[HIGH COURT OF AUSTRALIA.]

GROONGAL PASTORAL COMPANY LIMITED (IN LIQUIDATION) . . Appellant;
Plaintiff,

AND

FALKINER . . . . . Respondent.
Defendant,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. of A. 1924.

Sydney, *July* 31; *Aug.* 1, 4; *Dec.* 15.

Isaacs A.C.J., Gavan Duffy and Starke JJ.

Mortgage—Construction—Payment of interest "free from income tax"—Discharge—Statutory effect—Discharge of personal obligation of mortgagor—Real Property Act 1900 (*N.S.W.*) (*No.* 25 *of* 1900), *secs.* 36, 57, 65, 103, *Sched.* 9.

By a memorandum of mortgage under the *Real Property Act* 1900 (N.S.W.) the mortgagor covenanted to repay, in Sydney, the principal sum secured "free from exchange and all other deductions," by equal yearly instalments, and to pay to the mortgagee, in Sydney, interest at a certain rate by equal half-yearly payments "free from exchange, income tax and all other deductions."

Held, upon the construction of the mortgage, that the mortgagor was bound to indemnify the mortgagee, if necessary, by reimbursement, in respect of any diminution of the interest by reason of any income tax the mortgagee might have to pay in respect of the receipt thereof, so as to leave the interest at the rate specified clear in the hands of the mortgagee.

The mortgage, which was given to a company, was duly registered. Subsequently a discharge was endorsed on the mortgage acknowledging the receipt of the amount of the mortgage debt "being in full satisfaction and discharge of the within obligation," and executed by the mortgagee under its seal. The discharge was handed, with the certificate of title of the mortgaged property, to the mortgagor's solicitors, who procured its due registration.

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Held, that the discharge, being an instrument duly registered and bearing the stamp of the Registrar-General's seal, had, in law, the effect of a deed and operated by its terms to discharge the mortgagor from his personal obligation as well as to release the land from the encumbrance.

Decision of the Supreme Court of New South Wales (Full Court): *Groongal Pastoral Co.* v. *Falkiner*, (1923) 24 S.R. (N.S.W.) 122, affirmed.

APPEAL from the Supreme Court of New South Wales.

On 29th March 1912 a memorandum of mortgage under the *Real Property Act* 1900 (N.S.W.) was executed whereby Ralph Sadlier Falkiner mortgaged certain property to Groongal Pastoral Co. Ltd. (in Liquidation) to secure repayment of £120,000 with interest thereon at 4 per cent per annum. The mortgage contained the following covenants by Falkiner:—"Firstly: That I will pay to the Groongal Pastoral Company Limited hereinafter called the mortgagee in Sydney the above sum of one hundred and twenty thousand pounds by ten equal instalments of twelve thousand pounds each payable on the first day of September in each and every year free from exchange and all other deductions the first of such instalments to be payable on the first day of September one thousand nine hundred and twelve. Secondly: That I will pay to it in Sydney interest on the said sum of one hundred and twenty thousand pounds or such part thereof as shall for the time being remain unpaid at the rate of four pounds by the £100 in the year as follows: namely by equal half-yearly payments free from exchange income tax and all other deductions on the first day of the months of March and September in each and every year until the said principal sum of one hundred and twenty thousand pounds shall be fully paid and satisfied the first of such payments computed from the first day of September last was made on the first day of March instant."

An action was in 1923 brought in the Supreme Court against Falkiner by the Company, alleging a breach of the second of those covenants in that the defendant had not paid and had refused to pay income tax which had been paid by the plaintiff to the Commonwealth and to the State of New South Wales in respect of instalments of interest received by the plaintiff from the defendant, and seeking to recover £1,262 8s. 6d. At the hearing of the action it was admitted that the defendant, as an act of grace and without prejudice, had

paid to the plaintiff the sum of £403 13s. 4d. on account of income tax paid by the plaintiff to 31st December 1923 in respect of interest paid by the defendant to the plaintiff but had paid no other sum to the plaintiff in respect of income tax, and the defendant had refused to pay any further sum; that on 1st September 1921 a discharge of the memorandum of mortgage in the form prescribed by the *Real Property Act* 1900 was executed by the liquidators on behalf of the Company and was handed with the certificate of title issued in respect of the mortgaged property to the defendant's solicitors; and that the discharge was duly registered under that Act on 12th September 1921.

