Dist Margart Pty Ltd (in liq) Re; Hamilton v Westpac Banking Corp 79 FLR 330
Dist Norgard & Anor v DCT & Anor 85 FLR 220

[HIGH COURT OF AUSTRALIA.]

AUSTRALIAN MUTUAL PROVIDENT SOCIETY APPELLANT;

AND

GEO. MYERS & CO. LTD. (IN LIQUIDATION) RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1931.

BRISBANE, *June* 11, 12, 15, 16.

MELBOURNE, *Oct.* 1.

Gavan Duffy C.J., Starke, Dixon, Evatt and McTiernan JJ.

Real Property (*Q.*)—*Registered mortgage—Distress—Debenture—Receiver under debenture—Subsequent distress by mortgagee under Real Property Acts—Occupier—Mortgagor in possession—Receiver acting as distrainor for mortgagee—Winding-up petition presented same day as distress—Real Property Act* 1861 (*Q.*) (25 *Vict. No.* 14), *sec.* 61.*

Bill of Sale (*Q.*)—*Mortgage—Attornment clause—Distress—Necessity for registration as bill of sale—Application of Bills of Sale Act to mortgages by companies—Bills of Sale Act* (*Q.*) 1891 (55 *Vict. No.* 23) *sec.* 3 (3).*

Held, by *Gavan Duffy* C.J., *Starke*, *Dixon* and *McTiernan* JJ. (*Evatt* J. dissenting), that under sec. 61 of the *Real Property Act* 1861 (Q.) a distress may be levied by a mortgagee upon the goods and chattels of a mortgagor who is in occupation of the mortgaged land.

Held, also, by *Gavan Duffy* C.J., *Starke*, *Dixon* and *McTiernan* JJ., that (1) this statutory power of distress is not affected by sec. 3 (3) of the *Bills of Sale Act* 1891 (Q.), and registration under that Act of a mortgage registered under the *Real Property Act* is not necessary to the validity of that power

* The *Real Property Act* 1861 (Q.), by sec. 61, provides: "Besides his personal remedy against the mortgagor . . . every mortgagee for the better recovery of any principal sum . . . due under any bill of mortgage . . . shall be entitled . . . after application . . . for payment . . . shall have been made to the occupier or tenant to enter upon the mortgaged . . . land and distrain and sell the goods and chattels of such occupier or tenant . . . Provided that no lessee or tenant occupying such land shall be liable to pay to any mortgagee . . . a greater sum than the amount of rent . . . then due from such lessee or tenant to the mortgagor."

The *Bills of Sale Act* 1891 (Q.), by sec. 3 (3), provides that "Every attornment, instrument, or agreement . . . by which a power of distress is given or agreed to be given by any person to any other person by way of security . . . shall be deemed a bill of sale."

H. C. OF A. 1931.

AUSTRALIAN MUTUAL PROVIDENT SOCIETY v. GEO. MYERS & CO. LTD. (IN LIQUIDATION).

of distress although the mortgage instrument attempts to confer a further power of distress by means of an attornment clause which reserves a yearly rent equal to the amount of the interest; (2) the existence of an equitable charge affecting the assets of the mortgagor does not prevent them being "the goods and chattels" of the occupier within sec. 61 of the *Real Property Act* 1861; (3) the entry of a receiver for debenture-holders appointed under a power which provides that he shall be an agent of the company giving the debentures does not involve a change of possession, but in point of law the possession of the assets continues to reside in the company.

What amounts to a seizure under a warrant of distress considered.

Decision of the Supreme Court of Queensland (Full Court): *In re Geo. Myers & Co. Ltd.*, (1931) S.R. (Q.) 83, reversed.

APPEAL from the Supreme Court of Queensland.

