[HIGH COURT OF AUSTRALIA.]

STOCK MOTOR PLOUGHS LIMITED . . APPELLANT;
PLAINTIFF,

AND

FORSYTH . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1932.

SYDNEY, *May* 9, 10; *Aug.* 15.

Gavan Duffy C.J., Starke, Dixon, Evatt and McTiernan JJ.

Moratorium—Promissory notes—Collateral security—Instalments under hire-purchase agreement—Promissory notes dishonored—Leave to commence action thereon—Requirement by State legislation—Federal legislation—Consistency—Moratorium Act 1930-1931 (*N.S.W.*) (*No.* 48 *of* 1930—*No.* 43 *of* 1931), *secs.* 4, 11, 20—*Bills of Exchange Act* 1909-1912 (*No.* 27 *of* 1909—*No.* 24 *of* 1912), *secs.* 5 (2), 43, 62, 94, 95*—*The Constitution* (63 & 64 *Vict. c.* 12), *sec.* 109.

The *Moratorium Act* 1930-1931 (N.S.W.), by secs. 4, 11 and 20, requires that the leave of the Court mentioned in the Act be obtained before the making of a demand for, or the commencement of proceedings for the recovery of, any instalment under a hire-purchase agreement.

Held, by the whole Court, that this requirement applied to an action by the owner of goods against the hirer on a promissory note given as collateral

* The *Bills of Exchange Act* 1909-1912 provides (*inter alia*) as follows:—By sec. 5 (2) — "The rules of common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to . . . promissory notes." By sec. 43—"(1) The rights and powers of the holder of a bill are as follows:—(*a*) He may sue on the bill in his own name: (*b*) Where he is a holder in due course, he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill. (2) Where a holder's title is defective—(*a*) if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill, and (*b*) if he obtains payment of the bill, the person who pays him in due course gets a valid discharge for the bill." By sec. 62—"Where a bill is dishonored, the measure of damages, which shall be deemed to be liquidated damages, shall be as follows:—(*a*) The holder may recover from any party liable on the

security for an instalment payable under a hire-purchase agreement; and, by *Gavan Duffy* C.J., *Starke*, *Evatt* and *McTiernan* JJ. (*Dixon* J. dissenting), that the requirement as so applied was not inconsistent with the provisions of the *Bills of Exchange Act* 1909-1912.

Decision of the Supreme Court of New South Wales (Full Court): *Stock Motor Ploughs Ltd.* v. *Forsyth*, (1932) 32 S.R. (N.S.W.) 259, affirmed.

APPEAL from the Supreme Court of New South Wales.

William Forsyth was the maker of two promissory notes which he gave to Stock Motor Ploughs Ltd. as collateral security for two instalments due under an agreement. The amounts referred to in the notes were not paid to the Company on the due dates, being 1st September 1930 and 1st September 1931 respectively, and it brought an action against Forsyth for the recovery of the amounts purported to be secured by the notes. Forsyth pleaded that the agreement referred to above was a hire-purchase agreement within the meaning of the *Moratorium Act* 1930-1931 (N.S.W.) and that the plaintiff had commenced the action after 1st September 1931 without the leave of the Court, contrary to the provisions of secs. 4 and 20 of the Act.

An application was made to *Stephen* J. by the plaintiff to have the defendant's plea struck out as bad in law, on the ground that the *Bills of Exchange Act* 1909-1912 gave to the plaintiff, as payee of the promissory notes, the right to sue for and recover, in any Court of competent jurisdiction, the amounts promised to be paid, and that the *Moratorium Act* 1930-1931 did not deny such right, but, if it did, it was inconsistent with the *Bills of Exchange Act* and therefore void. The application having been granted, the defendant appealed to the Full Court of the Supreme Court, which

bill and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior indorser—(i.) the amount of the bill: (ii.) interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case." By sec. 94—"The maker of a promissory note, by making it—(*a*) engages that he will pay it according to its tenor; and (*b*) is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse." By sec. 95—"(1) Subject to the provisions in this Part . . . the provisions of this Act relating to bills of exchange apply, with the necessary modifications, to promissory notes. (2) In applying those provisions, the maker of a note shall be deemed to correspond with the acceptor of a bill, and the first indorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to drawer's order."

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held that the commencement of the action on the promissory notes was a demand for payment within the meaning of sec. 4 of the *Moratorium Act* 1930-1931; that the plaintiff was a mortgagee within the meaning of that section; and that the moneys sued for were instalments of purchase-money due to the plaintiff by the terms of a hire-purchase agreement, and, therefore, by virtue of secs. 4 and 20 of the *Moratorium Act* 1930-1931 the leave of the Court was necessary before the commencement of any proceedings on such promissory notes for the recovery of moneys thereby secured: *Stock Motor Ploughs Ltd.* v. *Forsyth* (1).

From this decision the plaintiff now, by special leave, appealed to the High Court.

Flannery K.C. (with him *Windeyer*), for the appellant. Sec. 4 of the *Moratorium Act* includes all agreements which exist side by side with the mortgage, or hire-purchase agreement, in question, that is, all collateral agreements (*In re Athill*; *Athill* v. *Athill* (2)). Sec. 4 is a reference to the actual document itself, and is directed to the rights of the mortgagee and mortgagor under a mortgage document. The language of the Act shows that its provisions are not intended to extend to any collateral transactions; such provisions are directed to preventing a mortgagee from recovering under his mortgage document. The cause of action on the promissory notes is quite different from and independent of the cause of action under the hire-purchase agreement (*Davies* v. *Rees* (3)). The provisions of a statute which adversely affects particular transactions do not extend to collateral transactions unless an intention so to extend such provisions is found in the statute itself (*Monetary Advance Co.* v. *Cater* (4)). The prohibition as to suing without leave of the Court refers only to suing on a mortgage document. So far as a document is a commercial document, that is, a promissory note or a bill of exchange, a State legislature is incapable of interfering with the limits prescribed by the Federal Legislature, or affecting the rights of parties to it whose rights are defined by the *Bills of Exchange Act*. The *Moratorium Act* 1930-1931 is inconsistent with the

(1) (1932) 32 S.R. (N.S.W.) 259.
(2) (1880) 16 Ch. D. 211, at p. 222.
(3) (1886) 17 Q.B.D. 408.
(4) (1888) 20 Q.B.D. 785.

provisions of sec. 43 of the *Bills of Exchange Act* which defines the rights of holders of a promissory note, and, to that extent, is void. If a holder sues on the promissory note itself, it is plain, in the Federal jurisdiction, that the Act is a code and that the application of the law merchant in the States depends upon its adoption in the *Bills of Exchange Act*.

[DIXON J. referred to *John Sanderson & Co.* v. *Crawford* (1).]

If sec. 4 of the *Moratorium Act* applies generally, the holder of a bill of exchange, including a promissory note, is prevented, subject to the discretion of State officials, from perfecting the bill under sec. 93 of the *Bills of Exchange Act* by due presentation, and from suing on the bill as holder. The negotiability of a promissory note is affected by any provisions which would prevent the holder from suing; the element of negotiability is that the holder can sue (*Miller* v. *Race* (2)). A State has no power to alter, restrict or fetter in any way the rights of parties to a promissory note.

