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WESTERN AUSTRALIA

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REPORT

of the

ROYAL COMMISSIONER

Mr. J. E. Shillington

on

Personal Covenants in Mortgages of Land

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*Presented to both Houses of Parliament by His Excellency's Command.*  
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[SECOND SESSION OF THE EIGHTEENTH PARLIAMENT.]

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ROYAL COMMISSION.

WESTERN AUSTRALIA, } By His Excellency Sir James Mitchell,
TO WIT. } K.C.M.G., Lieutenant-Governor in and
JAMES MITCHELL, } over the State of Western Australia
Lieutenant-Governor. and its Dependencies in the Common-
[L.S.] } wealth of Australia.
To John Eversley Shillington, Esq.,
Commissioner of Titles, Titles Office,
Perth.

Greeting:

KNOW ye that I the said Lieutenant-Governor acting with the advice and consent of the Executive Council do hereby appoint you, John Eversley Shillington, Commissioner of Titles of the Titles Office, Perth to be a Commissioner generally to inquire into and report upon the following:—

1. As to personal covenants by mortgagors of land to repay the principal moneys loaned and interest thereon:—

(a) Whether such covenants should be made unlawful.

(b) If permissible, whether any and if so what limitations should be imposed on the right of the mortgagee to enforce any such covenant.

(c) Whether any distinction should be made between mortgages comprising rural lands, and other mortgages, in relation to personal covenants.

(d) Whether any distinction should be made between existing and future mortgages, in relation to personal covenants.

(e) If any limitation should be imposed on the right of the mortgagee to enforce the personal covenant, what provision, if any, should be made in the case of any guarantor or guarantors, or any collateral security, or any general lien or other security given by the mortgagor.

(f) In the event of any limitation on the existing rights of mortgagees, in respect of personal covenants, what effects, if any, are probable or possible in relation to credit facilities of rural or other borrowers; the credit of the State, or its people; or the present structure and operation of finance and financial institutions.

(g) The rights of the mortgagees in respect of personal covenants.

(h) The effects of the personal covenant in the past on the borrowers from—(i) Government money lending authorities; (ii) private creditors.

2. Generally as to justification for or advisability or otherwise of legislation to abolish or limit the practice of personal covenants in mortgages, or restrict the operations of such covenants, or the rights of mortgagees thereunder.

And I declare that you shall, by virtue of this Commission, be a Royal Commission within the Royal Commissioners' Powers Act, 1902, as reprinted in the Appendix to the Sessional Volume of the Statutes for the year 1928 and that you shall have the powers of a Royal Commission or the Chairman thereof under that Act.

And I hereby request you as soon as reasonably may be to report to me in writing the result of this your Commission.

Given under my hand and the public seal of the said State at Perth this 11th day of January, 1945.

By His Excellency's Command,
(Sgd.) J. WILLCOCK, Premier.

Personal Covenant Royal Commission

To His Excellency the Honourable Sir James Mitchell, Knight Commander of the Most Distinguished Order of St. Michael and St. George, Lieutenant-Governor in and over the State of Western Australia and its Dependencies in the Commonwealth of Australia.

May it please Your Excellency:

In accordance with the terms of the Commission dated 11th January, 1945, whereby I was commissioned by Your Excellency to inquire into and report upon the following matters:—

1. As to personal covenants by mortgagors of land, to repay the principal moneys loaned and interest thereon:

- (a) Whether such covenants should be made unlawful.
- (b) If permissible, whether any and if so what limitations should be imposed on the right of the mortgagee to enforce any such covenant.
- (c) Whether any distinction should be made between mortgages comprising rural lands, and other mortgages, in relation to personal covenants.
- (d) Whether any distinction should be made between existing and future mortgages, in relation to personal covenants.
- (e) If any limitation should be imposed on the right of the mortgagee to enforce the personal covenant, what provision, if any, should be made in the case of any guarantor or guarantors, or any collateral security, or any general lien or other security given by the mortgagor.
- (f) In the event of any limitation on the existing rights of mortgagees, in respect of personal covenants, what effects, if any, are probable or possible in relation to credit facilities of rural or other borrowers; the credit of the State, or its people; or the present structure and operations of finance and financial institutions.
- (g) The rights of the mortgagees in respect of personal covenants.
- (h) The effects of the personal covenant in the past on the borrowers from—
 - (i) Government Money Lending Authorities.
 - (ii) Private Creditors.

2. Generally as to justification for or advisability or otherwise, of legislation to abolish or limit the practice of personal covenants in mortgages, or restrict the operations of such covenants, or the rights of mortgagees thereunder.

I have the honour to submit the following report:—

In order to bring the purposes of the Commission to the notice of the public generally, advertisements were inserted in the following newspapers, namely:—

“The West Australian,” “The Daily News,” “The Sunday Times,” “The Geraldton Express,” “The Albany Advertiser,” Bunbury “South Western Times,” “Kalgoorlie Miner,” and the “Primary Producer,”

setting out the Terms of Reference and inviting any person desirous of giving evidence to communicate with the Secretary to the Commission, Mr. C. L. McKittrick. Circulars were sent to the institutions and associations which I considered would be in a position to supply information or to tender suggestions helpful to the Commission. Such institutions and associations included the Agricultural Bank, the Commonwealth Bank, the Associated Banks, Life Assurance Societies, Building and Starr-Bowkett Societies, Stock and Station Agents,

Trustee Companies, the Public Trustee, the Wheat and Woolgrowers' Union, the Primary Producers' Association and the Pastoralists' Association.

So that cases of hardship would be revealed if any such existed, questionnaires were sent to lending institutions requiring particulars of all occasions on which action on the Personal Covenant had been resorted to or threatened since 1st January, 1929.

I commenced to hear evidence on the 26th day of February, 1945, and had 22 sittings, examining forty witnesses. Evidence was tendered by representatives of the following institutions and associations, and by the following individuals:—

Returned Sailors, Soldiers and Airmen's Imperial League of Australia—H. A. Leslie, M.L.A.
Wheat and Woolgrowers' Union of W.A.—W. E. Broadbank, E. Walker, T. H. Powell, F. Rooke.
Pastoralists' Association of Western Australia, Incorporated—J. L. B. Weir.
Associated Banks in Western Australia—B. R. Fitzhardinge.
Agricultural Bank of Western Australia (now Rural and Industries Bank)—C. Abey.
Bank of New South Wales Ltd.—B. R. Fitzhardinge.
Union Bank Ltd.—R. D. Grey.
Bank of Australasia—F. F. Hassett.
Bank of Adelaide Ltd.—A. G. Newman.
English, Scottish and Australian Bank, Ltd.—F. J. Neerhut.
Commercial Bank of Australia, Ltd.—G. E. Buckley.
National Bank of Australasia, Ltd.—H. R. MacKenzie, C. E. Buchan.
Australian Mutual Provident Society, Ltd.—R. E. Ball.
National Mutual Life Association of Australasia, Ltd.—H. B. Jackson, K.C., J. R. Bennett.
Temperance and General Mutual Life Assurance Society, Ltd.—H. B. Jackson, K.C., J. E. D. Batty.
Colonial Mutual Life Assurance Society, Ltd.—H. B. Jackson, K.C., W. B. Jeanes.
Dalgety and Co., Ltd.—R. A. Cameron.
Elder, Smith and Co., Ltd.—A. T. Sadleir.
The West Australian Trustee, Executor and Agency Company, Ltd.—L. Beasley.
The Perpetual Executors, Trustees and Agency Company (W.A.), Ltd.—H. Jones.
Perth Benefit Building Investment and Loan Society (Permanent)—R. D. Rodda.
Fremantle Benefit Building and Investment Society—F. L. Pearse.
The West Australian Starr-Bowkett, Investment Benefit Building Society—A. S. Chipper.
Manchester Unity Independent Order of Oddfellows—C. G. Dudley.
Real Estate Institute of W.A.—C. G. Dudley.
H. W. Bevilacqua, Ltd.—R. H. Williams.
A. J. Reid, Under Treasurer.
A. F. Watts, M.L.A., Leader of the Opposition.
F. W. Godfrey, of Perth, Legal Practitioner.
A. T. Threlfall, of Nalkain, Farmer.
O. L. Vetter, of Perth, Business Director.
F. A. Blott, Assessor, Land Titles Office.

C. G. Dudley, of Perth, Managing Director.
 N. P. Lappin, of Perth, Legal Practitioner.
 H. P. Hansen, of Mukinbudin, Farmer.
 A. J. Fisher, of Warongerup, Woolgrower.

In addition, written statements were forwarded by the following:—

J. J. Malden, Whelarra.
 F. V. Williams, Duranillin.
 T. D. Healy, Narrikup.
 H. J. Stafford, Mundaring.
 J. J. O'Dea, Bowgada.
 Mrs. Properjohn, Nedlands.
 S. J. W. Bowler, Yandanooka.

For the purpose of brevity, the term "personal covenant" will be used throughout this report to denote the personal covenant of a mortgagor of land to pay the principal money and interest.

In an endeavour to ascertain whether the evidence submitted by those who favoured the retention of a right of action on a personal covenant represented the viewpoint of a considerable body of mortgagees, I ascertained from the representative of each lending institution who appeared particulars of the number of mortgages registered by such institution at the Land Titles Office since 1st January, 1929. The total was approximately 62,000. From the 1st July, 1928 (the commencement of the financial year) to 31st December, 1944, mortgages registered at the Land Titles Office numbered 111,693. Although I am aware that not all mortgages are registered at the Land Titles Office, I think it is a fair inference that such figures are a reliable guide to the proportion of mortgagees represented. It would seem that a substantial number of mortgages would still be in the hands of private investors. It is impossible to ascertain what proportion of mortgages given over rural lands are in the hands of the Agricultural Bank (now the Rural and Industries Bank) and the Associated Banks, but I am of opinion that a very substantial proportion of mortgages over rural lands, certainly more than half, are held by the Rural and Industries Bank or the Associated Banks.

No private investor appeared as a witness before the Commission, but a written statement was tendered by a mortgagee who submitted that injustice and hardship would result in the particular instance cited if retrospective effect was given to any legislation extinguishing the right of a mortgagee to sue on the personal covenant. With this single exception, the only evidence tendered on behalf of private investors was that given by Mr. Williams who purported to express the views of lending clients as well as his own individual views.

No mortgagor attended to give evidence on his own behalf but statements were received from several farmers setting out their experience in borrowing money which they were unable to repay because of economic circumstances beyond their control, and from some farmers who advocated that the personal covenant be abolished from all mortgages, existing and future.

No statement was received from mortgagors other than mortgagors of rural lands.

In dealing with the evidence submitted by witnesses on many points, for instance the effect on the credit of rural or other borrowers in this State of any provision extinguishing or limiting the right of a mortgagee to proceed on the personal covenant, it must be remembered that the witnesses are expressing opinions only. It is true that some witnesses are better qualified to express an opinion on such a subject than others, but it is still only an opinion. Nevertheless, it is possible, by ascertaining the factors taken into consideration at the present time by witnesses who represent lending institutions when dealing with an application for a loan on mortgage, to gauge whether the opinions expressed by such witnesses are genuinely held and whether there is a sound basis for such opinions. On this particular point I am of opinion that the answers of all witnesses to paragraph 1 (f) of the Terms of Reference expressed the views on this subject honestly held by them.

The method of tendering evidence adopted by many witnesses was to read a written statement dealing generally with the desirability or otherwise of making action on the personal covenant in mortgages of land unlawful, or of imposing limitations on the right of the mortgagee to enforce such covenants. In many instances no attempt was made to deal specifically with the individual terms of reference. This did not prove a serious disadvantage, however, as the Terms of Reference are framed in such a way that the answer of a witness to one term necessarily indicates to some extent his attitude to one or more of the remaining terms. Whenever necessary, opportunity was taken to endeavour to ascertain the views of each witness on the individual Terms of Reference.

Owing to the difficulty that would be encountered in dealing with each Term of Reference taken separately and the unnecessary repetition of statement that would result, I intend to deal with the subject in a general manner. The difficulty of attempting to deal with each term of reference separately can be realised when it is seen that to answer paragraphs 1 (a) and 1 (b) of the Terms of Reference it is necessary to consider the questions raised by paragraphs 1 (c), 1 (d) and 1 (f). Therefore I shall set out below the general arguments advanced by witnesses in support of or in rebuttal of the propositions that the personal covenant should be made unlawful or that the rights of mortgagees thereunder should be limited and I shall then indicate the conclusions I have arrived at thereon. At the end of this report I shall indicate my findings in respect of the specific Terms of Reference.

Before outlining the arguments advanced by witnesses who advocated that the personal covenant should be made unlawful, or that limitations should be imposed on the right of the mortgagee thereunder, I think it advisable to refer to some mistaken impressions held by some of these witnesses.

Several witnesses appeared to be under a misapprehension as to the extent and nature of the remedy exercisable by a mortgagee under the personal covenant. Some appeared to think that the right to proceed against the mortgagor personally only arose after the mortgaged property had been realised and that it was only available to recover the balance of the debt outstanding. Others thought that the provisions of the Limitations Act had no application to a mortgage debt, whether a debt due to the Crown or not, and that lapse of time never operated in favour of a mortgagor. Another mistaken belief was that the mortgagee had a preferential right against all assets of a mortgagee whether the mortgaged assets or other assets, and that the claims of all other creditors were postponed in favour of a mortgagee, whereas in fact the mortgagee, outside the mortgaged asset, is in exactly the same position as an unsecured creditor, except that the mortgagee has a longer period in which to institute proceedings.

