H. C. OF A. 1922.

MINISTER FOR LABOUR AND INDUSTRY (N.S.W.) v. MUTUAL LIFE AND CITIZENS' ASSURANCE CO. LTD.

for appeal (if there is right to appeal, as here), not for prohibition (*Enraght* v. *Lord Penzance* (1); *Hooper* v. *Hill* (2)).

Appeal allowed. Order of Supreme Court set aside. Rule nisi for prohibition set aside. Appellant to pay costs of this appeal.

Solicitor for the appellant, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitors for the respondent, *A. J. McLachlan & Co.*

B. L.

(1) (1882) 7 App. Cas., 240, at pp. 254-257. (2) (1894) 1 Q.B., 659.

[HIGH COURT OF AUSTRALIA.]

CONNOLLY AND ANOTHER . . . . APPELLANTS; PLAINTIFFS,

AND

RYAN . . . . . RESPONDENT. DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1922.

MELBOURNE, *May* 17; *June* 2.

KNOX C.J., HIGGINS AND GAVAN DUFFY JJ.

Mortgage—Action by mortgagor for possession against trespasser—Consent of mortgagee—Onus of proof—Transfer of Land Act 1893 (*W.A.*) (56 *Vict. No.* 14), *secs.* 116, 117.

Sec. 116 of the *Transfer of Land Act* 1893 (W.A.) provides that "In addition to and concurrently with the rights and powers conferred on a mortgagee and on a transferee of a mortgage by this Act every present and future mortgagee for the time being of land under this Act and every transferee of a mortgage for the time being upon any such land shall until a discharge from the whole

of the money secured or until a transfer upon a sale or an order for foreclosure (as the case may be) shall have been registered have the same rights and remedies at law and in equity (including proceedings before justices of the peace) as he would have had or been entitled to if the legal estate in the land or term mortgaged had been actually vested in him with a right in the mortgagor of quiet enjoyment of the mortgaged land until default in payment of the principal and interest money secured or some part thereof respectively or until a breach in the performance or observance of some covenant expressed in the mortgage or to be implied therein by the provisions of this Act " &c. Sec. 117 provides that " A mortgagor or his transferee shall not either before or after such default or breach as aforesaid commence in his own name any action at law for or in respect of any cause of action for which a mortgagee or his transferee may sue under the last preceding section without obtaining the previous consent in writing of such mortgagee or transferee or his agent to the commencement of such action after giving which consent such mortgagee or transferee shall not be entitled to bring in his name any action at law in respect of the cause of action specified in such consent. Provided however that if a mortgagor or his transferee shall bring any such action in his own name and the defendant shall prove the existence of a mortgage the plaintiff shall not be nonsuited nor shall there be a verdict against him if he proves in reply that the action was brought with the written consent of the mortgagee or of the transferee of his mortgage or his agent."

Held, that the restriction imposed by sec. 117 on the right of the mortgagor to sue in his own name extends only to causes of action in respect of which the mortgagee is empowered by sec. 116 to sue, and that the proviso to sec. 117 does no more than prevent the operation of the earlier words of sec. 117 if the mortgagor proves in reply that he has the written consent of the mortgagee.

The registered proprietor of land in Western Australia which was subject to a mortgage brought an action against the defendant to recover possession of the land. The defendant raised the defence that the consent of the mortgagee to the mortgagor bringing the action had not been obtained. The mortgage was not produced in evidence.

Held, that the burden of proving that the action was one which the mortgagee could under sec. 116 have brought was upon the defendant; that the action was not one which the mortgagee could have brought under sec. 116 unless he was entitled to immediate possession of the land; and, therefore, that in the absence of evidence as to whether the mortgage debt was payable on a fixed date or on demand, whether default in payment had or had not been made, or whether any breach of any covenant expressed or implied in the mortgage had or had not been committed, it was not proved that the mortgagee could have brought the action, and the defence failed.

Quære, per Higgins J., whether the words of sec. 116 exclude the doctrine of *Doe d. Parsley* v. *Day*, (1842) 2 Q.B., 147.

