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EQUITY TRUSTEES EXECUTORS AND AGENCY CO. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

We think the payments under the New South Wales Act come within the definition of "debts."

We think the first question in the special case should be answered in favour of the taxpayer.

First question in case stated answered :—Yes. A deduction of the amounts mentioned in pars. 7, 9, 11, 12, and 13. Costs in the appeal.

Solicitors for the appellant, *Krcrouse, Oldham & Bloomfield.*

Solicitor for the respondent, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

Solicitor for the State of Queensland, *H. J. H. Henchman*, Crown Solicitor for Queensland.

H. D. W.

Cons
John Kaldor Fabricmaker v Mitchell Cotts Freight (Aust) Pty Ltd 90 ALR 244

[HIGH COURT OF AUSTRALIA.]

McCLELLAND . . . . . APPELLANT;
DEFENDANT,

AND

TRUSTEES EXECUTORS AND AGENCY COMPANY LIMITED . . . . } RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *May* 27, 29; *Sept.* 9.

Starke, Dixon, Evatt and McTiernan JJ.

Private International Law—Mortgage of land in New South Wales—Proper law—Mortgage executed in Victoria—Parties resident in Victoria—Statute of New South Wales abolishing personal covenant in mortgages—Action on covenant in Victoria—Moratorium Act 1930-1931 (*N.S.W.*) (*No.* 48 *of* 1930—*No.* 43 *of* 1931), *secs.* 11, 25.

A mortgage of land in New South Wales was given by a resident of Victoria to a company incorporated in Victoria. The instrument of mortgage was

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executed in Victoria. It was in the form prescribed by the *Real Property Act* 1900 (N.S.W.) and was registered under that Act. It incorporated some provisions of New South Wales statutes and excluded others.

Held that the law governing the transaction was that of New South Wales, and, the *Moratorium Act* 1930-1931 (N.S.W.) having extinguished the obligation of personal covenants for repayment of moneys secured by mortgages of land in New South Wales, the mortgagee could not enforce the personal covenant in Victoria.

Decision of the Supreme Court of Victoria (*Gavan Duffy* J.) reversed.

APPEAL from the Supreme Court of Victoria.

The Trustees Executors and Agency Co. Ltd., a company which was incorporated under the law of, and had its head office in, Victoria, commenced an action in the Supreme Court of Victoria against Andrew McClelland for the recovery of £14,039 7s. 1d., being principal and interest due under a mortgage given by the defendant to the plaintiff. The parties made the following mutual admissions of fact :—

1. The instrument of mortgage was executed at Melbourne in the State of Victoria.

2. At the date of the execution of the mortgage the defendant was resident and domiciled in the State of Victoria.

3. Such payments of interest due under the mortgage as were made were made to the plaintiff at Melbourne in the State of Victoria.

4. The principal sum of £12,000 secured by the instrument of mortgage and therein expressed to be repayable on 17th September 1934 has not been repaid.

5. The defendant paid to the plaintiff all interest due under the instrument of mortgage up to 17th March 1933 but has not paid interest due from 17th March 1933 to 17th March 1935 other than a sum of 12s. 11d. on account thereof.

6. The land described in the instrument of mortgage is situated in the State of New South Wales.

7. The original of the instrument of mortgage was registered at the office of the Registrar-General of the State of New South Wales under the provisions of the *Real Property Act* 1900 (N.S.W.) and the original instrument was lodged at and remains in his office.

8. Prior to 20th September 1929 the plaintiff had lent the sum of £10,000 to Messrs. J. & F. Hoare, which sum was secured by an

instrument of mortgage over the said land. Prior to that date the defendant purchased the land from J. & F. Hoare. The purchase was financed in part by the instrument of mortgage from J. & F. Hoare to the plaintiff being discharged and by the defendant executing the instrument of mortgage referred to in the statement of claim, the amount secured by such latter instrument of mortgage, namely, £12,000, representing the principal moneys secured by such former instrument of mortgage plus the arrears of interest accrued due thereunder plus the sum of £531 11s. then paid in Melbourne by the plaintiff to the defendant.

