[HIGH COURT OF AUSTRALIA.]

DRAKE . . . . . APPELLANT;

AND

TEMPLETON (REGISTRAR OF TITLES) . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1913.

MELBOURNE, *Mar.* 13, 14.

Griffith C.J., Barton, Isaacs and Gavan Duffy JJ.

Mortgage—Registration—Contributing mortgage—Money advanced by mortgagees in unequal shares—Tenancy in common—Transfer of Land Act 1890 (*Vict.*) (*No.* 1149), *secs.* 57, 65, 113, 229, 240.

By an instrument of mortgage a mortgagor mortgaged certain land under the *Transfer of Land Act* 1890 to two mortgagees. The instrument, after setting out the usual covenants, contained a number of provisoes. At the end of the first proviso, which related to the postponement of the time for payment of the principal in the event of punctual payment of interest and due performance of the covenants, was a clause stating that "it is hereby agreed" that the principal sum "belongs to" the two mortgagees in unequal specified proportions. The Registrar of Titles having refused to register the instrument,

Held, that the mortgage was a mortgage to the mortgagees as several owners, and not as joint owners, that there was nothing in the Act prohibiting the registration of such a mortgage, and, therefore, that the Registrar should have registered it.

Decision of *à Beckett* J.: *In re Transfer of Land Act* 1890; *Drake* v. *Templeton*, (1913) V.L.R., 9; 34 A.L.T., 146, reversed.

APPEAL from the Supreme Court of Victoria.

By an instrument of mortgage under the *Transfer of Land Act* 1890, dated 28th May 1912, entered into between Hugh Drake, the mortgagor, and Margaret Jane Mackay and Elizabeth Atchison, the mortgagees, it was stated that the consideration

H. C. OF A. 1913.

DRAKE v. TEMPLETON.

was the sum of £700 lent to him by the mortgagees. The mortgagor covenanted to pay to the mortgagees the principal sum of £700 on 1st December then next, and interest thereon at a certain rate so long as the principal or any portion of it should remain unpaid. The mortgage then set out a number of other usual covenants and contained a number of provisoes, the first of which was as follows :—

"Provided that if I shall duly pay the said interest on the days when the same shall become due and shall perform and observe all the covenants and agreements herein contained on my part (other than the covenant for the repayment of the said principal sum of £700 on the said 1st December next) then the said mortgagees will not call in or demand payment of the said principal sum until 1st June 1917 and I will not require or compel the said mortgagees to receive the said sum or any part thereof before that day and it is hereby agreed that the said sum of £700 belongs to the said Margaret Jane Mackay and Elizabeth Atchison in the proportions of £475 to the said Margaret Jane Mackay and £225 to the said Elizabeth Atchison."

By the second proviso it was provided that it should be lawful for the mortgagees to give the notice mentioned in sec. 114 of the *Transfer of Land Act* 1890 in case default should be made in payment of the principal sum or interest secured by the mortgage or any part thereof respectively or in the performance of any covenant therein expressed or implied, and such default should be continued for fourteen days; and also that the power to sell mentioned in sec. 116 of such Act might be exercised if such default should continue for fourteen days after the service of such notice.

By another proviso it was provided that the expression "mortgagees" in the mortgage should be deemed to mean and include the mortgagees their executors administrators and transferrees.

The mortgagor having lodged the mortgage in the Office of Titles, the Registrar of Titles refused to register it, and in accordance with a requisition made under sec. 209 of the *Transfer of Land Act* 1890, the Registrar set forth the grounds of his refusal as follow :—

1. The said instrument though purporting to be a mortgage is not in the form prescribed (see sec. 113, Schedule 12).

2. The variation from the said form is a matter of substance.

3. The insertion in the mortgage of an agreement as to the proportions of the sum of £700 contributed by each of the mortgagees is open to objection inasmuch as:

(*a*) It is, in effect, a declaration of the trusts on which the joint debt of £700 created by the covenant is to be held by the two mortgagees and the disclosure of a trust on the register book is expressly forbidden by the Act (see sec. 57).

(*b*) The effect in equity would appear to be to convert it *qua* the mortgagor into two mortgages ranking *pari passu*, one to secure to one mortgagee the payment of £475, and the other to secure to the other mortgagee £225, notwithstanding the covenants to pay £700 and interest are entered into with both the mortgagees jointly and the powers and remedies of the mortgagees are in the form of joint powers and remedies.

