[HIGH COURT OF AUSTRALIA.]

SEWELL . . . . . APPELLANT;
PLAINTIFF,

AND

THE AGRICULTURAL BANK OF WESTERN AUSTRALIA . . . . . } RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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PERTH, *Sept.* 4, 5, 12.

Gavan Duffy, Rich, Starke and Dixon JJ.

Land—Grazing leases—Mortgage—Power of sale—Sale to mortgagee's servant—Compensation claimed by mortgagor—Validity of sale—Agricultural Bank Act 1906 (*W.A.*) (*No.* 15 *of* 1906), *secs.* 13 (2), 37 (2)—*Land Act* 1898 (*W.A.*) (*No.* 37 *of* 1898), *secs.* 34, 140—*Transfer of Land Act Amendment Act* 1909 (*W.A.*) (*No.* 54 *of* 1909), *sec.* 6 (2).

Under a power of sale enabling a bank as mortgagee to sell certain land by private sale or public tender, it sold the land by private sale to a servant in its employ for the amount owing to the bank on the mortgage for principal and interest, after unsuccessfully attempting to sell by tender or otherwise. The sale to the servant was made in good faith and not at an undervalue. It was the servant's duty to help generally in the administration of the bank's business in the district where the land was situate, but he had no power to sell land, and all he could do was to submit offers to the head office of the bank, which had a separate sales department. The servant was the person who would have received tenders if any had been made, but he would have transmitted them to the head office with such advice as he thought fit. In fact no tender and no offer had been received, and the servant had taken no active step in relation to the exercise of the bank's power of sale.

Held, that the sale to the servant was not wrongful:

By *Gavan Duffy*, *Rich* and *Dixon* JJ., on the ground that he had not become really involved in the sale of the land in question and did not occupy a situation in which his duty and interest did or might conflict; and

By *Starke* J., on the ground that because his duty to look out for possible purchasers, such as it was, had been fully performed and therefore ceased to operate and so really had come to an end.

Decision of the Supreme Court of Western Australia (*Draper* J.): *Sewell* v. *Agricultural Bank of Western Australia*, (1929) 32 W.A.L.R. 61, affirmed.

APPEAL from the Supreme Court of Western Australia.

The appellant, Charles Edward Sewell, was the registered owner of two grazing leases which he mortgaged to the respondent, the Agricultural Bank of Western Australia, for £200 and interest on 30th August 1913. On 1st July 1924 there was due by the appellant a sum of £20 2s. 7d. for interest under the mortgage. In pursuance of the power of sale conferred by the mortgage and by the *Agricultural Bank Act* 1906 (W.A.), the respondent published in the *Government Gazette* (W.A.) of 19th December 1924 a notice inviting tenders for the purchase of the said grazing leases. No tenders were received for the purchase of the said lands. In June 1926 Walter Wardle, the district inspector of the Bank at Katanning, in the neighbourhood of where the land was situate, wrote to the general manager of the Bank asking if he could take over the land for his son. This proposal was considered and approved by the general manager and the trustees. Wardle agreed to buy the leases for £153 0s. 7d., the amount owing to the Bank for principal and interest, and to assume the liability for the remaining sums with which the land was burdened. He bought it in the name of his wife, Lily Wardle. Subsequently the Bank accepted a mortgage from Mrs. Wardle under the provisions of the *Agricultural Bank Act* 1906 to secure the payment to the Bank of the said sum of £153 0s. 7d. Wardle sold the land to a friend for the sum of £60 subject to all incumbrances, and on 19th January his wife executed a transfer, which was registered on 5th April 1928. Sewell brought an action against the Bank in the Supreme Court, and in his statement of claim alleged that the defendant Bank did not advertise the sale of the plaintiff's lands in a proper and sufficient manner; that the purported sale thereof to the said Lily Wardle was not a bona fide exercise of its powers under the said mortgage; that the said defendant did not obtain, nor take reasonable nor any precautions to obtain, a proper price for the said lands; that the purported sale thereof to the wife of one of its own officers was a fraud on the plaintiff's rights and/or was wrongful and improper;

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and that the plaintiff's said lands were wilfully and recklessly sacrificed; and that the said defendant purported to sell them at a price which was much less than their value. The plaintiff claimed damages.

