[HIGH COURT OF AUSTRALIA.]

THE PERPETUAL EXECUTORS AND TRUSTEES ASSOCIATION OF AUSTRALIA LIMITED . . . . . } APPELLANTS;

AND

HOSKEN (REGISTRAR OF TITLES) . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1912.

MELBOURNE, *May* 23, 24.

Griffith C.J., Barton and Isaacs JJ.

Mortgage—Registration—Instrument containing guarantee by third parties—Refusal of Registrar to register—Remedy of Mortgagee—Mandamus—Transfer of Land Act 1890 (*Vict.*) (*No.* 1149), *secs.* 113, 209, 240, 12*th Schedule*.

The Registrar of Titles is not justified in refusing to register a mortgage, otherwise in the ordinary statutory form, of land under the *Transfer of Land Act* 1890, on the ground that there is added to it a covenant by persons not parties to the mortgage guaranteeing repayment of the mortgage money.

Where the Registrar improperly refuses to register a mortgage the mortgagee has a remedy by mandamus to compel registration, notwithstanding that right is specifically given by the *Transfer of Land Act* 1890 by sec. 209 to the owner or the proprietor of the land to summon the Registrar to substantiate the grounds of his refusal before the Supreme Court.

Decision of the Supreme Court of Victoria: *R.* v. *Hosken*; *Ex parte Perpetual Executors and Trustees Association of Australia Ltd.* (1912) V.L.R., 4; 33 A.L.T., 76, reversed.

APPEAL from the Supreme Court of Victoria.

By instrument of mortgage dated 8th May 1911, John Dickson Love and Elizabeth Wilson, executor and executrix of the will of Charles William Wilson, deceased, mortgaged to the Perpetual Executors and Trustees Association of Australia Ltd. certain land under the *Transfer of Land Act* 1890. The instrument contained the ordinary covenants and also the following clause:—

"And we, Elizabeth Wilson, widow, William Edgar Wilson, medical practitioner, Mary Emily Wilson, spinster, Elizabeth Wilson, spinster, and James Rodney Wilson, engineer, all of Caringa, 30 York Street, St. Kilda, in the said State of Victoria, in consideration of the said sum of £2,000 being advanced and lent by the said mortgagee to the said John Dickson Love and Elizabeth Wilson at our request, do hereby covenant for ourselves, our executors, administrators and assigns, and each of us doth hereby for herself and himself, his and her respective executors, administrators and assigns, covenant that in the event of the said John Dickson Love and Elizabeth Wilson, as such executor and executrix, failing to pay the principal sum of £2,000 hereby secured on the date provided for payment thereof, or the interest thereon at the rate and on the days and times provided for payment thereof, or in the event of the said John Dickson Love and Elizabeth Wilson or either of them or their respective heirs, executors, administrators and assigns, not performing, fulfilling and keeping all the covenants, conditions and agreements in this mortgage contained, we or some or one of us, our executors, administrators or assigns, will pay to the said mortgagee, its successors or transferees, the principal sum of £2,000 as herein provided for payment thereof and also interest thereon at the rates and on the days and times respectively herein provided for payment thereof."

The instrument, which was executed by the mortgagors, the mortgagees and the five guarantors, was lodged on 13th May 1911 at the Office of Titles for registration. The registration was stopped, and the following requisition was endorsed on the papers by direction of the Commissioner of Titles:—"The mortgage requires amendment by excising all after the description of the land mortgaged. The portion referred to is a guarantee by persons not proprietors of the land, and has nothing to do with the land, and is a purely personal matter, and should be made the subject of a separate deed."

An order *nisi* was thereupon obtained by the mortgagees calling upon the Registrar of Titles to show cause why a writ of mandamus should not issue directing him to register the mortgage. On the return of the order *nisi* *à Beckett* J. made the order

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absolute and ordered the Registrar of Titles to register the mortgage, but on appeal to the Full Court the appeal was allowed and the order *nisi* was discharged: *R.* v. *Hosken*; *Ex parte Perpetual Executors and Trustees Association of Australia Ltd.* (1).

From this decision the mortgagees now appealed to the High Court.

