[HIGH COURT OF AUSTRALIA.]

BAKER . . . . . APPELLANT;
PLAINTIFF,

AND

BIDDLE . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1923.

BRISBANE, *June* 11, 12.

Knox C.J., Isaacs and Starke JJ.

Mortgage—Right of redemption—Lease, &c., of hotel—Agreement to finance intending purchaser—Security of person agreeing to finance—Option therein to purchase from purchaser—Clog on right of redemption—Subsequent bill of mortgage and bill of sale—Provisions inconsistent with option of purchase—Effect of the later instruments.

By an agreement in writing, called a "power of attorney and covenant," which recited that the plaintiff had agreed to assist the defendant in the acquisition of the lease and licence, &c., of a hotel and in the purchase of supplies for the hotel, and to finance her for that purpose, the defendant had appointed the plaintiff her attorney (*inter alia*) to sell the lease, &c., and attached to the power of sale was a proviso enabling the plaintiff to call upon the defendant at any time during the term of the lease to sell the lease, &c., to him. The defendant obtained the lease, and on the same day executed a bill of mortgage and a bill of sale in favour of the plaintiff; by the bill of mortgage the defendant mortgaged to the plaintiff her estate and interest in the lease, with a right to redeem at any time, and by the bill of sale the defendant assigned to the plaintiff the chattels, &c., in and about the hotel subject to a proviso for redemption or reassignment. Subsequently the defendant discharged her indebtedness to the plaintiff. Later on, the plaintiff called upon the defendant to sell to him the lease, &c., of the hotel in accordance with the agreement above referred to, but she refused to do so. On appeal to the High Court in an action by the plaintiff against the defendant for specific performance of such agreement,

Held, (1) that if the option of purchase was a distinct and separable transaction, the power of attorney was given as security for the repayment of moneys to be advanced by the plaintiff to the defendant, and therefore the option of purchase, as it was inconsistent with or repugnant to the defendant's equitable right of redemption, was invalid; and (2) that even if the provisions of the power of attorney could be treated as surviving the execution of the two later documents, the option of purchase was inconsistent with or repugnant to the defendant's contractual as well as her equitable right of redemption, and was therefore invalid.

Held, by *Knox* C.J. and *Starke* J., on the facts, that upon the execution of the two later documents, the document containing the option of purchase ceased to have any effect.

Semble, *per Isaacs* J.: The documents were in substance all parts of one transaction based on the same negotiation and the same consideration from the plaintiff and dealing with the same subject matter of purchase.

Held, therefore, that the action had been rightly dismissed.

Decision of the Supreme Court of Queensland (*McCawley* C.J.): *Baker* v. *Biddle*, (1923) S.R. (Qd.), 46, affirmed.

APPEAL from the Supreme Court of Queensland.

In an action brought in the Supreme Court of Queensland, the plaintiff, Frederick Charles William Mark Baker, claimed specific performance of an agreement made between him and the defendant, Martha Biddle, and dated 23rd September 1919, with respect to certain property. The plaintiff also claimed an injunction to restrain the defendant from transferring, disposing of or dealing with the property otherwise than in accordance with such agreement. By the agreement (which was called a "power of attorney and covenant") the plaintiff, who was therein described as a general commission agent and wholesale wine and spirit merchant, was given an option to purchase the property; and subsequently, on 24th October 1919, the defendant gave the plaintiff a bill of mortgage and a bill of sale over the same property, which contained usual clauses. In 1921 the defendant discharged her indebtedness to the plaintiff under the bills of mortgage and sale. In September 1922 the plaintiff notified the defendant that he had exercised his option of purchase under the power of attorney and covenant, and called upon her to sell to him, which she refused to do. He thereupon instituted the above-mentioned action.

H. C. OF A. 1923.

BAKER v. BIDDLE.

On a motion for an interim injunction (which was treated as a trial of the action) the Supreme Court of Queensland (*McCawley* C.J.) held that the three documents were subsisting securities, but that the option of purchase was repugnant to the right of redemption in the later documents and invalid; and he dismissed the motion for injunction and gave judgment for the defendant in the action with costs: *Baker* v. *Biddle* (1).

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

The other material facts appear in the judgments hereunder.