One statement by Mr. Walker, President of the Wheat and Woolgrowers' Union, which indicates some confusion of thought on the subject by some members of the farming community, was the following:—

"There seems to be the view amongst farmers that other sections of the community can obtain relief whereas they are not so fortunate. I refer to business dealings in other industries in the city. Farmers have the idea that the personal covenant follows them about and that they are perpetually liable, and this cramps their style when it comes to a question of starting out in some other walk of life. They say, "What is the use of breaking in another farm or attempting to do something else in trade or in business when this thing is hanging over us all the time."

The same witness also declared in effect that many farmers were under the impression that no relief against a mortgage debt could be obtained under Part XI. of the Bankruptcy Act. Some witnesses, and apparently many farmers, were also unaware that foreclosure of the mortgaged property extinguished the mortgage debt.

Another erroneous belief apparently widely held amongst the farming community was that the rural mortgagor was charged a higher rate of interest than was charged to other mortgagors. It was amply demonstrated by the evidence given that prior to interest rates

being pegged farmers who were indebted to any of the Associated Banks, or to almost any of the other lending institutions represented, were charged a lesser rate of interest than other mortgagors. In isolated cases farmers were charged the same rate of interest as were other mortgagors, but in no case was it stated that farmers were charged a higher rate.

The fact that these mistaken impressions are apparently widely shared by many farmers explains in part perhaps the hostility felt by some persons to the personal liability that attaches to a mortgagor under the personal covenant.

Arguments advanced in support of the contention that personal covenants in mortgages of land should be made unlawful or if permissible that limitations should be imposed on the right of the mortgagee to proceed thereon. (As will be indicated later, practically all witnesses who desired any alteration in the rights of a mortgagee under the personal covenant advocated a limitation of some sort in existing mortgages and total extinguishment of such right in future mortgages.)

- (1) The property to be mortgaged is the major, if not the only factor taken into consideration by a mortgagee when deciding whether he will make a loan, and, if so, the amount he is prepared to advance. As little or no reliance is placed on the personal covenant, credit will not be restricted if the liability of a mortgagor under the personal covenant is extinguished.
- (2) If lenders do attach any importance to the personal covenant in a mortgage they could achieve the same result without the personal covenant by entering into two separate transactions—a loan secured by mortgage for a safe proportion of the advance and the balance required either covered by collateral security or advanced as an unsecured loan.
- (3) A farmer or other person engaged in primary industry who has spent years of hard toil living under wretched conditions and who has lost his own capital, his health and virility, and failed through economic circumstances beyond his control, who has contributed materially to the development of the State, should be entitled to a clearance from his mortgage debt when the mortgaged property itself is made available to the mortgagee.
- (4) The liability under the personal covenant that attaches to a farmer who has failed prevents his rehabilitation. A farmer who is young enough and eager enough to start again in rural or other industry loses all incentive when he realises that any asset he builds up is at the mercy of a mortgagee. This is detrimental to the welfare of the State.
- (5) Some better form of relief than bankruptcy should be provided for rural mortgagors. There is a stigma attaching to a bankrupt and even after discharge his credit is affected.
- (6) In many cases, mortgagees will not compromise with the mortgagor who has pioneered the development of a farming property but will sell the property to an incoming settler at a figure far below the mortgage debt. This reduction or compromise should be given to the pioneer.
- (7) It is unjust and inequitable that a mortgagor alone should bear the brunt of any depreciation in value of a security when such depreciation is due to circumstances beyond the control of the mortgagor.
- (8) In rural mortgages excess money advanced beyond the value of the security should be borne by the mortgagee. The mortgaged asset should carry the whole debt irrespective of the financial standing and integrity of the borrower.
- (9) In the past, mortgagees have very seldom used the remedy given by the personal covenant, indicating that the remedy is of little benefit. Although it only benefits a few mortgagees, it hangs over and clouds the future of thousands of mortgagors.

- (10) The personal covenant constitutes a threat to the economic security of the mortgagor and his dependants. It prohibits future loans.
- (11) If mortgagees were unable to rely upon the remedy given by the personal covenant they would be forced to realise the security on abandonment by the mortgagor or when the mortgagor has been dispossessed. At present, mortgagees in many instances do not realise the security at the earliest opportunity as they rely upon the right to sue the mortgagor to recover the mortgage moneys. In the case of rural securities, depreciation after termination of occupancy is rapid and the debt owing by the mortgagor after belated realisation is consequently much greater than would otherwise be the case.
- (12) Many mortgagors were under the impression at the time the loan was made that the property alone was pledged for repayment of the debt and were unaware of their personal liability. Had they realised that they were personally liable to repay such loans they would not have borrowed so freely.
- (13) Even if credit is restricted this would be a good thing. In the past, money has been thrust upon farmers. Banks have competed for customers by offering larger loans to farmers than their competitors.
- (14) Finance would benefit if mortgagees were prevented from relying on the personal covenant. Its elimination would leave a clear-cut issue and both parties to a mortgage transaction would know where they stood.
- (15) Many farmers think the personal covenant follows them and that they are not able to obtain the same relief as is available to other mortgagors.
- (16) The personal equation (as distinct from the personal covenant) would still remain a factor to be considered by the mortgagee.
- (17) A mortgagee is in somewhat the same position as a shareholder and should stand the same risk of losing his investment.
- (18) Persons who wish to retain the personal covenant in a mortgage are opposed to reform and only interested in preserving the status quo. They are akin to the people who opposed reforms such as those that abolished the Debtors' Prison and the employment of child labour in mines and factories.

Witnesses who advanced the above arguments, or some of them, were not unanimous as to the class of mortgages to which they were to be applied. It will be noticed that many of the arguments apply almost solely to mortgages of rural lands. However, advocates of such arguments, although stressing that their knowledge and interests qualified them to speak particularly of mortgages of rural lands, generally submitted that in principle there should be no distinction in the treatment of mortgages of land other than rural land.

The only witnesses who proposed that the personal covenant should be made unlawful in all mortgages or that the right to proceed on the personal covenant should be extinguished in both existing and future mortgages were Mr. Leslie, M.L.A. (presenting the views of the Western Australian Branch of the Returned Sailors, Soldiers and Airmen's Imperial League of Australia), Mr. Powell (a representative of the Wheat and Woolgrowers' Union), and Mr. A. J. Fisher (Woolgrower of Waongerup). In addition, several farmers made a similar proposal in letters or written statements addressed to the Commission.

Witnesses who were of the opinion that the personal covenant should be unlawful in future mortgages and that limitations should be imposed on the right of the mortgagee to enforce such covenants in existing mortgages were Messrs. Broadbank, Walker and Rooke who all presented the views of the Wheat and Woolgrowers' Union, Mr. Watts, M.L.A., Mr. Threlfall and Mr. Vetter.

It will be seen that there is no clear-cut difference of opinion dividing the witnesses into two classes and two only. On the one hand there are the representatives of the lending institutions who are unanimous in their

opinion that the right of action on the personal covenant should remain unfettered in existing and future mortgages, whether given over rural or other lands. This view was held by all the witnesses who represented the Banks, the Life Assurance Societies, the Building Societies, the Trustee Companies, one of the Stock and Station Agents, Mortgage Brokers, and with a suggested slight amendment, the Real Estate Institute of W.A. and a Friendly Society. Mr. Godfrey, a practising Solicitor, was of the same opinion.

On the other hand are the representatives of some rural borrowers and the Returned Sailors, Soldiers and Airmen's League (who cannot be taken as representing any particular sectional interests), but amongst this group there is considerable difference of opinion as to whether the personal covenant should be unenforceable in both existing and future mortgages or future mortgages only with limitations imposed on the rights of mortgagees in the case of existing mortgages, and whether limitations imposed should be extended to collateral securities or guarantees.

Here it is appropriate to point out that witnesses who presented the views of an association, such as the Returned Sailors, Soldiers and Airmen's League, the Wheat and Woolgrowers' Union, and the Pastoralists' Association, were at times placed in a difficult position when asked to indicate the views of the association they represented on one or more of the particular Terms of Reference. In the case of the Returned Sailors, Soldiers and Airmen's League and the Wheat and Woolgrowers' Union, the view of each association was ascertained at conferences of delegates, which conferences were held prior to the Terms of Reference being framed. As a result, the question of the advisability or otherwise of abolishing the right of a mortgagee to sue on the personal covenant was dealt with without particular reference to such matters as, for instance, the provision, if any, that should be made in the case of collateral security or guarantees being taken to secure the repayment of money secured by a mortgage of land.

As to the motion carried by the Congress of the Wheat and Woolgrowers' Union (which motion urged the abolition of the personal covenant in all mortgages, past, present and future) it is interesting to note that three of the four representatives of the Union, after giving the matter detailed consideration, were of opinion that it would be impracticable to apply such a restriction to existing mortgages and were of opinion that if congress examined the question again they would be content to require limitations to be imposed in the case of existing mortgages and confine the abolition of the personal covenant to future mortgages. It is possible that if the question were re-examined by the congress of the Returned Sailors, Soldiers and Airmen's League in the light of the different considerations that can be applied to existing mortgages as opposed to future mortgages, congress might well see fit to differentiate between existing and future mortgages and perhaps advocate that limitations be imposed on the right of a mortgagee to proceed on the personal covenant in an existing mortgage rather than the extinguishment of such a right.

Amongst the witnesses who advocated that in existing mortgages limitations should be imposed on the right of a mortgagee to sue on the personal covenant, there was a difference of opinion as to the form that such limitation should take. Mr. Watts advocated that either the mortgagor or the mortgagee should be enabled to apply to a judge, or if the mortgage debt did not exceed £2,000 to a magistrate, and that a mortgagee should only be entitled to obtain leave to proceed on the personal covenant if the court was of opinion, firstly, that the mortgagee had exercised his remedies against the mortgaged land (other than foreclosure) to the best possible advantage, or had endeavoured so to do, and, secondly, that the default giving rise to the application was occasioned by or contributed to by reprehensible conduct or by gross inefficiency or mismanagement on the part of the mortgagor.

This proposal is substantially the same as that contained in a Bill introduced by Mr. Watts in the last session of Parliament entitled "The Personal Covenant Liability Limitation Bill," with the difference that the Bill was confined to mortgages of rural land. Mr.

Watts was of opinion that no consideration should be given to the relative financial positions of the mortgagor and mortgagee or to the question whether hardship would be occasioned to either party to the mortgage. The witness stated that in his opinion few mortgagees would be successful in an application for leave to proceed, although he pointed out that where property depreciated in value owing to the mortgagor failing to reasonably maintain such property the mortgagee would be able to obtain leave to proceed as to the whole or at least part of the balance outstanding.

However, in the case of the mortgagor of rural land (with whom Mr. Watts was mainly concerned) whose failure was due to economic circumstances beyond his control, a mortgagee would be unable to obtain the necessary leave.

The representatives of the Wheat and Woolgrowers' Union did not specify in detail the circumstances which, in their opinion, would justify the imposition of limitations on the right of the mortgagee to proceed on the personal covenant in existing mortgages, but proposed that a mortgagor of rural land who had made a substantial contribution to the welfare of the State over a lengthy period by reason of his farming activities and who had acted fairly should be relieved of liability. They considered, however, that the question of hardship to both the mortgagor and the mortgagee should be taken into consideration by the tribunal called upon to decide the question of whether the mortgagee should be permitted to proceed under the personal covenant.

Mr. Threlfall proposed that in existing mortgages the personal covenant should be void at the expiration of five years from the passing of the legislation required to effect the proposed change, or the expiration of five years from the forfeiture of the property or the ejection of the mortgagor therefrom, whichever period was earlier in date. Thus a mortgagor who abandoned the property in December, 1939, would have been freed of liability as from December, 1944, notwithstanding the fact that the proposed legislation was not then in force or even in contemplation.

The witness also proposed that in the case of a mortgagor still in possession of the mortgaged property, the mortgagor should have the option of annulling the personal covenant and replacing his obligation thereunder with an obligation to utilise all moneys advanced on the mortgage in developing, working and maintaining the mortgaged asset and utilising all income derived therefrom for the same purpose, reasonable living expenses of the mortgagor and his dependants being treated as working expenses. The mortgagee was to be given a right of action against the mortgagor for any loss or deficiency consequent upon contravention of this obligation and a right to proceed for restitution against any person knowingly receiving payment of moneys disposed of contrary to the obligations imposed on the mortgagor.

The attitude of the Pastoralists' Association (as stated by Mr. J. L. B. Weir) was that the mortgagor should be compelled to realise or attempt to realise the mortgaged property in the first instance before resorting to the remedy given by the personal covenant, and further, that a mortgagor should be empowered to apply to a tribunal for relief from liability under the personal covenant.

Mr. Hansen confined his suggestion to existing mortgages given by farmers over lands in what are now known as marginal areas, or given by farmers in areas adjacent to marginal areas whose properties have been adversely affected by their proximity to marginal areas.