Mitchell K.C. (with him *Hayes*), for the appellants. The Registrar should have registered the mortgage. Sec. 240 of the *Transfer of Land Act* 1890 permits the forms to be altered to suit the circumstances so long as the alteration is not matter of substance. The addition of this covenant by the guarantors is not a matter of substance: *R.* v. *Registrar-General*; *Ex parte Roxburgh* (2). It merely shows the real nature of the transaction. Mandamus will lie at the suit of a mortgagee to compel registration of a mortgage. There is no other remedy equally convenient, beneficial and effectual: *R.* v. *Leicester Union* (3).

Schutt, for the respondent. Under the Act the document was not registrable. The object of the legislation was to do away with cumbrous documents, and the Registrar is only to be called upon to deal with instruments which affect the land. Otherwise the register book might be loaded up with documents which it was intended should be kept out, and parties might have registered agreements which have some connection with the land but which have nothing to do with the transaction intended by the Act to be registered. The addition of this covenant of guarantee is a substantial departure from the form in the Schedule and is not permitted by sec. 240: *Staples* v. *Mackay* (4). [He also referred to *Manning* v. *Commissioner of Titles* (5).] Mandamus will not lie here. As to *R.* v. *Registrar-General*; *Ex parte Roxburgh* (6), there was no section in the Queensland Act similar to sec. 209, and the only alternative suggested there was an action against the Registrar-General under sec. 137 of the *Real Property Act* 1861 (Qd.). Mandamus will not lie unless it is shown that a remedy under sec. 209 is not open to the mortgagees.

(1) (1912) V.L.R., 4; 33 A.L.T., 76.
(2) 1 Qd. S.C.R., 201, at p. 205.
(3) (1899) 2 Q.B., 632.
(4) 11 N.Z. L.R., 258, at p. 262.
(5) 15 App. Cas., 195.
(6) 1 Qd. S.C.R., 201.

They must at least ask the mortgagors to make an application under that section. [He also referred to *Vale* v. *Blair* (1).

Mitchell K.C., in reply, referred to *Guest's Transfer of Land Act* 1890, p. 306.

Cur. adv. vult.

GRIFFITH C.J. This was an application for a mandamus requiring the Registrar of Titles to register an instrument of mortgage executed by the registered proprietors of land subject to the *Transfer of Land Act* 1890 and made in favour of the appellants. The registered proprietors were in fact trustees. The mortgage was in the usual form, except that at the end of it was a clause, worded as a covenant, by which several persons who were the beneficiaries under the trusts on which the land was held, after reciting that the loan had been made to the trustees at their request, covenanted that if the mortgagors did not pay the debt they or some of them would pay it with interest. The Registrar refused to register the instrument on the ground that it was not an instrument that ought to be registered under the Act on account of its containing this provision.

The substance of the scheme of the *Transfer of Land Act* was to substitute conveyance by registration for conveyance by deed. For the purpose of facilitating the carrying out of that scheme certain forms of instruments were given in the Schedules to the Act, but the Act nowhere said that these forms should be used precisely as given. On the contrary, the forms may be altered and modified, as I shall show. Forms of this sort, like forms for use in judicial proceedings, are good servants but bad masters, a proposition which is sometimes —too often indeed—forgotten. I should like upon that point to adopt the language of a distinguished predecessor of mine in the presidency of the Supreme Court of Queensland in a case decided in 1868 in which substantially the same point was raised as in this case: *R.* v. *Registrar-General*; *Ex parte Roxburgh* (2). *Cockle* C.J. said:—"It is more reasonable to suppose that the

(1) 9 A.L.T., 90.

(2) 1 Qd. S.C.R., 201, at p. 205.

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operations of the Registrar-General's office should be adapted to the transaction of business than that the transaction of business should be adapted to suit the Registrar-General's office."

The object of the Act was to facilitate, and not to hamper, dealings with land. That is an important consideration, because, since an instrument dealing with land under the Act is inoperative until registered, the effect of refusing registration would be that the instrument would be void as a mortgage. That is a very serious consequence. When the legislature intend that an instrument must be in a certain form, and that, if it is not, it shall be void, they say so, as, for instance, in the later English legislation as to bills of sale.

