

# Moratorium Act 1932 No 57

[1932-57]



New South Wales

## Status Information

### Currency of version

Current version for 16 June 2022 to date (accessed 25 April 2025 at 5:56)

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### Provisions in force

The provisions displayed in this version of the legislation have all commenced.

### Notes—

- **Editorial note**

The Parliamentary Counsel's Office is progressively updating certain formatting styles in versions of NSW in force legislation published from 29 July 2019. For example, colons are being replaced by em-dashes (em-dashes). Text of the legislation is not affected.

This version has been updated.

### Responsible Minister

- Attorney General

For full details of Ministerial responsibilities, see the [Administrative Arrangements \(Minns Ministry—Administration of Acts\) Order 2023](#).

### Authorisation

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File last modified 16 June 2022

# Moratorium Act 1932 No 57



New South Wales

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# Moratorium Act 1932 No 57



New South Wales

An Act to amend and consolidate the law providing for a moratorium and restricting the liability of mortgagors of land; to repeal the *Moratorium Act 1930*, and Acts amending the same; and for purposes connected therewith.

## Part 1 Preliminary

### 1 Name of Act

This Act may be cited as the *Moratorium Act 1932*.

### 2 Interpretation (cf Act No 48, 1930, s 2)

(1) In this Act, unless the context or subject-matter otherwise indicates or requires—

**Hire-purchase** includes a letting of goods with an option to purchase, and an agreement for the payment of the price of goods by instalments, whether such agreement describes such instalments as rent or hire or otherwise.

**Mortgage** means any deed, memorandum of mortgage, instrument, or agreement whereby security for payment of moneys or for the performance of any contract is granted over real or personal property in New South Wales or any interest therein, and includes an equitable mortgage by deposit of title deeds, and any document by which the duration of a mortgage is extended or by which any provision of the mortgage is varied, but shall not include—

- (a) any charge or lien existing solely by reason of a banker's lien under the law merchant,
- (b) any charge or lien existing by virtue of any statute, deed of settlement, articles of association, or rules, over shares in a company or society incorporated by or under any statute, or by Royal Charter,
- (c) any preferable lien on crops or wool,
- (d) a hire-purchase agreement.

**Mortgage of land** means any mortgage where land in New South Wales forms the whole or part of the security.

**Mortgagor** includes any person entitled to redeem a mortgage or who has guaranteed the payment of any money the payment of which is secured by a mortgage or the performance of any covenant, condition, or agreement expressed or implied in a mortgage whether such guarantee is expressed in the mortgage or in any other instrument.

**Mortgagee** means the person entitled to the benefit of the security of any mortgage.

**Person who has guaranteed the payment of money** includes and shall be deemed always to have included a person who to the knowledge of the creditor at the time of incurring such liability has incurred a primary liability to the creditor to pay money to such creditor as surety for a third person.

**Prescribed date for repayment** means the date fixed by Part 2 of this Act as the date upon which the principal sum secured by a mortgage to which such Part applies shall be payable or repayable.

**The rate provided in the mortgage** means the rate of interest provided in the mortgage, or, where there is provided in the mortgage a reduced rate of interest in the case of punctual payment, or in any other contingency, the reduced rate.

- (1A) A lessee from a mortgagor shall not be and shall be deemed never to have been, for the purposes of this Act or of any Act repealed by this Act, a person entitled to redeem the mortgage.
- (2) This Act shall be read and construed so as not to exceed the legislative power of the State to the intent that where any provision of this Act or the application thereof to any person or circumstances is held invalid the remainder of this Act and the application thereof to other persons or circumstances shall not be affected.

### **3 Repeal of Act No 48, 1930; Act No 43, 1931; and ss 2 & 4 of Act No 66, 1931**

- (1) The *Moratorium Act 1930-1931*, and sections two and four of the *Moratorium and Interest Reduction (Amendment) Act 1931*, are hereby repealed.
- (2) All regulations made under the *Moratorium Act 1930*, or any amendment thereof and in force at the commencement of this Act shall, to the extent to which they are not inconsistent with this Act, continue in force until repealed or replaced by regulations under this Act.
- (3) The repeal enacted by this section shall not, unless the contrary intention in this Act appears, affect—
- (a) any right accrued or obligation incurred before the commencement of this Act under any enactment so repealed,
  - (b) any action or proceeding pending or uncompleted at the commencement of this

Act.

- (4) Every such action or proceeding may be carried on and completed as if such repeal had not been enacted.
- (5) Nothing in the last preceding two subsections contained shall limit any saving in the *Interpretation Act of 1897*.
- (6) The repeal enacted by this section shall not, nor shall any provision of this Act operate to increase the rate at which immediately prior to the commencement of this Act interest may be lawfully charged under any mortgage.

**4 Crown** (cf Act No 48, 1930, s 3)

- (1) This Act shall not bind the Crown or any statutory body representing the Crown except—
  - (a) in respect of mortgages held for advances made under the *Returned Soldiers Settlement Act 1916*, as amended by subsequent Acts,
  - (b) the Commissioners of the Government Savings Bank of New South Wales in respect of mortgages held by the Rural Bank Department, Advances for Homes Department, and Government Housing Department other than mortgages given or executed between the eighteenth day of December, one thousand nine hundred and thirty, and the commencement of this Act.
- (2) In this section the expression **statutory body representing the Crown** includes every statutory body representing the Crown in right of the Commonwealth (including the Commonwealth Bank of Australia and the Commonwealth Savings Bank of Australia), the Sydney Harbour Trust Commissioners, the Transport Commissioners of New South Wales, and any public body which the Governor may by proclamation published in the Gazette declare to be a statutory body representing the Crown.

**5 Non-application of Act to certain mortgages** (cf Act No 48, 1930, s 13 (1) (d) (e))

This Act shall not apply to—

- (a) any mortgage to secure the repayment of a loan to one of its members by a building society registered under or included in the Second Schedule to the *Co-operation Act 1923-1931*, or registered under the *Permanent Building Societies Act 1967*, or
- (b) any mortgage to secure the repayment of a loan granted by a registered friendly society to one of its members or to a person who is not a member of the society, if the Minister, by notice in writing, declares that the mortgage is one or one of a class specified by him to which it is undesirable that this Act should apply.

## 5A Saving concerning application of Act

Section 2 of the *Moratorium (Amendment) Act 1968* continues in force despite the repeal of that Act by the *Statute Law (Miscellaneous Provisions) Act (No 2) 2003*.

## Part 2 Moratorium

### Division 1 Mortgages

#### 6 Mortgages to the Crown etc

(1) This section shall apply to—

- (a) any mortgage to the Crown, a Minister, or a statutory body representing the Crown, held for advances made under the *Returned Soldiers Settlement Act 1916*, as amended by subsequent Acts,
- (b) any mortgage to the Commissioners of the Government Savings Bank of New South Wales, held in respect of the Rural Bank Department, Advances for Homes Department, or Government Housing Department.

(2) A mortgagee under any such mortgage shall not exercise any of the rights, powers, or remedies against the mortgagor or the mortgaged property for the recovery of the moneys secured by the mortgage or for the enforcement or realisation of the security expressly or impliedly given to him by the mortgage, other than rights, powers, or remedies which may be exercised in accordance with this Part by a mortgagee without the leave of the court, unless he first gives not less than one month's notice of his intention so to do to the mortgagor.

Provided that where a mortgagor has by instrument inter vivos disposed of the whole of his estate or interest in any mortgaged property it shall not be necessary, nor shall it be deemed ever to have been necessary, to give any such notice to such mortgagor.

Provided further that in the case of a mortgage of land it shall not be necessary, nor shall it be deemed ever to have been necessary, to give notice to any person whose interest in the land was created by an instrument which is not registered either under the *Registration of Deeds Act 1897*, or the *Real Property Act 1900*, but this proviso shall not apply where the person whose interest is so unregistered is the original mortgagor or his personal representative or where such person is in possession of the land or where the mortgagee has express notice of the interest of such person.

(3) Any mortgagor who has been given any such notice may apply to the court for an order under this section.

The mortgagee on receiving notice of such application shall not exercise the right, power, or remedy the subject-matter of the notice given by him until such application has been heard and determined.



- (4) On any such application the court may make such order as to the exercise by the mortgagee of his rights, powers, and remedies under the mortgage or as to the suspension thereof, and on such terms and conditions as under all the circumstances of the case it thinks fit.
- (5) In dealing with an application under this section the court shall consider—
- (a) whether by reason of the wasting nature of the security or of the absence of a sufficient margin between the amount of the debt and the value of the security the mortgagee is likely to be prejudiced by the granting of the application,
  - (b) whether the mortgagor is able to perform any or all of the covenants contained in or implied by the mortgage,
  - (c) whether the conduct of the mortgagor in respect of the breach by him of any covenant contained in the mortgage, or in respect of any dealing with the mortgagee has been such as to render him undeserving of the benefit of an order,
  - (d) whether the refusal of an order would inflict great hardship on the mortgagor,
  - (e) whether the default of the mortgagor has been caused or contributed to by economic or financial conditions affecting trade or industry in the State,
  - (f) whether the granting of the application would be reasonably likely to enable the mortgagor, having regard to his circumstances and the economic and financial conditions aforesaid, to meet his liabilities under the mortgage within a reasonable time.
- (6) On any such application the court may by order declare that the provisions of this Part, or such of those provisions as may be specified in the order, shall apply to the mortgage in respect of which the application was made.

Unless the court makes an order under this subsection the provisions of this Part of this Act, other than this section, shall not apply to any of the mortgages specified in subsection one of this section.

- (7) A mortgagor entitled to the benefit and protection of this section may consent to the exercise by the mortgagee of all or any of his rights, powers, and remedies, but such consent shall not take away the necessity of giving the notice required by subsection two of this section unless the consent is in writing and witnessed by one of the persons mentioned in section thirty-seven of this Act.
- (8) Any such consent may be given to a particular exercise of any right, power, or remedy, or generally and whether or not any default has been made under the mortgage.
- (9) Any such mortgage as is referred to in subsection one of this section executed after

the commencement of this Act shall not be subject to any provision of this Act.

(10) In this section **mortgage** includes an agreement for the sale and purchase of land.

## **7 Fluctuating advances**

(1) The Supreme Court may on the application of the mortgagee under a mortgage to secure a fluctuating advance with a limit exceeding six thousand dollars, whether such mortgage shall have been executed before or after the commencement of the *Moratorium Act 1930*, or of this Act, order that some or all of the provisions of this Part of this Act shall not apply to such mortgage.

(2) On any such application the court shall consider—

- (a) whether by reason of the wasting nature of the security the mortgagee is likely to be prejudiced by a refusal of the application,
- (b) whether the mortgagor is able to perform all or any of the covenants contained in or implied by the mortgage,
- (c) whether the conduct of the mortgagor whether in regard to the mortgagee or the mortgaged property or otherwise has been such as to render him undeserving of relief,
- (d) whether the granting of such an order would inflict great hardship on the mortgagor or would seriously affect his ability to carry on his business,
- (e) whether the refusal of the application would be reasonably likely to enable the mortgagor having regard to his circumstances and the economic conditions affecting trade or industry in the State to meet his liabilities under the mortgage within a reasonable time,

and may make such order as to the exercise by the mortgagee of his rights, powers and remedies under the mortgage or any of them or as to the suspension thereof and on such terms and conditions as under all the circumstances of the case the court thinks fit.

(3) This section shall not extend to any mortgage which is by section eight of this Act excluded from the operation of this Part of this Act.