The Primary Producers' Association of W.A. did not formally give evidence but a letter was forwarded by the General Secretary setting out the decision arrived at when branch delegates of the Association at the Annual Conference of 1944 discussed a motion in the following terms:—"That conference is emphatically of the opinion that the personal covenant clause should be abolished from all financial arrangements as it affects the farmer, as it is considered that mortgagees have other means of safeguarding their interests without the inclusion of the personal covenant." After discussion had revealed a wide difference of opinion amongst delegates as to the advisability or otherwise of this course,

a compromise was arrived at in the form of the following amendment, which was carried:—"This conference is emphatically of the opinion that the personal covenant clause should not operate after a period of twenty-four months from the date the mortgagor leaves the farm."

Mr. Sadleir, representing Elder, Smith and Co., Stock and Station Agents, suggested that a mortgagor should be empowered to apply for relief from liability on the personal covenant to some tribunal in time of individual adversity, and applied this proposal to both existing and future mortgages.

Messrs. Godfrey and Dudley, while advocating the retention of the right of a mortgagee to proceed on the personal covenant, made proposals for the partial restriction of that right in certain circumstances. Mr. Lappin also made a proposal to limit the right of the mortgagee in a certain direction. These proposals will be dealt with in more detail at a later stage of the report.

Arguments advanced in opposition to the proposal that the personal covenant be made unlawful or that limitations be imposed on the enforcement thereof.

- (1) Restriction of credit and a demand for higher security margins would result. Many applications for loans would be refused that otherwise would be granted.
- (2) The granting of seasonal advances would be restricted.
- (3) Confidence between lender and borrower would be destroyed, forcing the former to think only in terms of security value and place little or no reliance on the credit-worthiness of the borrower. Elasticity, which is a feature of banker-borrower relationship would be affected. It would be impracticable to grant temporary accommodation from time to time without lodgment of further cover.
- (4) There would be a drift of investment moneys from Western Australia to other States and the diversion of investment moneys that otherwise would have come to this State to other States. In this connection it is emphasised that Western Australia is in course of development and is in need of increased population and investment money to develop primary production, industries, home building, etc.
- (5) Less consideration would be shown to mortgagors in times of adversity. Advances would be called up more quickly than would otherwise be the case and less risk taken. Mortgagors would not get the same chance to retrieve an unfavourable position. Indulgence has been granted in the past on many occasions where tangible security did not warrant it, on prospects of the mortgagor's ultimate recovery and because of his liability under the personal covenant to pay in the future if his position justified it.
- (6) The free exchange of land would be restricted and the price of land would be depressed. Intending purchasers would be unable, in many cases, to borrow sufficient money to finance the purchase or effect the intended improvements, as, for instance, a dwelling-house.
- (7) Mortgagees would be compelled to advance on the basis of present value of the proposed security alone. This policy would limit, particularly in the case of a mortgage of rural land, advances made to develop property.
- (8) There is no valid reason to differentiate between debts secured by a mortgage of land and other debts.
- (9) Although the right of a mortgagee to proceed on the personal covenant is only used occasionally, there have been many cases where reliance on it has resulted in advances being made in times of hardship that otherwise would not have been made. It would be disastrous to many borrowers if lenders were forced to adopt a more conservative attitude not through the desire of lender or borrower but because of legislative restrictions.
- (10) The provisions of the Bankruptcy Act provide an avenue of escape for a mortgagor who has met with misfortune or failure.
- (11) A person who borrows money with the expectation of using it for personal gain should recognise a personal liability to repay. If successful, the borrower retains the profits. He should be prepared, if unsuccessful, to shoulder the loss.
- (12) The borrowing power enjoyed by a person of good repute would be lost. The only factor finally considered would be the value of the security. Advances would be restricted to so low a proportion that all personal factors such as honesty, ability and industry would become of relative unimportance. The sense of responsibility that personal liability imposes on a mortgagor would be lacking.
- (13) Lending institutions such as Banks with responsibilities to depositors and shareholders, Building Societies and Life Assurance Societies dealing with funds of members, Trustee Companies investing money held in trust for widows and infant beneficiaries are entitled to the best security obtainable and might have to consider whether investments should be placed in other avenues than on mortgage of land. If the personal covenant were made unlawful or limitations imposed on the right of the mortgagee to sue thereunder in the case of mortgages of rural land only, investors who desired to invest moneys on mortgage would tend to invest in mortgages where the personal covenant still remained a factor.
- (14) Guarantors, even if permitted to assume personal responsibility, would be unobtainable. In the past, thousands have obtained a start only through a guarantee given by some friend or relative. Persons who would succeed in the future if able to obtain similar assistance will never have the chance to start.
- (15) The personal covenant is valuable inasmuch as it enables a mortgagee to obtain payment when a mortgagor, at the time of default, has resources outside the mortgaged property. Action on the personal covenant provides a speedy and inexpensive method of recovery, whereas action directed against the mortgaged asset is long drawn out and expensive. In the case of arrears of interest or an instalment of principal, it is beneficial to both the mortgagee and mortgagor if recourse can be had to the mortgagor personally as it leaves the mortgagor with the mortgaged asset.
- (16) To apply any restriction or limitation of a mortgagee's right to sue on the personal covenant to existing mortgages would be unmoral and unjust. It must impose hardship and financial loss on many mortgagees, and Banks particularly would suffer financial loss owing to the practice, common in banking, of advancing more freely than the tangible security taken warrants because of reliance placed on the financial position of the borrower. Any retrospective operation would give rise to uneasiness in business dealings generally.
- (17) Any limitation imposed on the right of a mortgagee to enforce his remedy under the personal covenant, such as the necessity to obtain leave to proceed from a court or tribunal would have an effect similar to total extinguishment of the mortgagee's right to sue on the personal covenant. The effect would vary with the severity of the limitation.
- (18) There is no widespread demand for the extinguishment or restriction of the mortgagee's rights under the personal covenant. There is no evidence that mortgagors have suffered hardship through the operation of the personal covenant.

- (19) Interest rates might be increased. (On this last point I would remark that there was a considerable difference of opinion amongst representatives of lending bodies. The opinion of the majority seemed to be that interest rates would not increase. They considered that the tendency would be to lend less against a particular security thus eliminating any increased risk that would require an increased rate of interest.)

Observations on the arguments put forward and conclusions.

The most important issue raised, and the one with which I intend to deal first, is the question as to whether the extinguishment of the right of action on the personal covenant or the imposition of any effective limitation on such right would restrict credit and result in lenders demanding additional margin. On this point the conflict of opinion between those advocating and those opposing any interference with the right of a mortgagee to proceed against the mortgagor personally on default is most marked.

Witnesses who contended that no restriction of credit would follow the extinguishment of the mortgagee's right to proceed on the personal covenant advanced the following arguments in support of such contention:—

- (1) It has yet to be proved that mortgagees lend any more freely with the personal covenant than they would without it.
- (2) Competition would bring lenders into line again and offset any tendency to restrict credit.
- (3) If some lenders, for example, Banks, did restrict credit, other lenders, such as Stock Agents or in the last resort the Commonwealth or State Government, would replace them.
- (4) The provisions of the Farmers' Debts Adjustment Act did not restrict rural credit although it was predicted that such would be the case, as unsecured creditors had their claims drastically reduced.
- (5) Any restriction of credit that did ensue would be temporary and not permanent, such as resulted when Australia "compulsorily" reduced interest rates on bonds in 1931.
- (6) Bank Managers make loans when newly arrived in a district and when the applicants for such loans are almost unknown to them.
- (7) After the 1914-1918 war, people were encouraged to enter the primary producing field without regard to their financial position or knowledge of the industry.

Representatives of the Banks, the Life Assurance Societies, the Stock and Station Agents, Building Societies, Starr-Bovkett Societies, a Friendly Society, Trustee Companies, as well as a practising Solicitor and two Mortgage Brokers, were unanimous and emphatic that credit must be restricted and a greater margin required between the value of the security offered and the loan advanced thereon if the right of a mortgagee to proceed on the personal covenant is extinguished or fettered.

The opinion held by the members of the Pastoralists' Association was that extinguishment of the right to proceed on the personal covenant would restrict credit. Apparently some of the delegates to the 1944 Annual Conference of the Primary Producers' Association were of the same opinion.

Witnesses who contended that credit would be restricted and that higher security margins would be required if the mortgagee was prevented or hindered from exercising his remedy under the personal covenant emphasised that the general financial position of the mortgagor, the likelihood of him succeeding and thus becoming prosperous, the personal liability that attached to a mortgagor, and the knowledge of his personal responsibility were important factors in deciding whether a loan should be granted to the prospective borrower, and, if so, the amount that should be advanced. They claimed that the personal covenant enabled a mortgagee to place considerable reliance on the credit-worthiness of a borrower, and moreover that all his assets were

available to meet his default. Knowledge of this fact was present in the mind of the borrower and guided his conduct. It was the personal link or contact between the two parties, and as such was relied on by lenders to a considerable extent. Many witnesses stated that the personal factor was the primary consideration and that the value of the tangible security offered was of secondary importance.

As to the arguments that it has yet to be proved that mortgagees lend any more freely with the personal covenant than they would without it, I would point out that at the present time a person desirous of borrowing money on mortgage is at liberty to stipulate that he shall not be made personally liable to repay the borrowed money if any mortgagee can be found to make an advance on such terms. The fact that in practically every mortgage the personal covenant is included indicates that mortgagees generally place reliance thereon and from this it is a fair inference that mortgagees do lend more freely because of the personal covenant.

The suggestion made by some witnesses that the factor of competition would counteract any tendency to restrict credit is resisted by the representatives of lending institutions giving evidence before the Commission and a spokesman for Stock and Station Agents rebutted the statement by a witness that if Banks showed any tendency to vacate the field of investment on mortgage of rural lands Stock and Station Agents would step in. At the present time these companies do not invest to any great extent on mortgage of farming lands. I do not consider that competition would offset any tendency on the part of investors to restrict credit. No mortgagee is going to take what he considers is an unjustified risk merely because mortgage money happens to be in short demand. If the risk is too great he will turn to some other form of investment. Nor can it be said with any certainty that the State or Commonwealth Government would completely fill the gap caused by private lending institutions restricting credit. Mr. Reid, Under Treasurer, suggests difficulties that might be encountered insofar as the State Government is concerned, and his evidence is dealt with in greater detail at a later stage. It must be remembered, too, that neither private lending institutions nor government instrumentalities would be anxious to accept a second mortgage as security if the mortgagor was forced to turn to more than one source to obtain the necessary finance.

It is no doubt true, as stated by some witnesses, that bank managers newly arrived in a district made loans to individuals on occasions who were almost unknown to them personally, but this fact cannot be accepted as evidence that the banker attached no importance to the personal liability of the mortgagor, whilst the argument that after the 1914-1918 war people were encouraged to enter the primary producing field without regard to their financial position can be applied only to persons who borrowed from Government instrumentalities, such as the Agricultural Bank. Considerations other than the desire to obtain interest on investments can be applied to such advances.

The assertion that any tendency to restrict credit would only be of temporary duration is one with which the representatives of lending institutions did not agree. The arguments that no restriction of credit followed the introduction of the Farmers' Debts Adjustment Act, which drastically reduced the claims of unsecured creditors, and that the restriction of credit that followed the "compulsory" reduction of the interest rate on Australian Bonds in 1931 was only temporary, appear to me to overlook the fact that in the first instance the benefit of the legislation was made available only to mortgagors who were in distressed circumstances, and in the second instance that the reduction of the interest rate (which purported to be optional and not compulsory) occurred at a time of, and was directly attributable to, a world wide financial crisis.

In an endeavour to ascertain whether the statements of persons representing lending institutions on the question of the importance attached by them to the personal covenant were borne out by present practice, I questioned such witnesses as to the factors now considered when dealing with loans, and the information obtained from applicants for such loans. The answers given indicate that it is universal practice to ascertain the

general financial position of an applicant for a loan, many witnesses taking a Statement of Assets and Liabilities from the applicant.

It appeared to be the practice of all lenders, except in certain isolated cases, to require a husband to join in a mortgage to secure payment of a loan to his wife (who in the ordinary course would have no separate income), or to guarantee the repayment of such a loan. In the case of a loan to a company, practically all witnesses asked stated that they were in the habit of requiring a guarantee from the directors or main shareholders.

Lenders whose policy it was to permit a mortgagor to transfer a property subject to the mortgage invariably required the purchaser from the mortgagor to execute a Deed of Covenant.

Lenders were also unanimous, with the exception of a Building Society representative, that a mortgagor with substantial assets outside a proffered security would obtain a larger loan on mortgage than would a mortgagor who proffered security of equal value but who had no other substantial assets, other personal factors being equal. The representative of the Building Society stated that the Society was more concerned with the income of an applicant for a loan than the value of his other assets.

There was some difference of opinion amongst representatives of lending institutions as to what reliance would be placed on personal factors such as honesty, ability and industry in the event of the right of a mortgagee to proceed on the personal covenant being abolished or restricted. The general opinion appeared to be that such factors would still retain considerable importance, particularly where the security was rural land. The general viewpoint appeared to be that in determining the amount of an advance less reliance would be placed on such factors, but as a factor in maintaining the asset more reliance would be placed thereon and this seems to me to be the logical result.

