

REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

Cons/Dist
Mawson v
Motor Credits
(Hire
Finance) Ltd
(1966) 116
CLR 293

[HIGH COURT OF AUSTRALIA.]

BANK OF NEW SOUTH WALES . . . APPELLANT ;
PLAINTIFF,

AND

PERMANENT TRUSTEE COMPANY OF NEW }
SOUTH WALES LIMITED . . . } RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF
NEW SOUTH WALES.

Moratorium—Mortgage to secure moneys payable under guarantee—Revival of personal covenant—Moratorium Act 1930-1931 (N.S.W.) (No. 48 of 1930—No. 43 of 1931), ss. 2, 25 (7)—Moratorium and Interest Reduction (Amendment) Act 1931 (N.S.W.) (No. 66 of 1931), s. 4—Moratorium Act 1932-1936 (N.S.W.) (No. 57 of 1932—No. 58 of 1936), ss. 33, 34, 35, 41. H. C. OF A.
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SYDNEY,
Aug. 4, 5.

On 1st February 1932 a mortgage of land was executed to secure payment by the mortgagor of moneys which had become payable by him under a guarantee of an unsecured debt which he had given in 1928. MELBOURNE,
Oct. 4.

Held, by Latham C.J., Rich and McTiernan JJ. (Starke J. dissenting), that liability on the personal covenant in the mortgage was not revived by the *Moratorium Act 1932-1936 (N.S.W.)*. Latham C.J.,
Rich, Starke,
and
McTiernan JJ.

Decision of the Supreme Court of New South Wales (Full Court), by majority, affirmed.

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An action was brought in the Supreme Court of New South Wales by Bank of New South Wales against Permanent Trustee Co. of New South Wales Ltd., as executor of the will of Percy Moore Wood, medical practitioner, deceased, for the recovery of the sum of £4,096 5s. 1d. together with interest upon the sum of £2,745 17s. 2d., part of the first-mentioned sum, from the date of the writ until judgment at the rate of four and one-half per cent per annum under the covenants for payment of principal and interest contained in a certain memorandum of mortgage under the provisions of the *Real Property Act* 1900 (N.S.W.), made between Dr. Wood as mortgagor and the plaintiff as mortgagee.

By consent of the parties and by an order of *Roper J.* made pursuant to s. 55 of the *Common Law Procedure Act* 1899 (N.S.W.) a case was stated substantially as follows for the opinion of the court without any pleadings.

Dr. Wood died on 27th February 1939, and probate of his will was granted to Permanent Trustee Co. of New South Wales Ltd., the executor named therein.

By guarantee in writing dated 21st June 1928 Dr. Wood and seven other persons did, and each of them and any two or more of them did, in consideration of certain credit advances and accommodation to be afforded by the bank to James Syphonic Visible Measures Ltd., jointly, severally and respectively guarantee to the bank the repayment when demanded in writing from them or any of them or from any of their representatives of all moneys which already were or should at any time thereafter be due or owing by that company to the bank on the balance of its current account with the bank or on any account or in any manner whatever either alone or jointly with any person or persons or with any body or bodies corporate and all interest on such moneys respectively payable or to become payable by the company together with all charges for commission and other expenses which the bank might in the course of its business as bankers charge in respect of any such moneys as aforesaid provided that the amount payable by them or any of them under the guarantee should not exceed the sum of £2,500 and a sum equal to one year's interest thereon and the costs and expenses incurred in obtaining payment of those sums respectively together with interest at the rate of eight pounds per cent per annum on the said sums respectively from the date when demand for payment thereof should be made until payment.

Between 21st June 1928 and 3rd December 1929 the bank afforded credit advances and accommodation within the meaning of the

guarantee to the company. On 3rd December 1929 there was due and owing by the company to the bank the sum of £2,514 3s. 7d. being wholly moneys the repayment whereof by the company to the bank was by the terms of the guarantee guaranteed by Dr. Wood and the other guarantors named in the guarantee.

On 5th December 1929 the bank, pursuant to the guarantee, duly demanded in writing from Dr. Wood payment by Dr. Wood to the bank of the said sum of £2,514 3s. 7d. On divers days between 4th December 1929 and 3rd February 1930 the bank demanded in writing from the company and pursuant to the guarantee duly demanded in writing from each of the guarantors named therein, other than Dr. Wood, payment by the company and by each of the other guarantors respectively of the said sum of £2,514 3s. 7d.

After the making of those demands sequestration orders were made by the Federal Court of Bankruptcy against each of the guarantors named in the guarantee other than Dr. Wood. The bank proved in the bankruptcy of each of the said guarantors except two against whom a sequestration order had been so made in respect of his liability under the guarantee, but received nothing from the estate of any of those guarantors. On 17th October 1932 an order was made by the Supreme Court of New South Wales in its equitable jurisdiction for the winding up of the company, but nothing was received by the bank out of the assets of the company.

The said sum of £2,514 3s. 7d. was not nor was any part thereof paid to the bank by Dr. Wood or by the company or by any of the other guarantors or at all and on 1st February 1932, and at the date of the action, that sum remained wholly unpaid.

On 1st February 1932 there was payable by Dr. Wood to the bank in accordance with the terms of the guarantee in respect of moneys the repayment of which was guaranteed thereby and interest thereon the sum of £2,745 17s. 2d. On that day, namely 1st February 1932, Dr. Wood for the purpose of securing to the bank the payment to the bank of the said sum of £2,745 17s. 2d. together with interest thereon and for the considerations therein set out made and executed in favour of the bank a memorandum of mortgage under the *Real Property Act* 1900 of the whole of the land comprised in certificate of title registered volume 680 folio 204.

By the memorandum of mortgage Dr. Wood covenanted with the bank that he would pay to the bank the principal sum of £2,745 17s. 2d. on 30th September 1934, together with interest thereon computed from 30th September 1931 at the rate of six pounds per cent per annum and that if the principal sum or any part thereof should remain unpaid after 30th September 1934 he

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would so long as the same sum or any part thereof should remain unpaid pay to the bank interest thereon or on so much thereof as should for the time being remain unpaid at the rate of six pounds per cent per annum by equal half-yearly payments until the whole of the principal sum should have been paid and satisfied.

The mortgage document was in printed form. The document was executed "in consideration of the sum of £2,745 17s. 2d. now owing by the mortgagor to the Bank of New South Wales" under or by virtue of a certain guarantee dated 21st June 1928 given by the mortgagor and others to the mortgagee to secure the repayment of advances and accommodation to be afforded by the mortgagee to James Syphonic Visible Measures Ltd. and in further consideration of the forbearance by the mortgagee to enforce immediate payment of the said sum of £2,745 17s. 2d., and it was expressed to be made for the purpose of collaterally securing to the mortgagee the payment in manner thereafter mentioned of the said principal sum and interest thereon. There was inserted in writing a clause in these terms:—"Nothing herein contained shall merge, extinguish, postpone, lessen or otherwise prejudicially affect the security of the mortgagee under or by virtue of the said guarantee or any other security now or hereafter held by the mortgagee or any right or remedy which the mortgagee now has or hereafter may have against the mortgagor or any other person." It was a condition of the mortgage that the provisions of the *Moratorium Act* 1930 (N.S.W.) as amended by the *Moratorium (Amendment) Act* 1931 and of any Act further amending the same were expressly excluded and accordingly the same should not apply to the security or to any of the powers, rights and remedies of the mortgagee thereunder.

The memorandum of mortgage was duly registered under the provisions of the *Real Property Act* 1900.

