

[HIGH COURT OF AUSTRALIA.]

SMITH APPELLANT ;
DEFENDANT,

AND

MOTOR DISCOUNTS LIMITED . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF
NEW SOUTH WALES.

*Moratorium—Advance of money—Agreement to repay—Guarantee—Mortgage—
Personal covenant in mortgage—Avoidance by statute—Repeal of statute—Revival
of liability—Action upon the guarantee—Plea—Allegations—Moratorium Act
1930-1931 (N.S.W.) (No. 48 of 1930—No. 43 of 1931), sec. 25 (7)—Moratorium
and Interest Reduction (Amendment) Act 1931 (N.S.W.) (No. 66 of 1931), sec. 4
—Moratorium Act 1932 (N.S.W.) (No. 57 of 1932), secs. 3, 8, 9, 34, 35—
Interpretation Act of 1897 (N.S.W.) (No. 4 of 1897), sec. 8.*

H. C. OF A.
1935.
SYDNEY,
Oct. 4, 8, 9,
31.
Rich, Starke,
Dixon, Evatt
and McTiernan
JJ.

The respondent brought an action against the appellant to recover the sum of £2,100. The action was based on an indenture dated 10th July, 1931, made between the appellant and the respondent, in which the appellant, therein called "surety," covenanted that, in consideration of the sum of £2,100, paid by the respondent, therein called "mortgagee," to the T.B. Settlement at his request, he would repay that sum to the respondent. The appellant pleaded that the respondent agreed to lend the appellant and two other persons the sum of £2,100, to be secured by a mortgage of real property containing a personal covenant on the part of the appellant alone and the covenant set forth in the indenture; that the mortgage dated 7th July 1931, set forth in full in the plea, and the indenture set forth in the declaration were executed, pursuant to this agreement, and not otherwise; and that there was no legal person or entity known as the T.B. Settlement. The sum of £2,100 referred to in the two documents was the same sum. Both documents provided for the exclusion of the provisions of the *Moratorium Act 1930* (N.S.W.), and any

H. C. OF A.
1935.

SMITH
v.
MOTOR
DISCOUNTS
LTD.

amendments thereof, and of any future similar legislation. The respondent demurred to the plea.

Held :—

(1) That the personal obligation of a mortgagor arising under instruments collateral to a mortgage of real property is not revived by the *Moratorium Act* 1932 (N.S.W.), notwithstanding the repeal by that Act of the *Moratorium Act* 1930-1931, as amended by the *Moratorium and Interest Reduction (Amendment) Act* 1931, by which such personal obligations were avoided.

(2) That the covenant in the indenture dated 10th July 1931 was a covenant “by a mortgagor” within the meaning of that expression in sec. 25 (7) of the *Moratorium Act* 1930-1931, as amended.

(3) That the plea sufficiently alleged that the covenant sued upon was not by way of guarantee and was therefore not within the qualification of sec. 25 (7) of the *Moratorium Act* 1930-1931 introduced by sec. 35 (1) of the *Moratorium Act* 1932.

Decision of the Supreme Court of New South Wales (Full Court): *Motor Discounts Ltd. v. Smith*, (1935) 35 S.R. (N.S.W.) 354; 52 W.N. (N.S.W.) 96, reversed.

APPEAL from the Supreme Court of New South Wales.

In an action brought by Motor Discounts Ltd. in the Supreme Court of New South Wales, that company sought to recover from the defendant, Sir James Joynton Smith, the sum of £2,257 10s., being £2,100 principal and £157 10s. interest, upon a covenant contained in an indenture made between the parties and bearing date 10th July 1931. The indenture was set forth in full in the declaration. It recited that the defendant (who was referred to in the indenture as the “surety”), in consideration of the sum of £2,100, the receipt of which was acknowledged, paid at his request to the Picton Lakes Village T.B. Settlement by the plaintiff company (which was referred to in the indenture as the “mortgagee”), covenanted and agreed that he would repay that sum to the plaintiff on 10th July 1932 and would make quarterly payments of interest thereon at a specified rate until the principal moneys had been repaid; that as between the defendant and the plaintiff the defendant should be considered a principal debtor for all the moneys thereby secured, and that he should not be released from any obligations thereby undertaken by any indulgence granted to the Picton Lakes Village T.B. Settlement; and that the provisions

of the *Moratorium Act* 1930 (N.S.W.) or any amendment or consolidation thereof, or of any future similar legislation by the Federal or State Legislatures were expressly excluded from having any effect on the transaction. The plaintiff averred payment of the principal money claimed and the due performance of all conditions necessary to entitle it to payment.

The defendant, by his first plea, alleged that he and two other persons were seised in fee simple of certain land as trustees, without having any beneficial interest, and by deed agreed with the plaintiff that it should lend them the sum of £2,100 to be secured by mortgage of the land referred to above subject to the condition that the defendant only should be liable for repayment to the extent provided by the instrument of mortgage and the indenture set forth in the plaintiff's declaration ; and that those two documents were thereupon executed in pursuance of that agreement and not otherwise. The instrument of mortgage, which bore date 7th July 1931, was set forth verbatim in the plea. It was recited therein that in consideration of the sum of £2,100 lent to the trustees, the receipt of which they acknowledged, the defendant solely covenanted to repay the money, with interest ; and that he and his co-mortgagors jointly covenanted to insure, to pay rates and taxes, and to attorn as tenants to the mortgagee. The instrument of mortgage also provided that the provisions of the *Moratorium Act* 1930, or any amendment or consolidation thereof, and of any future similar legislation by the Federal or State Legislatures were expressly excluded and should not apply to the mortgage. It was alleged in the plea that at the time of the execution of the documents there was no person or persons, or no entity, juristic or otherwise, known as the Picton Lakes Village T.B. Settlement. The plaintiff demurred to the plea.