MacLeod, for the appellant. The Supreme Court was wrong in deciding that the three documents constituted one transaction: if that determination of fact is correct the decision is right, for the reasons given; but the power of attorney and covenant was separable and distinct (*De Beers Consolidated Mines Ltd.* v. *British South Africa Co.* (2)), and was irrevocable while the tenant was lessee or licensee. It created a prior independent right which was not affected by the subsequent instruments, and for which the agreement to finance was part consideration. The rights subsequently given were subject to the prior option of purchase. The property mortgaged by the later documents was property burdened and encumbered by the prior obligation to sell. The question is one of substance, not of form (*Kreglinger* v. *New Patagonia Meat and Cold Storage Co.* (3)).

McGill, for the respondent. If the facts establish that there was only one transaction, the option of purchase is a clog on the right of redemption, and therefore invalid. If on the facts the power of attorney and covenant was distinct and independent, its provisions became inoperative owing to, and were replaced by, the different and inconsistent provisions in the later documents.

Cur. adv. vult.

June 12. The following judgments were delivered:—

KNOX C.J. This was an action for specific performance of an agreement dated 23rd September 1919, by which the defendant agreed to sell to the plaintiff the unexpired portion of the defendant's

(1) (1923) S.R. (Qd.), 46. (2) (1912) A.C., 52.
(3) (1914) A.C., 25.

lease of the Wadeleigh Hotel, Boreren, and the licence, goodwill, furniture and contents (stock excepted) of the said hotel; and for an injunction to restrain the defendant, her agents and servants from transferring, disposing of or dealing with the said lease, licence, goodwill, furniture and contents otherwise than in accordance with the said agreement. A motion for injunction was made and by consent was treated as the trial of the action.

It appears that on 23rd September 1919 an agreement was entered into and a document was executed by the defendant in the form of a power of attorney and covenant by which—after reciting that the plaintiff had agreed to assist the defendant in acquiring such lease and the licence of such hotel, and to finance her for that purpose, and had further agreed to charge nominal interest at four per cent for money expended in obtaining the lease or licence, to supply her with such quantities of goods and liquor as he might consider right and proper for the proper conduct of the hotel, and to forbear demanding payment therefor until three months after the month of supply—the defendant (Biddle) appointed plaintiff her attorney to do a number of things—amongst others, to execute a surrender of the lease of the hotel and to transfer the licence to any person the lessor might think fit and who should be approved of by the Licensing Authority; also to sell the furniture, goodwill, chattels, &c., of the hotel at such price as the attorney might think reasonable, with a proviso that the defendant might at any time call on the plaintiff to purchase from her the lease or unexpired portion thereof; in like manner the plaintiff might call on the defendant to sell to him or his nominee at the same price as he would have to pay for it had the defendant called on him to purchase. It was further declared that the power of attorney should be irrevocable as long as the defendant remained tenant or lessee or licensee of the hotel.

Shortly after this, on 24th October, the defendant obtained a lease of the hotel for ten years from 20th October, and on the same day executed in favour of the plaintiff a bill of sale and a bill of mortgage to secure (*inter alia*) the repayment of £325, or thereabouts, which the plaintiff had advanced to enable the defendant to complete the purchase. The bill of mortgage was collateral with the bill of sale, and the relevant provisions of the bill of sale are as follows :—

H. C. OF A. 1923.

BAKER v. BIDDLE.

KNOX C.J.

"Provided always and it is hereby agreed and declared that if the said sum of three hundred and twenty-five pounds four shillings and one penny and all such further and other sums as aforesaid together with the costs expenses and moneys incurred or paid by the mortgagee as hereinbefore mentioned with interest thereon respectively at the rate aforesaid shall be duly paid pursuant to the covenant in that behalf hereinbefore contained then and in such case the mortgaged property shall upon the request and at the cost of the mortgagor be reassigned to the mortgagor Provided also and it is hereby declared and agreed that whether any demand of or default in payment of the principal moneys hereby secured shall have been made or not it shall be lawful for the mortgagee at any time hereafter either by himself or his servants or agents to enter into and upon any dwelling house building enclosure land or other place in or upon which the mortgaged property or any part thereof now is or shall then be or be supposed to be and to seize and take possession of the mortgaged property and to retain and keep possession thereof either in or upon the dwelling house building enclosure land or other place where the same shall be found or in or upon any other place or places to which the mortgagee shall think fit to remove the same during so long as he shall think fit or to give up and again retake and resume possession thereof and for all or any of the purposes aforesaid or for any purpose connected with this security to use such force as may be necessary or expedient breaking open any outer and inner doors" &c. "And also to use and work the mortgaged property and to employ the same in any business trade or occupation which the mortgagee may think fit for any length of time either in his own name or in the name of the mortgagor And all costs expenses damages and losses which shall be incurred or paid by the mortgagee in connection with the taking or keeping possession or removal of the mortgaged property or in connection with the using and working the same or carrying on any business therewith or in connection with the sale or attempted sale of the mortgaged property under the power in that behalf hereinafter contained or otherwise in connection with this security shall be a charge upon the mortgaged property and shall bear interest and be payable at the same time and in the same manner as though the

