[HIGH COURT OF AUSTRALIA.]

SUMNER AND OTHERS . . . . . APPELLANTS;
APPLICANTS,

AND

CAMPBELL AND ANOTHER . . . . RESPONDENTS
RESPONDENTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1935.

SYDNEY, *April* 2, 3, 17.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Moratorium—Company—Winding up—Order made prior to commencement of Act—Secured creditor—Proof of debt—Restoration of rights—Moratorium Act 1932 (*N.S.W.*) (*No.* 57 *of* 1932), *sec.* 34 (7) (*c*).

The *Moratorium Act* 1932 (N.S.W.), by sec. 34 (7), provides: "Nothing in this section or in section twenty-five of the *Moratorium Act*" 1930-1931 (N.S.W.) "contained shall be construed so as to affect any right, power, or remedy of the mortgagee for the recovery of any moneys secured by a mortgage of land and interest thereon in the event of . . . (*c*) an order being made or resolution passed for the winding up of the mortgagor being a company."

Held that the effect of sec. 34 (7) (*c*) is, in the event of the winding up of a company, to restore to a mortgagee thereof rights taken from him by the *Moratorium Act* 1930-1931, irrespective of whether the winding up began before or after the commencement of the *Moratorium Act* 1932.

Decision of the Supreme Court of New South Wales (Full Court): *In re Property Insurance Co. Ltd.; Ex parte Motor Credits Ltd.*, (1934) 35 S.R. (N.S.W.) 1; 51 W.N. (N.S.W.) 199, reversed.

APPEAL from the Supreme Court of New South Wales.

The Property Insurance Co. Ltd., a company incorporated in New South Wales, went into voluntary liquidation on 10th January 1930, and appointed Alexander Ewan Campbell liquidator. Real property

of the company, situate at Pitt Street, Sydney, was subject to first and second mortgages. The second mortgage secured a debt due to Motor Credits Ltd. The security was not sufficient to pay the principal and other moneys due under the first mortgage. On 20th February 1930 Motor Credits Ltd. submitted to the liquidator a claim for £5,217 7s. 9d., and was later informed by the liquidator that the claim would be dealt with in the winding up. Nothing material transpired until 6th June 1934. On that date Motor Credits Ltd. lodged a proof of debt with the liquidator, in which it valued its security at nil and claimed to prove as an unsecured creditor in the sum of £5,217 7s. 9d. The liquidator rejected the proof of debt on the ground that the amount of the claim was secured by a mortgage of real property and Motor Credits Ltd. was debarred from proving the claim by virtue of sec. 25 (7) of the *Moratorium Act* 1930-1931 (N.S.W.). Upon a summons taken out in the Supreme Court of New South Wales by Charles Henri Sumner and William Halberg, the liquidators of Motor Credits Ltd., and that company, *Street* J. admitted the claim, following his decision in *In re Middlebrook & Stone Ltd.* (1). An appeal by the liquidator of Property Insurance Co. Ltd., and that company, was allowed by the Full Court of the Supreme Court: *In re Property Insurance Co. Ltd.*; *Ex parte Motor Credits Ltd.* (2).

From that decision the applicants now appealed to the High Court.

Sir *Thomas Bavin* K.C. (with him *Henry*), for the appellants. The decision of *Street* J. in *In re Middlebrook & Stone Ltd.* (1), and in this case, was correct and should be upheld. The principle of interpretation that should be applied in construing sec. 34 (7) of the *Moratorium Act* 1932 is that laid down by *Isaacs* J. in *Adams* v. *Commissioners of Taxation* (3). It is not sufficient to have regard only to the words " in the event of . . . an order being made " in sec. 34 (7) (*c*), and to say that they have a prospective and not a retrospective significance ; cognizance must be taken of the general scope and purpose of the Act as a whole. The intention of the Legislature as expressed in sub-sec. 7 of sec. 34 was that where there

(1) (1934) 51 W.N. (N.S.W.) 103.
(2) (1934) 35 S.R. (N.S.W.) 1 ; 51 W.N. (N.S.W.) 199.
(3) (1910) 10 C.L.R. 180, at p. 199.

