

[HIGH COURT OF AUSTRALIA.]

CONSOLIDATED TRUST COMPANY LIMITED APPELLANT;
PLAINTIFF,

AND

NAYLOR RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF
NEW SOUTH WALES.

Principal and Surety—Mortgage—Guarantor's covenant contained in mortgage instrument—Transfer of mortgage—Indorsement on mortgage instrument—Right of transferee to sue guarantor—Chose in action—Assignment—Notice—"Express"—Real Property Act 1900-1928 (N.S.W.) (No. 25 of 1900—No. 25 of 1928), secs. 51, 52*—Conveyancing Act 1919-1932 (N.S.W.) (No. 6 of 1919—No. 65 of 1932), secs. 12*, 91*, Schedule V. (5).* H. C. OF A.
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April 28, 29;
Aug. 12.

A transfer of mortgage does not operate, under either secs. 51 and 52 of the *Real Property Act* 1900-1928 (N.S.W.) or sec. 91 of the *Conveyancing Act* 1919-1932 (N.S.W.), to give the transferee the right to sue a surety on a covenant of guarantee contained in the instrument of mortgage.

Starke, Dixon
and Evatt JJ.

* The *Real Property Act* 1900-1928 (N.S.W.), provides:—Sec. 51: "Upon the registration of any transfer, the estate or interest of the transferor as set forth in such instrument, with all rights, powers and privileges thereto belonging or appertaining, shall pass to the transferee, and such transferee shall thereupon become subject to and liable for all and every the same requirements and liabilities to which he would have been subject and liable if named in such instrument originally as mortgagee . . . of such land, estate, or interest." Sec. 52 (1): "By virtue of every such transfer, the right to sue

upon any memorandum of mortgage or other instrument and to recover any debt, sum of money, annuity, or damages thereunder (notwithstanding the same may be deemed or held to constitute a chose in action), and all interest in any such debt, sum of money, annuity, or damages shall be transferred so as to vest the same at law as well as in equity in the transferee thereof."

* The *Conveyancing Act* 1919-1932 (N.S.W.), provides:—Sec. 12: "Any absolute assignment by writing under the hand of the assignor . . . of any debt or other legal chose in action, of which express notice in writing has been

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An indorsement, under the hand of the mortgagee, on a deed of mortgage of land under the general law stated, following form 5 in Schedule V. to the *Conveyancing Act* 1919-1932 (N.S.W.), that, for valuable consideration, he thereby assigned unto the appellant "all moneys secured by the within written mortgage and all my rights, powers and remedies thereunder." The deed contained a covenant of guarantee by the respondent. For the purposes of the *Moratorium Act* 1932 (N.S.W.) the appellant had given to the respondent a notice in writing, in which the appellant was described as the transferee from the mortgagee of the mortgage, which was identified by its registration number, that it intended to exercise all or any of its rights, powers and remedies against him as guarantor after three months unless he paid in the meantime to it all moneys owing under the mortgage.

Held, by *Dixon* and *Evatt JJ.* (*Starke J.* dissenting), that the indorsement amounted to an assignment of the respondent's covenant sufficient to satisfy the requirements of sec. 12 of the *Conveyancing Act* 1919-1932 (N.S.W.): For the purposes of that section the notice which had been given under the *Moratorium Act* was sufficient to perfect the assignment, and therefore the appellant, as assignee, was entitled to sue the respondent upon his covenant: The express notice in writing of the assignment required by the section need not contain an express statement that the assignment is a written one.

Decision of the Supreme Court of New South Wales (Full Court): *Consolidated Trust Co. Ltd. v. Naylor*, (1935) 35 S.R. (N.S.W.) 575; 52 W.N. (N.S.W.) 219, reversed.

APPEAL from the Supreme Court of New South Wales.

In an action in the Supreme Court of New South Wales, Consolidated Trust Co. Ltd. claimed from Rufus Theodore Naylor the sum of £1,930 5s., as being the balance of principal and interest due to the plaintiff under certain instruments of mortgage, the payment of which had been guaranteed by the defendant.

given to the debtor . . . or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been effectual in law . . . to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor." Sec. 91:—"(1) In the case of every mortgage . . . (e) the mortgage may be transferred—by a memorandum indorsed on or annexed to the mortgage, and signed by the persons to

be bound thereby and attested by one witness. (2) Such memorandum may be in such one of the forms in the fifth schedule hereto as applicable, or to the effect thereof, and shall . . . operate as a deed. . . . (4) Every such memorandum of transfer shall operate as a deed of assignment of the mortgage debt, and as a deed of conveyance of the estate and interest of the mortgagee of and in the mortgaged property, and shall vest the debt and estate and interest in the assignee, together with all the rights, powers, and remedies of the mortgagee expressed or implied in the mortgage."