9. The defendant shortly after purchasing the property from J. & F. Hoare resold the same.

The instrument of mortgage contained a personal covenant by the defendant to pay the principal sum and interest thereon, and (by clauses 7, 8 and 15) it expressly incorporated some, and excluded other, provisions of New South Wales statute law.

The defendant having died, the action was continued against his executrix, Hessie Maria McClelland.

The defence was taken that the *Moratorium Act* 1930-1931 (N.S.W.) rendered the personal covenants in the mortgage void and of no effect. The action was tried by *Gavan Duffy* J., who gave judgment for the plaintiff for the amount claimed with costs.

From that decision the executrix appealed to the High Court.

O'Bryan (with him *Barber*), for the appellant. This is a mortgage of land in New South Wales in a form prescribed by the *Real Property Act* 1900 (N.S.W.) and registered in the office of the Registrar-General of that State. It incorporates and excludes various provisions of New South Wales statute law. It becomes a deed only by virtue of registration under the *Real Property Act* (N.S.W.), and if it were not registered the covenant to repay would be barred after six years (*Wiseman* on *The Transfer of Land*, 2nd ed. (1931), p. 179; *Visbord* v. *Irvine* (1)). In these circumstances the proper law of the contract is the law of New South Wales (*British South Africa Co.* v. *De Beers Consolidated Mines Ltd.* (2); *Merwin Pastoral*

(1) (1921) V.L.R. 562; 43 A.L.T. 77. (2) (1910) 2 Ch. 502, at p. 512.

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Co. Pty. Ltd. v. *Moolpa Pastoral Co. Pty. Ltd.* (1); *Lloyd* v. *Guibert* (2)). If this is so, the personal covenants in the mortgage are void and of no effect by reason of the provisions of the *Moratorium Act* 1930-1931 (N.S.W.) (*Smith* v. *Motor Discounts Ltd.* (3)). One test is: What law did the parties intend to govern? Another is: With what law has the contract the most real connection? Whichever test is applied, the law of New South Wales is the governing law. The mortgage directly applies the law of New South Wales to matters vital to the personal covenant.

Fullagar K.C. (with him *Adam*), for the respondent. The immediate inquiry is whether a particular law of New South Wales has discharged an obligation. The only law which can discharge it is the law which created it. This document is more than a contract. It is a charge on the land as well as contract, and the contract and the charge may each have a different governing law. The governing law is Victorian. The place of payment must be where the creditor resides. In this case that is Victoria (*Weyand* v. *Park Terrace Co.* (4)).

[DIXON J. referred to *Beale, Conflict of Laws* (1935), p. 994; *De Wolf* v. *Johnson* (5).]

A different law may govern different obligations in a contract, and there may be several governing laws. A mortgage is a movable (*Campbell* v. *Dent* (6); *British South Africa Co.* v. *De Beers Consolidated Mines Ltd.* (7); *Harding* v. *Commissioners of Stamps for Queensland* (8); *In re Ralston*; *Perpetual Executors and Trustees Association* v. *Ralston* (9); *Lawson* v. *Commissioners of Inland Revenue* (10); *In re O'Neill*; *Humphries* v. *O'Neill* (11)). *In re Hoyles*; *Row* v. *Jagg* (12) is in conflict with current opinion. The form of the document should be disregarded (*Alliance Bank of Simla* v. *Carey* (13)).

[DIXON J. referred to *Groongal Pastoral Co. Ltd.* v. *Falkiner* (14).]

(1) (1933) 48 C.L.R. 565.
(2) (1865) L.R. 1 Q.B. 115.
(3) (1935) 54 C.L.R. 107.
(4) (1911) 202 N.Y. 231.
(5) (1825) 23 U.S. 367; 6 Law. Ed. 343.
(6) (1838) 2 Moo. P.C.C. 292; 12 E.R. 1016.
(7) (1910) 2 Ch. 502.
(8) (1898) A.C. 769.
(9) (1906) V.L.R. 689; 28 A.L.T. 45.
(10) (1896) 2 I.R. 418.
(11) (1922) N.Z.L.R. 468.
(12) (1911) 1 Ch. 179.
(13) (1880) 5 C.P.D. 429.
(14) (1924) 35 C.L.R. 157.