I can find nothing in the Act to exclude these considerations. Sec. 113 provides that "the proprietor of any land under the operation of this Act may mortgage the same by signing a mortgage thereof in the form in the Twelfth Schedule hereto." Very similar provisions are contained in the Act in respect of other dealings with land. But that it was not intended to lay down a rigid rule is shown by sec. 240, which provides that "the forms contained in the several schedules hereto and the forms for the time being in force under this Act may be modified or altered in expression to suit the circumstances of every case; and any variation from such forms respectively in any respect not being matter of substance shall not affect their validity or regularity." Therefore such a variation cannot be an objection to registration. The test laid down by sec. 240 is whether the variation is matter of substance. In this case the variation is by the addition of words. Does that addition substantially affect the character of this instrument as a mortgage? The most that can be said is that the addition is irrelevant, and, that being so, it cannot affect the character of the instrument as a mortgage. The general rule *utile per inutile non vitiatur* applies. It would, indeed, be a strange thing if such an addition should render the instrument non-registrable and void—for, as I have pointed out, it is inoperative as a dealing with land unless it can be registered.

A contention was set up that, if such a document were allowed to be registered, the register book might be encumbered. Again I refer to the language of *Cockle* C.J., which I have already

quoted. It was intended that the Registrar should be the servant of the public, and not that the public should be the servants of the Registrar.

If a document were substantially a departure from the form prescribed by the Act, the Registrar might very well refuse to register it and the Court would not compel him to do so. But that is not this case. The clause objected to is substantially a recital of facts showing the real nature of the transaction to give effect to which the mortgage was executed. If it was placed at the beginning of the instrument instead of at the end no objection could possibly be taken to it. Certainly the addition of the signatures cannot vitiate the instrument as a mortgage. In my opinion, therefore, the substantial objection entirely fails.

Another point taken was that mandamus will not lie to compel the Registrar to register an instrument. The general rule is that, where a duty is imposed upon a public officer of such a nature that unless he performs it some person will be prevented from enjoying a right which the law gives him, a mandamus will be granted to compel the officer to do his duty. But it is said that the operation of that rule is excluded by sec. 209 of the Act, which provides that if, on the application of an owner or proprietor to have any dealing with land registered, the Registrar refuses to do so, the owner or proprietor may take steps, which are not quite the same in form as proceedings for a mandamus, to compel the Registrar to register the dealing. It is said that the remedy is given only to the owner, and that this shows two things, first, that the owner cannot get a mandamus and, secondly, that nobody else can get any redress. Possibly the owner may be restricted to the particular form of relief given by the section. The suggestion in the present case is that the mortgagees ought to compel the mortgagors to take proceedings under sec. 209 to compel the Registrar to register the instrument, and that as that remedy is open—I do not know how long it would take or what would be the precise form of the proceedings—mandamus will not lie. I have stated the general rule as to mandamus. As to the suggested rule that a mandamus will not be granted where another remedy is open, I will content

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myself by reading what was said by *Hill* J. in *Re Barlow* (1):— "It is well settled that where there is a remedy equally convenient, beneficial and effectual, a mandamus will not be granted. This is not a rule of law, but a rule regulating the discretion of the Court in granting writs of mandamus; and unless the Court can see clearly that there is another remedy equally convenient, beneficial and effectual, the writ of mandamus will be granted, provided the circumstances are such in other respects as to warrant the granting of the writ." It seems to me to be a mere mockery to tell the appellants in this case that they have a remedy by bringing an action against the mortgagor to compel him to take proceedings for their benefit against the Registrar, and to say that that is as equally convenient, beneficial and effectual a remedy as mandamus. In my opinion the granting of a mandamus is in the discretion of the Court, and no reasons have been shown why the discretion should not be exercised in favour of the appellants.

For these reasons I am of opinion that *à Beckett* J. was right in the view he took, and that his decision should be restored.

BARTON J. We are asked to decide whether the Registrar of Titles is entitled to refuse registration to an instrument of mortgage by an executor and executrix (being also trustees of the estate) which, while in all other respects regular, contains a covenant by their beneficiaries guaranteeing the payment of the principal sum and interest to the mortgagees by the mortgagors. The mortgagee has advanced his money on one complete security, consisting of the powers given him over the land, the covenants of the mortgagors, and the covenant of the beneficiaries guaranteeing payment by the mortgagors.