## **8 Non-application of Act to certain transactions** (cf Act No 48, 1930, s 31)

This Part of this Act shall not apply to—

- (a) a mortgage, or an agreement for the sale and purchase of land, or a lease containing an optional or compulsory purchasing clause which was executed between the nineteenth day of December, one thousand nine hundred and thirty, and the first day of October, one thousand nine hundred and thirty-one (both inclusive), if the

mortgage, agreement, or lease contains a covenant or condition expressly excluding the provisions of the *Moratorium Act 1930*, and such covenant or condition has not been declared void in pursuance of subsection three of section thirteen of the *Moratorium Act 1930-1931*,

- (b) a mortgage or an agreement for the sale and purchase of land, or a lease containing an optional or compulsory purchasing clause which was executed between the second day of October, one thousand nine hundred and thirty-one, and the day prior to the date of commencement of this Act (both inclusive), if such mortgage, agreement, or lease contains a covenant or condition expressly excluding the provisions of the *Moratorium Act 1930-1931*, and has been witnessed and certified in the manner required by section ten of the said Act,
- (c) a mortgage or an agreement for the sale and purchase of land, whether executed before or after the commencement of the *Moratorium Act 1930*, and subsequently varied after the commencement of the said Act and before the commencement of this Act by a memorandum executed before the commencement of this Act, if such memorandum contains a condition or covenant expressly excluding the provisions of the *Moratorium Act* then in force, and if such memorandum was executed with such formalities, if any, as were required by the *Moratorium Act*, in force at the date of execution of the memorandum,
- (d) a mortgage executed on or after the date of commencement of this Act, if such mortgage contains a condition or covenant expressly excluding the provisions of this act,
- (e) a guarantee whether executed before or after the commencement of this Act if such guarantee contains a covenant or condition excluding the provisions of this Act or of any enactment hereby repealed,
- (f) any mortgage, whether executed before or after the commencement of this Act, which is extended or otherwise varied by an instrument executed after such commencement if such instrument contains a condition or covenant expressly excluding the provisions of this Act in relation to such mortgage,
- (g) any mortgage, whether executed before or after the commencement of this Act, which secures the performance by a guarantor of his obligations under a contract of guarantee made after the commencement of this Act if such contract of guarantee contains a condition or covenant expressly excluding the provisions of this Act in respect of such mortgage,
- (h) any mortgage executed before the commencement of this Act whereby further advances or further credits are secured as regards advances made or credits provided or given after the commencement of this Act,
- (i) any agreement for the sale and purchase of land or lease executed on or after the date

of commencement of this Act,

- (j) any lease containing an optional purchasing clause, if the court or the Minister upon application in that behalf under any Act hereby repealed has made a declaration that the lessee had no bona fide intention of exercising the option to purchase,
- (k) any agreement for the sale and purchase of leasehold interests in land with or without other personal estate, whether such agreement was entered into before or after the twenty-sixth day of November, one thousand nine hundred and thirty; but this provision shall not extend so as to exclude from the provisions of this Part of this Act agreements for the sale and purchase of land partly freehold and partly leasehold, or of a holding consisting of any leasehold held under any Act relating to the alienation of Crown lands or lands subject to the right of conversion into freehold,
- (l) any lease of land containing an optional purchasing clause by the terms of which the last date for the exercise of the option is a date later than the thirty-first day of December, one thousand nine hundred and thirty-two.

**9 Limitation of rights of mortgagee** (cf Act No 48, 1930, s 4)

- (1) A mortgagee shall not without leave of the court exercise any of the rights, powers, or remedies expressly or impliedly given to him by the mortgage against the mortgagor or the mortgaged property for the recovery of the moneys secured by the mortgage or for the enforcement or realisation of the security.

On any application under subsection one of this section founded upon default in the payment of interest, or of any rate, tax, or charge, the court shall have power to make such order as it thinks proper under the circumstances although such interest, rate, tax, or charge may not be in arrears for the period appropriate to the case mentioned in paragraph (a) or paragraph (b) of subsection two of this section.

Provided that nothing contained in this section or in any enactment by this Act repealed shall prevent the mortgagee—

- (a) from making any demand or giving any notice for payment of any moneys secured by the mortgage,
- (b) from bringing any action for debt or damages or suit or other proceeding for an injunction in the case of a breach of any covenant, agreement, or condition in the mortgage expressed or implied—
  - (i) securing to the mortgagee some collateral benefit,
  - (ii) in the nature of a covenant for title,
  - (iii) in the nature of a restrictive covenant,
- (c) from recovering by action the price of goods supplied or moneys payable for

services rendered by a mortgagee to a mortgagor notwithstanding that the payment of such price or moneys may be secured by a mortgage,

(d) in the case of a mortgage of leasehold premises or of licensed premises within the meaning of the *Liquor Act 2007*, from exercising any right, power, or remedy given to the mortgagee on the happening of any event whereby the lease may be forfeited or the licence endangered.

(2) Nothing contained in this section or in any enactment by this Act repealed shall preclude the mortgagee from entering into possession or taking proceedings to obtain possession or appointing a receiver of the mortgaged property in any of the following cases—

(a) where interest is or continues to be unpaid—

(i) in the case of a mortgage of land occupied by the mortgagor for any grazing, dairying, poultry farming, viticultural orcharding, beekeeping or horticultural purpose or for the growing of crops of any kind or for vegetable growing or for any purpose declared by the Governor to be an agricultural purpose for the purposes of the *Agricultural Lessees Relief Act 1931*—for a period of two years,

(ii) in the case of a mortgage of any other land occupied by the mortgagor as his home—for the period of two years,

(iii) in the case of any other mortgage to which this Act applies—for the period of two years

after the same becomes payable—

Provided that where the terms of the mortgage provide for the capitalisation of interest, the date at which by such terms a rest may be taken shall for the purposes of this paragraph be regarded as the date upon which the interest becomes payable,

Provided further that where on or after such date any unpaid interest has been or shall be capitalised in accordance with the terms of the mortgage, such interest shall not, for the purposes of this subsection, be, by reason of such capitalisation, deemed to have been or to be paid.

(b) where the mortgagor is or continues to be in default for a period of not less than two years under the provisions of any covenant or agreement in the mortgage expressed or implied for the payment of rates, taxes or other charges on or in respect of the mortgaged property,

(c) where the mortgagor is in default under the provisions of any covenant, agreement, or condition in the mortgage expressed or implied for the insurance, maintenance, or cultivation of the mortgaged property, or in the case of lands held

under the *Crown Land Consolidation Act 1913*, the *Returned Soldiers Settlement Act 1916*, or the Closer Settlement Acts, for the payment of moneys due to the Crown thereon, or for the doing of any act for the preservation of the security—

Provided, however, that if any suspension or deferment of any such payment shall have been made under the provisions of any of the aforesaid Acts, the mortgagor shall not, during the operation of any such suspension or deferment, be deemed to be in default in respect of such payment.

- (d) where the mortgagor has abandoned possession of the mortgaged property,
- (e) where a sequestration order has been or is made against the mortgagor,
- (f) where the mortgagor has executed or executes a deed of assignment or of arrangement under the provisions of any bankruptcy law for the time being in force,
- (g) where an order has been or is made, or a resolution has been or is passed, for the winding-up of the mortgagor being a company,
- (h) where the mortgagor being deceased and his estate insolvent, the same is being administered by or under the direction of any court,

but the court may, on the application of the mortgagor made within three months after the mortgagee has entered into possession or appointed a receiver, order the mortgagee to vacate possession or determine the appointment of the receiver either absolutely or on such terms or conditions as it thinks fit.

Unless the court otherwise orders no such order shall prevent the mortgagee from entering into possession or taking proceedings to obtain possession or appointing a receiver on the commission or omission by the mortgagor subsequently to the order of any act or thing entitling the mortgagee under the provisions of this subsection so to do.

(2A) Where the mortgagor has, by failing to make a payment of money, made default under the provisions of any covenant or agreement referred to in paragraph (b) or paragraph (c) of subsection two of this section he shall be deemed to continue to be in such default notwithstanding that the mortgagee has made the payment which the mortgagor has so failed to make.

(3)

- (a) The court shall not grant any application for leave to commence or continue proceedings for the recovery of the whole or any part of the principal sum secured by the mortgage, or for foreclosure, unless the court is satisfied that—
  - (i) after the commencement of the *Moratorium (Amendment) Act 1950*, the mortgagee has, with a view to discharging the mortgage (being a mortgage of

land), offered to take from the mortgagor or to arrange with some other person to take from the mortgagor a new mortgage (being a mortgage of land) over the mortgaged property on terms and conditions not less favourable to the mortgagor than the terms and conditions contained in the existing mortgage or where those terms and conditions have been affected by any of the provisions of subsection seven of section twenty-five of the *Moratorium Act 1930*, as amended by subsequent Acts, section thirty-four of this Act and the *Interest Reduction Act 1931*, as amended by subsequent Acts, not less favourable to the mortgagor than those terms and conditions as so affected, and the mortgagor has unreasonably refused to accept such offer, or

(ii) it would, having regard to all relevant circumstances, be unjust and inequitable not to grant the application.

(b) Any term or condition of a new mortgage referred to in subparagraph (i) of paragraph (a) of this subsection which would operate to exclude the provisions of this Part of this Act shall be disregarded in determining whether the terms and conditions of such new mortgage are not less favourable than those contained in the existing mortgage.

(c) The terms and conditions of a new mortgage referred to in subparagraph (i) of paragraph (a) of this subsection shall be deemed to be less favourable than the terms and conditions of the existing mortgage—

(i) if under such new mortgage an action, suit or proceeding for the payment by the mortgagor of any principal moneys secured by the new mortgage or interest thereon would lie at the instance of the mortgagee,

(ii) if such new mortgage fixes a date for payment of the principal sum secured by such mortgage or any part thereof earlier than five years from the date of execution of such mortgage.

For the purposes of this paragraph a mortgage shall be deemed to be one under which an action, suit or proceeding for the payment by the mortgagor of any principal moneys secured by the mortgage or interest thereon will lie at the instance of the mortgagee if—

(a) in any agreement supplementary to or collateral with such mortgage the mortgagor is under an obligation to the mortgagee for the payment of any such moneys or interest as aforesaid, or

(b) any bill of exchange or promissory note is to be given by the mortgagor to the mortgagee in connection with the mortgage transaction.

(4) In any case where, after the date fixed by the mortgage for repayment of the principal sum, the principal sum or any part thereof remains unpaid, and the mortgagor

satisfies the court that he is unable to redeem the property, or to repay a portion of the principal sum, as the case may be, the court shall not grant leave to take any proceedings to recover such principal sum or part thereof or for foreclosure unless the court is satisfied—

- (a) that, by reason of the wasting nature of the security, the continuance of the mortgage would seriously affect the security, or
- (b) that the conduct of the mortgagor has, in respect of the non-performance by him of any covenant expressed or implied in or by the mortgage, or in respect of any dealing with the mortgagee or the mortgaged property, been such as to render him undeserving of the benefit or protection of this Act, or
- (c) that by reason of any such non-performance great hardship will be inflicted on the mortgagee.

A mortgagor shall not be deemed unable to redeem the property, or to repay a portion of the principal sum, as the case may be, where the mortgagor has unreasonably refused to accept an offer by the mortgagee of the nature referred to in subsection three of this section.