On 17th September 1941, the principal moneys and interest remaining unpaid, the bank gave to the defendant a notice which, after containing references in detail to the mortgage and the guarantee given by Dr. Wood to the bank, was in the following terms:—"Pursuant to s. 41 of the *Moratorium Act* 1932-1939 the Bank of New South Wales hereby gives you notice, as the legal representative of the late Dr. Wood, of its intention to exercise all or any of its rights, powers and remedies against the estate of the late Dr. Wood and against you as such legal personal representative or against the mortgaged property by and under the memorandum of mortgage given by the late Dr. Wood to secure the performance of the guarantee after the expiration of the period of three months (mentioned in the said s. 41 of the said Act) computed from the date upon which this

notice shall be given or deemed to have been given under the provisions of the said Act."

At the date of the commencement of the action the said sum of £2,745 17s. 2d. had not nor had any part thereof nor had any interest thereon or any part thereof in accordance with the memorandum of mortgage been paid to the bank by Dr. Wood or by the defendant or at all and the said sum and interest thereon remained wholly due and unpaid.

No statement contained in the case stated was to be deemed to be an acknowledgment for the purposes of any statute of limitations or an admission for any purpose other than the purposes of the case.

The question for the opinion of the court was whether the bank was precluded by the provisions of the *Moratorium Act* 1930, as amended, or by the provisions of the *Moratorium Act* 1932, as amended, from suing for and recovering from the defendant as executor of the will of Dr. Wood in this action brought upon the covenants for payment of principal and interest contained in the memorandum of mortgage the principal sum of £2,745 17s. 2d. secured by the memorandum of mortgage and interest thereon in accordance with the provisions of that memorandum of mortgage.

It was agreed between the parties (*a*) that if the court should be of opinion in the negative then judgment should be entered up for the plaintiff bank for the sum of £4,096 5s. 1d. together with interest on £2,762 18s. of the said sum at the rate of four and one-half per cent per annum from the date of the writ until judgment and for costs of suit to be levied out of the assets of Dr. Wood deceased if the defendant had so much in its hands but if not then the costs to be levied out of the defendant's own assets, and (*b*) that if the court should be of opinion in the affirmative then judgment with costs of defence should be entered up for the defendant.

The Full Court of the Supreme Court of New South Wales answered the question in the affirmative and ordered that a verdict and judgment be entered in the action for the defendant with costs of and incidental to the special case.

From that decision the bank appealed to the High Court.

The relevant statutory provisions are set forth in the judgments hereunder.

Teece K.C. (with him *Sugerman*), for the appellant. In the contract of guarantee the guarantor, for the consideration therein mentioned, promises to pay in any event. The contract is one of guarantee both within the meaning of the *Moratorium Act* and at common law. In spite of the primary liability the guarantee remained

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effective (*Permanent Trustee Co. of N.S.W. Ltd. v. Hinks* (1)). Upon the execution of the mortgage the money Dr. Wood was liable to pay to the appellant under the guarantee was secured by a mortgage of land. The court below wrongly proceeded upon the basis that it is not possible to secure the performance of a contract if a breach has been committed. The mortgage was a mortgage which secured performance of a guarantee. The effect of sub-s. 7 of s. 25 of the *Moratorium Act* 1930-1931 was to invalidate not only the personal covenant contained in a mortgage but also a promise contained in any other instrument (*Smith v. Motor Discounts Ltd.* (2); *Stock Motor Ploughs Ltd. v. Forsyth* (3)). Upon the execution by him of the mortgage Dr. Wood became, without the necessity of resorting to the statutory definition, a mortgagor in fact. He thereupon rendered himself immune from an action under the contract of guarantee. In the circumstances the contract of guarantee was avoided by Part IV. of the 1930-1931 Act. Section 35 of the *Moratorium Act* 1932 must be given a retrospective operation (*Attorney-General v. Theobald* (4)). The effect of sub-s. 3 of that section is that nothing in s. 25 of the 1930-1931 Act shall be construed so as to impair the rights, powers or remedies of a mortgagee against a person who has guaranteed the payment of money. This action was brought by the appellant as mortgagee against the respondent as executor of the person who guaranteed the payment of money. The fact that Dr. Wood had a dual capacity, namely, guarantor and mortgagor, is immaterial. This view is strongly supported by s. 41 of the 1932 Act. The definition of "mortgagor" in the 1930-1931 Act is different from the definition of that word as appearing in the 1932 Act. Section 35 and s. 41 of the 1932 Act are independent sections and are not inconsistent one with the other. The mortgage was given by Dr. Wood to secure the performance by him of his guarantee. In short, the guarantee was operated upon by s. 25 (7) of the 1930-1931 Act; that operation was modified by the 1932 Act, and the modification went to the extent of reviving all rights against Dr. Wood whether in his capacity of guarantor or in that of mortgagor.

Weston K.C. (with him *Sheppard*), for the respondent. The guarantee given by Dr. Wood was never operated upon by any of the *Moratorium Acts*. As guarantor he was never a mortgagor within the definition of that word in the 1930-1931 Act. The guarantee was never at any stage a guarantee of a mortgage debt.

(1) (1934) 34 S.R. (N.S.W.) 130, at pp. 136, 137; 51 W.N. 37, at p. 38.

(2) (1935) 54 C.L.R. 107, at p. 115.

(3) (1932) 48 C.L.R. 128.

(4) (1890) 24 Q.B.D. 557.

One of the purposes of the 1932 Act was to displace the benefits obtained by certain guarantors under s. 25 (7) of the 1930-1931 Act. Dr. Wood as guarantor did not benefit under s. 25 (7) : he was outside the operation of the earlier Act, therefore there could not be any revival of any rights against him. The contract entered into by Dr. Wood in 1928 was a simple contract of guarantee to pay a simple contract debt : it never was a guarantee to repay mortgage moneys. The mortgage was a new bargain between the parties. The parties altered their position. It was expressly provided in the mortgage document that the liability under the guarantee was not to be in any way affected. The rate of interest under the mortgage and under the guarantee, also the dates of payment, were different. The guarantee was not an agreement by Dr. Wood to pay mortgage moneys secured by a mortgage of land, therefore *Stock Motor Ploughs Ltd. v. Forsyth* (1) and *Smith v. Motor Discounts Ltd.* (2) do not apply. Sections 35 and 41 of the 1932 Act only deal with the past operation of s. 25 (7) of the 1930-1931 Act. The revival of rights under s. 35 leaves those rights subject to s. 9 of the Act. Section 35 does not include any class of guarantor. Section 41 (1) has no relation to a guarantee which is not a guarantee of a mortgage debt. The generality of s. 41 is restricted by sub-s. 12, which operates as a proviso to that section. Dr. Wood's guarantee was not an agreement for the payment of mortgage moneys, but was an agreement to pay the unsecured debt of the company. The mortgage was not in itself a guarantee, but was merely an instrument to secure performance of the guarantee with modifications. Even if the mortgage was in itself a guarantee it would not be a guarantee within the meaning of any of the *Moratorium Acts*, because it was not a guarantee of a mortgage debt. Under the 1930 Act the mortgage must be given by the principal debtor.

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Teece K.C., in reply. The mortgage was in itself a guarantee. When Dr. Wood undertook personal liability to pay the debt he undertook that personal liability, *inter alia*, of guarantee ; he undertook that liability both as guarantor and as mortgagor (*In re Conley* (3) ; *Rowlatt on Principal and Surety*, 2nd ed. (1926), p. 1). The appellant comes exactly within the ambit of the benefits given by s. 41 of the 1932 Act.

Weston K.C., by leave. *In re Conley* (4) is distinguishable on the facts.

