

**[47.12] Definitions**

For 'land', 'mortgage', 'mortgagee' and 'mortgagor', see s 2 above.

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**48. Mortgage to 2 or more jointly**

Where any mortgage effected after the commencement\* of this section is expressed to be made to 2 or more persons jointly, the mortgage money shall (if and so far as the contrary intention is not expressed in the mortgage), as between them and the mortgagor, be deemed to be owing to these persons on a joint account and the receipt of the survivors or the last survivor of them or of the successor or personal representative of the last survivor shall be a complete discharge.

Editorial Note:

\* Commencement date: 1 November 1984.

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**[48.01] Enactment history**

This section is based on the now repealed s 28 of the Law Amendment and Reform (Consolidation) Ordinance (Cap 23).

**[48.02] England**

Cf s 111 of the Law of Property Act 1925 (UK).

**[48.03] General note**

In equity, there is a presumption that where two or more persons are advancing money, they do so as tenants in common. Even where two or more persons were expressed to be advancing money on a joint account, payment to the survivor required an inquiry into whether or not there had been a severance. This section deals with these two difficulties by, firstly, reversing the presumption, so that money advanced by more than one lender is deemed to be owed on a joint account; and, secondly, by providing that the receipt of the surviving lender is a complete discharge (see *The Hongkong and Shanghai Banking Corp v A-G* [2018] 1 HKC 305 (CA)).

**[48.04] Any mortgage**

In view of the definition of 'mortgage' in s 2 above, this section is limited to advances made on the security of land.

**[48.05] Commencement of this section**

The relevant commencement date is 1 November 1984.

**[48.06] Persons**

As to meaning, see [2.32] above.

**[48.07] Joint, jointly**

As to meaning, see [35.27] above.

**[48.08] So far as**

The present section is subject to a contrary intention, but that intention must be expressed in the mortgage itself and cannot be implied from any subsequent severance.

As to the meaning of 'contrary intention', see [9.07] and [16.04] (above).

**[48.09] As between them and the mortgagor**

This section does not affect the relationship between the co-mortgagees (*Re Jackson* (1887) 34 Ch D 732).

**[48.10] Deemed to be owing**

As to meaning of 'owing', see [45.11] above.

**[48.11] Receipt of the survivors or the last survivor of them**

As to meaning of 'receipt', and 'survive' see [4.14] and [11.06]–[11.07] respectively above.

**[48.12] Personal representative**

As to meaning, see [4.08] above.

**[48.13] Discharge**

As to meaning, see [18.09] above.

**[48.14] Definitions**

For 'mortgage' and 'mortgagor', see s 2 above.

**49. Action for possession of land by mortgagor**

- (1) A mortgagor under any mortgage (whether effected before or after the commencement of this section) entitled for the time being to the possession or receipt of the rents or profits of any land in respect of which no notice has been given by the mortgagee of his intention to take possession or to enter into the receipt of the rents and profits of that land may sue for such possession, or for the recovery of the rents and profits, or to prevent or recover damages in respect of any trespass or other wrong relating to that land, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person.
- (2) This section does not affect the power of the mortgagor, apart from this section, in right of the legal estate or otherwise, to take proceedings in his own name.

*[cf. 1925 c. 20 s. 98(1) U.K.]*

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**[49.01] Enactment history**

This section is based on the now repealed s 4 of the Law Amendment and Reform (Consolidation) Ordinance (Cap 23).

**[49.02] England**

Cf s 98 of the Law of Property Act 1925 (UK).

**[49.03] General note**

Under a mortgage by assignment, the mortgagee as the holder of the legal estate is, at common law, the party entitled to possession and receipt of the rents and profits. The mortgagor is so entitled only by leave of the mortgagee. Formerly, at common law, the mortgagor could only recover possession or sue for the rent if he joined in the mortgagee, unless the lease was granted by him after the mortgage was made, in which case the lessee would be estopped from denying his landlord's (the mortgagor's) title.

This section dispenses with the need for the mortgagor to join in the mortgagee in such action. Its effect is merely procedural, and it does not per se confer on the mortgagor any right to recover possession, sue for rent or recover damages for breach of covenant. Such rights flow from the lease itself.

A mortgagor under a legal charge retains the legal estate and thus also may be able to bring proceedings based upon his own title: see sub-s 49(2).

**[49.04] Subsection (1): Whether effected before or after the commencement of this section**

This section is retrospective in effect.

**[49.05] Entitled for the time being to possession or receipt of the rents or profits of any land**

A mortgagor loses his right to take action in respect of the mortgaged land, upon the mortgagee giving notice that he intends to exercise his right to take possession of the land or the rents or profits accruing there from – see s 45 above and Sch 4 para 2 below.

**[49.06] Sue for such possession**

As to meaning, see [43.09] above.

**[49.07] Recover, recovery**

As to meaning, see [31.09] above.

**[49.08] Prevent or recover damages in respect of any trespass or other wrong**

To ‘prevent’ an event means to stop it, either before it has been commenced or whilst it is going on (*Coverdale v Grant* (1882) 8 QBD 600). The word has also been held to mean ‘preclude’ and not merely ‘hinder’ (*Corfe Transport Ltd v Gwynedd County Council* [1984] RTR 79; cf *Lam Ying Bor Investment Co v Commissioner of Inland Revenue* [1977–1979] HKC 46, [1979] HKLR 571 (CA)).

Trespass to land means unlawful entry by one person on land in the possession of another: (*Scott v Shepherd* (1773) 2 Wm Bl 892; and *McPhail v Persons, names unknown* [1973] Ch 437, [1973] 3 All ER 393). As to the law relating to trespass to land, see Halsbury’s Laws of Hong Kong, Vol 25, Tort, para [380.369] et seq.

An example of another wrong committed in relation to land is private nuisance, as to which see Halsbury’s Laws of Hong Kong, Vol 25, Tort, para [380.198] et seq.

**[49.09] Cause of action arises ...jointly with another person**

The section does not alter the rights of mortgagors who are jointly entitled or obliged to take action together.

**[49.10] Definitions**

For ‘land’, ‘legal estate’, ‘mortgage’, ‘mortgagee’ and ‘mortgagor’, see s 2 above.