[HIGH COURT OF AUSTRALIA.]

THE NATIONAL TRUSTEES, EXECUTORS AND AGENCY COMPANY OF AUSTRALASIA LIMITED AND ANOTHER . . } APPELLANTS;
PLAINTIFFS,

AND

BOYD AND ANOTHER . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Oct.* 8, 11.

SYDNEY, *Nov.* 18.

Knox C.J., Isaacs, Higgins, Gavan Duffy and Rich JJ.

Landlord and Tenant—Life tenant—Power to lease for limited term—Fiduciary power—Lease granted pursuant to agreement with tenant—Lease extending beyond life of tenant for life—Lease not registered—Right of tenant to possession—Transfer of Land Act 1915 (*Vict.*) (*No.* 2740), *secs.* 61, 72—*Settled Estates and Settled Lands Act* 1915 (*Vict.*) (*No.* 2725), *secs.* 6, 90.

By a deed of family arrangement, made between the widow and the children of a testator and a trustee, it was agreed that the widow should transfer a certain hotel to the trustee and that thereupon the trustee should transfer a life estate in the hotel to the widow, who should have sole control and management of the hotel during her life with power to lease, to fix the rents and the amounts of bonuses to be paid therefor and to apply to her own use such bonuses, provided that she should not have power to grant any lease for a term exceeding seven years. It was also agreed that the trustee should hold the hotel after the widow's death upon trust for all the testator's children equally. The deed of arrangement was carried out and the widow became registered as the owner of a life estate in the hotel.

Held, by the whole Court, that the power given to the widow was not fiduciary.

In 1914 the widow executed a lease of the hotel to A for the term of seven years from 1st May 1914, and on the same day executed an agreement with A that on every 1st June in each year during the life of the widow so long as

the hotel should be licensed the lessee should make and give and the lessor should take and accept a surrender of the lease for the time being in existence of the hotel and immediately upon every such surrender the lessor should lease the hotel to the lessee for a term of seven years from the surrender. In that agreement it was stated that it was the intention of the lessor and the lessee "to keep and maintain the lease of the said . . . hotel at a constant term of seven years during the lifetime of the said lessor." It was also provided by that agreement that the rent, covenants, &c., of each new lease should be the same as in the lease of 1914. Pursuant to that agreement the widow in each subsequent year granted a new lease for seven years either to A or to the assignees of A, and the last of those leases was made in favour of B in 1925, less than a year before the death of the widow. That lease was not registered as required by sec. 61 of the *Transfer of Land Act* 1915 (Vict.).

Held, by *Knox* C.J., *Isaacs*, *Gavan Duffy* and *Rich* JJ. (*Higgins* J. dissenting), that the lease of 1925 was effective, as against the trustee and the children of the testator, to give B an equitable lease for seven years, and was a good defence to an action by the trustee and the children against B to recover possession of the hotel.

Decision of the Supreme Court of Victoria (*Mann* J.) affirmed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court by the National Trustees, Executors and Agency Co. of Australasia Ltd. and John Henry Sabelberg, on behalf of himself and all other persons (except the defendant Lucy Sabelberg) beneficially entitled to the hotel and premises known as the United Kingdom Hotel, Heidelberg Road, Clifton Hill, under a certain deed of agreement dated 15th January 1912, against William Thomas Boyd and Lucy Sabelberg, in which, by the statement of claim, the plaintiffs said substantially as follows :—

1. The National Trustees, Executors and Agency Co. of Australasia Ltd. (hereinafter referred to as "the Company") is a company duly incorporated under the provisions of the *Companies Act* 1915, and on 26th March 1912 became and is now the registered proprietor for an estate in fee simple of a certain piece of land on which is erected the hotel known as the United Kingdom Hotel, such land and hotel being hereinafter referred to as "the said hotel."

2. The plaintiff John Henry Sabelberg and those represented by him are all the persons, with the exception of the defendant Lucy Sabelberg, now beneficially entitled under the terms of the deed of agreement referred to in par. 3 hereof to the said hotel; and the

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defendant Lucy Sabelberg is the other person so beneficially entitled and is also the executrix of the will of Mary Ann Josephine Sabelberg, and she is sued in both those capacities.

3. By deed of agreement made 15th January 1912 between the said Mary Ann Josephine Sabelberg, widow, of the first part, the plaintiff John Henry Sabelberg, Emily Sabelberg, Joseph Sabelberg, Marian Wilson, Frederick Ernest Sabelberg, Herbert Percival Sabelberg, Catherine Jackson, Lydia Florence Meredith, Theodore Sabelberg and the defendant Lucy Sabelberg, being all the children of Theodore Sabelberg deceased, of the second part, and the Company of the third part, it was agreed (*inter alia*) as follows: (a) that the said Mary Ann Josephine Sabelberg would on the execution of the said deed sign a transfer of the said hotel to the Company and that the Company would immediately after the said transfer transfer to the said Mary Ann Josephine Sabelberg a life estate in the said hotel; (b) that the said Mary Ann Josephine Sabelberg should on the execution to her of such transfer as aforesaid have sole control and management of the said hotel during her life including the power to lease the said hotel to fix the rents and the amount of bonuses to be paid therefor or in relation thereto and to apply to her own use any bonus so fixed and paid as aforesaid Provided however that the said Mary Ann Josephine Sabelberg should not have power to grant any lease for a term exceeding seven years; (c) that the said Mary Ann Josephine Sabelberg would not by any personal act of her own or her agent or agents whether of omission or commission allow the said hotel to become wasted; (d) that the Company should stand seised and possessed of the said hotel from and after the death of the said Mary Ann Josephine Sabelberg upon trust for the said children of Theodore Sabelberg deceased in equal shares with the power of sale and the power to lease therein set out.