Roper, for the respondent. By the operation of secs. 4, 11 and 20 of the *Moratorium Act* 1930-1931, a vendor under a hire-purchase agreement must obtain the leave of the Court before commencing action for the recovery of instalments. On a proper construction the provisions of those sections must necessarily extend to prohibiting the bringing of an action on a promissory note where such note was given in conjunction with a hire-purchase agreement, and represents the same sum of money referred to in the agreement. The action of the appellant is an action by a vendor under a hire-purchase agreement to call up or demand part of the principal sum secured by the hire-purchase agreement; the mere fact that it is in form an action on a promissory note does not alter the substance of the transaction, that it is a demand or calling up of a part of the principal sum, and therefore comes within the prohibition contained in sec. 4. In such circumstances the *Moratorium Act*, on a proper construction, applies to promissory notes (*Hoare* v. *Farrow* (3); *Levick* v. *Trevascus* (4)). There is no conflict between the *Moratorium Act* and the *Bills of Exchange Act*. In the making of the note

(1) (1915) V.L.R. 568; 37 A.L.T. 89.
(2) (1758) 1 Burr. 452; 97 E.R. 398.
(3) (1917) Gaz. L.R. (N.Z.) 19.
(4) (1919) V.L.R. 118; 40 A.L.T. 124.

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there is an engagement in law that it will be paid, but that engagement between the immediate parties to the note is a matter of contract—any personal defences may be raised without infringing in any way the general or particular provisions of the *Bills of Exchange Act*. Sec. 62 of the *Bills of Exchange Act* does not confer upon the holder of a promissory note an absolute right to recover the amount thereof: sec. 43 shows there may be any number of circumstances giving right of defences. The *Moratorium Act* does not take away the right to sue on a promissory note, but merely provides that the leave of the Court must be obtained before that right is exercised. The possibility is recognized in sec. 43 of a State legislature enacting legislation which has the effect either of postponing or taking away altogether the rights of the parties to promissory notes, and legislation of that nature is valid (*Castles* v. *Freidman* (1)). The *Bills of Exchange Act* does not cover, nor purport to cover, the ground covered by the *Moratorium Act*: it does not deal with the position between immediate parties to a promissory note; as between them any defects may be raised based on tort or otherwise. The provisions of secs. 43 and 62 of the *Bills of Exchange Act* were not intended to confer the right to sue and recover on a promissory note against anyone; otherwise sec. 43 (1) (*b*) would be meaningless. The words "that he may sue" in sec. 43 mean provided he has the right to sue. The appellant, having brought an action in a State Court, is bound by the procedure of that Court, whether it is exercising Federal or State jurisdiction (see sec. 39 of the *Judiciary Act*). As to the question of jurisdiction under sec. 39 of the *Judiciary Act*, see *Welby* v. *Parker* (2).

Cur. adv. vult.

Aug. 15.

The following written judgments were delivered:—

GAVAN DUFFY C.J. On the pleadings in this case it appears that the plaintiff as payee is suing the defendant as maker of two promissory notes given by the defendant to the plaintiff as collateral security for two instalments payable under a hire-purchase agreement within the meaning of the *Moratorium Act* 1930-1931. The plaintiff commenced the action after the first day of September 1931 and

(1) (1910) 11 C.L.R. 580.

(2) (1916) 2 Ch. 1.

without the leave of the Court prescribed by sec. 20 of the Act. The first question for determination is whether the plaintiff's claim is obnoxious to the provisions of the Act. I think it is, because what he claims is, in fact, payment of the sums payable as instalments under the hire-purchase agreement. The next question which arises is this: If the *Moratorium Act* extends to such a claim, is it, to that extent, inconsistent with the provisions of the Federal *Bills of Exchange Act* 1909? In my opinion it is not. The Federal Act prescribes the form of a promissory note, and the obligations which arise between the parties when that form is adopted, but it leaves it open to the parties to alter those obligations by agreement between themselves, and it leaves it open to the State legislatures to determine the circumstances in which, and the extent to which, negotiable instruments shall have effect in matters under the control of those legislatures. Such a legislature may direct that a promissory note given to secure a payment unenforceable under the State law, shall itself be unenforceable, or it may impose a condition precedent to its enforcement.

In my opinion the appeal should be dismissed.

STARKE J. The appellant brought an action in the Supreme Court of New South Wales upon two promissory notes given by the respondent to it. The respondent by his plea alleged that the promissory notes were given as collateral security for two instalments payable under a hire-purchase agreement made between the appellant and himself, and that the action was commenced without leave of the Court, contrary to the provisions of the *Moratorium Act* 1930-1931 of New South Wales. This Act in effect prohibits, without leave of the Court mentioned in the Act, calling up or demanding or bringing action to recover hire-purchase money or any instalments thereof (secs. 4, 11 (1) and 20). The Supreme Court resolved that this was a good plea, and reversed an order striking it out. From this decision an appeal was brought to this Court, which also granted leave to appeal.

The decision, it was contended, was wrong for two reasons—one that the provisions of the *Moratorium Act* did not extend to obligations on collateral securities, the other that the provisions of

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the *Moratorium Act* were inconsistent with a law of the Commonwealth, namely, the *Bills of Exchange Act* 1909-1912, and to the extent of the inconsistency were invalid (Constitution, sec. 109).

In my opinion, the former reason was completely and satisfactorily disposed of in the Supreme Court by *Harvey* C.J. in Eq. The hire-purchase agreement and the promissory notes secured the same hire-purchase money ; it was one debt or sum of money secured by two separate or collateral promises, the performance of either of which fulfilled or satisfied the other. In short, the commencement of the action on the note is a demand for payment of the purchase-moneys or instalments due and payable under the hire-purchase agreement.

The latter reason raises a more difficult question, but I agree with the conclusion reached by the Supreme Court that there is no inconsistency between the provisions of the *Moratorium Act* and the *Bills of Exchange Act*. It should not be forgotten that the enactment of a moratorium for New South Wales is within the constitutional power of that State. The only question is whether there is an inconsistency, a contrariety, or an opposition between the State law —or the provisions of that law relevant to the case in hand—and the Federal law.

Sometimes such inconsistency is found because the Federal power has set up a uniform and exclusive rule or code relating to a subject matter within its jurisdiction and no room is left for the operation of State law. But that is not the case here, for the *Bills of Exchange Act* does not provide a complete and exclusive code in relation to bills of exchange and promissory notes. It is only necessary to refer to sec. 5 preserving the rules of common law ; to the provisions as to capacity and authority of parties (Part II., Div. 2) and as to the consideration of the bill (Part II., Div. 3) ; and to the absence of any provisions as to property in bills, as to equitable rights, limitations, and so forth. All these subjects must be governed by the laws of the States within their several territorial limits, for the Federal power has not been exercised upon them in relation to bills of exchange and promissory notes.