The Supreme Court of New South Wales held that the defendant was not a guarantor and, therefore, that he was not by sec. 35 of the *Moratorium Act* 1932 (N.S.W.) expressly excluded from the protection of that Act. But it held also that covenants for payment in mortgages in existence before the passing of the *Moratorium and Interest Reduction (Amendment) Act* 1931 (N.S.W.) were revived by the repeal of sec. 4 of that Act by the *Moratorium Act* 1932 (N.S.W.),

H. C. OF A.
1935.
SMITH
v.
MOTOR
DISCOUNTS
LTD.

H. C. OF A.
1935.
SMITH
v.
MOTOR
DISCOUNTS
LTD.

and became valid covenants, subject, however, to the provisions for immunity, and the exceptions therefrom, provided by sec. 34 of the latter Act, and, therefore, that the plaintiff was entitled to sue on the covenant contained in the indenture of 10th July 1931 : *Motor Discounts Ltd. v. Smith* (1).

The defendant now, by special leave, appealed from that decision to the High Court.

Weston K.C. (with him *Gain*), for the appellant. On the pleadings and the facts stated therein there was no principal debt other than that created in the mortgage. There was no person, juristic or otherwise, known as the Picton Lakes Village T.B. Settlement. The sum of £2,100 referred to in both documents is one and the same sum of money, which, notwithstanding the recital in the instrument of mortgage, was paid to the T.B. Settlement. The view expressed by *Davidson J.* in the Court below as regards secs. 8 and 9 of the *Moratorium Act* 1932 is incorrect. Reading the Act as a whole his Honor concluded that the operation of the *Interpretation Act* of 1897 was displaced; that if so, the common law principle applied, this transaction was not completed in the sense that money was not paid, and therefore the personal obligation was restored. Under the Act "mortgagor" includes a guarantor of a mortgage debt, whether the guarantee is included in the mortgage deed itself or in another instrument. Sub-sec. 7 of sec. 25 of the 1930-1931 Act is not limited to covenants, agreements, or stipulations by a mortgagor contained in the mortgage document.

[*DIXON J.* referred to *Stock Motor Ploughs Ltd. v. Forsyth* (2).]

Where, as here, the mortgage was executed during the period between the respective commencing dates of the first and second *Moratorium Acts*, and notwithstanding the deed and the mortgage contained provisions purporting to exclude moratorium legislation, the effect of sub-sec. 7 of sec. 25, as inserted by Act No. 66 of 1931, was totally to extinguish for all purposes the personal obligation of the mortgagor. The appellant's stipulation contained in the deed sued upon that he would pay the moneys referred to in the mortgage

(1) (1935) 35 S.R. (N.S.W.) 354; 52 W.N. (N.S.W.) 96.
(2) (1932) 48 C.L.R. 128.

became void and of no purpose. The provisions of the 1932 Act do not in any way operate to revive the personal obligation. This is clearly shown by sec. 34 of that Act, particularly by the requirement in sub-sec. 4 of confirmation of the covenant, and by the terms of sub-sec. 5. That section and secs. 33, 35 and 41, are of great importance in dealing with the problems which arise here. On the true construction of sec. 34, sub-secs. 1, 3 and 4 thereof deal with past mortgages and the right to sue thereon; sub-secs. 2 and 5 deal with future mortgages; therefore sub-sec. 5 (b) cannot be invoked in aid of the restoration of the right to sue. The provisions of sub-secs. 3 and 7 of sec. 25 of the 1930-1931 Act show that contracting out of the operation of the Act was forbidden. The provision as to the liability of mortgagors in New South Wales is a permanent part of the law. Sec. 9 of the 1932 Act only presupposes that actions might not be brought without leave. That section does not re-create the right to sue on the personal covenant. Nothing in sec. 34 (5) (b) of the 1932 Act avoids rights as to collateral documents; it leaves those rights untouched. Sec. 25 (7) of the 1930-1931 Act gave protection not only to the mortgage itself, but also to collateral instruments. There is a marked and material distinction between the words used in sub-sec. 1 of sec. 25 and those used in sub-sec. 7 of that section.

[DIXON J. referred to *City Mutual Life Assurance Society Ltd. v. Smith* (1).]

Sub-sec. 7 of sec. 25 extends to collateral documents given by a mortgagor in that character. Sec. 35 of the 1932 Act indicates a recognition by the Legislature of the continued operation of sec. 25 (7) of the 1930-1931 Act, notwithstanding its purported repeal; that is, that its operation continued except in so far as the 1932 Act modified it. The appellant is a principal debtor, not a guarantor; therefore sec. 35 of the 1932 Act does not operate to revive the personal obligation destroyed by sec. 25 (7) of the 1930-1931 Act (*Permanent Trustee Co. of New South Wales Ltd. v. Hinks* (2); *Roper v. Park* (3)). The decision in the latter case is in direct conflict with the decision by the same Court in this case.