Cur. adv. vult.

(1) (1932) 48 C.L.R. 128.

(2) (1935) 54 C.L.R. 107.

(3) (1938) 107 L.J. Ch. 257, at pp.
265, 266, 268, 269.

(4) (1938) 107 L.J. Ch. 257.

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The following written judgments were delivered:—

LATHAM C.J. This is an appeal from a judgment of the Full Court of the Supreme Court of New South Wales upon a special case stated under the *Common Law Procedure Act* 1899 (N.S.W.).

A company, James Syphonic Visible Measures Ltd., was in 1928 indebted to the appellant bank. Payment of the moneys due, or which might thereafter become due, was, subject to a maximum limit, guaranteed by Percy Moore Wood and seven other persons jointly and severally. The debt due by the company has not been paid. Other guarantors have become bankrupt, and the company has gone into liquidation. Dr. Wood, it is admitted, became liable under his guarantee. The *Statute of Limitations*, however, bars proceedings by the bank upon the guarantee. On 1st February 1932 the amount due under the guarantee by Dr. Wood was £2,745 17s. 2d. On that day Dr. Wood mortgaged land under the *Real Property Act* to the bank for the purpose of securing the payment to the plaintiff of the sum mentioned, together with interest. The mortgage contained a personal covenant by the mortgagor that he would pay these moneys. The mortgage recited the liability under the guarantee and also recited that the mortgage was given for the purpose of collaterally securing to the mortgagee the payment of the moneys due under the guarantee. The mortgage contained a provision excluding the provisions of the *Moratorium Act* 1930 of the State of New South Wales as amended by the *Moratorium (Amendment) Act* 1931 and of any Act further amending those Acts, and provided that the Acts should not apply to the security or to any of the powers, rights and remedies of the mortgagee under the mortgage.

The question for the opinion of the court upon the special case was whether the plaintiff was precluded by the provisions of the *Moratorium Act* 1930 as amended, or by the provisions of the *Moratorium Act* 1932 as amended, from suing for and recovering from the defendant, who is the executor of the will of Dr. Wood, the sum mentioned and interest in the action brought upon the covenant for payment of principal and interest contained in the mortgage.

The Supreme Court has held that the personal covenant in the mortgage upon which the action is brought is void by reason of the *Moratorium Act* 1930 as amended, s. 25 (7). The appellant contends that, though that covenant was void, liability upon it was restored by the *Moratorium Act* 1932, which, it is contended, excluded from the operation of s. 25 (7) persons who had guaranteed the payment of debts secured by a mortgage of real property. Remedies

against such persons were restored, it is said, by ss. 35 and 41 of the 1932 Act. The respondent's reply to this contention is that the 1932 Act restores only the liability of guarantors of mortgage debts where such liability had been abolished by the earlier legislation, that is, the liability of such persons as guarantors *simpliciter* and not as mortgagors if they happen also to be mortgagors. This contention was upheld in the Supreme Court. It was also held in the Supreme Court that a guarantor who himself gave a mortgage of land to secure the payment of moneys due under his guarantee did not fall within the description of a person who had guaranteed the payment of money secured by a mortgage of land. It was held that that description applied only to a person who had guaranteed the payment of a debt which was secured by a mortgage given *by another person* and that it did not apply to a person who was both guarantor and mortgagor in respect of the same debt, so far as it was sought to enforce liability against him by reason of the personal covenant in the mortgage. If this view is well founded the provisions in the 1932 Act relating to guarantors have no application to this case, because it is expressly provided in that Act that s. 41, which is one of the provisions restoring remedies upon which the appellant relies, should be applicable only in respect of contracts of guarantee made prior to the commencement of the Act (that is, the 1932 Act) *which were affected* by the provisions of Part IV., *Moratorium Act 1930-1931*, as amended by subsequent Acts. Therefore it was held that the appellant was merely trying to enforce a personal covenant to pay contained in a mortgage and that that covenant is void. In order to reach a decision as to the validity of these opposing contentions, it is necessary to examine carefully a number of statutory provisions which are not very clear in their terms.

The *Moratorium Act 1930* was simply a moratorium Act, that is, it was a statute which delayed the enforcement of remedies. It protected mortgagors against proceedings unless the leave of a court was obtained, but it did not purport to avoid covenants contained in mortgages. The Act also protected persons who had guaranteed the payment of money secured by a mortgage. If the Act had not applied to such guarantors, a mortgagee could have sued a guarantor on his guarantee, and the guarantor would normally have had a remedy over against the mortgagor, so that the protection given to the mortgagor would have become ineffective.

From 1928 to 1st February 1932, Dr. Wood was a guarantor only and not a mortgagor, and none of the legislation in question affected him. The debt due by the company to the bank was not secured by any mortgage given by any person and Dr. Wood was a guarantor

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pure and simple. In 1932 he mortgaged property under the *Real Property Act* for the purpose of securing the satisfaction of his own liability under the guarantee, but when that mortgage was given the parties contracted out of the Act, and contracting out was permissible under s. 13 of the 1930 Act. That section provided that, subject to certain provisions which are not material in this case, the Act should not apply to a mortgage if it contained a condition or covenant expressly excluding the provisions of the Act.

In 1931 an amending Act, No. 43, was passed. Section 4 (i) (i) of that Act provided that, in the case of mortgages executed after the commencement of the 1931 Act, a mortgage containing a contracting out clause must be witnessed and certified in a particular manner if such contracting out was to be effective. The mortgage in the present case was so witnessed and certified.

The *Moratorium and Interest Reduction (Amendment) Act* 1931, No. 66, inserted a provision in s. 25 of the *Moratorium Act* 1930-1931 in the following terms:—“(7) That subject to subsection four hereof, notwithstanding anything in this or in any other Act contained, all covenants, agreements, or stipulations by a mortgagor for the payment or repayment of any mortgage moneys secured by a mortgage of real property shall, 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.” (Sub-section 4 of s. 25 relates to the rights of mortgagees against or in respect of mortgaged property and is not material for the purpose of this case.)

Section 25 (7) was in force when Dr. Wood executed the mortgage to the bank. That section contains the words “notwithstanding anything in this or in any other Act contained.” The consequence, therefore, is that, notwithstanding the exclusion of the *Moratorium Acts* by the terms of the mortgage given by Dr. Wood in 1932, the covenant by him for the payment of the mortgage moneys secured by the mortgage was void. Section 25 (7), though now repealed (1932 Act, s. 3), operated upon the covenant in the mortgage, and prima facie, therefore, would exclude liability of the respondent in this case. It is contended for the appellant, however, that subsequent legislation has reinstated liability on the covenant because that legislation has deprived guarantors of protection which they had against personal liability upon a mortgage when the mortgage was a security for a guaranteed debt. Dr. Wood, it is said, is a guarantor of a debt, the debt is secured by a mortgage, namely by his own mortgage, and therefore the subsequent legislation has restored his liability.

The determination of the questions which arise depends upon the concurrent effect of a number of statutory provisions. The *Mortgage Act* 1930, s. 2, contained a definition of mortgagor in the following terms:—" 'Mortgagor' means the person liable under the provisions of a mortgage or entitled to redeem a mortgage, and includes any person who has guaranteed the payment of any money the payment of which is secured by a mortgage or the performance by the mortgagor of any covenant, condition, or agreement expressed or implied in the mortgage, whether such guarantee is expressed in the mortgage or in any other instrument."