- (4A) An order made by the court under subsection one of this section, giving a mortgagee leave to exercise all or any of his rights, powers or remedies against the mortgaged property, shall enure and shall be deemed always to have enured for the benefit of the assigns of the mortgagee, and shall not be and shall be deemed never to have been prejudiced or affected by any change occurring after the making of such order in the title to or ownership of the mortgaged property.
- (5) In any case where, after the date fixed by the mortgage for payment of the principal sum or any part thereof, the principal sum or part remains unpaid, the time for payment of the principal sum or part shall, unless and until an application for leave is dealt with by the court under this section, be by force of this Act extended to the prescribed date for repayment upon the terms that interest shall after the commencement of this Act continue to be payable at the close of the same intervals of time as are provided by the mortgage with respect to the interest thereby secured, or, if no provision is so made, then quarterly, and at the following rate—
  - (a) in the case of a mortgage the obligation to pay interest whereunder has been affected by the provisions of the [Interest Reduction Act 1931](#), as amended by subsequent Acts, at the rate provided in the mortgage as reduced by the provisions of section five and subsection one of section six of that Act, or if and so far as any order has been made under section seven of that Act, at the rate determined by such order,
  - (b) in the case of a mortgage the obligation to pay interest whereunder has not been affected by that Act, at the rate provided in the mortgage.



Provided that in any case the rate of interest payable shall not exceed seven per centum per annum, unless the court on the application of the mortgagee fixes a higher rate, but not exceeding the rate provided in the mortgage.

- (6) Where a mortgagee obtains a decree absolute or an order under the provisions of the *Real Property Act 1900*, for foreclosure and sells the foreclosed property within twelve months of the making of the decree or order for foreclosure, the mortgagor shall be entitled to recover in a court of competent jurisdiction the amount, if any, by which the net purchase money received by the mortgagee exceeds the amount of the moneys due to him under and by virtue of the mortgage after deducting therefrom all moneys reasonably spent by the mortgagee in improving the mortgaged property.

## **10 Remedy of mortgagee etc**

- (1) Where any mortgagor or puisne mortgagee has at any time since the nineteenth day of December, one thousand nine hundred and thirty, been or shall at any time after the commencement of this Act be in occupation of the mortgaged property or in receipt of the rents, profits or income thereof, and default has or shall have been made in the payment of interest under the mortgage, the court may on the application of the mortgagee order such mortgagor or puisne mortgagee to pay to the mortgagee the whole or such part as it thinks fit of the amount of interest due and unpaid.

Where the terms of a mortgage provide for the capitalisation of interest, the date at which by such terms a rest may be taken shall, for the purposes of this section, be regarded as the date upon which the interest is payable, and default shall be deemed to be made or to have been made in the payment thereof if such interest be not paid at such date notwithstanding any capitalisation thereof.

- (2) On any application under this section against a mortgagor or puisne mortgagee who has been in occupation of the mortgaged property, the court in determining whether it shall order the payment of any and if so what sum shall take into consideration the value to the mortgagor or puisne mortgagee of the occupation of the mortgaged property, the conduct of the mortgagor or puisne mortgagee in respect of any covenants, agreements, or conditions in the mortgage expressed or implied, and generally any other circumstances which the court deems relevant.
- (3) On any application under this section against a mortgagor or puisne mortgagee who has been in receipt of the rents, profits, or income of the mortgaged property, the court shall have regard to the sums, if any, paid by such mortgagor or puisne mortgagee for rates, taxes, insurance premiums and other charges and outgoings on or in relation to the mortgaged property during or in respect of the period for which he was or has been in receipt of the rents, profits, or income of the mortgaged property to the intent that such mortgagor or puisne mortgagee shall not, on such application, be ordered to pay a sum which with the sums already paid by him in respect of the

matters aforesaid will be in excess of the rents, profits and income received, or which, but for his wilful neglect and default might have been received by him during the period for which such interest was payable.

- (4) In the application of this section to contracts for the sale of land the court may order the payment of moneys on account of interest whether such interest be made payable expressly by the contract or by the operation of any rule of law or equity.
- (4A) On any application under this section the court may order the mortgagor, puisne mortgagee or purchaser, as the case may be, to file accounts, verified by affidavit, showing, for or in respect of the period specified in the order, the amounts of rents, profits or income received by him from the mortgaged or purchased property, and the sums paid by him for rates, taxes, insurance premiums and other charges and outgoings on or in relation to such property, and may order the person making such affidavit to attend before the court for cross-examination thereon.
- (5) Section twenty-six of the *Moratorium Act 1930-1931*, as amended by the [Moratorium and Interest Reduction \(Amendment\) Act 1931](#), shall be construed as if the words “damages for breach of the agreement or for any damages or expenses whatsoever incurred by the vendor in or about the agreement” did not include payments which the court may direct in pursuance of this section.
- (6) Such remedy shall be in addition to and not in substitution for any other remedy of the mortgagee for the recovery of interest.

#### **11 Instalments** (cf Act No 48, 1930, s 6)

- (1) Where by the terms of a mortgage or an agreement for the purchase and sale of land to which this Part of this Act applies, payment is provided by a series of regular instalments and the rate of interest is not fixed in the mortgage or agreement, 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 Part of this Act be deemed to include interest at such rate or to such amount as is assessed by the court.
- (2) On the application of any party to such mortgage or agreement the court may—
  - (a) determine how much of each such instalment consists of principal and how much of interest,
  - (b) determine the respective times at which the respective amounts payable for interest shall be payable.
- (3) Where the mortgage or agreement was entered into before the first day of October, one thousand nine hundred and thirty-one, the sums so determined by the court to be interest shall be subject to the provisions of the [Interest Reduction Act 1931](#), as amended by subsequent Acts.

- (4) This section shall not apply to any mortgage or agreement in respect of which a court has made an order under the provisions of section six of the *Moratorium Act 1930-1931*.

**12 Mortgages payable on demand** (cf Act No 48, 1930, s 7)

Where a mortgage for a specific amount provides for the payment of the principal sum on demand, and a demand had not at the commencement of the *Moratorium Act 1930*, been made, the principal sum shall for the purpose only of this Part of this Act be deemed to be payable immediately after the commencement of the first-mentioned Act.

**13 Mortgagees in possession** (cf Act No 48, 1930, s 8)

Notwithstanding anything contained in the preceding provisions of this Part of this Act, any mortgagee in possession, who entered into possession on or before the twenty-sixth day of November, one thousand nine hundred and thirty, may exercise all or any of his rights, powers, and remedies under the mortgage without leave of the court—

Provided that, on the application of the mortgagor made within three months after the commencement of this Act, the court may, if in all the circumstances it thinks it just and equitable so to do, forbid the mortgagee from exercising any power of sale or of foreclosure and may otherwise make such order as to the exercise by the mortgagee of such rights, powers, or remedies as it thinks fit, and the mortgagee shall comply with any such order.

**13A Further provisions as to mortgagee in possession**

- (1) Where a mortgagee under a mortgage of land to which the provisions of this Part of this Act apply has, either before or after the commencement of the *Moratorium (Amendment) Act 1936*, entered into possession of the mortgaged property or appointed a receiver thereof and has been paid or tendered by the mortgagor or any subsequent mortgagee, or has, out of the rents, profits or income of the mortgaged property, received an amount sufficient to discharge all interest due to him and to all prior mortgagees (if any) and all rates, taxes and other outgoings on or in respect of the mortgaged property properly paid by him, or, where a receiver has been appointed, such interest, rates, taxes and other outgoings have been discharged out of such rents, profits or income, the court may, on the application of the mortgagor or any subsequent mortgagee, order the mortgagee to deliver up possession to the applicant, or to determine the appointment of the receiver either absolutely or on such terms and conditions as it thinks fit.
- (2) A mortgagee in possession of land comprised in any mortgage to him shall, on request in writing made by any subsequent mortgagee and on tender of a reasonable sum for the expenses of preparing the account, give to such subsequent mortgagee an account in writing verified by statutory declaration showing all rents, profits and income received by him and all moneys appropriated or paid by him for interest, rates,

taxes or other outgoings on or in respect of the mortgaged property.

The court may, on the application of the person who requested the account, order the person who made the statutory declaration to attend before the court for cross-examination thereon.

- (3) If such mortgagee neglects or refuses, within a reasonable time to give such account, the court may, on the application of the person who has requested such account, order such mortgagee to give to the applicant, within a time to be fixed by the order, such account.
- (4) In this section **mortgagor** means the person entitled to the equity of redemption in the mortgaged land, or if the land comprised in the mortgage is under the provisions of the *Real Property Act 1900*, has the same meaning as in that Act.

### **13B Mortgagor's right to accounts**

- (1) Any mortgagee shall, on request in writing made by the mortgagor and on tender of a sum of two dollars ten cents for the expenses of preparing the account, give to such mortgagor in writing a full and itemised account as between the mortgagor and the mortgagee in respect of the mortgage. Such account shall be verified by statutory declaration and show the total balance claimed to be outstanding in respect of the mortgage.

The court may, on the application of the person who requested the account—

- (a) order the person who made the statutory declaration to attend before the court for cross-examination thereon,
  - (b) order the mortgagee to give a further and more detailed account.
- (2) If such mortgagee without reasonable cause, proof whereof shall lie upon him, neglects or refuses within twenty-one days of receipt of such request and of such tender to give such account he shall be guilty of an offence against this Act and shall be liable upon summary conviction to a penalty not exceeding two hundred dollars.
  - (3) Where a mortgagee is convicted of an offence under subsection two of this section, interest on the mortgage debt shall not accrue in respect of the period commencing on the expiration of twenty-one days after the receipt of such request and terminating upon the date the account is given.
  - (4) No conviction under subsection two of this section shall affect any remedy to which a mortgagor may be entitled at law or in equity under this Act or otherwise against the mortgagee.
  - (5) Where an account has been given pursuant to the provisions of this section, the mortgagor may cause a copy thereof to be filed in the office of the Master in Equity, and upon such copy being filed the Master shall fix an appointment for the taking

thereof. Upon proof of service of notice of such appointment upon the mortgagee the Master shall proceed, at the time fixed by the appointment, to take such account, and shall certify the respective items and amounts allowed. Any such certificate, as between the mortgagor and the mortgagee, shall be final and conclusive as to the amount of the mortgagor's indebtedness under the mortgage—

Provided that where the amount of total indebtedness so certified by the Master exceeds six thousand dollars, an appeal shall lie to the Supreme Court.

- (6) Where the amount of total indebtedness so certified is less than ninety-eight per centum of the amount of the total balance claimed to be outstanding by the mortgagee in his statement of account, the costs of all proceedings under subsection five of this section shall be paid by the mortgagee, and the mortgagee shall not be entitled to recover any such costs from the mortgagor or to add the amount thereof to the mortgage debt, notwithstanding any law or anything contained in any covenant or agreement in the mortgage to the contrary.
- (7) In this section **mortgagor** means the person entitled to the equity of redemption in the mortgaged land or if the land comprised in the mortgage is under the provisions of the [Real Property Act 1900](#), has the same meaning as in that Act.

**14 Consent by mortgagor to exercise of rights, powers, and remedies by mortgagee** (cf Act No 48, 1930, s 10)

- (1) Where a mortgagor is entitled to the benefit or protection of this Part of this Act, he may consent to the exercise by the mortgagee of all or any of his rights, powers, or remedies, but such consent shall not take away the necessity of the leave of the court, unless the consent is in writing and witnessed by one of the persons mentioned in section thirty-seven of this Act.
- (2) Any such consent may be given to a particular exercise of any right, power, or remedy or generally and whether or not any default has been made under the mortgage.
- (3) If consent is so given and witnessed, the leave of the court shall, so far as the consent extends, be unnecessary.
- (4)
  - (a) any consent given prior to the commencement of this Act by a mortgagor to the exercise by a mortgagee of all or any of his rights, powers or remedies if duly given in accordance with the provisions then in force of the [Moratorium Act 1930](#), or any Act amending the same,
  - (b) any order made by any court under the provisions of the said Act or Act amending the same granting leave to a mortgagee to exercise all or any of his rights, powers or remedies,

shall be as valid and effective as if such consent had been given or such order made in accordance with the provisions of this Act.

