H. C. OF A. 1917.

PEARCE v. W. D. PEACOCK & CO. LTD.

Gavan Duffy J. Rich J.

with except for the gravest reasons. The charge against the respondent has not been proved if he has satisfied the onus imposed on him by sec. 9 (4) of the *Commonwealth Conciliation and Arbitration Act* 1904-1915, and if the evidence of Mr. Lord is accepted we think the respondent has satisfied that onus. The Magistrate, having heard the witnesses, accepted Mr. Lord's evidence, and we see no reason for saying that he was wrong in doing so.

*Appeal dismissed with costs.*

Solicitors for the appellant, *H. H. Hoare* for *A. G. Ogilvie*, Hobart.
Solicitors for the respondent, *Page, Hodgman & Seager.*

B. L.

---

[HIGH COURT OF AUSTRALIA.]

THE REGISTRAR-GENERAL (SOUTH AUSTRALIA) . . . . . } APPELLANT;

AND

WRIGHT . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1917.

ADELAIDE, *June* 1, 2.

Isaacs, Powers and Rich JJ.

*Real Property—Registration of instruments—Transfer—Production of certificate—Refusal to produce—Issue of summons—Jurisdiction of Registrar-General (S.A.)—Real Property Act* 1886 (*S.A.*) (*No.* 380), *secs.* 98, 220 (3).

Sec. 98 of the *Real Property Act* 1886 (S.A.) provides that "When a transfer purporting to transfer any estate of freehold is presented for registration, the duplicate certificate shall . . . be delivered to the Registrar-General; and the Registrar-General shall, upon registering the transfer, enter on the original certificate and also on the duplicate certificate (if delivered to

him) a memorandum cancelling the same, either wholly or partially," &c. Sec. 220 (3) provides that the Registrar-General "shall, whenever the production of any duplicate certificate, or other instrument of title is required, for the purpose of entering or making on the same any memorial or entry by this Act directed to be entered or made thereon, or for the purpose of cancelling or correcting the same under the provisions of this Act, summon any proprietor, mortgagee, encumbrancee, or other person having the possession, custody, or control thereof, to produce the same for such purpose, and such proprietor, mortgagee, encumbrancee, or other person shall thereupon produce the same on payment of a sum of one pound."

The registered proprietor of land subject to a mortgage, under the terms of which the mortgagee held the certificate of title, sold the land subject to the mortgage and executed a transfer thereof to the purchaser, and, being desirous of having the transfer registered, applied to the mortgagee to produce the certificate of title for the purpose of having the transfer registered. The mortgagee refused to produce the certificate, and thereupon the registered proprietor applied to the Registrar-General to issue a summons under sec. 220 (3), calling upon the mortgagee to produce the certificate of title. The Registrar-General then issued a summons.

*Held*, that the summons was properly issued.

Decision of the Supreme Court of South Australia reversed.

APPEAL from the Supreme Court of South Australia.

Vincent Anthony Zed was the registered proprietor of certain land subject (*inter alia*) to a mortgage to Hubert Charles Wright under the terms of which Wright held the certificate of title, and, having agreed to sell the land subject to the mortgage, had executed a transfer thereof to the purchaser. Being desirous of having the transfer registered, Zed on 8th November 1916 by letter applied to Wright to produce at the Lands Titles Office the certificate of title for the purpose of the transfer being registered, and offering to pay a production fee of £1 1s. On 9th November Wright refused in writing to produce the certificate. On 10th November Zed by letter informed the Registrar-General that Wright had refused to produce the certificate of title for the purpose of the registration of the transfer, and requested him to issue a summons to Wright under sec. 220 of the *Real Property Act* 1886. The Registrar-General accordingly, on 13th November, issued a summons calling upon Wright to appear before him on 16th November at the Lands Titles Office and produce the certificate. Wright did not obey the

H. C. OF A. 1917.

REGISTRAR-GENERAL (S.A.) v. WRIGHT.

summons, and on 22nd November, on the application of the Registrar-General, an originating summons was issued in the Supreme Court under sec. 227 of the *Real Property Act* 1886 calling upon Wright to show cause why he should not obey the summons of 13th November. The originating summons came on for hearing before *Murray* C.J., who on 1st December made an order dismissing it with costs. From that decision the Registrar-General appealed to the Full Court, but the appeal was dismissed.

From the decision of the Full Court the Registrar-General now appealed to the High Court.

On the hearing of the appeal counsel for the respondent objected that there was no appeal as of right because the cause or matter was criminal, and also because the question was not in respect of any property or civil right of the value of £300. The Court, however, granted special leave to appeal.

*Cleland* K.C. (with him *H. P. Ward*), for the appellant. The Full Court has held that under sec. 220 (3) of the *Real Property Act* 1886 the Registrar-General has no right to issue a summons until a transfer has been lodged for registration. The proper construction of that section is that the Registrar-General shall issue a summons whenever by the Act the production of the certificate is rendered necessary. Under sec. 98 the certificate is required to be delivered to the Registrar-General at the same time as the transfer is presented for registration, and the Registrar-General will not receive a transfer for registration unless it is accompanied by the certificate. The summons is in anticipation of the time when the production of the certificate is necessary, and that time is simultaneous with the lodging of the transfer.

