[HIGH COURT OF AUSTRALIA.]

PEPPER . . . . . APPELLANT;

AND

McNIECE AND ANOTHER . . . . RESPONDENTS.

ON APPEAL FROM THE FEDERAL COURT OF BANKRUPTCY.

H. C. OF A. 1941.

SYDNEY, *Aug.* 1; *Sept.* 8.

Rich A.C.J., Starke, McTiernan and Williams JJ.

Bankruptcy—Bankruptcy notice—Final order—Order of Court of Petty Sessions (N.S.W.) under Moratorium Act (N.S.W.) directing payment of arrears of interest—Power to review order—Address of creditor outside New South Wales but within Commonwealth—Bankruptcy Act 1924-1933 (*No.* 37 *of* 1924—*No.* 66 *of* 1933), *secs.* 42, 52 (*j*), 53—*Moratorium Act* 1932-1939 (*N.S.W.*) (*No.* 57 *of* 1932—*No.* 28 *of* 1939), *secs.* 10, 30 (7), (8).

Sub-sec. 7 of sec. 30 of the *Moratorium Act* 1932-1939 (N.S.W.) provides: "Any determination, decision, judgment, direction, order, or assessment made or given by any court in any matter arising under this Part of this Act" (which includes sec. 10) "shall be final and conclusive and without appeal." Sub-sec. 8 of the same section provides: "The court may reconsider any matter which has been dealt with by it, or rescind, or vary any decision or order previously made by it."

Held that an order of a Court of Petty Sessions under sec. 10 of the *Moratorium Act* 1932-1939 is, while it stands, a final order within the meaning of sec. 52 (*j*) of the *Bankruptcy Act* 1924-1933.

A bankruptcy notice founded on an order of a Court of Petty Sessions in New South Wales is not invalid because it specifies as the address of the creditor to whom payment is to be made a place outside New South Wales but within the territorial limits of the Commonwealth.

In re a Debtor, (1912) 1 K.B. 53, distinguished.

Decision of the Federal Court of Bankruptcy affirmed.

APPEAL from the Federal Court of Bankruptcy, District of New South Wales and the Australian Capital Territory.

Upon an application made under the provisions of secs. 9 and 10 of the *Moratorium Act* 1932-1939 (N.S.W.) by Arthur John McNiece

and Birtha Marion McNiece, as executor and executrix respectively of the will of Jean Mary Ings deceased, against Mabel Frances Pepper, the mortgagor respondent, a married woman of Leeder Avenue, Penshurst, near Sydney, New South Wales, the Court of Petty Sessions, Central Police Court, Sydney, on 24th July 1940, made the following order: "In respect of memorandum of mortgage registered number C11592 dated 9th September 1930 given by Mabel Frances Pepper to Jean Mary Ings (now deceased)—and the executors of whose estate are Arthur John McNiece and Birtha Marion McNiece —to secure the sum of £600 over the whole of the land comprised in certificate of title volume 4238 folio 224 and which land is subject to second mortgage, this court doth grant leave to the applicants to exercise all or any of the rights, powers and remedies conferred on them by the said mortgage, including the powers of sale and/or foreclosure, and doth order, under sec. 10 of the *Moratorium Act* 1932-1939, that the respondent (mortgagor) do pay to the applicants (mortgagees) the sum of £120, being part of the arrears of interest due and unpaid, and doth further order that the respondent (mortgagor) do deliver up possession of the said land to the applicants (mortgagees) on or before" 22nd August 1940.

By a bankruptcy notice under the *Bankruptcy Act* 1924-1933 served upon her at Penshurst on 28th February 1941, notice was given to Mrs. Pepper that "within twenty-one days after service of this notice on you, excluding the day of such service, you must pay to Arthur John McNiece and Birtha Marion McNiece (executors of the estate of the late Jean Mary Ings) of 91 Princes Street, Sandy Bay, Hobart, Tasmania, the sum of one hundred and twenty pounds claimed by Arthur John McNiece and Birtha Marion McNiece as being the amount due on a final order obtained by them against you in the Central Police Court, dated 24th July 1940, whereon execution has not been stayed, or you must secure or compound for the said sum to their satisfaction or the satisfaction of the court."

By a petition under the *Bankruptcy Act* 1924-1933, dated 24th March 1941, Arthur John McNiece and Birtha Marion McNiece, "both of 91 Princes Street, Sandy Bay, Hobart, in the State of Tasmania," petitioned the Federal Court of Bankruptcy, District of New South Wales, that a sequestration order be made in respect of the estate of Mrs. Pepper, the act of bankruptcy alleged being that she had failed to comply with the requirements of the bankruptcy notice served upon her.

Upon the hearing of the petition it was submitted on behalf of Mrs. Pepper that the order of the Court of Petty Sessions was not

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a final order within the meaning of sec. 52 (*j*) of the *Bankruptcy Act* 1924-1933. No other submissions were made.

Judge *Lukin* made an order of sequestration.