4. In pursuance of the said deed of agreement, by instrument of transfer dated 26th March 1912 the said Mary Ann Josephine Sabelberg transferred the said hotel to the Company, which became the registered proprietor thereof for an estate in fee simple, and by instrument of transfer dated 26th March 1912 the Company transferred to the said Mary Ann Josephine Sabelberg an estate for

her life in the said hotel and she became the registered proprietor thereof for an estate for her life.

5. By agreement in writing dated 19th May 1914 and made between the said Mary Ann Josephine Sabelberg and one Mary Biggins the said Mary Ann Josephine Sabelberg leased or purported to lease the said hotel to Mary Biggins for the term of seven years from 1st June 1914, and by the same agreement undertook and contracted with the said Mary Biggins to make and give to her on 1st June 1915 and thereafter on every 1st June in each and every year during the term of her the said Mary Ann Josephine Sabelberg's natural life so long as the said hotel should be licensed under the provisions of the Licensing Acts as and for an inn, hotel or public-house, a surrender of the lease of the said hotel, and the said Mary Ann Josephine Sabelberg (*inter alia*) undertook and contracted to take and accept such surrender and immediately upon such surrender to demise and lease to the said Mary Biggins the said hotel for a term of seven years from the date of such surrender—it being the intention of the parties to the said agreement to keep and maintain the lease of the said hotel at a constant term of seven years during the lifetime of the said Mary Ann Josephine Sabelberg so long as the said hotel should remain licensed.

6. By divers instruments and assurances all the rights and liabilities of the said Mary Biggins under the agreement referred to in par. 5 hereof were assigned to the defendant Boyd.

7. Pursuant to the agreement referred to in par. 5 hereof, by alleged instrument of lease dated 2nd June 1920 the said Mary Ann Josephine Sabelberg purported to lease the said hotel to one Thomas William Bird for the term of seven years from 1st June 1920 at the rental and subject to the terms and conditions therein appearing.

8. By an assignment in writing dated 15th December 1920 the said Thomas William Bird assigned all his interest in the alleged lease referred to in par. 7 hereof to the defendant William Thomas Boyd.

9. From time to time during the period extending from 15th December 1920 up to 1st June 1925 the said Mary Ann Josephine Sabelberg purported to lease the said hotel to the said Boyd for periods of seven years in each case, and during such former period from time to time purported to grant and accept surrenders of the

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alleged subsisting leases from the said Boyd with the object and intention of keeping and maintaining the alleged lease of the said hotel at a constant term of seven years during her life as alleged in par. 5 hereof.

10. In order further to carry out the object and intention referred to in par. 5 hereof and in pursuance of the agreement referred to in the said paragraph, by alleged lease dated 1st June 1925 the said Mary Ann Josephine Sabelberg in consideration of the sum of £125 purported to lease unto the defendant Boyd the said hotel for a period of seven years from 1st June 1925 aforesaid at the yearly rental of £260 payable as therein set out, it being provided therein, *inter alia*, that the said Boyd should not be liable to repair damage to the said hotel occasioned by fair wear and tear or fire and tempest, he being thereby exempted from liability for waste.

11. Under the said deed of agreement the said Mary Ann Josephine Sabelberg did not have power or authority to undertake or contract (a) to give any lessee a right to surrender any lease of the said hotel granted by her under the power to lease reserved to her under the said deed of agreement; (b) to accept any surrender of any such lease and immediately upon such surrender to grant a new lease for a further or other term; (c) to make or contract to make any lease to commence *in futuro*; (d) to permit any such lessee to commit waste.

12. The rent referred to in par. 10 hereof was and is grossly inadequate, a fair annual rental for the said hotel at all times material being the sum of £1,200.

13. The said Mary Ann Josephine Sabelberg died on 11th June 1925 and the defendant Boyd is now wrongfully in possession of the said hotel.

14. The plaintiffs submit that the agreement referred to in par. 5 hereof and the leases referred to in pars. 9 and 10 hereof were and are of no force and effect *ab initio* as being *ultra vires* and a fraud upon the power reserved to the said Mary Ann Josephine Sabelberg under the said deed of agreement, or alternatively that the said agreement and the said leases are not binding upon or enforceable against the Company or the said children of Theodore Sabelberg deceased as being *ultra vires* and a fraud upon the said power as aforesaid.

The plaintiffs claim—

(1) A declaration that they are or the Company is entitled to the possession of the said hotel;

(2) A declaration that the said agreement in writing dated 19th May 1914 and the said lease dated 1st June 1925 were and are of no force and effect and void *ab initio* or alternatively that the said agreement and the said lease are void and unenforceable as against the said children of the said Theodore Sabelberg deceased;

(3) An order for the recovery of possession of the said hotel;

(4) Mesne profits at the rate of £1,200 per annum for the period extending from 15th June 1925 to the date of judgment;

(5) Such further or other relief as to the Court may seem just.

The material provisions of the deed of agreement of 15th January 1912, referred to in par. 3, were as follows:—"(3) The said Mary Ann Josephine Sabelberg will on the execution hereof sign a transfer of the said land hotel property and premises known as the United Kingdom Hotel to the said Company and do all things within her power to enable it to obtain an unencumbered certificate of title thereto And the said Company will immediately after the said transfer to it transfer to the said Mary Ann Josephine Sabelberg a life estate in the said land hotel property and premises The said Mary Ann Josephine Sabelberg shall on the execution to her of such transfer as aforesaid have sole control and management of the said land hotel property and premises independently of the said Company during her life including the power to lease the said land hotel property and premises to fix the rents and the amount of bonuses to be paid therefor or in relation thereto and to apply to her own use any bonus so fixed and paid as aforesaid Provided however that the said Mary Ann Josephine Sabelberg shall not have power to grant any lease for a term exceeding seven years The said Company shall stand seized and possessed of the said land hotel property and premises from and after the death of the said Mary Ann Josephine Sabelberg upon trust for all the children of the said Theodore Sabelberg in equal shares with power of sale" &c. "(5) The said Mary Ann Josephine Sabelberg will not by any personal act of her own or her agent or agents whether of omission or commission allow the said property to become wasted or the licence thereto

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imperilled or liable to be forfeited suspended or otherwise lost."