- (5) Where a mortgagor has, by instrument inter vivos, disposed of the whole of his estate or interest in any mortgaged property, the consent of such mortgagor shall not be necessary and shall be deemed never to have been necessary under this Act or under any Act repealed by this Act to enable the mortgagee to exercise, without the leave of the court, any of his rights, powers or remedies against that mortgaged property.
- (6)
- (a) In the case of a mortgage of land the consent of any person whose interest in the land was created by an instrument which is not at the time the right, power or remedy is exercised registered under either the *Registration of Deeds Act 1897*, or the *Real Property Act 1900*, shall not be necessary and shall be deemed never to have been necessary under this Act or under any Act repealed by this Act, to enable the mortgagee to exercise without the leave of the court all or any of his rights, powers or remedies against the land.
- (b) Paragraph (a) of this subsection shall not apply where the person whose interest is so unregistered is the original mortgagor or his personal representative or where such person is in possession of the land or where the mortgagee has express notice of the interest of such person.
- (7) Where a mortgagee exercises, without the leave of the court, any power of sale or foreclosure of the mortgaged property or of the land subject to the mortgage, as the case may be, the exercise of such power shall operate to discharge the liability under any covenant expressed or implied in the mortgage of any person whose consent would, but for subsection five or subsection six of this section, have been necessary to the exercise of such right, power or remedy and who has not in fact consented thereto.

#### **14A Further provisions as to consent**

Unless otherwise therein expressly provided and subject to any such provision a consent given by a mortgagor pursuant to the provisions of section six or of section fourteen of this Act or in accordance with the provisions of the *Moratorium Act 1930*, or any Act amending the same in force at the date of the consent—

- (a) shall be, and shall, from the commencement of this Act, be deemed always to have been irrevocable,
- (b) shall enure and be deemed always to have enured for the benefit of any person thereafter acquiring any interest in the mortgage,
- (c) shall, so far as it extends, be and be deemed always to have been sufficient for the purpose, without any further consent by any person thereafter acquiring any interest

in the mortgaged property, and

- (d) if given after the purported exercise by the mortgagee of any right, power or remedy to which such consent relates, shall be and be deemed always to have been as efficacious as if given before such exercise.

### **15 Penal rate of interest suspended**

During the operation of this Part of this Act, interest under the provisions of any mortgage executed before the commencement of this Act, shall not be chargeable or accrue against the mortgagor or the mortgaged property at a rate higher than the rate provided in the mortgage and (in cases where the obligations to pay interest has been reduced by or under the provisions of the [Interest Reduction Act 1931](#), as amended by a subsequent Act) as so reduced.

### **16 Extension of Act to agreements for sale and purchase of land, and to leases containing a purchasing clause** (cf Act No 48, 1930, s 11)

- (1) The provisions of Divisions 1 and 4 of this Part of this Act shall extend and apply, mutatis mutandis, to an agreement for the sale and purchase of land (including exchange) existing at the commencement of this Act, and to a lease of land containing a compulsory purchasing clause existing at such commencement.
- (2) The court, on application by the lessee, may determine that under the circumstances of the case some or all of the provisions of the said Divisions shall apply to a lease of land containing an optional purchasing clause existing at the commencement of this Act, and such provisions shall then so apply.
- (3) For the purposes of this Part of this Act an agreement for the sale and purchase of land and a lease of land containing a compulsory purchasing clause, respectively, shall be deemed to be a mortgage of such land by the purchaser to the vendor to secure payment of the unpaid purchase-money and interest thereon, and fulfilment of the conditions set forth in the agreement.
- (4) For the purposes of this Part of this Act a lease of land containing an optional purchasing clause shall on any application to the court under the provisions of this Part of this Act be dealt with by the court 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 were mortgagor of the land, and as if the rent reserved by the lease were interest and the agreed purchase-money were principal-moneys secured.

The term of the lease may, if necessary, be extended by the court for the purpose of giving effect to this provision.

- (5) Nothing in this section contained shall affect any reduction of rent made by or under the provisions of the [Reduction of Rents Act 1931](#).

- (6) Nothing in this section or section nine of this Act contained shall prevent the lessor or other the person entitled to the rent of the premises comprised in any such lease from suing for and recovering any rent payable thereunder.
- (7) In this section an agreement for the sale and purchase of land means in any case in which land is not the whole of the subject-matter of the sale an agreement in which the land comprised is, as at the date of the contract, at least one-half in value of the property the subject-matter of the sale.

## **17 Agreements for sale and purchase of land**

- (1) Notwithstanding anything contained in this Part of this Act if the purchaser of any land under an agreement for the sale and purchase of land existing at the commencement of this Act and to which this Part of this Act applies—
  - (a) is or becomes in default for a period of two years in payment of any rates and taxes or in payment to the vendor of any moneys (other than principal of the purchase money) due and payable by him under the agreement, or
  - (b) is or becomes in default under any provision in the agreement express or implied for the insurance, maintenance or cultivation of the land the subject of the agreement, or the payment of charges thereon, including in the case of land held under the *Crown Lands Consolidation Act 1913*, the *Returned Soldiers Settlement Act 1916*, or the Closer Settlement Acts, the payments due to the Crown thereon or the doing of any act for the preservation of the said land,

the vendor may serve by registered post on the purchaser (and in any case in which the vendor has notice of an assignment of the whole or any part of the purchaser's interest in the agreement on the assignee) addressed to his last-known place of address a notice intimating that he proposes after the expiration of a period of one month from the date when, in the ordinary course of post, the notice should be delivered to the purchaser or assignee, to exercise any or all of his rights under the agreement—

Provided, however, that if any suspension or deferment of any such payment shall have been made under the provisions of any of the aforesaid Acts, the purchaser shall not during the operation of any such suspension or deferment be deemed to be in default in respect of such payment.

- (2) After the expiration of the period of one month specified in subsection one of this section the vendor may, unless the court upon application made by the purchaser or assignee within the period so specified otherwise directs, exercise any or all of his rights under the agreement as if the provisions of this Part of this Act had not been extended and applied to the agreement.

Upon application being made under this subsection, the vendor shall not be entitled to exercise any of his rights under the agreement until such application has been heard



and a decision given thereon.

- (3) In this section the word **vendor** includes the vendor, his executors, administrators, and assigns, and the word **purchaser** includes his executors or administrators.

### **18 Prescribed date for repayment**

- (1) Where by the terms of a mortgage to which this Part of this Act applies, the date fixed by the mortgage for payment of the principal sum secured is a date in the year one thousand nine hundred and fifty-two, such date shall be the prescribed date for repayment.
- (2) Where by the terms of a mortgage to which this Part of this Act applies, the date fixed by the mortgage for payment of the principal sum secured is a specified day of any month in a year earlier than the year one thousand nine hundred and fifty-two, the prescribed date for repayment shall be the day of the month in the year one thousand nine hundred and fifty-two which corresponds to the specified day in such earlier year.
- (3) The prescribed date for repayment of the principal sum secured by a mortgage to which this Part of this Act applies shall, if the principal sum—
- (a) is payable on demand, or
  - (b) is by virtue of section twelve of this Act deemed to be payable immediately after the commencement of the *Moratorium Act 1930*,
- by the twenty-eighth day of February, one thousand nine hundred and fifty-two.
- (4) Where by the terms of a mortgage to which this Part of this Act applies the principal sum secured by the mortgage is payable only upon notice, notice in accordance with the mortgage may be given by the mortgagee at any time after the twenty-eighth day of February, one thousand nine hundred and fifty-two, and the date specified in that notice as the date fixed for payment shall for the purposes of this Part of this Act be deemed to be the prescribed date for repayment.
- (5) Until the prescribed date for repayment, the rate of interest, and the intervals of time at which it is payable, shall be such rate and intervals as are prescribed by or fixed under this Part of this Act.
- (6) In the case of a mortgage to which this Part of this Act applies and which provides for payment by instalments, the prescribed date for repayment of such part of any instalment as consists of principal, which would, apart from such Part have been due and payable on or before the twenty-eighth day of February, one thousand nine hundred and fifty-two, shall be determined in the same manner as if that instalment were the principal sum secured by a mortgage to which this Part of this Act applies; but nothing in such Part shall affect the date for payment of any instalment due and payable after the twenty-eighth day of February, one thousand nine hundred and fifty-

two.

- (7) Any party to such mortgage may apply to the court to determine how much of each such instalment is principal and how much interest, and the court shall so determine.
- (8) Upon or after the prescribed date for repayment the mortgagee may exercise all his powers under the mortgage without leave of the court.
- (9) Nothing in this section shall abridge the time which is ordered or allowed by any court, in pursuance of this Part of this Act, for payment of the principal sum secured by a mortgage.
- (10) This section shall not apply to any lease of land containing an optional purchasing clause.

**19 Power to extend date for payment in cases of hardship** (cf Act No 48, 1930, s 17)

- (1) Notwithstanding anything contained in section eighteen of this Act, the court may, upon the application of the mortgagor made before the prescribed date for repayment, make an order on such terms and conditions (if any) as the court thinks fit, extending the date for payment, and may fix the intervals of time and rate at which interest is payable during such extended period.
- (2) Upon any application under subsection one of this section the court shall take into consideration in addition to all other relevant matters—
  - (a) any hardship which would be caused to the mortgagor by being obliged to pay the principal sum by the prescribed date for repayment,
  - (b) the conduct of the mortgagor in respect of dealings with the mortgagee,
  - (c) any hardship which would be caused to the mortgagee by the making of an order.
- (2A) Notwithstanding anything contained in subsection two of this section, an application made by a mortgagor under subsection one of this section for an order extending the date for payment to a date not later than the thirty-first day of December, one thousand nine hundred and fifty-three, shall not be refused if the court is satisfied—
  - (a) that the mortgagor, by reason of floods during the years one thousand nine hundred and forty-nine and one thousand nine hundred and fifty, sustained losses which, by reference to the amount of the principal sum of the mortgage, were substantial, and
  - (b) that the conduct of the mortgagor in respect of dealings with the mortgagee has not been such as to render him undeserving of the benefit and protection of this section.
- (3) No purchaser or other person dealing in good faith with any property affected by the

order shall be affected thereby unless the order is registered in the office of the Registrar-General in the manner prescribed by regulations under the *Conveyancing Act 1919-1930*.

**20 Mortgagee not entitled to notice where mortgagor pays within time allowed** (cf Act No 48, 1930, ss 18, 18A)

Where the principal sum secured by a mortgage is paid after the date for payment fixed by the mortgage, but upon or before the prescribed date for repayment, or where the court in pursuance of section nineteen has extended the date for payment, upon or before such extended date, the mortgagee shall not be entitled to receive any payment by way of interest in lieu of notice.