H. C. OF A.
1935.
SMITH
v.
MOTOR
DISCOUNTS
LTD.
—

(1) (1932) 48 C.L.R. 532, at p. 541.

(2) (1934) 34 S.R. (N.S.W.) 130, at p. 137; 51 W.N. (N.S.W.) 37, at p. 38.

(3) (1935) 35 S.R. (N.S.W.) 430; 52 W.N. (N.S.W.) 129.

H. C. OF A.
 1935.
 SMITH
 v.
 MOTOR
 DISCOUNTS
 LTD.

Roper, for the respondent. The documents now under consideration contain provisions expressly excluding the 1930 Act; therefore, by virtue of sec. 13 of that Act, the mortgage was not affected by moratorium legislation prior to the 1932 Act, or by any part of it, and this notwithstanding the amendment made to sec. 13 (a) by Act No. 43 of 1931. The 1930-1931 Act read as a whole shows that the mortgage is not caught by the provisions of sec. 25 (3) of that Act. That sub-section should be construed as if the words "to which this Act applies" appeared after the word "property." Any other construction would tend to bring in Crown mortgages exempted by sec. 3. Sub-sec. 7 of sec. 25 should be read as applying to those mortgages to which the 1930-1931 Act applies. The words "notwithstanding anything in this or in any other Act contained" refer to those provisions of the Act which appear to give a mortgagee in respect of any mortgage, either qualifiedly or unqualifiedly, a right of action. The *Moratorium Acts* do not expressly provide that the personal covenant in mortgages of real property shall be void for all time. This matter does not come within the operation of sec. 25 (7). The word "mortgagor" in that section must be confined in its interpretation to the person who is acting in the character and capacity of a mortgagor: it does not extend to a person who, as here, merely happens to be a mortgagor (*Macansh v. Mackey* (1)). It is a matter of chance that the appellant happens to be the mortgagor; the obligation sought to be enforced against him is an obligation undertaken by him in a separate deed as a guarantor. The money was advanced to a third party. The money payable under the mortgage was the debt of the appellant and two other persons; under the separate instrument of guarantee sued upon the debt is the debt of the appellant alone (*Re Robinson's Deed of Arrangement* (2)), and it was incurred by him outside his capacity as mortgagor. On the state of the pleadings it is admitted, or not denied, that the obligation was incurred by the appellant as a guarantor within the meaning of the *Moratorium Act*. That being so, the combined effect of the 1932 Act and the 1930-1931 Act is to render him liable on his contract of guarantee. That instrument is, on the face of it, purely a document of guarantee. The allegation

(1) (1934) 51 W.N. (N.S.W.) 156.

(2) (1932) 5 A.B.C. 145.

that the money was paid to the Picton Lakes Village T.B. Settlement implies an obligation on the part of that association, whatever it may be, to repay the money advanced to it. The mere fact that the documents were executed in the form and manner shown is sufficient to make the appellant's liability that of a guarantor. A guarantee may subsist and be enforced even though the primary obligation has not come into being (*Yorkshire Railway Wagon Co. v. Maclure* (1); *Garrard v. James* (2)). The Legislature has provided in sec. 34 of the 1932 Act a code to cover the whole of the relationship between mortgagees and mortgagors in respect of all mortgages, whether executed before or after the commencement of that Act. That section establishes a contrary intention to the provisions of sec. 3 as to the effect of the repeal, and a contrary intention, also, to the provisions of the *Interpretation Act*. Sub-sec. 1 of sec. 3 is in a form which is incomprehensible, as applied to old mortgages, if the covenant had become and remained void. That sub-section shows an intention on the part of the Legislature to revive personal covenants. If the effect of the repeal is to revive the obligation, then it must revive all the obligations which were made void by sec. 25 (7) of the 1930-1931 Act. Where a mortgagee is able to confine his right of action to a document which is not a mortgage, the provisions of sec. 35 (1) of the 1932 Act apply. The phrase "right accrued" involves something being done by the party claiming the benefit of the right (*Abbott v. Minister for Lands* (3)). The difference between the recitals in the two documents, which are not alleged as statements of facts, is a necessary consequence of the difference in the nature of those documents. It amounts to the same thing whether the money was lent to the mortgagors or to some other person at their request.

H. C. OF A.
1935.
SMITH
v.
MOTOR
DISCOUNTS
LTD.

Weston K.C., in reply. In New South Wales matters of evidence from which inferences may be drawn are not stated in common law pleadings; those pleadings should contain allegations of fact and not evidence in proof of the fact. Therefore the allegation that the appellant is a surety is not conclusive, and it cannot be supplemented

(1) (1881) 19 Ch. D. 478. (2) (1925) Ch. 616.
(3) (1895) A.C. 425, at p. 431.