The declaration contained two counts. In the first count it was alleged that King William Mansions Ltd., by memorandum of mortgage registered under the *Real Property Act*, No. B720690, mortgaged the land therein described to one Charles Clarence Gale to secure the repayment with interest of a loan of £2,000 made by him to that company, "and in and by the said memorandum of mortgage the defendant in consideration of the . . . loan which was made at the defendant's request guaranteed to . . . Gale the repayment by . . . King William Mansions Ltd. of the " loan "and interest thereon on the dates mentioned in the . . . memorandum of mortgage and thereafter the said memorandum of mortgage was by transfer registered number B983537 duly transferred to the plaintiff," and, although the plaintiff had given to the defendant not less than three calendar months' notice in writing of its intention to exercise all or any of its rights, powers and remedies against the defendant under the memorandum of mortgage and that period of notice had expired, both King William Mansions Ltd. and the defendant had failed to pay the moneys due under the mortgage.

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In the second count it was alleged that King William Mansions Ltd., by a deed dated 11th September 1928, mortgaged the land therein described to Gale to secure the repayment with interest of the loan referred to above "and in and by the said deed the defendant in consideration of the said loan which was made at the defendant's request " guaranteed to Gale the repayment of the loan and interest thereon on the dates specified and thereafter the deed of mortgage was by indorsement thereon, dated 19th June 1930 and duly executed by Gale and on behalf of the plaintiff, "duly transferred to the plaintiff and the said indorsement was in the words and figures following that is to say—In consideration of the sum of One thousand seven hundred and fifty pounds paid to me by Consolidated Trust Company Limited, a company duly incorporated and having its registered office at No. 26 Hunter Street, Sydney (the receipt whereof is hereby acknowledged) I hereby assign unto the said Consolidated Trust Company Limited all moneys secured by the within written mortgage and all my rights powers and remedies thereunder and all my estate and interest in the land therein described . . . and

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thereafter a written notice" dated 14th January 1935, and duly executed on behalf of the plaintiff "was given to the defendant by the plaintiff in the words and figures following, that is to say . . . Pursuant to section 41 of the *Moratorium Act* 1932, Consolidated Trust Company Limited whose registered office is situated at 26 Hunter Street, Sydney, the transferee from Charles Clarence Gale of mortgages dated respectively the eleventh day of September 1928, registered as number B720690 and number 102 book 1529 respectively, from King William Mansions Limited whereby all that land messuages and premises known as King William Mansions, William Street, Sydney, more particularly described in the said mortgages, are given as security for the repayment of the principal sum of Two thousand pounds and interest thereon hereby gives you notice that it intends to exercise all or any of its rights, powers and remedies against you as guarantor of the due payment of the said principal and interest moneys after the expiration of three calendar months from the receipt by you of this notice unless in the meantime you shall pay to it all principal and interest moneys owing to it under such mortgages," and although the period specified in the notice had expired both King William Mansions Ltd. and the defendant had failed to pay the moneys due under the mortgage.

The indorsement on the deed of mortgage referred to in the second count followed form 5, "Transfer of mortgage," in Schedule V. to the *Conveyancing Act* 1919-1932 (N.S.W.).

The defendant demurred to each count on the grounds (a) that it disclosed no cause of action in the plaintiff against the defendant, (b) that it disclosed that the plaintiff was not a party to nor otherwise entitled to enforce the contract therein sued upon, and (c) that the transfer of mortgage alleged therein did not operate to transfer to the plaintiff the right to enforce the said contract against the defendant.

The Full Court of the Supreme Court upheld both demurrers and ordered that judgment should be entered for the defendant: *Consolidated Trust Co. Ltd. v. Naylor* (1).

From that decision the plaintiff appealed to the High Court.

(1) (1935) 35 S.R. (N.S.W.) 575; 52 W.N. (N.S.W.) 219.