same were part of the principal moneys intended to be hereby secured Provided also and it is hereby further agreed and declared that if default shall be made in payment of the said principal or interest or any instalment thereof respectively or in the performance or observance of any covenant condition or restriction herein contained on the part of the mortgagor to be performed or observed or if she shall become insolvent or file any petition of insolvency or for the liquidation of her affairs or call any meeting of her creditors or commit or suffer any act of insolvency or if any judgment shall be obtained against her and she shall not immediately pay the same on demand by the mortgagee it shall be lawful for the mortgagee at any time or times thereafter and whether in or out of possession and although advantage may not have been taken of some previous default to sell the mortgaged property or any part thereof . . . And it is hereby agreed and declared that the mortgagee shall with and out of the moneys to arise from any such sale as aforesaid in the first place pay the expenses attending such sale or sales or otherwise paid or incurred in relation to this security And in the next place pay and retain the moneys which shall be owing on the security of these presents and shall pay the surplus (if any) to the mortgagor" &c. "Provided also and it is hereby agreed and declared that until possession shall be taken or retaken by the mortgagee under the power in that behalf hereinbefore contained it shall be lawful for the mortgagor to retain possession of the mortgaged property and to receive and collect the . . . book debts" now owing or which shall hereafter be owing to the mortgagor "and sell the stock-in-trade in the usual way of business but not to remove the same or any part thereof from the dwelling house or building land or place where the same now is without the previous consent of the mortgagee" &c. "And the mortgagor hereby irrevocably nominates constitutes and appoints the mortgagee his executors administrators and assigns the attorney or attorneys of her the mortgagor for her and in her name or otherwise to ask demand sue for and receive the mortgaged property or any part thereof from all persons liable to pay or deliver the same and to make any further assignment or assurance of the mortgaged property or any part thereof which he or they shall think fit and to apply for renewals of the licence for

H. C. OF A. 1923. BAKER v. BIDDLE. Knox C.J.

the said hotel and for a transfer thereof to any person . . . and to appoint any person nominated by the mortgagee . . . as agent or manager to carry on the business of the said hotel on such terms and conditions as such attorney or attorneys shall think fit and any such appointments to revoke . . . and to pay any rent rates taxes or licence fees which shall hereafter be payable in respect of the said hotel and to surrender and transfer the said lease and any future lease of the same premises or any part thereof which shall hereafter during the continuance of this security be held by the mortgagor and to sign seal execute deliver give lodge publish and do all such assurances transfers surrenders applications notices appointments documents writings and things whatsoever which the said attorney or attorneys shall deem necessary or expedient for all or any of the purposes aforesaid and for protecting the mortgagee's interests under this security And generally to act for the mortgagor in relation to the premises as fully and effectually as the mortgagor himself could do the mortgagor hereby agreeing to ratify and confirm whatsoever the said attorney or attorneys shall lawfully do by virtue thereof."

The Chief Justice held that the whole matter was one transaction and took the view that the agreement, the bill of sale and the bill of mortgage were part of one mortgage transaction, and that it would make no difference in substance had the option of purchase been included in the bill of mortgage or bill of sale, and that in that case it would be inconsistent with the contractual right of redemption. He came to the conclusion that the option was invalid, and dismissed the action; and it is against that decision that the present appeal is brought. It is not disputed that if this view of the facts was correct, the action must fail because the option to purchase, extending over the whole period of the lease irrespective of the fact of redemption, would be inconsistent with or repugnant to the right of redemption vested in the mortgagor.

The appellant argues that the power of attorney was a distinct and separable transaction. If it was not, it is conceded that the option was invalid. If it was, I cannot see how the power of attorney can remain in force having regard to the bill of sale and bill of mortgage subsequently taken. The provisions of the bill of sale and

bill of mortgage are inconsistent with the view that the power of attorney remained in force after execution of these documents. I refer particularly to the right to redeem, to the power of attorney, to the power to sell on default and to the covenant for quiet enjoyment contained in the bill of sale, which are inconsistent with the original power of attorney.