From this decision Mrs. Pepper appealed to the High Court on the grounds, *inter alia*, (*a*) that the order of the Court of Petty Sessions was not a final order within the meaning of sec. 52 (*j*) of the *Bankruptcy Act* 1924-1933, (*b*) that the bankruptcy notice was not a notice requiring payment in accordance with the terms of the order of the Court of Petty Sessions, and (*c*) that the bankruptcy notice was not a good notice, because no place within the State of New South Wales was stated therein where payment of the sum ordered to be paid under the said order could be made to the judgment creditors, the petitioners.

Further facts and the relevant statutory provisions appear in the judgments hereunder.

Richards, for the appellant. In view of the provisions of sub-sec. 8 of sec. 30 of the *Moratorium Act* 1932-1939, the order made under that Act by the Court of Petty Sessions against the appellant is not a final order within the meaning of sec. 52 (*j*) of the *Bankruptcy Act* 1924-1933 (*Berkeley* v. *Elderkin* (1); *Bailey* v. *Bailey* (2)). The order so made by the Court of Petty Sessions was not a final adjudication between the parties (*Ex parte Moore*; *In re Faithfull* (3); *In re a Debtor* (4)). That court had power to rescind or vary the order so made (*Davis* v. *Davis* (5)). The issuing of the bankruptcy notice did not alter the rights of the parties, nor did it prevent the Court of Petty Sessions from dealing with the order under the powers conferred by sec. 30 (8) of the *Moratorium Act*. Whether an order is final or not must be determined at the time at which it is made (*In re Henderson*; *Ex parte Henderson* (6)). Although the jurisdiction of the Court of Petty Sessions is limited to New South Wales, the bankruptcy notice required payment of the debt at a place beyond that jurisdiction; therefore the bankruptcy notice did not require such payment "in accordance with the terms of the order," within the meaning of sec. 53 of the *Bankruptcy Act* (*In re a Debtor* (7); *In re Howes*; *Ex parte Hughes* (8); *In re H. B.* (9)). The provisions of the *Bankruptcy Act* affect the status of persons; therefore those provisions must be strictly complied with (*In re a Debtor*; *Ex parte Debtor* (10); *Re Smith*; *Ex parte*

(1) (1853) 1 E. & B. 805, at pp. 808, 809 [118 E.R. 638, at p. 639].
(2) (1884) 13 Q.B.D. 855, at p. 860.
(3) (1885) 14 Q.B.D. 627, at p. 632.
(4) (1912) 3 K.B. 242, at pp. 245-247.
(5) (1922) 22 S.R. (N.S.W.) 185, at p. 190.
(6) (1888) 20 Q.B.D. 509, at p. 510.
(7) (1912) 1 K.B. 53.
(8) (1892) 2 Q.B. 628.
(9) (1904) 1 K.B. 94.
(10) (1935) Ch. 353.

Closer Settlement Ltd. (1)). These defects are not cured by any of the provisions of the *Small Debts Recovery Act* 1912-1933 (N.S.W.) or of the *Service and Execution of Process Act* 1901-1934.

Asprey, for the respondents. Unless and until a proceeding has been taken under sub-sec. 8 of sec. 30 of the *Moratorium Act* and has been adjudicated upon so as actually to rescind or vary an order made under sec. 10 of that Act that order is a final order by virtue of the provisions of sub-sec. 7 of sec. 30 (*Ex parte Willsford*; *Re Sheahan* (2)). Once the order has been acted upon it is not open to anybody to seek to have it rescinded or varied under sub-sec. 8. Sec. 53 of the *Bankruptcy Act* does not prescribe any place in New South Wales at which the debt is to be paid, or that an address in New South Wales shall be specified; nor do the rules or the form make any such provision. The terms of the order were followed precisely; it gave a right of payment to the respondents, and did not specify where such payment was to be made. *In re a Debtor* (3) is distinguishable on the ground that in that case the address for payment was outside the jurisdiction of the court. The jurisdiction of the Federal Court of Bankruptcy extends to Tasmania. Notice, as required by rule 172 of the *Bankruptcy Rules*, of opposition to the bankruptcy petition was not filed (*Re Sanders*; *Ex parte Sanders* (4)). The points which were not taken in the court below are not now available to the appellant as grounds of appeal.

[He was stopped.]

Richards, in reply. In *Ex parte Willsford*; *Re Sheahan* (2) and *Ex parte Automobile and General Finance Co. Ltd.*; *Re Pownall* (5) the court did not find that the orders there under consideration were final orders or final judgments, but that as the orders had been acted upon in such a way that the rights of the parties had been determined, the court had lost its jurisdiction to rescind or vary the order.

Cur. adv. vult.

Sept. 8.

The following written judgments were delivered :—

RICH A.C.J. The order of sequestration against which this appeal was lodged was made on a petition based on an act of bankruptcy alleging non-compliance with a bankruptcy notice ordering the appellant to pay the respondents the sum of one hundred and

(1) (1916) 34 W.N. (N.S.W.) 48.
(2) (1933) 33 S.R. (N.S.W.) 291; 50 W.N. (N.S.W.) 95.
(3) (1912) 1 K.B. 53.
(4) (1894) 1 Mans. 382; 63 L.J. Q.B. 734.
(5) (1932) 49 W.N. (N.S.W.) 23.