Is there any inconsistency between the *Moratorium Act* and any particular provision of the Federal Act ? The only material

provisions are, I think, those contained in secs. 43, 62, 94 and 95. The effect of these provisions is that the maker of a promissory note engages that he will pay it according to its tenor, and that the holder may sue on the note in his own name and recover the amount thereof and interest thereon. The sections set forth the obligations arising *ex contractu* on the making of an instrument within the definition of a promissory note (sec. 89). But the statement and enactment of those obligations does not prescribe, define, or deal with the time within which they may be exercised, or how and in what manner they may be suspended. Such matters rest upon the agreement of the parties or the action of a competent legislature. Where the Federal power has not acted, the competent legislatures are necessarily the States, within their territorial limits.

The appeal ought, in my opinion, to be dismissed.

DIXON J. The question in this appeal is whether, notwithstanding the *Moratorium Act* 1930-1931 of New South Wales, the payee of a promissory note, given before 19th December 1930 as a collateral security for an instalment payable under a hire-purchase agreement, may, without the leave of a District Court or a Court of Petty Sessions, maintain an action against the maker to enforce payment of the note. The bailee or hirer of the chattels, besides contracting under the hire-purchase agreement to pay to the bailor or owner the instalments of hire or rent, made in his favour as payee a promissory note for the amount of each instalment and delivered the note to him as a collateral security for the payment of the instalment. The legal consequence was to bring into existence two independent obligations to pay the same sum of money. Each obligation requires the same person to do the same act so that by performing one he performs the other. He must make, in respect of each instalment, a single not a double payment, but he incurs a double obligation to make it. The obligations are collateral in the sense that they are separate, concurrent, secure the same sum, rank equally and are enforceable in any order. The total amount of instalments, each of which is secured by two such obligations, answers the description contained in sec. 11 (4) of the *Moratorium Act* "the amount of rent upon payment of which . . . the goods would

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under the agreement become the property of the hirer." Sec. 11 (1) and sec. 4 (1) (*a*) operate in combination to forbid the owner to call up or demand payment from the hirer of sums answering that description. It appears to me that he is forbidden to do so whether he relies upon the obligation expressed in the hire-purchase agreement or upon a separate obligation to make the same payment. Further, sec. 20 (2) provides that, without the leave of a District Court or Court of Petty Sessions, the person to whom an instalment is by the terms of the hire-purchase agreement due shall not take action to recover the same. Again the prohibition depends not upon the nature of the obligation relied upon to obtain payment, but upon the description of the sum of money for the recovery of which the action is brought. That sum of money is an instalment due by the terms of a hire-purchase agreement, and sec. 20 (2) means that it shall not be sued for whether the cause of action arises from a promise contained in the agreement or from an obligation created by some other instrument. For these reasons I think that the *Moratorium Act* construed, not artificially to avoid inconsistency with Federal law, but according to its natural meaning, intends to restrain proceedings to enforce promissory notes given as collateral security for the payment of hire or rent under hire-purchase agreements. The matter, therefore, depends upon the effect of the Federal *Bills of Exchange Act* 1909. The question is whether a State law operating to prevent recovery upon a promissory note, which, at the time of its enactment, was valid and subsisting, is inconsistent with the Commonwealth statute. A provision which prevents or suspends the enforcement of an accrued right cannot do otherwise than impair the enjoyment of that right. In this Court an interpretation of sec. 109 of the Constitution has been adopted which invalidates a law of a State in so far as it would vary, detract from, or impair the operation of a law of the Commonwealth. Further, when the Parliament appears to have intended that the Federal law shall be a complete statement of the law governing a particular relation or thing, it is considered that the operation of the Federal law would be impaired if the State law were allowed to affect the matter at all (*Clyde Engineering Co.* v. *Cowburn* (1); *H. V. McKay Pty. Ltd.*

(1) (1926) 37 C.L.R. 466.

v. *Hunt* (1); *Hume* v. *Palmer* (2); *Ex parte McLean* (3)). Such an interpretation requires the consequence that, except in so far as the law of the Commonwealth appears otherwise to intend, enjoyment of a right arising under it may not be directly impaired by State law. The nature of the *Bills of Exchange Act* 1909 makes the application of such a rule somewhat difficult and uncertain. It is in the main a transcript of the English Act of 1882. It is not a statutory expression of any design or plan conceived or policy devised by the legislature. It is an attempt to convert a part of the *lex non scripta* into *lex scripta*. It has been said that it does not purport to be a scientific code dealing with the whole law relating to bills of exchange but is more in the nature of a digest of the law on the subject (per *Walton* J., *Embericos* v. *Anglo-Austrian Bank* (4)).

When from the general body of the law rules governing a special kind of instrument were selected for formulation in a statutory shape, it was inevitable that what was stated should, not only for its proper understanding but for its practical application, continue to depend upon the whole content of the law of which it formed a coherent part. The subject could not be isolated. Bills of exchange and promissory notes have very special characteristics, but they are not and could not be removed from the operation of the general law of status, of obligation, and of remedies. Further, heads of law which deal with particular relations, with transactions of a special nature and with general conceptions of property must continue to include bills and notes within their operation. For the most part, the rules of common law and the doctrines of equity cover this ground but statute plays its part. The capacity of lunatics is not, but that of married women and infants is, materially affected by legislation. The validity and effect of a transaction between solicitor and client is not, but between money-lender and client is, dealt with by statute. Again, since 31 Geo. III. c. 25, at least, bills and notes have been considered proper subjects for the revenue, and most Stamp Acts have made non-compliance with their requirements a ground of invalidity. Under a unitary system all this occasions no difficulty

(1) (1926) 38 C.L.R. 308.
(2) (1926) 38 C.L.R. 441.
(3) (1930) 43 C.L.R. 472.
(4) (1904) 2 K.B. 870, at p. 876.

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because the one legislature can deal as it chooses with every department of law, common law and statute. But under a Federal system where, except for such special subjects as bills of exchange and promissory notes, the law of civil rights is under the authority of the State, but upon these subjects the Federal law is paramount, it becomes no easy task to determine how far State law has been permitted to affect the operation of the Federal. On the one hand, some of the provisions of the *Bills of Exchange Act* 1909, particularly those which deal with the special properties and peculiar characteristics of negotiable instruments, appear to be intended to be exhaustive. On the other hand, a number of considerations makes it clear that the force and effect of bills and notes must in many respects depend upon the law under the authority of the State, including State legislation. It is an obvious but most important consideration that the very nature of the statute as a partial code or digest of rules of law militates against any interpretation which would render inoperative or inapplicable rules of law or statutory provisions which theretofore had gone to the determination of rights and liabilities in connection with such instruments. For instance, it is not conceivable that the Federal statute meant to displace the operation of State enactments which require that bills and cheques shall be deemed to have been given for an illegal consideration when the issue or transfer has been in consideration of money won at gaming or lent for gaming, or State enactments which allow the seizure and sale of negotiable securities under writs of execution, although rights which would arise under the Federal law in the former case are nullified, and in the latter case are transferred in a manner not authorized by its provisions. Again, it must not be forgotten that bills, notes and cheques are instruments in a double sense. Not only do they serve to express and record in formal shape a promise or agreement, but in most cases they are tools or implements which afford the subsidiary means of carrying out a principal transaction. More often than not the very purpose of a bill of exchange demands that its efficacy shall depend upon the legal fate of a main transaction. A further consideration strongly supporting the conclusion that a large field of operation is allowed to State legislation appears from the express provisions of the