Snelling (with him *Smyth*), for the appellant. As regards the mortgage under the general law, the words used to transfer the interest are wide enough, and their proper construction is, to pass to the appellant the benefit of the surety's covenants in the mortgage deed. The form of words used by the parties indicates that their intention was that the whole mortgage transaction, as comprised in the deed, should pass, including the surety's covenants as well as the mortgagor's covenants. Sureties are parties to the mortgage deed; the word "mortgage" covers the whole transaction to which the mortgagor and sureties are parties (*Coote on Mortgages*, 9th ed. (1927), vol. 1, p. 103; *Robbins' Law of Mortgages* (1897), vol. 1, p. 78). Sureties' covenants form part of the mortgage (*Bythewood's Conveyancing*, 3rd ed. (1840), vol. 6, p. 84; *Encyclopædia of Forms and Precedents* (1905), vol. 8, pp. 585, 600, 741). The only essentials of a mortgage are the charge or conveyance of land and the simple mortgage debt (*Halsbury's Laws of England*, 1st ed., vol. 21, p. 70; see also p. 90, par. 166). The mortgage of itself implies a debt (*King v. King and Ennis* (1); *Coote on Mortgages*, 9th ed. (1927), vol. 1, pp. 10, 139; *Fisher's Law of Mortgage*, 6th ed. (1910), p. 7). The surrounding circumstances support the view that by indorsing the assignment on the document as a whole the parties intended it to refer to the whole document. There is no difference in principle between a surety's covenants and a mortgagor's covenants; a mortgagor's covenants, e.g., to pay, and the mortgage, are not separate deeds. It was so held in *Howatson v. Webb* (2) and the *obiter dictum* upon this point in *Bagot v. Chapman* (3) was doubted. An examination of the issues before the court and the judgments in *Perpetual Executors and Trustees Association of Australia Ltd. v. Hosken* (4) shows that that case is not an authority to the contrary. The effect of sec. 91 (4) of the *Conveyancing Act* 1919 is that it enlarges the meaning of the words "interest in the mortgage." It does not cut down the ordinary meaning of the words but merely provides that they shall have some additional operation (*Craies' Statute Law*, 3rd ed. (1923), p. 191). The provisions of sec. 91 (2) are permissive, not mandatory. The parties did not intend that the indorsement

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(1) (1735) 3 P. Wms. 358; 24 E.R. 1100.

(2) (1908) 1 Ch. 1, at p. 2.

(3) (1907) 2 Ch. 222, at pp. 227, 228.

(4) (1912) 14 C.L.R. 286.

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should have merely its statutory effect. The words used must be given their ordinary meaning. The indorsement has its own efficacy, and in addition has statutory efficacy (*Groongal Pastoral Co. Ltd. v. Falkiner* (1)). Unless there is a clear power in a statute it will not cut down the ordinary meaning of a document. The statute is not needed for the assignment of the guarantee, or the benefit of the surety's covenant. The notice pursuant to sec. 41 of the *Moratorium Act* given by the appellant to the respondent is an express notice of the assignment within the meaning of sec. 12 of the *Conveyancing Act*. In that notice the mortgages and the material particulars of those mortgages were sufficiently indicated to the respondent (*Denney, Gasquet and Metcalfe v. Conklin* (2) ; *General Motors Acceptance Corporation v. Johnson* (3) ; *Imperial Bank v. Georges* (4) ; see also *McIntosh v. Shashoua* (5)). The provisions of sec. 91 of the *Conveyancing Act* cover the benefit of a covenant by a surety. The generality of the provisions used in sub-sec. 4 of that section is not qualified by an implied limitation to rights against the mortgagor, and an intention so to limit those words should not be imputed to the legislature. The appellant's rights in regard to the mortgage under the *Real Property Act* are based upon sec. 52 of that Act (See *Measures v. McFadyen* (6)). The question must be determined by the meaning of the expression "memorandum of mortgage or other instrument" in sec. 52 (1), considered as a whole. The definition of the word "instrument" only does not assist the determination of the question. That definition does not support the construction placed upon it by the court below. For many years prior to the first *Real Property Act* it was the practice to insert sureties' covenants in or on mortgage documents and the legislature must be taken to have been aware of the practice when dealing with this legislation. The forms contained in, and the general provisions of, the *Real Property Act* contemplate rights being created in favour of third parties (*Perpetual Executors and Trustees Association of Australia Ltd. v. Hosken* (7)). The legislature intended by sec. 91 (4) of the *Conveyancing Act*

(1) (1924) 35 C.L.R. 157, at p. 163.