O'Bryan, in reply. The various covenants in this mortgage are inextricably bound up together (*Conveyancing Act* 1919 (N.S.W.), Part VII., Div. 1, secs. 92, 93). The cases cited for the respondent relate only to the severability of the loan and the conveyance. There is no case in which obligations springing from one instrument have been held to be governed by different laws (*In re O'Neill* (1); *Payne* v. *The King* (2); *In the Will of Currie* (3)). Whether a contract is a deed or a simple contract is decided by the *lex fori* (*Campbell* v. *Dent* (4); *Cood* v. *Cood* (5)). To determine the proper law of a contract relating to land all the circumstances must be looked at. The *lex situs* does not necessarily govern the matter (*Deschamps* v. *Miller* (6)). *Dicey's Conflict of Laws*, 5th ed. (1932), p. 579, accepts *In re Hoyles* (7), which decides that the *lex situs* determines what is a movable (*Westlake's Private International Law*, 7th ed. (1925), p. 217; *Wanganui-Rangitikei Electric Power Board* v. *Australian Mutual Provident Society* (8)). The contract refers throughout to a code of New South Wales laws, and the parties must be taken to have intended to apply that law.

Fullagar K.C., by leave. It does not follow that New South Wales law is the proper law of the contract because the remedies under this mortgage are governed by the law of that State. The place of payment is of vital importance. *In re Hoyles* (7) is inconsistent with *Harding* v. *Commissioners of Stamps for Queensland* (9), and *In the Will of Currie* (3) is inconsistent with *Payne* v. *The King* (2) (See *Australian Law Journal*, vol. 2, p. 85).

Cur. adv. vult.

Sept. 9.

The following written judgments were delivered :—

STARKE J. The *Real Property Act* 1900 of New South Wales enacts (sec. 56) that " whenever any land or estate or interest in land under the provisions of this Act is intended to be charged or made security in favour of any mortgagee the mortgagor shall execute a memorandum of mortgage in the form " in the schedule.

(1) (1922) N.Z.L.R., at p. 474.
(2) (1902) A.C. 552.
(3) (1899) 25 V.L.R. 224; 21 A.L.T. 127.
(4) (1838) 2 Moo. P.C.C. 292; 12 E.R. 1016.
(5) (1863) 33 Beav. 314; 55 E.R. 388.
(6) (1908) 1 Ch. 856.
(7) (1911) 1 Ch. 179.
(8) (1934) 50 C.L.R. 581.
(9) (1898) A.C. 769.

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Such a mortgage has effect as a security, but does not operate as a transfer of the land thereby charged (sec. 57). It has, upon registration, the effect of a deed duly executed (sec. 36 (4)).

On 29th September 1929, Andrew McClelland " in consideration of Twelve thousand pounds . . . lent to " him " by the Trustees Executors and Agency Company Limited " (called the company) executed a memorandum of mortgage, in the form allowed by the Act, whereby he mortgaged to the company certain lands, under the provisions of the Act, to secure the principal sum of £12,000 and interest thereon. The memorandum contained covenants or agreements on the part of McClelland to pay the principal sum mentioned and interest thereon. The company brought an action against McClelland, upon the covenants or agreements contained in the mortgage, for principal and interest. McClelland died in April of 1935, but the action has been continued against his executrix. Judgment was given for the company in the Supreme Court of Victoria, and an appeal is now brought to this court.

The question for determination on this appeal is whether the law of the State of New South Wales or the law of the State of Victoria is the law governing the obligation to pay the principal money and interest under the memorandum of mortgage. If the law of New South Wales governs the obligation, then the obligation is subject to the *Moratorium Act* 1931 of that State, No. 66, sec. 4, which came into force on 11th December 1931 and provides that all covenants, agreements or stipulations by a mortgagor for 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 whatever ; whereas the law of Victoria makes no such provision.

" The rights of the parties to a contract are to be judged of by that law by which they intended " to bind, " or rather by which they may justly be presumed to have bound themselves " (*Lloyd* v. *Guibert* (1) ; *Merwin Pastoral Co. Pty. Ltd.* v. *Moolpa Pastoral Co. Pty. Ltd.* (2)). How is this presumed intention to be ascertained? " Every term of the contract, every detail affecting its formation

(1) (1865) L.R. 1 Q.B., at p. 123.