**21 Leases of land containing an option to purchase** (cf Act No 48, 1930, s 19)

In the case of a lease of land in force at the commencement of this Act—

- (a) which contains an optional purchasing clause by the terms of which the last date for exercise of the option is a date not later than the thirty-first day of December, one thousand nine hundred and thirty-two, and
- (b) which has been dealt with by the court under this Act or any enactment hereby repealed as if the lessee had already notified his exercise of the option, and
- (c) in respect of which the lessee has not in fact notified, prior to the commencement of this Act, his exercise of the option,

the lessee may, notwithstanding anything contained in the lease, notify at any time during the currency of the lease and up till the thirty-first day of December, one thousand nine hundred and thirty-two, his exercise of the option—

Provided that where, by the terms of any such lease, the date of the expiry of the lease is a date after the nineteenth day of December, one thousand nine hundred and thirty, and on or before the thirty-first day of December, one thousand nine hundred and thirty-two, the lessee may before the date of expiry of the lease, notify the lessor that it is probable that he will, on or before a date specified by him, not being later than the said thirty-first day of December, notify his exercise of the option, and if the lessee so notifies the lessor the term of the lease shall, by force of this Act, be extended until the date specified by the lessee—

Provided further that, where the term of a lease is so extended, the extension shall be at the same rent, or if such rent has been reduced by or under the provisions of the [Reduction of Rents Act 1931](#), at such rent and upon the same terms and conditions as those prevailing immediately before the date upon which, but for this Part of this Act, the lease would have expired.

## **22 Power to postpone sales of land for rates by the NSW Trustee and Guardian**

- (1) Where the council of any municipality or shire applies or has applied to the NSW Trustee and Guardian to sell land, the NSW Trustee and Guardian shall in the prescribed manner notify all persons interested in such land.
- (2) Any such person may apply to the court for an order under this section.
- (3) In dealing with any application under this section the court shall consider—
  - (a) whether the owner of the land or the person liable to pay the rates is able to pay the same,
  - (b) whether the conduct of such owner or person has been such as to entitle him to the benefit of an order,
  - (c) whether the default in payment has been caused or contributed to by economic or financial conditions affecting trade or industry in the State,
  - (d) whether the granting of the application would be reasonably likely to enable the applicant, having regard to his circumstances and the economic and financial conditions aforesaid, to meet his obligations within a reasonable time.
- (4) On any such application the court may by order postpone the sale of such land.
- (5) The court may at any time on the application of such person or of the council, or of the NSW Trustee and Guardian, by order vary or rescind any order made under this section.
- (6) In this section **court** means a judge of the Supreme Court or the District Court.

## **23 Power to defer making of order to realise charge of rates**

- (1) When the council of any municipality or shire institutes proceedings for the recovery of rates by suit in equity for the enforcement of the charge for rates on land, any person interested in such land may apply by motion in the suit for an order staying proceedings in the suit.
- (2) The provisions of subsection three of section twenty-two of this Act shall apply, mutatis mutandis, to and in respect of any application made under this section.
- (3) On any such application the court may make an order staying either generally or for a time specified in the order and on such terms and conditions as it thinks fit proceedings in the suit.
- (4) The provisions of subsection five of section twenty-two of this Act shall apply, mutatis mutandis, to and in respect of any order made under this section.
- (5) This section applies to proceedings instituted before as well as to proceedings

instituted after the commencement of this Act.

### **23A Council not to bring suit for charging order in certain events**

No suit shall be brought by the council of any municipality or shire to enforce the charge for rates on land whilst such land is subject to any mortgage registered under either the *Registration of Deeds Act 1897*, or the *Real Property Act 1900*, to which the provisions of this Part of this Act apply, unless the mortgagee under such mortgage is in possession of the mortgaged land or he or any receiver appointed by him is in receipt of the rents and profits thereof.

## **Division 2 Hire-purchase agreements**

### **24 Definitions** (cf Act No 48, 1930, s 20 (8))

In this Division—

**Hirer** means a purchaser or lessee of goods under a hire-purchase agreement, whether such purchaser or lessee is described as hirer, purchaser, lessee, or otherwise; and includes any person deriving title under or through a hirer.

**Vendor** means a person who has disposed of goods under a hire-purchase agreement whether such person is described as vendor, owner, lessor, or otherwise; and except in subsection three of section twenty-seven includes any person deriving title under or through a vendor to his interest in such goods.

### **25 Application of Division** (cf Act No 48, 1930, s 20)

- (1) This Division of this Part of this Act shall apply to all hire-purchase agreements made or executed prior to the commencement of this Act whether or not any option to purchase expressed in the agreement has subsequently to such making or execution expired or been determined and whether or not the term fixed therein for the hiring has expired, if in any such case the goods the subject of such agreement are in the possession of the hirer, except—
  - (a) any hire-purchase agreement made after the nineteenth day of December, one thousand nine hundred and thirty, but prior to the second day of October, one thousand nine hundred and thirty-one, which contains a covenant or condition expressly excluding the provisions of the *Moratorium Act 1930*, and such covenant or condition has not been declared void in pursuance of the provisions of subsection three of section thirteen of the *Moratorium Act 1930-1931*,
  - (b) any hire-purchase agreement made on or after the second day of October, one thousand nine hundred and thirty-one, which contains a covenant or condition expressly excluding the provisions of the *Moratorium Act 1930-1931*, and is witnessed and certified in the manner required by section ten of the said Act.
- (2) This Division of this Part of this Act shall not apply to any hire-purchase agreement

made or executed after the commencement of this Act.

**26 Restriction on rights of vendors** (cf Act No 48, 1930, s 20)

- (1) A vendor shall not, without leave of the court—
  - (a) call up or demand payment for the hirer of any sum due under a hire-purchase agreement,
  - (b) commence any action or proceeding for the breach of any covenant or condition expressed or implied in any hire-purchase agreement,
  - (c) take any steps for obtaining possession of the goods the subject of a hire-purchase agreement.
- (2) Nothing in this section shall preclude the person to whom an instalment is, by the terms of a hire-purchase agreement, due, from taking action to recover the same in any court of competent jurisdiction, but the defendant in any such action may file a defence relying on this Act, and such court shall in such action in addition to any other defence set up consider the claim of the defendant for relief, and may grant such relief under the provisions of this Act as appear to such court just and equitable, and in granting such relief the court shall in such action take into account the conduct of both parties to the transaction.
- (3) Notwithstanding the provisions of this section where the terms of any hire-purchase agreement provided that the goods the subject-matter of the agreement shall not without the consent of the vendor be removed from the premises where such goods are kept or to which they have with the consent of the vendor been removed, and such goods have before or after the commencement of this Act been removed from such premises without the consent of the vendor, then and in any such case the vendor may without leave of the court repossess such goods and exercise all or any of his rights, powers, and remedies under the hire-purchase agreement—

Provided nevertheless that the hirer may within one month after such repossession apply to the court for an order that the goods be returned to him, and the court may in its discretion and having regard to all the circumstances of the case order such return upon such terms and conditions as it thinks fit.

**27 Readjustment by court** (cf Act No 48, 1930, s 20)

- (1) The court at any time, on the application of any party to a hire-purchase agreement, may readjust the amount of the instalments, and may at the same or any other time postpone the payment of all or any instalments in such manner and for such time as the court thinks just, due regard being had to the rights and interests of both parties to the agreement, to the conduct of the hirer, and to all the circumstances of the case.

In any such readjustment the court may direct interest upon any postponed

instalment at such reasonable rate as it may fix to be paid to the vendor.

In any proceeding to recover an instalment the court may exercise the powers conferred by this subsection.

- (2) This section and section twenty-six of this Act shall extend to all instalments the payment of which is provided for by a hire-purchase agreement, whether such agreement described such instalments as rent or hire or otherwise, and whether or not the hirer is in default at the date of the application or proceedings.
- (3) Where a vendor has, since the first day of June, one thousand nine hundred and thirty-two, and before the commencement of this Act retaken possession of any goods which were, on the said first day of June, in the possession of the hirer, and were at or prior to that day the subject of a hire-purchase agreement other than one of those referred to in paragraphs (a) and (b) of subsection one of section twenty-five, then in any such case, upon the application of the hirer made within one month from the commencement of this Act, the court may if the goods are then in the possession or within the control of the vendor, and if in all the circumstances it thinks it desirable so to do, order that such goods be returned to the hirer upon such terms and conditions (including conditions as to the payment of costs) as the court thinks fit.

Where the goods are not, at the date of any application under this subsection, in the possession or within the control of the vendor, the court may make such order as to payment of compensation by the vendor to the hirer as to it seems fit.

## **Division 3 Judgment debts**

### **28 Relief of judgment debtors** (cf Act No 48, 1930, s 14)

- (1) Where the Supreme Court or any other court has given judgment or made an order for the payment by any person to any other person of a sum of money, and such court is satisfied that immediate payment of the whole or part of the money would inflict great hardship on the person adjudged or ordered to pay the money by reason of the operation of this Act or any enactment repealed by this Act upon his property or investments, or upon the realization thereof, or by reason of any other cause whatsoever which such court in the circumstances of the case deems sufficient, such court may, at the time of the entry of judgment or the making of the order or subsequently thereto, upon the application of the person adjudged or ordered to pay the money, in its discretion, if in all the circumstances it thinks it desirable so to do, order that the payment of the whole or part of the sum of money in question shall be deferred until such time and upon such conditions as such court thinks fit.

A default judgment shall be deemed to be an order of the court.

- (2) An order may be made under this section in respect of judgments or orders for the payment of money given or made by any court before the commencement of this Act

as well as in respect of judgments or orders given or made after the commencement of this Act.

In any case where after the commencement of this Act proceedings are instituted against a person in any court for debt or damages or for an order for the payment of money, such person may at any time after the writ, summons, or other originating process has been served on him make an application under this section, and such application shall take effect as from the date of any judgment or order that may be made in the proceedings against him. No such application shall be taken or construed as an admission of liability by such person.

- (3) An application under this section shall operate as a stay of proceedings upon the judgment until the hearing of the application.
- (4) The court may rescind or vary any decision or order previously made by it.
- (5) (Repealed)

## **Division 4 Jurisdiction and procedure**

### **29 Court**

- (1) The courts having jurisdiction under Divisions 1 and 2 of this Part of this Act shall be—
  - (a) in any application in respect of licensed premises within the meaning of the *Liquor Act 1912*, the Licences Reduction Board constituted under the *Liquor (Amendment) Act 1919*, or where the amount of the principal sum owing on the security thereof is under two thousand dollars, a member of that board,
  - (b) in any application in respect of a mortgage (other than a mortgage of licensed premises) in which the principal sum owing on the security thereof is six thousand dollars or over, the Supreme Court,
  - (c) in any application in respect of mortgages other than those specified in paragraphs (a) and (b) of this section and in respect of all hire-purchase agreements, the District Court or the Local Court.
- (2) If on any application to a court under this Part of this Act an objection is taken to the jurisdiction of the court based on the amount of the principal sum owing on the mortgage, the court shall determine the objection summarily, and no order made by the court shall be challenged for defect of jurisdiction based on such objection, but the decision of the court as to such amount shall not operate as an estoppel between the parties or their privies in any subsequent proceedings.

### **30 Jurisdiction of court—how exercised** (cf Act No 48, 1930, s 9)

- (1) The jurisdiction conferred on a court by this Part of this Act may be exercised by a judge of the court sitting either in court (including in the absence of the public), or in



the case of the Local Court, by a Magistrate.