Decision of the Supreme Court of Western Australia (*Burnside* J.) reversed.

H. C. OF A. 1922.

CONNOLLY v. RYAN.

APPEAL from the Supreme Court of Western Australia.

An action was brought in the Supreme Court of Western Australia, by Patrick Andrew Connolly and Freda Hale against Matthew Ryan, in which the plaintiffs by their statement of claim alleged that they were the registered proprietors of certain land on which was erected a hotel, and that the defendant wrongfully refused to deliver possession of the land to them, and they claimed possession. The defendant denied the allegations in the statement of claim. The action was heard by *Burnside* J. The certificate of title to the land was put in evidence for the plaintiffs; and it showed that the defendant was registered as proprietor on 14th March 1914, and that on 5th October 1921 the land was transferred by indorsement to the plaintiffs as tenants in common. The certificate also showed that the land was mortgaged by the defendant to the Mia Mia Pastoral Co. Ltd. by a mortgage which was registered on 30th June 1919, that the transfer to the plaintiffs by indorsement above referred to was upon sale by the Mia Mia Pastoral Co. under the power of sale contained in the mortgage from the defendant to that Company, and that the plaintiffs mortgaged the land to the Mia Mia Pastoral Co. Ltd. by a mortgage which was registered on 5th October 1921. The last-mentioned mortgage was not put in evidence. A consent by the Mia Mia Pastoral Co. to the plaintiffs' bringing the action was put in evidence, but it was subject to certain conditions, and no evidence was given that the conditions had been complied with. No evidence was called for the defence. *Burnside* J. upheld the contention that the consent of the Mia Mia Pastoral Co. to the plaintiffs' bringing the action was necessary, and he gave judgment for the defendant with costs.

From that decision the plaintiffs now appealed to the High Court.

Latham K.C. (with him *Gregory*), for the appellants. This is not an action in respect of which the mortgagee's consent was necessary. Under secs. 111 and 116 of the *Transfer of Land Act* 1893 (W.A.) a mortgagee is not entitled to possession until default. In order that a person may bring an action to recover possession he must have a right to immediate possession. Secs. 111 and 116 exclude the right to possession which a mortgagee has under the general law. Sec.

117 applies only to such actions as those referred to in sec. 116, of which an action for waste is an example. Sec. 118 shows the class of actions to which sec. 117 applies. In order that the respondent should succeed he must show that the mortgagee could bring this action; and he has not done so. If by the mortgage a day were fixed for payment of the mortgage debt, that at common law would have operated as a demise of the land to the mortgagor, in which case the mortgagee could not bring this action. [Counsel referred to *Commercial Bank* v. *Breen* (1); *Farrington* v. *Smith* (2); *Equity Trustees, Executors and Agency Co.* v. *Lee* (3); *Louch* v. *Ball* (4); *Burwood Land Co.* v. *Tuttle* (5).]

Lowe, for the respondent. Sec. 117 assimilates the relation of mortgagor and mortgagee under the Act to that which existed at common law, under which the mortgagor was a tenant on sufferance or a trespasser (*Doe d. Roby* v. *Maisey* (6)). The question whether there has been default or not is immaterial (*Commercial Bank* v. *Breen* (7)).

[KNOX C.J. referred to *Moore* v. *Shelley* (8).]

Sec. 116 gives to the mortgagee the same rights as if he were the owner in fee, except that the mortgagor has a right to quiet enjoyment until default. Sec. 117 provides that whether there has or has not been default the mortgagor must get the consent of the mortgagee; which would be appropriate to the position of a mortgagor under sec. 116. If all that appears is that there is a mortgage and there is no evidence of its terms, the position is the same as it would have been at common law where the mortgagor was a tenant on sufferance and might have been ejected at any time. If there is anything which would show a demise to the mortgagor, it is necessary for the plaintiff to show it. [Counsel also referred to *Griffin* v. *Dunn* (9).]

Latham K.C., in reply.

Cur. adv. vult.