(2) (1933) 48 C.L.R., at p. 579.

and performance, every fact that serves to indicate the design of the parties, is relevant. No one fact is conclusive. The court must take into account, for instance, the following matters: the domicil and even the residence of the parties; the national character of a corporation and the place where its principal place of business is situate; the place where the contract is made and the place where it is to be performed; the form in which the contract is drafted, as, for instance, whether the language employed is appropriate to one system of law but inappropriate to another; the fact that a certain stipulation is valid under one law and void under another . . . and, in short, any other fact from which the character of the contract and the nature of the transaction can be inferred" (*Cheshire, Private International Law* (1935), p. 187).

The question must be solved on substantial considerations, the preference being given to the law of the country with which the transaction has the most real connection (*Westlake's Private International Law*, 7th ed. (1925), p. 302; *Merwin Pastoral Co. Pty. Ltd.* v. *Moolpa Pastoral Co. Pty. Ltd.* (1)). McClelland was domiciled and resident in Victoria. The company carried on business in Victoria. But it must be observed that the form of the memorandum is according to the provisions of the *Real Property Act* 1900 of New South Wales, and refers, in several of its clauses, to that Act and to the *Conveyancing Act* 1919 of New South Wales. Further, it is not a mere contract, it is in the nature of a conveyance, that is, it operated, when registered, as a charge or security upon land in New South Wales. All rights over or in reference to that land conferred by the memorandum are governed exclusively by the law of New South Wales. "All questions concerning the property in immovables, including the forms of conveying them, are decided by the *lex situs*" (*Westlake's Private International Law*, 7th ed. (1925), p. 216, sec. 156). But it is suggested that this consideration cannot control personal covenants, which neither operate nor purport to operate as conveyances (*Polson* v. *Stewart* (2)). And especially, it is contended, must this be so where, as here, the parties to the mortgage security reside or carry on business, and the money is advanced, in a State other than that in which the land is situate,

(1) (1933) 48 C.L.R. 565.

(2) (1897) 167 Mass. 211, at p. 214.

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and where, as here, the implication of the mortgage security is that payment of the moneys secured by it should be made in the State in which the mortgagee carries on its business and not in the State in which the land is situate.

In my judgment, however, despite these various considerations, the rights of the parties in the land, also the personal obligations arising under the memorandum of mortgage, are all governed by the law of New South Wales, and that is the proper law of the contract or the mortgage security—the law by which the parties must justly be presumed to have bound themselves. The dominant consideration, to my mind, is that the covenants are incorporated in the mortgage security itself, or in the conveyance, as I have ventured to describe it. The security is in the form prescribed by the law of New South Wales, its language is appropriate to and confers various authorities and powers by reference to that law. The various provisions in the mortgage security are inseparably connected, so that the law governing one provision must be identical with respect to other provisions. Thus the parties must have contemplated that the law of New South Wales should regulate and govern their rights in reference to the charge on the land and to the authorities and powers contained in the seventh, eighth and fifteenth clauses. The nature of the transaction and the stipulations contained in the memorandum all show that the parties contemplated and intended that their rights should be governed by the law of New South Wales. Moreover, it appears that McClelland purchased the land subject to a mortgage for £10,000 in favour of the company. He financed the payment of his purchase money by giving a new mortgage to the company for £12,000, which represented the £10,000 already secured on the land, and accrued interest thereon, and a comparatively small sum paid in Victoria by the company to McClelland. Such a transaction, in its ultimate analysis, can be resolved into the terms of a contract of loan from the company to McClelland, but in substance McClelland was paying his purchase money for land in New South Wales by taking over liabilities existing upon it in favour of the company. And this also appears to me a circumstance in favour of the view that the parties were negotiating

and agreeing upon the basis of the law of New South Wales governing the matter in hand.

The result is that the appeal should be allowed, and judgment entered for the defendant by reason of the provisions of the *Moratorium Act* 1931 of New South Wales already mentioned.

DIXON J. The cause of action sued upon is the obligation expressed in a memorandum of mortgage to pay the principal moneys and interest.