The agreement of 19th May 1914 contained the following provisions:— "(1) On the first day of June one thousand nine hundred and fifteen and thereafter on every first day of June in each and every year during the term of the natural life of the lessor so long as the said United Kingdom Hotel shall be licensed under the provisions of the Licensing Acts for the time being in force in Victoria as and for an inn hotel or public house the lessee shall make and give and the lessor shall take and accept a surrender of the lease for the time being existing in respect of the said land and hotel and immediately upon every such surrender the lessor shall demise and lease to the lessee the said land and hotel for a term of seven years from the date of such surrender it being the intention of the lessor and lessee to keep and maintain the lease of the said land and hotel at a constant term of seven years during the lifetime of the said lessor as long as the said hotel shall be licensed as aforesaid. (2) The lessee shall on the occasion of every such surrender and grant of a new lease for the term of seven years as aforesaid pay to the lessor clear of all deductions and abatements whatsoever a sum of £125 as consideration money for such surrender and new lease. (3) The rent reserved under every such new lease and the covenants powers agreements conditions and stipulations by and on behalf of the lessor and lessee to be contained or implied therein shall be the same as those reserved contained and implied in the aforesaid instrument of lease dated the nineteenth day of May one thousand nine hundred and fourteen."

The action was heard by *Mann* J., who dismissed it with costs.

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

The other material facts are sufficiently stated in the judgments hereunder.

R. E. Hayes K.C. (with him *E. V. Hayes*), for the appellants. The lease to the respondent Boyd being in fulfilment of the agreement of 19th May 1914 and that agreement being outside the power granted by the agreement of 15th January 1912, the lease itself is outside the power and is invalid. It is a fraud upon the power. The effect of the lease and the agreement of 19th May 1914 is to create an agreement for a lease which is to enure for the lifetime of Mrs. Sabelberg and for practically seven years afterwards.

[KNOX C.J. referred to *Sheehy* v. *Lord Muskerry* (1); *King* v. *Bird* (2); *Edwards* v. *Millbank* (3).]

The agreement of 15th January 1912 does not give Mrs. Sabelberg a right to accept a surrender of the lease. Alternatively, the lease is invalid since it exempts the lessee from liability for waste. The granting to Mrs. Sabelberg of the power to lease implies that the lease must contain the usual and proper covenants of a hotel lease (*Foa on Landlord and Tenant*, 5th ed., pp. 375, 376). [Counsel also referred to *Davies* v. *Davies* (4).]

[ISAACS J. referred to *Gas Light and Coke Co.* v. *Towse* (5); *Davis* v. *Harford* (6).]

The lease not having been registered during the lifetime of Mrs. Sabelberg, the power granted to her has not been exercised.

Gregory (with him *C. Gavan Duffy*), for the respondent Boyd. The lease to Boyd was within the terms of the power (*Mostyn* v. *Lancaster* (7); and see sec. 90 of the *Settled Estates and Settled Lands Act* 1915 (Vict.)). The general terms of the power cannot be limited by terms not contained in the grant of the power. There is nothing to suggest that this lease does not contain the usual terms of a lease of a hotel. There is nothing in the grant of the power to compel Mrs. Sabelberg to have provisions in leases granted by her imposing liability for waste upon the tenant. [Counsel also referred to *Davies* v. *Davies* (8); *Nugent* v. *Cuthbert*, cited in *Sugden's Law of Property*, p. 475; *Vaizey on Settlements*, vol. I., p. 553.] There was power for Mrs. Sabelberg to covenant to accept a surrender of a lease granted by her and to grant a renewal (*Doe d. Bromley* v. *Bettison* (9); *In re Hunloke's Settled Estates*; *Fitzroy* v. *Hunloke* (10)).

[HIGGINS J. referred to *In re Rodes*; *Sanders* v. *Hobson* (11).]

Lowe, for the respondent Lucy Sabelberg. The power granted to Mrs. Sabelberg was for her benefit, and was not a fiduciary power

(1) (1848) 1 H.L.C. 576, at p. 584.
(2) (1909) 1 K.B. 837.
(3) (1859) 4 Drew. 606.
(4) (1888) 38 Ch. D. 499, at p. 503.
(5) (1887) 35 Ch. D. 519, at p. 534.
(6) (1882) 22 Ch. D. 128.
(7) (1883) 23 Ch. D. 583.
(8) (1888) 38 Ch. D., at p. 505.
(9) (1810) 12 East 305.
(10) (1902) 1 Ch. 941.
(11) (1909) 1 Ch. 815.

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to be exercised for the benefit of the remaindermen (*In re Hunloke's Settled Estates*; *Fitzroy* v. *Hunloke* (1)). A power to grant leases for a term not exceeding a named period authorizes a covenant to renew (*Dowell* v. *Dew* (2)). It also authorizes the donee of the power to accept a surrender of a lease granted (*In re Penrhyn's Settlement*; *Lord Penrhyn* v. *Pennant* (3)). The renewal covenant may be on the same terms as those of the lease surrendered, so long only as those terms are authorized at the time the renewal is granted (*Gas Light and Coke Co.* v. *Towse* (4)). The terms of the current lease to Boyd were, when that lease was granted, authorized by the power.

R. E. Hayes K.C., in reply. The power to the extent that a lease granted under it may extend beyond the death of Mrs. Sabelberg is fiduciary.

Cur. adv. vult.

NOV. 18.