Within this definition Dr. Wood was a mortgagor when he gave the mortgage, because he was a person liable under the provisions of the mortgage and was entitled to redeem the mortgage. It is urged that he was also a mortgagor within the special statutory "inclusive" meaning attributed to that word as being also a person who had guaranteed the payment of money, payment of which was secured by a mortgage, namely by his own mortgage. In my opinion he did not fall within this latter part of the definition because (in agreement with the judgment of the Supreme Court) I think that it does not apply to the case of a person who, being under a liability as guarantor, gives a mortgage to secure the payment of money under his own guarantee. A person cannot guarantee the payment of money by himself. He may undertake an additional obligation to pay money which he is already bound to pay, but that added obligation cannot be described as a guarantee. A guarantee is essentially a promise to answer for the debt, default or miscarriage of another, and it does not include as such the case of a person incurring an additional liability in respect of a sum of money for which he is already liable. It may further be observed that the part of the definition of the term "mortgagor" which relates to guarantors includes two classes of persons: 1. persons who have guaranteed the payment of money, the payment of which is secured by a mortgage; 2. persons who have guaranteed the performance by the mortgagor of any covenant, condition or agreement, expressed or implied in the mortgage. It is plain that in the case of a guarantee of the performance by the mortgagor of a covenant &c. expressed or implied in the mortgage the reference is to the case of one person who guarantees the performance by another person, namely, a mortgagor, of a covenant &c. in the mortgage under which that mortgagor is liable. The terms are not apt to cover the case of a person who, having already entered into a covenant, gives another undertaking to perform that which he is already bound by that covenant to perform. Thus, in the second part of the provision

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quoted, the words "the mortgage" must refer to a mortgage given by another person, not by the person who has given a guarantee. The words "the mortgage" in the second part of the provision plainly have the same reference as the words "a mortgage" in the first part of the provision. Thus in both cases the reference is to a mortgage given by a person other than the guarantor. Thus Dr. Wood was not a mortgagor within the statutory extension of the meaning of the term "mortgagor," but he was a mortgagor simply because he was liable under the mortgage and was entitled to redeem the mortgage which he had given to the bank.

The *Moratorium (Amendment) Act* 1936, s. 2 (a) (i), amends the principal Act by inserting the following words in the definition section of that Act :—" ' Person who has guaranteed the payment of money ' includes and shall be deemed always to have included a person who to the knowledge of the creditor at the time of incurring such liability has incurred a primary liability to the creditor to pay money to such creditor as surety for a third person."

I find some difficulty in understanding this provision, because the words "such liability" do not clearly refer to any preceding provision of the section in which this new provision is inserted. The provision is intended to deal with the case of a person who has (already) incurred "a primary liability" to a creditor "as surety" for a third person. "Such liability" is some *other* liability which is not clearly identified. The liability as guarantor is the liability of a surety, and the other liability must presumably be a liability under a mortgage. But it was not necessary to amend the Act to bring about this result, unless, indeed, it was thought that the fact that in a particular case the mortgage liability followed and did not precede the guarantee liability would prevent the definition of mortgagor applying to such person. If this be the object of the definition, then Dr. Wood would be included within the term "person who has guaranteed the payment of money." I do not regard this point however, as of any importance, because, as I have said, Dr. Wood was a mortgagor under the first part of the definition of the word "mortgagor," independently altogether of the second part of that definition relating to guarantors.

The *Moratorium Act* 1930-1931, s. 25 (7), has already been quoted. That provision prevented the enforcement against a mortgagor of personal covenants for the payment of mortgage moneys secured by a mortgage of real property. It applied to Dr. Wood because, as already stated, Dr. Wood was a mortgagor in fact. If, contrary to what I have said, Dr. Wood were held to be a person who must be regarded as a mortgagor because he had guaranteed the payment

of moneys secured by the mortgage (that is, by his own mortgage), on this ground also s. 25 (7) would prevent the enforcement of the covenant in the mortgage to repay the mortgage moneys. If it were held that, by virtue of the mortgage itself and alone, Dr. Wood was a guarantor because the sum which he undertook to pay was money which was owed by the debtor company to the bank, the position would still be the same, because the covenant to pay would be a covenant by a mortgagor to pay a mortgage debt and would be void. In *Smith v. Motor Discounts Ltd.* (1) it was held that s. 25 (7) applies to a covenant given by a person who is a mortgagor in fact, whether or not the covenant is given "in his character as mortgagor." See also the report (2) to the same effect. Thus, from any point of view, Dr. Wood was not liable under the personal covenant in his mortgage.

The *Moratorium Act* 1932 came into operation on 21st December 1932. The mortgage in question was executed on 1st February 1932.

This Act contains in s. 2 a definition of "mortgagor" which differs in two particulars from the definition contained in the 1930 Act. In the first place, persons "liable" under the provisions of a mortgage are not included—doubtless for the reason that the personal liability of mortgagors had been terminated by s. 25 (7) of the 1930-1931 Act. In the second place the phrase "covenant &c. expressed or implied in *the* mortgage" is altered into "covenant &c. expressed or implied in *a* mortgage." This amendment deprives of effect, in relation to the definition in the 1932 Act, the argument which was used above for the purpose of showing that the definition in the 1930 Act did not apply to a person who had given a mortgage to secure the performance of his own guarantee. But, as I have said, Dr. Wood was a person entitled to redeem a mortgage, and so falls within the clear words of the definition of "mortgagor" in the 1932 Act, as well as within the corresponding words in the definition in the 1930 Act.

Part I. of the 1932 Act contains certain definitions, including the definition of "mortgagor" just mentioned, and now, by reason of the provisions of the 1936 Act, contains the provision relating to the meaning of "person who has guaranteed the payment of money" to which reference has already been made. Part II. of the Act contains the moratorium provisions. Part III. of the Act relates to the liability of mortgagors. For the purpose of Part III., a special provision is made in relation to the meaning of the word "mortgagor."

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(1) (1935) 54 C.L.R., at p. 122.

(2) (1935) 54 C.L.R., at p. 124.

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Section 33 provides :—" In this Part, unless the context or subject-matter otherwise indicates or requires— . . . 'Mortgagor' does not include a person who has guaranteed the payment of money notwithstanding that the payment of such money or the performance of such guarantee is secured by a mortgage of land."

Subsequent provisions restored rights of action against guarantors, who, because they fell within the definition of "mortgagor" in the 1930-1931 Act, had been protected by s. 25 (7) of that Act from proceedings against them personally.

Dr. Wood had guaranteed the payment of money and the provision quoted states that it is immaterial for the purposes of the definition whether the payment of such money or the performance of the guarantee was secured by a mortgage of land. If this provision is read as an absolute provision, so that the provision that the word "mortgagor" does not include a "person who has guaranteed the payment of money" means that no person who has guaranteed the payment of money can possibly be a mortgagor for the purposes of Part III. of the Act, whether or not he has in fact also entered into a mortgage, then Dr. Wood is not a mortgagor within the meaning of Part III. But in my opinion this provision should not be read as a substantive provision saying that guarantors cannot possibly be mortgagors. It is an awkward means of omitting, for the purpose of Part III., that part of the definition of mortgagor which included guarantors. The provision deals with the definition which has already been given to "mortgagor" for the purposes of the Act and means that a person does not become a mortgagor for the purposes of Part III. merely because he is a guarantor. If he is, apart altogether from being a guarantor, in fact a mortgagor, then this provision does not prevent the application to him of other provisions of Part III.

It is now necessary to consider the changes which Part III. of the 1932 Act made in the law.