(2) (1913) 3 K.B. 177.

(3) (1930) 4 D.L.R. 291, at p. 297.

(4) (1909) 2 Alta. L.R. 386, at p. 390.

(5) (1931) 46 C.L.R. 494, at pp. 514, 515.

(6) (1910) 11 C.L.R. 723.

(7) (1912) 14 C.L.R. 286.

that the whole document should be transferred so far as it could be included in the term "mortgage." The operation of the subsection is not limited to the estate in the land and such covenants as relate to the land, but extends to the whole of the covenants in the mortgage.

[EVATT J. referred to *Moir v. Loxton* (1).]

There the covenant was not contained in the mortgage; it was a separate deed of covenant, so the question did not arise.

Roper (with him *Watson*), for the respondent. The transfer of a mortgage under the *Real Property Act* operates only to transfer the estate, or rather the right, to the mortgagee under that Act, and the powers of the mortgagee in respect of the mortgage in the strict sense. The form set forth in the seventh schedule to the *Real Property Act*, which follows sec. 46 of that Act, shows that what is intended to be transferred is the interest in land and powers incidental to that estate. There is nothing in sec. 51 that confers privileges on a transferee other than rights, powers and privileges belonging to the estate or interest transferred. Recourse must be had to sec. 52 to ascertain the effect of the Act on any additional privileges which are conferred on a transferee. In the construction of that section the essential words are "right to sue upon any memorandum of mortgage or other instrument." The memorandum of mortgage is looked at strictly as being the memorandum which creates the mortgage and not as being the memorandum which contains any other provisions or terms. The decision in *Measures v. McFadyen* (2) indicates some of the limits which must be placed upon the interpretation of the section. The effect of that section is to transfer the mortgage and not to transfer anything which is not a necessary incident or necessarily belonging or appertaining to the interest of the mortgagee as such under the Act (*Measures v. McFadyen* (3)). There is no necessary equity following upon a transfer of mortgage, and there are no legal rights unless they are transferred (*Sheers v. Thimbleby & Son* (4)). In order that the release of a surety from a transaction may be negated it must

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(1) (1912) 13 S.R. (N.S.W.) 143, at p. 159.

(2) (1910) 11 C.L.R. 723.

(3) (1910) 11 C.L.R., at pp. 730, 731.

(4) (1897) 76 L.T. 709.

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appear as a matter of law that a transfer of the guarantee has taken place. A guarantee to pay certain moneys secured by a mortgage was dealt with in *Smith v. Motor Discounts Ltd.* (1). In *Moir v. Loxton* (2) reliance was placed, not upon the *Real Property Act*, but upon the *Trustee Act*; therefore that case is an authority in favour of the respondent. On the proper construction of secs. 51 and 52 of the *Real Property Act* it is essential to restrict the rights that are transferred to such rights as belong or appertain to the estate of the mortgagee, that is, his estate or interest in the land. Sec. 91 (1) (e) of the *Conveyancing Act* only deals with the transfer of mortgages. The effect given to the form in the fifth schedule to the Act, that is, the form followed here, should be the same as the effect given to sub-sec. 4 of sec. 91. The interpretation put upon that sub-section by the court below is correct. It operates as "a deed of assignment of the mortgage debt." The assignment here only assigns the mortgage in the strict sense; it does not assign the obligation against the mortgagor; consequently the first requirement under sec. 12 of the *Conveyancing Act* is not present, there is no absolute assignment in writing.

[STARKE J. referred to *Ex parte Smith* (3).]

The notice given pursuant to sec. 41 of the *Moratorium Act* does not satisfy the requirements of sec. 12 of the *Conveyancing Act*. That section requires an express notice in writing of an absolute assignment in writing. Here the guarantor of the debt is unable to ascertain from the form of the notice whether there has been an assignment, or whether the assignment was such as to make him liable in law. The notice given is not a notice under sec. 12 of an assignment of the respondent's obligation, because it only refers to transfer of mortgages, and it does not state that the assignment was in writing.