The action was tried by *Draper* J., who gave judgment for the defendant: *Sewell* v. *Agricultural Bank of Western Australia* (1).

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

Further material facts appear in the judgments hereunder.

H. P. Downing K.C. and *F. Downing*, for the appellant. Although the sale by the Bank purported to be to Mrs. Wardle, it was admitted at the trial that Wardle was the real purchaser. Wardle was the district inspector of the defendant Bank, and the person to whom tenders for purchase had to be sent. By virtue of sec. 12 of the *Agricultural Bank Act* 1906 he was a person in the service of the Government, and was, therefore, debarred from purchasing or leasing Crown lands (sec. 34 of the *Land Act* 1898 (W.A.)). Although the titles to the land came under the operation of the *Transfer of Land Act Amendment Act* 1909 (W.A.) the prohibition was continued by sec. 6 of that Act. Moreover, no advance could be made to Wardle by the Bank owing to the provisions of sec. 13 (2) of the *Agricultural Bank Act*. The sale was expressly prohibited; if not, it was either against public policy or, in the circumstances, an invalid exercise of the Bank's powers (*Wilkinson* v. *Osborne* (2); *Martinson* v. *Clowes* (3); *Horne* v. *Barber* (4); *Grover* v. *Hugell* (5); *Hodson* v. *Deans* (6)). The Bank did not obtain nor take reasonable precautions to obtain a proper price for the lands, as the sale was not advertised sufficiently, the improvements were incorrectly described in the advertisements, and the amounts actually paid in rents (which under the Act were really payments on account of purchase-money) were not stated. An express promise was made that the plaintiff would be given an opportunity of paying the arrears of interest before any tender was accepted. This promise was not kept. The Bank was, therefore, guilty of bad faith. (See

(1) (1929) 32 W.A.L.R. 61.
(2) (1915) 21 C.L.R. 89.
(3) (1882) 21 Ch. D. 857.
(4) (1920) 27 C.L.R. 494.
(5) (1827) 3 Russ. 428; 38 E.R. 636.
(6) (1903) 2 Ch. 647.

Farrar v. *Farrars Ltd.* (1); *Kennedy* v. *De Trafford* (2); *Pendlebury* v. *Colonial Mutual Life Assurance Society Ltd.* (3).) The title of the land passed from Mrs. Wardle to a man named Napthali. No remedy is available, therefore, to set aside the transaction (*Transfer of Land Act* 1893 (W.A.), sec. 135). The plaintiff is, in the circumstances, entitled to recover as damages the value of his interest in the lands (*Barns* v. *Queensland National Bank Ltd.* (4)).

J. L. Walker, for the respondent, was not called on.

Cur. adv. vult.

The following written judgments were delivered:—

Sept. 12.

GAVAN DUFFY, RICH AND DIXON JJ. The appellant was plaintiff in an action in which he sought compensation, called in his pleadings "damages," from the respondent by reason of the manner in which the respondent exercised its power of sale over two grazing leases which the appellant had mortgaged to it. The mortgage was given in 1913 to secure the sum of £200 advanced, or to be advanced, by the respondent, which is the Agricultural Bank of Western Australia established and incorporated under the *Agricultural Bank Act* 1906. By sec. 37 (2) of this statute the Bank is empowered to "sell the whole or any part of the land with respect to which the advance has been made, either by private sale or public tender or auction, and subject to any conditions of sale they may think expedient, and after such notice of the time, place, terms, and conditions of sale as they may think just and expedient."