George Myers & Co. Ltd., a company registered and carrying on business in Queensland, on 31st August 1927 gave to the Australian Mutual Provident Society a bill of mortgage over the premises in which the Company carried on business, to secure the sum of £20,000 and interest. The mortgage was registered under the *Real Property Act* 1861 (Q.). It contained a clause (clause 12) whereby the mortgagor attorned tenant to the mortgagee at a yearly rent equal to the annual interest. On 5th September 1927 George Myers & Co. Ltd. gave a debenture to the Commercial Bank of Australia Ltd. to secure advances to the extent of £10,000 repayable on demand. This debenture was registered pursuant to sec. 3 of the *Companies Acts Amendment Act* 1909 (Q.). The debenture was a first charge and floating security on the Company's stock-in-trade, goods and assets. It provided that after the moneys secured became payable the Bank had the right to appoint a receiver, who was to be the agent of the Company, to take possession of the property, to carry on the business, and sell the property so charged. On 4th September 1929 the Bank appointed William Leonard Trewern as receiver under the debenture. He entered into possession, carried on business and sold goods on behalf of the Bank until 9th December 1929. Default was made in payment of the principal sum due under the mortgage on 24th October 1929, and, in the intended exercise of the power of distress conferred by sec. 61 of the *Real Property Act*, the mortgagee, on 29th November 1929, issued to Trewern a warrant to distrain therefor on the goods of the Company.

On the same day Trewern affixed a duplicate of the warrant, with an inventory, on the main entrance door of the Company's premises. He continued to act as receiver for the Bank. At 9 a.m. on 10th December 1929 he entered the premises as distrainor for the mortgagee and re-engaged the staff as agent for the mortgagee. He carried on the business and sold goods as distrainor. On 10th December 1929 a petition to wind up the Company was presented to the Supreme Court of Queensland. Trewern, by arrangement with the Public Curator, who was the provisional liquidator, ceased to sell goods after 16th December 1929.

Proceedings were taken in the Supreme Court by the petitioning creditor to restrain the mortgagee from continuing with the distress. At the hearing before *Webb* J. it was agreed that the only issue to be tried was whether the mortgagee was entitled to the proceeds of sale. *Webb* J. held that the mortgagor in possession was an "occupier" within the meaning of sec. 61 of the *Real Property Act* 1861, but that the distress could not proceed because the mortgagee had not discharged the onus of proof, which was on it, that the distress had preceded the presentation of the winding-up petition.

On appeal to the Full Court of the Supreme Court, it was held that the mortgagor in possession was an occupier within the meaning of sec. 61 of the *Real Property Act* 1861, and the onus of proof was on the Company to show that the winding-up petition was presented before the distress commenced, but that the mortgagee was not entitled to distrain because the mortgage had not been registered as a bill of sale under the *Bills of Sale Act* 1891 (Q.): *In re Geo. Myers & Co. Ltd.* (1).

From this decision the mortgagee now appealed to the High Court.

Macgregor and *McGill*, for the appellant. The effect of the *Bills of Sale Act* 1891 is to eliminate clause 12 from the mortgage and leave the statutory power given by sec. 61 of the *Real Property Act* 1861 untouched. The attornment clause gives a power of distress which is independent of the statutory power of distress. It is possible to sever the clauses. The *Bills of Sale Act* strikes at

(1) (1931) S.R. (Q.) 83.

H. C. OF A. 1931.

AUSTRALIAN MUTUAL PROVIDENT SOCIETY v. GEO. MYERS & CO. LTD. (IN LIQUIDATION).