In view of the evidence as to the present practice of lending institutions when arranging loans as set out above, and in view of the clear and unequivocal evidence of all representatives of lending institutions that credit would definitely be restricted, I am convinced that the elimination of the right of a mortgagee to proceed on the personal covenant or any effective limitation imposed thereon would restrict credit. In coming to this decision I am influenced by statements such as those made by Mr. Fitzhardinge, Inspector of the Bank of New South Wales, and Mr. MacKenzie, Manager of the National Bank of Australasia. Mr. Fitzhardinge said, "I have very wide powers in Western Australia and am never questioned as to advances except very big ones, and I would want more security. This would curtail advances, because many would come along that would not have sufficient security, but who would get through in the past." Mr. MacKenzie said, "My powers here are wide and I deal with applications as they come before me. I decide whether to agree or disagree to the recommendations of my branch manager or some other executive officer with regard to applications." The same witness said, "Without the personal covenant a man would not get as high an advance as he would otherwise."

Statements such as these and similar statements made by the persons in control of the lending policy of other leading financial institutions in this State cannot be ignored or dismissed lightly. It is obvious that if all the Associated Banks, the Rural Bank, practically all Life Insurance Companies, most of the Stock Companies, the Trustee Companies and the Building Societies hold this opinion then credit must be restricted.

It will be as well at this point to set out the impressions gained by me when making personal investigation in New South Wales into the consequences that followed legislative enactments affecting the right of a mortgagee to proceed on the personal covenant. I will commence by giving a brief outline of

the legislative changes made during the relevant period, affecting the right of a mortgagee to proceed on the personal covenant.

In October, 1931, the Moratorium (Amendment) Act, 1931, was passed in New South Wales and provided, *inter alia*, that a mortgagee should not proceed by action to enforce his remedy under the personal covenant upon default in payment by the mortgagor. At this time, measures similar in substance to the provisions of the Mortgagees' Rights Restriction Act in this State were in operation in New South Wales but the Act of October, 1931, had a much wider effect. It prohibited a mortgagee from proceeding on the personal covenant irrespective of the financial position of the parties to the mortgage. This Act did not extinguish the right of the mortgagee to sue but was apparently intended to suspend the remedy.

By the Moratorium and Interest Reduction (Amendment) Act, 1931, passed in December, 1931, a vital change was made. The right of a mortgagee to sue on the personal covenant was extinguished for all time.

In December, 1932, after a change of Government had occurred, the Moratorium Act, 1932, was passed. This Act provided briefly, and with some minor exceptions, that the personal covenant should not be restored in existing mortgages except where a mortgagor by separate acknowledgment made before an independent witness voluntarily confirmed the personal covenant after his position had been clearly explained.

As to mortgages given after the commencement of the 1932 Act, it was provided that no action should be commenced by the mortgagee for payment of any principal moneys or interest thereon unless the mortgage contained an express covenant for such payment and unless the knowledge and approval of the mortgagor to the insertion of the covenant was evidenced by certificate signed as provided by the Act. In effect, the mortgagor only became bound when he expressly agreed to be bound and he was separately advised as to his liability under the personal covenant by an independent witness. It will be seen that mortgagors incurred no personal liability in mortgages executed within a very limited period, although liability under the personal covenant in mortgages executed prior to the commencement of the Moratorium Act, 1932, was not revived except where the mortgagor voluntarily agreed to such revival.

Before I visited New South Wales, I was fully aware that it would be difficult, if not impossible, to ascertain with certainty the effect on credit and mortgage investments of the Acts of October, 1931, and December, 1931. At the time these Acts were passed, New South Wales, in common with other parts of the world, was in the depth of a depression, certain other enactments of the then Government had an unsettling effect on investors generally, a period of fourteen years since the repeal of the relevant legislation had elapsed and the restrictive legislation was in force for a comparatively short period. Finally, moratorium provisions had interfered with the natural turnover in mortgage securities so that money very often could not be got in to re-invest.

I interviewed the President and a Vice-President of the Law Institute, the Registrar General, other Government officials, leading conveyancing practitioners, and representatives of Banks and Trustee Companies. Every assistance was rendered me and I take this opportunity to express my appreciation for the valuable and ready assistance given.

Those interviewed agreed that it was not possible to say with certainty just how much the provisions of the Moratorium (Amendment) Act, 1931, and the Moratorium and Interest Reduction (Amendment) Act, 1931, contributed to the great restriction of credit that was apparent at the time. Practically all the witnesses agreed that the provisions of these Statutes had some effect thereon, and a majority of the witnesses stated that they had considerable effect.

Some facts were apparent. For instance, there is no doubt that this legislation which prevented a mortgagee from taking action on the personal covenant in an existing mortgage, caused great injustice and a financial

hardship to many mortgagees. Many mortgagees who had advanced in reliance on the general financial position of a mortgagor or who had granted indulgence to a mortgagor for the same reason lost considerably. Some were ruined. Very often the small investor was penalised for the benefit of a mortgagor who was a wealthy man. These facts are beyond dispute and they fortify me in my opinion that any retrospective legislation that would grant effective exemption from liability on the personal covenant to a large body of mortgagors must result in financial loss and perhaps economic disaster to many mortgagees.

Another undoubted fact that emerged is that, since the enactment of the legislation of 1931 heretofore referred to, second mortgages have almost disappeared from the register book. Only on very rare occasions, I am assured, is a second mortgage registered.

At the same time, private mortgagees have decreased very greatly in number. It would seem that practically all mortgage investing is now in the hands of lending institutions such as Banks, Building Societies, Trustee Companies, and Life Assurance Societies. The reasons for these changes cannot be ascertained with certainty but a view widely held is that private investors were driven from the field through the unsettling effect of the 1931 legislation. Some were ruined, particularly holders of second mortgages; others suffered financially to some extent, and many who then forsook this form of investment never returned to the field despite the subsequent alteration in the law.

Figures are set out hereunder showing the reduction that occurred in the number of mortgages registered over a period in the Land Titles Office. It cannot be inferred, of course, that the fluctuation can be attributed directly to the legislative changes made in the rights of a mortgagee to resort to action on the personal covenant.

Year.	Mortgages.	Consideration.
1930	36,402	35 million pounds (approx.)
1931	18,959	18 " " "
1932	14,557	8 " " "
1933	20,503	9 " " "
1934	23,314	15 " " "

Representatives of Banks and Trustee Companies stated definitely that the effect of the Moratorium (Amendment) Act, 1931, and the Moratorium and Interest Reduction (Amendment) Act, 1931, was to greatly restrict the investment of money on mortgage.

In the case of the Banks, investment on mortgage continued but greater margin was required and loans were not made so freely.

In the case of Trustee Companies, investment on mortgage ceased entirely, these institutions having been advised that a mortgage in which the personal covenant was excluded as a factor was not a proper trustee security. This opinion was apparently based on a decision of Simpson, C. J. in *In re Smiths' Trusts* reported in 5 New South Wales State Reports at page 500. I was informed that it was possible that if provision had been made to ensure that such an investment could be regarded as an authorised trustee investment the Trustee Companies might have recommenced investing on mortgage without the personal covenant. My informant was emphatic, however, that credit would have been on a restricted scale and that more margin would have been demanded of a prospective mortgagor.

Bankers contended also that there was a definite drift of money from the State into the neighbouring States of Victoria and Queensland. Here again it cannot be stated with certainty that such a drift was the result of the legislative bar imposed on the mortgagee's remedies, although quite a number of those interviewed expressed the conviction that this legislative bar was a material factor.

The figures shown in the following table set out the totals (in millions) of moneys held by the Australian Trading Banks in New South Wales and Victoria for the period October, 1929, to September, 1933, inclusive. It will be noted that over this period there was a decrease in deposits in the former State and an increase in deposits in the latter State.

TRADING BANK DEPOSITS.

Australian Trading Banks.
(including A.B.C., Ltd. until amalgamation with B.N.S.W., also Bank of New Zealand).

	New South Wales.			Victoria.		
	Bearing Interest.	Not bearing Interest.	Total.	Bearing Interest.	Not bearing Interest.	Total.
	£m.	£m.	£m.	£m.	£m.	£m.
1929—						
IV.	68·4	42·1	110·5	65·1	27·8	92·9
1930—						
I.	67·9	42·9	110·8	63·0	27·3	90·3
II.	68·9	41·2	110·1	62·5	24·7	87·2
III.	69·7	37·8	107·5	62·6	22·8	85·4
IV.	68·5	38·0	106·5	62·6	22·9	85·5
1931—						
I.	67·1	37·1	104·2	63·2	24·2	87·4
II.	64·4	35·4	99·8	66·5	23·6	90·1
III.	61·9	33·8	95·7	67·8	22·5	90·3
IV.	60·1	36·6	96·7	71·6	26·5	98·1
1932—						
I.	59·7	37·9	97·6	70·3	28·8	101·1
II.	56·0	35·3	91·3	83·7	27·8	111·5
III.	56·9	33·5	90·4	78·9	25·6	104·5
IV.	59·1	35·0	94·1	77·3	27·7	105·0
1933—						
I.	59·6	36·8	96·4	76·8	28·0	104·8
II.	59·0	36·7	95·7	76·1	27·8	103·9
III.	58·1	35·4	93·5	74·5	25·8	100·3

One other fact that emerged clearly during the course of my investigations in New South Wales is that the personal covenant is included in practically every mortgage executed since the Moratorium Act, 1932, came into operation. In practically every case the mortgagor has expressed his willingness to be personally bound to repay the principal money borrowed and the interest thereon, and the requirement of a certificate from a duly authorised independent witness certifying that the mortgagor agreed to be so bound has become a formality. In other words, mortgagees insist upon, and mortgagors submit to, the inclusion of the clause that makes the mortgagor personally liable.

The requirement of an express acknowledgment by the mortgagor in the presence of an independent witness of his willingness to be bound by the personal covenant has in my view one thing, and one thing only, to recommend it, namely, that a mortgagor would then be under no misapprehension as to the personal nature of his responsibility.

The witness (who cannot be the solicitor or conveyancer acting for the mortgagee) is required to certify that the mortgagor knew the effect of and approved of the insertion in the mortgage of the covenant to pay the principal and interest moneys.

A similar requirement introduced in this State, that is a certificate from an independent witness that the mortgagor knew the effect of and approved of the insertion in the mortgage of the personal covenant would prevent a mortgagor signing a mortgage in ignorance of the true nature of his obligation, and from this aspect would be, in my opinion, a desirable reform. The objection to such a course is the fact that a mortgagor would be involved in additional expense. To ensure that the mortgagor was competently advised as to his liability, it would be necessary to restrict authorised witnesses to members of the legal profession and naturally the performance of such a service as explaining to a mortgagor the full extent of his obligations would merit a fee. In New South Wales the fee usually charged for such a service is ten shillings and sixpence. I do not consider that mortgagors would welcome such compulsory enlightenment, whether required or not, at the cost of ten shillings and sixpence each time.

I would summarise the impressions gained by me in New South Wales as to the effects of the legislation that extinguished the right of the mortgagee to proceed on the personal covenant as follows:—

- (1) Extinction of the personal liability of the mortgagor to pay principal money and interest in existing mortgages caused financial disaster to many mortgagees and worked unjustly to the detriment of many other mortgagees, particularly banking institutions.

- (2) It contributed materially to the restriction of credit that occurred at that period and appears to have driven many private investors permanently from the field of mortgage investment, and particularly from the field of second mortgage investments.
- (3) It probably contributed materially to the drift of money from New South Wales to neighbouring States.

I am also convinced that any provision that exempted a mortgagor from personal liability unless such mortgagor expressly accepted such liability would be useless as a measure of protection to mortgagors and would result in such acceptance being undertaken as a matter of course, thus becoming a meaningless formality.

These impressions as to what did happen when the experiment was tried of relieving the mortgagor from personal liability to pay principal money and interest support the contention of those who predict that similar results would follow the introduction of similar legislation in this State.

The extent to which credit would be restricted if limitations were imposed on the enforcement of the personal covenant depends to a great extent upon the relative severity of the limitations imposed. But unless the limitation on the right of the mortgagee to proceed is sufficiently drastic to enable it to be applied to the great majority of mortgagors, it would fail of its purpose and would not meet the desire of those who advocate the necessity for a change.

As indicated earlier, the only advocates for imposing limitations on, as opposed to extinguishment of, the right of the mortgagee to proceed on the personal covenant in future mortgages were Mr. Weir, the representative of the Pastoralists' Association, and Mr. Saddleir of Elder, Smith and Co. Neither witness had any concrete suggestion as to the form such limitation should take and both were of opinion that the complete elimination of the right of the mortgagee to proceed on the personal covenant would restrict credit.

Witnesses who favoured imposing a limitation on the right of mortgagees to enforce the personal covenant in existing mortgages differed, as stated earlier, as to the form such limitation should take. However, witnesses who were asked to express an opinion on the effect on credit of the Bill introduced by Mr. Watts in the last session of Parliament, namely, the Personal Covenant Liability Limitation Bill, if applied to future mortgages, expressed the view that a limitation such as that contained in the Bill would deprive the great majority of mortgagees of the right to proceed on the personal covenant and would therefore restrict credit. With this contention I agree. The proposals put forward by the representatives of the Wheat and Wool-growers' Union were nebulous, but so far as I could understand them I am of opinion that such proposals if applied to future mortgages would also have a drastic effect on credit. The suggestion of Mr. Threlfall I consider impracticable and one that in its entirety would not be welcomed by mortgagors generally. I would emphasise again that none of these witnesses suggested that limitations should be imposed on the right of a mortgagee to proceed on the personal covenant in future mortgages. All desired the extinguishment of such a right. I do not consider that any of these proposals could be applied with advantage to future mortgages.

