

[HIGH COURT OF AUSTRALIA.]

MAHONY AND ANOTHER . . . APPELLANTS;

AND

HOSKEN (REGISTRAR OF TITLES) . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF
VICTORIA.

Charge of land—Registration—Annuity charged on land to secure performance of a contract—Annuity ceasing to be payable in certain events—Transfer of Land Act 1890 (Vict.) (No. 1149), secs. 4, 113, 240; 13th Schedule.

H. C. OF A.
1912.

MELBOURNE,
June 14.

Griffith C.J.,
Barton and
Isaacs JJ.

By an instrument in writing A. purported to charge certain land with an annuity of £150 a year for three years payable by equal monthly instalments in favour of B. The instrument contained a provision whereby it was expressly agreed as to any instalment of the annuity that, if throughout the month immediately preceding the due date for payment of such instalment the whole of the covenants of A. with B. should have been duly observed and performed, B. should give A. a release in respect of that instalment. The instrument then contained several covenants on the part of A. including covenants to use the premises on the land as a hotel only, to keep in force the licence for the hotel, to perform and observe all the provisions of the Licensing Acts, and to purchase from B. at certain prices all colonial beer &c. sold in the hotel.

Held, that that which was called an annuity in the instrument was an annuity within the meaning of sec. 4 of the *Transfer of Land Act 1890*, and that the instrument was a charge within sec. 113 and the 13th Schedule of that Act, and therefore that the Registrar was not justified in refusing to register the instrument as a charge.

Perpetual Executors and Trustees Association of Australia Ltd. v. Hosken, 14 C.L.R., 286, followed.

Decision of the Supreme Court of Victoria : *In re a Charge from Mahony to Carlton and United Breweries Proprietary Ltd.*, (1912) V.L.R., 65, reversed.

H. C. OF A. APPEAL from the Supreme Court of Victoria.

1912.

MAHONY
v.
HOSKEN.

An application was made by John Joseph Mahony and Maria Cecilia Mahony to the Registrar of Titles to register an instrument of charge over certain land of which they were the registered proprietors in favour of the Carlton Brewery Co. Ltd. On the land was a hotel of which John Joseph Mahony was the licensee. The instrument purported to charge the land for the benefit of the Company with an annuity of £150 a year for three years payable by monthly instalments of £12 10s. on the 1st day of each month throughout the period, such payments to be made in advance. It contained the following provision:—

“It is hereby expressly agreed as to any instalment of the said annuity charged or payable as aforesaid that if throughout the month immediately preceding the due date for payment of such instalment the whole of the covenants with the said Company hereinafter contained shall have been duly observed and performed the said Company shall upon request execute and give to the said John Joseph Mahony and Maria Cecilia Mahony or their executors administrators or transferees respectively and in such form as may reasonably be required an acknowledgment or release which shall be as effectual to prevent any enforcement of the charge or covenant hereinbefore contained or for the purposes of procuring or compelling the said Company to execute a discharge of the said annuity as if the said instalment had in fact been duly paid.”

Then followed a number of covenants including covenants that the premises should be used as a hotel and not for any other purposes, that the victualler's licence for the hotel should be kept in force and the provisions of the Licensing Acts be duly performed and observed, and that throughout the period the Company should have the exclusive right to supply, and the licensee for the time being should take and purchase from the Company or its nominee and not from anyone else all ale, beer, porter or stout brewed in the Commonwealth and received, consumed, sold or disposed of in the hotel, with a proviso as to the price to be charged and paid for such ale, &c.

The Registrar refused to register the instrument on the following grounds:—

1. The Instrument is not in the form in the Thirteenth Schedule to the *Transfer of Land Act* 1890. H. C. OF A. 1912.

2. The variations from the said form are matters of substance.

3. The registered proprietors do not, in fact, charge their land with the payment of an annuity within sec. 113 of the said Act, but only with the payment of an annuity if in a specified event (which may never happen) there shall be an annuity to be paid.

4. The instrument is in substance a tied house agreement and not an annuity charged on land.

5. The annuity in the instrument lodged is merely the penalty to secure performance of the agreement.

6. An agreement to which a registered proprietor is a party is not entitled to registration for the reason only that the penalty for non-performance by him is in the form of an annuity and payment thereof—in the event of the penalty becoming payable—is charged on the land.

7. Registration of the instrument would enable the chargee to enforce payment of the penalty by selling under the power in the Act and retaining the whole amount of the penalty out of the proceeds.

