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ment of it, the defendant should afterwards be allowed to bring another action to recover it back from the plaintiff. I think, therefore, that the first question should be answered to the effect that the respondent was precluded from issuing the notice of 22nd February 1913.

As to the other point I will say a few words, as it has been fully argued, and an expression of opinion upon it may be useful in other cases, although, under the law as it now stands, it cannot affect the extent of the appellants' liability to taxation in future. I have already stated the terms of the will. It was contended by Mr. *Waterhouse*—and for some time I was disposed to accept his contention—that, upon a proper construction of the will, the widow is a tenant for life according to the meaning of that term at common law. But on further consideration I have come to the conclusion that the true position of the widow is that she has an estate for years. It is true that estates for years are generally created by demises *inter vivos*. But there is no reason why they should not be created by will. If an estate for years is so created it is not, of course, an estate for life. In my opinion what was given to the widow was an equitable estate for a term the maximum duration of which was 21 years from the birth of the younger son, which was in July 1905, that term being subject to determination in either of three events: first, the earlier attainment of the age of 21 by the elder son; secondly, the death of both sons; and, thirdly, the death of the widow herself. It is settled that an estate created, by whatever means, for a fixed term or with a defined end subject to prior determination by the death of the grantee, is an estate for years, and not an estate for life. If it is determinable upon any other contingency it is none the less an estate for years, and not an estate for life. I think, therefore, that if the case had rested on the second point alone the respondent would not have been entitled to the benefit of sec. 25.

BARTON J. I agree in the conclusion at which the learned Chief Justice has arrived as to the first question, and for the same reasons. As to the second question, as the case is concluded by the answer to the first question it seems to me unnecessary to

answer it, but I am inclined to the same view which the learned Chief Justice has taken.

GAVAN DUFFY J. I agree with the answer which the learned Chief Justice has made to the first question for the reasons which he has given. In the circumstances, I think it unnecessary to make any judicial determination in respect of the second question.

The first question answered in the negative.

Solicitors, for the appellants, *Ritchie & Parker*, Launceston, by *Simmons, Wolfhagen, Simmons & Walch.*

Solicitor, for the respondent, *Gordon H. Castle*, Crown Solicitor for the Commonwealth, by *Dobson, Mitchell & Allport.*

B. L.

[HIGH COURT OF AUSTRALIA.]

CROWLEY . . . . . APPELLANT;

AND

TEMPLETON (REGISTRAR OF TITLES, VICTORIA) RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Feb.* 26; *March* 2.

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

Lease—Registration—Variation of lease from prescribed form—Matter of substance—Transfer of Land Act 1890 (*Vict.*) (*No.* 1149), *secs.* 3, 4, 99, 112, 137, 240, *Ninth Schedule.*

Sec. 99 of the *Transfer of Land Act* 1890 provides that "the proprietor of any freehold land under the operation of this Act may lease the same for any term exceeding three years by signing a lease thereof in the form in the Ninth Schedule hereto."

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Held, that a lease for more than three years of land under the operation of the Act, must, in order to entitle it to registration under the Act, be in the form set out in the Ninth Schedule to the Act or a variation of that form not being matter of substance.

A lease for five years of land which was under the *Transfer of Land Act* 1890 began with the words "This instrument," and was under seal. It did not recite that the lessor was the registered proprietor of the land. It did not refer to any encumbrances upon the land, except that in indorsements upon it reference was made to certain mortgages. It did not adopt the covenants implied under the *Transfer of Land Act* 1890, but did adopt certain covenants set out in the *Landlord and Tenant Act* 1890, and it did not negative by express declaration the covenants implied under the *Transfer of Land Act*. It included furniture in a house on the land.

Held, that the variation from the form of lease prescribed by the Ninth Schedule to the *Transfer of Land Act* 1890 was "matter of substance" within the meaning of sec. 240 of that Act, and, therefore, that the Registrar was justified in refusing to register the lease.

Decision of the Supreme Court of Victoria (*à Beckett* J.): *In re Crowley and Burns's Lease*, (1913) V.L.R., 266; 34 A.L.T., 201, affirmed.

APPEAL from the Supreme Court of Victoria.