The point, therefore, is not whether the respondent is bound to encumber the Register with everything that may be presented to him in or in connection with an instrument tendered. No one has put forward such a contention. The real question is whether he is entitled to refuse registration to an instrument on the sole ground that it embodies something which is not only pertinent to the transaction as a whole, but a part of that whole. No one

(1) 30 L.J.Q.B., 271.

reading the document could call it other than a mortgage. To refuse it registration is to refuse operative effect to the transaction of mortgage and to open wide the way to the defeat of honest dealings in themselves valid.

Holding this to be the matter in dispute, I think it unnecessary to say more than that I am in entire agreement with the Chief Justice that the view taken by *à Beckett* J. is the correct one, and that the instrument ought to be registered.

On the remaining point I think, for the clear reasons given by His Honor, that a mandamus should issue.

ISAACS J. I agree that this appeal should be allowed. The judgment of the Full Court appears to rest on two grounds which require separate consideration. The first is that the *Transfer of Land Act* forbids the registration of such a mortgage as that now under consideration. The learned Chief Justice of Victoria says (1) "it would be incongruous that there should be a right to have registered an instrument into which has been introduced a bargain which effects a different object from that instrument presented for registration and between parties extrinsic to those who are parties to the instrument."

His Honor later on says (1):—"The *Transfer of Land Act* precludes the registration of instruments which are collateral to a mortgage itself; although they form part of the same transaction out of which the mortgage arose or in the course of which the mortgage was agreed upon."

Now, with very much of that I thoroughly agree, but, with very great deference, the difficulty in his Honor's mind was caused, as it appears to me, by using, in the passage first quoted, the word "instrument" in two senses. The learned Chief Justice there employs the one word instrument to denote both the mortgage alone, and the whole document containing the mortgage and the extrinsic bargain. The whole trouble disappears if the true statutory, and, indeed, common law, meaning of "instrument" is borne in mind. On the same piece of material may be written several "instruments." A promissory note, a receipt, an agreement for a lease, a guarantee, may all be written on the same

(1) 33 A.L.T., 76, at p. 77.

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piece of paper, and some of them may be separately dutiable as distinct instruments. Thus in the Schedules to the *Stamps Acts* 1890 and 1892, it is provided that there shall be charged and paid for the several "instruments" thereinafter specified the undermentioned duties. If more than one such instrument were contained on one piece of paper, they would still remain distinct instruments.

The *Transfer of Land Act* 1890, in sec. 4, says "'Instrument' shall include a transfer lease sub-lease mortgage charge and creation of an easement." So far, then, as what is written on the paper here is a "mortgage," it is a complete instrument, and the question is whether, as a "mortgage," it complies with sec. 113 as being "a mortgage in the form of the Twelfth Schedule." It is not and cannot be denied that as far as the mortgagor's covenants and stipulations, and their agreement to give a security over the land, are concerned, the instrument of mortgage is precisely in the statutory form. There is no need so far to call in aid the elastic provisions of sec. 240. But after that instrument is completed there is added an undertaking called a covenant by other persons and for the consideration mentioned to pay the money secured in case the mortgagor fail to do so. That, as *à Beckett* J. rightly said, in no way affects any of the provisions of the mortgage. It does not, I may add, affect any of those provisions either in form or in substance. It is, as *Madden* C.J. said in one of the passages I quoted, "between parties extrinsic to those who are parties to the instrument." There his Honor used the word "instrument" in the statutory sense. Now that extrinsic agreement is not presented for registration, any more than if there were appended to the instrument of mortgage a verse of "Omar Khayam," or a copy of an Egyptian hieroglyphic. It is the mortgage, and that alone, that is sought to be registered. No one would suggest that the undertaking of the guarantors would or could affect the land, or be taken into consideration by the Registrar or any person subsequently interested in the land. So far, then, as any direct statutory prohibition is concerned, the matter is free from objection, and, if the Registrar had registered the document, no one could possibly say the Statute had not been strictly complied with.

Then the judgment appealed from treats the matter as within the Registrar's discretion. Now of course the Registrar is not an automaton; he has a high and responsible public duty to discharge, and he has an obligation to see that the purpose of the Act is neither destroyed nor prejudicially affected. He has the right and the duty to preserve his entries and records from confusion, and to prevent the intrusion of anything calculated to obscure or mislead, or even to impede the ordinary and practical working of his department. He has also in certain cases a necessary discretion, though forms are complied with, to act so as not by undue haste or too facile compliance with any application to do what appears to him may be a wrong to another person, or bring a claim upon the assurance fund. But he has no discretion to declare that an instrument is not in statutory form which in fact and in law is in statutory form, or that an addendum to the document destroys the statutory form of the instrument sought to be registered, when in fact and in law that is not the effect.