8. The Registrar is forbidden to enter in the Register Book notice of any trust, and the covenant by the registered proprietors that the land and all buildings thereon shall be used as a licensed hotel and the covenants incidental or subsidiary thereto are in effect declarations of trust.

9. The Company (chargee) is improperly defined so as to include its successors in business.

A summons was issued calling upon the Registrar to substantiate and uphold the grounds of his refusal before the Full Court, and, on the hearing, the Full Court by majority held that the grounds of refusal had been substantiated, and dismissed the summons with costs: *In re Charge from Mahony to Carlton and United Breweries Proprietary Ltd.* (1).

From this decision J. J. Mahony and M. C. Mahony now by leave appealed to the High Court.

MAHONY
v.
HOSKEN.

Weigall K.C. (with him *Gregory*), for the appellant. The

H. C. OF A. instrument should be registered under sec. 113 of the *Transfer of*
 1912. *Land Act* 1890 as a charge to secure an annuity. It contains an
 { absolute covenant to pay an annuity with a defeasance on the
 MAHONY happening of certain events. It is a rent charge, and the legis-
 v. lature had in mind the well-recognized practice of conveyancers
 HOSKEN. to create a rent charge to secure an annuity: See *Austerberry*
 — *v. Corporation of Oldham* (1); *Key and Elphinstone's Precedents*
of Conveyancing, 8th ed., vol. I., p. 338n. The annuity is one
 which remains dormant until wanted. This is an ordinary busi-
 ness operation which under the Act is intended to be capable of
 registration: *Perpetual Executors and Trustees Association of*
Australia Ltd. v. Hosken (2).

Irvine K.C. (with him *Schutt*), for the respondent. The scheme of the Act is that what is registered is to be a concise statement of a particular charge. What sec. 113 enables to be registered is an annuity charged upon land, and not an instrument which among many other things contains an annuity charged upon land. A charge of an annuity which may be registered does not include a defeasance. A charge of an annuity does not imply a defeasance as a mortgage implies the repayment of the mortgage money. A charge of an annuity is a rent charge which has a clearly defined meaning at common law. It is the policy of the Act not to allow any equities arising out of a transaction to appear on the register. The purpose for which a rent charge is given may not be registered. That which is called an annuity in the instrument is not an annuity within the meaning of the definition in sec. 4 of the Act. The essence of an annuity is a certain payment of a certain sum.

Weigall K.C., in reply. If the charge of an annuity is substantially in the form of the Thirteenth Schedule to the Act so that it can be at once recognized, it should be registered.

GRIFFITH C.J. I am unable to distinguish this case from *Perpetual Executors and Trustees Association of Australia Ltd. v. Hosken* (2), which we decided last month. The application was one by the registered proprietors of land held under the *Transfer*

(1) 29 Ch. D., 750, at p. 783.

(2) 14 C.L.R., 286.

of *Land Act* 1890 to compel the Registrar to register an instrument presented to him which was alleged to be in the form of a charge.

The appellants, no doubt, for sufficient consideration—that is not a matter for us—executed the instrument in question by which they purported to charge the land for the benefit of the Carlton Brewery Co. with an annuity of £150 to be paid at the times and in the manner following, that is to say £12 10s. on the first day of every month for a period of three years, subject to a proviso. The proviso was that if during each month of the period of three years certain covenants contained in the instrument, including a covenant to keep the premises as an hotel and to purchase all Australian beer and porter from the Carlton Brewery Co., should be duly observed and performed, the obligation to pay £12 10s. on the first of the succeeding month should be released. The Registrar refused to register the instrument on the ground that it is not a charge within the meaning of the Act. I confess, with all respect to the majority of the learned Judges of the Supreme Court, that I have some difficulty in appreciating the argument upon which they rely and which has been presented to us now by Mr. *Irvine*.

Sec. 113 of the Act provides that “The proprietor of any land under the operation of this Act . . . may charge the same with the payment of an annuity by signing a charge thereof in the form in the Thirteenth Schedule hereto.” Sec. 240 provides that “The forms contained in the several schedules hereto . . . 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.” The form given in the Thirteenth Schedule is:—“I A.B. . . . being registered as the proprietor of an estate [*here state nature of the estate*] in All that piece of land being . . . and desiring to render the said land available for the purpose of securing to and for the benefit of C.D. the annuity hereinafter mentioned Do hereby charge the said land for the benefit of the said C.D. with an annuity of to be paid at the times and in the manner following that is to say [*here state the times appointed for the payment of the*

H. C. OF A.
1912.

MAHONY
v.
HOSKEN.

Griffith C.J.