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twenty pounds. The bankruptcy notice was issued after the appellant failed to pay this sum, which was the subject of an order made in the Court of Petty Sessions, Sydney. The first part of the order gave leave under sec. 9 of the *Moratorium Act* 1932-1939 to the applicants (mortgagees) to exercise all or any of the rights, powers and remedies conferred on them by the mortgage in question, including the powers of sale and/or foreclosure. It was next ordered that under sec. 10 of the same Act the respondent (mortgagor) should pay to the applicants (mortgagees) the sum of £120, being part of the arrears of interest due and unpaid under a memorandum of mortgage given by the appellant M. F. Pepper to Jean Mary Ings deceased, of whose estate the respondents are executors. The substantial objection argued in this appeal was that raised by the original notice of appeal, viz., that the order of the magistrate is not a final order within the meaning of sub-sec. *j* of sec. 52 of the *Bankruptcy Act* 1924-1933.

It would be a misspending of time to go through the cases relating to the distinction between interlocutory and final orders. The question for determination is the meaning of " final " in sub-sec. 7 of sec. 30 of the *Moratorium Act* 1932-1939 (N.S.W.), and whether the order made under that Act which is the basis of the bankruptcy notice in this case is a final order within sec. 52 (*j*) of the *Bankruptcy Act* 1924-1933.

The order was one which, having regard to the amount of the debt, £600, the Court of Petty Sessions had jurisdiction to make (sec. 29). And it determined the amount of arrears of interest payable and ordered them to be paid. Moreover, by sec. 31 (4), the order was enforceable as under the *Small Debts Recovery Act* 1912-1933 (N.S.W.), as to which see secs. 33 and 45. Thus, apart from the provisions of sub-secs. 7 and 8 of sec. 30, it would seem that all the necessary elements required by sec. 52 (*j*) of the *Bankruptcy Act* were present, viz., creditors who have obtained a final order upon which execution has not been stayed, and service of a bankruptcy notice not complied with. But when one turns to the *Moratorium Act* one finds in sec. 30 two sub-sections (7 and 8) which are difficult to reconcile. The former says that any order made by any court in any matter arising under Part II. of the Act (which includes sec. 10) shall be final and conclusive and without appeal, while the latter sub-section provides that the court may consider any matter which has been dealt with by it or rescind or vary any decision or order previously made by it.

No doubt " due significance must be attached to the word ' final ' " (*In re a Debtor* (1)). And in the ordinary case the question whether

(1) (1929) 2 Ch. 146, at p. 151.

an order is final or not is to be determined upon a view of it at the time it is made. If it is not final at that time, it cannot be made so by reason of its not being obeyed, or by any circumstances which have arisen since that time (*In re Henderson* (1)). Accordingly, an order for payment which is subject to revision cannot be regarded as final in any sense, whether for the purposes of bankruptcy or of the enforcement of foreign orders, as to which see *Nouvion* v. *Freeman* (2), *Dicey's Conflict of Laws*, 5th ed. (1932), pp. 465-470, and cases there cited. But as the legislature has thought fit to provide expressly in sub-sec. 7 that an order of the character of the order in question shall be final and conclusive and without appeal, sub-sec. 8 must be read so as to give effect to these words. And on this ground I have come to the conclusion that the critical time at which to regard such an order is when the bankruptcy notice is to be issued. At that time there was an existing order which had determined that £120 should be paid to the respondents. The court in making it pronounced the order as a final and definitive command that the appellant should pay the money. No doubt the court could not renounce its power of reconsideration, but it did not mean the order to be provisional or defeasible. No attempt has been made on the part of the respondents to move the court which made the order to reconsider the matter or to rescind or vary the order. If this be the criterion, having regard to the very definite words contained in sub-sec. 7, the order in question is a final order within the meaning of sec. 52 (*j*), and the other ingredients which this section requires to constitute the statutory act of bankruptcy are present.

The other objections which the appellant was allowed to argue may be dealt with shortly. The petition was signed by Edgley, attorney of the respondents, and it was contended that the power of attorney under which he acted did not authorize him to take proceedings in bankruptcy against the appellant. Clause 1 of the power, however, contains an express authority to take legal proceedings for the recovery of any personal estate in New South Wales. In any event, taking such legal proceedings would be a medium or subordinate power necessary to the attainment of the principal power contained in the power of attorney in evidence in this case: Cf. *Howard* v. *Baillie* (3). It follows that the petition was duly signed by an authorized agent within the meaning of sec. 42 of the *Bankruptcy Act*.

Lastly it was contended that the notice requiring payment was defective in not naming a place of payment in New South Wales.

(1) (1888) 20 Q.B.D., at p. 510.
(2) (1889) 15 App. Cas. 1, at p. 13.
(3) (1796) 2 H.Bl. 618, at p. 620 [126 E.R. 737, at p. 738].