Bills of Exchange Act. That consideration is that the Act contains many express provisions referring, or deferring, to that law written and unwritten over which the State legislature retains authority as the law governing particular matters by which the rights and obligations arising from bills and notes are determined. Apart from secs. 27 and 97 (2) which involve the State law as to capacity of natural or artificial persons as well as the mode of authenticating corporate acts, and sec. 32 which imports the law upon the doctrine of consideration, and sec. 25 (1) and (4) which recognize the stamp laws of the States, secs. 34 (2), 35 (2), 41 (2) and (5) and 43 (1) (*b*) will be found on examination to remit to the operation of the general law over which the State retains control some of the most important elements in the validity of or title to bills and notes. The references to "unlawful means" and "illegality" and "defects of title" as well as to "personal defences" necessarily involve the proposition that it is by this general law that the rights arising under bills and notes must be ascertained. How far State legislation may and does affect the acquisition of rights under these instruments is illustrated by a mere reference to enactments relating to money-lending, gaming, gold-buying and supplying liquor on credit. Finally, it is not possible to neglect the argument of *expressio unius exclusio alterius* which arises from the express and particular annulment contained in sec. 7 of the specified State legislation. These considerations establish that, although Federal law undertakes the definition of what shall be bills of exchange, promissory notes and cheques, the statement of what special properties they shall possess, and the description of some of the consequences which ensue from their use, yet it leaves generally to State law authority to prescribe when and under what conditions, by what persons and subject to what qualifications they may be employed. Further, in matters of procedure, and perhaps in some matters of substantive law, sec. 79 of the *Judiciary Act* 1903-1927 adopts in the case of causes of action arising under Federal as well as State law the rules and provisions of State law so far as they are applicable. It is this provision that, in my opinion, operates to apply the appropriate State law relating to the limitation of actions when proceedings to enforce bills, cheques or notes are brought in Federal jurisdiction. (See *Federated Sawmill*,

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Timberyard and General Woodworkers' Employees' Association (Adelaide Branch) v. *Alexander* (1) and the United States cases there cited; cf. *Cohen* v. *Cohen* (2).)

But large as is the area within which the laws of a State may operate to affect the acquisition and transfer of rights by means of these negotiable instruments, the peculiar nature of the *Moratorium Act* appears to me to raise special difficulties in admitting it within that area. This legislation does not operate to affect or control the acquisition or transfer of rights by the use of bills and notes. It is not concerned with conditions attending a transaction in which such instruments may be employed as are, for instance, the enactments relating to money-lending, or with the policy of allowing them to be given effectually for some particular consideration, as are the provisions relating to gaming founded on 5 & 6 Wm. IV. c. 41, sec. 1, or with the possession of them as assets available in execution, as are those based on 1 & 2 Vict. c. 110, sec. 12, or with matters governing the fairness and propriety of transactions in the course of which bills and notes may be given, as, for instance, do secs. 25B to 25E of the South Australian *Land Agents Act* 1925 and 1927. The *Moratorium Act* does not affect instruments at their inception, and does not provide in advance how and under what limitations and qualifications rights may accrue or disabilities may be incurred. It is concerned with accrued rights. It seeks to suspend, subject to a discretionary relaxation of the suspension, the enforcement of existing liabilities incurred unconditionally with the full allowance of the State law and it includes liabilities upon bills and notes. That a right is given by the Federal statute to the holder of an undischarged instrument validly and regularly made, and issued for lawful consideration, by persons of full capacity, to enforce it when he is subject to no personal defence seems undeniable (see secs. 43 (1) (*b*), 62 (*a*) and 64 (2) (*a*)). It is true that the statute does no more than express and imply what the common law itself accomplished. But, by so doing, it has transformed rules of law which the State Legislature might vary or detract from as it chose into Federal statute law over the operation of which the State has no

(1) (1912) 15 C.L.R. 308, at p. 321, per *Isaacs* J.
(2) (1929) 42 C.L.R. 91, at p. 99.

authority. It is true, also, that the rights so enforceable flow from agreement. But agreement gives rise only to those consequences which the law affixes to it, and it is the Federal statute which contains that law. In my opinion, that statute exhibits no intention that State law might extinguish or impair accrued rights arising under its provisions. No doubt it contemplates the provisions of sec. 79 of the *Judiciary Act* 1903-1927 and the retention by the States of authority over the general law of remedies including the limitation of actions. But, in my opinion, the *Bills of Exchange Act* 1909 does not contemplate the legislative extinguishment of suspension of a right to enforce payment which has been obtained under Federal law.

In the present case, the promissory notes were given before the *Moratorium Act* came into operation and it is unnecessary to consider whether a distinction exists in the case of notes given after its commencement.

In my opinion, so far as the *Moratorium Act* would otherwise operate to preclude the holder from suing upon a bill, cheque or note, at least if given before 19th December 1930, it is inconsistent with the *Bills of Exchange Act* 1909 and is to that extent invalid.

I think the appeal should be allowed.

EVATT J. The respondent was the maker of two promissory notes which he gave to the appellant as collateral security for two instalments payable under an agreement. By the pleadings, the agreement is admitted to be a hire-purchase agreement within the meaning of the New South Wales *Moratorium Act* 1930-1931. The notes were not paid to the appellant on their due date, and he brought an action against the respondent in the Supreme Court of New South Wales for their amount.

The answer of the respondent is (1) that sec. 20 of the New South Wales Act requires the leave of a New South Wales District Court or Court of Petty Sessions before action can be brought and that such leave has not been obtained, and (2) that the appellant has not complied with sec. 4 (1) (*a*) of the Act.

The case for the appellant is based upon the proposition that the Federal *Bills of Exchange Act* gave it, as payee of the promissory

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notes, the right to sue for and recover in any Court of competent jurisdiction the amount promised to be paid, that the New South Wales *Moratorium Act* does not deny such right, but, if it does, it is inconsistent with the Federal Act, and void by reason of sec. 109 of the Commonwealth Constitution.

In the first place, I think it is reasonably clear that the State Act applies to the present action although in form it is merely an action for the recovery of the payments specified in the notes. For although the promissory notes were given collaterally to the agreement, the plaintiff is really seeking to recover instalments due under a hire-purchase agreement, despite sec. 20 of the Act. And there has also been a non-compliance with sec. 4 (1) (*a*) of the Act, which prevents a mortgagee, without leave of the Court, from calling up or demanding payment from any mortgagor of the whole or any part of the principal sum secured by the mortgage. (See secs. 11 (1) and (4).) With the opinions of *Harvey* C.J. in Eq., *James* and *Davidson* JJ. on this part of the case, I agree. They are in accordance with the judgment of *Cussen* J. in *Levick* v. *Trevascus* (1) and of *Stout* C.J. in *Hoare* v. *Farrow* (2).