I think the true view of the facts is that the power of attorney was taken as a temporary measure to protect the lender until the lease should be granted and the bill of sale and bill of mortgage executed, and that upon execution of those securities it ceased to have any effect. If it remained in operation, the appellant could sell whether default was made or not, and even after payment of the mortgage debt, which entitled the mortgagor to a reassignment of the premises. But even if it could be treated as remaining in force I think it is clear that it was given as security for the repayment of the amount agreed to be advanced, and in this view the option would be obnoxious to the rule which invalidates provisions inconsistent with or repugnant to the right to redeem.

In any view of the facts which is open on the evidence, I think the plaintiff fails, and the appeal should be dismissed.

ISAACS J. The stipulation on which the appellant relies is contained in a document executed by the respondent on 23rd September 1919, and called a " power of attorney and covenant." The clause containing it does three things :—(1) It empowers the appellant to sell the lease and licence of the Wadeleigh Hotel with furniture, &c., at such price as he thinks reasonable either by public auction or private contract and to such person as he thinks fit ; (2) it provides that the respondent may call on him at any time to buy (except stock) for a certain price, and (3) that the appellant may compel her to sell at that same price. The third stipulation is the one relied on by the appellant.

The respondent successfully maintained before the learned Chief Justice of Queensland the contention that the document of 23rd September 1919 was but the initial step of an arrangement intended from the first to eventuate in a loan by the appellant to the respondent to purchase the property referred to, and in appropriate

H. C. OF A. 1923.

BAKER v. BIDDLE.

Isaacs J.

mortgages of the property, according to its nature, real and personal, and that, on the well-known principle of equity, the stipulation relied on was repugnant to and inconsistent with the contractual and statutory right of redemption, and judgment was therefore given for the respondent.

The appellant's argument before this Court was that the judgment was wrong inasmuch as the document of 23rd September 1919 was prior to and quite separable from the mortgages dated 24th October 1919, consisting of a bill of sale of personal chattels as the primary instrument and a mortgage of lease under the *Real Property Act*. The appellant urged that the stipulation founded upon was quite outside and independent of the mortgage arrangement, and should be separately given effect to as a collateral but valid bargain.

If it were absolutely necessary to determine the fact whether the power of attorney was only the initial step in an intended course of business conduct involving the acquisition of the lease and licence for the respondent, the advance of money necessary therefor and the giving of the two mortgages to secure the appellant, I should be quite prepared to agree with the finding of the Chief Justice of Queensland. That seems to be the inevitable result of the appellant's own evidence. The only negotiations between him and the respondent were those from which the three instruments successively flowed. Allowing for the obvious fact that he first on 23rd September secured his position before proceeding to get the lease and then proceeded to get a ten years' lease not restricted as between him and the respondent by any specific commencing point, and allowing for the time necessary to obtain the execution of the lease, it seems quite natural that the subsequent documents should bear date 24th October. But the question does not turn on whether the instruments were made at the same time or at different times. We have to regard the substance and identity of the whole transaction of which they form part. Lord *Haldane* L.C., in *Kreglinger's Case* (1), said: "The question is in my opinion not whether the two contracts were made at the same moment and evidenced by the same instrument, but whether they were in substance a single and undivided contract or two distinct contracts." And his Lordship

(1) (1914) A.C., at p. 39.

adds: "The question is one not of form but of substance, and it can be answered in each case only by looking at all the circumstances, and not by mere reliance on some abstract principle."

Looking at the substance, I should, were I called on definitely to decide this point, say that the documents were in substance all parts of one transaction based on the same negotiation, and the same consideration from the appellant, and dealing with the same subject matter of purchase. But however the position is regarded, whether the power of attorney and covenant of 23rd September be assumed to be the first step in a connected series of events or an original and independent bargain, it cannot, at least on a fair review of the actual circumstances of the case and the terms of the instruments, be read as collateral in the sense that it can stand consistently with due effect being given to the later instruments. The mortgage of land provides in the 7th clause as follows:—"That I" (that is, the respondent) "shall be at liberty at any time to discharge the whole of my liability to the said mortgagee" (that is, the appellant) "under this security." The bill of sale provides that if the moneys owing are duly paid "then and in such case the mortgaged property shall upon the request and at the cost of the mortgagor be reassigned to the mortgagor." The stipulation relied on, if valid, gives to the mortgagee an option *at any time* to insist that the property shall be absolutely transferred to him at the stipulated price. If, on the one hand, we are to regard the documents as connected though partly overlapping instruments intended, as the appellant asserts, to confer on him whatever contractual rights can be found in his favour in any of them, then the stipulation relied on cannot be supported either at law or in equity. In *Kreglinger's Case* (1) Lord *Parker* says: "A condition that the mortgagee is to have such an option" (that is, an option of purchasing the mortgaged property) "for a period which begins before the time for the exercise of the equitable right" (that is, the mortgagor's equitable right to redeem) "has arrived, or which reserves to the mortgagee any interest in the property after the exercise of the contractual right, is inconsistent not only with the equity but with the contractual right itself, and might, I think, be held invalid for repugnancy even in a Court of

(1) (1914) A.C., at p. 50.