Snelling, in reply. The form of transfer does not throw any light on the matter. *Measures v. McFadyen* (4) was not correctly decided. Sec. 52 of the *Real Property Act* means, not that any rights must pass, but that such rights as are transferable should pass by

(1) (1935) 54 C.L.R. 107.

(2) (1912) 13 S.R. (N.S.W.) 143;
 (1914) 18 C.L.R. 360.

(3) (1832) 2 Deac. & Ch. 271.

(4) (1910) 11 C.L.R. 723.

virtue of the transfer. The benefit of a guarantee is assignable. *Sheers v. Thimbleby & Son* (1) is distinguishable for two reasons: a personal covenant was involved, and the surety's covenant or agreement was in a separate document. If the form of the indorsement does not comply with the requirements of the *Conveyancing Act*, then the operation given by that statute does not apply to the transaction (*In re Beachey*; *Heaton v. Beachey* (2)). A distinction should not be drawn merely because the matter has been expressed generally instead of specifically. The intention of the parties was to transfer everything in the mortgage. An equitable assignment can be comprised within an absolute assignment (*Camp v. King* (3)). The word "mortgage" in the notice referred to the document signed by the parties on the date shown. A mortgagee cannot sue on an equity of redemption (*Gemmell v. Brienesse* (4)).

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Cur. adv. vult.

The following written judgments were delivered:—

Aug. 12.

STARKE J. The questions in this appeal arise upon demurrer. The declaration alleges that King William Mansions Ltd. executed a memorandum of mortgage, which was registered under the provisions of the *Real Property Act* 1900 of New South Wales, whereby it mortgaged certain lands to Charles Clarence Gale to secure a sum of £2,000 with interest thereon, that the respondent Naylor, for valuable consideration, in and by the memorandum guaranteed Gale the repayment of the moneys, that the mortgage was duly transferred to the appellant by a transfer, and that he is now registered as the proprietor thereof. The appellant's claim is against the respondent upon his guarantee contained in the mortgage, and is founded upon the provisions of secs. 51 and 52 (1) of the Act. The former section provides: "Upon the registration of any transfer, the estate or interest of the transferor as set forth in such instrument, with all rights powers and privileges thereto belonging or appertaining, shall pass to the transferee, and such transferee shall thereupon become subject to and liable for all and every the same requirements

(1) (1897) 76 L.T. 709.

(2) (1904) 1 Ch. 67.

(3) (1887) 14 V.L.R. 22; 9 A.L.T. 165.

(4) (1933) 33 S.R. (N.S.W.) 472; 50 W.N. (N.S.W.) 175.

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and liabilities to which he would have been subject and liable if named in such instrument originally as mortgagee, encumbrancee, or lessee, of such land, estate, or interest." The latter provision declares: "By virtue of every such transfer, the right to sue upon any memorandum of mortgage or other instrument and to recover any debt, sum of money, annuity, or damages thereunder (notwithstanding the same may be deemed or held to constitute a chose in action), and all interest in any such debt, sum of money, annuity, or damages shall be transferred so as to vest the same at law as well as in equity in the transferee thereof." The purpose of these provisions is to transfer the mortgage security and the rights, powers and privileges relating to the debt secured by the mortgage. But the provisions do not, I think, extend to collateral obligations, such as guarantees, given by strangers to the mortgage transaction. *Measures v. McFadyen* (1) supports this conclusion.

Another count of the declaration alleges a mortgage by deed, of land, by King William Mansions Ltd., to Gale to secure certain moneys, and interest, and a guarantee contained therein on the part of the respondent Naylor. It is not alleged that the land is under, or that the mortgage is registered under, the *Real Property Act*; it is a mortgage of land operating under the general law. But the count goes on to allege that the mortgage was by an indorsement thereon duly transferred to the plaintiff (the appellant), and that the indorsement was in the words and figures following: "In consideration of the sum of One thousand seven hundred and fifty pounds paid to me by Consolidated Trust Company Limited, a company duly incorporated and having its registered office at No. 26 Hunter Street, Sydney (the receipt whereof is hereby acknowledged) I hereby assign unto the said Consolidated Trust Company Limited all moneys secured by the within written mortgage and all my rights powers and remedies thereunder and all my estate and interest in the land therein described." This indorsement follows the form in the fifth schedule of the *Conveyancing Act* 1919 of New South Wales, which is allowed by sec. 91 of that Act, and its effect is stated in sub-sec. 4 of that section: "Every such memorandum of transfer shall operate as a deed of assignment of the mortgage

(1) (1910) 11 C.L.R. 723.

debt, and as a deed of conveyance of the estate and interest of the mortgagee of and in the mortgaged property, and shall vest the debt and estate and interest in the assignee, together with all the rights, powers, and remedies of the mortgagee expressed or implied in the mortgage." But here again, the purpose of the Act is to convey the estate or interest mortgaged, and all the rights, powers, and remedies in relation to the debt secured by the mortgage. The provision does not, any more than does the *Real Property Act*, extend to collateral obligations, such as guarantees, given by strangers to the mortgage transaction.