The grazing leases, the subject of the security, comprised 1,945 acres of land situate near Cranbrook. This land had been taken up in 1913 by the appellant, who is a solicitor. It had been fenced by him, but, save for ring-barking, eradication of poison plant, and a little clearing, he had made no other improvements. In July 1924 there was owing to the Bank £119 for principal and £20 2s. 7d. for interest in arrear. An inspector of the Bank reported in that month that the value of the land was 4s. 9d. per acre, which was

(1) (1888) 40 Ch. D. 395.
(2) (1897) A.C. 180.
(3) (1912) 13 C.L.R. 676.
(4) (1906) 3 C.L.R. 925, at p. 945.

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the amount fixed as the price payable to the Crown, and apparently 2s. 9½d. had been paid in rent. He assigned to improvements a value of £240. The appellant had, however, allowed not only land tax and rates, but also Crown rent, to remain unpaid, and the leases were liable, at least technically, to be forfeited. The last payment he had made to the Bank was a sum of £25 on 1st March 1922. In these circumstances the Bank's inspector at Albany, where the appellant was then practising, interviewed him "in reference to arrears of interest," but the inspector reported: "After a tirade of abuse he informed me that he was making arrangements with his son . . . to pay the amount." Upon receiving this report, the Bank's district inspector at Katanning, one Wardle, advised the Bank to "gazette the place open for tender," as the only way of compelling payment. By notice in the *Government Gazette* and in newspapers in December 1924 the Bank called for tenders for the purchase of the land to be made to the district inspector at Katanning, in whose district the land was situate. The notice did not fully describe the improvements, but it gave a clear and adequate description of the land, and it allowed a reasonable time for the return of tenders. No tenders were forthcoming, but the notice aroused the appellant sufficiently to cause him to enlist the aid of an intermediary, who secured from an officer of the Bank a promise that, before a tender was accepted, the appellant would be given an opportunity of making payment. One inquiry was made for particulars of the land, and in response the Bank informed the inquirer of the amount of the Bank's debt and of the rent owing, and that the terms of sale were "any reasonable proportion of the Bank's arrears of rent, rates and taxes and costs of transfer to be arranged for payment as ingoing—the balance of the Bank debt may remain on the usual long term of mortgage." This, however, produced no offer or tender. After the date for tendering, the Bank, in reply to a protest from the appellant, informed him that the trustees of the Bank were not prepared to withdraw the holding from sale; but, if he were able to make the necessary financial arrangements, they would consider reinstatement. Matters remained in this position for nearly eighteen months, no offers to purchase were received, the appellant made no payments, and the

amount of unpaid rates, land tax and rent increased, so that the total amount of these various incumbrances upon the land stood at a little more than £250 as at 30th June 1926. On 15th June 1926 Wardle, the district inspector at Katanning, wrote to the general manager of the Bank asking if it were possible for him to take over the land, and explaining that he wished to acquire it although it was certainly not a good property because he wished his son, who was about to leave school, to make a beginning with it. This proposal was considered by the general manager and by the trustees, and was approved. In the result Wardle agreed to buy the leases for the sum of £153 0s. 7d., the amount owing to the Bank for principal and interest, and to assume the liability for the remaining sums with which the land was burdened. He succeeded, however, in making some arrangement with the Crown by which the obligation to pay the arrears of rent was made less onerous, and the Bank advanced to him the sum of £153 0s. 7d. upon the security of the land. He had bought it in his wife's name, because sec. 13 (2) of the *Agricultural Bank Act* 1906 provided that no advance could be made in respect of any lands or other security in which an officer had an interest. In taking a mortgage for the purchase-money, the Bank did not go beyond its power of sale (see *Belton* v. *Bass, Ratcliffe & Gretton Ltd.* (1)). Not long after purchasing, Wardle determined to change his plans and to sell the land. He negotiated the sale to a friend for the sum of £60 subject to all incumbrances, and on 19th January 1927 his wife executed a transfer, which was registered on 5th April 1928.