A lease from Thomas Crowley to Florence Lockett Burns of certain land of which he was the registered proprietor for an estate in fee simple under the *Transfer of Land Act* 1890, was lodged for registration at the Office of Titles, Melbourne, on 18th February 1913. The lease was as follows:—

"This instrument made the 23rd day of January 1913 between Thomas Crowley of Healesville in the State of Victoria saw-mill proprietor (hereinafter called the lessor) of the one part and Florence Lockett Burns of Healesville aforesaid married woman (hereinafter called the lessee) of the other part witnesseth that for and in consideration of the yearly rent hereinafter reserved and the covenants agreements and provisoes hereinafter contained and by and on the part of the said lessee her executors administrators and permitted assigns to be paid observed and performed he the said lessor doth by these premises demise and lease unto the said lessee her executors administrators and permitted assigns all those pieces of land being Allotments two and three of Section three in the Township of Healesville Parish of Gracedale County of Evelyn and Allotment thirteen Section C Parish unnamed

within the Township Reserve of Healesville County of Evelyn containing six acres one rood and twenty-one perches or thereabouts together with all that the interest of the said lessor in the furniture contained in the house on the said land to be held by the said lessee for the term of five years from the first day of January 1913 yielding and paying therefor during the said term the yearly rental of sixty-five pounds payable monthly on the first day of each and every calendar month during the currency of the tenancy hereby created the first of such monthly payments to be made on the execution hereof and the last of the said monthly payments to be made in advance one calendar month from the expiration of the said term.

"The following covenants are to be construed according to sec. 5 of Part I. of the *Landlord and Tenant Act* 1890:—

"And the said lessee doth hereby for herself her executors administrators and assigns covenant with the lessor:—1. To pay rent. 2. And to pay taxes. 3. And to repair including fences. 4. And that the said lessor may enter and view the state of repair. 5. And that the said lessee will repair according to notice. 6. And will not assign without leave. 7. And that she will leave the premises in good repair.

"Proviso for re-entry by the said lessor on non-payment of rent or non-performance of covenants.

"Provided also and it is hereby agreed and declared that if the said lessee or her executors administrators or permitted assigns shall become insolvent or assign over her or their estate or effects or any part thereof for the benefit of creditors it shall be lawful for the said lessor his executors administrators or assigns into and upon the said premises hereby demised or any part thereof in the name of the whole to re-enter and the same to have again re-possess and enjoy as in his or their first and former estate. And it is hereby further agreed and declared that sec. 22 of the *Conveyancing Act* 1904 No. 1953 shall not apply to this lease.

"The said lessor covenants with the said lessee for quiet enjoyment.

"In witness whereof the said parties to these presents have hereunto set their hands and seals the day and year first hereinbefore written.

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"Signed sealed and delivered by the said Thomas Crowley in the presence of F. Jolliffe J.P. Thos. Crowley (L.S.).

"Signed sealed and delivered by the said Florence Lockett Burns in the presence of F. Jolliffe J.P. Florence Lockett Burns (L.S.)

"Encumbrances referred to.—Mortgages Numbers 258412, 265701, 315906 and 262119."

The Registrar of Titles refused to register the lease, and, on being required to do so, gave the following reasons for his refusal:—

"1. That the lease or instrument lodged for registration is not in the form in the Ninth Schedule to the said Act.

"2. The variation from such form is a matter of substance within sec. 240 of the *Transfer of Land Act*.

"3. The instrument lodged for registration as a lease cannot be regarded as having been made in exercise of the statutory power conferred on registered proprietors by sec. 99.

"4. There is no authority to register under the *Transfer of Land Act* any leases except those made in exercise of the power conferred in sec. 99.

"5. The practice with regard to the registration of leases has always been in accordance with the view expressed in ground 4.

"6. The registration of leases in forms other than that prescribed would cause confusion and doubt as to the effect of the several provisions in the Act relating to leases made under the Act (sec. 100 and following sections) and would prejudicially affect the value of the register as evidence of the title of the lessee.

"7. The instrument lodged for registration is not a lease made under the *Transfer of Land Act* 1890 but is or purports to be a lease made under the *Landlord and Tenant Act* 1890."

On a summons to the Registrar to substantiate and uphold his reasons, *à Beckett* J. held that the reasons had been substantiated, and he dismissed the summons: *In re Crowley and Burns's Lease* (1).

(1) (1913) V.L.R., 266; 34 A.L.T., 201.

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

Schutt, for the appellant. The form of lease in the Ninth Schedule to the *Transfer of Land Act* 1890 is optional. In Act No. 140, which originated the system, the word "shall" was used where the word "may" now is in sec. 99. Sec. 112 contemplates that leases of land under the Act may be either leases under the Act or leases not under the Act. A lease for whatever term, or in whatever form, is an "instrument" within the definition of that term in sec. 4, and the Act intends that all instruments may be registered. See secs. 55, 63, 112. A lease for less than three years may be registered: *Guest's Transfer of Land Act* 1890, p. 90. This lease is substantially in the form prescribed in the Ninth Schedule. It contains all the provisions required by that form, except that it does not say that it is subject to the implied covenants. [He also referred to *Perpetual Executors and Trustees Association of Australia Ltd.* v. *Hosken* (1); *Mahony* v. *Hosken* (2); *Drake* v. *Templeton* (3).]