- (2) Any application to the Supreme Court or the District Court under this Part of this Act may be made on motion or summons in accordance with the rules of court respectively applicable to motions or summonses in such courts.
- (3) Any court hearing any application under this Part of this Act may order notice to be given to such persons as it thinks fit, or such court may, under such circumstances as it thinks fit, hear any application *ex parte*, or order substituted service of notice of the application on, or dispense with notice to, such persons affected by the application as it thinks fit.
- (4) In dealing with an application under this Part of this Act the court may—
  - (a) grant or adjourn the application upon such terms and conditions (if any) as the court thinks fit, or
  - (b) refuse the application, or
  - (c) at any stage of the hearing allow such amendments of the application or other process as it thinks fit.
- (5)
  - (a) Any court hearing any application under this Part of this Act may in its discretion direct that the application be heard *in camera* and shall so direct if so requested at any stage of the proceedings by all parties appearing. Such a direction shall not preclude a barrister or solicitor from being present at the proceedings for the purpose of reporting the case for the New South Wales State Reports or Weekly Notes.
  - (b) No report of the proceedings heard *in camera* shall be published which discloses the names or identity of any of the parties to any application under this Part of this Act. Any publication in contravention of the foregoing provision shall be punishable as contempt of the Supreme Court.
- (6) (Repealed)
- (7) Any determination, decision, judgment, direction, order, or assessment made or given by any court in any matter arising under this Part of this Act shall be final and conclusive and without appeal, but the District Court and the Local Court shall be bound by and follow decisions of the Supreme Court or a judge thereof on the construction of this Act.
- (8) The court may reconsider any matter which has been dealt with by it, or rescind, or vary any decision or order previously made by it.
- (9) The costs of any party to an application under this Part of this Act to the court shall,

unless the court otherwise orders, be borne by such party.

Where the court makes any order as to costs, the costs covered by such order shall be borne by the party by whom such costs are ordered to be paid.

Where the court makes any order allowing any costs to any party the court may if it thinks fit assess the amount thereof.

The provisions of this subsection shall have effect notwithstanding any law, or any covenant or agreement in the mortgage, to the contrary.

### **31 Enforcement of orders**

- (1) On any application by a mortgagee under this Part of this Act for leave to enter into possession of the mortgaged property the court may, if the mortgagor be in actual possession of the mortgaged property, order the mortgagor to deliver up possession of the same.
- (2) If such order be made by the Supreme Court the mortgagee shall, if the mortgagor refuses or neglects after due service of such order to obey the same, be entitled without any further order to a writ of assistance or habere facias.
- (3) If such order be made by any court other than the Supreme Court, and the mortgagor after due service of such order refuses or neglects to obey the same, the mortgagee may file in the office of the Master in Equity a copy of such order certified by the proper officer of the court making the order, and shall thereupon without any further order be entitled to a writ of assistance or habere facias.
- (4) Any order for the payment of money or of costs made by the Local Court or by the Licences Reduction Board or a member thereof under this Act shall operate as an order for the payment of money under the [Civil Procedure Act 2005](#), and be enforceable as such under the provisions of that Act.
- (5) Without limiting the interpretation of "mortgagor" in section two that word shall in this section include any puisne mortgagee.

### **32 Registration of orders**

- (1) Any order made on any application under the provisions of Division 1 of this Part of this Act may be registered in the office of the Registrar-General in the manner prescribed by regulations under the *Conveyancing Act 1919-1930*.
- (2) No such order shall as against a purchaser be invalidated on the ground of want of jurisdiction or want of any party, concurrence, consent, notice, or service, whether the purchaser has notice of any such want or not.

## Part 3 Liability of mortgagors of land

### 33 Definitions

In this Part, unless the context or subject-matter otherwise indicates or requires—

**Moratorium Act** means the *Moratorium Act 1930*, as amended by subsequent Acts.

**Mortgagor** does not include a person who has guaranteed the payment of money notwithstanding that the payment of such money or the performance of such guarantee is secured by a mortgage of land.

**Principal moneys secured by a mortgage of land** include moneys paid by a puisne to a prior mortgagee for interest on his mortgage or to redeem or procure a transfer of such mortgage but do not include moneys paid or expended by a mortgagee in payment of rates, taxes, or insurance premiums, or for the protection, preservation, or otherwise for the benefit of the mortgaged property, or moneys due by a mortgagor to a mortgagee for goods supplied or for services rendered, notwithstanding that under the provisions of the mortgage or otherwise the mortgagee may or does add the moneys so paid, expended, or due to the principal sum secured by the mortgage.

### 34 Restriction on rights of mortgagee

- (1) Except as in this Part provided no action, suit or proceeding shall be commenced or continued by a mortgagee for the payment by a mortgagor of any moneys secured by a mortgage of land executed or given before the commencement of this Act, or interest thereon, unless the mortgagor, his attorney or agent, or some other person having power in that behalf has, after the commencement of this Act, by instrument under his hand, confirmed any covenant or agreement in the mortgage expressed or implied for such payment, and unless the knowledge and approval of the mortgagor, his attorney or agent, or other person, as the case may be, of the confirmation of such covenant or agreement, is evidenced by a certificate signed in accordance with subsection three of this section.

In the case of a memorandum of mortgage or encumbrance under the provisions of the *Real Property Act 1900*, such instrument and certificate shall be presented to the Registrar-General in duplicate for registration, and the Registrar-General may register the same.

In the case of a mortgage or charge under the provisions of the *Companies (Registration of Securities) Act 1918*, such instrument and certificate or verified copy thereof shall, within thirty days after the execution of such instrument, or, if such instrument be executed out of New South Wales, within thirty days after the date on which such instrument or copy would in due course of post, if despatched with due diligence, have been received in New South Wales, be delivered to the Registrar of Joint Stock Companies, and on receipt thereof the Registrar shall enter particulars

thereof in the register of mortgages and charges of the mortgagor company kept by him in pursuance of the said Act.

(2) Except as in this Part provided no action, suit or proceeding shall be commenced by a mortgagee for the payment by a mortgagor of any principal moneys secured by a mortgage of land executed or given after the commencement of this Act, or interest thereon, unless such mortgage contains an express covenant or agreement for such payment and unless the knowledge and approval of the mortgagor, his attorney or agent, or some other person having power in that behalf, executing or giving the mortgage, of the insertion of such covenant or agreement, is evidenced by a certificate signed in accordance with subsection three of this section.

(3) Such certificate shall be written or endorsed on the instrument of confirmation or mortgage instrument, as the case may be, and shall be in or to the effect of such of the forms in the Schedule to this Act as may be appropriate, and shall be signed by one of the persons mentioned in section thirty-seven of this Act—

Provided that in any case in which a series of debentures contain a charge over any land of a corporation and there is no trust deed, or other instrument mortgaging or charging such land to secure such debentures, the certificate referred to in subsection two of this section shall be endorsed on one of the debentures of the series or a verified copy thereof, and—

(a) if the corporation be a company formed or registered under the provisions of Part 1 of the *Companies Act 1899*, shall be delivered to the Registrar of Joint Stock Companies with the documents required to be filed with or delivered to the said Registrar for registration of the debentures under the provisions of the *Companies (Registration of Securities) Act 1918*, and the said Registrar shall include particulars of such certificate in the particulars of the charge entered by him in the appropriate register kept by him in pursuance of the said Act,

(b) in any other case shall be registered under the provisions of the *Registration of Deeds Act 1897*.

(4) Any covenant or agreement so confirmed and evidenced as in subsection three of this section provided shall be as valid and effectual as if subsection seven of section twenty-five of the Moratorium Act had not been enacted.

(5) Nothing in this section contained shall in any way affect—

(a) any of the rights, powers, or remedies of the mortgagee to, over, or against the mortgaged property,

(b) any of the rights, powers, or remedies of a mortgagee upon any security for the payment of money other than a mortgage of land and whether collateral thereto or not, and whether such security gives a charge over property or not.

- (6) Nothing in this section or in section twenty-five of the Moratorium Act contained shall in any way affect—
- (a) the remedy given to a mortgagee by section ten of this Act,
  - (b) any of the rights or remedies of a holder in due course of any bill of exchange, promissory note, cheque, or other negotiable instrument against any person liable thereunder,
  - (c) any of the rights of action or other remedies of a mortgagee against a mortgagor to recover advances made or the amount of credits provided or given after the commencement of this Act in the case of a mortgage executed before the commencement of this Act whereby further advances or further credits are secured.
- (7) Nothing in this section or in section twenty-five of the Moratorium Act contained shall be construed so as to affect any right, power, or remedy of the mortgagee for the recovery of any moneys secured by a mortgage of land and interest thereon in the event of—
- (a) a sequestration order being made against the mortgagor whether such order be made before or after the commencement of this Act, or
  - (b) the mortgagor executing a deed of assignment or of arrangement under the provisions of any bankruptcy law for the time being in force whether such deed be executed before or after the commencement of this Act, or
  - (c) an order being made or resolution passed for the winding-up of the mortgagor being a company whether such order or resolution be made or passed before or after the commencement of this Act, or
  - (d) the estate of a deceased mortgagor being insolvent and being administered by or under the direction of any court whether the decree or order for such administration be made before or after the commencement of this Act.
- (8) A creditor whose proof of debt has, before the commencement of the *Moratorium (Amendment) Act 1936*, been rejected on the ground that the provisions of subsection seven of this section did not extend to the winding-up of a company or the administration of the estate of a deceased mortgagor pursuant to an order or decree made or resolution passed before the commencement of this Act, or to the administration of the estate of a mortgagor against whom a sequestration order has, before such commencement, been made, or who has, before such commencement, executed a deed of assignment or of arrangement, and whose proof of debt is after the commencement of the *Moratorium (Amendment) Act 1936*, admitted, shall be entitled to be paid, out of any money available for dividend, any dividends he has failed to receive, before that money is applied to the payment of any future dividend;

but he shall not be entitled to disturb the distribution of any dividend declared before his debt is proved after the commencement of the *Moratorium (Amendment) Act 1936*, by reason that he has not participated therein.

#### **34A Mortgage of land excluding personal covenant to be trustee investment**

A mortgage of land in New South Wales shall be deemed an investment authorised by the *Trustee Act 1925-1942*, notwithstanding the fact that no action, suit or proceeding for the payment by the mortgagor of any principal moneys secured by the mortgage or interest thereon will lie at the instance of the mortgagee upon any covenant or agreement for such payment contained in the mortgage.

#### **34B Covenants or agreements as to payment by mortgagor of Commonwealth Land Tax**

Where under any covenant or agreement in any mortgage executed before or after the commencement of the *Moratorium (Amendment) Act 1950*, the mortgagor is under a liability to pay or indemnify the mortgagee against the payment of any tax levied upon the mortgagee in respect of the mortgaged property under the *Land Tax Assessment Act 1910-1947* of the Parliament of the Commonwealth of Australia, such covenant or agreement shall, except as to the amount of tax which would have been levied upon the mortgagee had the land the subject of the mortgage been the only land in respect of which the mortgagee was liable for any such tax, be absolutely void.

This section shall apply only to any such tax as is levied in respect of any period subsequent to the thirtieth day of June, one thousand nine hundred and fifty.

#### **35 Construction of Moratorium Act 1930-1931**

- (1) Subsection seven of section twenty-five of the Moratorium Act shall be construed as if—
  - (a) the word “mortgagor” in the said subsection did not include—
    - (i) a person who has guaranteed the payment of any money notwithstanding that the payment of such money or the performance of such guarantee is secured by a mortgage as defined by the said Act, and
    - (ii) a lessee under a lease containing an optional or compulsory purchasing clause, and
  - (b) the words “the mortgaged property” in the said subsection meant any property real or personal held by or given to the mortgagee whether from or by the mortgagor or any other person as security for the moneys secured by the mortgage, and
  - (c) the expression “mortgage of real property” meant the same as “mortgage of land” in this Part of this Act.