The action was tried by *Draper* J., who entered judgment for the defendant.. The evidence before the learned Judge as to the true value of the land was conflicting, but at least two witnesses deposed to the opinion that the price paid by Wardle was its full value, and there was evidence to show that the land had a very low carrying capacity and had been much neglected. His Honor considered that the land in an unimproved state had very little value, and was not worth more than 4s. 6d. per acre, of which amount a large part was still owing to the Crown, and he thought that the value of the improvements was not more than £240 and was probably

(1) (1922) 2 Ch. 449, at p. 463.

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less. He was of opinion that the trustees were wise in taking the first opportunity that they had of selling, and was satisfied that they were actuated by no improper motives, and that the sale was a bona fide exercise of the defendants' power.

Upon this appeal the first ground taken for impeaching this judgment was that Wardle was disqualified by the provision of the *Land Act* 1898 from purchasing a Crown lease inasmuch as he was in the service of the Government. It was said that the combined effect of sec. 34 and sec. 140 (first proviso) of that Act and sec. 6 (2) of the *Transfer of Land Act Amendment Act* 1909 is to make the sale of a grazing lease to a person in the service of the Government unlawful and that inasmuch as the further sale of the land by Wardle was to a person who took bona fide for value so that his title over-reached that of the appellant, the Bank was responsible in damages. This contention involves a number of dubious steps, but it is unnecessary to examine them. Unfortunately for the argument, no trace of it appears in the pleadings, the Judge's notes and judgment or the notice of appeal, and the learned Judge, who was consulted by this Court as counsel were unable to agree that the point was not taken at the trial, informed us that the contention was not raised before him. The question is not one of illegality which the Court is bound to notice, and in these circumstances it cannot now be entertained.

The second ground upon which the appellant attacked the sale to Wardle was that, as a servant of the Bank, he could not purchase. It was said that he was an officer charged with the duty of acting on behalf of the Bank as mortgagee in the exercise of its power of sale, and therefore a transaction by which he became himself a purchaser involved a conflict of interest and duty which could not be permitted in one whose fiduciary character affected the interests of the mortgagor. The effect of the authorities relied upon is conveniently summarized in the judgment of *Joyce* J. in *Hodson* v. *Deans* (1) as follows :—" It is true that a mortgagee is not a trustee for sale in the ordinary sense. He has rights of his own, but he is under certain obligations to the mortgagor, especially where the security is ample. The mortgagee in this case is not an ordinary

(1) (1903) 2 Ch., at p 652.

individual, but a society, an artificial person acting through the agency of the committee. A mortgagee may, under certain circumstances, sell to his own solicitor; but the solicitor or agent managing the sale cannot as against the mortgagor sell to himself. In *Farrar* v. *Farrars Ltd.* (1) *Lindley* L.J. said:—'It is perfectly well settled that a mortgagee with a power of sale cannot sell to himself either alone or with others, nor to a trustee for himself . . . nor to anyone employed by him to conduct the sale. . . . A sale by a person to himself is no sale at all, and a power of sale does not authorize the donee of the power to take the property subject to it at a price fixed by himself, even although such price be the full value of the property. Such a transaction is not an exercise of the power.' So, too, in *Martinson* v. *Clowes* (2), where the circumstances were analogous to the present case, but not quite the same, *North* J. said: 'It is quite clear that a mortgagee exercising his power of sale cannot purchase the property on his own account, and I think it clear also that the solicitor or agent of such mortgagee acting for him in the matter of the sale cannot do so either.' Then, again, as to agents, in the case of *In re Bloye's Trust* (3) Lord *Cottenham* said: 'If the principal is incapacitated, can the agent do that which the principal could not?' And further on, quoting Lord *Eldon* in *Downes* v. *Grazebrook* (4), he asks, 'whether if a party is incapacitated from purchasing he can employ an agent to do that which he could not do himself; and whether that agent had a power to purchase which his principal had not: it would be the most absurd distinction in the world.'"