H. C. OF A.
1935.

SMITH
v.
MOTOR
DISCOUNTS
LTD.
—

by inferences drawn from the facts pleaded. There is not any allegation in the declaration itself that there was any principal obligation to which the appellant is accessory. The pleadings do not contain any allegations of a principal debt, or of a secondary debt. The appellant's pleading brings the matter within the scope of the remarks by Lord *Esher* in *Counsell v. London and Westminster Loan and Discount Co.* (1), referred to in *Stock Motor Ploughs Ltd. v. Forsyth* (2). There is nothing on the pleadings to justify the view that the Picton Lakes Village T.B. Settlement assumed any obligation whatever. The matter comes within the general principle stated by *Isaacs J.* in *Toohy v. Gunther* (3), especially having regard to the statement in the plea that there was one comprehensive agreement, and it was part of that agreement that the two documents should be executed to give effect to it. The problem whether guarantee means strictly guarantee, or what is termed quasi-guarantee does not arise, because there is no allegation that the Picton Lakes Village T.B. Settlement was in any way interested in the mortgaged land. "Guarantee" is a technical term (*Permanent Trustee Co. of New South Wales Ltd. v. Hinks* (4)). *Garrard v. James* (5) and *Yorkshire Railway Wagon Co. v. Maclure* (6) are distinguishable. In those cases there was contemplated a principal liability of the company to which the liability of the defendant was meant to be accessory (see *Halsbury's Laws of England*, 2nd ed., vol. 16, pp. 26, 27, note *h*, and *In re Alexandra Palace Co.* (7)). Here there was not any contemplation of a principal liability (*Lakeman v. Mountstephen* (8)). *Re Robinson's Deed of Arrangement* (9) is distinguishable; there a simple contract debt was owed by a firm. The covenant in the collateral document sued on was avoided by sec. 25 (7) of the 1930-1931 Act. Sec. 34 (1) of the 1932 Act recognizes that the covenant remains void and is not revived by the repeal. If sec. 34 contained a contrary intention as contended on behalf of the respondent, sub-sec. 7 would be unnecessary.

(1) (1887) 19 Q.B.D. 512, at p. 515.

(2) (1932) 32 S.R. (N.S.W.) 259, at pp. 261, 262; 49 W.N. (N.S.W.) 61, at p. 62.

(3) (1928) 41 C.L.R. 181, at pp. 195, 196.

(4) (1934) 34 S.R. (N.S.W.), at p. 137; 51 W.N. (N.S.W.), at p. 38.

(5) (1925) Ch. 616.

(6) (1881) 19 Ch. D. 478.

(7) (1882) 21 Ch. D. 149.

(8) (1874) L.R. 7 H.L. 17, at pp. 24, 25.

(9) (1932) 5 A.B.C. 145.

[STARKE J. referred to *In re Paul & Gray Ltd.* (1).]

Cur. adv. vult.

H. C. OF A.

1935.

SMITH

v.

MOTOR
DISCOUNTS
LTD.

Oct. 31.

The following written judgments were delivered :—

RICH, DIXON, EVATT AND McTIERNAN JJ. By the judgment under appeal the Supreme Court of New South Wales, consisting of *Davidson* and *Milner Stephen* JJ. and *Markell* A.J., placed upon the *Moratorium Act* 1932 an interpretation which revived the personal liability of the mortgagor upon a limited class of instruments. Sec. 25 (7) of the *Moratorium Act* 1930-1931 (as amended by Act No. 66 of 1931) invalidated covenants, agreements or stipulations by a mortgagor for the payment of any mortgage moneys secured by a mortgage of real property, not only when the covenant, agreement or stipulation was contained in the mortgage, but also when it was contained in some other instrument.

In the opinion of their Honors, the effect of the Act of 1932 is again to validate the latter covenants, agreements and stipulations, viz., those contained, not in the mortgage of real property, but in some other instrument.

By sec. 3 of the *Moratorium Act* 1932, the earlier enactment is repealed. But sec. 3 expressly provides that the repeal shall not, unless the contrary intention appears, affect accrued rights and obligations, and that its so providing shall not be taken to limit any saving in the *Interpretation Act* of 1897. It is clear that sec. 8 of the *Interpretation Act* operates to continue the invalidity of covenants invalidated by the repealed legislation, except in so far as an intention to the contrary appears in the Act of 1932. Their Honors, however, found, to the extent stated, such a contrary intention. The provisions of the Act of 1932 in which the intention to revive collateral covenants was so found are secs. 8, 9 and 34. *Davidson* J. relied rather on secs. 8 and 9, and *Milner Stephen* J. on sec. 34. We are unable to agree in the opinion that these sections, or any others in the statute, disclose an intention to revive without any act of the parties the personal liability of a mortgagor upon a collateral covenant given by him for repayment of the mortgage moneys.

(1) (1932) 32 S.R. (N.S.W.) 386 ; 49 W.N. (N.S.W.) 164.

H. C. OF A.

1935.

SMITH

v.

MOTOR

DISCOUNTS

LTD.

Rich J.

Dixon J.

Evatt J.

McTiernan J.

It is convenient, before dealing with the reasoning which commended itself to their Honors, to state what appears to us to be the effect of the provisions upon which the question depends. Sec. 9 is one of the chief provisions of Division I. of Part II. of the Act. That Part was meant to continue in force only for a limited time (sec. 49). Its general purpose is to impose a control upon the pursuit of the remedies which are available to a creditor under mortgages of real or personal property, under contracts of sale of land, under hire-purchase agreements and under judgments. It deals both with personal and proprietary remedies. Division I. relates to mortgages and to contracts of sale of land. Sec. 9 (1) provides that 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 realization of the security. The provision assumes the existence of the remedies to which it refers and proceeds to control them. It applies alike to mortgages given before the Act and those afterwards. It applies to mortgages of real property and mortgages of personal property. The assumption that the personal and proprietary remedies to which it refers exist within this large area of operation is, of course, well founded. But this does not mean that in every case within the operation of the section all such remedies exist, or that it assumes they do. If they exist, they are controlled. But their existence is entirely independent of the section. It depends upon the general law, including the other provisions of the moratorium legislation.