It is contended, however, that the words of the indorsement operate as an absolute assignment in writing to the appellant of the debt or legal chose in action arising under the guarantee, and constitute a sufficient notice in writing for the purposes of sec. 12 of the *Conveyancing Act* 1919. Apart from the *Conveyancing Act* 1919, the words used in the indorsement do not amount to an absolute assignment in writing of the debt or legal chose in action created by the guarantee. The indorsement relates, in my judgment, to the moneys secured by mortgage, and the rights, powers, and remedies in relation to that debt, and not to collateral obligations, such as guarantees, given by strangers to the mortgage transaction. But its proper construction is, I think, placed beyond doubt when it is read in conjunction with the *Conveyancing Act* 1919, which authorizes the form, and provides how that form shall operate and what it shall vest in the transferee or assignee. For the Act, as already indicated, does not vest in the transferee or assignee obligations collateral to the mortgage transaction.

In my opinion, the judgment of the Supreme Court was right, and this appeal should be dismissed.

DIXON AND EVATT JJ. The defendant joined as guarantor in two mortgage instruments. One was a mortgage of land under the *Real Property Act*; the other was a mortgage of land under the general law.

The plaintiff is transferee or assignee of the mortgages and sues upon the covenants of guarantee which they contain.

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The question is whether the cause of action given by either covenant has been vested at law in the plaintiff so as to enable it to sue in its own name. The question arises on demurrer to the declaration.

The count which declares on the instrument containing the mortgage under the *Real Property Act* does not set out any of the terms of the memorandum of transfer, but alleges simply that the memorandum of mortgage was, by transfer registered under a certain number, duly transferred to the plaintiff. Under this count, therefore, the plaintiff's title to sue must rest upon the provisions of the *Real Property Act* which, upon registration of a transfer of mortgage, vest the mortgage in the transferee. These provisions are contained in secs. 51 and 52. Sec. 51 says that the estate or interest of the transferor as set forth in the instrument of transfer with all rights, powers and privileges thereto belonging shall pass to the transferee. Sec. 52 says that by virtue of the transfer the right to sue upon the memorandum of mortgage and to recover any debt or sum of money thereunder, notwithstanding that it is a chose in action, and all interest in the debt or sum of money shall be transferred so as to vest the same at law as well as in equity in the transferee. Such language is not incapable of including among the rights which pass to the transferee the benefit of the covenant by a surety who joins as a party in the instrument of mortgage for the purpose of giving the covenant. But, in our opinion, the language should not be so interpreted. The statute is concerned with dealings in land and it is because a mortgage involves such a dealing that the statute prescribes how mortgages may be transferred and with what consequences. It is concerned with the mortgage transaction in its entirety as it affects the land, and, therefore, extends to the personal liability of the mortgagor for the mortgage debt because that liability is intimately connected with the rights of property arising out of the mortgage transaction. A surety's obligation stands in a different relation to the dealing. His liability is introduced by way of additional security. It is personal and, except as a result of subrogation, does not directly or indirectly affect the land. Rights of subrogation are not of a kind falling within the scope of the *Real Property Act*. A guarantee is thus collateral

to the mortgage transaction, and the circumstance that the obligation is expressed in the mortgage instrument must be regarded as accidental to the mortgage transaction and not as characteristic of the dealing contemplated by the legislation. In relation to transfers of mortgage secs. 51 and 52 should be understood as dealing only with rights, powers, privileges, debts and sums of money affecting the mortgage transaction as between mortgagor and mortgagee.