The action was brought in the Supreme Court of Victoria, the State in which the instrument was executed and in which the mortgagor resided. It is also the State where the mortgagee was incorporated and carries on business. The land is situated in New South Wales. The instrument is an ordinary memorandum of mortgage under the *Real Property Act* 1900 of that State. It was given by the mortgagor, on his acquiring the land, in substitution for a prior mortgage by which the previous proprietors, from whom he purchased, had secured the repayment to the mortgagee of a somewhat smaller sum. The mortgage sued upon was given in 1929. All covenants, agreements and stipulations by a mortgagor for the payment of any mortgage moneys secured by a mortgage of real property were invalidated by sec. 25 (7) and (8) of the New South Wales *Moratorium Act* 1930-1931 as amended by Act No. 66 of 1931. Sec. 34 of the *Moratorium Act* 1932 enables a mortgagor, by confirming his covenant in manner prescribed, to revive a liability thus destroyed. But, unless this course has been followed, the avoidance of the personal liability continues (Cf. *Smith* v. *Motor Discounts Ltd.* (1)).

The question for decision is whether the destruction of the personal obligation by the law of New South Wales affords an answer to the action brought in Victoria. In my opinion it does afford an answer. The law governing the discharge of the liability is, I think, that of New South Wales. Under that law the obligation arose and upon that law its existence depends.

In the choice of law for giving obligatory force to promises or agreements, ascertaining their scope and determining their operation,

(1) (1935) 54 C.L.R. 107, at pp. 118, 121.

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English Courts have been avowedly guided by the real or presumed intention of the parties. Learned writers have urged that such a standard is alike unsound in principle and inconvenient in practice. How, they ask, can an English forum be justified in giving any legal effect to the intention of the parties until it has decided by what law efficacy is ascribed to their intentions ? Why should the minds of the parties affect the question whether a foreign law operates upon an agreement made by them and translates it into rights and duties which English Courts ought to recognize and enforce ? If the law of a country declares that some description of transaction shall be unlawful and of no effect, why, in a question whether that law is applicable to a particular transaction of that description brought before an English forum, should any regard be paid to the intention of the parties on the subject ? How often do the parties possess any intention that their agreement shall be governed by a particular law ? And, if they express such an intention, may it not be for the purpose of evading the operation of the law of a country justly claiming to control them ? If an intention must be imputed where none existed, how can any certainty be found, unless by the use of presumptions producing the same effect as independent substantive rules ? (See *Westlake's Private International Law*, 7th ed., (1925), secs. 211-214 ; *Baty, Polarized Law* (1914), pp. 43-50 ; *Cheshire, Private International Law* (1935), pp. 183 et seq. ; *Beale, Conflict of Laws* (1935), pp. 1079 et seq. Cp. *Salmond and Winfield, Law of Contracts* (1927), pp. 542-544 ; *Dicey's Conflict of Laws*, under General Principle No. VI. and note 22, pp. 60-64 and 857-865, 3rd ed. (1922) ; *Gutteridge, Cambridge Law Journal*, vol. 6, p. 16.)

It might, perhaps, have been a logical course to attribute the obligatory force of a contract, and with it the definition of the obligations, wholly to the law of the place where it was made, simply because it was the *lex loci actus*. Some of the consequences, no doubt, would have appeared artificial. But English law has taken no such course. The place of performance could not be made the invariable source of the governing law. Performance may extend over many countries, and, besides its locality, has often little bearing upon the obligation of the contract. The origin of the

English view has been traced (*Beale*, pp. 1092-1097). But the rejection of the *lex loci actus* and the *lex loci solutionis* left, in any case, no definite criterion capable of certain application. When parties enter into contractual relations, they do so on the supposition that rights and liabilities will be attached by law to their action. Perhaps the net result of the English rules is that where this might be done by more than one law, the function is attributed to that law upon which in the circumstances of the case parties to such a transaction might be supposed instinctively to rely for the purpose.

In the present case the parties had no actual intention to adopt a governing law, or, at any rate, they did not express one. But they entered upon a stereotyped transaction, the elements in which (subject to permissible contractual variations) are virtually settled by the statute law of New South Wales. The obligation put in suit is a constituent part of the form of instrument which, under that law, creates the collection of interdependent personal and proprietary rights by which payment of the mortgage moneys is secured. It is true that English law regards the mortgage debt as the principal right to which the security over the land is accessory. It is probably also true that, in spite of *In re Hoyles* (1), the mortgage debt is a movable and not an immovable (*Harding* v. *Commissioners of Stamps for Queensland* (2); *Lambe* v. *Manuel* (3); *In re Ralston* (4); *In re O'Neill* (5); and cf. *Australian Law Journal*, vol. 2, p. 85).