4. If in such a mortgage as that contained in the said instrument a statement as to the proportions in which the total sum is contributed by the two mortgagees can properly be allowed to be inserted, then, in order that the covenants entered into with the two mortgagees jointly to pay the total sum and interest can be given effect to, it would be necessary to add to the said mortgage clauses to the effect that, as against the mortgagors, the total sum should be deemed to be money held by the mortgagees on a joint account, and to provide for the exercise and devolution of the joint powers and remedies.

5. The insertion of a declaration or agreement as to the proportions of the total sum of £700 contributed by each mortgagee materially alters the effect of the mortgage as drawn and the rights and duties of the parties thereto would be regulated, not by the mortgage as drawn, but in accordance with the rules of equity as to the effect of such a declaration or agreeement in the mortgage.

6. The effect of the proposed dealing would be to make one instrument of mortgage do duty for two distinct mortgages under

H. C. OF A. 1913.

DRAKE v. TEMPLETON.

one stamp and without giving priority to either mortgagee as against the other, which would not only be inconsistent with the provisions of the Act as above-mentioned, but would render it impossible for the office, if occasion arose, to determine the respective claims of the respective mortgagees *inter se* or to act with safety to the assurance fund in the event of the right to sell or foreclose on the part of either of the mortgagees.

7. That the instrument so tendered for and refused registration contains in fact two mortgages, and would therefore in any event be subject to two fees on registration whereas one fee only has been paid or tendered.

A summons was then issued calling upon the Registrar to substantiate the grounds of his refusal. The summons was heard by *à Beckett* J., who dismissed it: *In re Transfer of Land Act* 1890; *Drake* v. *Templeton* (1).

From this decision the mortgagor now, by special leave, appealed to the High Court.

Schutt, for the appellant. Apart from the *Transfer of Land Act* 1890 and the *Conveyancing Act* 1904, where money is contributed by two mortgagees they are in equity tenants in common. The object of the introduction of the clause at the end of the first proviso is to make it clear that the mortgagees are tenants in common and not joint tenants, so that the provision in sec. 229 of the *Transfer of Land Act*, that in the case of the death of one of two mortgagees entitled jointly in equity the survivor is entitled to be registered as sole proprietor of the mortgage, shall not be applicable. [He referred to *Transfer of Land Act* 1890, secs. 65, 66: *Conveyancing Act* 1904, sec. 68; *Mahony* v. *Hosken* (2).] The instrument, read as a whole, constitutes the mortgagees tenants in common: *Davidson's Conveyancing*, 3rd ed., vol. II., p. 595; *Coote on Mortgage*, 7th ed., vol. I., p. 556; *Morley* v. *Bird* (3); *In re Jackson*; *Smith* v. *Sibthorpe* (4).

[ISAACS J. referred to *Powell* v. *Brodhurst* (5).

GRIFFITH C.J. referred to *R.* v. *Registrar-General*; *Ex parte Roxburgh* (6).]

(1) (1913) V.L.R., 9; 34 A.L.T., 146.
(2) 14 C.L.R., 379.
(3) 3 Ves., 628, at p. 631.
(4) 34 Ch. D., 732.
(5) (1901) 2 Ch., 160.
(6) 1 Qd. S.C.R., 201.

Davis, for the respondent. The Court will not interfere with the Registrar's decision if it is doubtful whether the mortgage should be registered or not. The Registrar is entitled to refuse to register if the mortgage is embarrassing to him in the performance of his duties, or to the public who see the document and are entitled to know what is the relationship between the parties. He referred to *Perpetual Executors and Trustees Association of Australia Ltd.* v. *Hosken* (1). There is in this instrument a substantial variation from the form prescribed. If a mortgage is expressed on its face to be an advance on a joint account, then under sec. 68 of the *Conveyancing Act* the mortgagor may safely pay the survivor. Under sec. 57 of the *Transfer of Land Act* 1890 the Registrar is prohibited from entering in the register book notice of any trust. It is very doubtful on the face of this instrument whether it does or does not create a tenancy in common or a joint tenancy. It is therefore confusing. The *Transfer of Land Act* plainly indicates that where there are two mortgagees the mortgage must be expressed as an advance on a joint account, and it does not contemplate a mortgage being expressed as being an advance by the mortgagees as tenants in common.

[ISAACS J. referred to *Ex parte National Trustees Executors and Agency Co. of Australia Ltd.* (2).]

This instrument discloses a trust: *Lewin on Trusts*, 12th ed., p. 186; *White & Tudor's Leading Cases*, 8th ed., vol. II., p. 980. There is an attempt here to combine two mortgages in one instrument and fees have only been paid in respect of one mortgage. [He referred to *Stamps Act* 1890, sec. 75; *Transfer of Land Act* 1890, sec. 197.]