A jury having by consent been dispensed with, the action was heard by *Gordon* J., who held that by the second covenant in the mortgage the defendant agreed to pay not only interest at 4 per cent per annum but also any other sums which the plaintiff might have to pay by way of exchange, income tax or otherwise which would reduce the payments of interest in its hands below the actual amount of 4 per cent per annum; that as to State income tax the plaintiff was precluded from recovering it by the decision of the High Court in *Harris* v. *Sydney Glass and Tile Co.* (1); but that as to Federal income tax the plaintiff was entitled to recover it since the discharge of the mortgage operated only to release the land from the mortgage but did not release the defendant from his personal obligation. His Honor therefore found a verdict for the plaintiff for £506 8s. 6d.

On motions by the plaintiff and the defendant that judgment should be entered for them respectively or that a new trial should be ordered, the Full Court by a majority (*Cullen* C.J. and *Ralston* A.J., *Campbell* J. dissenting) directed that a verdict should be entered for the defendant, being of opinion that the discharge of the mortgage operated to release the defendant from his personal liability: *Groongal Pastoral Co.* v. *Falkiner* (2).

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

Other material facts are stated in the judgment of the Court hereunder.

(1) (1904) 2 C.L.R. 227.

(2) (1923) 24 S.R. (N.S.W.) 122.

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Leverrier K.C. and *Weston*, for the appellant. The meaning of the second covenant of the mortgage is that the mortgagor was to pay any income tax which the mortgagee would have to pay in respect of the instalments of interest which would diminish the rate of interest below 4 per cent. Sec. 36 (4) of the *Real Property Act* 1900, which gives to every instrument when registered and stamped with the seal of the Registrar-General the effect of a deed, does not apply to forms of receipt such as a discharge of the mortgage is (*Kelly* v. *Fuller* (1); *In re Currie*; *R.* v. *Currie* (2); sec. 3 of the *Real Property Act*). If the discharge does fall within sec. 36 (4), it only operates to discharge the land from the principal sum due (sec. 65 (2) of the *Real Property Act* 1900; *Bell* v. *Rowe* (3)). The discharge is not in fact a deed. The seal of the appellant Company merely takes the place of a signature, and there was no delivery of the document with the intention that it should be a deed (*Chanter* v. *Johnson* (4)). Even if it was in fact a deed, the intention was that it should only release the land from the principal sum. The word "obligation" in the discharge means the charge on the land. As to State income tax the second covenant in the mortgage was never within sec. 63 of the *Land and Income Tax Assessment Act* 1895 (N.S.W.) by reason of the repeal of that Act by the *Income Tax (Management) Act* 1912 (N.S.W.) and the substitution of the provisions of the latter Act. The latter Act by implication operated retrospectively to validate the covenant. If the covenant was originally within sec. 63 of the Act of 1895, the repeal of that Act operated so as to render the section thereafter inapplicable to the covenant. [Counsel referred to *Harris* v. *Sydney Glass and Tile Co.* (5).]

Flannery K.C. (with him *Hammond* and *Stuckey*), for the respondent. As to the construction of the covenant, income tax was by the covenant regarded as a deduction, and the covenant may have been intended to refer to possible future legislation under which the mortgagor would be required to deduct income tax from payments of interest made by him (see *In re Barry's Trusts*; *Barry*

(1) (1867) 1 S.A.L.R. 15.
(2) (1899) 25 V.L.R. 224; 21 A.L.T. 127.
(3) (1901) 26 V.L.R. 511; 22 A.L.T. 156.
(4) (1845) 14 M. & W. 408.
(5) (1904) 2 C.L.R., at p. 240.

v. *Smart* (1)). It is unlikely that the mortgagor would have agreed to pay a variable sum dependent in its amount upon the total income of the mortgagee.

[STARKE J. referred to *Gleadow* v. *Leetham* (2); *Booth* v. *Booth* (3); *Blount* v. *Blount* (4).]