But, in the present case, the obligation or debt is entirely the creature of the New South Wales memorandum of transfer. There is nothing to connect the obligation with Victoria except the residence of the parties and their execution there of the instrument. It is said that by implication Melbourne became the place of payment and it may be true that in the circumstances the chose in action has a locality in Victoria as a simple contract debt (*Payne* v. *The King* (6)). But, even with the addition of that circumstance, the obligation remains, in my opinion, an integral part of an entire transaction which on its face is referable to the law of New South

(1) (1911) 1 Ch. 179.
(2) (1898) A.C. 769.
(3) (1903) A.C. 68.
(4) (1906) V.L.R., at p. 694; 28 A.L.T., at p. 46.
(5) (1922) N.Z.L.R. 468.
(6) (1902) A.C., at pp. 559, 560.

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Wales. *Duffy* J. reached the contrary conclusion because he considered that, as the security over the land should be regarded only as an accessory to the debt, the considerations applicable to an ordinary contract of loan should prevail. My reason for not treating the obligation in this manner is that it is not a debt for money lent secured collaterally by a mortgage. It is part and parcel of one thing, a mortgage transaction entered into in reliance upon the law of New South Wales.

I think the appeal should be allowed and judgment entered for the defendant.

EVATT J. This is an appeal from the judgment of *Gavan Duffy* J., who was of opinion that the instrument of mortgage upon which the plaintiff sued had for its governing or proper law the law of Victoria. Whether such opinion is right is the only question which arises upon the present appeal for, as was pointed out in *Merwin Pastoral Co. Pty. Ltd.* v. *Moolpa Pastoral Co. Pty. Ltd.* (1), the fact that sec. 25 of the *Moratorium Act* of New South Wales (upon which the appellant relies to annihilate the obligation of the personal covenant contained in the mortgage) was passed after the execution of the mortgage, does not preclude the operation of that section if, in truth, New South Wales is the country by reference to the laws of which the obligations of the parties have to be measured.

In the same case of *Merwin Pastoral Co. Pty. Ltd.* v. *Moolpa Pastoral Co. Pty. Ltd.* (2) I ventured to examine some of the criticisms which have been directed by the text writers and jurists against the rule of English law which has to be invoked in order to determine the proper or governing law of a contract. To what I then said, I now add the following passage from an article by Professor Willis which conveniently summarizes the English law of to-day :—

> "The English rules as to the law which governs the formation of a contract are to-day based clearly upon justice and convenience. They show a marked development from the old mechanical application of the *lex loci contractus* to the modern investigation of the so-called 'proper law,' which is either, according to *Dicey*, the law which the parties intend to govern their contract, or, according to *Westlake*, the law of the country with which the transaction has the most real connection. . . . Whether we define proper law with *Dicey*, as the law which the parties intend to govern, or with *Westlake*, the law of the country

(1) (1933) 48 C.L.R., at pp. 582, 583. (2) (1933) 48 C.L.R. 565.

with which the transaction has the most real connection makes no difference; in either case the approach is the same. In either case the inquiry is directed to discovering what law should 'on substantial considerations,' in fairness that is, be applied to the transaction" (*Canadian Bar Review*, vol. 14, pp. 10, 11).

In order to support the judgment appealed from, the respondent relied upon the decision in *British South Africa Co.* v. *De Beers Consolidated Mines Ltd.* (1), where the Court of Appeal held that the contract there in question though it related to foreign immovables fell to be governed by English law. Reliance was placed upon what *Farwell* L.J. called "the theory of our law, as settled by the intervention of the Court of Chancery following the civil law" to the effect that when a mortgage is executed the debt intended to be secured by it is considered to be the principal and the securities are considered as adjuncts (2). *Farwell* L.J. said it followed that, in considering a mortgage, the nature of the property secured was of little importance, that the transaction was primarily a personal transaction and the fact that the security was real estate abroad was only material as requiring the observance of the foreign law in the instrument creating the charge.