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But the answer to this contention is that the *Bankruptcy Act* is a Federal Act not limited by State boundaries and its processes are effective throughout the Commonwealth : Cf. *McGlew* v. *New South Wales Malting Co. Ltd.* (1).

The appeal should be dismissed with costs, which, if not recoverable from the bankrupt personally, may be allowed out of her estate either by the official receiver or by the Judge in Bankruptcy.

STARKE J. Appeal against an order of the Federal Court of Bankruptcy sequestrating the estate of the appellant, Mabel Frances Pepper. The sequestration order was founded upon failure to comply with the requirements of a bankruptcy notice.

By sec. 52 (*j*) of the *Bankruptcy Act* 1924-1933, a debtor commits an act of bankruptcy " if a creditor has obtained a final judgment " (See *Ex parte Chinery* ; *In re Chinery* (2) ; *Ex parte Schmitz* ; *In re Cohen* (3)) " or final order against him for any amount, and execution thereon not having been stayed, has served on him . . . a bankruptcy notice . . . and the debtor " has not complied with it or satisfied the court that he has a counterclaim, set-off, or cross-demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action or proceeding in which the judgment or order was obtained.

The creditors in this case obtained an order from the Court of Petty Sessions at Sydney under sec. 10 of the *Moratorium Act* 1932-1939 that the debtor (a mortgagor) do pay to the creditors (mortgagees and the respondents here) the sum of £120, being part of the arrears of interest due and unpaid. The bankruptcy notice was founded upon this order.

It has been contended on this appeal that the order of the Court of Petty Sessions is not a " final order," though it is declared to be final and conclusive and without appeal by sec. 30 (7) of the *Moratorium Act* 1932-1939. The contention is founded upon the provision contained in sec. 30 (8), providing that the court may reconsider any matter which has been dealt with by it or rescind or vary any decision or order previously made by it. A final order, I apprehend, is one made in some proceeding between parties and an adjudication in that proceeding of their right ; in short, it is an order that decides the rights of the parties (*Ex parte Moore* ; *In re Faithfull* (4) ; *In re Riddell* ; *Ex parte Earl of Strathmore* (5) ; *Annual Practice* 1940, pp. 1265, 1293, and cases there collected). And

(1) (1918) 25 C.L.R. 416.
(2) (1884) 12 Q.B.D. 342.
(3) (1884) 12 Q.B.D. 509.
(4) (1885) 14 Q.B.D. 627.
(5) (1888) 20 Q.B.D. 512.

apparently the creditor who issues a bankruptcy notice must be in a position to issue execution on the judgment or order (*Ex parte Woodall*; *In re Woodall* (1); *Ex parte Ide*; *In re Ide* (2)). The order made pursuant to the *Moratorium Act* 1932-1939 has these characteristics. It is an adjudication that interest to the amount of £120 is due under the mortgage and orders that it be paid. In foreclosure or redemption proceedings, the order would be conclusive that the amount mentioned in it was then due, though payment would come to credit in account in such proceedings. The order was also enforceable by means of execution when the bankruptcy notice was issued (*Moratorium Act*, sec. 31 (4); *Small Debts Recovery Act* 1912, sec. 43, under which latter Act the duty to issue a precept is purely ministerial and involves the exercise of no judicial discretion, as, for instance, in the cases of *In re Woodall* (1) and *Ex parte Ide*; *In re Ide* (2)). And an order is not the less final because it is subject to appeal or to reconsideration or to rescission or variation, for until rescinded, set aside, or varied, the order stands with its quality and condition unimpaired.

Another contention was based upon the decision of the Court of Appeal in *In re a Debtor* (3). There a bankruptcy notice was held bad which required payment to a creditor "of 7, Rue Lafitte, Paris" because it required the debtor to pay the judgment debt outside the realm, and was therefore not "in accordance with the terms of the judgment" under the *Bankruptcy Act* 1883, which adjudged "that the plaintiff recover against the defendant" a certain sum. But the case is not a governing authority in the present case, because it is consistent with the Federal system and the laws of Australia that a debt arising from the judgment of an Australian court creates an obligation enforceable throughout Australia (*Commonwealth of Australia Constitution Act*, sec. 5; *Service and Execution of Process Act* 1901-1934, secs. 3 (*d*), (*h*), 20 et seq.). No variance, therefore, exists between the obligation of the final order and the requirement of the bankruptcy notice.

Another contention was that the creditors' petition in bankruptcy was signed by an attorney who was not duly authorized; but he had authority to take legal proceedings for payment of obligations due to the creditors, and that is sufficient: Cf. *In re a Debtor* (4).

A final contention that the act of bankruptcy was not proved or not sufficiently proved is without substance. An affidavit was filed and used without objection that the statements in the petition were within the knowledge of the deponent true.

Consequently this appeal should be dismissed.