The second count in the declaration sets out the terms of the document relied upon as effecting an assignment of the covenant contained in the mortgage under the general law. It is an indorsement upon the mortgage following the form given by the *Conveyancing Act* 1919-1932 as sufficient to transfer such a mortgage (Schedule V. (5)). Sec. 91 (1) (e) of that Act provides that in the case of every mortgage, the mortgage may be transferred by a memorandum indorsed on or annexed to the mortgage and signed by the persons bound thereby and attested by one witness. By sec. 91 (2) it is provided that the memorandum may be in the form already mentioned and shall operate as a deed. By sec. 91 (4) it is enacted that the memorandum of transfer shall operate as a deed of assignment of the mortgage debt and as a deed of conveyance of the estate and interest of the mortgagee of and in the mortgaged property, and shall vest the debt and estate and interest in the assignee, together with all rights, powers and remedies of the mortgagee expressed or implied in the mortgage. In the same way as in the case of the similar provisions of the *Real Property Act*, the plaintiff relies upon these sub-sections as vesting in it the benefit of the defendant's covenant as guarantor.

Upon grounds analogous to those we have already given in relation to the construction of secs. 51 and 52 of the *Real Property Act*, we think the meaning of the sub-sections of sec. 91 of the *Conveyancing Act* should be confined so as to exclude the obligation of suretyship.

The expression "mortgage debt" in sub-sec. 4 does not, in our opinion, naturally include the secondary and collateral liability of a guarantor. The "rights, powers, and remedies of the mortgagee expressed or implied in the mortgage" are those arising out of the transaction between the mortgagor and mortgagee, and do not extend to the rights and remedies of the mortgagee against a

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third party who is a stranger to the estate and joins in the instrument of mortgage only to give a personal obligation by way of additional security for the loan.

But the count in which the plaintiff declares on the covenant contained in the mortgage under the general law does not depend only upon sec. 91 of the *Conveyancing Act*. The count, besides setting out the memorandum of transfer indorsed on the mortgage, also states the terms of another document, which the plaintiff says constitutes an express notice in writing to the defendant of an assignment to the plaintiff of the defendant's covenant. The contention on behalf of the plaintiff is that the indorsed transfer is expressed in language which, according to its natural meaning and apart altogether from sec. 91, would be effective to assign the benefit of the defendant's covenant, and that the subsequent document amounted to express notice in writing of the assignment. If this be so, then under the provisions of sec. 12 of the *Conveyancing Act*, taken from sec. 25 (6) of the *Judicature Act* 1873, the plaintiff would be entitled to sue on the covenant in the plaintiff's own name.

In our opinion the indorsed memorandum of transfer does amount to an assignment by writing of the defendant's covenant sufficient to satisfy sec. 12. It is under the mortgagee's hand and it states that he thereby assigns unto the plaintiff company all moneys secured by the mortgage written within it and all his rights, powers and remedies thereunder. Because it is indorsed on the mortgage and refers to it as "the within written mortgage," the memorandum of transfer must be read as it would be if it contained a full recital of the mortgage. Unless, therefore, the circumstance that it is taken from a statutory form makes it proper to place some artificial limitation upon the natural meaning which the memorandum read in this manner would bear, the assignment of all moneys secured by the mortgage would be interpreted as an assignment of all the rights to recover such moneys which the instrument bearing the indorsement gave. An assignment of moneys that are secured by personal obligations means an assignment of the obligations securing them. The same moneys could not have been intended to belong to the transferee, the plaintiff, if paid by the mortgagor, but to the transferor, the mortgagor, if paid by the surety, the defendant. We do

not think the circumstance that the indorsed memorandum is in fact expressed in the form given by Schedule V. (5) of the *Conveyancing Act* should lead to its receiving a narrower interpretation. No doubt that form is not expressed as it is for the purpose of transferring or assigning the benefit of the collateral obligations of a guarantor. That purpose is absent because the inclusion of such obligations in the mortgage is not contemplated by sec. 91, and sub-sec. 4 of that section does not give the form an operation vesting the benefit of such obligations in the transferee. But the terms adopted in the form are apt to cover all rights and remedies by means of which the mortgage moneys might be reduced into possession and a general reference to such rights and remedies seems to us to be intended by the form. There is no reason to give an artificial meaning to the language of the form merely because the statutory enactment, which gives it an operation not otherwise belonging to it, relates to a specific subject matter only, namely, the transaction between the mortgagor and the mortgagee. When the general language of the form is applied by the parties to a larger transaction, we see no reason why they should not be taken to intend that it should operate according to its meaning in relation to that transaction. We are, therefore, of opinion that the benefit of the defendant's covenant was included in the assignment expressed by the indorsed memorandum. It thus becomes necessary to consider whether express notice in writing has been given of the assignment.