Turning to the constitutional point, it should be noted that the New South Wales Act is not directed to the subject of promissory notes as such, but deals with them only as incidents of a special personal relationship between maker and payee.

The mere possession by B of a promissory note made in B's favour by A and duly delivered to B, affords little or no guide in ascertaining what was the transaction between A and B. By making the note A promises to pay it according to its tenor (*Bills of Exchange Act*, sec. 94 (*a*)). And it is true that promissory notes may be valid and binding, even although other securities collaterally to which they are made, are void (*Monetary Advance Co.* v. *Cater* (3)). But the agreement between A and B may give A a perfect defence to any action by B on the note, and A may even be able, by equitable process, to restrain B's action at law altogether. B's possession as payee of A's note is therefore quite consistent with the existence of many personal defences to any action by B, although, if B proceeds to negotiate the note, such defences may be no longer available to A.

(1) (1919) V.L.R. 118; 40 A.L.T. 124. (2) (1917) Gaz. L.R. (N.Z.) 19.
(3) (1888) 20 Q.B.D. 785.

Now it is conceivable that the Federal Legislature might have passed a law upon the subject of promissory notes, so that, when an instrument answering the described form came into existence, any action upon the note by the payee against the maker should not be defeated or restrained because of any personal relationship between those parties. In that event, a question would have arisen whether the law was a "properly framed" law with respect to the subject matter of "bills of exchange and promissory notes." For sec. 51 of the Constitution gives no general power to the Federal Parliament to pass laws with respect to contracts, other than those specified in sec. 51 (xx.), and it would be contended that the Federal authority had trespassed beyond the true domain of negotiable instruments because it set at nought the transactions in which they were given.

A perusal of the existing Commonwealth Act indicates that it was not intended to place restrictions upon the contractual freedom of the two original parties to a promissory note. Personal defences may be availed of by the maker against the payee (sec. 43 (1) (*b*)). Yet it does not follow from the availability of personal defences to makers against payees, that the State Parliament could pass a law depriving every payee of a promissory note of the right of suing the maker in the Courts of the State. And such a law is best attacked, not because sec. 43 (1) (*a*) of the Federal Act enables the holder of a bill to sue in his name, for, as *Harvey* C.J. in Eq. points out (1), the essence of that provision "is not in giving the holder a right to sue, but a right to use his own name as a plaintiff," but because "inconsistency" within the meaning of sec. 109 of the Constitution may exist between State and Federal laws even although it is possible to obey both laws. For the Federal *Bills of Exchange Act*, although leaving a limited number of questions in relation to negotiable instruments to be measured and ascertained by reference to the laws of the States, may well be regarded as intending to exclude from any operation whatsoever State laws which are, in substance, laws with respect to promissory notes. A State law of the character suggested above could hardly be regarded as a law establishing a personal defence. But it would be correctly described as a law upon the sole topic of promissory notes.

(1) (1932) 32 S.R. (N.S.W.), at p. 262.

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But in my opinion the situation is different when a State Parliament passes, let us suppose, a general law upon the subject matter of usury or interest or upon the subject matter of mortgages or hire-purchase agreements. The State Act would be addressed to transactions of the character described, and may regulate, and, by regulating, qualify, limit or even destroy, existing contractual rights. Usury may be made less profitable, interest rates may be reduced, the rights and remedies of parties to mortgage or hire-purchase transactions may be altered. Now it is obvious that there will often be promissory notes made and delivered in relation to, and as an integral part of, the transactions which the State Legislature is assumed to be regulating. But, in the first place, no such regulation could be described as one merely with respect to "promissory notes"; secondly, there is no express contradiction to the Federal *Bills of Exchange Act* discernible in laws of such a general character.

For sake of clearness, let me repeat two sentences from the judgment of *Harvey* C.J. in Eq. (1) which express his view of the present problem:—(*a*) "The general scheme of the" Federal "Act appears to me to leave questions arising between the maker and payee of the note to the general law of contract." (*b*) "As between the immediate parties to the note, any equities may arise by contract or conduct, and the mutual rights of the immediate contracting parties are, in my opinion, left to be decided by State law."

The first of these two propositions is based upon a construction of the Federal Act. The second expresses the learned Chief Judge's conclusion as to the present dispute. The difficulties I feel about a general adherence to the two propositions is implicit in what I have already said. I doubt whether a State enactment, denying payees of a promissory note the right of seeking to recover the amount thereof in its Courts, could be upheld though the enactment dealt solely with the "mutual rights of the immediate contracting parties" to the note.

But the New South Wales *Moratorium Act* restricts the rights of parties to mortgage and hire-purchase transactions, and it is only as an incident of the regulated transactions that one party has become the payee and the other the maker of a promissory note. With such

(1) (1932) 32 S.R. (N.S.W.), at pp. 262, 263.

mortgage and hire-purchase transactions, the Commonwealth Parliament has no general constitutional power to deal and the State Parliament has exclusive authority. In my opinion State legislation upon those general topics is not invalidated although, as part of its scheme, it restricts the rights and remedies of payees of promissory notes against the makers thereof. The case is of great importance, and I shall elaborate my reasons for reaching this opinion.

It should not be forgotten that the State legislatures are not, by the Constitution, deprived of all authority to deal with the subject matter of promissory notes, as they are with respect to the subjects mentioned in sec. 52 of the Constitution. Indeed, the very question raised in this case, of inconsistency under sec. 109 between Commonwealth and State legislation, assumes that the State law is competent to the State legislature and would, but for sec. 109, be fully operative.

The tendency of the earlier decisions of this Court was to deny any "inconsistency" between the laws of Federal and State legislatures, if it was possible for both laws to operate without contradiction, so that obedience could be rendered to both sets of commands. Of recent years, however, a more extended meaning has sometimes been accorded to the word "inconsistency." Thus, in *Cowburn's Case* (1), part of a New South Wales Act, by which additional obligations to their employees were cast upon employers, was under consideration. Both employers and employees were subject to the operation of a Commonwealth industrial award which had the force of a Commonwealth statute, but it was possible for the employers to obey both Commonwealth award and State statute. For instance, the Commonwealth award fixed a maximum working week of 48 hours, but the employer bound by it was able to obey it, as well as the State statute fixing the hours at a maximum of 44, by working his employees the lower number, 44. But this Court held the State statute to be "inconsistent" with the Federal law contained in the award, because the statute dealt with and sought to control the very matters and relationships which were already regulated and fully dealt with by the Commonwealth authority. Such a conclusion was capable of statement in two different ways: —(1) The Federal award, prescribing a maximum week of 48 hours

(1) (1926) 37 C.L.R. 466.