Section 34 (1) is as follows :—"Except as in this Part provided no action, suit or proceeding shall be commenced or continued by a mortgagee for the payment by a mortgagor of any moneys secured by a mortgage of land executed or given before the commencement of this Act, or interest thereon, unless the mortgagor, his attorney or agent, or some other person having power in that behalf has, after the commencement of this Act, by instrument under his hand, confirmed any covenant or agreement in the mortgage expressed or implied for such payment, and unless the knowledge and approval of the mortgagor, his attorney or agent, or other person, as the case may be, of the confirmation of such covenant or agreement, is

evidenced by a certificate signed in accordance with subsection three of this section."

No confirmation or certificate of the covenant to pay the mortgage moneys has been made or given and, accordingly, the exception contained in the latter part of this provision does not apply to enable the plaintiff bank to sue the respondent executor of Dr. Wood. Apart from this exception, the substantive provision is that no action shall be commenced by a mortgagee for the payment by a mortgagor of moneys secured by a mortgage of land executed before the Act, except as provided in Part III. In this proceeding the bank is seeking to recover from the executor of a mortgagor payment of moneys secured by a mortgage executed before the Act, and, accordingly, this section is a bar to the action, unless there is some other provision in the Act which makes it possible to bring the action.

Another provision in the Act is s. 35 (1), which provides as follows:—"Subsection seven of section twenty-five of the *Moratorium Act* shall be construed as if—(a) the word 'mortgagor' in the said subsection did not include—(i) a person who has guaranteed the payment of any money notwithstanding that the payment of such money or the performance of such guarantee is secured by a mortgage as defined by the said Act;".

This provision relating to the word "mortgagor" should, in my opinion, be construed in the manner which I have explained in connection with the similar provision contained in s. 33. It means only that a person who has guaranteed payment of moneys (even if such payment is secured by a mortgage) is not to be regarded as a "mortgagor" (for the purposes of s. 25 (7)) merely by reason of the fact that he is such a guarantor. That is, this provision takes out of the original definition of mortgagor guarantors who became statutorily describable as "mortgagors" only because they had guaranteed payment of mortgage moneys. But it does not affect persons who, independently of the statutory extension of the meaning of the word "mortgagor," were in fact mortgagors simply because they had executed mortgages. Accordingly, there is nothing in this provision which effectively excludes Dr. Wood from the category of mortgagor.

Section 35 (3) of the 1932 Act is as follows:—"Nothing in the said section" (i.e., s. 25 (7) of the 1930-1931 Act) "of the *Moratorium Act* or in this Part of this Act contained shall be construed so as in any way to impair the rights, powers, or remedies of a mortgagee against a person who has guaranteed the payment of money notwithstanding that the payment of such money or the performance of such guarantee is secured by a mortgage of land."

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The effect of this provision is to restore (not to create) personal remedies (if any) against persons who had guaranteed the payment of mortgage moneys and who had been relieved from their personal liability by s. 25 (7) of the earlier Act. As was said in *Smith v. Motor Discounts Ltd.* (1), “s. 35 deals separately with guarantees and restores the liability *upon them* which s. 25 (7) had annihilated” (my italics). The operation of this provision upon Dr. Wood’s liability was to restore the liability under the guarantee if that had been annihilated by the earlier legislation. But it restores the liability under the guarantee only by providing that nothing in s. 25 (7) of the 1931 Act shall impair rights and remedies against the guarantor. It leaves the plaintiff in the present case unaffected, as far as the guarantee is concerned, by s. 25 (7), but subject to any defence which may exist under the *Statute of Limitations* or otherwise. This provision, therefore, is of no service to the plaintiff in this action brought upon the covenant in the mortgage.

Section 41 (1) of the 1932 Act is, as amended in 1936, as follows :—
“Notwithstanding anything in this Act or in the *Moratorium Act*, 1930, or any Act amending the same contained, where any person has before the commencement of this Act guaranteed the payment of any money or the performance or observance of any obligation and such payment, performance, or observance, or such guarantee was or is secured by a mortgage of land, the person entitled to the benefit of the guarantee may give to the guarantor not less than three calendar months’ notice of his intention to exercise all or any of his rights, powers, and remedies against the guarantor or against any property mortgaged by the guarantor to secure the guarantee, and after the expiration of the said period of notice the person entitled to the benefit of the guarantee may, subject to the provisions of this section, exercise such of the said rights, powers, and remedies against the guarantor and against any property mortgaged by the guarantor to secure the performance of the guarantee as he would have been entitled to exercise if this Act, and the said Act as amended, had not been passed . . . (2) Any guarantor who has been given any such notice may within the time limited by the notice apply to the Supreme Court for an order under this section.”

This provision is supplementary to s. 35. Section 35 removes the invalidating effect in respect of guarantees of prior enactments. Section 41 imposes conditions upon the enforcement of liability under guarantees. The appellant bank contends that this section

(1) (1935) 54 C.L.R., at p. 119.

applies to the present case and enables it to recover from the respondent the moneys sued for. The appellant contends that this is a case where Dr. Wood, before the 1932 Act, guaranteed the payment of money, namely, money due by the company to the bank; that guarantee was secured by a mortgage of land, that is, by the mortgage given by Dr. Wood; the person entitled to the benefit of the guarantee, namely, the bank, may therefore give to the guarantor, that is, Dr. Wood (or his personal representative), not less than three calendar months' notice of intention to exercise all his rights against the guarantor, or against any property mortgaged by the guarantor to secure the guarantee, and he may exercise those rights as if the Act had not been passed.

It may be observed that s. 41 is not in itself any source of substantive rights. Sub-section 1, for example, provides only that a notice may be given to a guarantor and that rights (whatever they may be) may be exercised, and sub-s. 2 provides that the guarantor may apply to the Supreme Court for an order under the section—such order being an order staying the enforcement of the creditor's remedies. There is neither in those sub-sections nor in any other part of s. 41 any provision which imposes a liability upon any guarantor. The source of liability in the case of an ordinary guarantee, uncomplicated by any considerations of a mortgage, is the guarantee itself. In cases where there is a mortgage as well as a guarantee, all that the Act has done is, by s. 35 (3), to remove the protection given to guarantors by earlier Acts and by s. 41 to impose conditions upon proceedings to enforce guarantees. But the source of liability under any guarantee is still simply the guarantee itself and not s. 41 or any other provision of the 1932 Act.

In my opinion s. 41 must be construed as relating only to personal rights &c. under a guarantee, and to rights &c. against "property mortgaged by the guarantor to secure the guarantee." The section speaks of two things, namely rights &c. against a guarantor personally under his guarantee and rights &c. against property under a mortgage. Personal remedies against a mortgagor under a mortgage are not mentioned and the section has no application to them. Accordingly, in my opinion, the provisions relied upon by the plaintiff do not get rid of the fact that what is sought to be enforced in the action is the personal liability of a mortgagor under a mortgage. His personal liability, not being created by a covenant confirmed and certified as required by the statute, is not enforceable by reason of s. 25 (7) of the 1930-1931 Act, which still applies in favour of mortgagors in respect of their personal covenants to pay mortgage moneys.

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This conclusion is not affected by sub-s. 12 of s. 41, which is in the following terms :—" This section shall apply only in respect of contracts of guarantee made prior to the commencement of this Act which were affected by the provisions of Part IV of the *Moratorium Act*, 1930-1931, as amended by subsequent Acts."