H. C. OF A. 1923.

BAKER v. BIDDLE.

Isaacs J.

law." On the other hand, if we regard the instruments as distinct and separable, then it equally follows from the same reasoning that the parties, settling in October their contractual relations respecting the property, have settled those relations on a basis and on terms inconsistent with the arrangement originally arrived at. And the later contracts must prevail. I need not consider other possible inconsistencies.

Quacunque viâ, therefore, the appeal ought to be dismissed.

STARKE J. The appellant Baker had agreed to finance the respondent Biddle in the acquisition of an hotel, and the purchase of supplies for that hotel. In consideration of the premises, the respondent appointed the appellant her attorney with power to surrender the lease of the hotel, to apply for renewals of the licence, and to sell the lease as he might think fit. Clearly, the power was given to the appellant for the purpose of securing any advances made or goods, &c., supplied by him. But a proviso was attached to the power of sale which enabled the respondent to compel the appellant to purchase the lease, and in like manner the appellant might call upon the respondent to sell to him the lease, &c. A month after this power of attorney was executed, the two parties executed two other documents—a bill of mortgage and a bill of sale. The bill of mortgage was a mortgage of all the respondent's estate and interest in the lease, with a right to redeem at any time. The bill of sale was an assignment of the chattels and stock in and about the hotel, subject also to a proviso for redemption or reassignment. Both documents contained powers of sale in case of default, &c.

In the Supreme Court the three documents were treated as still subsisting in point of law, and together operative as a security to the appellant. But the Chief Justice of the Supreme Court held that the proviso to the power of sale was repugnant to the proviso for redemption in the bill of mortgage and the bill of sale. My brother *Isaacs* has shown that the decision would have been correct if the facts were as assumed. In my opinion, however, the better view of the facts is that the bill of sale and the bill of mortgage were substituted for the security constituted by the power of attorney. What, then, was the effect of this substitution? It

seems to me that it amounted to a cancellation of the power of attorney as between the parties (see *Smale* v. *Burr* (1)). Consequently, the proviso to the power of sale in the power of attorney was no longer subsisting, and the action was therefore rightly dismissed.

H. C. OF A. 1923. BAKER v. BIDDLE.

Appeal dismissed with costs.

Solicitors for the appellant, *Hamilton & Nielson*, Bundaberg, by *Morris, Fletcher & Cross.*

Solicitors for the respondent, *Thornburn & Thornburn*, Bundaberg, by *J. Nicol Robinson, Fox & Edwards.*

J. L. W.

(1) (1872) L.R. 8 C.P., 64.

Appl T C Newman (Qld) Pty Ltd v D H A Rural (Qld) Pty Ltd 2 ACLR 257

Foll T C Newman (Qld) Pty Ltd v D H A Rural (Qld) Pty Ltd [1988] 1 QdR 308

Dist FAI Insurances Ltd v Urquhart 11 ACLR 25

Appl Geneva Finance Ltd, Re; Quigley v Cook (1992) 7 ACSR 415

Appl Geneva Finance Ltd, Re; Quigley v Cook (1992) 7 WAR 496

[HIGH COURT OF AUSTRALIA.]

THE AUSTRALIAN METROPOLITAN LIFE ASSURANCE COMPANY LTD. . . } APPELLANT;
RESPONDENT,

AND

URE AND OTHERS . . . . . RESPONDENTS.
APPLICANTS,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1923.

BRISBANE, *June* 12, 13.

SYDNEY, *Aug.* 2.

Knox C.J., Isaacs and Starke JJ.

Company—Shares—Transfer—Refusal to register transfer—Discretion of directors—Articles of association—Companies Act 1863 (*Q.*) (27 *Vict. No.* 4), *secs.* 21, 34.

One of the articles of association of a company provided that the directors might refuse to register any transfer whatever of any shares without assigning any reason therefor. A member of the company purchased certain additional