The appellant maintains that these principles thus formulated operate, not only to make the sale voidable at the option of the mortgagor, and to render the agent who purchases liable to account for profits, but also to impose upon the mortgagee-vendor a liability to compensate the mortgagor. But the question of fact upon which this whole argument depends, is whether Wardle's duties as an officer of the Bank were actually of such a nature as to raise a conflict, or possible conflict, of duty and interest if he became a

(1) (1888) 40 Ch. D., at p. 409.
(2) (1882) 21 Ch. D. 857; on app., (1885) 52 L.T. 706; (1885) W.N. 41.
(3) (1849) 1 Mac. & G. 488, at pp. 494, 495; 41 E.R. 1354, at p. 1357.
(4) (1817) 3 Mer. 200; 17 R.R. 62; 36 E.R. 77.

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purchaser. Unfortunately the evidence upon this question is by no means definite or clear. The Bank had a sales department which apparently was responsible for selling securities. Wardle was agent for the Crown Lands Department as well as a district inspector of the Bank. It is said that, as a district inspector, he advised from time to time on the state of securities, and it was his duty to help generally in the administration of the Bank's business. It also appears that his office was that to which tenders were to be sent, but it was no part of his duty to deal with them. Doubtless, if an offer had been made to him, it would have been his duty to transmit it with such observations as he considered appropriate. He said in evidence :—" If anyone called I should not negotiate with them in any way. It was a matter for Perth. We did not sell. . . . I did not deal in any way with the sale of Sewell's property from 14th January 1925 to 15th June 1926. Had no instructions from Bank during that period." It is true that the managing trustee, in giving evidence, expressed the opinion that Wardle should "do what he could" to get purchasers ; but this somewhat vague and indefinite statement is qualified by other statements, and although in one part of his judgment the learned Judge said that it was an inspector's duty to be on the look-out for possible purchasers, and to report them to the Perth office, yet on the whole evidence he found that it was " clear that Wardle had no power to sell, and that he cannot be regarded as the agent of the defendant to effect a sale. The most that he could do was to submit any offer made to the trustees of the defendant in Perth." This finding is amply supported by the evidence, and, although it does not necessarily exclude Wardle from all participation in the Bank's power of sale, it destroys much of the foundation upon which the plaintiff's second contention rests. In spite of the reference to the duty of an "inspector" "to be on the look-out for possible purchasers in the district" (*sc.*, of any land the Bank had for sale), there is no finding that Wardle acted for the Bank in the matter of attempting to sell the plaintiff's lands. It does not appear that Wardle actually did anything at all towards the sale of the land. In these circumstances we are certainly not prepared, upon the evidence as it stands, to hold that Wardle was really involved in the sale of the land in

question and occupied such a situation that it was not open to him to become a purchaser.

The third ground upon which the appellant impeached the judgment appealed from was that upon a proper view of the facts the sale amounted to a wilful or reckless sacrifice of the interest of the mortgagor (see *Pendlebury* v. *Colonial Mutual Life Assurance Society* (1)). It was urged that the mortgagee took no sufficient steps to find a purchaser, and was content to obtain the amount of the mortgage, and did not fulfil its promise to notify the appellant of a tender or offer, and did not advertise in a proper manner. The view which should be taken of such a contention must be greatly influenced by the market value ascribed to the property. In spite of the attack made upon the findings of the learned Judge upon the question of value, a consideration of the whole of the evidence shows that they were fully justified. Moreover, it appears that the district in which the land is situated is not considered a good one, that persons were unwilling to undertake the responsibility of holding land in it and that very many other properties were for sale. The appellant's own conduct cannot be left out of account, and his failure to find the interest owing which was continued over so long a period appears highly significant. Again, the fact that Wardle resold the property at an advance of £60 only, strengthens the view that the sale to him was at no great undervalue. In all these circumstances, it is impossible to disturb the learned Judge's finding that the sale was bona fide and not made recklessly and in disregard of the mortgagor's interest. The suggestion that notification or advertisement was necessary although the transaction was by way of private sale is disposed of by the observations of *Turner* L.J. in *Davey* v. *Durrant* (2) (see, too, *Hickey* v. *Heydon* (3), overruled on another point in *Irving* v. *Commercial Banking Co. of Sydney* (4)).

For these reasons the appeal should be dismissed with costs.