I consider that any restriction on the right of a mortgagee to proceed under the personal covenant would restrict the credit of pastoralists to an even greater degree than would be the case with other mortgagors. As contended by Mr. Cameron, Manager of Dalgety and Co. Limited, the value of the mortgaged property in the case of a loan to a pastoralist, that is the leasehold interest of the pastoralist in the land on which his industry is conducted, is not commensurate in many cases with the amount of the loan advanced. Such loans, moreover, are exposed to more than ordinary risks owing to the vagaries of the season playing such a vital part in the conduct of the pastoral industry. Restriction of the right to proceed under the personal covenant would result in many cases in pastoralists being unable to obtain sufficient finance to commence operations or to continue same during a long continued period of adversity.

I believe, too, that mortgagors of rural land would suffer more from any tendency of lending institutions to restrict credit than would mortgagors of other lands. It appeared to be the general opinion of witnesses that rural land was subject to more violent fluctuations in value than suburban or city lands, owing to changing economic prices for primary products, drought and other adverse conditions that occur from time to time. For these reasons, I am of opinion that larger margins would be required in many cases with rural borrowers although there would, of course, be exceptions to this rule, and the difference would be less marked in what are recognised as safe farming districts.

If restriction of credit and a demand for a greater margin of security did result from the extinguishment of, or any limitation imposed on, the right of the mortgagee to proceed on the personal covenant, as I consider would happen, then many other consequences would inevitably ensue. Seasonal advances would be harder to obtain, less consideration would be shown to mortgagors in time of adversity, resulting in less opportunity to recover from temporary setbacks, advances would be made more on the present value of the mortgaged asset without so much regard being paid to the value of future improvements and developments. Dealings in land would be restricted to some extent.

That many mortgagors of rural or pastoral lands have been carried on in the past and assisted with further loans when the tangible security held was not sufficient to warrant such further advances has been amply demonstrated by the evidence given by representatives of Banks, Life Assurance Societies, and Stock and Station Agents.

Mr. Ball, who gave evidence on behalf of the Australian Mutual Provident Society, tendered details of specific instances where it was demonstrated that mortgagors were carried on for years when the value of the tangible assets held by the Society was less than the amount of the mortgage indebtedness. Ultimately, these mortgagors attained a favourable financial position. Other witnesses gave evidence that such cases were comparatively numerous. All stressed the point that without the reliance placed on the personal covenant, with the consequent obligation imposed on the mortgagor to pay when able, such liberal financial assistance and forbearance would not have been forthcoming. It is impossible to avoid the conclusion that many mortgagors who would otherwise be enabled to recover from a temporary reverse would fail as a result of restriction of credit.

In the case of mortgages of suburban lands, any restriction of credit at the present time would be particularly unfortunate. There is no doubt that when building restrictions are relaxed many thousands of people are hopeful of purchasing or building a dwelling house. Restriction of credit must delay the fulfilment of these plans in numerous cases as prospective home owners would require to finance a larger proportion of the cost than would otherwise be the case. This would entail a longer period of saving. It is a safe assumption that a majority of houses when newly erected are saddled with two mortgages, the first mortgage often being for a fixed term, and the second, and smaller mortgage, being a reducible mortgage. The margin between the total indebtedness and the value of the mortgaged property, is at the commencement comparatively small in many cases, and as witnesses have stressed, the personal covenant is particularly important to a second mortgage. For this reason, any restriction of credit would make home-financing more difficult.

Practically every witness who represented a lending institution expressed the opinion that any restriction on the right of a mortgagee under the personal covenant would result in a drift of investment moneys from Western Australia to other States and the diversion of investment moneys to other States that otherwise would have come to this State.

It was argued that many persons who otherwise would be accommodated would be refused accommodation and that the big lending institutions, almost all of which are represented in all the Australian States, would invest more of the funds available for investment in States where the security offered was more favourable. Witnesses such as Mr. Fitzhardinge,

whose opinion on such a matter cannot be treated lightly, believed that this result would follow. It would seem to me to be a logical result of the elimination from a lender's consideration of what I judge to be a material factor. The extent of such a drift is impossible to predict, but any such movement, whether very appreciable or not, would be unfortunate for the future welfare and development of the State.

Mr. Reid, Under Treasurer, instanced what he considered would be a possible result of any restriction on the rights of a mortgagee under the personal covenant, insofar as the credit of the State or its people would be affected. Mr. Reid based his reasoning on the assumption that private lending institutions would restrict credit, and as I have already stated I believe this course would result. Briefly stated, Mr. Reid's submission is that the State would be required to make more finance available than heretofore to persons engaged in industry and might be unable to cope with the situation for the following reasons:—As a result of the increased demand on Government loan moneys, the Government would have to endeavour to increase its loan raisings. Since the commencement of the Financial Agreements the State raises loan moneys through the Loan Council. The procedure followed is for the various Governments to submit at a meeting of the Loan Council applications for the amount they desire to borrow. The Council considers the applications and if satisfied that the total amount may be borrowed at a reasonable rate of interest it proceeds through the Commonwealth Treasury and the Commonwealth Bank to float a loan.

If the Loan Council considers that the amount required by the various Governments is in excess of the amount which the market can provide (and in the experience of the witness the Loan Council has never agreed to the requests of the States in their entirety) resort is had to what is known as "the formula." The Commonwealth under this "formula" is entitled to one-fifth of the total amount to be raised (this share does not include amounts required by the Commonwealth for defence purposes), and the States are entitled to the proportion of the total amount to be raised—after the Commonwealth's share—equal to the proportion which their loan expenditure over the preceding five years bears to the total loan expenditure of all the States for the same period. Because of this method of allocation, it might be impossible to obtain any increase to meet the increased demand, more particularly if other State Governments were of opinion that the need for the larger loan allocation was due to the adoption of a policy peculiar to one State.

Mr. Reid also suggested a second way in which the financial position of the State might be adversely affected by any change, as follows:—"If losses arising from advancing loan moneys by the State increased, the burden on the States consolidated revenue budget would increase and the State Government might find itself in the position of having to finance a fairly large deficit. Western Australia is at present a claimant State under the provisions of the Commonwealth Grants Commission Act, 1933. The Grants Commission, which is the body appointed to hear claims by States for Commonwealth assistance under section 90 of the Constitution Act, has laid down well recognised principles which it follows in measuring the amounts recommended by it to the Commonwealth Government for payment to the claimant States. In very rough outline these principles are that a claimant State must be taxing itself up to the average of the non-claimant States; it must be exercising economy in expenditure; and its losses on borrowed money should not be in excess of the average losses suffered by the non-claimant States. Having regard to these principles, the Grants Commission then recommends an amount to be paid sufficient to bring the budgetary position of the claimant States up to equality with the budgetary position of the non-claimant States. So far as this State is concerned, per head of population our loan losses are above the average of the States of Australia and on this account the amounts of the grants which we otherwise would have received under the recommendation of the Grants Commission have been reduced. In effect,

we have to suffer a penalty because of these excessive loan losses. If, on account of special legislation affecting mortgages, the State's loan losses increased, the penalty would of course automatically increase and the State would be left with part of the deficit not recouped to it under the recommendation of the Grants Commission. If this condition continued for many years, the State would find itself with a heavy burden of debt incurred to finance revenue deficits, and in the absence of increased taxation to meet the debt charges thereon would find itself in a difficult financial position."

The reasoning of Mr. Reid is supported by the opinion of economic experts with whom I discussed the matter in the Eastern States, and appears to me to be a likely consequence if the assumption that credit will be restricted is accepted.

Having expressed my conviction that the extinguishment of, or the imposition of a limitation on, the right of a mortgagee to proceed on the personal covenant will restrict the amount that would be advanced against any particular asset, I now turn to the argument advanced that any restriction of credit could be avoided by two separate transactions, part of the required advance being made on mortgage, within a safe margin of the value of the mortgaged asset, and the balance being secured separately on other assets or even being unsecured.

In this way, many mortgagors, no doubt, would be able to obtain as much or almost as much credit as could be obtained under existing conditions. Such a course, however, would have many disadvantages. If portion of the loan were made on security other than the mortgaged property, or unsecured, the lender would perhaps require a higher rate of interest on such portion of the loan. Moreover, flexibility would be lost. A mortgagor who, because of some temporary setback, or to effect further improvements, required further temporary accommodation, would be forced to lodge additional cover in many cases for what would have to constitute a separate loan.

The free and unrestricted use of the property or asset comprised in any separate security would be lost to the borrower at the inception of the loan and not at the time of default which would otherwise be the case. The credit-worthiness of a borrower would change from day to day as the value of his assets rose or fell.

Lenders would have two separate sets of transactions to consider and disputes might arise as to the account on which further moneys were advanced. Borrowers who were not in a position to put up other security would be penalised and some of the value that lenders attach to the personal covenant, namely, the sense of responsibility engendered in borrowers and the reliance placed on the future prospects of success would be lost to such borrowers.

Finally, the change would not benefit borrowers to any appreciable extent. If a borrower has given separate security over his other assets he will lose them if he fails financially. In the same way his unsecured assets will be available in execution for the portion of the loan not secured by the mortgage instrument.

It is pertinent here to note that if liability on the personal covenant was extinguished, unsecured creditors would be placed in a better position in some respects than secured creditors. So long as the debtor was able to pay all his debts the unsecured creditor would receive payment in full whereas the secured creditor would suffer loss if the mortgaged asset provided insufficient on realisation to meet the mortgage debt. This in spite of the fact that the profit made by the secured creditor (that is, the interest) is generally much lower than that made by an unsecured creditor whose claim arises through the supply of some commodity to the debtor.

It is true that if the assets of the debtor prove to be insufficient to meet all his liabilities the secured creditor may be placed in the more advantageous position by reason of his right of priority of payment out of the mortgaged asset. However, if the debtor is insolvent any restriction on the right of the secured creditor to resort to assets outside the mortgaged asset will not benefit the debtor financially.

Dealing particularly with the question of whether the personal covenant should be extinguished in existing mortgages or whether limitations should be imposed on

the exercise of the mortgagee's rights thereunder, I consider it beyond doubt that any interference with the right of a mortgagee to enforce the personal covenant in existing mortgages on the lines suggested by Mr. Watts, representatives of the Wheat and Woolgrowers' Union, or Mr. Threlfall, would cause serious financial loss and injustice to many mortgagees. These witnesses, when asked whether financial loss and injustice might not be occasioned to some mortgagees by interference with the mortgagee's rights in existing mortgages, expressed the opinion that no such result would occur. Their views in this respect were based upon their undoubted belief that mortgagees in the past had placed little or no reliance on the personal covenant but had made advances in reliance on the security only and the personal equation, by which was meant such attributes as honesty, ability and industry.

Believing as I do that the witnesses were under a misapprehension as to the factors taken into consideration by lenders when estimating the amount to be advanced on mortgage, I believe that they were also in error in their belief that mortgagees would be unlikely to suffer financial loss and injustice if unable to rely on the remedy given by the personal covenant.

Representatives of all the Associated Banks stated that it is common banking practice to advance to men of good financial standing sums larger than would be warranted by the tangible security taken on mortgage. Such advances have been made in definite reliance on the financial standing of the borrower and the right of the lender, under the personal covenant, to have recourse to all the assets of the borrower to obtain payment. Although this practice is not so prevalent amongst lending institutions other than banks, many cited instances where, although the original advance was fairly well covered by tangible security taken, further advances made to tide mortgagors over times of adversity had taken the debt beyond a figure warranted by tangible security alone.

There is no question that many mortgagors if relieved from personal liability would be enabled to leave the mortgagee lamenting. To expect them all to act otherwise would be expecting too much of human nature. Bearing in mind the fact that practically all mortgages held by the Associated Banks are repayable on demand and the likely reaction of these financial institutions to any legislation which deprived mortgagees of the benefit of the personal covenant in existing mortgages, I consider that such legislation would seriously embarrass many mortgagors, who would be faced with a demand for immediate reduction of the mortgage indebtedness or be required to lodge additional security.

At this stage it might be advisable to deal with the attitude of witnesses on the question of whether any limitations imposed on a mortgagee should be applied to other securities executed by the mortgagor to secure the same moneys, and the question of the provision, if any, that should be made in the case of guarantors.

Most of the witnesses who expressed any opinion on the point (not all were prepared to do so) advocated that any restriction or limitation placed on the right of a mortgagee to proceed on the personal covenant in a future mortgage should extend to any collateral security or any general lien or other security given by the mortgagor. These witnesses were of the opinion, which is the opinion I hold myself on the question, that if such restriction or limitation were not extended to prevent a mortgagor incurring personal liability for the loan by the execution of some other form of security, the practice would arise of obtaining such other security as a matter of course, thus avoiding the alleged benefit of the proposed change.