In my opinion, as already stated, the section relates to contracts of guarantee which are not personal covenants contained in mortgages, but does not apply to such covenants ; the liability sought to be enforced in this case is a mortgage liability ; therefore s. 41 has no relevance to the case. Upon the view of the Supreme Court that the earlier legislation, so far as guarantors were concerned, affected their liability only when they guaranteed the payment of moneys secured by a mortgage given by another person, it would follow that the guarantee in question in this case was not affected by the provisions of the earlier Acts, and therefore (by reason of sub-s. 12) s. 41 of the 1932 Act would have no application. If, however, this view is not accepted, then the guarantee would be a guarantee which had been affected by the provisions of the earlier legislation and s. 41 would apply. But it would apply only, as above stated, to restore the personal remedies under the guarantee, and not any personal remedies under the mortgage.

Accordingly, in my opinion, the executor of Dr. Wood, if sued upon the guarantee, would not be able to rely upon any of the provisions of the *Moratorium Acts*, but sued, as he is, upon the personal covenant contained in the mortgage, those Acts provide him with a defence.

In my opinion the appeal should be dismissed.

RICH J. In this matter after action brought a special case was stated without pleadings under s. 55 of the *Common Law Procedure Act* 1899 (N.S.W.) for the opinion of the Supreme Court. The question submitted was " whether the plaintiff is precluded by the provisions of the *Moratorium Act* 1930, as amended, or by the provisions of the *Moratorium Act* 1932, as amended, from suing for and recovering from the defendant as executor of the will of Percy Moore Wood in this action brought upon the covenants for payments of principal and interest contained in the memorandum of mortgage in the case mentioned the principal sum of two thousand seven hundred and forty-five pounds seventeen shillings and twopence (£2,745 17s. 2d.) secured by the said memorandum of mortgage and interest thereon in accordance with the provisions of the said memorandum of mortgage." The facts giving rise to this question are fully set out in the special case, but may be shortly summarized.

On 21st June 1928, Dr. Wood since deceased—whose executor the defendant company is—with seven other persons jointly and severally guaranteed the repayment on demand of the balance due by the debtor, James Syphonic Visible Measures Ltd., on its current or any account or in any manner whatever together with interest charges and expenses. The amount payable by the guarantors was limited to the sum of £2,500, a sum equal to one year's interest thereon, and the costs and expenses incurred in obtaining payment and interest at eight per cent on the said sums respectively from the date of demand for payment until payment. The guarantee also provided for the retention by the plaintiff bank during the continuance of the liability under the guarantee of any deeds or documents lodged by the guarantors with the bank for safe custody or otherwise. After the date of the guarantee the bank made advances to the company to the amount of £2,514 3s. 7d., and between 4th December 1929 and 3rd February 1930 the bank made unsuccessful demands for the repayment of this sum upon the company and the several guarantors and in consequence obtained sequestration orders against each of the guarantors except Dr. Wood. The plaintiff proved in all the bankrupt estates except two without recovering anything. The debtor company was wound up on 17th October 1932, but the plaintiff recovered no part of the sum of £2,514 3s. 7d. out of its assets.

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For the determination of the question submitted it is necessary to construe certain *Moratorium Acts* of New South Wales and apply them to the facts stated.

The *Moratorium Act* 1930, by s. 2, provided that unless the context or subject matter otherwise indicated or required "mortgagor" meant the person liable under the provisions of a mortgage or entitled to redeem a mortgage, and included any person who had guaranteed the payment of any money the payment of which was secured by a mortgage or the performance by the mortgagor of any covenant, condition or agreement expressed or implied in the mortgage, whether such guarantee was expressed in the mortgage or in any other instrument. The legislature by the 1930 Act was giving relief to mortgagors as between them and the mortgagees at the expense of the latter—see, e.g., s. 4 of the Act—and it doubtless realized that if relief was not given to a guarantor of a mortgage debt against the principal creditor, the principal creditor might sue the guarantor, and the guarantor would be able to sue the mortgagor upon his contract of indemnity. It was presumably to prevent this happening that the legislature extended the definition of mortgagor to a guarantor who had guaranteed the payment of money the payment

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of which was secured by a mortgage, or the performance of covenants, conditions or agreements expressed or implied in the mortgage. However that may be, the definition of mortgagor only included guarantors of a mortgage debt or obligation, and no other guarantor whatsoever. The *Moratorium and Interest Reduction (Amendment) Act* 1931, No. 66, by s. 4 added sub-s. 7 to s. 25 of the Act of 1930-1931 in the following terms:—"That subject to subsection four hereof, notwithstanding anything in this or in any other Act contained, all covenants, agreements, or stipulations by a mortgagor for the payment or repayment of any mortgage moneys secured by a mortgage of real property shall, 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." Immediately prior to the execution of the mortgage next mentioned the sum of £2,745, owing by Dr. Wood to the bank, was and had long been presently payable and carried interest at eight per cent. Dr. Wood had not paid any of this amount to the bank, but on 1st February 1932 executed a mortgage to the bank containing the covenant the basis of the present action. The interest payable under the mortgage was fixed at six per cent, and the principal was not repayable until September 1934.

The mortgage, however, provided that it should have no effect upon the guarantee, whether by merger or otherwise. The question of merger which was argued before the Supreme Court was disclaimed before us. But when Dr. Wood executed the mortgage his covenant to pay the mortgage moneys became instantly void under s. 25 (7) abovementioned. Because Dr. Wood under the guarantee was not a guarantor of a mortgage debt he was not as guarantor a mortgagor within the definition s. 2 already in statement, and therefore did not as guarantor obtain any relief under s. 25 (7).

But it has been suggested that the mortgage itself might be a guarantee. In my opinion, however, it cannot operate as a guarantee of Dr. Wood's own debt to the bank under the guarantee, and even if in some aspects it might be regarded as a guarantee of the company's indebtedness it would not as a guarantee of the company's indebtedness be a guarantee of a mortgage debt. I consider, therefore, that s. 25 (7) never had any operation at all upon Dr. Wood as guarantor either under the instrument of 21st June 1928 or under the mortgage.

The Act of 1932, s. 2, contains a similar definition of mortgagor to that contained in the Act of 1930. The Acts prior to 1932 had given relief to mortgagors and to guarantors of mortgage obligations. It is not suggested on behalf of the appellant that the Act of 1932 operated

to revive any rights or remedies against a mortgagor unless the mortgagor was also a guarantor. The Acts of 1930 and 1931, which I shall call the earlier Acts, had given relief to mortgagors and guarantors of mortgage obligations only, and s. 35 of the Act of 1932 only operated to abolish that relief in relation to guarantors who had obtained relief under the earlier Acts. Thus s. 35 provides that sub-s. 7 of s. 25 shall be construed as if the word "mortgagor" in that sub-section did not include a person who has guaranteed the payment of any money notwithstanding that the payment of such money or the performance of such guarantee is secured by a mortgage as defined. And s. 35 (3) provides that nothing in s. 25 of the earlier Acts shall be construed so as in any way to impair the rights, powers, or remedies of a mortgagee against a person who has guaranteed the payment of money, notwithstanding that the payment of such money or the performance of such guarantee is secured by a mortgage of land. These provisions show that s. 35 reversed the operation of the earlier Acts upon those guarantors only who had been relieved by them. But Dr. Wood was not such a guarantor, and was therefore outside the scope of s. 35. It was alternatively argued that sub-s. 1 of s. 41 of the Act of 1932 also revived the liability of Dr. Wood under the mortgage. I consider, however, that this provision should be read in conjunction with sub-s. 12 of the same section. Sub-section 1 provides for persons entitled to the benefit of a guarantee giving a certain notice, but this notice can only be given in the cases specified in sub-s. 12 of s. 41, and that sub-section provides that s. 41 shall apply only in respect of contracts of guarantee made prior to the commencement of the Act of 1932 which were affected by the provisions of Part IV. of the earlier Acts, which contained s. 25 (7) already mentioned.