The discharge operated as a deed signed, sealed and delivered, and also under sec. 65 of the *Real Property Act*. In either character its effect was to discharge the personal obligation of the respondent. [Counsel also referred to *Dalgety & Co.* v. *Beviss* (5); *Sinclair* v. *Gumpertz* (6).]

Leverrier K.C., in reply. By the covenant, so far as income tax is concerned, it was intended that the mortgagor should indemnify the mortgagee in respect of income tax upon payments of interest.

Cur. adv. vult.

Dec. 15.

THE COURT delivered the following written judgment:—

On 29th March 1912 the respondent executed in favour of the appellant a mortgage, under the *Real Property Act* 1900, to secure the repayment of £120,000 and interest at 4 per cent per annum. The mortgage was duly registered, and on 1st September 1921 was duly discharged under the provisions of the Act. The Company over a series of years paid, to the Federal Government and to the Government of the State of New South Wales, income tax upon income including the interest it received from the respondent. By an action at common law it seeks to recover from him the total amount of the tax so paid. The appellant's case rests on the second clause of the mortgage. It will be desirable to quote that clause together with the preceding clause. They run as follows:—"Firstly: That I will pay to the Groongal Pastoral Co. Limited hereinafter called the mortgagee in Sydney the above sum of one hundred and twenty thousand pounds by ten equal instalments of twelve thousand pounds each payable on the first day of September in each and every year free from exchange and all other deductions the first of such

(1) (1906) 1 Ch. 768.
(2) (1882) 22 Ch. D. 269.
(3) (1922) 1 K.B. 66.
(4) (1916) 1 K.B. 230.
(5) (1921) S.A.L.R. 252.
(6) (1898) 15 N.S.W.W.N. 125.

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instalments to be payable on the first day of September one thousand nine hundred and twelve. Secondly: That I will pay to it in Sydney interest on the said sum of one hundred and twenty thousand pounds or such part thereof as shall for the time being remain unpaid at the rate of four pounds by the £100 in the year as follows: namely by equal half-yearly payments free from exchange income tax and all other deductions on the first day of the months of March and September in each and every year until the said principal sum of one hundred and twenty thousand pounds shall be fully paid and satisfied the first of such payments computed from the first day of September last was made on the first day of March instant."

The case came in the first instance before *Gordon* J., who held that though, as a matter of construction, the second clause bound the respondent to repay the moneys claimed, yet the appellant was not entitled to recover the amount of tax paid to the State because of the invalidity of the provision relied on (sec. 63 of the *Land and Income Tax Assessment Act* of 1895 and *Harris* v. *Sydney Glass and Tile Co.* (1)). His Honor, however, held that Federal tax could be recovered within the limits of secs. 53 and 54 of Act No. 34 of 1915. A defence that the statutory discharge of the mortgage was a discharge of the respondent's personal obligation was determined by his Honor against the respondent. Both parties appealed to the Full Court, which by a majority held that the statutory receipt had the effect of discharging also the personal obligations of the respondent, and therefore determined the whole action in his favour, without dealing with the other points.

The crucial words in the second clause of the mortgage are "free from exchange income tax and all other deductions." Do those words mean that, when payment of interest is made, it shall be so made that the Company shall receive in cash at its Sydney office the full 4 per cent interest, undiminished by any deduction whatever; or do they mean that, if it does receive the full 4 per cent interest in cash, there shall be a further sum paid corresponding to whatever income tax the Company may pay or have to pay to Commonwealth and State in respect of the full 4 per cent? Our duty is to construe the words actually used. It is not the intention of either party we

(1) (1904) 2 C.L.R. 227.

have to ascertain: it is the expressed common intention of both parties. The dominant intention of the covenant as expressed is that the mortgagee shall receive 4 per cent interest undiminished by any cost of exchange, or income tax, or by any other sum burdening that interest. The mortgagor, having so undertaken, was bound to indemnify the mortgagee and, if necessary, by reimbursement, in respect of any diminution so as to leave a clear 4 per cent in the hands of the mortgagee.