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without payment of overtime, was also ordaining that employers need not pay overtime until 48 hours had been worked. In this sense there was actual contradiction between the Federal and State commands. (2) The Federal award completely "covered the relevant field," which was the regulation of the industrial relationship of described employees and described employers, because it laid down an exhaustive code upon the subject and left no room for the operation of the State Act. Each statement of the conclusion affirms "inconsistency" but the second statement indicates that, despite the mere possibility of obedience to commands issuing from the two law-making authorities of Australia, there may be an inconsistency which nullifies the State command.

Two other classes of case may be referred to. In *Hume* v. *Palmer* (1) this Court held that State navigation regulations for preventing collisions at sea, identical in every respect with Commonwealth navigation regulations of vessels engaged in inter-State and foreign trade and commerce, were "inconsistent" with the latter so far as they related to such trade and commerce. Obedience to both sets of rules was of course involved in obeying either. But the Commonwealth rules were regarded as "covering the relevant field," and as necessarily shutting out the application of those promulgated by the State. Again, each set of commands was addressed to the very same subject matter and the very same aspect of it. The case of *Union Steamship Co. of New Zealand* v. *The Commonwealth* (2) treated from very much the same angle of approach the question of "repugnancy" between an Imperial merchant shipping enactment and Commonwealth navigation legislation, both enactments dealing with the method of the engagement and discharge of seamen.

The other class of case is represented by *Ex parte McLean* (3). A State Act prescribed a certain method of punishment for employees found guilty of specified conduct towards their employers. But a Federal award dealt with exactly the same conduct by employees, and imposed a somewhat different sanction. It was held that the Federal award exhibited an intention of imposing its duty and its sanction as the complete set of rules to govern this aspect of the

(1) (1926) 38 C.L.R. 441. (2) (1925) 36 C.L.R. 130.
(3) (1930) 43 C.L.R. 472.

industrial relationship between specified employers and employees, and that, consequently, the State Act did not apply to any employees bound to observe the duties laid down by the Federal award.

It is now established, therefore, that State and Federal laws may be inconsistent, although obedience to both laws is possible. There may even be inconsistency although each law imposes the very same duty of obedience. These conclusions have, in the main, been reached, by ascribing "inconsistency" to a State law, not because the Federal law directly invalidates or conflicts with it, but because the Federal law is said to "cover the field." This is a very ambiguous phrase, because subject matters of legislation bear little resemblance to geographical areas. It is no more than a *cliché* for expressing the fact that, by reason of the subject matter dealt with, and the method of dealing with it, and the nature and multiplicity of the regulations prescribed, the Federal authority has adopted a plan or scheme which will be hindered and obstructed if any additional regulations whatever are prescribed upon the subject by any other authority; if, in other words, the subject is either touched or trenched upon by State authority.

Now, in a general way, it is true to say that some of the subjects mentioned in sec. 51, as to all of which the Commonwealth Parliament has power, but not exclusive power, to make laws, may be so dealt with by the Commonwealth Parliament that the concurrent power of the State Parliament to deal with those subjects, will, for all practical purposes, be terminated. For any law passed by the State Parliament on the specified subject matter may be, or become, "inconsistent" with a Federal law which "covers the relevant field."

But it is also clear that, owing to the very nature of some of the subjects specified in sec. 51, it will seldom, if ever, be possible for the Commonwealth Parliament to pass a law, which will not only be a valid law with respect to the specified subject, but will also be one "covering the field" so as to render inconsistent and void any State law which deals with or operates upon the same subject. Take, for instance, the subject of aliens, mentioned in sec. 51 (XIX.). A Commonwealth statute might validly impose prescribed duties upon aliens, but it is difficult to see how a Commonwealth law

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could be passed upon the subject of aliens which would render inconsistent with it State laws imposing separate and additional duties, even upon aliens alone. With other subject matters, the position is more difficult of general statement. Could a Commonwealth law with respect to taxation ever render void as inconsistent with it, a State law imposing direct taxation, unless compliance with the Commonwealth imposition made it impossible to obey that of the State ?

In other words, does not the subject matter of " aliens " indicate a class of persons who may enter into an innumerable number of relations with the States and their citizens, and that of " taxation " indicate a process or system of extraction which, as exercised by the Commonwealth authority, implies the payment of taxes *to* the Commonwealth itself, and is not directly related to what the States may demand as taxes from the same citizens, so long as Commonwealth requirements are met ? (Cf. *The Federalist*, Essay XXXIII.)

These two subject matters of legislative power may well be contrasted with that of conciliation and arbitration for the prevention or settlement of certain industrial disputes. Once admit that the Commonwealth Parliament may give the sanction of Commonwealth law to an arbitrator's award settling such disputes, and that such award may prescribe a complete industrial code for the government of the disputants, there is little or no room left for any action by other persons or authorities having the effect of adding to, much less altering, the duties laid down in the Commonwealth code. Much the same position arises in relation to the regulation by the Commonwealth of portions of inter-State trade and commerce such as navigation rules, the contents of contracts of affreightment and the like. Selection by the Commonwealth of small portions of a subject upon which it may legislate, especially where such subjects, if systematically regulated at all, cannot admit of more systems than one, readily results in the avoidance of State legislation which, though capable of being simultaneously obeyed, deals with the same small portion of the given subject.

But this doctrine of " inconsistency " is very difficult of application to a subject like " promissory notes," so far as it is concerned with the respective rights and duties of the maker and payee

of the note. In some cases, as has already been indicated, the promissory note may represent a principal transaction, but it is very often a minor aspect of the transaction between maker and payee. The transactions in the course of which a note may be given are infinite in number and variety. No Commonwealth law could deal with them all. A State law which deals with such promissory notes only so far as it is regulating the duties of persons who have come into other relationships where some of those persons have chanced to make, deliver or receive notes of hand, can seldom, if ever, be regarded as setting up any additional or conflicting scheme relating to promissory notes, although incidentally the rights and remedies of payee and maker are affected.

Clearly, the Federal *Bills of Exchange Act* has not attempted to confer any statutory "right of continuous recourse" upon the maker as against the payee of a note, irrespective of the relationship between those parties and of all provisions of State law governing that relationship or adding to or subtracting from its existing rights and duties. There is certainly no inconsistency or contradiction in the narrower sense of "direct collision" referred to by *Higgins* J. in *Union Steamship Co. of New Zealand* v. *The Commonwealth* (1). And there is no ground, in my opinion, for applying the extended doctrine of "inconsistency" to the restriction which the New South Wales *Moratorium Act* places upon the remedies of certain payees against makers. That Act is in no sense an embodiment of any plan or system or code relating to promissory notes. It deals with a limited number of transactions and with persons who have entered into certain relationships. With those relationships, as relationships, the Commonwealth Parliament cannot, and the State Parliament alone can, deal. Exercising this exclusive authority, the State Parliament has touched only incidentally upon the subject of promissory notes, a subject with which it is not debarred from dealing. If, merely because negotiable instruments have been brought into existence by members of the class consisting of mortgagors, the State is debarred from according relief to the members of that class, this can only be because the Federal Act has brought about that result. If it had done so, it would have been

(1) (1925) 36 C.L.R., at p. 156.