On the other hand *Kennedy* L.J. regarded the question as one largely dependent upon "the inferences to be drawn from the nature of the transaction," it being an important or at least a relevant circumstance that the contract "affects immovables situated out of the jurisdiction" (3). And *Cozens-Hardy* M.R., in holding that the proper law of the particular contract was English, placed reliance upon the fact that it was "in English form" (4).

It is also to be noted that the agreement in question in the *British South Africa Co.'s Case* (1) was merely an agreement to give security, that a sum of £112,000 had already been lent and that a further sum of £100,000 was agreed to be lent as part of a new transaction providing for security to be given to the lender.

The present case is quite distinct from the decision of the Court of Appeal which has been examined. In the first place, the plaintiff is being sued upon a particular instrument of mortgage in which the transaction of loan between the parties is completely recorded.

(1) (1910) 2 Ch. 502.
(2) (1910) 2 Ch., at p. 516.
(3) (1910) 2 Ch., at p. 523.
(4) (1910) 2 Ch., at p. 512.

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Evatt J.

The surrounding circumstances (showing that the defendant was then engaged in the purchase of the New South Wales land from J. & F. Hoare) also tend to support the inference of a New South Wales proper law, for reasons suggested in *Merwin Pastoral Co. Pty. Ltd.* v. *Moolpa Pastoral Co. Pty. Ltd.* (1). Further, the instrument of mortgage which is sued upon is undoubtedly impressed with a New South Wales character. In the passage cited from the judgment of *Cozens-Hardy* M.R. importance was attached to a similar fact. In approaching the question of the proper or governing law of a contract, significance attaches to the fact that the statute of a particular country operates in material respects upon the obligations contained in it. See the case of *Wanganui-Rangitikei Electric Power Board* v. *Australian Mutual Provident Society* (2). Here the land mortgaged was not merely situated in New South Wales but was land which had been brought under the provisions of the *Real Property Act* of that State. Sec. 56 of the New South Wales *Real Property Act* provides that, whenever any land under the Act is intended to be made security in favour of a mortgagee, the mortgagor shall execute a memorandum of mortgage in the statute form. Elaborate provision is made in secs. 57, 58 and 59 of the Act for conditions to be observed in the exercise of the power of sale in case of default. Provision is also made in sec. 60 of the Act for the mortgagee's obtaining a right to enter into possession by receiving the rents and profits, to distrain upon the occupier or tenant, and to bring an action of ejectment as though the principal sum had been secured by a conveyance of the legal estate. Provision is also made by sec. 61 for foreclosure proceedings.

The memorandum of mortgage is headed "New South Wales" and specific reference is made in it to the *Real Property Act* of that State. There are covenants in it which expressly provide for repayment of the principal sum and for payment of interest. The mortgage in clauses 7, 8 and 15 refers to the provisions both of the *Real Property Act* 1900 and of the *Conveyancing Act* 1919 of the State of New South Wales.

(1) (1933) 48 C.L.R. 565.

(2) (1934) 50 C.L.R. 581.

The ultimate question is, with what law was the transaction most intimately concerned ? It is plain that every obligation, including the obligation to pay principal and interest, is intended to be embodied in the one document and to be governed by the same law. The document incorporates or excludes provisions of the statute law of New South Wales. It is impossible to act upon the theory of an independent or collateral contract of loan, for the transaction was one and indivisible. We find that the statute law of New South Wales confers important rights upon persons who have executed the statutory document. In this case it is not a choice between a local law and a foreign law in the ordinary acceptation of the term, for the Commonwealth Constitution expressly requires in sec. 118 that full faith and credit must be given throughout the Commonwealth to the laws of every State, and, in the application of the doctrine of the proper law, this fact is important (Cf. *Merwin Pastoral Co. Pty. Ltd.* v. *Moolpa Pastoral Co. Pty. Ltd.* (1)).

In my opinion the inference is undoubted that the country with which the transaction had the most real connection was New South Wales and it is by reference to the laws of New South Wales that all the obligations of the instrument should be measured. And, on reference to such law, the obligation here sued upon has been discharged.

It follows that the appeal should be allowed and the judgment of the Supreme Court reversed.