Sec. 8 contains a list of transactions which it excepts from the operation of the Part. The reasons for excluding them from the application of its provisions vary in the different cases. Par. a of sec. 8 excepts, among other transactions, mortgages executed after the enactment of the *Moratorium Act*, No. 48 of 1930, and before that of No. 43 of 1931, if the mortgages contained a covenant excluding the operation of the *Moratorium Act*, and had not, in the meantime, been declared invalid. The reason for this exemption is that contracting out of the operation of Act No. 48 of 1930 was permitted until the passing of Act No. 43 of 1931, which put an

end to it for the future, and, as to past transactions, empowered the Court upon an application made within six months to declare void the clause excluding the operation of the *Moratorium Act*.

At the time of the passing of the Act of 1932, mortgages which fell within this category, whether of real or personal property, were effectual to give to the mortgagees whatever remedies against the mortgaged property the general law, apart from the Act, attached to the transaction, and, in the case of mortgages of chattels personal, whatever remedies existed under the general law against the mortgagor personally. But, in the case of mortgages of land, sec. 25 (7) and (8) had in the meantime annihilated the personal covenant. These sub-sections were introduced by Act No. 66 of 1931 and were expressed to apply notwithstanding anything in the *Moratorium Act* or any other Act. Sub-sec. 3 of sec. 25 had already made that section apply to all mortgages of real property whenever executed and notwithstanding any stipulation to the contrary. In spite of an argument advanced upon this appeal to the effect that no part of sec. 25 could apply to mortgages excluded by sec. 13 (1) (a) of the *Moratorium Act* 1930-1931 from its operation, it appears to be clear that sub-sec. 7 of sec. 25, by its force as a later inconsistent enactment, invalidated covenants contained in such mortgages. It follows that covenants, agreements or stipulations by a mortgagor for the repayment of any mortgage moneys secured by a mortgage of real property were, at the time of the passing of the Act of 1932, void, notwithstanding that the mortgage was executed between the passing of Act No. 48 of 1930 and the passing of Act No. 43 of 1931 and contained a clause excluding the operation of the *Moratorium Act*. In continuing the exclusion of such mortgages from the operation of the provisions controlling remedies and affecting times and payment and of similar provisions which are now contained in Part II. of the Act of 1932, sec. 8 (a) of that Act appears to intend no more than to leave mortgages executed during the period between the two Acts in the same position as it found them.

Sec. 34 of the Act of 1932 is the leading provision of Part III., which relates to the "Liability of Mortgagors of Land." Sub-sec. 1 of sec. 34 relates to the personal remedy for the recovery of moneys secured by a mortgage of land executed before the commencement

H. C. OF A.

1935.

SMITH

v.

MOTOR

DISCOUNTS

LTD.

Rich J.

Dixon J.

Evatt J.

McTiernan J.

H. C. OF A.
1935.

SMITH
v.
MOTOR
DISCOUNTS
LTD.

Rich J.
Dixon J.
Evatt J.
McTiernan J.

of the Act of 1932. Sub-sec. 2 relates to the personal remedy for the payment by a mortgagor of principal moneys secured by a mortgage of land executed after the commencement of the Act. Sub-sec. 1 provides that no proceeding shall be brought for the payment by the mortgagor of such moneys, unless he has confirmed the covenant by an instrument under hand indorsed with a certificate of his knowledge and approval fulfilling certain requirements specified by sub-sec. 3. Sub-sec. 2 provides that no such proceeding shall be brought on a covenant given after the passing of the Act, unless the covenant is express and there is a similar certificate. The validity of covenants given after the Acts depends, of course, only upon the general law. But covenants given before the Act of the description covered by sub-sec. 1 were, until it was passed, invalid. Thus sub-sec. 1, if it stood alone, would impose conditions on the bringing of proceedings upon covenants, although, in any event, they were unenforceable and void. But it does not stand alone; for sub-sec. 4 provides that any covenant or agreement so confirmed and evidenced as in sub-sec. 3 of that section provided shall be as valid and effectual as if sub-sec. 7 of sec. 25 of the *Moratorium Act* had not been enacted. Thus the validity of the covenant is re-established by confirmation duly certified, and, at the same time, the obligation it expresses becomes actionable, subject to the requirement that the leave of the Court to proceed is obtained in cases which are not excepted from sec. 9 by par. a of sec. 8 or otherwise.

The avoidance of the personal liability which sec. 25 (7) of the repealed *Moratorium Act* worked did not affect the mortgagee's rights, powers and remedies against the mortgaged property, and that Act was so expressed. No doubt for greater precaution, a similar qualification is made of the requirement contained in sub-sec. 1 of sec. 34 that antecedent covenants shall be confirmed and certified. The qualification is expressed in par. a of sub-sec. 5.

The language of sub-sec. 1 and of sub-sec. 2, although not identical, is wide enough in each case to cover collateral securities, covenants, agreements and stipulations not contained in the mortgage of land. But apparently it was not desired to make certification a condition precedent to recovery upon obligations expressed in instruments

collateral to the mortgage. Par. *b* of sub-sec. 5 of sec. 34 prevents that result. It provides that nothing in the section shall in any way affect 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. The form in which this provision is expressed has, however, another result which may not have been foreseen. It prevents sub-sec. 4 operating to validate obligations arising from instruments collateral to a mortgage of land. Confirmation and certification of a collateral instrument cannot revive the obligations arising from it, nor can they be revived by confirmation and certification of the mortgage itself. For nothing in sec. 34 is in any way to affect the rights or remedies of a mortgagee upon such a security for the payment of money. This seems anomalous, or, at any rate, asymmetrical.