Mann, for the respondent. In order to entitle a lease to registration it must be substantially in the form prescribed by the Ninth Schedule, otherwise common law conveyances and mortgages would be entitled to registration. This lease differs substantially from the form. It is under seal, and one of the objects of sec. 99 was to do away with the necessity of a lease for over three years being under seal, as was required by sec. 163 of the *Real Property Act* 1890. The lease omits to state that the lessor is the registered proprietor of the land, and he is the only person who can make a lease which is entitled to registration. The lease refers to and adopts a set of covenants different from those referred to in the form, and does not refer to those which, under the *Transfer of Land Act*, are to be implied. It is only a lease made under the *Transfer of Land Act* that is entitled to registration, and it must be made clear that although there is a variation from the form the parties intend to make a lease under the

(1) 14 C.L.R., 286. (2) 14 C.L.R., 379.
(3) 16 C.L.R., 153.

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Act. Here the parties have departed as far as they could from the form, and the inference is that they did not intend the lease to be one under the Act.

Schutt, in reply.

Cur. adv. vult.

March 2.

GRIFFITH C.J. This is an appeal from a decision of *à Beckett* J. refusing to order the Registrar of Titles to register a document tendered for registration as a lease of land under the provisions of the *Transfer of Land Act*. The principal ground upon which the appeal was brought to this Court is, as I understood the argument, that under the *Transfer of Land Act* any document is entitled to registration provided that it falls within the definition of the term "instrument," given in sec. 4 of that Act, which provides that "'instrument' shall include a transfer lease sub-lease mortgage charge and creation of an easement," no matter in what form it may be. In previous cases which have come before this Court, the question has been whether the particular document tendered for registration was substantially in the form given in the Act. We are now asked to go further and to say that any instrument is entitled to registration.

Sec. 3 of the Act provides that "all laws Statutes Acts and rules whatsoever, so far as inconsistent with this Act, shall not apply or be deemed to apply to land whether freehold or leasehold which shall be under the operation of this Act." It is common knowledge, after so many years, that the scheme of the *Transfer of Land Act* is to substitute title by registration for title by deed. When, therefore, a man who is registered as proprietor of an estate in land wishes to deal with it, the only way to do so is by procuring an alteration of the register. The Act accordingly contains provisions enabling a person who is registered as proprietor of an estate or interest in land to transfer that estate or interest to another person. Sec. 89 provides that "the proprietor of land or of a lease mortgage or charge or of any estate right or interest therein respectively may transfer the same by a transfer in one of the forms in the Sixth Schedule hereto; . . . . Upon the registration of the transfer the

estate and interest of the proprietor as set forth in such instrument or which he shall be entitled or able to transfer or dispose of under any power, with all rights powers and privileges thereto belonging or appertaining, shall pass to the transferee,"—that is, it passes by the registration and not by the instrument. Sec. 99, which deals with leases, provides, in similar terms, that "the proprietor of any freehold land under the operation of this Act may lease the same for any term exceeding three years by signing a lease thereof in the form in the Ninth Schedule hereto." 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, and may charge the same with the payment of an annuity by signing a charge thereof in the form in the Thirteenth Schedule hereto." Then, when those instruments are registered, the registration gives effect to the intention of the parties.

Our attention was called to the fact that secs. 89, 99 and 113 are in form permissive, while in the Act which introduced the new system, the *Real Property Act* 1862, the corresponding provisions were imperative, the word "shall" being used where the word "may" is now used. But, as I have already pointed out, the only way of dealing with land which is under the provisions of the Act is by alteration of the register, and modes by which such alteration can be procured are prescribed by the Act. No other mode is authorized. These provisions, therefore, although in form permissive or facultative, are in effect peremptory and exclusive. That point therefore fails.

