[HIGH COURT OF AUSTRALIA.]

KEOGH . . . . . APPELLANT;
PLAINTIFF,

AND

THE REGISTRAR-GENERAL OF NEW SOUTH WALES AND OTHERS . . } RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 12, 15, 25.

Barton, Gavan Duffy and Rich JJ.

Mortgage—Indenture—Construction—Mortgage by equitable owner—Power of sale over lands under Real Property Act—Registration—Injunction—Real Property Act 1900 (*N.S.W.*) (*No.* 25 *of* 1900), *secs.* 41 (1), 51, 52, 56-59, *Ninth Schedule.*

A station property in New South Wales consisting partly of lands under the *Real Property Act* 1900 (N.S.W.), partly of lands held under common law titles and partly of lands held under the *Crown Lands Acts* (N.S.W.), was mortgaged by the equitable owner by a memorandum of mortgage and an indenture of mortgage both of the same date. By the indenture of mortgage the mortgagor purported to assure to the mortgagee the whole of the lands comprised in the station and to give a power of sale over such lands on default in payment.

Held, that the indenture of mortgage included the lands under the *Real Property Act* and effectually gave a power of sale in respect of them.

Held, therefore, that where the mortgagee had sold the station in pursuance of the power of sale, the mortgagor had no interest in the lands which would entitle him to restrain registration of a transfer of the lands under the *Real Property Act*.

Decision of the Supreme Court of New South Wales (*Street* J.) affirmed.

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APPEAL from the Supreme Court of New South Wales.

A station property in New South Wales, called "Warrana," consisted partly of lands under the *Real Property Act* 1900, partly of freehold lands held under common law titles and partly of lands held under the *Crown Lands Acts*. On 25th February 1909 Dalgety & Co. Ltd. had become the first mortgagees of the station, the mortgagor being Bessie Maria Keogh, executrix of Denis Patrick Keogh deceased, and all the lands comprised in the station stood in the name of the Company as absolute owners or registered proprietors thereof but only as mortgagees. Disputes having arisen between the Company and Mrs. Keogh as to the indebtedness of the estate to the Company, by an agreement of compromise made on that date between Mrs. Keogh, the Company and William Monahan Keogh it was agreed in substance that Mrs. Keogh should sell the station to W. M. Keogh for £180,000, that the Company should release all their mortgages over the station and should transfer the station to W. M. Keogh, who was to pay the £180,000 to the Company, that sum being secured by a first mortgage for £100,000 to be procured by the Company and by a second mortgage to the Company of £80,000. Pursuant to the agreement the Company procured Charles William Chapman and John Michael Higgins to lend £100,000 on first mortgage of the station, and on 22nd November 1910 W. M. Keogh executed in favour of the first mortgagees a memorandum of mortgage of the land held under the *Real Property Act* and an indenture of mortgage for £100,000, and in favour of the Company similar documents of second mortgage for £80,000.

By the indenture of first mortgage W. M. Keogh purported to "grant assign transfer and release and otherwise assure unto the said mortgagees . . . all those the freehold conditionally purchased and conditionally leased lands mentioned or referred to in the schedule hereunder written and also all further or other conditionally purchased or conditionally leased lands which may at any time during the continuance of this security be held or applied for by the said mortgagor in virtue of the said conditionally purchased or conditionally leased lands or any of them which said lands are collectively known as the Warrana Station and are hereafter collectively referred to as 'the said station.'" In the schedule

were set out categorically all the lands comprised in the station, including the freehold lands held under the *Real Property Act*.

The indenture also contained the following provision: "If default shall be made in payment of the said principal sum or any part thereof or of the interest to accrue due in respect thereof or of any part thereof as hereinbefore provided or in case default shall be made in the due performance of any of the covenants herein contained then the said principal sum or so much thereof as shall then be unpaid and all interest thereon and all other moneys payable under these presents and intended to be hereby secured shall forthwith become due and payable anything herein contained to the contrary notwithstanding and it shall be lawful for the said mortgagees or their attorney or agent for the time being in Australasia immediately thereupon or at any time thereafter to enter upon the said lands hereby assured and to receive and retain the rents thereof or without making such entry as aforesaid either to foreclose the equity of redemption of the said mortgagor therein or to sell the said lands and premises or any part thereof by public auction or private contract at one time or at different times and either together or separately and in one lot or in parcels and for such price or prices and payable at such time or times and with or without interest in the meantime and generally in such manner and on such terms and conditions as to title or evidence of title or otherwise as the said mortgagees shall deem most expedient and with power to buy in at any sale by auction and to rescind or vary any contract for sale of the said lands and premises or any part thereof respectively and to resell the same or any part thereof respectively either by public auction or private contract without being answerable for any loss which may be occasioned by a resale and upon any such sale or sales being made to convey transfer and assure the said lands and premises which may be so sold unto or according to the directions or appointment of the purchaser or purchasers thereof and to enter into make and execute all necessary contracts conveyances transfers and assurances for completing and carrying into effect any such sale or sales which contracts conveyances transfers and assurances shall operate and be as effectual to all intents and purposes as if the said mortgagor had executed the same." The indenture also contained

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the following provision: "And it is hereby agreed and declared that these presents and a certain memorandum of mortgage bearing even date herewith and given by the said mortgagor to the said mortgagees over certain other lands situate in the parishes of" (the parishes in which the lands were situated were set out) "are respectively collateral securities and are intended to secure the same principal interest and other moneys as are hereby secured."

