undue sacrifice or hardship to fulfil his obligations as to repayment of the principal under the mortgage, but would, if the court made the order asked for, or some other order authorised by this Act, have a reasonable prospect of being able to fulfil those obligations, and that having regard to the relative hardship which would be suffered by the applicant if an order were not made, and by the mortgagee if an order were made, and to the question whether by reason of the wasting nature of the security, the continuance of the mortgage would seriously affect the security, it is just and equitable to afford relief to the mortgagor, the court may make the order asked for or such other order as it deems just.

(2) Any order made under this section may be on any terms and conditions which the court thinks fit.

Rescission of
order.

7. (1) If while an order made under this Act is in force the mortgagor entitled to the benefit of the order makes default in the payment of any interest due under the mortgage or in compliance with any other term or condition of the mortgage, and the default continues for a period of twenty-eight days, the mortgagee may apply to the court for rescission or variation of the order.

(2) If on the hearing of the application the court is of opinion that there is no prospect that the mortgagor will during the continuance of the order be able to pay the interest due under the mortgage within a reasonable time after it falls due, or that the conduct of the mortgagor in relation to any other default under the mortgage has been such as to disentitle him to relief under this Act, the court may in its discretion rescind the order or vary the terms thereof in such manner as it considers just.

(3) When an order is rescinded under this section the principal under the mortgage shall fall due at the time when it would have fallen due if no order had been made, and if the principal or any part thereof fell due prior to the rescission of the order, the said principal or part shall be due and payable forthwith upon the making of the order of rescission.

8. Notwithstanding anything in any Act, or any law, or any trust deed or instrument to the contrary, every trustee, being a mortgagee, if requested by the mortgagor to do so is hereby authorised and empowered to postpone the time for repayment of the balance for the time being unpaid of the principal secured by the mortgage until such date, not later than the thirtieth day of June, nineteen hundred and thirty-seven, as such trustee in his absolute discretion shall think reasonable in the circumstances, having regard to the rights conferred on the mortgagor by this Act: Provided that the agreement for such postponement shall be in writing, signed by both parties, and shall purport to be made in pursuance of the powers given by this Act.

Power of trustees to extend time for repayment of principal.

Amended by 2112, 1933, s. 2; 2145, 1934, s. 3; 2197, 1935, s. 3; 2277, 1936, s. 3.

9. (1) No mortgagee shall after the commencement of this Act and before the thirtieth day of June, nineteen hundred and thirty-seven, commence or continue any proceedings, judicial or extra-judicial, to put into operation any of the powers which under the mortgage or by law he is entitled to use on default made by the mortgagor in repayment of principal, unless he first gives not less than two months' notice in writing of his intention to the mortgagor: Provided that this section shall not prevent the mortgagee from commencing or continuing any proceedings on breach by the mortgagor of any covenant, other than a covenant for repayment of principal, or from commencing or continuing any proceedings for repayment of principal during such time as any such breach as aforesaid continues.

Duty of mortgagee or vendor to notify proposed exercise of powers.

Of U.K. 10 & 11 Geo. 5 c. 17. s. 7.

Amended by 2112, 1933, ss. 2, 5; 2145, 1934, s. 3; 2197, 1935, s. 3; 2277, 1936, s. 3.

(2) If the mortgagor within that period makes any application to the court under this Act for relief against the proposed action of the mortgagee, the mortgagee shall not commence or continue any proceedings of the kind mentioned in subsection (1) until the application has been disposed of.

10. (1) Where at the commencement of this Act a mortgagee is in possession of the mortgaged land but has not sold the said land nor obtained an order for foreclosure the mortgagor may apply to the court for an order that the mortgagee vacate the said land and for relief under section 5.

Provision where mortgagee in possession at commencement of Act.

(2) If having regard to the considerations mentioned in section 6, the court considers it just and equitable to do so,

s. 9. *WARD v. SMITH* (1935) S.A.S.R. 205. No notice is required in an action for principal and interest, if there is breach of a covenant other than that for repayment of principal.

VERCO AND OTHERS v. MORPHETT (1935) S.A.S.R. 306. Proceedings on an encumbrance which charges land with the payment of money on the death of the tenant for life, but makes no provision for interest, and contains no express covenant to pay the sum secured, are not proceedings to which s. 9 applies.

it may order that the mortgagee vacate the said land and grant the mortgagor such relief under section 5 and on such terms and conditions as it deems just.

Provision
where judg-
ment obtained
against mort-
gagor.

11. Where the mortgagee has either before or after the commencement of this Act obtained judgment against the mortgagor for any money owing under the mortgage the mortgagor may apply for relief under section 5 if at the time of making application he has paid interest on the amount of the mortgage debt at the rate fixed by the mortgage in respect of the period before the judgment was obtained and interest at a rate not lower than that fixed by the mortgage on the amount of the judgment from the time when it was obtained, until the making of the application, and the court may on such application make an order under section 5, and the order shall operate as a stay of all further proceedings under the judgment so long as the interest on the amount of the judgment continues to be paid at the rate aforesaid and at the same periodical dates throughout the year as are fixed by the mortgage for payment of interest.

Provision as
guarantees.

Amended by
2112, 1933,
s. 2; 2145,
1934, s. 3;
2197, 1935,
s. 3;
2277, 1936,
s. 3.

12. (1) An order under this Act for postponement of the time for repayment of any principal moneys secured by a mortgage, or an agreement between the mortgagor and mortgagee for such postponement until any date not later than the thirtieth day of June, nineteen hundred and thirty-eight, shall not discharge any person who has guaranteed repayment of the said principal moneys, but every guarantor shall, subject as hereinafter mentioned, be liable for repayment of the debt on the date to which the time for payment is postponed.