(1) (1884) 13 Q.B.D. 479.
(2) (1886) 17 Q.B.D. 755.
(3) (1912) 1 K.B. 53.
(4) (1912) 1 K.B., at p. 61.

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McTIERNAN J. In my opinion the appeal should be dismissed.

The sequestration order, the subject of this appeal, was made on 2nd May 1941 on a petition which was founded on the allegation that the appellant committed an act of bankruptcy by failing to comply with the requirements of a bankruptcy notice issued under sec. 52 (*j*) of the *Bankruptcy Act* 1924-1933 and served on her by the respondents. The notice both in respect to form and contents satisfied the requirements of the Act and the rules made under it: See sec. 53, rule 144, and form 5.

The first objection made by the appellant is that there was no final judgment or order to support the bankruptcy notice. The appellant was required by the bankruptcy notice to pay to the respondents, who were described as of an address in Hobart, the sum of one hundred and twenty pounds, which the notice stated to be the amount due on a final order obtained by the appellant on 24th July 1940 in the Central Police Court, Sydney. The order was made under secs. 9 and 10 of the *Moratorium Act* 1932-1939 (N.S.W.), by a Court of Petty Sessions sitting at the Central Police Court, Sydney. It is entitled, "In the matter of an application to the court under the provisions of secs. 9 and 10 of the Act." The parties to the order are the present respondents, described in it both as mortgagees and applicants, and the present appellant, described as mortgagor and respondent. A third party is described as "person affected." The body of the order is as follows: "In respect of memorandum of mortgage registered number C 11592 dated 9th September 1930 given by Mabel Frances Pepper to Jean Mary Ings (now deceased)—and the executors of whose estate are Arthur John McNiece and Birtha Marion McNiece—to secure the sum of £600 over the whole of the land comprised in certificate of title volume 4238 folio 224 and which land is subject to second mortgage this court doth grant leave to the applicants to exercise all or any of the rights powers or remedies conferred on them by the said mortgage including the powers of sale and/or foreclosure and doth order under sec. 10 of the *Moratorium Act* 1932-1939 that the respondent (mortgagor) do pay to the applicants (mortgagees) the sum of £120 being part of the arrears of interest due and unpaid and doth further order that the respondent (mortgagor) do deliver up possession of the said land to the applicants (mortgagees) on or before" 22nd August 1940.

The appellant's personal obligation under this mortgage to pay interest and other mortgage moneys was annihilated by sec. 25 of the *Moratorium Act* 1930-1931, as amended by the *Moratorium and Interest Reduction (Amendment) Act* 1931, and it was never revived:

See *Smith* v. *Motor Discounts Ltd.* (1). Moreover, in consequence of the restrictions imposed on the mortgagee of land by sec. 9 (one of the sections mentioned in the order), the respondents were unable to realize the security without the leave of a court. The terms of the order show that in addition to granting them such leave, the court made an order under sec. 10 (the other section mentioned in the order) against the appellant for the payment by the appellant to them of the sum of one hundred and twenty pounds, the sum mentioned in the bankruptcy notice. Sec. 10 (1) provides that where a mortgagor or puisne mortgagee is in occupation of the mortgaged property or in receipt of the rents, profits or income thereof and is in default in the payment of interest, the court may on the application of the mortgagee order the mortgagor or puisne mortgagee to pay to the mortgagee the whole or such part as it thinks fit of the amount of interest due and unpaid. The section lays down rules governing the court in the exercise of this discretion. The application under sec. 10 is one of the proceedings which a Court of Petty Sessions has power under sec. 30 (1) to determine, and any order which the court makes under sec. 10 comes within sec. 30 (7) which, in the part now material, says that "any determination, decision, judgment, direction, order or assessment made or given by any court in any matter arising under this Part of this Act shall be final and conclusive and without appeal." It would be difficult to suggest how finality would be more exhaustively expressed than by these words. The mortgagee may obtain the fruits of an order under sec. 10 by proceeding under sec. 31 (4), which provides that any order made by, among other tribunals, a Court of Petty Sessions can be enforced in the same manner as an order for payment under the *Small Debts Recovery Act* 1912 (N.S.W.). By virtue of these provisions the order made under sec. 10 was enforceable by execution.

It appears, therefore, that the order was made in a statutory proceeding which was judicially determined by such order. The question is whether the order is a "final" order. If the question depended only on sec. 10 and sec. 30 (7) no-one could doubt that the court finally, and, indeed, finally and conclusively, determined the application, and that it resulted in a final order. But sec. 30 (8) provides: "The court may reconsider any matter which has been dealt with by it, or rescind, or vary any decision or order previously made by it." The appellant's objection is based on that sub-section. To uphold the objection would be to decide that sec. 30 (8) flatly contradicts sec. 30 (7). There is no inconsistency between