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undesignedly, but the question would then arise whether the power of the Commonwealth Parliament to deal with promissory notes has not, also undesignedly, been exceeded. But as it is, no such question of Commonwealth power arises. There is no inconsistency between the *Moratorium Act's* restriction of the remedies of the mortgagee, when he is pursuing them by means of a promissory note made in his favour by the mortgagor, and anything contained or implied in the Federal *Bills of Exchange Act*.

In the present case the plaintiff's rights have been suspended, not because he is the payee and not in his capacity as payee of the defendant's note, but because he and the defendant are parties to a hire-purchase transaction. The plaintiff's rights as payee are affected, not because the State Parliament is concerning itself with the subject of promissory notes, but only because the note was made and given as part of a larger and more important transaction. That transaction with all its minor incidents, the Parliament of the State of New South Wales has seen fit to regulate in the interests of its citizens, and its method of regulating the transaction is not contradictory to anything expressed or implied in the Federal *Bills of Exchange Act*.

In my opinion this appeal fails, and it should be dismissed.

McTIERNAN J. Sec. 20 of the *Moratorium Act* of New South Wales prohibits a person to whom an instalment is due under the terms of a hire-purchase agreement from taking action to recover the same except with the leave of the Court granted under sec. 4 of of that Act. The Court means a District Court or a Court of Petty Sessions of New South Wales. The *Moratorium Act* is expressed to be "an Act to make provision for a moratorium: to restrict temporarily certain of the rights possessed by mortgagees, vendors and others: and for purposes connected therewith." The appellant and the respondent are the payee and the maker respectively of two several promissory notes. The appellant having sued on the notes after they became due, the respondent pleaded that they were made by the respondent and given to the appellant as collateral security for two respective instalments payable under an agreement, which is a hire-purchase agreement within the meaning of the

Moratorium Act, and the appellant commenced the action without leave of the Court, contrary to the provisions of sec. 20 of the Act. The Supreme Court held that the commencement of the action on the notes is a demand for payment within the meaning of sec. 4; that the appellant is a mortgagee within the meaning of that section, and that the moneys sued for are instalments of purchase-money due to the appellant by the terms of a hire-purchase agreement. In that view I concur. The defendant's plea, in my opinion, does allege that the sums of money for which the appellant is suing are instalments of purchase-money within the meaning of sec. 20 (*Counsell* v. *London and Westminster Loan and Discount Co.* (1); *Levick* v. *Trevascus* (2); *Hoare* v. *Farrow* (3)). In this view of the operation of secs. 20 and 4, the payee of any such note may not sue the maker without the leave of the Court. Should he apply for leave the Act authorizes the Court to refuse the application. If the application be refused, the right of the payee to recover the debt may be indefinitely postponed. The Court is also authorized to grant leave subject to conditions, or it may postpone the date for the payment of the instalment which is due by the terms of the agreement. In *Gould* v. *Robson* (4), which was a case in which time was given by the holder to the acceptor of a bill of exchange, Lord *Ellenborough* said (5): "How can a man be said not to be injured if his means of suing be abridged by the act of another?" It is obvious that these sections of the *Moratorium Act* restrict the right of a person to recover money expressed to be due by the terms of a promissory note, which is given as security for an instalment due in the manner mentioned in sec. 20.

Thus a question of considerable difficulty arises, namely, whether these provisions of the *Moratorium Act* are inconsistent with the *Bills of Exchange Act* 1909, so that the latter prevails, and the former are, to the extent of their inconsistency, invalid. The principle which should be applied to determine whether there is inconsistency under sec. 109 of the Constitution between a law of the Commonwealth and a State was stated by *Dixon* J. in *Ex parte McLean* (6),

(1) (1887) 19 Q.B.D. 512.
(2) (1919) V.L.R. 118; 40 A.L.T. 124.
(3) (1917) Gaz. L.R. (N.Z.) 19.
(4) (1807) 8 East 576; 103 E.R. 463.
(5) (1807) 8 East, at p. 579; 103 E.R., at p. 465.
(6) (1930) 43 C.L.R. at p. 483.

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in these terms:—"When the Parliament of the Commonwealth and the Parliament of a State each legislate upon the same subject and prescribe what the rule of conduct shall be, they make laws which are inconsistent, notwithstanding that the rule of conduct is identical which each prescribes, and sec. 109 applies. That this is so is settled, at least when the sanctions they impose are diverse (*Hume* v. *Palmer* (1)). But the reason is that, by prescribing the rule to be observed, the Federal statute shows an intention to cover the subject matter and provide what the law upon it shall be. If it appeared that the Federal law was intended to be supplementary to or cumulative upon State law, then no inconsistency would be exhibited in imposing the same duties or in inflicting different penalties. The inconsistency does not lie in the mere co-existence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount Legislature to express by its enactment, completely, exhaustively, or exclusively what shall be the law governing the particular conduct or matter to which its attention is directed. When a Federal statute discloses such an intention, it is inconsistent with it for the law of a State to govern the same conduct or matter." It becomes material therefore to inquire whether the provisions of the *Moratorium Act* above mentioned, are, to the extent and in the degree that they abridge the means of the payee to recover moneys which the maker has by the terms of a promissory note, engaged to pay him, legislation with respect to "a particular matter or conduct" on which the Parliament of the Commonwealth intended by the *Bills of Exchange Act* to express completely or exhaustively or exclusively what shall be the law governing that matter or conduct. The Parliament has stated that the *Bills of Exchange Act* is "an Act relating to bills of exchange, cheques and promissory notes. In *Embericos* v. *Anglo-Austrian Bank* (2) *Walton* J. said, concerning the English *Bills of Exchange Act* 1882, from which the Australian Act is copied, that it "does not purport to be a scientific code dealing with the whole law relating to bills of exchange, but it is more in the nature of a digest of the law on the subject, and it contains, like many similar statutes, a general saving clause (sec. 97, sub-sec. 2) . . . ."

(1) (1926) 38 C.L.R. 441.

(2) (1904) 2 K.B., at p. 876.