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was a winding up the statutory restrictions placed upon mortgagees were not to have any application; in that set of circumstances there no longer remained any reason for giving the mortgagor company the benefit of the moratorium legislation, or for restricting the rights of the mortgagee. It is arbitrary and unjust to draw a distinction between a future winding up and one that has already commenced. Accrued rights are preserved by sec. 3 of the Act. By sec. 34 (7) the Legislature sought to overcome the effect of the decision in *In re Paul & Gray Ltd.* (1). In sec. 34 (7) the Legislature dealt with a certain state of facts, and was not concerned with time. The difference between the language used in sec. 25 (7) of the 1930-1931 Act and the language used in sec. 34 (7) of the 1932 Act is notable. If sec. 34 (7) does not have a retrospective operation, then the reference therein to sec. 25 of the 1930-1931 Act is meaningless, because, in view of the repeal of that Act by sec. 3 of the 1932 Act, sec. 25 does not affect the rights of creditors in a winding up which began after the commencement of the 1932 Act. The repeal of the 1930-1931 Act had the effect of restoring, for some purposes, the personal covenant. The provisions of sec. 8 of the *Interpretation Act* 1897 (N.S.W.) do not operate to prevent this result. Sub-sec. 7 should be construed in such a way as not to affect any right, power or remedy of a mortgagee in the event of the existence of a winding up order (*Attorney-General* v. *Theobald* (2)). The words " shall be construed " in sec. 34 (7) show that its provisions are declaratory, and apply to all windings up whether commenced before or after the 1932 Act. Upon any other construction a secured creditor would be in a worse position than an unsecured creditor. *Ward* v. *British Oak Insurance Co.* (3) is distinguishable. In that case the Court held that the statutory provisions there under consideration were not retrospective so as to affect rights already vested. The proper principle of construction to apply is stated in *Craies* on *Statute Law*, 3rd ed. (1923), p. 94.

Flannery K.C. (with him *Street* and *Robert Smith*), for the respondents. Words similar to those used in sec. 34 (7) were considered

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

(2) (1890) 24 Q.B.D. 557, at p. 561.

(3) (1932) 1 K.B. 392.

by the Court in *Ward* v. *British Oak Insurance Co.* (1) and were there held to indicate a prospective operation. The language of sec. 34 (7) shows that its operation was restricted to events of the specified nature occurring after the commencement of the 1932 Act. The words "in the event of" obviously refer to something which may happen in the future. This view is supported by the reference in the sub-section to an order "being" made, and also by the provisions of sec. 9 (2) (*e*), (*f*) and (*g*) of the Act. The canon of construction which should be applied is as stated in *In re Athlumney*; *Ex parte Wilson* (2). The words in sec. 34 (7), "nothing in this section," refer to the provision that before the personal covenant is good it must be confirmed and the confirmation evidenced by a certificate. Sec. 34 (7) was not intended to apply to a winding up which commenced before the Act came into operation (*In re Joseph Suche & Co.* (3)). The words used should be given their literal meaning.

[RICH J. referred to *Re Anglo-French Co-operative Society Ltd.*; *Ex parte Pelly* [*No.* 2] (4).]

The questions of the preservation in a repealing statute of rights accrued under the repealed statute, and what constitutes an accrued right, were dealt with in *Abbott* v. *Minister for Lands* (5).

Cur. adv. vult.

April 17.

The following written judgments were delivered:—

RICH J. The *Moratorium Act* 1932 (N.S.W.), sec. 34 (7), reads as follows:—"Nothing in this section or in section twenty-five of the *Moratorium Act* contained shall be construed so as to affect any right, power, or remedy of the mortgagee for the recovery of any moneys secured by a mortgage of land and interest thereon in the event of—(*a*) a sequestration order being made against the mortgagor; or (*b*) the mortgagor executing a deed of assignment or of arrangement under the provisions of any bankruptcy law for the time being in force; or (*c*) an order being made or resolution passed for the winding up of the mortgagor being a company; or (*d*) the

(1) (1932) 1 K.B., at pp. 399, 400.
(2) (1898) 2 Q.B. 547, at pp. 551, 552.
(3) (1875) 1 Ch. D. 48, at p. 51.
(4) (1884) 50 L.T. 754, at p. 755.
(5) (1895) A.C. 425, at p. 431.

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estate of a deceased mortgagor being insolvent and being administered by or under the direction of any Court." The interpretation of this section is not free from difficulty, but I think that reason strongly supports the view that the Legislature could not have intended to distinguish between liquidations already in progress before the passing of the Act and those afterwards commenced. And this general view is not inconsistent with the language of the section, which is fairly susceptible of the construction placed upon it by the judgment of *Evatt* J., which I have had an opportunity of reading. In *Re Anglo-French Co-operative Society Ltd.*; *Ex parte Pelly* [*No.* 2] (1), a retrospective operation was given to the words "being wound up," which were held to mean being wound up at or after the commencement of the Act in question.

The appeal should be allowed and the order of *Street* J. restored.