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

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the two sub-sections, because the effect of sec. 30 (7) is that a proceeding under sec. 30 (8) in reference to an order under sec. 10, cannot be a proceeding in the application upon which that order was made nor a continuance of that proceeding. An application to reconsider a matter dealt with under sec. 10 or to rescind or vary any order made under that section is a new and separate proceeding. The mortgagor is the only party who can apply under sec. 10, whereas either he or any mortgagee can apply under sec. 30 (8). The order made under sec. 10 may grant or refuse the mortgagor's application. Sec. 30 (8) in its relation to sec. 10 presupposes that a " final and conclusive order " has been made under that section. A proceeding under sec. 30 (8) cannot possibly be a further step in the proceeding under sec. 10, which *ex hypothesi* has been determined by a final and conclusive order. Sec. 30 (8) vested the court with jurisdiction to reconsider in another and separate application a matter which has already been dealt with and carried to finality. In the present case, when the court in the application under sec. 10 made the order upon which the bankruptcy notice was founded, the proceeding ended and there was nothing further for the court to do in that proceeding. The order was not interlocutory. It was the final order in the proceeding. The bankruptcy notice therefore was supported by a final order in a proceeding. The appellant's objection that it did not come within sec. 52 (*j*) should fail.

Another objection is that the bankruptcy notice was bad because it did not specify an address within the jurisdiction of the Court of Petty Sessions. The jurisdiction, it was contended, did not extend beyond the territorial limits of New South Wales. In my opinion there is no substance in this objection. The territorial unit for the purposes of the Commonwealth *Bankruptcy Act* must be as extensive at least as the territorial limits of the Commonwealth. Sec. 53 provides that a bankruptcy notice shall be in the prescribed form. The form, as has been observed, is prescribed by rule 144. Pursuant to these requirements the applicants were stated to be of " 91 Princes Street, Sandy Bay, Hobart." Whether these words are to be regarded as descriptive of them as the judgment creditors or as the place at which payment was to be made, it is enough to say that the words designate a place within the Commonwealth. The fact that they describe a place outside of New South Wales, the State to which the Petty Sessions Court belongs, is not in itself an invalidating circumstance.

The only other objection which need be mentioned is that the person who signed the petition as attorney for the respondents was not authorized under the terms of the power of attorney given him

by them to take bankruptcy proceedings. This objection was not taken at the hearing of the petition. It does not deny the commission of the act of bankruptcy. If it had been taken at the hearing and the court considered that there was any substance in the objection, it is obvious that the court might have taken some course other than to dismiss the petition out of hand. The appellant should not be allowed to take the objection at this stage.

WILLIAMS J. On 24th July 1940 the Court of Petty Sessions, Sydney, made an order under sec. 10 of the *Moratorium Act* 1932-1939 (N.S.W.), that the appellant, Mabel Frances Pepper, as mortgagor, should pay to the respondents, Arthur John McNiece and Birtha Marion McNiece, as executor and executrix of the will of Jean Mary Ings, the sum of one hundred and twenty pounds, being part of the arrears of interest due and unpaid under a memorandum of mortgage, dated 9th September 1930, over certain land in New South Wales, given by M. F. Pepper to the deceased to secure the sum of six hundred pounds and interest.

The appellant did not obey this order, and, on 3rd September 1940, the respondents as such executor and executrix caused a bankruptcy notice under the Federal *Bankruptcy Act* 1924-1933 to be issued, ordering her to pay this sum to them within the time therein mentioned. The address of the respondents was given in the notice as 91 Princes Street, Sandy Bay, Hobart, Tasmania. The appellant did not comply, and the respondents then caused a bankruptcy petition to be issued against her, the act of bankruptcy alleged being that she had failed to comply with the requirements of the notice. The petition was signed by John Edgley as attorney for the petitioners.

On 2nd May 1941 Judge *Lukin* made an order sequestrating her estate. She then filed a notice of appeal to this court, the one ground of appeal mentioned being that the order of the magistrate was not a final order within the meaning of sub-sec. *j* of sec. 52 of the Act.

Subsequently two affidavits were filed by her solicitor seeking to add additional grounds of appeal, of which I need only refer to the three which were pressed at the hearing, (*a*) that the bankruptcy notice was not a notice requiring payment in accordance with the terms of the order of the Court of Petty Sessions, (*b*) that the power of attorney of 1st August 1940, under the authority of which Edgley signed the petition, did not confer upon the donee of the power authority to take proceedings in bankruptcy against the appellant, and (c) that there was no evidence that the appellant committed any act of bankruptcy. The appellant was represented by her solicitor at the hearing of the petition. He took the objection,

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which his Honour rejected, that the order of the Court of Petty Sessions was not a final order, but did not raise any of the matters referred to in the affidavits.

On the opening of the appeal in this court, counsel for the respondents took the preliminary point that neither the original ground nor the additional ones were open to the appellant, because no notice of opposition had been filed as required by rule 172. This point was not taken before his Honour. If it had been, he could have granted an adjournment, had the petitioners been prejudiced. But seeing that, if the original ground or the new grounds *a* or *b* were valid, they would have been fatal, the court would have been bound to determine them once they had been raised.