The other question raised is whether the variation in the document sought to be registered from the form in the Ninth Schedule is matter of substance within the meaning of sec. 240. The instrument in question is a lease for five years. I have already referred to sec. 99. Sec. 100 provides that in every lease made under the provisions of the Act there shall be implied certain covenants. One of them is to pay rent, and another is to keep in repair. Sec. 101 declares that in every lease made under the provisions of the Act there shall be implied certain powers, one of which is that if the rent is in arrear for a prescribed time the lessor may re-enter. By sec. 112, if the lessor is

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entitled to re-enter the Commissioner may investigate the facts, and if he finds that the lessor has re-entered in conformity with the provisions for re-entry, he may enter that fact upon the register, which has the effect of terminating the lease. The form given in the Ninth Schedule is this :—" A.B. . . . (hereinafter called the lessor) and who is registered as the proprietor of an estate [*here state nature of the estate*] in the land hereinafter described subject to the encumbrances notified hereunder Hereby leases to C.D. . . . (hereinafter called the lessee) All that piece of land being " &c. " To be held by the lessee for the term of . . . years " &c. " subject to the covenants and powers implied under the *Transfer of Land Act* 1890 (unless hereby negatived or modified) and also to the covenants hereinafter contained," setting them out. The form of the instrument now sought to be registered is much more like what is called a common law conveyance. It begins: " This instrument." It does not recite the fact that the lessor is the registered proprietor of the land. It does not, in the body of it, refer to any encumbrances on the land, although there is an indorsement upon it containing references to some mortgages upon the land. It is under seal. It does not adopt the covenants implied under the *Transfer of Land Act* 1890, but adopts a different set of covenants altogether, namely, the covenants set out in the *Landlord and Tenant Act* 1890. The points on which Mr. *Mann,* on behalf of the Commissioner, principally relied were the omission to recite that the lessor was the registered proprietor, the omission to refer to the encumbrances, the fact that the instrument was under seal, and the fact that it adopted a set of covenants different from those set out in the Ninth Schedule. If the matter rested on those objections alone I should be very much inclined to say that the variation was not matter of substance within the meaning of sec. 240. But there appear to be other difficulties in the way, one of which, at any rate, is very serious. I do not attach any importance to the inclusion of furniture. I have already stated the provisions in sec. 112 as to the power to re-enter and the duty of the Registrar to register a re-entry properly made. Sec. 137 provides that " every covenant and power to be implied in any instrument by virtue of this Act may be negatived or modified by express declaration in the

instrument or indorsed thereon." Now this document, as I have said, contains by incorporation a set of covenants different from those mentioned in the *Transfer of Land Act*. So far as the covenant for re-entry for non-payment of rent is concerned, that in this document is different in substance from that mentioned in the *Transfer of Land Act*. Sec. 137 says that the implied covenants may be negatived or modified "by express declaration." Here there is an affirmative adoption of other covenants which are more or less inconsistent with those in the *Transfer of Land Act*. It appears to me that the Registrar might fairly consider himself embarrassed if, being asked to do his duty upon an alleged re-entry, he has to determine first of all which form of covenant he is to act upon. Is he to act upon the covenant in the Statute which, unless expressly negatived, is to apply, or is he to hold that the affirmative covenant on the same subject, without any express declaration negativing the statutory covenant, in effect supersedes it? A very nice question might arise for argument as to which view he should take.

In my opinion, the work of the Registrar is intended to be to a great extent, I will not say mechanical, but automatic. The instruments which the Registrar is to be called upon to register are to be such as not to involve difficult questions of law or interpretation of documents, except so far as to record bargains made by the parties which they have a right to make. But it was intended that the document sought to be registered should state distinctly what the parties mean. Having regard to all these matters together, I think the Registrar was justified in refusing to register this document, not on any one of the grounds he has given, but because all the variations together amount to a variation in matter of substance. Although perhaps one, or two, or three of them might be trivial, yet if the document as a whole departs so widely as this does from the only form authorized, the variation is one in matter of substance. I think, therefore, that this document is one which the Court should not order to be registered.

BARTON J. I am of the same opinion.

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The judgment of ISAACS and GAVAN DUFFY JJ. was read by

ISAACS J. This case is of considerable importance. The *Transfer of Land Act* 1890 makes provision for creating estates and interests and evidencing their creation, in a manner otherwise unknown to the law. The new method is simpler, and, where it is followed, certain legal consequences are prescribed by the Statute. But the benefit of the Act is dependent on its requirements being satisfied. For various specified transactions, appropriate forms are provided, and when these are followed and registered, and not otherwise, statutory effect attaches according to the nature of the transaction. To attain this end all rules of law inconsistent with the provisions of the Act are, by sec. 3, declared inapplicable. This section has an important bearing in the present case.

Slavish adherence to the forms is not demanded. Technical and immaterial departures from them do not deprive the dealing of efficacy. Substantial compliance is sufficient. But a document offered for registration must show at least substantial compliance on its face. The Act requires it to be in writing, and the writing does not comply with the requirements of the Statute unless those it affects or who are to act upon it, including the Registrar of Titles, whose duty it is to register it, can see from the document itself, when fairly read, that it is an instrument made in pursuance of the Act. Any other rule would introduce endless confusion and risk.