*McLachlan* (with him *Browne*), for the respondent. The Registrar-General must see the document which is sought to be registered before he issues a summons under sec. 220 (3), so that he may see whether it is a registrable instrument. He has no authority to issue the summons upon the mere statement of a person that he has an instrument which he wishes to have registered. Under sec. 54 nothing is to be registered which is not an instrument in

accordance with the provisions of the Act, so that the Registrar-General must see the instrument before issuing a summons. [Counsel also referred to secs. 50, 53, 97.]

*Cur. adv. vult.*

June 2.

The judgment of the COURT, which was read by ISAACS J., was as follows :—

The material facts are that the registered proprietor of land under the South Australian *Real Property Act* 1886 (No. 380) subject to a mortgage sold his land to a third person, and executed a transfer to the purchaser. The mortgagee has possession of the duplicate certificate of title by virtue of a covenant in the mortgage containing also an undertaking to produce it. For the purpose of obtaining registration of the transfer, the transferor applied to the mortgagee to produce the certificate of title to the Registrar-General, and the mortgagee refused. The Registrar-General, on being applied to, then under sec. 220, sub-sec. 3, of the Act summoned the mortgagee to produce the duplicate certificate. The Supreme Court held that it was *ultra vires* the Registrar-General to issue the summons as the circumstances calling for the exercise of the power had not yet arisen.

The words of the sub-section are : " He shall, whenever the production of any duplicate certificate, or other instrument of title is required, for the purpose of entering or making on the same any memorial or entry by this Act directed to be entered or made thereon, or for the purpose of cancelling or correcting the same under the provisions of this Act, summon any proprietor, mortgagee, encumbrancee, or other person having the possession, custody, or control thereof, to produce the same for such purpose." The rest of the sub-section is immaterial to the present case.

At the date of the summons was the production of the duplicate certificate " required " for the purpose of making an entry upon it or cancelling or correcting it? We are of opinion it was.

It may be at once conceded that the power given to the Registrar-General by the sub-section was in order to enable him to perform his statutory duties. But the words conferring the power

H. C. OF A. 1917.

REGISTRAR-GENERAL (S.A.) v. WRIGHT.

ought to be read, if possible, as enabling him to perform those duties in conformity with all the provisions of the Act. In other words, the Act intends obedience to its provisions, and not a contravention of them.

Sec. 98, so far as material, provides that "When a transfer purporting to transfer any estate of freehold is presented for registration, the duplicate certificate shall . . . be delivered to the Registrar-General; and the Registrar-General shall, upon registering the transfer, enter on the original certificate and also on the duplicate certificate . . . a memorandum cancelling the same, either wholly or partially." It is plain that the Act directs that the transfer shall not be presented without delivery of the duplicate certificate. The Registrar-General is bound by sec. 56 to register transfers in their order of production, but unless accompanied by the duplicate certificate the registration of the transfer would be irregular and unauthorized, and contrary to the express directions of the Legislature.

It could not, therefore, be said that on that irregular production the moment had arrived when the Registrar-General had the duty of registering the transfer. Still less could it be said that on mere presentation of the transfer the Registrar-General's duty would arise to enter on the duplicate certificate a memorandum of cancellation. How could he have that duty when the document was not before him, and the statutory direction of sec. 98 with respect to it was still unfulfilled?

To construe sec. 220 (3) as operating only to compel lodgment of the duplicate certificate when the Registrar-General's duty has arisen to make the entry on the duplicate certificate, and sec. 98 as operating to create the duty of making the entry on the certificate only on condition that both the transfer and the duplicate certificate are already lodged, is really to create an *impasse*.

Apart from his contractual undertaking to produce the certificate, which does not affect this question, the mortgagee was not in default in refusing to produce it to the Registrar-General before the summons was issued. But it may be observed that the position would have been no different in that respect, even if the transfer had been lodged. His refusal to produce simply prevented the transferor from fulfilling

the statutory requirement of delivering the certificate to the Registrar-General.

On the construction maintained by the respondent, sec. 98 and sub-sec. 3 of sec. 220 would not be workable except upon condition of some breach of the former section, or the voluntary acquiescence of a mortgagee or other person holding the certificate. That is not consistent with the policy of the Act, which aims at simplicity and facility of transactions combined with security of title. (See *Acts Interpretation Act* 1915, sec. 22.)

The construction contended for by the Registrar-General should, in our opinion, prevail and the appeal be allowed.

The order of the Court will be:—Appeal allowed. Order of Full Court discharged and appeal to Supreme Court allowed. Order in Chambers of 1st December 1916 set aside and order made on summons of 22nd November 1916 as asked. Wright to forfeit and pay a penalty which, looking at this as a test case, we fix at 1s. With regard to the costs, the respondent's refusal to produce was in order to compel payment of the mortgage notwithstanding the Moratorium Regulations. He must therefore pay all the costs except the costs of this appeal, as to which, in the circumstances, we say nothing.

*Order accordingly.*

Solicitors for the appellant, *Young, Newland & Ward.*
Solicitors for the respondent, *McLachlan, Napier & Browne.*

B. L.