Ground *c* is in a different category. It is based upon the contention that the only evidence that the appellant did not comply with the bankruptcy notice was that of Mr. Edgley, who could not have known of his own personal knowledge that she had not paid the money to the respondents in Hobart. This is probably correct, although the deponent did swear that the money had never been so paid, but his evidence, which in fact was true, was not objected to; and, since it is evident that, if the objection had been taken, the defect could have been cured by a further affidavit sworn by the respondents themselves, it is now too late to raise this point for the first time (*Yorkshire Insurance Co.* v. *Craine* (1); *McIntosh* v. *Shashoua* (2); *Parsons* v. *Bunge* (3)).

The other three grounds of appeal, particularly the original and ground *a*, raise points of substance which would not have been curable if they had been taken at the hearing. The appellant should, therefore, be allowed to raise and argue them, and for this purpose it should be assumed that leave had been granted to amend the notice of appeal and that grounds *a* and *b* had been added thereto.

As to ground *b*, sec. 42 of the Act authorizes a petitioner to act by a duly authorized agent. The power of attorney of 1st August 1940, after appointing Edgley the true and lawful attorney of the petitioners generally, specifically authorized him on non-payment of money to take all such legal and other proceedings for its recovery as he should think fit. It is quite usual to issue a bankruptcy notice to enforce payment of a judgment debt. To take legal proceedings is a phrase which has a wide import (*Parsons* v. *Bunge* (3)). The present power was plainly wide enough to authorize Mr. Edgley to present and prosecute a petition for the sequestration of the estate of a debtor of his principals (*Ex parte Wallace*; *In re Wallace* (4);

(1) (1922) 2 A.C. 541, at pp. 552, 553.
(2) (1931) 46 C.L.R. 494, at p. 504.
(3) *Ante*, p. 421.
(4) (1884) 14 Q.B.D. 22.

In re Anderson (1); *Re Williams*; *Ex parte Trustees of Assigned Estate of Vass* (2)).

Ground *a* is based on the submission that the bankruptcy notice was defective because it did not, as required by sec. 53, direct the appellant to pay the sum of £120 in accordance with the terms of the order of the Court of Petty Sessions. This order required the appellant to pay this sum to the respondents as executors of the above deceased, and the bankruptcy notice faithfully reproduced this direction, but the appellant's counsel referred the court to the decision of the Court of Appeal in *In re a Debtor* (3), and contended that, since the process of the Court of Petty Sessions only ran in the State of New South Wales (*Small Debts Recovery Act* 1912-1933 (N.S.W.), sec. 43), the notice should have required payment at a place in that State. It is true the Court of Appeal did decide that, in the bankruptcy notice, a judgment creditor must fix some place within the jurisdiction of the court where the judgment was obtained at which the judgment debtor may pay the debt. But the foundation of the decision was that, where a bankruptcy notice issues in respect of a judgment debt of an English Court, the debtor must be given an opportunity to pay the debt within the realm before he can make default and thereby commit an act of bankruptcy. The principle of the decision must be adapted to the different conditions in Australia due to Federation. The process of the New South Wales Court of Petty Sessions does in substance and actuality run in all the States of the Commonwealth, by reason of sec. 21 of the Federal *Service and Execution of Process Act* 1901-1934, which enables the successful party to register a certificate of the order in the other States, and so enforce it there. Moreover, the validity of the notice can be upheld on the broader ground that it is a notice which issues out of the Federal Court of Bankruptcy and can be served anywhere in the Commonwealth without leave. As the Commonwealth currency is legal tender in all the States no difficulty would be experienced by a resident of one State in paying a creditor in any other. Sec. 53 provides that a bankruptcy notice shall be in the prescribed form. This form is No. 5 of the First Schedule to the Rules. Assuming the words which it contains, "you must pay to C D of ," indicate a requirement that the address to be inserted should be one at which payment should be made, there is no reason from the point of view of principle or convenience why the address should not be anywhere in the Commonwealth. This ground therefore fails.

(1) (1909) V.L.R. 465.
(2) (1911) 28 W.N. (N.S.W.) 119.
(3) (1912) 1 K.B. 53.

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The original ground taken in the notice of appeal still remains for consideration.

The order of the Court of Petty Sessions was made pursuant to the powers conferred upon it by secs. 10, 29 and 30 of the *Moratorium Act*. Sec. 25 (7) of the previous Act (1930-1931 as amended by Act No. 66 of 1931) had avoided all personal liability on the covenants for payment of principal or interest contained in a mortgage of land. Sec. 10 enables the court to make an order, in the circumstances therein mentioned, for the payment by the mortgagor to the mortgagee of the whole or such part as it thinks fit of the amount of interest due and unpaid under the mortgage. The amount of the mortgage debt determines whether the court which has jurisdiction to make the order is the Supreme Court or a District Court or Court of Petty Sessions.