Schutt, in reply.

GRIFFITH C.J. In my opinion this case is governed by the two cases we have already decided, *Perpetual Executors and Trustees Association of Australia Ltd.* v. *Hosken* (3) and *Mahony* v. *Hosken* (4). In those cases it was laid down as plainly as we could lay it down, that the object of the *Transfer of Land Act*

(1) 14 C.L.R., 286, at p. 295.
(2) 19 A.L.T., 222.
(3) 14 C.L.R., 286.
(4) 14 C.L.R., 379.

H. C. OF A. 1913.

DRAKE v. TEMPLETON.

Griffith C.J.

was not to obstruct but to facilitate business, and that the Registrar is not justified in refusing to register an instrument merely because it does not literally comply with the precise form prescribed for such instruments, provided that any variation from the form does not affect the substance. The Act itself says so in the plainest language.

The objection taken in the present case is this:—The document is a mortgage of the kind commonly called a contributory mortgage. The two mortgagees contributed the mortgage money, £700, between them in unequal proportions, and on the face of the mortgage that fact is stated. It is true that it is stated in an inartificial manner. It might have been stated by inserting after the words "in consideration of the sum of £700 this day lent to me by" the two mortgagees, the words "in the respective proportions of £475 and £225." That would have been one way. Instead of that, it is put in as an addendum to the first proviso. There is no possible doubt as to the meaning of the words, and they mean the same thing whether they are put in in one place or the other. The effect of them is that it is a mortgage to two mortgagees as several owners, not as joint owners either at law or in equity.

It is said that that is embarrassing. Whom can it embarrass? It is suggested that the Commissioner of Titles cannot understand the document. It is not complimentary to his intelligence to say that he cannot understand it. I assume that he can, or, at all events, that he can get advice to enable him to understand it. Then, how can dealings with the land be affected? There can be no dealing with the land, so long as both mortgagees are alive, without the signatures of both. If they seek to foreclose, both must join in the application. If they seek to exercise the power of sale, both must join in the sale. If they wish to give a release on payment, both must join in the release. No doubt, therefore, can arise until one of the mortgagees dies. Sec. 229 of the *Transfer of Land Act* 1890 provides that when there are two or more mortgagees and one of them dies, the survivor or survivors may apply to be registered as sole owner or owners, but only in the event of the mortgage being one "owned on a joint account in equity." The fact that the statement objected to is contained

on the face of the mortgage would prevent any such application being made in this case. So that no embarrassment is caused to the Commissioner in that respect. Before any alteration can be made in the register on the death of one of the mortgagees, the representatives of the deceased mortgagee will have to have notice. That is all. How can anybody be embarrassed by any of those things?

Then it is said that the public may be embarrassed if they do not understand the document, and so will fail to obtain information about someone else's business with which they have no concern. The argument answers itself.

In my opinion all the arguments put forward on behalf of the Registrar are quite untenable.

One or two other points were taken to which I do not think it necessary to refer. The learned Judge from whom this appeal is brought did not express an opinion in any way in conflict with anything I have said. He supported the Commissioner on the ground only that the statement as to joint contribution was made in an objectionable form, and thought that it was something extraneous woven into the fabric of the mortgage in a manner which justified the Commissioner in refusing registration. I do not think it is any concern of the Commissioner to watch over the rights of the mortgagor and mortgagees. If it is the effect of the language used that the mortgagor agrees to treat the mortgage as a contributory mortgage, that agreement is quite immaterial. But, as a matter of construction, I do not think that he agrees to anything of the kind. It is, indeed, quite immaterial whether he does or not, since if the question arose his equitable obligation would be the same whether he formally agreed to be bound by it or was bound by having notice of it.

In my opinion the appeal should be allowed.

BARTON J. I am entirely of the same opinion, and I am equally unable to distinguish the case from the other two cases in which, the Registrar having made similar objections, the Court ordered him to register.

ISAACS J. I also think that the appeal should be allowed.

H. C. OF A. 1913.

DRAKE v. TEMPLETON.

Isaacs J.