The following written judgments were delivered :—

KNOX C.J., GAVAN DUFFY AND RICH JJ. The question for solution depends entirely upon the construction of a power contained in a deed of family agreement. That deed conferred a life estate on Mrs. Sabelberg, and the power was given to her for her own benefit as a right additional to the life estate so conferred. The limitation of the term of years was, no doubt, imposed in the interests of the remaindermen, but it does not follow that it created any rights in the remaindermen as to the manner in which the power should be exercised. It merely forms the delimitation of the power and is part of the description of what falls within it. It is not intended to impose any duty on the life tenant towards the remaindermen controlling her in creating any of the interests which actually come within the power. In the first place, it is competent for the donee of the power to create a lease for seven years and it is not disputed that that may be a legal or equitable term. In the next place, the lease may be surrendered when created. In the next place, the lease may be surrendered and a new lease granted at the same time.

(1) (1902) 1 Ch., at p. 944.
(2) (1842) 1 Y. & C. C. C. 345.
(3) (1922) 1 Ch. 500, at pp. 501, 502.
(4) (1887) 35 Ch. D., at pp. 532-535.

The statement in *Lefroy* v. *Walsh* (1) is, we think, well founded. In that case it was suggested that a tenant for life with power to lease for three lives or thirty-one years at the best rent may, *toties quoties*, accept surrenders of existing leases granted in execution of his power and create new demises, provided that at the time of their execution they are in conformity with the terms of such power. And a covenant by a lessor with a lessee for renewal does not affect the validity of the lease (*Doe d. Bromley* v. *Bettison* (2)).

The contention that an unregistered lease made by the life tenant, in obedience to a covenant in a prior instrument of the like character that she would accept a surrender and grant a new lease yearly, does not bind the remaindermen because the power is expressed to extend to making leases and not to making contracts, seems to involve a confusion of matters quite distinct from one another. No one would suggest that the life tenant's contracts as such could bind the remaindermen. Even if the power was expressed to enable the donee to contract so as to bind the remaindermen, they could not be rendered liable in contract by any exercise of that power. For it would not come within any known exception to the general rule that a contract binds only the promisor, his executors and administrators.

The covenant bound no one but the covenantor, and it bound her whether she could lawfully perform it or not. If she had power to do the thing she covenanted to do, she could not diminish that power by covenanting in advance to do it. Doubtless, if the power was fiduciary in its character, i.e., entrusted to the donee so that she might exercise a discretion in the interest of others as well as herself, the covenant would be a circumstance from which might be inferred the bye or sinister purpose which suffices to vitiate the exercise of such a power. But this is not a fiduciary power. The fact, therefore, that the power is not expressed to enable the donee to contract, and the further fact that the instrument attacked was given by the donee by reason of the binding character of the covenant, are equally irrelevant to the real point of this argument, which is that, inasmuch as the *Transfer of Land Act* does not allow the creation of a legal term of years of more than three years' duration

(1) (1851) 1 Ir. C.L.R. (N.S.) 311, at p. 313. (2) (1810) 12 East 305.

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without registration, the instrument can operate only as a contract and not as a lease binding the remaindermen. The simple answer is that it operates, not merely to create contractual rights and duties, but to create an equitable term of years and a tenure by estoppel between the lessor and her privies and the lessee. The creation of an equitable term of years is as much within the power as a legal term. Moreover, it may be said, the remaindermen are privies to the estoppel.

For these reasons we consider that the judgment of *Mann* J. is right and that this appeal should be dismissed.

ISAACS J. In this action the plaintiffs claimed (1) a declaration of right to possession of land with an hotel thereon, and (2) possession. The defendant in possession resisted both. *Mann* J. decided in favour of the defendant, and this is an appeal from that decision.

Some discussion took place as to the interpretation of the pleadings, but, in my view, the substance of the matter is open to consideration and calls for determination.

The appellants' rights depend primarily on the fact that the Company is the registered proprietor of the land under the *Transfer of Land Act*. Its certificate is a clean certificate, no encumbrances being registered. The Act, however, by sec. 72 makes the certificate subject to the rights of any tenant, and the respondent Boyd claims to stand in that position and that his rights as tenant are to hold possession for seven years from 1st June 1925. His claim is founded on an instrument of lease of the date mentioned, executed as lessor by Mary Sabelberg, who was then the registered proprietor of the land for an estate for her life. She died before the commencement of this action, and the date of the appellant Company's certificate is subsequent to her death. The lease is not registered, and consequently by sec. 61 of the Act the respondent Boyd has no legal interest in the land. If the rights of the parties were limited to legal title, the appellants would necessarily succeed. But under the *Judicature Act* a defendant may defend his possession of land on equitable grounds (*Attorney-General for Trinidad and Tobago* v. *Bourne* (1)).

(1) (1895) A.C. 83.

The equitable grounds relied on by the respondent Boyd are these :—In 1912 Mary Sabelberg and members of her family were in dispute respecting their respective rights with regard to the estate of the deceased husband of Mary Sabelberg, and a deed of family arrangement was executed to which Mary Sabelberg, the members of her family and the appellant Company were parties. Among other provisions of the deed there was one contained in clause 3, by which it was agreed that Mary Sabelberg, who was then the registered proprietor in fee simple of the land now in controversy, should transfer it to the Company in fee as trustee for the members of her family, and that thereupon a life estate should be transferred to her, and then followed these words, which form the basis of the defendant Boyd's claim to retain possession : " The said Mary Ann Josephine Sabelberg shall on the execution to her of such transfer as aforesaid have sole control and management of the said land hotel property and premises independently of the said Company during her life including the power to lease the said land hotel property and premises to fix the rents and the amount of the bonuses to be paid therefor or in relation thereto and to apply to her own use any bonus so fixed and paid as aforesaid Provided however that the said Mary Ann Josephine Sabelberg shall not have power to grant any lease for a term exceeding seven years." Clause 5 provided as follows : " The said Mary Ann Josephine Sabelberg will not by any personal act of her own or her agent or agents whether of omission or commission allow the said property to become wasted or the licence thereto imperilled or liable to be forfeited suspended or otherwise lost."