(1) (1889) 15 V.L.R., 572; 11 A.L.T., 92.
(2) (1894) 20 V.L.R., 90; 15 A.L.T., 218.
(3) (1914) V.L.R., 57; 35 V.L.R., 98.
(4) (1879) 5 V.L.R. (L.), 157; 1 A.L.T., 10.
(5) (1895) 21 V.L.R., 381.
(6) (1828) 8 B. & C., 767.
(7) (1889) 15 V.L.R., at p. 579; 11 A.L.T., at p. 94.
(8) (1883) 8 App. Cas., 285.
(9) (1878) 4 V.L.R. (L.), 419.

H. C. OF A. 1922.

CONNOLLY v. RYAN.

June 2.

The following written judgments were delivered :—

KNOX C.J. AND GAVAN DUFFY J. The appellants sued the respondent in the Supreme Court of Western Australia claiming possession of certain land in the town of York, alleging that they were the registered proprietors thereof and that the respondent refused to deliver possession to them. By his statement of defence the respondent denied the allegations in the statement of claim. At the trial the respondent obtained leave to amend his statement of defence by setting up that the appellants were mortgagors of the land in question and had not obtained the consent of the mortgagee to their bringing the action. *Burnside* J. upheld this objection and entered judgment for the respondent. It is against this judgment that the appeal is brought.

The relevant facts established by the evidence are as follows :— Before 5th October 1921 the respondent was registered proprietor under the *Transfer of Land Act* 1893 of the land in question subject to a mortgage to the Mia Mia Pastoral Co. Ltd. This Company in exercise of its powers as mortgagee sold the land to the appellants, and on 5th October 1921 a transfer from the Company to the appellants was registered under the Act. On the same day a mortgage over the land from the appellants to the Company was registered. Both these dealings were noted on the certificate of title. The mortgage was not put in evidence, and it does not appear whether the mortgage debt was payable on a fixed date or on demand, or whether default had been made in payment of the mortgage debt, or any breach in the observance of any covenant expressed or implied in the mortgage had been committed at the date of the commencement of the action. The writ was issued on 12th October 1921.

The first question that arises for decision is whether on this state of facts the consent of the mortgagee was necessary in order to enable the appellants to maintain the action. The answer to this question depends on the true construction of secs. 116 and 117 of the *Transfer of Land Act* 1893. Before considering these sections certain other provisions of the Act may be referred to.

By sec. 63 every certificate of title is made conclusive evidence that the person named in such certificate as the proprietor of any estate in the land therein described is seised of such estate. The

certificate of title put in evidence is therefore conclusive evidence that the appellants were seised of this land for an estate in fee simple as tenants in common. Sec. 106 provides that a mortgage shall not operate as a transfer of the land thereby mortgaged. Sec. 108 gives the mortgagee a power of sale on default by the mortgagor in payment of the mortgage debt or observance of his covenants. Secs. 111 and 112 empower the mortgagee on default by the mortgagor in payment of the mortgage debt to enter into possession of the land, to distrain upon the occupier or tenant and to bring an action of ejectment.

Sec. 121 provides for foreclosure by the mortgagee. The relevant portion of sec. 116 is in the following words :—" In addition to and concurrently with the rights and powers conferred on a mortgagee and on a transferee of a mortgage by this Act every present and future mortgagee for the time being of land under this Act and every transferee of a mortgage for the time being upon any such land shall until a discharge from the whole of the money secured or until a transfer upon a sale or an order for foreclosure (as the case may be) shall have been registered have the same rights and remedies at law and in equity (including proceedings before justices of the peace) as he would have had or been entitled to if the legal estate in the land or term mortgaged had been actually vested in him with a right in the mortgagor of quiet enjoyment of the mortgaged land until default in payment of the principal and interest money secured or some part thereof respectively or until a breach in the performance or observance of some covenant expressed in the mortgage or to be implied therein by the provisions of this Act." Sec. 117 is in the following words :—" A mortgagor or his transferee shall not either before or after such default or breach as aforesaid commence in his own name any action at law for or in respect of any cause of action for which a mortgagee or his transferee may sue under the last preceding section without obtaining the previous consent in writing of such mortgagee or transferee or his agent to the commencement of such action after giving which consent such mortgagee or transferee shall not be entitled to bring in his name any action at law in respect of the cause of action specified in such consent. Provided however that if a mortgagor or his transferee shall

H. C. OF A. 1922.

CONNOLLY v. RYAN.