The decision in that case was affirmed on appeal (*Embiricos* v. *Anglo-Austrian Bank* (1)). Sec. 5 (2) of the Australian *Bills of Exchange Act*, except for a minor textual difference, is a copy of sec. 97 (2) of the original English Act. The instruments to which the Act relates are commonly known as negotiable instruments. They have also been described as "instruments of commerce" (*Nathan* v. *State of Louisiana* (2)), "circulating medium" (*Byles* on *Bills*, 16th ed. (1899), p. xiii.), and "circulating credit" (*Story, Commentaries on the Law of Promissory Notes*, 5th ed. (1859), p. 3). They are contracts possessing special advantages and privileges, in virtue of which they perform the functions implied in the above-mentioned descriptions. "The particular conduct or matter" to which the Parliament of the Commonwealth directed its attention in passing the *Bills of Exchange Act*, was, in my opinion, the characteristics or attributes which distinguished these contracts as a class apart from other contracts. Viewed as "negotiable instruments" or "instruments of commerce" or "circulating credit" they fulfil after a fashion a function of currency, and in that character are matters of general and national importance. Speaking of the attributes of negotiability, which in the course of legal development became attached to a promissory note, *Story*, in his *Commentaries on the Law of Promissory Notes*, 5th ed., at p. 3, writes "yet it is the latter quality which gives it its principal importance and value in modern times, and makes it circulating credit, so extensively useful and so generally resorted to in the commerce of the world." The language of Parliament is the guide to its intention. However, it would probably not be a false assumption, and it is not, in my opinion, inconsistent with the language of the Act, to say that the motive of public policy and convenience which led to the enactment of this Act by the National Legislature was to obtain uniformity throughout Australia in the rules of law to which these instruments owe their utility in commerce. In summarizing the characteristics of these instruments the learned author of *Halsbury's Laws of England*, 1st ed., vol. II., p. 461, writes the following statement concerning the nature of the original English Act: "The outstanding

(1) (1905) 1 K.B. 677.
(2) (1849) 8 How. 73, at p. 81; 17 Curtis 505, at p. 507.

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characteristics common to bills, cheques and notes which found expression in the cases before 1882, and are embodied in the codifying statute, are—(1) that in the case of such instruments a valuable consideration is presumed, so that there is no necessity to state it; (2) that such instruments may be transferred from one person to another by indorsement or by delivery, so as to enable the transferee to sue thereon in his own name; (3) that the transferee who takes such an instrument in good faith and for value obtains a good title in spite of any defect of title in the transferor. The codifying statute is based upon these broad principles, and, even in its details, for the most part crystallizes in permanent form the effect of the many judicial decisions which preceded it. But exceptions are to be found where the law has been deliberately altered by it." The Australian Act is based upon the same principles as the English Act. The gist of its provisions is that it defines the nature of the instruments to which it relates, prescribes the requisites of such instruments respectively and, generally, with some variation, gives statutory effect to a set of rules which effected and regulated their complete operation as negotiable instruments and gave them special advantages and privileges over other classes of contracts. Within the Act itself there is full recognition of the existing law on matters with respect to which the Parliament of a State may have legislated or could legislate in exercise of the powers reserved to it by the Constitution. By the operation of the *Bills of Exchange Act* a promissory note reduces a debt to certainty, renders it transferable, and the maker is provided with credit while the payee is afforded the means of obtaining ready money by discount. But the Act recognizes that the transaction out of which the debt arises may be governed by the law of a State. The Federal Act is a special system of law erected upon a foundation of which State law forms part for resolving debts into negotiable paper. If debts were not contracted, the instruments to which the Act relates would not come into existence. Any law of a State which purported to set up a rule with respect to the operation of a bill of exchange, cheque or promissory note, as a negotiable instrument would be with respect to a "particular matter or conduct" to which the Parliament of the Commonwealth has directed its attention to the extent and in the degree

described in the passage which has been quoted from the judgment of *Dixon* J. in *Ex parte McLean* (1). The provisions of the *Moratorium Act*, which are in question in this case, do not, in my opinion, assume to enact any rule with respect to the operation of a promissory note as a negotiable instrument. If these provisions are effective, failure to observe them is of course a good ground of defence to the maker of a promissory note in an action brought by the payee to recover moneys due on a note which evidences the debt which has its origin in the hire-purchase agreement, to which the maker and payee are parties. This defence is additional to other defences which he may have under rules of law not defined by the *Bills of Exchange Act*. It is true that the right of the maker to sue is thereby restricted. But the *Bills of Exchange Act* expressly recognizes that there may be personal defences to the action, and it neither defines nor limits the number of such defences. Instances of statutes under which defences may be set up are the *Gaming and Betting Act* 1912 (N.S.W.), the *Money-lenders and Infants Loans Act* 1905 (N.S.W.) and the *Statute of Limitations*. As the source of a defence which is available to the maker in an action by the payee against him, the provisions of the *Moratorium Act* may, in my opinion, be classed with such statutes. The effect of the *Moratorium Act* is that the maker may plead that the suspension of the payee's rights under the hire-purchase agreement which the Act imposes, has not been raised pursuant to its provisions. Considering these provisions of the *Moratorium Act* from this point of view, it cannot, in my opinion, be excluded from the class of statutes, not regarded as inconsistent with the *Bills of Exchange Act*, under which the maker of a note may resist the payee's claim to be paid according to its tenor. An Act in this class may destroy the claim at its root by the provision made in it with respect to the transaction to which the note relates or the effect of such an Act may be, *inter alia*, to modify or extinguish the liability, arising under the transaction, in the person who is the maker of the note. For example, under sec. 1 of the *Money-lenders and Infants Loans Act* of New South Wales the debt due to a money-lender may be reduced or extinguished. If the legislature of a State came to view certain transactions hitherto legitimate as mischievous

(1) (1930) 43 C.L.R., at p. 483.

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and by statute declared them to be void *ab initio*, whether made before or after the Act, such a statute would afford a good defence to an action on a promissory note made before the Act to carry into effect any such transaction. So also the *Moratorium Act*, which suspends the rights of persons to sue for the recovery of moneys agreed to be paid in connection with certain transactions in relation to which the State Parliament has legislated, does, in my opinion, afford a good defence to the maker of a note, should the payee in disregard of such provisions sue on a note given for the purpose of securing the right of the payee to receive payment of such moneys.

Secs. 43 (1), 62 and 94 (*a*) were cited as particular provisions of the *Bills of Exchange Act* with which secs. 20 and 4 of the *Moratorium Act* are in conflict. I agree with the opinion of *Harvey* C.J. in Eq. with respect to sec. 43 (1). His Honor said (1):—"In my opinion, the gist of that provision is not in giving the holder a right to sue, but a right to use his own name as a plaintiff. In other words, it might be paraphrased thus: 'Any holder of a bill, who has a right to sue, may sue in his own name.'" The sub-section gives statutory recognition to that outstanding feature of a negotiable instrument by the law merchant, namely, that the holder could use his own name in any proceeding taken on the bill, although he was not a party to the original contract. Similarly as to secs. 62 and 94 (*a*), of the *Bills of Exchange Act*, a State Act affecting a transaction carried out by a promissory note, would not be overborne by those sections if the Act prohibited the transaction or prescribed conditions precedent to its enforcement. The State Act would afford a ground of defence to the maker of the note. Those sections of the *Bills of Exchange Act* do not entitle the payee to judgment as of course against the maker of a promissory note. In my opinion the provisions of the *Moratorium Act*, to the extent to which they apply to an action on a promissory note, brought by the payee against the maker to recover money due to the payee under the terms of a hire-purchase agreement, do not conflict with the *Bills of Exchange Act*.

The appeal should be dismissed.

Appeal dismissed with costs.

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Solicitors for the respondent, *Cater & Atkins*, Leeton, by *J. M. Rossell.*

J. B.

(1) (1932) 32 S.R. (N.S.W.), at p. 262.