Mary Sabelberg during her life from time to time leased the land, and ultimately on 1st June 1925 executed an instrument of lease for seven years from that date to the defendant Boyd, which he says constitutes him a tenant with equitable right of possession under sec. 72 of the Act, notwithstanding the appellants' certificate of title. That right is challenged by the appellants on several grounds, which may be briefly stated. They are :—(1) The lease is now, by reason of the death of Mary Sabelberg, unregistrable because, for want of registration or application by Mary Sabelberg for registration, the power was not exercised. (2) It was not a valid exercise of

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the power for two separate reasons: first, because it was made in performance of an agreement of 19th May 1914 by which Mary Sabelberg bound herself in advance to constantly keep on foot a lease for seven years at a stated rent and on stated terms; next, because it exempted the lessee from liability to restore the hotel in case of destruction by fire.

As to the first objection, the power was, in my opinion, fully exercised by the execution of the instrument by Mary Sabelberg and the lessee. Registration is not the act of a party: it is the act of the State. Application to register may be made by any party interested, and the death of either or both of the parties to a transfer is no necessary obstacle to registration (*Tierney* v. *Halfpenny* (1)). As between the transferor and the transferee it may in ordinary circumstances be the duty of the former to procure registration (see *Taylor* v. *Land Mortgage Bank of Victoria Ltd.* (2)), but the latter may dispense with the obligation and produce the transfer for registration. And in any case the power in the present case to proceed, so far as to execute an instrument which on registration by the lessor at any time binds the lessee, carries an implication that, on failure of the lessor for any reason to register, the lessee may proceed to have the instrument duly registered. The principle of *Barry* v. *Heider* (3) applies, and the first objection fails.

As to the second objection, the position is not so simple. The appellants' main contention was that, since Mary Sabelberg had, and was known to have, only a life estate, the grant of an absolute term of seven years, so far as it could be taken to extend beyond her life, must be taken to have been impressed with a fiduciary character. And, having a fiduciary character, it is urged that the limitation of seven years indicates that the rent and other terms must form the subject of free and unfettered consideration of the donee of the power at the time the lease is granted. This essential, it is said, was absent, because the agreement of 19th May 1914 coerced the donee of the power into a formal and automatic grant of the lease now existing.

The answer is that everything depends upon the nature and terms of the power. Now, the power is that referred to and quoted. As

(1) (1883) 9 V.L.R. (Eq.) 152. (2) (1886) 12 V.L.R. 748; 8 A.L.T. 39.
(3) (1914) 19 C.L.R. 197.

is seen, it was created by or reserved against persons who were not then, and are not even now, the registered proprietors of the land. The utmost that can be said for the respondent Boyd is that the beneficiaries interested, on whose behalf the registered proprietor is suing and who are themselves plaintiffs, gave, or agreed to give, an authority to Mary Sabelberg to grant the lease, and she executed the lease in accordance with that authority. There are, however, no intervening rights or interests of third persons, and the matter therefore rests on the personal equities of the immediate parties.

It is said on behalf of the appellants that the power was really a reserved power, reserved, that is, by Mary Sabelberg, to deal with the property according to the terms of the reservation. Assume it is so, though my opinion is to the contrary. Assume that as between themselves, and as part of the arrangement, the agreed distribution of legal interests was subject to the agreed continuance of the right of Mary Sabelberg to treat the property as hers during her life, subject only to the provision that no lease was to be granted for more than seven years, and subject to any other express or necessarily implied restriction on her part. But whether the stipulation be regarded as a reservation or as a mandate, the extent of the authority agreed to is the same. The words are of the most general character. In *Muskerry* v. *Chinnery* (1) *Sugden* L.C. said of a power to lease :—"I must say that I think Courts of law and equity have very often been misspending their time in seeking to introduce qualifications where parties have used general expressions, and not taken the trouble to explain the intention to use them in a restricted sense. If I am to restrain this power at all, will anybody point out how far I am to restrain it ?" And the Lord Chancellor refused to restrain it. It was the decree then made that, after some vicissitudes, was ultimately affirmed by the House of Lords in *Sheehy* v. *Lord Muskerry* (2). In that case Lord *Cottenham* confirmed Sir *Edward Sugden's* method of construction, in these words (3): "Courts of law and equity can only discover the intention from the terms used, and are not at liberty to speculate upon the possible existence of any intention, not consistent with the plain and obvious meaning of such terms."

(1) (1835) L. & G. 185, at p. 225. (2) (1848) 1 H.L.C. 576.
(3) (1848) 1 H.L.C., at p. 593.

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Now, reading the very wide terms of the authority before us and applying them to the circumstances and to the purposes of the family arrangement as narrated in the deed itself, I am unable to see that the terms of the power are impressed with any fiduciary character in relation to any lease to be made by the tenant for life. The arrangement, in substance, was that the mother, Mary Sabelberg, should enjoy her property during her life as before, and that after her death it should pass to the family, who then were to take it in absolute dominion except so far as it was burdened by a lease not exceeding a term of seven years. For such a lease they agreed to trust her entirely. What she agreed to do during her life was immaterial to them after her death so long as she had given no lease for more than seven years and, I would add, so long as any lease granted or any other act of hers did not contravene clause 5.