The document relied upon is a notice given by the plaintiff company to the defendant for the purposes of the *Moratorium Act* 1932. In the course of the notice, the plaintiff company is described as the transferee from the mortgagee of the mortgages, and those instruments are identified by their registration numbers. The document then states that the plaintiff company thereby gives the defendant notice that it intends to exercise all or any of its rights, powers and remedies against him as guarantor of the due payment of the principal and interest moneys after three months, unless he pays in the meantime to it all principal and interest moneys owing to it under the mortgages.

This document acquaints the defendant with the fact that the plaintiff company is or claims to be the transferee of the mortgages,

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and is or claims to be entitled to the rights and remedies the mortgages confer against the defendant. But it does not identify any particular document or documents as instruments constituting the transfer. In *Denney, Gasquet, and Metcalfe v. Conklin* (1) *Atkin J.* said that it appeared from the section that the notice which has to be given in order to pass the legal right to the debt to the assignee is express notice in writing of an absolute assignment by writing under the hand of the assignor. He held that a written statement which referred to the trustees of a deed of arrangement and indicated that the debt was included sufficed, although the names of the assignees were not disclosed. But the notice gave the date of the deed and described it as executed by the assignor, and the reason for the decision was that there was "an express and accurate reference to the deed to which the trustees were parties."

A difficulty in the present case is that there is no reference to any document but merely to the status or position of the plaintiff company as "transferee" of the mortgages. Of course, in point of law, it could not be transferee of either mortgage except as a result of a written instrument under the hand of the assignor. But the notice must be express, and, if the section requires not merely notice that there has been an assignment but that the assignment is in writing, it is difficult to say that the notice of the latter fact was express.

The dictum of Lord *Atkin* is stated in terms literally meaning that notice of a written instrument must be expressly given. On the other hand, in *General Motors Acceptance Corporation v. Johnson* (2) *Hyndman J.A.* said:—"It seems clear from these authorities that no special form of notice is necessary, it being sufficient if the effect upon the debtor is to convey to him with sufficient certainty the fact that the obligation is transferred to a third person as assignee." He held that a writing written for another purpose amounted to a sufficient notice because it conveyed the information that an assignment had taken place, to a debtor who actually had seen the document constituting the assignment. But the text of the informal notice did not disclose that the assignment was in writing.

The object of the requirement made by the words "of which express notice in writing shall have been given" is, we think,

(1) (1913) 3 K.B. 177, at p. 180.

(2) (1930) 4 D.L.R., at p. 297.

correctly stated in *Warren's Choses in Action* (1899), at pp. 177, 178. "The term 'express notice' is doubtless employed by way of opposition to notice arising by implication or operation of law, and to what was known in equity as constructive notice. It means a notice which indicates an express intention—a direct and definite statement of a thing, as distinguished from supplying materials from which the existence of such a thing may be inferred." The purpose is to make essential actual notice that the debt has been assigned. "One of the objects of the giving of notice to the debtor is that he shall 'know with certainty' in whom the legal right to sue him is vested" (*McIntosh v. Shashoua* (1), per *Evatt J.*). The purpose does not extend to giving the debtor particulars of the assignment. The assignment must be by writing, but, if it is in writing, then notice to the debtor is necessary only to acquaint him with the fact that the debt is payable to the assignee and the statute requires that he shall be expressly notified. But, neither in its exact terms, nor according to its general intent, does the provision appear to make it essential that the notice should contain an express statement that the assignment is a written one.

We think the notice relied upon in the second count is sufficient to perfect the assignment for the purposes of sec. 12 of the *Conveyancing Act*. The demurrer to that count should, therefore, have been overruled.

In our opinion the appeal should be allowed, and judgment in demurrer should be given for the plaintiff upon the second count of the declaration.

Appeal allowed with costs. Judgment of the Supreme Court in demurrer on second count of the declaration set aside and demurrer to that count overruled.

Solicitors for the appellant, *Gale & Gale*.

Solicitor for the respondent, *H. J. Bartier*.

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(1) (1931) 46 C.L.R. 494, at p. 515.

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