That renders other defences necessary to be considered. One stands prominently forward, namely, the effect of the discharge of 1st September 1921. The appellant contends that the only effect of that discharge is to liberate the land as a security, leaving the personal obligations untouched. The respondent contends that its effect is to put an end to all personal liability as well as to free the land.

The *Real Property Act* 1900 is an Act the purpose of which is to simplify and facilitate dealings with land, including its mortgage to secure repayment of debts. But, except so far as may be inconsistent with its provisions (see sec. 2 (4)), it does not interfere with the ordinary operation of contractual or other personal relations, or the effect of instruments at law or equity. In *Barry* v. *Heider* (1), as a result of the decisions cited, *Isaacs* J. said:—"They have long, and in every State, been regarded as in the main conveyancing enactments, and as giving greater certainty to titles of registered proprietors, but not in any way destroying the fundamental doctrines by which Courts of equity have enforced, as against registered proprietors, conscientious obligations entered into by them" (2). "The *Land Transfer Act* does not touch the form of contracts. A proprietor may contract as he pleases, and his obligation to fulfil the contract will depend on ordinary principles and rules of law and equity, except as expressly or by necessary implication modified by the Act" (3).

In order to carry out its purposes the Act provides, in the Schedule, forms of instruments to be followed. But by sec. 103 (2) it enables those forms to be used with "such alterations as the character of the

(1) (1914) 19 C.L.R. 197. (2) (1914) 19 C.L.R., at p. 213.
(3) (1914) 19 C.L.R., at p. 216.

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parties or the circumstances of the case may render necessary." Registration is necessary to give statutory effect to an instrument, and by sec. 36, sub-sec. 4, every instrument when registered and stamped with the seal of the Registrar-General "shall have the effect of a deed duly executed by the parties signing the same." In the Ninth Schedule are forms of mortgage and of discharge. As mentioned, however, those forms may be accommodated to meet the actual requirements of the case, and so contain the actual bargain of the parties. When completely registered and stamped they are by force of law deeds with all the effect that law gives to a deed. The mortgage itself (sec. 57) is a security only. The personal obligation itself is independent of the security, but it is contained in and constituted by the statutory deed by which also it is secured. A discharge of the land may be effected by an endorsement on the mortgage under sec. 65, and that may be, according to its tenor and as sec. 65 says, a discharge (1) of the whole land from the whole or part of the principal sum secured or (2) of any part of the land from the whole of the principal sum. Reading that with sec. 103 (2), the discharge may be moulded to the agreement of the parties. Then, says sec. 65, upon entry of the discharge the land is, to the extent of the discharge, no longer subject to the encumbrance.

The particular form of the discharge in this case is: "Received from Ralph Sadlier Falkiner, this first day of September 1921, the sum of one hundred and twenty thousand pounds, being in full satisfaction and discharge of the within obligation.—The common seal of Groongal Pastoral Company Limited (in Liquidation) was hereto affixed by Sir Henry Yule Braddon and Wilfrid Cecil Metcalfe in the presence of Fred. I. W. Harrison, secretary.—(Sgd.) Hy. Y. Braddon—Wilfrid Cecil Metcalfe—(Seal of Company)." The discharge is in the most ample terms, apt to express a full and complete discharge of all personal "obligation." The Company executed the discharge under its common seal, and by the twelfth written admission the discharge was handed with the certificate of title issued in respect of the mortgaged property to the defendant's solicitors. They procured its registration. Had the discharge released all the land except an insignificant part, the full personal liability would clearly have continued. But if so, it shows that the

personal liability for the debt and the burden on the land are not coincident. The extinguishment of the remaining unsubstantial security could not make all the difference between the existence and the non-existence of the personal liability for the debt. The discharge is an instrument duly registered and bears the stamp of the Registrar-General's seal, and, therefore, in law, has the effect of a deed, and, without expressing any opinion as to whether it is in fact a deed duly executed and delivered, it operates by its terms to discharge the respondent from his personal obligation, as well as to release his land from the encumbrance. A discharge differently worded would not necessarily have that effect.

The appeal therefore should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Metcalfe & Dangar.*

Solicitors for the respondent, *Norton Smith & Co.*

B. L.