So far as recognized general principle is required to assist in this case, I think it is found in the following words of *Kay* J. in *Gas Light and Coke Co.* v. *Towse* (1): "In a lease under a power a covenant to renew that lease at the expiration of the term is a good covenant, even though the first lease was for the full term authorized by the power; but . . . when the time for carrying that covenant into effect arrives by the expiration of the first lease, then it must be shown that the rent and covenants stipulated for are such as are the best rent and the proper covenants at that time." That, as is seen, applies to a case where there is a fiduciary or other requirement to get the best and usual or other proper covenants in order to bind the inheritance. *A fortiori* does it apply to this case where the most absolute discretion as to rents is given, where bonus is allowed to be retained and where no limitation is imposed as to covenants.

With respect to surrender I need quote but one passage from Sir *Edward Sugden's* judgment in *Muskerry* v. *Chinnery* (2): "Where the transaction is bona fide, and the terms of the power do not require the number of years to be absolute, I see no reason for holding that a clause of surrender vitiates the lease." Still more clearly is it innocuous, if, as here, the surrender provision is not in the lease, but only in a collateral agreement.

(1) (1887) 35 Ch. D., at pp. 534, 535.

(2) (1835) L. & G., at p. 229.

Clause 5 has been relied on to support the view that the exemption from restoration in case of fire is a breach of that clause. I do not reject that argument on the ground that granting a lease permitting waste is not a personal act allowing waste. But I reject it because I do not read the lease as liberating the lessee from responsibility in consequence of fire which is cause by negligence which was his actually or imputably.

I am of opinion the appeal should be dismissed.

HIGGINS J. The action is an action for the possession of land. The National Trustee Co., one of the plaintiffs, is the registered proprietor of the land for an estate in fee simple in possession ever since the life tenant died, 11th June 1925 ; and, prima facie therefore, the Company is entitled to recover possession. But the defendant Boyd is in actual possession, and claims the right to stay there by virtue of what the plaintiffs call, in their statement of claim, an " alleged lease," dated 1st June 1925. It turns out that the alleged lease was not registered under the *Transfer of Land Act*, and therefore does not operate as a lease (sec. 61).

Yet, in my opinion the effect of this alleged lease is not to be ignored, unless we are compelled to ignore it by the nature of the pleadings. Such a document may be treated as an agreement for a lease for seven years ; and if the agreement is one of which specific performance would be enforced by a Court of equity, if there is a good equitable title to a lease, it would appear from the decision of the Full Supreme Court of Victoria in *Sandhurst Mutual Permanent Investment Building Society* v. *Gissing* (1) that the estate of the Company as registered proprietor is subject to the right of Boyd to get a lease, by virtue of the words of sec. 72 of the Act, as to " the interest of any tenant of the land." As a matter of pleading, all the facts relied on as constituting such an equitable title ought to have been stated in the defence, under the Victorian Rules (Order XXI., r. 21) ; and sec. 72 is not even mentioned in the defence. But inasmuch as all the facts on which the defendant could rely for such a defence were stated in the statement of claim, and as it is not suggested that other material facts could be added

(1) (1889) 15 V.L.R. 329 ; 11 A.L.T. 62.

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on either side, I shall assume, in favour of the defendant, that the defence under sec. 72, though not mentioned, is open to the defendant. We must remember, however, that the burden of establishing such a defence lies on him.

I take it as being clear also that although the agreement was not an agreement to which the Company or the beneficiaries were parties, the agreement would be binding on them as to the interest in the land, provided the agreement is within the power given to the tenant for life (and made in execution of that power), and fair to the remaindermen (*Shannon* v. *Bradstreet* (1); *Ingle* v. *Vaughan Jenkins* (2)). This is an exception to the ordinary rule that none but parties to a contract can be sued for specific performance of the contract.

Now, the limits of the power given to the tenant for life appear in clause (b) of a deed of family arrangement (15th January 1912), to which the Company and the beneficiaries were parties :—" (b) The said Mary Ann Josephine Sabelberg shall on the execution to her of such transfer as aforesaid have sole control and management of the said . . . hotel . . . during her life *including the power to lease the said . . . hotel . . .* to fix the rents and the amount of bonuses to be paid therefor or in relation thereto and to apply to her own use any bonus so fixed and paid as aforesaid Provided however that the said Mary Ann Josephine Sabelberg shall not have power to grant any lease for a term exceeding seven years."

Now, it is clear that but for this power any lease, legal or equitable, from the tenant for life, would cease on her death (*Bacon's Abridgement*, " Leases and Terms for Years," (I) 2). And any lease under the power had to be a lease *in possession*—not in reversion after the expiration of an existing or a future lease (*Countess of Sussex* v. *Wroth* (3); *Shecomb* v. *Hawkins* (4)). Nor did the power allow of concurrent leases—such as a lease for seven years from 1914, and a further lease for seven years from 1915, adding a further year to the term after 1921. The intention evidently was to allow the tenant for life to give a lease for (say) seven years from 1914, and then at the expiration of that lease to give a further lease for a period up to seven years. But the

(1) (1803) 1 Sch. & Lef. 52.
(2) (1900) 2 Ch. 368.
(3) (1582) Cro. Eliz. 5.
(4) (1613) Cro. Jac. 318.

tenant for life was allowed to fix, at her own will and discretion, both rent and bonus for any lease that she chose to give within the power; and the Company, as holding the hotel in remainder, was to be bound by the lease for any portion of the term that remained after her death. The Company (and the beneficiaries) agreed, in short, to take the risk of any bargain that the tenant for life should make, under the power, in her own interest; but it took no risk beyond the true scope of the power.