There is no doubt that any mortgagor who wanted to borrow money would willingly contract out if the opportunity existed and the mortgagee insisted upon such a course. The mortgagor who could offer separate tangible security would, of course, still be able in one sense to avoid the provision against contracting out by splitting the loan and placing his other assets within reach of the mortgagee for part of the loan. It would be impossible, in my view, to prevent this practice.

As to existing mortgages, those witnesses who desired to restrict the right of a mortgagee to proceed on the personal covenant were generally in favour of applying such restriction to other securities given by the mortgagor to secure the same money.

Witnesses were not unanimous as to what provision should be made in the case of guarantors if limitations were imposed on the right of a mortgagee to enforce the personal covenant. Some thought that, as to existing mortgages, the guarantor should be entitled to the same relief as the mortgagor. Others were of the opinion that inasmuch as the existence of a guarantee would indicate that the mortgagee considered the mortgaged property insufficient cover for the debt, any legislation that limited the right of the mortgagee to proceed against the guarantor would be likely to result in financial loss to the mortgagee and would be unjust.

As to future mortgages, practically all witnesses agreed that to be effective and to prevent the object of any restrictive legislation being defeated any limitation applied to mortgages must be applied to guarantors. It was pointed out, however, by some witnesses, that if mortgagors were not to be personally liable to repay a mortgage debt, then guarantors would be difficult to obtain if the guarantor was to be personally liable or not.

As was pointed out by witnesses, the questions raised by paragraph 1 (c) of the Terms of Reference indicate to some extent the difficulties to be met and the factors to be considered in attempting to relieve a mortgagor from personal liability to pay a debt. It is inevitable that any such alteration will conflict at some point or points with the general system of law. As I am of opinion that no limitation should be imposed on the right of a mortgagee to proceed on the personal covenant, it is unnecessary, and in fact without contemplating a particular limitation, impossible, to answer this particular Term of Reference.

Some witnesses have urged that restriction of credit would be beneficial to mortgagors generally, basing this opinion on the contention that, in the past, money has been too easily obtained by farmers on mortgage. They allege that banks have thrust money on farmers and competed for loans by offering larger advances than their competitors. Such witnesses when questioned further have generally confined the period when this over-extension of credit is alleged to have occurred to the years 1920-1929 and concede that the practice has not been current since the latter date.

Whatever the justification for the allegation, the fact that the practice was alleged to exist only for a short period in the somewhat distant past affords no ground for the contention that restriction of credit would be beneficial in the future, nor does it appear to lend much support to the proposition that in future mortgages the right to proceed on the personal covenant should be abolished. It seems to me that in the majority of cases where farmers have incurred unnecessary expenditure in the past such expenditure has been mainly on items such as expensive farm machinery, and such indebtedness was not usually secured by a mortgage of land.

No specific instance of a mortgagor being induced to borrow more money than he required was cited despite my request to be supplied with details of any particular transaction.

Mr. Powell, a representative of the Wheat and Woolgrowers' Union, contended on the other hand that the personal covenant was unnecessary in mortgages of agricultural land as the lender, even in the most favourable cases, advanced only to 60 per cent. of the general market value of the land. He further stated that "in the early stages of farm development, which are always the most strenuous in both agriculture and horticulture, the fact of being able to work even in the most favourable cases on only 60 per cent. of the value of the property is a severe handicap to the struggling farmer." If this statement is correct, and I have no reason to doubt that it is, it seems to me to be evident that any general restriction of credit will make the task of the pastoralist and farmer more difficult and in fact might prevent many persons from commencing in industry who, with a larger advance, would achieve success.

The argument that the farmer who fails after years of hard work through economic circumstances beyond his control should be entitled to relief from liability under the personal covenant after the mortgaged asset has been made available to the mortgagee is one that appeals to the sympathy, if not to the reason, of every disinterested person. It is impossible not to feel sympathy for one who has lost his own capital, his immediate means of livelihood, and finally, his home, and this

through no fault of his own. It would be most unfortunate for such an individual if there were no means of escape from personal liability in such circumstances.

There is, however, an avenue of escape, as has been admitted by all persons who urge this consideration. There is no doubt that the provisions of the Bankruptcy Act provide the necessary relief. In many instances the provisions of Part XI, whereby a debtor can, with the consent of the requisite majority of creditors, obtain release from his debts by executing a Deed of Assignment, provide almost immediate relief. This provision does not seem to be clearly understood by many mortgagors. In cases where this procedure cannot be availed of for any reason, such as failure to obtain the necessary consent, a petition to the Bankruptcy Court can be resorted to.

Objections have been urged against a mortgagor, particularly a mortgagor of rural lands, being forced to rely upon this method of release and these objections are in brief that a farmer is entitled to some better form of relief, that bankruptcy is accompanied by a stigma and that the future credit of a person who has resorted to the benefit of the Bankruptcy Act is affected.

Dealing firstly with the contention that mortgagors of rural land are entitled to some better form of relief, it might be conceded that this is justifiable, if practicable, although there is perhaps no reason why this benefit should be confined to mortgagors of rural land alone.

It seems to me that it is not practicable to provide that the mortgagor shall be released from liability at the time of abandonment of the property. I am of opinion that such a provision would react to the detriment of the great majority of mortgagors and would prove of doubtful benefit to any. No mortgagee would place the same reliance on the personal liability of a mortgagor if that liability should disappear on abandonment or dispossession.

For the same reason, I reject the suggestion of the conference of the Primary Producers' Association that the liability of the mortgagor should not operate after a period of twenty-four months from the date the mortgagor leaves the farm. In my opinion, such a contraction of the mortgagor's personal liability would detract greatly from the value in the eye of the mortgagee of the personal covenant.

I have been unable to devise any method whereby a mortgagor can be freed from the disadvantages that attach to liability on the personal covenant and still retain what I consider to be the advantage that he derives from the existence of such a covenant.

The suggestion that a stigma attaches to bankruptcy was made by many witnesses. All stressed that this stigma was unjustified and if questioned as to their own personal views indicated that they did not hold a bankrupt in contempt. I am doubtful whether the view that a stigma attaches to bankruptcy is so widely held as was suggested.

The question of whether the credit of a discharged bankrupt, or of a person who has obtained a release from his debts under Part XI of the Bankruptcy Act, would necessarily be affected, was put to all witnesses who appeared on behalf of lending institutions. The witnesses all expressed the opinion (some altering earlier views after detailed consideration) that the credit of such an individual would not necessarily be affected because of recourse to the relief afforded by bankruptcy. The generally held view was that if more exhaustive investigations showed that the failure of the individual was due to circumstances beyond his control, as, for example, unfavourable prices or seasonal conditions in the case of a farmer, his credit would not be affected. It was also the universally held opinion that such an individual would be viewed as favourably as, if not more favourably than, a mortgagor whose mortgagee had failed to realise repayment of his loan in full because of his inability to proceed upon the personal covenant through legislative change.

The fact that the provisions of the Bankruptcy Act are available to a mortgagor is an answer to the

argument advanced that liability under the personal covenant prevents a mortgagor from rehabilitating himself, and the further argument that the personal covenant constitutes a threat to the economic security of the mortgagor and his dependants. In any event, these consequences, if consequences they are, are not peculiar to indebtedness incurred on mortgage advances but apply to any debt whether secured or unsecured. Nor is it any answer to say that indebtedness on a mortgage debt can be large whilst indebtedness on other secured debts or unsecured debts is likely to be small. In principle there is no distinction. Moreover, many unsecured debts can amount in the aggregate to a large sum.

It was urged in justification of the proposal that liability on the personal covenant should be abolished, that mortgagees in many cases will not compromise with the mortgagor who has pioneered the development of a farming property, but will compromise for the benefit of an incoming settler, and that the benefit of any compromise should be given to the pioneer. In this respect it was stated that it was not uncommon for debts owing to the Agricultural Bank or any of the Associated Banks to reach a figure four or five times the value the mortgaged property realised on sale, and the witness expressed the opinion that this position was pretty generally spread over the banks (by which was meant the Associated Banks) and the Agricultural Bank. From the evidence given by members of the Associated Banks, I consider that the occasions are extremely rare in which the debt owing to one of the Associated Banks reached a figure four or five times that realised on the sale of the mortgaged asset.

Questioned on the allegation that banks were disinclined to compromise with the original pioneer, the representatives of the Associated Banks stated that it was the policy of the particular Bank they represented to write down a mortgagor's indebtedness whenever circumstances warranted, to an amount that was within the compass of the productive capacity of the mortgaged land. These witnesses emphasised that the ability and industry of the mortgagor were very relevant factors in deciding whether writing down of a debt was justified and likely to permit the mortgagor to make a success of the venture.

Mr. Abey, General Manager of the Agricultural Bank, stated that from the period 1st July, 1935, to 30th June, 1944, the Commissioners wrote down debts of farmers in occupation amounting to £1,599,805 and added that the Commissioners were always prepared to reduce a farmer's indebtedness to what the Commissioners considered was the value of the property provided such reduction was within the bounds of the Agricultural Bank Act.

Whatever the justification for the complaint that the benefit of compromise and writing down of indebtedness is not made available to the pioneer I do not consider it any ground for extinguishing the liability of mortgagors generally on the personal covenant or even mortgagors of rural land only, whatever the financial position of the mortgagor. I consider that the remedy for such a position, if a remedy is needed, would be some form of compulsory adjustment of debt rather than the general release of all mortgagors from personal liability to repay a mortgage debt. Whether such provision is necessary, and if so what form it should take, I consider are questions that are outside the scope of this inquiry.

Arguments such as "it is unjust and inequitable that a mortgagor alone should bear the brunt of any depreciation in value of a security when such depreciation is due to circumstances beyond the control of the mortgagor," and "in rural mortgages excess money advanced beyond the value of the security should be borne by the mortgagee," and "the mortgaged asset should carry the whole debt irrespective of the financial standing and integrity of the borrower" are based on a misconception of the nature of a mortgage transaction.

Such arguments imply that a mortgagor and mortgagee are joint partners in a venture. Rather the position is that the mortgagee invests his money on mortgage in preference to engaging in the industry in which

the mortgagor utilises the money. The mortgagee lends his money, and like every person who lends money he expects it to be repaid if it is in the power of the borrower to repay it. He is content to accept a small fixed return on his money (that is the specified rate of interest) and the return of his capital, however substantial the success that attends the efforts of the mortgagor in industry.

Although it is true that property may depreciate in value through circumstances over which the mortgagor has no control, it is equally true that property may appreciate in value through circumstances equally outside the control of the mortgagor.

It is not correct to compare a mortgagee with a shareholder in a company as some witnesses have done. A shareholder is in the position of a part owner. His profit is not fixed. The rate of dividend payable on his shares may vary and he will benefit from any increase in the price of his shares on the stock market. A shareholder should be compared rather with a person who buys land than with a person who invests money in a mortgage of land.

I agree with the contention of some witnesses that the elimination of the personal covenant would leave a clear-cut issue and that both parties to a mortgage transaction would then know where they stood. I cannot agree with the further contention of the same witnesses that finance would benefit as a result. For the reasons that I have tried to indicate, I am of opinion that mortgagors would not "stand" in such a favourable position when endeavouring to arrange finance as they do under present conditions, nor would they "stand" in so favourable a position when further credit was required to tide them over periods of adversity.

The argument was advanced that mortgagees in many instances did not realise the security at the earliest opportunity and that where the security comprised rural lands rapid depreciation resulted. As a consequence, it was claimed, mortgagors were severely penalised inasmuch as their indebtedness after belated realisation was much higher than would otherwise be the case.

It was suggested that reliance by mortgagees on the remedy under the personal covenant was responsible, at least in part, for the failure of the mortgagee to take prompt steps to effect realisation and that this was so even in cases where the whole amount of the loan could have been obtained by sale of the mortgaged asset. I cannot agree with this conclusion and am of opinion that where properties have not been promptly realised on abandonment the reason has been the inability of the mortgagee to dispose of the mortgaged asset.

The statement was made that in very many cases the Agricultural Bank had failed to realise abandoned or repossessed properties for very long intervals after the properties had come into the possession of the Bank. The witness admitted that doubtless there had been difficulties in the way of disposing of such properties. It was claimed that the debt owing by the dispossessed settler was considerably increased because of the depreciation that had inevitably resulted, and the consequent fall in value, between the time of abandonment or dispossession and the time of sale.

Mr. Abey, when questioned, declared that the procedure adopted by the Agricultural Bank on abandonment by the settler is to enter into formal possession and make claim for the debt. Endeavours are then made to sell and in default of sale a valuation is placed on the property for would-be buyers. He stated that once a property had been valued and a claim made on a mortgagor for a definite amount the indebtedness of the mortgagor was not increased by reason of subsequent depreciation but only by the addition of interest.

It is true, as claimed by many witnesses who advocate the extinguishment of liability under the personal covenant, that action on the personal covenant has been rarely taken by many of the lending institutions whose representatives were examined.

In an endeavour to ascertain whether recourse to the remedy was freely availed of by mortgagees and whether hardship had been caused mortgagors thereby,

a questionnaire was addressed to all the principal lending institutions requiring their representatives to be in a position when examined to give full particulars of every occasion since 1st January, 1929, on which action had been taken under the personal covenant or money obtained by the threat of such action. This date was chosen as a starting point in order to include the depression years.