STARKE J. Motor Credits Ltd. claimed to prove as an unsecured creditor in the winding up of Property Insurance Co. Ltd. for a sum of £5,217 7s. 9d., payable to it under a covenant in a second mortgage of property in Pitt Street, Sydney, from the Insurance Co. to it. The Insurance Co. was in the course of voluntary winding up pursuant to a resolution passed on 10th January 1930. The *Moratorium Act* 1930-1931 of New South Wales, sec. 25, had provided that all covenants, agreements or stipulations by a mortgagor for payment or repayment of any mortgage moneys secured by a mortgage of real property should, except for the purpose of enabling a mortgagee to exercise all or any of his rights against the mortgaged property, be void and of no effect for any purpose whatsoever. (See *In re Paul & Gray Ltd.* (2); *City Mutual Life Assurance Society Ltd.* v. *Smith* (3).) But the *Moratorium Act* 1932, sec. 34 (7), provided: "Nothing in this section or in section twenty-five of the *Moratorium Act* contained shall be construed so as to affect any right, power, or remedy of the mortgagee for the recovery of any moneys secured by a mortgage of land and interest thereon in the event of . . . (*c*) an order being made or resolution passed for the winding up of the mortgagor being a company." The Supreme Court of New

(1) (1884) 50 L.T. 754.
(2) (1932) 32 S.R. (N.S.W.) 184, 386; 49 W.N. (N.S.W.) 49, 164.
(3) (1932) 48 C.L.R. 532.

South Wales rejected the claim on the ground that the amending sec. 34 (7) (*c*), upon its proper construction, was not retrospective in operation, and had no application to orders made or resolutions passed before the commencement of the Act. And the provisions of sec. 9, sub-sec. 2 (*e*), (*f*) and (*g*) were referred to in support of this view. But it is plain that the construction of sec. 34 (7) adopted by the Supreme Court is not universally true; thus it cannot be applied to par. (*d*)—"the estate of a deceased mortgagor being insolvent and being administered by or under the direction of any Court." Prima facie, it would seem that the words used in sec. 34 (7) (*c*) refer to future and not past events. But the purpose of the section is clear; it was to restore in certain cases rights which had been taken away by the *Moratorium Act* 1930-1931. It did not annul rights vested in creditors in any true sense, though they benefited by the provisions of sec. 25. The Courts lean against interpreting an Act so as to deprive a party of an accrued right, but such a presumption has no application to such an Act as the present, which is designed to restore and not to destroy rights. The substance of sec. 34 (7) (*c*) is that nothing in the Act of 1930-1931 shall affect the rights or remedies of a mortgagee for the recovery of any moneys secured by a mortgage of land in case of winding up. The words "order being made or resolution passed" are not so intractable that, having regard to the character and other provisions of the Act of 1932, they must be referred to some future event rather than the existence in fact of an order or resolution.

The appeal should be allowed and the claim admitted to proof.

Dixon J. I have had an opportunity of reading the judgment prepared by *Evatt* J., and I agree, for the reasons which he gives, that the better construction of the language of sec. 34 (7) of the *Moratorium Act* 1932 (N.S.W.) is that which makes the words "in the event of" describe the nature of the right, power or remedy of the mortgagee re-established by the provision instead of treating them as modifying the verb "shall be construed" and stating when temporally his general rights, powers, and remedies shall be considered to exist. This construction removes the apparent incongruity between pars. (*a*), (*b*) and (*c*) of the sub-section, on the one hand, and par. (*d*),

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on the other hand. Par. (*d*) upon its terms necessarily includes estates of deceased mortgagors which, at the commencement of the Act, are insolvent or in the course of administration by the Court, whereas, if " in the event of " be given a temporal meaning or effect, pars. (*a*), (*b*) and (*c*) prima facie would, as the Supreme Court held, refer only to orders, deeds and resolutions made, executed and passed in the future. The construction harmonizes the provision with the language of sec. 9 (2) (*e*) and (*g*), in which the use of the adverbial " where " makes the express allusion to past and future natural. It has the great advantage of giving a meaning to the provision which is just and reasonable in policy. Notwithstanding Mr. *Flannery's* attempt to justify it on the ground that the Legislature may have intended not to disturb the shares in which assets might be distributed among creditors in bankruptcies and liquidations commenced before the Act, the contrary meaning does not appear to me reasonable, first, because dividends already paid on either view would not be affected, and secondly, because such an intention clearly cannot be imputed in the case of par. (*d*).

We are concerned in this matter only with par. (*c*) which, by reason of sec. 2 (2), would be severable from pars. (*a*), (*b*) and (*d*) of sub-sec. 7, if they or any of them were invalid. The question how far they are affected by sec. 109 of the Constitution, therefore, did not arise in this case.

In my opinion the appeal should be allowed.

EVATT J. Sec. 34 (7) of the *Moratorium Act* 1932 provides as follows :

> " Nothing in this section or in section twenty-five of the *Moratorium Act* contained shall be construed so as to affect any right, power, or remedy of the mortgagee for the recovery of any moneys secured by a mortgage of land and interest thereon in the event of—(*a*) a sequestration order being made against the mortgagor; or (*b*) the mortgagor executing a deed of assignment or of arrangement under the provisions of any bankruptcy law for the time being in force ; or (*c*) an order being made or resolution passed for the winding up of the mortgagor being a company ; or (*d*) the estate of a deceased mortgagor being insolvent and being administered by or under the direction of any Court."