STARKE J. A mortgagee with a power of sale cannot sell to himself, nor a trustee to himself. Nor can a person acting for a mortgagee in connection with a sale take advantage of his position

(1) (1912) 13 C.L.R. 676.
(2) (1857) 1 DeG. & J. 535, at p. 560; 44 E.R. 830, at p. 840.
(3) (1895) 16 N.S.W.L.R. (Eq.) 49.
(4) (1897) 19 N.S.W.L.R. (Eq.) 54.

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and become a purchaser (cf. *Farrar* v. *Farrars Ltd.* (1); *Hodson* v. *Deans* (2); *Daniell* v. *Griffiths* (3); *Orme* v. *Wright* (4)). Where a man's duty and his interest in respect of a purchase conflict, he cannot become a purchaser (*Guest* v. *Smythe* (5)). A purchase made in such circumstances can, I apprehend, be set aside at the suit of the mortgagor, who could then exercise his right to redeem as if the sale had not been made.

In the present case the Bank, which was a mortgagee from the plaintiff, sold the land mortgaged, under a power of sale contained in the mortgage, to one of its officers, a district inspector. This officer, as the learned Judge who tried the case found, was not an agent of the Bank to effect a sale: the Bank had a branch which dealt with the sale of lands mortgaged to it. But it was within the scope of the officer's duty to receive offers and communicate them to the Bank, and also to be on the look-out for persons who were possible purchasers, and report to the Bank concerning them. Further, this officer knew the terms on which the Bank would sell, namely, any reasonable portion of the Bank's debt (£139 2s. 7d. on 30th June 1927), arrears of rent, rates and taxes, and costs of transfer. The Bank did its best, for eighteen months, to sell the land, but without success: it was poor land, and situated in a district in which many properties were on the market. In June 1926 the Bank's officer—the district inspector—inquired whether it would be possible for him to take over the land, and the Bank sanctioned a transfer to his wife at a price which, as the learned trial Judge found, was not inadequate or improvident, and was the best price that could be obtained.

The Bank in no way disregarded its duty to the plaintiff in the matter of price, and the district inspector in no way disregarded his duty to the Bank in requiring its sanction to the purchase of the land by him. Still, it is said, the Bank exceeded its power, or disregarded its duty to the plaintiff in selling to its officer, and the officer disregarded the rule of Equity that a person acting for the mortgagee in connection with a sale ought not to take advantage of his position and become a purchaser. The Bank was certainly

(1) (1888) 40 Ch. D. 395.
(2) (1903) 2 Ch. 647.
(3) (1883) 1 N.Z.L.R. (C.A.) 340, at p. 353.
(4) (1838-1839) 3 Jur. 19, 972.
(5) (1870) L.R. 5 Ch. 551, at p. 556.

not precluded from selling to any of its officers who were not acting for it in connection with the sale. But the position of the district inspector raises two questions: one, whether his duty "to look out for possible purchasers" was a duty in connection with the sale of the mortgaged land which disqualified him as a purchaser; the other, whether the duty, such as it was, had not, when he purchased the property, been fully performed and therefore ceased to operate, and so really come to an end. I prefer to leave open the first question, because I feel clear that the district inspector was not, when he purchased the land, an agent of the Bank who had any duty in the matter of the sale. Possible purchasers had been "looked for," and long before the district inspector's purchase the Bank was satisfied, and rightly satisfied, that a sale was hopeless. No offers had been made to the Bank, nor to any of its officers. All efforts to effect a sale had been fruitless, and no further efforts were being made or were justified. In my opinion the Bank was, in these circumstances, within its powers in selling the land to its district inspector, and the inspector was guilty of no breach of duty to the Bank or to the plaintiff in purchasing the land. The relief claimed in the latter's action against the Bank might require consideration if the district inspector had been disqualified as a purchaser.

In the result I agree that this appeal must be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Downing & Downing.*

Solicitors for the respondent, *J. L. Walker*, Crown Solicitor for Western Australia.