McTiernan J. The question whether the mortgagor's liability under the covenants sued upon was destroyed by the moratorium legislation of New South Wales should be answered in the affirmative if the proper law of these covenants is the law of New South Wales, and this is to be ascertained by seeking the intention of the parties. The parties, however, made no open declaration as to the law which they intended should govern the mortgage and the court must therefore gather what their intention was from the mortgage itself and the surrounding circumstances.

Gavan Duffy J. considered that, because in the view of English law the debt is the principal element in a mortgage and the security

(1) (1933) 48 C.L.R., at pp. 577, 588.

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only an adjunct to the debt, the situation of the mortgaged property and the provisions for securing payment of the debt are of little if of any moment for the purpose of ascertaining the proper law of the covenants creating the debt, and held that "a contract made in Victoria to repay, between persons whose homes are located in Victoria, should be treated as governed by the *lex loci contractus*." In *British South Africa Co.* v. *De Beers Consolidated Mines Ltd.* (1) the relation of a debt to the security for its payment was adverted to. *Gavan Duffy* J. saw in that relation, as I understand his judgment, the underlying principle for the decision of the Court of Appeal that the proper law of the agreement there in question was English law. With respect, that conclusion was, I think, reached on wider and more general grounds (See *British South Africa Co.* v. *De Beers Consolidated Mines Ltd.* (2)).

In my opinion the mortgage is clearly a New South Wales mortgage. It is a mortgage of land in New South Wales embodied in an instrument headed "New South Wales. Memorandum of Mortgage. (*Real Property Act* 1900)" and it was registered in the office of the Registrar-General in Sydney. It binds the mortgagor to perform not only the covenants which are set out in it, but also the covenants, agreements and conditions implied by certain New South Wales statutes, and it expressly empowers the mortgagee to exercise all the powers given to a mortgagee by those statutes. It is not open to doubt that the mortgage was entered into as a contract depending for its efficacy upon the law of New South Wales and the rights and obligations of the parties are expressly conditioned by that law. Now the covenants sued upon are an integral part of this mortgage. These and the other provisions of the instrument constitute the contract from which the mortgagor's liability to pay principal and interest springs. The situation of the mortgaged property, the form and substance of the mortgage and its express relation to and dependence upon New South Wales law furnish stronger grounds for inferring that the parties intended the mortgage to be governed by the law of New South Wales than do the place of execution and the Victorian character of the parties for inferring an intention that it should be governed by the law of Victoria. In

(1) (1910) 2 Ch. 502. (2) (1910) 2 Ch., at pp. 512, 513, 515, 516, 523.

my opinion the proper law of the contract of mortgage should be held to be that of New South Wales. It follows that the moratorium legislation of New South Wales is a good defence to the mortgagee's action (*Merwin Pastoral Co. Pty. Ltd.* v. *Moolpa Pastoral Co. Pty. Ltd.* (1)).

The appeal should be allowed with costs.

Appeal allowed with costs. Judgment of Supreme Court discharged. In lieu thereof order that judgment be entered for the defendant with costs including the costs of pleadings.

Solicitor for the appellant, *C. W. Stewart.*

Solicitors for the respondent, *Phillips Fox & Masel.*

H. D. W.

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HOUSE ; THE KING . . RESPONDENT.

APPELLANT ;

ON APPEAL FROM THE COURT OF BANKRUPTCY.

Bankruptcy—Property obtained on credit and not paid for, pawned by bankrupt—Offence—Sentence by Court of Bankruptcy—Severity—Discretion of Judge—Appeal to High Court—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 73—*Bankruptcy Act* 1924-1933 (*No.* 37 *of* 1924—*No.* 66 *of* 1933), *secs.* 26 (2), 210 (3) (*c*), 217.

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SYDNEY, *Aug.* 6, 17

Starke, Dixon, Evatt and McTiernan JJ.

Twelve months after the sequestration of his estate, the Court of Bankruptcy ordered a bankrupt to apply for his discharge. When the application came on to be heard the court, acting under sec. 217 of the *Bankruptcy Act* 1924-1933, proceeded to charge him with offences against the Act. In the result he was dealt with summarily by the Court of Bankruptcy upon a charge which he

(1) (1933) 48 C.L.R. 565.