The Act provides, by sec. 30 (7), that any order made by any court in any matter arising under Part II. of the Act, which includes sec. 10, shall be final and conclusive and without appeal; by sec. 30 (8), that the court may reconsider any matter which has been dealt with by it or rescind or vary any decision or order previously made by it; by sec. 31 (4), that any order for the payment of money made by a Court of Petty Sessions shall operate as an order for the payment of money under the *Small Debts Recovery Act* 1912-1933, and be enforceable as such under the provisions of that Act. The latter Act (sec. 43) provides that whenever any Court of Petty Sessions makes any order for the payment of money, the registrar may issue a precept in the nature of a *fieri facias* to any bailiff of the court, who is empowered to execute the same in any part of the State in the same manner as a process of a similar nature issuing out of the Supreme Court may be executed by the sheriff; by sec. 45, that where an order of a Court of Petty Sessions for the payment of money has been entered up or made in favour of any person, the registrar shall, on proof that a warrant of execution on such order has been returned unsatisfied in whole or in part, issue to such person the certificate therein mentioned, and such person may file the said certificate in the District Court, and thereupon execution may be issued out of such District Court in the same manner as upon a judgment or order of such court, and after the issue of such certificate no further proceedings shall be taken in the Court of Petty Sessions in respect of such order and all the provisions of the *District Courts Act* 1912-1936 relating to such proceedings consequent on an order given or made in a District Court shall apply as if the order of the Court of Petty Sessions were a judgment or order of the District Court.

The power given to the court by sec. 30 (8) of the *Moratorium Act* to reconsider, rescind or vary orders is a power which must be construed in the light of sub-sec. 7, which makes orders final and conclusive and without appeal. Effect must be given to both sub-sections. Sub-sec. 7 makes it clear that the order, so long as it has not been rescinded or varied, may be acted upon as final and conclusive. An order made under sec. 10 is not in the nature of an interlocutory order. There is a *litis contestatio*, a judicial determination in a proceeding in which all defences are open to the defendant on the merits that an amount of interest is overdue, an order for the payment of the whole or part of that sum raising a legal obligation to pay it, and a right given to the mortgagee to recover that sum from the mortgagor by the issue of execution.

The right to issue execution is an important element to determine whether an order is final or not for the purposes of sec. 52 (*j*) of the *Bankruptcy Act*. In *In re a Debtor* (1) *Farwell* L.J. quoted the words of *Bowen* L.J. in *Ex parte Ide*; *In re Ide* (2): "In order to entitle a creditor to issue a bankruptcy notice, he must be in a position to issue execution on his judgment at the time when he issues the bankruptcy notice": See also *Williams* on *Bankruptcy*, 15th ed. (1937), p. 25.

Sec. 52 (*e*) of the *Bankruptcy Act* provides that a debtor commits an act of bankruptcy if execution against him has been levied by seizure of his goods under process in an action in any court or in any civil proceeding in any court, and the goods have been either sold or held by the sheriff for seven days or if any such execution has been issued against him and has been returned unsatisfied. It is plain that the executors could have issued execution against Mrs. Pepper, that if any of the events specified in the sub-section had then occurred she would have committed an act of bankruptcy on which they or any other creditor or creditors to whom alone or in the aggregate she owed £50 could have presented a petition for the sequestration of her estate, and that if a sequestration order had been made the executors could have proved as creditors for the one hundred and twenty pounds. For these purposes the order could have been acted on as final. It seems to follow that it should also be regarded as final for the purposes of sec. 52 (*j*).

In fact, there does not appear to be any distinction in principle between an order under sec. 10 and the order in question in *In re a Debtor* (3). This was an order for the payment of the purchase money made in a suit brought by a vendor against a purchaser for

(1) (1912) 3 K.B., at p. 247. (2) (1886) 17 Q.B D., at p. 759.
(3) (1912) 3 K.B. 242.

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the specific performance of a contract to purchase real estate. It was held to be final, although the court still retained the power in the event of non-payment of the purchase money to rescind it and make an alternative order cancelling the contract, forfeiting the deposit, and giving other consequential relief (*Fry* on *Specific Performance*, 6th ed. (1921), p. 547 ; *Williams* on *Vendor and Purchaser*, 4th ed. (1936), vol. 2, p. 1063).

Construed together, the two sub-sections mean that until an order is undone " judicially upon judicial grounds " (under sub-sec. 8) it should be treated as " in itself, and until judicially rescinded, valid and final " (*Boswell* v. *Coaks* [*No.* 2] (1)).

The conclusion is that the present order was a final order within the meaning of sec. 52 (*j*) of the *Bankruptcy Act* upon which execution had not been stayed, and that the executors were at the date of the notice persons who for the time being were entitled to enforce a final order for the payment of the money.

This ground therefore fails.

The appeal should be dismissed.

Appeal dismissed with costs. If and in so far as the respondents are unable to recover their costs from the bankrupt personally they are to be at liberty to apply to the official receiver to allow them out of the estate of the bankrupt and if he disallows them to the Judge in Bankruptcy.

Solicitor for the appellant, *R. J. M. Foord.*

Solicitors for the respondents, *Edgley, Son & Williams.*

J. B.

(1) (1894) 86 L.T. 365, note *a*, at p. 366.