(2) If such an order is made in proceedings to which any guarantor is not a party, that guarantor may repay to the mortgagee any amount which, if the order had not been made, would be due and payable by the mortgagor, and may, notwithstanding the order aforesaid, exercise against the mortgagor for recovery of the amount so paid all or any of the rights and remedies available (whether by subrogation or otherwise) to a guarantor who has paid the debt of the principal debtor.

Any guarantor may join in any application under section 5 as co-plaintiff with the mortgagor, and if he refuses so to join, when requested by the applicant mortgagor, the said mortgagor may make him a defendant. In determining whether to make any order in proceedings to which a guarantor is a party, the court shall take into consideration the hardship to the guarantor if the order were made or were not made.

(3) If an agreement for postponing the time for repayment of any principal moneys secured by mortgage is made between the mortgagor and mortgagee, and any guarantor is not a party to that agreement, that guarantor may notwithstanding the agreement repay to the mortgagee any money, which, if the agreement had not been made, would be due and payable by the mortgagor and may forthwith, notwithstanding the agreement, exercise against the mortgagor for recovery of the amount so paid, all or any of the rights and remedies available (whether by subrogation or otherwise) to a guarantor who has paid the debt of the principal debtor.

13. Where the original mortgagor or any subsequent owner of the land who has become personally liable for repayment of the principal moneys secured by the mortgage, has transferred the land, and the land remains subject to the mortgage, the provisions of section 12 of this Act shall apply in relation to the mortgage as if the said person were the guarantor of the repayment of the principal moneys secured by the mortgage, and the owner for the time being of the land were the mortgagor.

Provision as to mortgagor who has transferred the land.

14. On any application under this Act, the court shall inquire whether any persons not parties to the application, and having an interest in, or liabilities under the mortgage, are likely to be adversely affected by any order which may be made in the proceedings, and may order that any such person shall be served with notice of the proceedings and given an opportunity to be represented at the hearing and to adduce any relevant evidence; and in determining whether to make any order the court may consider any hardship likely to accrue to such person if the order were made or not made.

Power of court to hear all interested parties.

15. (1) Every mortgage shall be construed as though varied in accordance with the terms of any order or agreement relating thereto made under this Act.

Effect of order.

(2) Any person who fails to comply with any order of a local court made under this Act or takes or institutes or continue any proceedings, judicial or extra-judicial, in contravention of any such order, shall be deemed guilty of contempt of court and the Supreme Court shall on motion made in accordance with the existing practice of the said court relating to motions to commit for contempt of inferior courts inflict on the said person such punishment as it deems just.

Extended mortgages deemed to be current during the extension.

16. Where an application is made under this Act in respect of a mortgage entered into before the commencement of the Financial Emergency Act, 1931 (whether the principal moneys are overdue at the time of such application or not) and a postponement of the time for repayment of the principal moneys is ordered under this Act, that mortgage shall be deemed to be existing and current within the meaning and for the purpose of the Financial Emergency Act, 1931, throughout the period from the commencement of the said Financial Emergency Act, 1931, until the date to which the payment is postponed.

Avoidance of certain proceedings.

17. Any proceeding, judicial or extra-judicial, taken or continued in contravention of any provision of this Act or any order under this Act shall be void.

Jurisdiction of Courts.

18. (1) Every application under this Act shall be made to the local court of full jurisdiction nearest to the usual place of residence of the mortgagee, and where the mortgagee is a company the application shall be made to the local court of full jurisdiction nearest to its principal place of business in the State: Provided that by consent of the parties applications may be made to and be dealt with in any local court of full jurisdiction.

(2) Where the mortgagee is not resident in the State, or being a company, has no place of business in the State, the application shall be made to the local court of full jurisdiction at Adelaide.

Procedure.

19. (1) Subject to this Act applications under this Act shall be instituted by claim in accordance with the provisions of the Local Courts Act, 1926.

(2) The provisions of the Local Courts Act, 1926, except where inconsistent with this Act, and subject to any rules made under that Act and specially applicable to applications under this Act, shall apply to applications under this Act as far as possible in the same way as they apply to actions under that Act.

No right of appeal.

20. There shall be no appeal against any order made under this Act.

Privacy of applications.

21. (1) Applications under this Act shall be dealt with in chambers.

(2) No person shall publish, except in a Trade Gazette, the names of the parties to any application under this Act or any report of any such application from which the name of any party can be ascertained.

Any person contravening this subsection shall be guilty of an offence punishable summarily and liable to a penalty not exceeding one hundred pounds.

“Trade Gazette” includes any newspaper, circular, or other document published for the sole or main purpose of affording to persons engaged in trade business or manufacture information as to the financial position and dealings of members of the public.

22. Any notice required to be served on or given to any person under this Act shall be deemed duly served or given if it has been—

Notices, how
given.

- (a) given to such person personally; or
- (b) left at his usual or last known place of abode; or
- (c) sent by post by registered letter to his usual or last known place of abode or an address for service mentioned in any notice given by him.

Rules of Court.

The following rules of court were in force under this Act on 24th May, 1937:—

RULES OF THE LOCAL COURT AS TO PROCEEDINGS UNDER THE ACT—

Gazette—28th January, 1932, p. 158.

MOTOR OMNIBUSES

see Local Government : Municipal Tramways Trust.

MOTOR VEHICLES

see Road Traffic.

MUNICIPAL CORPORATIONS

see Local Government.