- (2) Subsection six of the said section of the Moratorium Act shall be construed as if the words “a contract of sale of real property” meant in any case in which land is not the whole of the subject-matter of the sale, a contract in which the land comprised is as at the date of the contract at least one-half in value of the property the subject-matter of the sale.
- (3) Nothing in the said section of the Moratorium Act or in this Part of this Act contained shall be construed so as in any way to impair the rights, powers, or remedies of a mortgagee against a person who has guaranteed the payment of money notwithstanding that the payment of such money or the performance of such guarantee is secured by a mortgage of land.
- (4) Nothing in the said section of the Moratorium Act contained shall be construed so as to affect the right of a purchaser under a contract for the sale and purchase of land, whether alone or together with other property, his executors, administrators, or assigns, to sue the vendor, his executors, administrators, or assigns, for the specific performance of such contract or for the repayment of any deposit or instalments of purchase-money paid by him or them under such contract.

### **36 Trustees protection**

- (1) A trustee, who holds any property being the whole or part of the estate of the deceased person or the whole or part of the estate subject to the trust as the case may be, all or any or which is subject to a mortgage of real property or to a mortgage of land as the case may be, shall not be deemed guilty of any breach of trust or breach of duty by reason only of his paying or repaying out of such property any principal moneys, or interest secured by the mortgage, where such payment or repayment would not have been improper if this Act, or the Moratorium Act, had not been enacted.
- (2) If any mortgagee is a trustee, such mortgagee shall not be deemed guilty of any breach of trust by reason only of his agreeing with a mortgagor to a reduction of the rate of interest payable under any mortgage forming part of the trust estate.
- (3) If any mortgagee is a trustee such mortgagee shall not be deemed guilty of any breach of trust by reason only of his agreeing with a mortgagor for the extension or renewal of a mortgage existing at the date of commencement of this Act although at the time of such renewal the loan by reason of depreciation in value of the property subject to such mortgage may exceed two-thirds of the value of such property.
- (4) In this section **trustee** includes personal representative of a deceased person, committee of the estate of an insane person, manager of the estate of an incapable person, the Master in Lunacy, the Master in Equity, and any other person acting in any fiduciary capacity.
- (5) Nothing in this Act shall be so construed as to render a trustee liable as for breach of

trust or breach of duty where the act or agreement complained of though done or made before the commencement of this Act would not render a trustee so liable if done or made after such commencement or submit him to any liability for any act done by him prior to such commencement where such act was then lawful.

## **Part 4 Miscellaneous**

### **37 Authentication of consents etc** (cf Act No 48, 1930, s 10)

- (1) Any consent, knowledge, approval, or any other matter or thing required by this Act to be witnessed or certified may be so witnessed or certified by any of the following persons—
  - (a) where the mortgage, memorandum, or other instrument is executed in New South Wales by a commissioner for affidavits, registrar of the Local Court, or solicitor or conveyancer who is not the solicitor or conveyancer for the mortgagee, and if the knowledge and approval required to be witnessed are those which are so required by subsection two of section thirty-four of this Act, by any of the persons abovementioned or when the mortgage, memorandum or other instrument is executed in New South Wales, but outside the counties of Cumberland and Northumberland, by a justice of the peace,
  - (b) where the mortgage, memorandum, or other instrument is executed outside New South Wales, by any of the persons respectively mentioned in subsection one of section one hundred and sixty-eight of the *Conveyancing Act 1919-1930*, or any person appointed by the Chief Justice thereunder.
- (2) Where any such consent, knowledge, or approval has been so witnessed or certified, such attestation or certificate shall be conclusive evidence of such consent, knowledge or approval.

### **38 Protection of trustees in respect of consents**

A personal representative of a deceased person, or a trustee, shall not be deemed guilty of any breach of trust or breach of duty by reason only of the fact that—

- (a) he gives any consent under section six or section fourteen of this Act,
- (b) he has given any consent under section ten of the *Moratorium Act 1930*, or under that section as amended by the *Moratorium (Amendment) Act 1931*.

### **39 Power of trustees, attorneys & c to exclude Act and to confirm or execute covenants**

- (1) Any corporation or any personal representative of a deceased person, or any trustee, attorney, or agent having power to execute a mortgage shall have and be deemed always to have had power—
  - (a) to include in such mortgage a condition or covenant expressly excluding the



provisions of this Act or of any enactment repealed by this Act,

- (b) to confirm any covenant or agreement express or implied for the payment or repayment of principal moneys or interest contained in a mortgage of land executed or given before the commencement of this Act,
- (c) to include in any mortgage of land executed or given after the commencement of this Act an express covenant or condition for the payment or repayment of principal moneys or interest,
- (d) to compound or settle and pay the amount to be paid on any contract of guarantee which is affected by this Act or by any enactment repealed by this Act and which was entered into by the corporation or by his testator settler or intestate principal.

(2) This section shall apply only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust or conferring the power, and shall take effect subject to the terms of that instrument and to the provisions therein contained.

#### **40 Rights of mortgagee in respect of set-off and cross-action**

Nothing in Part 2 or Part 3 of this Act or in the *Moratorium Act 1930*, as amended by subsequent Acts, shall prevent any mortgagee who is sued by a mortgagor from pleading or setting up in any such action or suit by any plea of set-off or cross-action or by counter-claim any claim or demand which under the provisions of the said enactments, or any of them, he could not sue for except with the leave of the court or any claim or demand in respect of any covenant, agreement, or stipulation which is avoided by section twenty-five of the said Act as so amended—

Provided that such mortgagee shall not be entitled under the provisions of this section to recover in such action or suit any amount by which such claim or demand is found to exceed the debt or demand proved by the plaintiff.

#### **40A Further restrictions on rights of mortgagee**

Where, under the provisions of a mortgage to which the provisions of Part 2 of this Act apply, a mortgagee is empowered to expend moneys in payment of rates, taxes or insurance premiums or for the protection, preservation or benefit of the mortgaged property, and to add the amount of any such payments to the mortgage debt, and in pursuance of such provisions the mortgagee, after the commencement of the *Moratorium (Amendment) Act 1936*, has expended or shall expend moneys in any such payments, the moneys so expended shall, unless such moneys were so expended with the consent in writing, or at the request in writing, of the mortgagor, be deemed not to be advances made or credits provided or given within the meaning of paragraph (h) of section eight or of paragraph (c) of subsection six of section thirty-four of this Act.

#### **41 Rights and remedies of person entitled to benefit of guarantee**

(1) Notwithstanding anything in this Act or in the *Moratorium Act 1930*, or any Act amending the same contained, where any person has before the commencement of this Act guaranteed the payment of any money or the performance or observance of any obligation, and such payment, performance, or observance, or such guarantee was or is secured by a mortgage of land, the person entitled to the benefit of the guarantee may give to the guarantor not less than three calendar months' notice of his intention to exercise all or any of his rights, powers, and remedies against the guarantor or against any property mortgaged by the guarantor to secure the guarantee, and after the expiration of the said period of notice the person entitled to the benefit of the guarantee may, subject to the provisions of this section, exercise such of the said rights, powers, and remedies against the guarantor and against any property mortgaged by the guarantor to secure the performance of the guarantee as he would have been entitled to exercise if this Act, and the said Act as amended, had not been passed.

(1A) Money payable by a purchaser to a vendor under a contract for the sale of land for or on account of the purchase price thereof and interest thereon shall for the purposes of this section be and be deemed always to have been money the payment whereof is secured by a mortgage of land.

(2) Any guarantor who has been given any such notice may within the time limited by the notice apply to the Supreme Court for an order under this section.

Notice of the application shall be given in the manner prescribed by rules of court to the person entitled to the benefit of the guarantee, to any co-guarantor, and to the principal debtor or person the performance or observance of whose obligation the guarantor has guaranteed.

(3) The provisions of section thirty of this Act relating to the exercise of the jurisdiction shall so far as applicable extend to any proceeding under this section.

(4) On any such application the court, if satisfied that the exercise by the person entitled to the benefit of the guarantee of such rights, powers, or remedies, or any of them, would inflict great hardship on the guarantor by reason of the operation of this Act or of any Act by this Act repealed upon his property or investments, or upon the realisation thereof, or by reason of the operation of the *Farmers' Relief Act 1932*, on any remedy of the guarantor against the principal debtor or by reason of the conduct of the mortgagee or any receiver appointed by him in or about the realisation of the mortgaged property, or by reason of any other cause whatsoever which such court in the circumstances of the case deems sufficient, may in its discretion, if in all the circumstances it thinks it desirable so to do, order that the exercise of such rights, powers, and remedies, or any of them, be deferred for such time and upon such conditions as such court shall determine or order that such conditions as such court

thinks fit be imposed on the exercise of such rights, powers, or remedies, or any of them.

In determining the time for which the exercise of such rights, powers, or remedies shall be deferred the court shall (inter alia) take into consideration any depreciation in value, since the date of the guarantee, of any security given by the mortgagor or the guarantor to the mortgagee, and the prospect of recovery in whole or in part of the value of such security.

- (5) The court may impose upon any party terms relating to the enforcement of rights of reimbursement or of contribution and may extend the benefit of Part 2 of this Act or of any provision thereof to the mortgagor, guarantor or any co-guarantor, and may on the hearing of the application or at any time thereafter order that any right of any party arising out of the transaction may be exercised or enforced in such manner and subject to such conditions, or that any such exercise or enforcement be deferred for such time and subject to such conditions as to it seems just having regard to all the circumstances.
- (6) On any such application the court may order such notice as it deems sufficient to be given to the principal debtor or person, the performance or observance of whose obligation the guarantor has guaranteed or where satisfied that such principal debtor or person cannot conveniently be served may dispense with service thereof and proceed to hear and determine the matter.
- (7) In this section the term guarantor includes any person in whom the estate of a guarantor shall have become vested under or by virtue of any sequestration order or any deed of assignment or arrangement under the provisions of any bankruptcy law for the time being in force and the personal representatives of a deceased guarantor.
- (8) Where a guarantee has been given for the payment of money, upon default being made in the payment thereof upon demand or notice, nothing contained in this Act, or in any Act hereby repealed, shall prevent a demand or notice for payment from being at any time made or given so that as between the guarantor and the person entitled to the benefit of the guarantee, such demand or notice shall have the same effect as regards default as if this Act and the Acts hereby repealed had not been passed.
- (9) Where a person entitled to the benefit of a guarantee can exercise any of his rights, powers, or remedies against the guarantor without obtaining the leave of the court pursuant to the provisions of section nine of this Act, this section shall not be deemed to impose on such person the obligation of giving to the guarantor the notice specified in subsection one of this section.
- (10) Nothing in this Act contained shall in any of the following cases impose on a person who immediately prior to the date of commencement of the *Moratorium and Interest Reduction (Amendment) Act 1931*, was liable under a contract whereby the payment of a debt secured by a mortgage of land was guaranteed, any liability to which he

would not have been subject if this Act had not been passed—

- (a) in any case where the mortgaged property or more than one-half in value thereof at the commencement of this Act has been sold by the mortgagee between the eleventh day of December, one thousand nine hundred and thirty-one, and the said commencement,
  - (b) in any case where the guarantor under a contract of guarantee is the husband or wife of the mortgagor and the mortgaged property was for a period of at least three months at any time between the commencement of the *Moratorium Act 1930*, and the commencement of this Act the matrimonial home of the mortgagor and the guarantor and the principal sum owing under the mortgage at the commencement of this Act does not exceed the sum of four thousand dollars,
  - (c) in any case where land is vested in a person in trust for two or more persons (whether including himself or not) as joint-tenants, tenants-in-common or co-partners, and the person in whom the land is so vested mortgaged it to secure the payment of money advanced for the benefit of the persons beneficially entitled, and one or more of the persons so beneficially entitled has guaranteed the payment of such moneys whether by a covenant or stipulation in or endorsed on the deed or instrument of mortgage or by a separate instrument.
- (11) Nothing in this Act or the *Moratorium Act 1930–1931*, as amended by subsequent Acts, shall be construed to impair the right of a guarantor to reimbursement by a mortgagor or to contribution from any co-guarantor.
- (12) This section shall apply only in respect of contracts of guarantee made prior to the commencement of this Act which were affected by the provisions of Part 4 of the *Moratorium Act 1930–1931*, as amended by subsequent Acts.