For these reasons the contract of guarantee was not, in my opinion, affected by s. 25 (7).

However, even if Dr. Wood was a guarantor to whom the earlier Acts applied, the question arises whether assuming the provisions of s. 35 or s. 41 did apply their application would or would not be limited to reviving Dr. Wood's liability under the instrument of guarantee. A careful examination of the language of s. 35 and s. 41 shows that the legislature had in mind the distinction between a guarantor and a mortgagor, and the rights and remedies to which the principal creditor was entitled under the guarantee and to which he might be entitled as the mortgagee, and each of these sections, if it revived any rights and remedies against Dr. Wood, would only revive rights and remedies against him as guarantor. For instance, s. 41 provides for the exercise of rights, powers and remedies against

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the guarantor and against any property mortgaged by the guarantor to secure the performance of the guarantee.

Three cases which were relied upon by the appellant are clearly distinguishable. One was *Smith v. Motor Discounts Ltd.* (1), where Smith had executed a mortgage as mortgagor on 7th July 1931 and also an indenture on 10th July 1931 to pay the amount secured by the mortgage. It was there held that the covenant in the indenture was a covenant by a mortgagor. Another case was *Stock Motor Ploughs Ltd. v. Forsyth* (2) where instalments were payable under a hire-purchase agreement and were also the subject of promissory notes. And it was held that an action upon the promissory notes was an action to recover instalments under the hire-purchase agreement. Neither of these cases touches the question whether, assuming that there had been a revival of rights, powers and remedies against Dr. Wood as a guarantor there would also be a revival of rights, powers and remedies against him under the mortgage. And the other case was *In re Conley* (3). In that case there was a debt to a bank and the only transactions between the persons who were held to be sureties and the bank were the lodging of war loan and shares, the lodging of which created suretyship for the first time. In the present case, however, the instrument of guarantee created suretyship and the mortgage merely gave the bank, at a later date, security for Dr. Wood's own debt to the bank, with the modifications as to rate of interest and date of repayment.

For these reasons I agree with the conclusions arrived at by the learned judges of the Supreme Court and am of opinion that the appeal should be dismissed.

STARKE J. Appeal from a judgment of the Supreme Court of New South Wales upon a special case stated by the parties. The question for the opinion of the court was whether the appellant was precluded by the provisions of the *Moratorium Act* 1930 as amended or by the provisions of the *Moratorium Act* 1932 as amended from suing for and recovering from the defendant as executor of the will of Percy Moore Wood upon covenants contained in a memorandum of mortgage dated 1st February 1932 for the payment of the principal sum of £2,745 17s. 2d. and interest thereon secured by the mortgage.

In June 1928, Dr. Wood and several other persons jointly and severally guaranteed to the bank repayment of certain credit advances and accommodation to be given to James Syphonic Visible

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

(2) (1932) 48 C.L.R. 128.

(3) (1938) 107 L.J. Ch. 257.

Measures Ltd., the principal debtor. Default was made by the principal debtor, and ultimately an order to wind it up was made and sequestration orders were also made against each of the guarantors other than Dr. Wood, who was called upon by the bank to meet his engagement under the guarantee. He did not meet that engagement, but instead gave the mortgage already mentioned upon which the bank sues.

The mortgage was given in consideration of the sum of £2,745 17s. 2d. owing by the mortgagor to the bank under and by virtue of the guarantee already mentioned given by the mortgagor and others to secure the repayment of advances and accommodation to be afforded by the bank to James Syphonic Visible Measures Ltd. and in further consideration of the forbearance by the mortgagee to enforce immediate payment of the said sum of £2,745 17s. 2d. And for the purpose of collaterally securing to the bank payment of the said principal sum and interest thereon the mortgagor did mortgage to the bank certain lands and also for the consideration aforesaid the mortgagor covenanted with the bank to pay to it the principal sum of £2,745 17s. 2d. together with interest thereon at the rate of six per cent per annum. The mortgage also contained a stipulation that nothing contained in it should merge, extinguish, postpone, lessen or otherwise prejudicially affect the security of the bank under or by virtue of the guarantee or any other security then or thereafter held by the bank or any right or remedy which the bank had or thereafter might have against the mortgagor or any other person. There were also other covenants and provisions in the mortgage, but they are not material to this case.

The *Moratorium and Interest Reduction Act* 1931 (No. 66 of 1931, s. 4) avoided all covenants, agreements or stipulations by a mortgagor for the payment or repayment of any moneys secured by a mortgage of real property, and s. 2 of the Act of 1930 (No. 48 of 1930) provided that "mortgagor" means the person liable under the provisions of a mortgage or entitled to redeem a mortgage and includes, *inter alia*, any person who has guaranteed the payment of any money the payment of which is secured by a mortgage or the performance by the mortgagor of any covenant, condition or agreement expressed or implied in the mortgage or in any other instrument. Consequently the personal covenant given by Dr. Wood for the payment of the principal sum mentioned in the mortgage and interest thereon was avoided.

But the *Moratorium Act* 1932 (No. 57 of 1932, ss. 35 and 41), which repealed s. 4 already mentioned of the Act No. 66 of 1931 (inserted as s. 25 (7) in the *Moratorium Act* 1930-1931 (No. 48 of

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1930—No. 66 of 1931)), provided that the word “mortgagor” in that section did not include a person who had guaranteed the payment of any money notwithstanding that the payment of such money or the performance of such guarantee was secured by a mortgage as defined by the *Moratorium Act*: See *Permanent Trustee Co. of N.S.W. Ltd. v. Hinks* (1). The words are, I think, clear and explicit, and the policy or assumed policy of the Act is irrelevant in such a case. Dr. Wood certainly gave a mortgage which contained covenants to pay the money therein mentioned. But a mortgagor may be a guarantor and his mortgage may operate as and be a guarantee. And if the mortgage given by Dr. Wood guaranteed the payment of money the Act expressly provides that the word “mortgagor” shall not include him notwithstanding the mortgage.

Further, s. 41 of the Act No. 57 of 1932 also provided that, notwithstanding anything contained in the Act or the *Moratorium Act* 1930, or any Act amending the same, where any person whether before or after the Act guaranteed the payment of any money or the performance or observance of any obligation and such payment, performance or observance or such guarantee was secured by a mortgage of land the person entitled to the benefit of the guarantee might give notice of his intention to exercise his rights, powers and remedies against the guarantor or against any property mortgaged by the guarantor to secure the guarantee then the person entitled to the benefit of the guarantee might exercise such of the rights, powers and remedies against the guarantor and any property mortgaged by the guarantor to secure the performance of the guarantee as he would have been entitled to exercise if the Acts had not been passed. But it was provided that s. 41 should apply only in respect of contracts of guarantee made prior to the commencement of the Act No. 57 of 1932 which were affected by the provisions of Part IV. of the *Moratorium Act* 1930-1931 as amended by subsequent Acts: See No. 48 of 1930; No. 43 of 1931; No. 66 of 1931.

Guarantees for the payment of money the payment of which was not secured by a mortgage stand outside the foregoing provisions and were not avoided by them. Consequently the guarantee of 21st June 1928 was unaffected by any of these provisions and might have been sued upon by the bank but for difficulties, so it was said at the Bar, arising out of the *Statute of Limitations*. And the bank has not sued on this guarantee, but, having given a notice pursuant to the provisions of s. 41 of the Act of 1932 (No. 57 of 1932), upon the covenants in the mortgage of 1st February 1932 given by Dr.

(1) (1934) 34 S.R. (N.S.W.), at p. 136; 51 W.N., at p. 38.