If, however, an instrument in the most perfect form were presented for registration linked with other matters, so as to manifestly encumber the register, or even so as to raise a fair case for the Registrar's consideration as to office difficulties or public inconvenience, it would be difficult to persuade a Court to overrule his refusal to accept the documents. The Act, while prescribing a statutory form as the only expressed essential, assumes reasonable conduct on the part of those lodging the instruments, and a due regard by them for the conduct of public business and the facilities of inspection and investigation. And a Court is not so well able to determine that in a doubtful case as the Registrar.

But where, as here, the matter is so plain and simple, and so eminently proper and desirable as between the parties and so absolutely free from public objection, I think no hesitation can be felt in saying the Registrar's duty was to register the mortgage. I have said the course adopted was proper and desirable as between the parties, and I will explain what I mean. The real parties for whose benefit and at whose request the money was borrowed were obviously the guarantors, who are the bene-

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ficiaries. The registered proprietors are the executor and the executrix of the will, the widow possessing both capacities. It is quite true a separate document embodying the guarantee could have been drawn up, but it would have involved more trouble and more expense. Further, though the mortgagees would have been equally safe with this separate document, the trustees would not. They would probably have required for their protection a third document indemnifying them, or in some way exonerating them, and, as there were two of them, a fourth document might even have been thought desirable. Then comes the question of preserving the indemnity, so that the simplest, cheapest and most effective method all round was to append the agreement to the trustees' mortgage where their action and its justification stood together, and at the same time secured the mortgagee.

Unless the simplicity of the Act in one direction is necessarily to be counteracted by increased complexity and expense in other directions, I cannot see why this transaction is not within the letter and the spirit of the enactment. The legislature has not, in my opinion, insisted on anything so unreasonable as to require this transaction to be split up. Then it was urged that mandamus is not a remedy open to the applicant, the argument being that the mortgagor owed a duty to the mortgagee to get the mortgage registered, a duty which could be enforced in an action, if the mortgagor otherwise refused, and that the proper and the only path to compel registration was by way of sec. 209. There is nothing in the Act giving any specific remedy to a purchaser or mortgagee, and there are directions in the Statute which might indicate a very great possibility of embarrassment and risk to them, if the carriage of registration and consequent priorities and compulsive process to obtain registration were left in the hands of the registered proprietor in all cases. Even where an alternative legal remedy is available, yet unless it is equally convenient, beneficial or effectual mandamus may be granted to compel the performance of a public duty. The suggested alternative proceeding in this aspect offers no obstacle.

In my opinion the judgment of *à Beckett* J. was correct and should be restored.

Appeal allowed. Order appealed from discharged. Appeal from judgment of àBeckett J. dismissed with costs and his order restored. Respondent to pay the costs of the appeal.

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Solicitors, for the appellant, *Willan & Colles.*

Solicitor, for the respondent, *Guinness*, Crown Solicitor for Victoria.

B. L.

Appl
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[HIGH COURT OF AUSTRALIA.]

NISSEN AND OTHERS . . . . . APPELLANTS;
DEFENDANTS,

AND

GRUNDEN AND OTHERS . . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Trustees—Executors—Commission—Jurisdiction to allow past and future—Removal of trustee—Retirement of trustee and appointment of new trustee—Employment of retired trustee at a salary—Breach of trust—Profit made by trustee out of trust—Appeal in administration action—Costs of trustee—Right to indemnity out of estate—Supreme Court Act 1890 (*Vict.*) (*No.* 1142), *sec.* 21—*Administration and Probate Act* 1890 (*Vict.*) (*No.* 1060), *sec.* 26.

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MELBOURNE, *May* 24, 27, 28, 29, 30.

Griffith C.J., Barton and Isaacs JJ.

The Supreme Court of Victoria has, under sec. 21 of the *Supreme Court Act* 1890 (sec. 16 of 15 Vict. No. 10) jurisdiction to grant commission both past and future to executors, administrators and trustees for their pains and trouble, and this jurisdiction is not limited in its exercise by the provisions of sec. 26