#### **42 Policies of insurance**

- (1) Nothing in this Act or in any enactment by this Act repealed shall prevent a mortgagee from claiming, suing for, or receiving the proceeds of any policy of insurance in any case in which the terms or conditions of the policy or of any mortgage provide that such proceeds shall be payable by the insurer to the mortgagee.
- (2) Nothing in this Act or in any enactment by this Act repealed, shall be construed to prevent a mortgagee of a debt, trust fund or other chose in action (not being a mortgagee of a mortgage debt) from suing the debtor, trustee or other the person against whom the chose in action is enforceable, to recover any moneys due and payable by such debtor, trustee or other person under or by reason of such debt, trust or other chose in action or from receiving from such debtor, trustee or other person such moneys.

**43 Offences** (cf Act No 48, 1930, s 21)

Any person who contravenes or fails to comply with any provision of this Act or with any order directing a mortgagee or mortgagor to vacate the mortgaged property or with any order made pursuant to section thirteen or section 13A or section 13B of this Act shall be guilty of an offence against this Act and shall be liable upon summary conviction to a penalty not exceeding two hundred dollars or to imprisonment for a term not exceeding six months, or to both such penalty and imprisonment.

**44 Order for possession** (cf Act No 48, 1930, s 21A)

- (1) Where a person is convicted of an offence in consequence of which a mortgagor has been deprived of the possession of property, the subject of a mortgage, or the purchaser or lessee of goods under a hire-purchase agreement has been deprived of the goods the subject of the agreement, the court may, in a summary manner, make such order as to costs and the possession of the property or of the goods as to it seems fit.
- (2) A copy of such order may be served on the person in possession of the property or of the goods, and, if such person makes default in complying with such order, he shall be liable to a penalty not exceeding ten dollars per day for each day he makes default in complying with the order.

Such penalty and costs may be recovered in a summary way under the provisions of the [Justices Act 1902](#).

**45 Dealings by mortgagees** (cf Act No 48, 1930, s 15)

- (1) The Registrar-General may, upon the submission to him for registration of any instrument require such evidence as he deems necessary that the dealing sought to be given effect to by the instrument does not contravene any provision of Division 1 of Part 2 of this Act, or of any enactment by this Act repealed, and may refuse to register the instrument until such evidence is submitted to him.
- (2) The Registrar-General may rely upon the register book under the [Real Property Act 1900](#), and shall not be bound to make any inquiry as to any interest not appearing therein unless the same is protected by a caveat.
- (3) The Registrar-General shall not be bound to inquire into the genuineness of any consent that purports to be duly given in accordance with the provisions of any enactment repealed by this Act.

**46 Notices**

- (1) Any notice required or authorised by this Act to be given shall be in writing, and shall be sufficiently given—
  - (a) if delivered personally,

- (b) if sent by post in a registered letter addressed to the person to whom it is to be given, by name, at his place of abode or business last known to the person giving the notice; and the notice shall be deemed to have been given at the time when the registered letter would in the ordinary course be delivered,
- (c) if given in the manner provided by section 109X of the *Corporations Act 2001* of the Commonwealth when the person to whom notice is to be given is a company,
- (d) in cases of notices required on any application to the court in the manner directed by the court or prescribed by rules of court or by regulations under this Act.

(2) Where a mortgagor or purchaser—

- (a) has abandoned possession of the mortgaged or purchased property and his address is unknown to the mortgagee or vendor, or
- (b) is dead and there is no personal representative within the State of New South Wales,

notice may be given to such mortgagor, purchaser, or persons interested in the estate of the deceased mortgagor or purchaser in the manner prescribed by regulations under this Act.

#### **46A Consents and notices**

In the events mentioned in the first column hereunder and distinguished by a number therein any notice required or authorised by this Act to be given may be given to the respective persons mentioned in the second column and distinguished by a corresponding number in place or on behalf of the persons respectively referred to in the first column as the mortgagor and the respective persons so mentioned and distinguished in the second column shall have and be deemed always to have had power to make any application to the court or to give any consent under any of the provisions of this Act in place or on behalf of the respective persons referred to in the first column as the mortgagor—

**First Column**

**Second Column**

<b>1</b>	Where the mortgagor is dead and probate of his will or letters of administration of his estate have been granted or resealed in New South Wales.	<b>1</b>	The personal representative of the mortgagor or other the person in whom the interest of the mortgagor in the mortgaged property has vested.
<b>2</b>	Where the mortgagor is a bankrupt or has executed a deed of assignment or arrangement under the provisions of any bankruptcy law for the time being in force.	<b>2</b>	The person in or to whom the interest of the mortgagor in the mortgaged property is vested or has been conveyed or assigned or, where the interest of the mortgagor in the mortgaged property is not vested in or has not been assigned or conveyed to any other person, the person who is empowered to direct the mortgagor to convey or assign his interest in the mortgaged property.
<b>3</b>	Where the mortgagor is a company and the company is being wound up whether voluntarily, compulsorily or under the supervision of the Court.	<b>3</b>	The liquidator of the company.
<b>4</b>	Where the mortgagor is an insane patient or an incapable or insane person within the meaning of the <i>Lunacy Act of 1898</i> , or any Act amending or replacing the same.	<b>4</b>	The Master in Lunacy or the person to whom has been committed the management of the estate of the mortgagor, as the case may be.

#### **46B Notice to NSW Trustee and Guardian in certain events**

- (1) Where, either before or after the commencement of the *Moratorium (Amendment) Act 1936*, a mortgagee has, under this Act, obtained the leave of the court to exercise all the rights, powers and remedies expressly or impliedly given to him by the mortgage, any notice required or authorised by this or any other Act to be given to the mortgagor or to any other person interested in the mortgaged property for any purpose of or relating to or in any way concerning the exercise of any such right, power or remedy may, where such mortgagor or person is dead and there is no personal representative of such mortgagor or person in New South Wales, be given personally or by post to the NSW Trustee and Guardian and shall be accompanied by a statement containing such particulars as may be prescribed.
- (2) Any notice given in accordance with the provisions of subsection one of this section shall be as valid and effectual as if given to the personal representative of the mortgagor or person unless probate of the will or letters of administration of the estate of such mortgagor or person is granted to some person other than the NSW Trustee and Guardian within one month after such notice has been so given.

**46C Statutes of limitations not to run**

During such time as any right or remedy of the mortgagee of any property or the vendor of any land against the mortgagor or mortgaged property or the purchaser or purchased land is or has been, by reason of this Act or any Act hereby repealed, suspended, time shall not run against such mortgagee or vendor under the provisions of any Statute of Limitations barring such right or remedy of the mortgagee or vendor against the mortgagor, mortgaged property, purchaser or purchased land.

**47 Regulations** (cf Act No 48, 1930, s 22)

- (1) The Governor may make regulations not inconsistent with this Act prescribing all matters which are necessary or convenient to be prescribed for carrying out or giving effect to this Act.

Without limiting the generality of the foregoing provisions of this subsection the regulations may prescribe the manner in which applications under this Act shall be made, and may make provision for the delegation to a Magistrate of all or any of the jurisdiction and powers of the Supreme Court or district court under the provisions of section twenty-eight of this Act.

- (2) The regulations may impose a penalty for any breach thereof not exceeding forty dollars.
- (3) (Repealed)

**48 Savings** (cf Act No 48, 1930, s 23)

The expiration of Part 2 of this Act in pursuance of section forty-nine of this Act or of any regulation made in pursuance of this Act shall not—

- affect any right, privilege, obligation, or liability acquired, accrued, or incurred under such Part of regulation, or
- affect any penalty or punishment in respect of any offence committed against such Part or regulation, or
- affect any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability, penalty, or punishment, as aforesaid,

and any such investigation, legal proceeding, or remedy may be instituted, continued, or enforced, and any such penalty or punishment may be imposed as if such Part or regulation had not expired.

**49 Duration of Part 2** (cf Act No 48, 1930, s 24)

The provisions of Part 2 of this Act shall continue in force until the twenty-eighth day of February, one thousand nine hundred and fifty-two, and thereafter until such time as the Governor notifies by proclamation published in the Gazette that he is satisfied that the



prescribed dates for repayment in respect of all mortgages to which such Part applies have been reached and that any extended period allowed by a court upon application made under the said Part has expired—

Provided that after the twenty-eighth day of February, one thousand nine hundred and fifty-two, the provisions of the said Part shall apply only to a mortgage the prescribed date for repayment of which has not been reached and to a mortgage in respect of which a court has in pursuance of the said Part made an order extending the date of repayment.

## **Schedule Forms of certificates under Section 34 of this Act**

### **A—Certificate under Section 34 (1)**

#### **1 Where mortgagor is a corporation and the instrument is executed under the seal of the corporation or by an attorney or agent for the corporation**

The above (or within) written instrument was executed under the seal of the above (or within) named A (or by N M as attorney or agent for the abovenamed A) and the person or persons by whom or in whose presence the seal of the said corporation purports to have been affixed to the said instrument (or the said N M) has (or have) stated to me that the said corporation knew the effect of and approved of the confirmation of the covenants or agreements to pay the moneys secured by the mortgage (charge or debenture) and interest thereon in the said instrument referred to, and (*if the certifying person is a solicitor or conveyancer*) I certify that I am not the solicitor (or conveyancer) for the mortgagee.

*(Signature, address, and description of certifying person.)*

#### **2 In any other case**

The above (or within) written instrument was executed by the above (or within) named A [or by B, the attorney, agent, executor (or other apt description) of the abovenamed A] and on or before (or shortly after) his execution of the same he stated to me that he knew the effect of and approved of the confirmation of the covenants by the said A to pay the moneys secured by the mortgage (charge or debenture) in the said instrument referred to, and (*if the certifying person is a solicitor or conveyancer*) I certify that I am not the solicitor (or conveyancer) for the mortgagee.

*(Signature, address, and description of certifying person.)*

### **B—Certificate under Section 34 (2)**

#### **1 Where mortgagor is a corporation and the mortgage or charge is executed under the seal of the corporation or by an attorney or agent for the corporation**

The above (or within) written mortgage (or charge, or debenture) was executed under the seal of the above (or within) named A (or by N M as attorney or agent for the abovenamed A) and the person or persons by whom or in whose presence the seal of the said corporation purports to have been affixed to the said mortgage (or charge or debenture) (or the said N M) has (or have) stated to me that the said corporation knew the effect of and approved of the insertion in the said mortgage (or charge or debenture) of the covenants (or agreements) to pay the principal and interest moneys secured by the above (or within) written mortgage (or charge or debenture) and (*if the certifying person is a solicitor or conveyancer*) I certify that I am not the solicitor (or conveyancer) for the mortgagee.

*(Signature, address, and description of certifying person.)*

#### **2 In any other case**

The above (or within) written mortgage (or charge) was executed by the above (or within) named A (or by B, the attorney or agent for the abovenamed A) and on or before (or shortly after) his execution of the same he stated to me that he knew the effect of and approved of the insertion in the said mortgage (or charge) of the covenants (or agreements) to pay the principal and interest moneys secured by the above (or within) written mortgage (or charge) and (*if the certifying person is a solicitor or conveyancer*) I certify that I am not the solicitor (or conveyancer) for the mortgagee.

*(Signature, address, and description of certifying person.)*