Wood to it. It was said, however, that Dr. Wood was properly described by reason of the guarantee of 21st June 1928 as a person who had guaranteed the payment of money notwithstanding (No. 57 of 1932, s. 35) that the payment of such money was secured by the mortgage of 1st February 1932 and also because (No. 57 of 1932, s. 41) he had guaranteed (by the guarantee of 21st June 1928) the payment of money the payment whereof was secured by the mortgage of 1st February 1932 which was affected by the provisions of Part IV. of the *Moratorium Act* 1930-1931 as amended by subsequent Acts.

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But this argument cannot, I think, be supported. The covenant or obligation sued upon must operate as and be a guarantee, for only if the person sued is a guarantor (whether a mortgagor or a person who has guaranteed the payment of money secured by mortgage) (Act No. 57 of 1932, ss. 35 and 41) is his liability restored. The guarantee of 21st June 1928 affords aid no doubt to the proper understanding of the relationship created by the mortgage of 1st February 1932, but it does not determine the nature of the obligation created by the mortgage nor the description of the parties thereto. The question, as I see it, is whether the obligation created by the mortgage can be described as a guarantee and Dr. Wood as a person who guaranteed the payment of money covenanted to be paid and secured by the mortgage. If so, then the personal covenants in the mortgage are restored by force of the Act No. 57 of 1932, ss. 35 and 41. I say by force of s. 41 as well as s. 35 because if the mortgage be a guarantee then it was affected by the provisions of Part IV. of the *Moratorium Act* 1930-1931 as amended by subsequent Acts. The personal covenants in it were, as we have seen, avoided by those Acts.

A guarantee may be described as an engagement to answer the debt of another, but is not limited to cases in which a personal liability is assumed (*De Colyar, Law of Guarantees*, 3rd ed. (1897), p. 1; *In re Conley* (1)). "This does not mean that" the "liability is necessarily only conditionally enforceable but merely that it is collateral. . . . And what is contemplated is that the principal shall pay. But this may be so, although the undertaking of the surety is as absolute as that of the principal" (*Rowlatt on Principal and Surety*, 3rd ed. (1936), pp. 2, 3; *Permanent Trustee Co. of N.S.W. Ltd. v. Hinks* (2)). "In strictness," says *Rowlatt* (p. 4), "perhaps, no-one under a liability *ex facie* absolute should be described as a surety, unless that liability was from the first, to the knowledge of the creditor at that time, only undertaken for the purpose of affording security for the payment of the principal debt."

(1) (1938) 107 L.J. Ch. 257.

(2) (1934) 34 S.R. (N.S.W.) 130; 51 W.N. 37.

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The question is one of substance and not of form. But in considering the question "it is of course important not to be misled by the fact that certain relationships involve the application of equitable principles similar to those which apply in the case of sureties" (*In re Conley* (1)). Still, when two or more persons bound as full debtors arrange, either at the time when the debt was contracted, or subsequently, that, *inter se*, one of them shall only be liable as surety, the creditor after he has notice of the arrangement is bound thereby and the surety acquires rights as such (*Rouse v. Bradford Banking Co. Ltd.* (2)).

Some illustrations may aid the application of the Acts and of these propositions to the case now before the Court.

1. *I guarantee the payment of the debt of A.*

Such a promise is a mere guarantee and would not be affected by the *Moratorium Act* avoiding personal covenants for the payment of money secured by mortgage.

2. *I guarantee the payment of the debt of A and hereby mortgage my property to secure such payment.*

An instrument in this form constitutes a mortgage and all stipulations by a mortgagor for the payment of any mortgage moneys would, if this be so, be avoided by the Act No. 66 of 1931, s. 4. Then comes s. 35 of the *Moratorium Act* 1932 (No. 57 of 1932), which restores the guarantee stipulation, for it provides that a person who has guaranteed the payment of money is not included within the word "mortgagor" notwithstanding that the payment of such money is secured by a mortgage as defined by the *Moratorium Act*. And if the guarantee stipulation be not a covenant or stipulation by a mortgagor for the payment of any moneys secured by a mortgage of real property within the meaning of the Act No. 66 of 1931, s. 4, then it would also stand outside the Act and not be avoided or affected by it.

3. *I promise to pay the debt of A absolutely but collaterally with him and hereby mortgage my property to secure such payment.*

This I apprehend is in law a guarantee, and the same result would follow as in case 2.

4. *Having failed to meet my engagement under my guarantee as in case 1 and being granted further time to meet my engagement I promise absolutely to pay the debt of A on a given day but collaterally with A and hereby mortgage my property to secure such payment.*

Again I apprehend such a promise would be a guarantee and the same result would follow as in case 2.

5. *So I come to the present transaction.*

(1) (1938) 107 L.J. Ch., at pp. 265, 270.

(2) (1894) A.C. 586.

It originated as one of guarantee ; in other words, Dr. Wood by the document of 21st June 1928 guaranteed the payment of advances made by the bank to the principal debtor. But the principal debtor did not meet its engagement, nor did Dr. Wood, its surety. By the mortgage of 1st February 1932 Dr. Wood obtained time, but engaged to meet the sum of £2,745 17s. 2d. which was payable by him to the bank under and by virtue of the guarantee and also interest thereon and he gave a mortgage over his land to secure the performance of that engagement. But the moneys which Dr. Wood engaged to pay were in substance and in truth the sum for which he had become collaterally liable with the principal debtor under his guarantee. The right of Dr. Wood to recover over against the principal debtor was in no way affected by the mortgage, nor was his right to contribution against the co-sureties, nor his right to take over from the bank, upon discharging the engagement which he undertook under the mortgage, securities, if any, given to it by the principal debtor. In essentials Dr. Wood was under the same liability as and entitled to the same rights as a surety. And the relationship existing between Dr. Wood and the bank was that of guarantor (surety) and guarantee (creditor) because the bank had notice and was at all times aware of the relevant facts.

But to clinch the matter there was passed in 1936 another statutory provision, the *Moratorium (Amendment) Act* 1936 (No. 58 of 1936, s. 2) as follows :—“ ‘ Person who has guaranteed the payment of money ’ includes and shall be deemed always to have included a person who to the knowledge of the creditor at the time of incurring such liability has incurred a primary liability to the creditor to pay money to such creditor as surety for a third person.”

To me the section seems plain enough : it contemplates the case of a person incurring a primary liability to a creditor as did Dr. Wood to the bank by means of the mortgage and, as I think, to the knowledge of the bank as surety for a third person, namely, James Syphonic Visible Measures Ltd. The giving of a mortgage of land to secure a guarantee is both recognized and provided for in ss. 35 and 41 of the Act of 1932 (No. 57 of 1932). *Smith v. Motor Discounts Ltd.* (1) does not conflict with this result. The plea alleged that the covenant sued upon was not a guarantee : See the report (2).

Consequently the argument that the mortgage creates a liability separate and different in character and substance from that of a guarantee fails and this appeal should be allowed. The bank

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

(2) (1935) 54 C.L.R., at pp. 121, 122, 124.

H. C. OF A. should have judgment for the sum of £4,096 5s. 1d. together with
1943. interest on £2,762 18s. at the rate of four and a half per cent from
BANK OF the date of writ to judgment and for costs as agreed in the special
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PERMANENT McTIERNAN J. I agree with the reasons and conclusions of his
TRUSTEE Honour the Chief Justice.
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Appeal dismissed with costs.

Solicitors for the appellant, *Ice-ton, Faithfull & Baldock.*

Solicitor for the respondent, *R. A. Bryant.*

J. B.