There were some questions raised which it is not necessary now to decide—questions of great interest and some little difficulty which may have to be considered at a future time. One of them is as to the necessary parties, whatever the equities may be, who must join in the release of a mortgage. But on the document before us the matter can be resolved very simply. The learned primary Judge thought, as I understand, that the mortgage, apart from the portion of the first proviso which is objected to, was to be considered as a joint mortgage, and that the portion objected to sought to modify the mortgage so construed and to do so in an objectionable way. He said that he was not considering whether, if at the foot of the mortgage the mortgagees had chosen to say that, as between themselves, they held the mortgage in specific shares, setting out the proportions, the Commissioner could have refused to register the mortgage containing that statement. But he thought that from the position of the portion objected to, as well as from its words, it had been woven into the fabric of the mortgage in a manner which made the whole document substantially not what it would otherwise have been. I think that that mode of approaching the matter has led to error. When the document is looked at as a whole, it does not amount to a joint mortgage in the sense to which I have referred. It is a mistake to construe a document apart from any given portion of it first and then to see what change has been made by that portion. The meaning of each and every part of the document must be ascertained by reference to the whole document. When this particular document is looked at as a whole, it is found that nowhere is it stated expressly that the advance is a joint advance. There are words which are capable of that implication if nothing more appeared, but, when these particular words are put in defining the several interests of the mortgagees, then that implication is impossible because the parties have expressly stated what they mean.

In *Keightley* v. *Watson* (1) *Parke* B. said:—"The rule that covenants are to be construed according to the interest of the parties, is a rule of construction merely, and it cannot be sup-

(1) 3 Ex., 716, at p. 722.

posed that such a rule was ever laid down as could prevent parties, whatever words they might use, from covenanting in a different manner. It is impossible to say that parties may not, if they please, use joint words, so as to express a joint covenant, and thereby to exclude a several covenant, and that because a covenant may relate to several interests, it is therefore necessarily not to be construed as a joint covenant. If there be words *capable of two constructions*, we must look to the interest of the parties which they intended to protect, and construe the words according to that interest." That is exactly the position here upon the two provisions I have indicated. If that be so, there is no extraneous provision woven into the fabric of the mortgage with another meaning.

Then comes another question raised by Mr. *Davis*: Can a mortgage of that character, namely, a mortgage in which there are several interests of mortgagees, be registered? The learned Judge of first instance does not say that such a mortgage is incapable of registration, and I do not know of any authority bearing out that contention. If that had been the opinion of that Judge, who is specially learned in this branch of the law, I think he would have said so. However that may be, I can see nothing in the *Transfer of Land Act* to prevent the registration of such a mortgage, because the Act does not set out to limit the class of mortgages which may be made and registered, but it prescribes the form which they are to assume, and the land to which they are to refer. The form of this particular mortgage, does not, so far as I can see, depart from the form in the Schedule, and therefore, in my opinion, the Registrar was wrong in not registering the document.

GAVAN DUFFY J. Had the matter come before me in the first instance, as it did before *à Beckett* J., I should probably have taken the same view as he did. On consideration, and after having had the benefit of argument, I think that that view is not correct, and I have come to the same conclusion as the other members of the Court. I adopt the judgment of my brother *Isaacs* as expressing the reasons for my opinion.

H. C. OF A. 1913.

DRAKE v. TEMPLETON.

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

Solicitors, for the appellant, *Maddock, Jamieson & Lonie.*

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

B. L.

Foll *Zeneca Ltd* v *Sanonda (Australia) Pty Ltd* (1998) 41 IPR 587

[HIGH COURT OF AUSTRALIA.]

SCHWEPPES LIMITED . . . . . APPELLANTS;

AND

E. ROWLANDS PROPRIETARY LIMITED . RESPONDENTS.

ON APPEAL FROM THE REGISTRAR OF PATENTS.

H. C. OF A. 1913.

MELBOURNE, *March* 18, 19.

Griffith C.J., Barton, Isaacs and Gavan Duffy JJ.

Trade mark—Registration—Invented word—Variation of known word—Word having reference to character or quality of goods—Trade Marks Act 1905 (*No.* 20 *of* 1905), *secs.* 16, 114.

By *Griffith* C.J. and *Barton* J.—Where a word is sought to be registered as a trade mark, in determining the question whether it is an invented word within the meaning of sec. 16 of the *Trade Marks Act* 1905 or a mere variant of a known word, regard must be had to the meaning of the known word and to the subject matter to which the word sought to be registered is to be applied.

Eastman Photographic Materials Co. v. *Comptroller-General of Patents, Designs, and Trade Marks*, (1898) A.C., 571; 15 R.P.C., 476, discussed.

The word "Sarilla" was sought to be registered as a trade mark in respect of "mineral and aerated waters, natural and artificial, including ginger beer." The application was opposed on the ground that the word was not an invented