Knox C.J. Gavan Duffy J.

bring any such action in his own name and the defendant shall prove the existence of a mortgage the plaintiff shall not be non-suited nor shall there be a verdict against him if he prove in reply that the action was brought with the written consent of the mortgagee or of the transferee of his mortgage or his agent."

It was not and could not be disputed that the restriction imposed by the first part of sec. 117 on the right of the mortgagor to sue in his own name extended only to causes of action in respect of which the mortgagee was empowered by sec. 116 to sue, and the proviso in our opinion does no more than prevent the operation of the earlier words of sec. 117 if the mortgagor proves in reply that he had the written consent of the mortgagee to bring the action.

It is difficult to see the reason for the introduction in the proviso of the words " and " if " the defendant shall prove the existence of a mortgage," but, whatever purpose these words were intended to serve, they do not, in our opinion, operate to affect the restriction on the right of the mortgagor to sue which is imposed by the first part of the section.

The question for decision is, therefore, whether the mortgagee, on the facts proved in this case, was authorized by sec. 116 to sue the respondent to recover possession of the land in question.

Mr. *Latham* for the appellants contended that the right of a mortgagee in whom the legal estate is vested to sue to recover possession of the mortgaged land depends on his right to immediate possession of the land at the date of the commencement of the action, and that he has no such right to possession before default by the mortgagor if the covenant for quiet enjoyment by the mortgagor until default amount to a redemise of the mortgaged land. He argued that the onus of establishing that the cause of action was one for which the mortgagee might sue by virtue of sec. 116 was on the defendant, and that, as there was in the present case nothing to show that the covenant for quiet enjoyment did not amount to a redemise of the mortgaged land and no evidence of default by the mortgagor, the defendant had not discharged this onus.

It is, we think, clear on the authorities that where by the mortgage deed a day is fixed for payment and the deed contains a covenant for quiet enjoyment by the mortgagor until default the deed operates

as a redemise to the mortgagor (*Wilkinson* v. *Hall* (1)). On the other hand, where no day for payment is fixed by the mortgage deed such a covenant does not amount to a redemise, and the mortgagee may bring an action to obtain possession of the land at any time without notice (*Doe d. Parsley* v. *Day* (2)).

In the present case sec. 116 requires the Court to assume, in deciding whether the mortgagee is entitled by force of that section to sue as if the legal estate were vested in him, that there is " a right in the mortgagor of quiet enjoyment of the mortgaged land " until default in payment or breach of covenant. On this assumption, without more, the mortgagee of the appellants may or may not have had the right to sue for possession, and the question whether he had the right to do so depends on the terms of the mortgage, as to which there is no evidence.

In our opinion the onus of establishing that the cause of action is one for which the mortgagee can sue by virtue of sec. 116 is on the defendant, and, as he has failed to establish this, sec. 117 affords no answer to the claim of the appellants in this action.

HIGGINS J. I concur in the opinion that the mortgagee's consent was not essential to the right of the mortgagors, Connolly and Hale, to bring this action for possession of the land against the former owner, Ryan, who is now a mere trespasser. Under sec. 117 such a consent is not necessary unless it be shown that the mortgagee could bring the action under sec. 116; and that has not been shown. The mortgage has not been put in evidence. For aught that appears, the mortgagor may be entitled to possession under the mortgage; and, if so, the mortgagee could not bring the action.

The Supreme Court has probably been misled by the opening words of sec. 117: a mortgagor " shall not *either before or after such default* " commence in his own name any action at law, for any cause of action for which a mortgagee may sue under sec. 116, without the previous consent of the mortgagee. But the rule laid down by sec. 117 does not apply, as is expressly provided, unless the mortgagee can sue; and the mortgagee cannot sue, cannot

(1) (1837) 3 Bing. (N.C.), 508. (2) (1842) 2 Q.B., 147.