Possibly the Legislature considered that, in all the complications of collateral obligations, it was better, for good or ill, to leave them untouched by the new legislation. Antecedent collateral obligations might thus remain void, but subsequent collateral obligations would be unaffected by any of the statutes. When a mortgagor is minded to confirm his personal covenant in the mortgage, there is not much inconvenience in his also executing a new collateral security, if it is desired that he should again become liable on an additional obligation not contained in the mortgage.

More probably, however, the matter was simply not adverted to.

Sec. 35 deals separately with guarantees and restores the liability upon them which sec. 25 (7) had annihilated. It does so by requiring that sec. 25 (7) shall be construed as if the word "mortgagor" in the sub-section did not include a person who has guaranteed the payment of money, even although the guarantee itself is secured by mortgage.

In this legislative scheme, we find nothing evidencing an intention contrary to the effect which sec. 8 of the *Interpretation Act* of 1897 would produce, viz., preventing a restoration of the personal liability upon covenants and agreements invalidated by sec. 25 (7) of the repealed Act.

On the other hand, the provisions contain strong confirmation of the intention that the personal liability should not be revived except

H. C. OF A.

1935.

SMITH

v.

MOTOR
DISCOUNTS
LTD.Rich J.
Dixon J.
Evatt J.
McTiernan J.

H. C. OF A.

1935.

SMITH

v.

MOTOR

DISCOUNTS

LTD.

Rich J.

Dixon J.

Evatt J.

McTiernan J.

when, in particular circumstances, the repealing Act expressly so provides. Thus, sub-sec. 4 specifically restores the covenant when there has been a confirmation and certification under sub-sec. 1; sub-sec. 6 expressly excludes from the application of sec. 25 of the repealed Act some specified classes of obligations, of which one is the obligation to a holder in due course of a negotiable instrument; sub-sec. 7 excludes its application in cases of bankruptcy, insolvency and winding up. Again, the express exclusion of guarantees from the operation of sec. 25 (7) would be quite unnecessary if rehabilitation of the personal obligation of collateral covenants was otherwise accomplished.

The reasoning which led *Davidson J.* to the conclusion that liability upon the personal covenant was revived was founded upon the provisions of sec. 8 (a) and sec. 9 (1) considered in combination. His Honor thought that these provisions treated the personal covenants in mortgages as effective for all purposes, including the right to sue for payment, as well as to proceed against the land; that they enabled a mortgagee, no matter when his mortgage was executed, to apply to the Court for leave to exercise his personal remedy, and, in the case of mortgages falling within sec. 8 (a), to pursue those remedies without leave. In this view, his Honor thought that the covenant could not but be revived and sec. 34 must, accordingly, be read as dealing only with proceedings and not as defining when liability should be revived; sub-sec. 5 (b) being no more than precautionary. The basis upon which this interpretation evidently rests is his Honor's view of the scope and effect of the exemption by sec. 8 (a) of mortgages executed between the respective dates of the enactment of the first and second *Moratorium Acts*, if they be expressed to exclude the operation of the legislation. His Honor impliedly adopts the view that this exemption is directed at the control, which sec. 9 would otherwise exert, of the liability of the mortgagor upon his personal covenant. But this does not appear to us to be a correct explanation of sec. 8 (a). It is true that sec. 9 includes the personal remedy. But it includes all remedies, personal or proprietary, upon all mortgages, whether of realty or of personalty and whenever made. The exemption in sec. 8 (a) is from the entire application of the Act,

not merely from sec. 9. The scope of sec. 8 (a) is to give an immunity from all the restrictions which otherwise would apply. The scope of sec. 9 is to restrict all mortgage remedies which otherwise are available. The provisions are not pointed at personal covenants in mortgages of real property given between the dates of the commencement of the two earlier Acts. No inference arises that such covenants were regarded as necessarily efficacious.

Milner Stephen J. founded his opinion altogether upon the exhaustive nature which he attributed to the provisions of sec. 34. His Honor considered those provisions to amount to a complete code. So considering them, he could find no useful effect for the detailed provisions contained in sub-sec. 1 for immunity from action upon covenants, unless those covenants in themselves were no longer void. In our opinion the answer to his Honor's difficulty lies in sub-sec. 4, which expressly rehabilitates and gives validity to covenants confirmed and certified under sub-sec. 1. We cannot agree that sub-sec. 4 should be read as *preserving* the effect of covenants executed during the operation of Act No. 66 of 1931. It revives and restores their validity. It would be needless for it to do so if they were otherwise validated. It is precisely because they would remain void, that it makes them valid when the requirements of sub-sec. 1 have been complied with.

Markell A.J. gave no separate reasons, but concurred in the judgment of *Davidson J.*

For the reasons we have given we think that the personal obligation of a mortgagor arising under instruments collateral to a mortgage of real property is not revived by the *Moratorium Act 1932*. This is the only ground upon which the Supreme Court upheld the demurrer to the appellant's plea.