The actual terms of the bargain are a totally different matter. These the parties are at liberty to mould and settle for themselves; and, so long as the fair working of the Act is not impeded or embarrassed, the parties are left unfettered with respect to the stipulations they desire. Short provisions are framed with full elaboration of effect, suitable for ordinary occasions; implied terms are enacted which are to prevail in the absence of contrary provision, but contrary provision can always be made. The power to make it is specifically given (sec. 137), but in giving it the legislature requires it to be exercised in a particular form, namely, " by express declaration in the instrument or indorsed thereon." This form is itself one of the means of indicating that the instrument is made under the Act.

We have therefore to distinguish between the substance of the transaction or bargain, which is left to the discretion of the parties, and the substance of the form in which the transaction is embodied, which is not left to the parties, but is insisted on by the legislature as one of the conditions of statutory operation.

The first contention for the appellant, namely, that whatever its form a lease is registrable, is therefore unsustainable. A similar conclusion was reached under a corresponding Act by the Supreme Court of South Australia in *Cuthbertson* v. *Swan* (1), and, again, in *In re Bosquet* (2).

The question, then, is: Does the lease in this case, speaking for itself, appear to be a lease made under the *Transfer of Land Act*, and substantially in accordance with the form prescribed for such a transaction? In our opinion it does not. All the Schedules to the Act refer to the Act in some way; and in the forms of transfer, whether they be transfers of the fee, or of a lease, mortgage or charge, and in the forms of the original lease, sub-lease, mortgage, charge, sheriff's transfer, transfer made under decree of the Court, and power of attorney, there is expressly stated the basic fact of a certain person being the registered proprietor of the land or estate or interest dealt with. The express mention of that fact may not be essential because its effect may be otherwise supplied, but it is an important feature, and its omission makes some equivalent necessary. The Schedule form of lease also makes specific reference to the Statute, as well as to some words in sec. 137, and it provides for mere signature.

The lease here in question nowhere contains the least indication that the land is under the Act. The lessor is called "proprietor" not "registered proprietor." The Act is not referred to; on the contrary, where such reference might be expected in relation to the construction of covenants, another Act, the *Landlord and Tenant Act*, is expressly inserted, and the short form of covenants follows the latter Act. There is thus a deliberate avoidance, not only of actual mention of the *Transfer of Land Act*, but also of the method of negativing or modifying covenants as provided by sec. 137; and the latter omission in itself appears to be to some extent a negation of the document being

(1) 11 S.A.L.R., 102, at p 116. (2) 17 S.A.L.R., 173, at p. 177.

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one under the *Transfer of Land Act*. The presence of a seal by both parties in a given case may or may not be material, according to the tenor of the document. A lease may, notwithstanding a seal, appear clearly to be under the Act, and the seal may therefore be superfluous. Or there may be additional stipulations of a personal nature beyond the provisions of the Act, and as to which a common law covenant may be necessary or desirable, the seal being reasonably attributable to their presence.

But in the present case there is strong reason for considering the presence of the seal as showing the lease to be one not under the Act, and this is why we consider sec. 3 of so much importance. This lease is for five years, and therefore by sec. 3 of the *Landlord and Tenant Act* (the *Statute of Frauds*) it is required to be in writing. Superadded to this is sec. 163 of the *Real Property Act* 1890 (following 8 & 9 Vict. c. 106, sec. 3), which declares that "a lease required by law to be in writing of any land" shall be "void at law unless made by deed." Now, the question presents itself, why was this lease made in the form of an indenture, notwithstanding the specific declaration in sec. 92 of the *Transfer of Land Act*, that every instrument shall be deemed of the same efficacy as if under seal?

It will be observed that the demise is of furniture as well as of land, and that an undivided rent is stipulated for both land and furniture. Standing by itself, that would not be a determining circumstance, because, as said by the learned Chief Justice, a furnished house must be premises that can be leased, and the principle that in such a case the rent issues out of the land only would apply (*Newman* v. *Anderton* (1); *Farewell* v. *Dickenson* (2); and *Brown* v. *Peto* (3)). But taken in conjunction with the fact of its seal it has this effect. If the rent is to be regarded as attributable to the land alone, the only apparent reason for sealing is to overcome the provisions of sec. 163 of the *Real Property Act*, and this would, by reason of sec. 92, be unnecessary if the lease were under the *Transfer of Land Act*.

On the other hand, if, to escape this result, the seal is, by a wider meaning given to the word "rent," to be attributed to the

(1) 2 B. & P. N.R., 224.
(2) 6 B. & C., 251.
(3) (1900) 1 Q.B., 346, at p. 354; affirmed (1900) 2 Q.B., 653.