The question which is raised upon this appeal is whether the fact that the winding up of the mortgagor, being a company, commenced

before December 21st, 1932 (the day on which the *Moratorium Act* 1932 was assented to) prevents the appellant mortgagee from proving in the liquidation.

The judgment of the Full Court rests mainly upon the use of the words " in the event of " in sec. 34 (7). These words, it is suggested, are indicative of futurity, and the judgment proceeds :—

> " The question which arises for decision in this matter is whether the provisions of sec. 34 (7) of the *Moratorium Act* 1932 are retrospective in their operation. Before giving such a construction to an Act of Parliament one would require that it should either appear very clearly in the terms of the Act or arise by necessary and distinct implication " (1).

My opinion is that this is not the correct method of approach to the problem which has arisen, and that no question of retrospectivity really arises. Sec. 25 of the *Moratorium Act* 1930 and sec. 34 (1) of the *Moratorium Act* 1932 placed restrictions upon the mortgagee's rights, powers and remedies for the recovery of the mortgage moneys. Thus sec. 34 (1) of the *Moratorium Act* 1932 requires that a confirmation shall be obtained from the mortgagor as a condition of the mortgagee's commencing proceedings for the payment of the mortgage moneys, sec. 25 (1) of the Act of 1930 places a general prohibition upon the mortgagee's bringing proceedings for the breach of any covenant of the mortgage, and sec. 25 (7) of the *Moratorium Act* 1930 invalidates all covenants for the payment or repayment of mortgage moneys, excepting for the purpose of enabling a mortgagee to exercise his rights against the mortgaged property.

It is in relation to these restrictions upon the rights of the mortgagee that sec. 34 (7) has to be understood. The overriding purpose of the sub-section is to remove the statutory restrictions in the four cases specified—in (*a*), (*b*), (*c*) and (*d*). In form the sub-section creates a special statutory rule as to the construction of the provisions which are restrictive of a certain " right, power, or remedy of the mortgagee." The real question which arises is: What " right, power, or remedy " is to remain unimpaired by the statutory restrictions referred to at the commencement of the sub-section ? For the answer, reference has to be made to all the words from " for the recovery " to the end of the sub-section. All such words

(1) (1934) 35 S.R. (N.S.W.), at p. 4; 51 W.N. (N.S.W.), at p. 200.

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go to make up the description of the "right, power, or remedy" which the sub-section expressly protects. In the result, the protected "right, power, or remedy" is to recover the mortgage moneys in any of four specified types of proceedings.

If the sub-section is approached in this way, it is not possible to hold that any of the four types of proceedings must have commenced prior to the passing of the sub-section itself. The words "in the event of" are quite capable of describing proceedings which have already commenced, and they address themselves to the contingency that a certain state of affairs is existing. This view of the sub-section is strongly supported by sec. 7 (*d*) and by the use of the words "being made," "executing," and "being made" in sec. 7 (*a*), (*b*) and (*c*) respectively.

The fallacy in the argument for the respondent is to overlook the fact that English is a "positional" language (cf. per *Rich* J. in *Dignan* v. *Australian Steamships Pty. Ltd.* (1)) and to treat the words "in the event of" and the four pars. (*a*), (*b*), (*c*) and (*d*) as though they had been transposed to the commencement of the sub-section. Then the words would naturally and grammatically have been construed as relating to future events, and could not be regarded as part of the description of the "right, power, or remedy" of the mortgagee to which special protection was being accorded by the sub-section.

The argument based on the doctrine against retrospectivity mistakes the chief purpose of the sub-section. The sub-section is not concerned with the question whether the events which have created the occasion for the creditors of the mortgagor instituting a special type of proceeding have occurred before or after the commencement of the Act in which the sub-section occurs. *Quoad* the mortgagee, such an "occasion" is necessarily fortuitous, and it is not inaccurately referred to as an "event." And the Legislature has considered that the restrictions which otherwise impede the mortgagee should be regarded as non-existent in those instances where it is no longer possible to carry out the main purpose of the *Moratorium Acts* by saving the mortgagor from liquidation. The

(1) (1931) 45 C.L.R. 188, at p. 197.

Legislature has determined that in all such cases the mortgagee should not be put in a worse condition than the other creditors of the mortgagor.

For these reasons the appeal should be allowed and the order of *Street* J. restored.

McTIERNAN J. I am of the same opinion as *Rich*, *Dixon* and *Evatt* JJ., whose judgments I have read.

Appeal allowed with costs. Order of the Full Court discharged and order of Street J. restored. Respondents to pay costs of the Full Court appeal.

Solicitors for the appellants, *Allen, Allen & Hemsley.*

Solicitors for the respondents, *F. A. Davenport & Mant.*

J. B.