But the respondent has attempted to support the judgment appealed from on other grounds. The most formidable of these is that the plea fails to allege enough to bring the covenant sued upon within the operation of sec. 25 (7) of the repealed Act as modified by sec. 35 (1) of the repealing Act. The modification excludes guarantors from the ambit of the invalidating provision. The plea must, therefore, show that the defendant is a mortgagor other than a guarantor. The instrument sued upon is, as appears from the

H. C. OF A.
1935.

SMITH
v.
MOTOR
DISCOUNTS
LTD.

Rich J.
Dixon J.
Evatt J.
McTiernan J.

H. C. OF A.
1935.
SMITH
v.
MOTOR
DISCOUNTS
LTD.
Rich J.
Dixon J.
Evatt J.
McTiernan J.

plea, a collateral security given by the defendant for payment of mortgage moneys secured by a mortgage given by himself and two others, of whom he alone undertook a personal liability. The plea is in many respects unsatisfactory, but it is not disputed that it should be understood as alleging that both instruments related to the same sum of money. The instrument sued upon is, however, expressed as a guarantee; a guarantee of the payment of money "paid to The Picton Lakes Village T.B. Settlement." The question is whether it appears from the plea that no primary or principal liability was incurred by "The Picton Lakes Village T.B. Settlement" and consequently that the so-called guarantee was only an additional obligation on the part of the obligor to pay his own debt due upon the mortgage. The plea alleges that, at the time of the execution of the documents, there was no person or persons, or no entity juristic or otherwise, known as "The Picton Lakes Village T.B. Settlement." It also alleges that the documents were executed in pursuance of an agreement to lend the money to the defendant appellant and the two other persons, and that the agreement was that, of them, he alone should incur a personal liability. These allegations are inconsistent with the existence of a primary liability elsewhere than in the defendant, because they make the loan one to him and his associates to the exclusion of anybody intended to be represented by the expression "The Picton Lakes Village T.B. Settlement," and of any other body.

In spite of its unsatisfactory nature, the plea upon demurrer is enough to take the covenant sued upon out of the qualification of sec. 25 (7) of the Act of 1930-1931 introduced by sec. 35 (1) of the Act of 1932. It was argued, however, that nevertheless the covenant did not fall within sec. 25 (7), because it was not given by the defendant in his character of mortgagor. This argument is somewhat elusive, because it substitutes the indefinite expression "character of a mortgagor" for the exact words of the invalidating provision. The transaction clearly falls within the fair meaning of those words.

The appeal should be allowed.

The judgment of the Supreme Court should be discharged and in lieu thereof the demurrer should be overruled.

STARKE J. The plaintiff, Motor Discounts Ltd.—the respondent here—sought in this action to recover from the defendant—the appellant here—certain moneys upon a covenant contained in an indenture dated 10th July 1931. The indenture was set out verbatim in the declaration, and according to its terms as so set out the appellant was called surety and the respondent mortgagee, and the consideration recited was the sum of £2,100, paid at the request of the surety to the Picton Lakes Village T.B. Settlement by the mortgagee, and the provisions of the *Moratorium Act* were excluded.

The substance of the first plea to the declaration was that the respondent agreed to lend the appellant and others certain moneys to be secured by a mortgage of real property containing a personal covenant, on the part of the appellant alone, and the covenant set forth in the indenture, and that the mortgage dated 7th July 1931 set out in the plea, and the indenture set out in the declaration, were executed pursuant to this agreement and not otherwise, and that there was no person or persons, or no entity juristic or otherwise, known as Picton Lakes Village T.B. Settlement. The plaintiff demurred to this plea, and the Supreme Court of New South Wales gave judgment in its favour. Hence this appeal.

The questions involved depend upon the construction of some confused legislation in New South Wales known as the *Moratorium Acts* 1930-1931 and 1932. The *Moratorium and Interest Reduction (Amendment) Act*, 1931, No. 66, sec. 4, enacted—without any provision for compensation whatever—that all covenants, agreements and stipulations by a mortgagor for the payment or repayment of any moneys secured by a mortgage of real property should, except for the purpose of enabling a mortgagee to exercise all or any of his rights against the mortgaged property, be void and of no effect for any purpose whatsoever. The section applies to all mortgages of real property, whether executed before or after the commencement of the *Moratorium Act* and notwithstanding any stipulation to the contrary (Act, 1931, No. 43, sec. 25 (3)). The definitions of mortgage and mortgagor are very wide (see Act, 1930, No. 48, sec. 2) and make it plain that the covenant or stipulation to pay, in the indenture declared upon, is a covenant or stipulation by a mortgagor for the payment of moneys secured by a mortgage of real property.

H. C. OF A.
1935.
{
SMITH
v.
MOTOR
DISCOUNTS
LTD.
—

H. C. OF A.
 1935.
 {
 SMITH
 v.
 MOTOR
 DISCOUNTS
 LTD.
 ———
 Starke J.

It was urged that the covenant was not given by the mortgagor in his character of, or as, a mortgagor, but it is enough to say that the Act avoids covenants and stipulations by a person who is a mortgagor; therefore the covenant in the indenture is *prima facie* avoided by the Act. But several arguments have been advanced in opposition to this conclusion.

Firstly, that the provisions of sec. 13 of the *Moratorium Act*, 1930, No. 48, exclude from the operation of the Act a mortgage executed after 19th December 1930, if it contains a covenant expressly excluding the provisions of the Act. But the provisions of the Acts of 1931, Nos. 43 and 66, sec. 25 (3) and (7), are later than the Act of 1930, and explicitly provide for the avoidance of covenants and stipulations notwithstanding anything in any other Act contained.