H. C. OF A. *annuity and the events on which it shall cease to be payable also*
1912. *any special covenants or powers and any modification of the*
powers or remedies given to an annuitant by the Act]" &c.

MAHONY

v.

HOSKEN.

Griffith C.J.

The instrument in this case recites the desire of the charger to render the land available for the purpose of securing an annuity, it charges the land with what is called an annuity, and it proceeds to state the times appointed for the payment of the annuity and the events on which it shall cease to be payable. The only argument that can be adduced is that the sums secured are not an annuity. The definition of an "annuity" in sec. 4 is "a sum of money payable periodically and charged on land." The alleged annuity in this case is the sum of £150 a year payable monthly, but ceasing to be payable in certain events. It seems to me to fall exactly within the definition given by the Act. Apart from that consideration, there is no doubt that such a transaction could be carried into effect at common law. As Mr. *Irvine* very properly concedes, an annuity contemplated by this Act secured by a charge is only a rent charge at common law called by another name, and the real objection taken is that an annuity or rent charge, if it is to be made a burden upon land under this Act, must be payable at all events. That is contradicted by the words of the form itself which directs the events upon which the annuity shall cease to be payable to be set out. There is nothing to show that the only event is to be the expiration of a certain time. The events may be as various and as numerous as the parties choose to make them. In *Perpetual Executors and Trustees Association of Australia Ltd. v. Hosken* (1) I expressed the opinion that the scheme of the Act was to facilitate, not to hamper, dealings with land. In my opinion any lawful bargain between parties, the effect of which is to create an interest in land, may be carried out and registered under the provisions of the Act. By "interest in land," of course, I mean something more than a mere right of recourse to an individual in respect to land and include an interest by way of mortgage or charge, using those terms in the widest sense. There may be cases in which it would be inconvenient to register the whole of an instrument of that sort. Mr. *Irvine* suggested the case of a

(1) 14 C.L.R., 286.

marriage settlement which might contain some stipulation creating a rent charge. I can see no objection in point of law why in such a case an instrument of charge should not be registered under the Act to secure the rent charge, nor any reason why the events upon which that rent charge is to cease to be payable as stated in the marriage settlement should not be set out in the form of a schedule to the charge. It might be cumbrous, but I can see no objection in point of law to its being done. I think the illustration put by *àBeckett J.* in the Supreme Court is exactly applicable. It is this (1):—"For valuable consideration A. agrees with B. to maintain him for the remainder of his life and to secure the performance of the obligation by charging an annuity of £100 a year during the life of B. on land under the Act. An instrument of charge is drawn up accordingly containing a covenant by A. that he will maintain B. during his life, that each year during which B. is so maintained he will on request give an acknowledgment to operate as a release of the annuity for that year, and that while B. is properly maintained the right given by the charge shall not be enforced."

I am unable to distinguish that illustration from the present case, and I think it is perfectly clear that such an instrument would be a valid charge under the Act. I think therefore that the appeal must be allowed.

BARTON J. I agree that the appeal should be allowed. I think the case is governed by *Perpetual Executors and Trustees Association of Australia Ltd. v. Hosken* (2).

ISAACS J. I agree. The case is not distinguishable in principle from *Perpetual Executors and Trustees Association of Australia Ltd. v. Hosken* (2), and the only other question is whether this is really an annuity. In my opinion the parties have agreed between themselves that one of them shall pay a specified sum *per annum* by monthly instalments, and that answers the definition of an "annuity" in the Act. The mere fact that in the same document that is on the same material there is added some proviso for relieving the charger of the obligation to pay does

H. C. OF A.
1912.
MAHONY
v.
HOSKEN.
Griffith C.J.

(1) (1912) V.L.R., 65, at p. 70.

(2) 14 C.L.R., 286.

H. C. OF A. 1912.
MAHONY
v.
HOSKEN.
Isaacs J.

not prevent the instrument of charge itself from falling within the statutory definition. In some cases the Registrar's discretion may be properly exercised to prevent his records from being improperly incumbered by some unreasonably long or complicated written transaction which contains the instrument offered for registration. In the case I put in argument of a transfer of land on a dissolution of partnership being included in an extensive and cumbrous document of that nature, the Registrar might reasonably object to put that document upon his records. But that is a matter of discretion and is not within the present case. I agree that the appeal should be allowed.

Appeal allowed. Order appealed from discharged. Order to Registrar to register and to pay costs of the application. Respondent to pay costs of the appeal.

Solicitors, for the appellants, *Pavey, Wilson & Cohen.*

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

B. L.