It appears, however, that, two years after the deed of family arrangement, the tenant for life determined to exercise the power of leasing instead of carrying on the business. So she executed a form of lease—unregistered—as for seven years from 1st June 1914, in favour of one Mary Biggins. But on the same date as the form of lease, she executed an agreement with Mary Biggins (Ex. H.) "that on the first day of June one thousand nine hundred and fifteen and thereafter on every first day of June in each and every year during the term of the natural life of the lessor so long as the . . . hotel shall be licensed . . . the lessee shall make and give and the lessor shall take and accept a surrender of the lease for the time being existing in respect of the said . . . hotel and immediately upon every such surrender the lessor shall . . . lease to the lessee the said . . . hotel for a term of seven years from the date of such surrender *it being the intention of the lessor and lessee to keep and maintain the lease of the said . . . hotel at a constant term of seven years during the lifetime of the said lessor* as long as the said hotel shall be licensed as aforesaid." Clause 2 provided that on every surrender and every grant of a new lease for seven years the lessee would pay a sum of £125 as consideration; clause 3 provided that the rent, covenants, &c., of each new lease were to be the same as in the lease of 1st June 1914; clause 4 provided that the agreement should be binding upon the transferees and assigns of the lessor and executors, administrators and transferees of the lessee.

It will be noticed that the agreement (Ex. H.) is *not expressed to be binding upon the Company*, as entitled in remainder after the life estate. But it is admitted by the defendant in his answer to the fourth interrogatory that the alleged "lease" of 1st June 1925 was granted pursuant to this agreement (Ex. H). The rent fixed

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by each annual lease was £260 per annum, and the bonus £125; although, as admitted in the defence and in clause 2 of Ex. P (written admissions) the fair rental value of the hotel, without fine or bonus, for the seven years' period from 1st June 1925 would be £1,200 per annum. It appears also that, for some reason not stated, the tenant for life objected to carry out Ex. H; and that in 1923 the defendant Boyd obtained a judgment in the Supreme Court against her for specific performance of Ex. H.

In my opinion any agreement to give a lease if it is to be implied from the "alleged lease" (unregistered) of 1st June 1925 is not such as can in fairness be enforced specifically against the Company and the beneficiaries, even if it is within the words of the power; and therefore the defendant Boyd has no equitable title as against the Company's title as registered proprietor—has no "interest" as "tenant" of the land within sec. 72 of the Act. Moreover, the agreement is not even within the words of the power; for it is merely part of an arrangement and the result of an arrangement whereby the tenant for life bound herself to grant a new seven years' lease every year. It has the same effect as an agreement to grant concurrent leases; and there is no power to grant concurrent leases.

As a general rule, of course, remaindermen are not bound by contracts to lease made by donees of a power to lease in possession, but only by actual leases (see *Shannon* v. *Bradstreet* (1) and *In re Wills' Settlement* (2)). But this does not mean that the donee of such a power must wait until an existing lease has actually expired and the property has become actually vacant, before he makes his new arrangements for a new lease. As *Jessel* M.R. said in *Moore* v. *Clench* (3), "the meaning is, that he" (the donee of the power) "shall exercise his discretion in the choice of a tenant when the property falls into possession, and not many years before." But, as Lord *Redesdale* said in *Shannon* v. *Bradstreet* (4): "A contract of some kind he" (the tenant for life) "must make before he can make an occupation lease; he must agree with the tenant upon the terms; the tenant must prepare himself to take possession, for no lease can be made but in possession; so that the whole contract

(1) (1803) 1 Sch. & Lef., at p. 67.
(2) (1880) 6 V.L.R. (Eq.) 99; 1 A.L.T. 195.
(3) (1875) 1 Ch. D. 447, at p. 453.
(4) (1803) 1 Sch. & Lef., at p. 60.

must be complete on both sides before a lease can be made; it is evident therefore that some contract must *precede*." But the same Lord Chancellor held in *Harnett* v. *Yeilding* (1) that a tenant for life having power to lease for twenty-one years could not bind himself in his first lease to renew the said lease by giving to the lessee a lease for a (further) twenty-one years when applied to. The essential point is that the power must be exercised when the problem of leasing becomes a present problem; and when the time comes for the exercise of the power, not before, the donee of the power may make a valid agreement to clinch the arrangements for an imminent new lease. This is the explanation of such cases as *Dowell* v. *Dew* (2), where, under a power to grant leases for twenty-one years, arrangements having to be made for suitable crops, &c., in an agricultural lease, the Vice-Chancellor, *Knight-Bruce*, held that even the lapse of eighteen months between the agreement and the expiration of an existing lease was "nothing beyond that which is ordinary and reasonable." This case was affirmed on appeal on the same grounds (3). So, in the case of a mortgagee with a power of sale, a mortgagee made on 18th November 1841 a contract to sell although the time for selling did not arrive till 24th November 1841; but the contract was conditional on the mortgagor not paying the amount due in the meantime (*Major* v. *Ward* (4); see also *Farrars* v. *Farrars Ltd.* (5), *Davis* v. *Harford* (6)). The principle of the distinction as to contracts for leases when the leases are presently impending is clear enough; but the doubts which arose, as to the time before possession which the Courts would allow, led to provisions in the English Conveyancing Acts which fixed one year before possession as a legitimate time for contracts. These provisions were copied in the Victorian *Settled Estates and Settled Lands Act* 1915, but the contracts have to be made in Victoria with the consent of the Court or of the trustees of the settlement (secs. 90, 55), and the provisions are not applicable in the present case.

The case of the *Gas Light and Coke Co.* v. *Towse* (7) has been misunderstood. There, it was present to the mind of the learned

(1) (1805) 2 Sch. & Lef. 549.
(2) (1842) 1 Y. & C. C. C. 345.
(3) (1843) 7 Jur. 117.
(4) (1847) 5 Ha. 598.
(5) (1888) 40 Ch. D. 395.
(6) (1882) 22 Ch. D. 128.
(7) (1887) 35 Ch. D. 519.