H. C. OF A. 1922.

CONNOLLY v. RYAN.

Higgins J.

recover in ejectment, if he has not the right to possession. The opening words of sec. 117 are not nugatory; there are divers actions for which a mortgagee may sue before default of the mortgagor—*e.g.*, waste (sec. 119) and other acts tending to diminish the value of the land which is his security. It has been held that the consent of the mortgagee is not a condition precedent to the right of the mortgagor to sue for possession unless the mortgagee is in a position himself to bring such a suit (*Louch* v. *Ball* (1); *Burwood Land Co.* v. *Tuttle* (2)).

During the argument it has been assumed on both sides that the doctrine of *Doe d. Parsley* v. *Day* (3) is applicable to sec. 116 of the *Transfer of Land Act* 1893. The same assumption was made by the Full Supreme Court of Victoria in the cases of *Commercial Bank* v. *Breen* (4) and *Farrington* v. *Smith* (5), in relation to the Victorian section which corresponds with sec. 116. According to that doctrine, if there is a covenant for quiet enjoyment until default, that covenant does not operate as a demise of the land to the mortgagor unless some definite, certain date is fixed for payment. Under the common law a demise for years must be for a term certain. The words of sec. 116, however, are that the mortgagee shall have the same rights and remedies at law and in equity as he would have had or been entitled to if the legal estate in the land mortgaged had been actually vested in him with a *right* in the mortgagor of quiet enjoyment until default &c. There is no express reference in sec. 116 to a fixed day for payment, or even to demise; the words are simply "with a *right* in the mortgagor of quiet enjoyment until default"—not "with a *covenant* on the part of the mortgagee for quiet enjoyment." The common law Courts in 1842 would not treat a *covenant* for quiet enjoyment as giving a *right* to possession unless the words operated as a demise in themselves; a mere covenant or other agreement was ignored for the purposes of an action in ejectment. But now, in all States where the provisions of the English *Judicature Act* of 1873 have been copied, the rules of equity are to prevail; and equity, in considering the rights of the

(1) (1879) 5 V.L.R. (L.), 157; 1 A.L.T., 10.
(2) (1895) 21 V.L.R., 381.
(3) (1842) 2 Q.B., 147.
(4) (1889) 15 V.L.R., 572; 11 A.L.T., 92.
(5) (1894) 20 V.L.R., 90; 15 A.L.T., 218.

parties to an agreement, treats the agreement (if capable of specific performance) as having the same force as between the parties as if the agreement had been carried out (see *Walsh* v. *Lonsdale* (1) and other cases). It may be that the words of sec. 116 exclude the doctrine of *Doe d. Parsley* v. *Day* (2). But we do not decide the point, as it is unnecessary to do so for the purpose of this case; we assume, in favour of the respondent, that the doctrine applies. The point has not been argued; and as great weight is justly due to the views of the Judges who decided the Victorian cases, it seems better to leave the point open until it has to be decided, while we guard ourselves against the inference that we accept the assumption as valid.

In my opinion, the appeal should be allowed.

The mortgage having been produced by the consent of the parties, it appeared that it was one in respect of which the consent of the mortgagee to the bringing of the action was not necessary.

Lowe. The case should be remitted to the Supreme Court as there may be other grounds upon which the defendant may succeed.

KNOX C.J. The case should only be remitted if there is some reasonable ground in fact for doing so.

Appeal allowed. Judgment for plaintiffs with costs. Respondent to pay costs of appeal other than additional costs occasioned by transfer of appeal to Melbourne Registry. Appellants to pay respondent's costs occasioned by such transfer. Set-off of costs.

Solicitors for the appellants, *Pavey, Wilson & Cohen* for *Northmore, Hale & Davy*, Perth.

Solicitors for the respondent, *Eggleston & Eggleston* for *Downing & Downing*, Perth.

B. L.

(1) (1882) 21 Ch. D., 9.

(2) (1842) 2 Q.B., 147.