These inquiries revealed that mortgagees had rarely instituted legal proceedings under the personal covenant. For example, so far as could be ascertained from the records of the Agricultural Bank, recourse to court proceedings had occurred only once in the history of the Bank.

It was customary for the Banks, in the great majority of cases where default occurred, to rely in the first instance on the remedies available against the mortgaged asset.

One Building Society, and to a lesser extent the Trustee Companies, sometimes had recourse to action on the personal covenant in the first instance upon default. The reasons advanced were that action on the personal covenant was less drastic from the viewpoint of both mortgagor and mortgagee and provided a speedy and comparatively inexpensive method of recovery. By the exercise of such a remedy, it is claimed, mortgagors were enabled to retain their homes.

Instances were cited by witnesses where action had been taken against a husband who joined in a mortgage given by his wife, with the result that payment had been made and the mortgaged asset, the family dwelling house, still remained the property of the mortgagor.

The Trustee Companies generally resorted to action on the personal covenant to recover unpaid interest when letters requiring payment had been ignored, and stressed the fact that when such interest was so often required promptly for the maintenance of widows or infant beneficiaries speed in recovery was an important factor.

Mortgages to Building Societies are generally long term mortgages, repayable over terms as long as sixteen or twenty years and are repaid by weekly instalments which are applied firstly in payment of interest and secondly in reduction of the principal moneys.

The Secretary of one of the Building Societies cited twenty-three occasions since 1st January, 1929, when a summons had been issued against a mortgagor to obtain payment of arrears ranging in amount from twenty-seven pounds to two hundred and thirty-seven pounds. On occasions more than one summons had been issued against a mortgagor where default had occurred repeatedly. In all these instances, payment of arrears had been obtained, generally by payment of increased instalments under the mortgage, or satisfactory arrangements made. In no case had the property been sold by the mortgagee.

These cases represented instances in which the mortgagor had not responded to repeated written requests for payment of arrears or to letters from the Society's solicitors threatening action if payment was not made. In all cases, it was emphasised, repeated opportunities had been given the defaulting mortgagor before action was taken.

The witness expressed doubt as to whether the same result, that is, payment, or the making of a satisfactory arrangement, would have resulted from a threat to exercise the power of sale. He emphasised that the occasions instanced were those in which a threat or several threats to sue had been unproductive and stated that with many people it was necessary to force them to the last ounce to obtain any reaction.

If the Society had been forced to commence proceedings by way of exercise of power of sale and incurred considerable expense in advertising the property for sale and placing it in the hands of an auctioneer, he was doubtful whether the Society would withdraw on the promise to repay the arrears.

In addition, this witness cited numerous instances where a threat of recourse to action on the personal covenant had been productive of results.

Instances where payment was obtained by threat of recourse to action on the personal covenant were not very numerous with the exception of the abovementioned cases, although in the case of the Agricultural Bank, details were supplied of twenty-four occasions on which the Bank had threatened recourse to action on the personal covenant after possession of the mortgaged property had reverted to the Bank. In the majority of such cases, payment or part payment had resulted.

When attempting to judge the extent to which the remedy under the personal covenant has been availed of in the past to secure payment of mortgage moneys on default, it is important to remember that the common practice amongst mortgagees when default occurs is to demand payment, and to intimate in the notice of demand that upon continued default the mortgagee will proceed to exercise the remedies available to him. The mortgagee does not specify in this notice which remedy will be used upon continued default, but warns the mortgagor in effect that continued default will result in the exercise of whatever remedy the mortgagee sees fit to resort to.

It does not necessarily follow that the remedy under the personal covenant is not of real importance because it is not used more frequently. Part of its value lies in the fact that it is available for use if circumstances warrant its use, and this knowledge may exercise considerable influence on many mortgagors. As was stated by a witness, the power of sale is not used by mortgagees very extensively, but no one can doubt that the lack of such a power would be detrimental to a mortgagee.

Throughout the sittings of the Commission, witnesses were encouraged to refer to the Commission particulars of any case of hardship known to them which resulted from the exercise or threatened exercise by a mortgagor of the remedy under the personal covenant. It was stressed that the names of the parties involved would not be published. This was done to overcome any reluctance that might be caused through fear of publicity. Although, as one witness stated, hardship can be relative, no case was cited in which a mortgagor could be said to have actually suffered financial hardship through the operation of the personal covenant.

Mr. Walker, the President of the Wheat and Wool-growers' Union, stated that cases of hardship would not be numerous, and the particulars elicited from the representatives of lending institutions did not reveal one instance in which the mortgagee could be said to have acted oppressively or harshly towards the mortgagor under the personal covenant.

In practically all cases where action was taken on the personal covenant to recover principal money due under a mortgage or portion thereof, an order was first obtained under the Mortgagees' Rights Restriction Act. The fact that a Judge of the Supreme Court, after consideration of the circumstances and factors by the Statute required to be taken into consideration, saw fit to make an order empowering a mortgagee to exercise, *inter alia*, his remedy under the personal covenant, disposes of any question of actual hardship thereby being occasioned to the mortgagor.

Insofar as the Agricultural Bank is concerned, which institution is not bound by the provisions of the Mortgagees' Rights Restriction Act, recourse was had to action on the personal covenant only once in the history of that institution as already stated. In the twenty-four cases in which that institution threatened proceedings on the personal covenant, it is apparent that the Commissioners were justified in attempting to obtain payment and that every opportunity was given to the mortgagors to pay, where necessary, by instalments of such amounts as would not impose too great a strain upon the financial resources of the mortgagor.

Of the twenty-four individuals followed, only eleven could be classified as farmers or pastoralists, the remainder being mainly engaged in other pursuits and indulging in farming as a side line.

Some witnesses contended that mortgagors suffered hardship because the liability under the personal covenant remained as a bar to their future rehabilitation. They argued that the knowledge of this liability destroyed the incentive to make a fresh start and also affected credit. Questioned as to whether a loan on

mortgage of unencumbered property would be made to a person who still remained liable under a personal covenant in a mortgage, some witnesses stated that they would not be anxious to make the loan. The reason advanced was that such a transaction would be liable to be disrupted by the creditor pressing for payment of the debt. This opinion was not unanimous. One witness cited the case of a mortgagor who remained liable on the personal covenant after abandonment of the mortgaged asset some years earlier and who was allegedly refused accommodation by one of the Associated Banks and the Mortgage Bank Department of the Commonwealth Bank, although satisfactory security for the required loan was offered. The particulars of this matter were brought to the notice of representatives of the Banks concerned and a difference of opinion was revealed. The representative of the Associated Bank stated that no definite refusal had ever been made and that the Bank was still willing to consider the proposed loan. On behalf of the Mortgage Bank Department of the Commonwealth Bank it was stated that an inquiry had been received as to how the Bank would view an application for a loan by a person who was under liability to pay a mortgage debt. The person making the inquiry had been told that such a debt should be shown in the Balance Sheet supplied but had not been told that the existence of such a debt would preclude the making of a loan. The matter was not followed up by the inquirer and no application for a loan was made.

Despite the attitude of the abovementioned Banks, I have no doubt that outstanding indebtedness under the personal covenant might make credit harder to obtain. As I have stated before, indebtedness incurred other than under a mortgage debt would have the same result. It is the normal consequence of liability to pay money owing, and to my mind affords no justification for the extinguishment of the right to proceed on the personal covenant.

The argument advanced that those people who desire to retain the personal covenant in a mortgage are opposed to reform and only wish to retain the status quo I reject. As I have stated earlier, I believe that such people are genuine in their expressed belief that the extinguishment or restriction of the right of the mortgagee to proceed on the personal covenant would be detrimental to both lender and borrower. Nor am I impressed by the reminder that similar prophecies of the disaster that would follow such reforms as the abolition of the Debtors' Prison and the prohibition on the employment of child labour in mines and factories proved to be incorrect. No doubt many instances could be cited where gloomy prophecies of disaster or of ill effects that would follow some proposed "reform" proved to be well justified.

My attention was drawn by several witnesses to the provisions of an Act in force in Saskatchewan, Canada, namely, the Limitation of Civil Rights Act, Chapter 88, Revised Statutes of Saskatchewan, 1940. By section 2 thereof it is provided, in effect, that no action shall lie on the covenant for payment of the purchase price contained in an agreement for sale or on the covenant for payment contained in a mortgage taken by a vendor of land to secure the balance of purchase money outstanding on the sale of the land. The Act applies only to contracts of sale or mortgages executed after the commencement of the Act, and, it will be noted, does not apply to mortgages generally but only to mortgages given to a vendor to secure the balance of purchase money. The Act of 1940 is a consolidation of previous Acts referring to the same subject matter, and the provisions of section 2 were first enacted in an Act passed in 1934, Chapter 89 of the Statutes of Saskatchewan, 1934-35.

As far as could be ascertained, the above provisions have no counterpart in any other province of Canada.

In an endeavour to ascertain the reasons that influenced the legislature of Saskatchewan in restricting the remedies of a vendor of land, whether under a contract of sale or under any mortgage taken to secure the balance of purchase money, I communicated with the Master of Titles at Regina, Saskatchewan. In his reply, the Master of Titles stated that the adoption of such legislation was of course a matter of government policy, but he expressed the opinion that what led to

the passing of the legislation was the condition of the province at the time it was first passed and the general world conditions. The depression, he said, combined with other factors, hit the people of Saskatchewan particularly hard and high prices of land after the war of 1914-1918 were followed by a resultant heavy decline in the price of land.

It would appear that this enactment was probably part of a general attempt to counteract the severe depression that gripped Saskatchewan. The correspondent informed me that the protection afforded to the particular class of mortgagors mentioned had never been extended to mortgagors generally.

I do not consider that present economic conditions in this State warrant the introduction of similar legislation nor the extension of the principle to mortgagors generally.

I will summarise my findings in a few brief words as under:—

(1) If the personal covenant in mortgages of land was made unlawful or limitations imposed on its enforcement, the results would be:—

(a) If applied to existing mortgages, injustice and financial loss to many mortgagees, and immediate disruption of many mortgage investments. Many mortgages repayable on demand would be called up or the mortgagors would be required to reduce their indebtedness or put up additional tangible security.

(b) Restriction of credit, resulting in a demand for larger margins in future mortgages and less forbearance on the part of mortgagees when mortgagors are in difficulties. This would affect adversely pastoralists and primary producers generally and persons with small means who desired to finance the building of homes.

(c) The drift of some moneys to other States that would otherwise be invested in Western Australia. This drift of money to other States might not be particularly pronounced but whatever its extent it would react adversely to the interests of the State and retard development.

(2) No instance of a mortgagor suffering hardship through the exercise by a mortgagee of his right thereunder has been cited.

(3) There is no justification for legislation that would compulsorily prohibit or restrict a mortgagor from assuming personal liability to repay money advanced on mortgage in all cases. When economic conditions become abnormal, such as happened in the period of the last depression, relief of a temporary nature against the liability of a mortgagor on the personal covenant may well be justified, but the form and extent of the relief required can best be determined at the time when such abnormal economic conditions prevail.

(4) No case has been made out for placing a mortgagor in a class apart from other debtors. In common with other debtors a mortgagor should be personally liable to repay a loan.

Having dealt with the arguments advanced as to the desirability of extinguishing or limiting the right of the mortgagee under the personal covenant in mortgages generally or in mortgages of rural lands, I now turn to the proposal put forward by Mr. Hansen. This witness, as I understood him, proposed that a tribunal (the constitution of which he did not specify) should be set up, to which certain mortgagors should be entitled to apply for release from liability under the personal covenant. Mr. Hansen was concerned with individuals who had taken up land which later turned out to be unsuitable for the use to which it was put. He referred to districts which were subsequently proclaimed marginal areas and also nearby areas which had suffered as a result of their proximity to marginal areas owing to the increase in vermin and other similar causes.

Mr. Hansen proposed that mortgagors within such areas should be relieved from liability on the personal covenant in existing mortgages, whether given to a State instrumentality or not, and further, that such mortgagors should be compensated by the State for any loss that had been sustained through the policy of

the Government in first encouraging settlement thereon and then declaring these areas to be "marginal areas." He also proposed that if a mortgagor had abandoned land which proved unsuitable for the use to which it had been put, any mortgagee who suffered loss should be recompensed by the Government. Release of liability under the personal covenant was not to be confined, however, to mortgagors who had abandoned their holdings, but to be extended to all mortgagors, whatever their position, in this class.

There is no doubt that liability under the personal covenant must attach to very many mortgagors whose failure as farmers was attributable in the main to the land taken up being unsuitable for the purpose to which it was put. Whether these individuals are as worried over this fact as Mr. Hansen believes is hard to determine. The witness knew of no mortgagor who had sought the relief provided by the provisions of the Bankruptcy Act, and only one witness who could possibly be included in the class of persons to whom Mr. Hansen referred appeared before the Commission.

Disregarding the sweeping proposals made by Mr. Hansen dealing with proposed compensation, I cannot recommend that any exception be made in the case of this somewhat indefinite class of mortgagors to relieve them from liability on the personal covenant. Insofar as mortgagees other than instrumentalities of the State are concerned, the proposal would cause injustice unless compensation from the State was exacted, and this I consider quite unjustifiable. Moreover, it would, in my opinion, be impracticable to draw a dividing line and stipulate the persons to whom such relief should or should not apply. Nevertheless, this difficulty alone would not be sufficient to justify rejection of Mr. Hansen's proposal if I were convinced of the merit of such a course. As I have stated I am not convinced.