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Judge, right through his remarks (1), that the special Act in question gave express power, not only to lease, but to *contract for a lease*; and, as any lease had to be at the best rent obtainable, specific performance would be enforced of the contract if, at the time for the lease coming into operation, the rent reserved was shown to be the best rent. In the present case, of course, there is no power to contract for a future lease in reversion, or by way of anticipation. As for the case of *Doe d. Bromley* v. *Bettison* (2), it is sufficient for my purpose to say that it was a decision confined to a case stated for the opinion of the Court, and the general validity of a power in a lease to give a new lease every year for twenty-one years in consideration of repairs was not a matter left to the Court; for the case stated that the lease contained covenants, &c., such as were usual in leases according to the usage of the County of Nottingham. The relevant argument was as to the effect of the particular covenant in securing the best rent. As for *Wilson* v. *Sewell* (3), the special Act 12 Car. II. c. 36 expressly allowed concurrent leases (but only within seven years of the expiration of the lease then in being). No one pretends that there is power to grant concurrent leases in the case before us.

The net result is, if the judgment be permitted to stand, that the remaindermen have to submit to a lease which, admittedly, carries a much lower rent than is fair (the bonuses were all received by the tenant for life), and which is to last for (practically) seven years from the death of the tenant for life instead of for the mere balance of a term created in the manner allowed by the power; and the remaindermen are said to be helpless. It is said that the remaindermen are estopped: from what, and how? Not by the deed of family arrangement, which did not give power to create more than one lease at a time and in possession. To my mind, it is not correct to say that the lease under the power may be for an equitable term. The power is to give a full legal lease; and there is no power to give an equitable lease as such; but if the contract of the donee of the power were within the power and were such as equity would enforce against the remaindermen, the lessee would have an equitable

(1) (1887) 35 Ch. D., at p. 531. (2) (1810) 12 East 305.
(3) (1766) 4 Burr. 1975.

lease binding on the remaindermen until completed by the legal lease. No one contends that the tenant for life had any fiduciary relation towards the remaindermen (the recent Acts do not apply); but it is obvious that she was limited by the nature of the power conferred on her by the deed of family arrangement.

It is only fair to say that the position as it now appears was not put before the learned Judge of first instance.

I have not said anything as to the provision for surrenders of leases under a power. My silence is due to a doubt as to the effect of sec. 6 of the *Settled Estates and Settled Lands Act* 1915: "Any leases, *whether granted in pursuance of this Part or otherwise*, may be surrendered either for the purpose of obtaining a renewal of the same or not." Counsel have not discussed the question whether the section enables the lessee to surrender a lease to the donee of a power of leasing. The cases of *In re Hunloke's Settled Estates*; *Fitzroy* v. *Hunloke* (1), and *In re Penrhyn's Settlement*; *Lord Penrhyn* v. *Pennant* (2), on which counsel for the defendants relied, are cases where the lessees had a *right* to determine the lease (for mining) under express provisions in a previous lease or a previous settlement: "the lease was made *under a power* in the will, and was determined by the lessees *in pursuance of a provision in the lease*" (3). I prefer to rest my judgment, however, on the fact that the tenant for life, in effect, and as the result of the transactions as a whole, purported to bind herself in 1914 to grant a lease every year during her life, even in 1925, although her power was merely to grant a lease *in possession*, for seven years at the most, and when some existing lease expired. I rest my judgment also on the grounds that a series of leases, and *a fortiori* a contract for a series of leases, was not within the ambit of the power; that the "alleged lease" from 1st June 1925 was made because the tenant for life had bound herself personally by covenant to make it; and that there is such unfairness to the Company (and the beneficiaries) that they ought not—especially as they were not parties to the contract—to be compelled to perform it specifically. The plaintiff should be left to his action for damages against the executor of the tenant for life who made

(1) (1902) 1 Ch. 941. (2) (1922) 1 Ch. 500.
(3) (1902) 1 Ch., at p. 944.

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the contract (see *Williams on Vendor and Purchaser*, 3rd ed., p. 1060; *Twining* v. *Morrice* (1)).

There is another objection, an objection to treating this "alleged lease" as even an attempt to execute the power—an objection to which I should be inclined to attach much weight, but that it has not been mentioned in the argument; and I am diffident about giving a final opinion inasmuch as there may be some obvious answer that has not occurred to me. I refer to the objection that neither the "alleged lease" nor Ex. H was intended to be an exercise of this special power at all, but an exercise merely of the lessor's right as tenant for life. The special power is not once mentioned in either the "alleged lease" (Ex. M) or in the contract (Ex. H); and yet "in order to exercise a special power there must be a sufficient expression or indication of intention in the will or other instrument alleged to exercise it" (per *Sargent* J. in *In re Ackerley*; *Chapman* v. *Andrew* (2): and see *Sugden on Powers*, 8th ed., p. 289; *Farwell on Powers*, 3rd ed., pp. 201, 215). Ex. H and Ex. M, *both*, mention only the title of Mrs. Sabelberg as tenant for life. If the "alleged lease" is to be confined to her title as tenant for life, the lease must end at her death. It is not even alleged, either in the statement of claim or in defence, that the lease was given in execution of the power to lease contained in the deed of arrangement. The lessor and lessee relied, possibly, on the interest of Mary Ann Josephine Sabelberg as tenant for life, and on that alone.

Perhaps I should add that I see no good ground for the contention that by the "alleged lease" of 1st June 1925 the tenant for life violated her covenant not to allow the hotel to become wasted. I agree with my brother *Isaacs* on this point. But the points on which I rely in this judgment are points which, to say the least, seem to call for a close and detailed consideration.

I am of opinion that the appeal should be allowed, and judgment entered for the plaintiff.

Appeal dismissed with costs.

Solicitor for the appellants, *J. Sabelberg.*

Solicitors for the respondents, *Gillott, Moir & Ahern*; *Warming & Mulcahy.*

B. L.

(1) (1788) 2 Bro. C.C. 326.

(2) (1913) 1 Ch. 510, at p. 515.