The indenture of second mortgage, which included the stock on the station, was in all material respects similar to that of first mortgage, except that in the declaration that the memorandum of mortgage of even date was collateral, the lands covered by the memorandum were described as "42,307 acres 1 rood and 33 perches of freehold land situate in" certain parishes.

On 29th November 1910, in further pursuance of the agreement of 25th February 1909, the Company executed transfers and other appropriate assurances by way of release of all the lands standing in their name to Mrs. Keogh, who executed transfers and other appropriate assurances of the whole of the lands comprised in the station to W. M. Keogh. All of the transfers, assurances and documents of title were upon execution handed to the Company, and none of them were registered. On 31st December 1915, the amount secured by the first mortgage not having been paid by W. M. Keogh on the due date, the Company paid it and obtained an assignment of the mortgage to themselves. In November 1916 the Company, purporting to exercise the power conferred by the mortgages, agreed to sell the station to Thomas Alfred Field, and thereafter the Company lodged for registration under the *Real Property Act* 1900 the first and second mortgages of 22nd November 1910 of the lands under the Act, a transfer of the first mortgage of those lands dated 31st December 1915 from the first mortgagees to the Company and a transfer of those lands dated 1st May 1917 from the Company to T. A. Field.

W. M. Keogh, who in September 1915 had lodged a caveat under the provisions of the *Real Property Act* forbidding the registration of any memorandum of transfer or instrument affecting the lands under the Act, except those executed on 29th November 1910, brought a suit against the Registrar-General, the Company, the first

mortgagees and T. A. Field, claiming (*inter alia*) a declaration that the memoranda of mortgage of 22nd November 1910, the memorandum of transfer of mortgage of 31st December 1915 and the memorandum of transfer to T. A. Field were null and void; a declaration that the sale from the Company to T. A. Field was null and void; a declaration that neither the Company nor the first mortgagees had any valid power of sale over the lands comprised in the station; that the defendants should be restrained from registering the documents except the transfers to W. M. Keogh which had been lodged for registration; that the Company and T. A. Field should be restrained from further proceeding with the sale and that the Company and the first mortgagees should be restrained from selling the lands.

A motion was then made by the plaintiff for an interim injunction restraining the registration of the documents lodged for registration or any other documents relating to the lands except the transfers to W. M. Keogh, restraining the Company and T. A. Field from proceeding with the sale, and restraining the Company from selling any of the lands, and for an order extending the caveat lodged by the plaintiff until further order of the Court. The motion was heard by *Street* J., who dismissed it with costs.

From that decision the plaintiff now, by leave, appealed to the High Court.

Other facts are stated in the judgments hereunder.

Knox K.C. (with him *Weston*), for the appellant. When the appellant gave the mortgages of 22nd November 1910 he was neither registered proprietor of the lands under the *Real Property Act* nor was he the holder of any registrable instrument in respect of them, and therefore could not give a valid mortgage over the lands under the Act or give a valid power of sale in respect of those lands. The power of sale contained in the indentures of mortgage does not apply to the lands under the Act, for it is plain that the memoranda of mortgage and the indentures of mortgage were intended to apply to the lands to which they were appropriate, namely, the memoranda to the lands under the Act, and the indentures to the other lands. The statutory power of sale of the lands

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under the Act would only arise upon registration of the mortgages. This motion is not premature. A mortgagor whose mortgagee is threatening or intending to sell in violation of, or without, a power of sale may come to a Court of equity and restrain him without showing any merits, and in the case of land under the Act he may come as soon as documents are lodged for registration. [Counsel referred to the *Real Property Act* 1900, secs. 41 (1), 51, 52, 56-59, Ninth Schedule.]

Maughan (with him *J. A. Browne*), for the respondent Company. The equitable owner of land which is under the *Real Property Act* can effectually deal with his interest by any kind of document whatever (*Barry* v. *Heider* (1)). The appellant has by the indenture of mortgage given a power of sale over all the lands comprised in the station, and that power of sale is valid with regard to the lands under the *Real Property Act* as well as the other lands. That power having been exercised, the appellant no longer has any equitable interest in the lands, and is not entitled to an injunction. [Counsel also referred to *In re Harwood* (2) ; *Walsh* v. *Lonsdale* (3).]

S. A. Thompson, for the respondent Field, did not argue.

Cur. adv. vult.

April 25.

The following judgments were read :—

BARTON J. I think this case may be decided without any very long discussion on my part.