Many mortgagors who failed were doubtless industrious settlers, but not all would come within this category. All embarked on farming, mostly with moneys borrowed from the State, with the hope and expectation of profiting themselves thereby. Some took up this land as an investment hoping to develop the properties with the aid of the borrowed moneys and sell the properties at a profit.

Those mortgagors who changed from wheat growing to sheep farming per medium of the moneys made available by the Commonwealth Government for that purpose have already received some benefit in the writing down by the State of their capital indebtedness and by the enlargement of their holdings on favourable terms. Others have been shifted from marginal to "safe" areas.

The fact that both the lender and borrower were mistaken as to the capacity of the land and the purpose to which it should be put is not a valid reason for extinguishing the right of the mortgagee under the personal covenant.

To attempt to confine relief to mortgagors who settled in marginal areas or areas adjacent thereto would give rise to many anomalies and might raise a demand from many other individuals in other districts for the same treatment. It must be remembered that soil is not uniform throughout a district and that no dividing line can possibly separate land suitable for any particular purpose from land unsuitable for such a purpose.

I shall now deal with suggestions for particular reforms suggested by witnesses, and the first of these is the proposal put forward by Mr. Dudley.

This witness, while emphasising that he regarded the right to proceed on the personal covenant as a material factor in determining the amount to be advanced on mortgage, particularly in the case of second mortgages and mortgages to Friendly Societies, made a proposal for an alteration in the rights of a mortgagee thereunder that deserved serious consideration. Mr. Dudley stated that in his opinion many mortgagors were unaware of the personal liability that attached to a mortgage to repay the principal moneys owing on a mortgage and interest thereunder. In particular he thought that many mortgagors were unaware that such a liability remained after the mortgaged property had been transferred by the mortgagor to a purchaser subject to the mortgage.

He was further of the opinion that such liability, whether known or unknown to the mortgagor, should be terminated upon registration of a transfer of the mortgaged property, considering that it was not equitable to hold a mortgagor responsible for the due payment of money when the mortgaged property had passed from the control of the mortgagor. The witness proposed that if mortgaged property were transferred by the mortgagor subject to the mortgage, the liability of the mortgagor should terminate three months after the expiration of the term of the mortgage. This proposal had the support of the Real Estate Institute of W.A. and of the Manchester Unity Independent Order of Odd-fellows.

No mortgagor appeared before the Commission to complain that he had executed a mortgage in ignorance of the personal liability attaching to him, but I consider it beyond doubt that quite a large proportion of mortgagors are not fully conscious of the fact that they remain personally liable to repay a mortgage debt, in the absence of agreement to the contrary, after the property has been sold by the mortgagor subject to the mortgage.

At the present time, a mortgagor who desires to transfer the mortgaged property upon sale can obtain release from liability in one of three ways, namely, by the transferee arranging finance elsewhere to repay the mortgagee, by the mortgagee discharging the mortgage and taking a fresh security from the transferee, or by the mortgagee releasing the mortgagor from liability and obtaining a Deed of Covenant from the transferee. The objection advanced to these methods is that of expense. As Mr. Dudley pointed out, the expense of discharging the existing mortgage and registering a fresh mortgage is an item worth consideration.

The weakness in Mr. Dudley's proposal lies in the fact that mortgages which are not for fixed terms but which are repayable on demand would not be covered. Nor would the proposal greatly benefit mortgagors when the mortgages are for long terms such as sixteen or twenty years, as for instance, Building Society mortgages.

At the present time many mortgages are made repayable on demand and even when the money is intended to be advanced for a fixed term the mortgage is often worded in such a way that the mortgage moneys are in fact repayable on demand although the mortgagee agrees not to require payment before a stipulated date if the mortgagor observes and performs the covenants on his part to be observed and performed. With a little ingenuity on the part of the person preparing a mortgage, any legislation attempting to give effect to Mr. Dudley's suggestion could easily be circumvented. Another probable result of any such change would lead to increased cost being incurred by the mortgagor.

At the present time, many mortgages although expressed to be for a period such as three years are not called up at the expiration of the term, nor is an instrument of extension of mortgage required to be executed and registered. By mutual agreement or in default of any arrangement, the loan is allowed to run on. So long as the mortgagor continues to meet his obligations other than the payment of the principal sum under the mortgage instrument and the property remains, in the eyes of the mortgagee, a sound investment, the loan will often be allowed to run on indefinitely. If Mr. Dudley's suggestion were given effect to, so that the mortgagor was released from liability after transfer at the expiration of three months from the mortgage moneys falling due, it would tend to become a universal practice, in my opinion, for a mortgagee to require an extension of mortgage to be signed and registered, thus making a mortgagor incur considerable expense. Desirable as is Mr. Dudley's proposal in some ways, I consider that in practice it would be likely to work in many respects to the detriment of the mortgagor.

I consider, however, that the eyes of a mortgagor should be opened to his liability. With the knowledge of his position clear to him, a mortgagor could take steps to obtain a release from liability when he desired to sell the mortgaged property.

The best method of impressing upon the mortgagor the extent of his obligation is not easy to decide. It is impossible, without putting a mortgagor to expense, to provide any certain method whereby a careless mortgagor, who will sign a document without making sure that he understands the contents, can be made to realise his obligations thereunder.

I recommend that the Transfer of Land Act, 1893-1944, be amended to provide that a mortgage of land under that Act (unless personal liability is expressly excluded in the mortgage) shall include an acknowledgment by the mortgagor that he is aware of his personal liability to repay the principal moneys and interest thereon and that such acknowledgment be in the form hereinafter contained or in a like form and require separate signature. I consider that an amendment of the Transfer of Land Act is the best method of effecting the required alteration in the law and that the great majority of mortgages will be thereby affected.

Mr. Godfrey suggested that on the death of a mortgagor there should be some provision to free his personal representative from contingent liability. He proposed that the personal representative should be enabled, by written notice, to require a mortgagee to proceed in exercise of his remedies within six months of receipt of such notice, and in default of the mortgagee complying with the notice the mortgagee should thereafter be precluded from proceeding against the personal representative. He was of opinion that such a provision should only apply when the term of the mortgage had expired.

The suggested provision appears at first sight to be desirable, but on reflection I do not consider it will achieve any desirable object. It is obvious that if the term of the mortgage has expired the mortgagee is in a position to call up the mortgage and the personal representative who forwarded such a notice would be forced to consider that the result of such an action might be a demand for payment. If the loan would be hard to raise in another quarter the personal representative would not send the notice. If the required sum was easily obtainable the personal representative would be able to determine his liability by transferring the property to the beneficiary or purchaser who could execute a new mortgage, in person, to replace the existing mortgage. Further, if money was hard to get out the mortgagee, as at present often happens, would probably agree to release the personal representative and take a Deed of Covenant from the beneficiary or purchaser, thus obviating the necessity of arranging a new loan.

Mr. Godfrey also suggested that provision should be made to assist a mortgagor who had been required in the first instance to pay the whole amount of the mortgage debt after the property had been transferred by him to another. His suggestion was that the mortgagor should be entitled, at the time of payment, to require the mortgage to be transferred to him.

It does not often happen, in my opinion, that a mortgagee has recourse in the first instance to the original mortgagor for payment without exhausting his remedies against the mortgaged property, and it would be rarer still that a mortgagee who received payment by such an action would refuse a request by the person making the payment for a transfer of the mortgage security. Nevertheless, it would be advisable to give the original mortgagor, as I will term the person who made payment, the right to demand a transfer of the mortgage instrument, thus putting him in the position of the mortgagee with a right to exercise the remedies available against the mortgaged property. I recommend that the Transfer of Land Act, 1893-1944, be amended accordingly.

Mr. Lappin proposed that where property has been sold and transferred by a mortgagor subject to the mortgage or sold under contract of sale by the mortgagor subject to a mortgage, the liability of the mortgagor on the personal covenant should be determined at the expiration of six years from the date of the sale.

In support of this proposal the witness gave particulars of the position in which two clients of his firm are placed. Stated shortly, these individuals, both men of substance, sold property which was encumbered with a substantial mortgage, and the property was transferred subject to such mortgage. The transferee died

and his executors defaulted in a payment of interest. The mortgage was subject to the provisions of the Mortgagees' Rights Restriction Act. The mortgagee called upon the transferors to pay the interest in arrear, and the transferors instituted third party proceedings against the executors of the transferee who duly paid. The transferors then instituted proceedings against the executors of the transferee in the nature of a quia timet action and judgment was given directing the executors to indemnify the transferors against payment of the mortgage moneys and, in order to implement the indemnity, the executors were ordered to either pay the mortgage moneys to the mortgagee or into court or procure or provide the discharge of the transferors from all liability under the covenants of the mortgage. No further action was possible because of the provisions of the Mortgagees' Rights Restriction Act. The transferors continue liable under the personal covenant, and the mortgagee appears content to rely upon his remedy under the personal covenant.

As I stated when dealing with the proposal made by Mr. Dudley, I do not consider that it is practicable or

advisable to relieve a mortgagor who disposes of property subject to the mortgage of liability. In the absence of provision in the mortgage to the contrary a mortgagee cannot prevent a mortgagor disposing of the mortgaged asset subject to the mortgage to whomsoever he pleases and his right to proceed against the mortgagor should not in the circumstances be curtailed, as would be the case where the mortgage had a longer period than six years to run or the mortgage ran on by the operation of the Mortgagees' Rights Restriction Act. I think it better to ensure, as far as possible, that the mortgagor shall be aware of his liability and that if he desires release from such liability when disposing of the mortgaged asset he shall obtain a formal release, if the mortgagee is willing to give same, or allow the transferee to execute a new mortgage and obtain a discharge of the existing mortgage.

There is, too, this point to consider, that in the instance cited by Mr. Lappin, the mortgagors had, and availed themselves of, what was a completely satisfactory remedy, had not the provisions of the Mortgagees' Rights Restriction Act operated as a temporary bar.

FINDINGS.

I now set out my findings on the express Terms of Reference:—

1. As to personal covenants by mortgagors of land, to repay the principal moneys loaned and interest thereon:

(a) Whether such covenants should be made unlawful.

Such covenants should not be made unlawful.

(b) If permissible, whether any and if so what limitations should be imposed on the right of the mortgagee to enforce any such covenant.

No limitations should be imposed on the right of the mortgagee to enforce any such covenant.

(c) Whether any distinction should be made between mortgages comprising rural lands, and other mortgages, in relation to personal covenants.

No distinction should be made between mortgages comprising rural lands and other mortgages in relation to personal covenants.

(d) Whether any distinction should be made between existing and future mortgages, in relation to personal covenants.

No distinction should be made between existing and future mortgages in relation to personal covenants.

(e) If any limitation should be imposed on the right of the mortgagee to enforce the personal covenant, what provision, if any, should be made in the case of any guarantor or guarantors, or any collateral security, or any general lien or other security given by the mortgagor.

As I find that no limitation should be imposed on the right of the mortgagee to enforce the personal covenant it is unnecessary to answer this Term of Reference, and without any particular limitation to consider, impossible.

(f) In the event of any limitation on the existing rights of mortgagees, in respect of personal covenants, what effects, if any, are probable or possible in relation to credit facilities of rural or other borrowers; the credit of the State or its people; or the present structure and operations of finance and financial institutions.

Any limitation which would effectively limit existing rights of mortgagees in respect of personal covenants must adversely affect the credit facilities of rural and other borrowers, and may affect the credit of the State and its people. The operations of financial institutions would generally be curtailed.

(g) The rights of the mortgagees in respect of personal covenants.

No alteration in such rights is justified or advisable other than as hereinafter set out.

(h) The effects of the personal covenant in the past on the borrowers from—

No case of actual hardship occasioned to the borrower by reason of the personal covenant has been cited.

(i) Government Money Lending Authorities.

(ii) Private Creditors.

2. Generally as to justification for or advisability or otherwise, of legislation to abolish or limit the practice of personal covenants in mortgages, or restrict the operations of such covenants, or the rights of mortgagees thereunder.

There is no justification for nor would it be advisable to legislate to abolish or limit the practice of personal covenants in mortgages or restrict the operation of such covenants or the rights of the mortgagees thereunder.

RECOMMENDATIONS.

I recommend that the Transfer of Land Act, 1893-1944, be amended:—

- (a) To provide that a mortgage of land, unless the personal liability of the mortgagor is expressly excluded therein, shall contain an acknowledgment in the following form, requiring separate signature by the mortgagor.

Form of Acknowledgment.

I am aware that in executing this mortgage I become personally liable to repay the money secured and that all my assets and not only the mortgaged property can be resorted to by the mortgagee for payment if I default. I am also aware that my personal liability remains after I have disposed of the mortgaged property unless and until the mortgage is discharged.

- (b) To provide that where a mortgagor who has transferred the mortgaged property is required in the first instance to pay the whole amount of the mortgage debt he shall be entitled, as a condition of making the payment, to demand and obtain a transfer of the mortgage from the mortgagee.

I have the honour to be,

Your Excellency's obedient servant,

J. E. SHILLINGTON,
Royal Commissioner.

August, 1945.