Secondly, that the *Moratorium Act* 1930-1931, and sec. 4 of the Act, 1931, No. 66, avoiding covenants and stipulations for payment of money secured by a mortgage of real property, have been repealed by the *Moratorium Act*, 1932, No. 57, sec. 3. But the *Interpretation Act*, No. 4 of 1897, of New South Wales, sec. 8 (a), provides that where an Act repeals, in the whole or in part, a former Act, then, unless the contrary intention appears, the repeal shall not affect the previous operation of an enactment so repealed. The repeal of the Act of 1930-1931 cannot, therefore, revive the covenant or stipulation in the indenture sued upon.

Thirdly, that the *Moratorium Act*, No. 57 of 1932, sec. 35, provides that the word "mortgagor" in the provision (sec. 25 (7), No. 66 of 1931) avoiding covenants and stipulations for the payment of moneys secured by mortgages of real property shall not include a person who has guaranteed the payment of any money, notwithstanding that the payment of such money is secured by a mortgage as defined by the Act. But, despite the form of the indenture declared upon, the plea sufficiently alleges that the covenant or promise of the appellant is not by way of guarantee. A guarantee is a collateral contract postulating the principal liability of another (*Rowlatt on Principal and Surety*, 2nd ed. (1926), p. 1). The plea in this case excludes the liability of any other person, and alleges that the appellant's obligation is not founded upon the liability of another but upon his own debt or liability.

Lastly, it was contended that though the mere repeal of an Act does not affect the previous operation of the Act so repealed, yet it is otherwise where a contrary intention is expressed in the repealing Act, and that this is done in the *Moratorium Act*, No. 57 of 1932. Doubtless, in some of the provisions of that Act such an intention is expressed. Thus covenants and agreements falling within the earlier provisions of sec. 34, confirmed and evidenced in the manner required by that section, are as valid and effectual as if the provisions in the Act of 1931 avoiding covenants and stipulations for the payment of moneys secured by a mortgage of real property had not been enacted. But these provisions of sec. 34 do not cover the present case, for it is not alleged that the mortgage or indenture declared upon has been confirmed and evidenced in the manner required. However, it was argued that the provisions of sub-sec. 5 (b) of sec. 34 recognize and restore by implication the obligation created by such documents as the indenture declared upon in this case: "Nothing in this section contained shall in any way affect . . . 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." But the sub-section does not create or revive any right; it only preserves rights, powers or remedies that exist under such securities free from the restriction on the rights of mortgagees imposed under the earlier provisions of sec. 34. An obligation that has been avoided under sec. 25 (7) of the *Moratorium Act* 1931 does not exist, and gains nothing in effect from the provision contained in sub-sec. 5. Again, secs. 8 and 9 of the *Moratorium Act*, No. 57 of 1932, were relied upon. But sec. 9 only limits the exercise of rights, powers or remedies on the part of the mortgagee. It creates no rights, and revives no rights; it operates upon rights that exist and are recognized in law. An obligation that is avoided is no right. Sec. 8 withdraws certain transactions from the operation of Part II. of the Act. But it does not create any right or revive any right that has been destroyed; indeed, the final words of par. a of the section give no little support to this view. Finally it was urged that the repeal of the Act of 1930-1931 and the

H. C. OF A.
1935.
SMITH
v.
MOTOR
DISCOUNTS
LTD.
Starke J.

H. C. OF A. 1935. { substitution of a new set of provisions—a complete code, it was called
SMITH v. MOTOR DISCOUNTS LTD. —regulating the rights of mortgagors and mortgagees operated as the
Starke J. expression of a general intent to restore rights that had been destroyed
by the repealed legislation. But legislative intent can only be
gathered from what the Legislature has chosen to enact, either in
express words or by reasonable and necessary implication. The
Act No. 57 of 1932 explicitly states the legislative intent, as in sec.
34, and beyond the intent so expressed the Courts cannot go.
In my opinion the result is that the appeal should be allowed.

Appeal allowed with costs. Demurrer overruled.

Solicitor for the appellant, *F. P. Donohoe*.
Solicitor for the respondent, *R. S. B. Sillar*.
J. B.

[HIGH COURT OF AUSTRALIA.]

HEIMANN APPLICANT ;

AND

THE COMMONWEALTH RESPONDENT.

H. C. OF A. 1935. { *Constitutional Law—Action against Commonwealth for breach of contract brought in
State Supreme Court—Removal into High Court—“Cause . . . arising
under the Constitution or involving its interpretation”—Judiciary Act 1903-1933
(No. 6 of 1903—No. 65 of 1933), secs. 40, 56.*
SYDNEY, Nov. 20, 28. { *Practice—Discovery—Action against Commonwealth—Jurisdiction of State Supreme
Court to order discovery against the Commonwealth—Common informer—Equity
Act 1901 (N.S.W.) (No. 24 of 1901), sec. 45.*
Evatt J.

An action brought in the Supreme Court of a State for the determination,
as between an individual and the Commonwealth, of rights and obligations
arising *ex contractu* is not a cause arising under the Constitution or involving
its interpretation within the meaning of sec. 40 of the *Judiciary Act 1903-1933*.
Neither the action itself, nor any issue it involves, depends upon the meaning
or application of the Constitution. The action is based solely upon the
contract and upon sec. 56 of the *Judiciary Act*.