I will first deal with the point that the securities executed apart from the provisions of the *Real Property Act*—that is to say, what may be termed the common law mortgage indentures —do not include in the mortgaged lands the freeholds held under the Act as well as the conditionally purchased and conditionally leased lands mentioned. At the date of these mortgages all the station lands of "Warrana," including the last-mentioned freeholds, stood in the name of the respondent Company, some in

(1) 19 C.L.R., 197.
(2) 35 Ch. D., 470.
(3) 21 Ch. D., 9.

the books of the Lands Titles Office and some in those of the Lands Office, according to their tenure, under the *Real Property Act* or the *Crown Lands Acts*. They were in the same position at the time when the injunction was sought. By the mortgage of 22nd November 1910 to Chapman and Higgins the plaintiff assured to the mortgagees "all those the freehold conditionally purchased and conditionally leased lands mentioned or referred to in the schedule . . . and also all further or other conditionally purchased or conditionally leased lands which may at any time during the continuance of this security be held or applied for by the said mortgagor in virtue of the said conditionally purchased or conditionally leased lands or any of them which said lands are collectively known as the Warrana Station and are hereafter collectively referred to as 'the said station'." The power of sale extended over "the said lands and premises or any part thereof." The schedule comprised categorically all the lands in the station, including the freeholds held under the provisions of the *Real Property Act*. It is to me quite clear that the last-mentioned lands are included in the mortgage. It is true that in this indenture the lands in the memorandum of mortgage of the same date between the same parties were referred to as "certain other lands" in the declaration that the two securities were collateral. But that is by no means sufficient to except the *Real Property Act* lands from the very specific words of the granting part and the schedule. Moreover the habendum included the whole of the lands under the term "the said station." This mortgage was assigned to the respondent Company on 31st December 1915, the day before the expiration of the mortgage term. The common law mortgage of the same 22nd November 1910 from the plaintiff to the respondent Company assured the lands subject to the first mortgage in similar terms, with the same collective description. It also granted by way of first mortgage the stock on the holding. The power of sale extended to "the said station and all lands forming part thereof," and of course to the stock. The schedule comprised categorically all the lands in the station, including the lands held under the provisions of the *Real Property Act*. There was in this deed, as in the other, a declaration that the memorandum of mortgage of even date was collateral with the mortgage now under

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Barton J.

description, but it referred to the lands covered by the memorandum as 42,307 acres of freehold land, and abstained from the use of the term "certain other lands." In this deed again the habendum used the term "the said station," which by the words of grant included all the schedule lands. I do not think there can be any doubt whatever that both these common law mortgages included, and were intended to include, the *Real Property Act* lands, and that they were made subject to the same power of sale as the other lands.

It is admitted by the statement of claim that the plaintiff made default, and, the lands under the Act being included in the indentures of mortgage and both mortgages being vested in the respondent Company, who held the legal estate, it seems to me that the respondent Company was entitled to sell under its power and to transfer to Field its whole estate. The notice to redeem dated 13th May 1916 appears to have been in proper form, and no question has been raised that the sale was at an undervalue. There is no contention that the sale was not carried out in due pursuance of the terms of the notice. The plaintiff himself appears to have had only an equitable and unregistered interest, but it was an interest that he could deal with if he so chose, and he has done so. There is no claim of fraud. He has really no interest entitling him to claim an injunction. The appellant has argued the question on the motion for an interlocutory injunction below. He has argued it again on appeal. He does not urge that its decision should be held over until the hearing, and it would not advantage the parties to hold it over. There are other questions raised by his statement of claim, which may be dealt with at the hearing, but these cannot be the subject of such a motion as the present. The only way in which the plaintiff could have prevented the sale was by a tender of the sum due.

The points raised under the *Real Property Act* do not appear to me to have any application under the circumstances.

I am of opinion therefore that the appeal must be dismissed with costs.

GAVAN DUFFY AND RICH JJ. This is a motion for an interlocutory injunction, but as the facts clearly raise a point of law

which can be determined on the motion it is unnecessary to defer its decision until the hearing on the ground of balance of convenience. The only question which arises for determination is whether the powers of sale contained in the common law mortgages are effective to confer valid powers of sale over all the lands or are referable only to the lands under the old system of conveyancing. On 22nd November 1910 all the lands in question stood in the name of the defendant Company as absolute owners, whether as registered proprietors under the *Real Property Act* or as registered owners in the books of the Department of Lands. On that day the appellant, being the equitable owner of all these lands subject to the contractual obligation imposed on him by the agreement of 25th February 1909, executed the mortgages under consideration. There is nothing in the *Real Property Act* restricting the power of an equitable owner of lands under the Act to enter into a binding agreement with reference to such lands enforceable in equity. The question, then, is one of construction of the common law indentures. In our opinion they were intended to and do include all the lands comprising what is known as Warrana Station, and they contain a valid power of sale over such lands and an authority to defeat the appellant's equity of redemption in them. That power has been exercised, and the plaintiff has now no estate or interest either legal or equitable in any of such lands on which to found his motion.

We agree in the conclusion arrived at by *Street* J., and that this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant, *Vindin & Littlejohn* for *Hedderwick, Fookes & Alston*, Melbourne.

Solicitors for the respondent Company and T. A. Field, *Asher, Old & Jones.*

B. L.