the attornment clause, and not at the whole transaction (*Morton* v. *Woods* (1); *In re Willis*; *Ex parte Kennedy* (2); *In re Isaacson*; *Ex parte Mason* (3)). In order that the *Bills of Sale Act* should apply, there must be an express power of distress or words in the instrument which raise an implied power of distress. This power must be given by agreement. Clause 12 of the mortgage does no more than create the relationship of landlord and tenant, and the power of distress flows from sec. 61 of the *Real Property Act* 1861. If the *Bills of Sale Act* does apply, clause 12 is void only in so far as it relates to seizure, and does not affect the relationship of landlord and tenant. The *Bills of Sale Act* was not intended to deal with real property or to restrict the powers given to mortgagees under the *Real Property Acts* (*In re Roundwood Colliery Co.*; *Lee* v. *Roundwood Colliery Co.* (4)). Those powers are distinct and entirely dependent on the *Real Property Acts*. There must be a registered mortgage before such powers are available. These powers are a statutory right untouched by the *Bills of Sale Act*. If this Act does apply, the Court will excise the attornment clause and uphold the rest of the document as a mortgage (*In re Isaacson*; *Ex parte Mason*). Where the illegal part can be severed, the Court will reject the illegal part and retain the part that is valid (*In re Burdett*; *Ex parte Byrne* (5)). The statutory power is not a licence to take possession of chattels as security for a debt (*Climpson* v. *Coles* (6)). There was a valid seizure on 29th November 1929. The effect was to make a floating charge a fixed security. The fact that the Commercial Bank of Australia Ltd. was allowed to get payment does not affect the validity of the seizure. It is possible to seize subject to the rights of other people (*Interdict Act* 1867, sec. 33; *Miller & Co.* v. *Solomon* (7); *Evans* v. *Rival Granite Quarries Ltd.* (8)). The onus is upon the liquidator to prove the time at which the winding-up commenced. The *Bills of Sale Act* does not apply to mortgages by companies (*In re Standard Manufacturing Co.* (9)). In the *Bills of Sale Act*

(1) (1869) L.R. 4 Q.B. 293.
(2) (1888) 21 Q.B.D. 384.
(3) (1895) 1 Q.B. 333.
(4) (1897) 1 Ch. 373, at p. 390.
(5) (1888) 20 Q.B.D. 310.
(6) (1889) 23 Q.B.D. 465.
(7) (1906) 2 K.B. 91, at pp. 97, 98.
(8) (1910) 2 K.B. 979, at p. 990.
(9) (1891) 1 Ch. 627, at pp. 647, 648.

1891 no reference was made to mortgages by companies. There was other provision for companies in sec. 42 of the *Companies Act* 1863. This section was repealed by the *Companies Acts Amendment Act* 1909, which by secs. 12 and 13 made provision for a register of mortgages by companies. The mischief aimed at by the *Bills of Sale Act* was not present in the case of companies, as at the time of passing the *Bills of Sale Act* 1891 any person could inspect the register of mortgages of a company. Sec. 42 of the *Companies Act* 1863 was similar to the *Companies Act* in force in England in 1891.

Macrossan, for the respondent. A mortgagor in possession is not an occupier for the purposes of sec. 61 of the *Real Property Act*, and his goods are not liable to distress under that Act. The mortgage, in so far as it operates to confer a right of distress, is to that extent a bill of sale and unenforceable unless registered under the *Bills of Sale Act*. The mortgagee did not distrain effectively. The only act of distress by the mortgagee was on 29th November 1929. At that time it was not possible for the mortgagee to distrain, (1) because the debenture-holder had converted his floating charge to a fixed charge by the appointment of a receiver and the receiver had gone into possession, and (2) because the alleged distress purported to be a conditional distress subject to the rights of the debenture-holders, and there was no subsequent distress. In order to be a bill of sale an instrument need not contain an express power of distress. It is sufficient that a document establishes a legal relationship from which the power of distress flows. The power may be incidental to the relationship created by an attornment clause (*In re Willis*; *Ex parte Kennedy* (1); *Green* v. *Marsh* (2)). The *Bills of Sale Act* strikes at agreements creating relationships from which distress flows, whether given by common law or statute (*In re Yates*; *Batcheldor* v. *Yates* (3)). The register under the *Companies Act* 1863 was open only to creditors and members, and did not give the public the protection afforded by the *Bills of Sale Act*. The *Bills of Sale Act* 1891 expressly excluded debentures (*Bergl* v. *Mount Chalmers Copper Mines Ltd.* (4)). A debenture is

(1) (1888) 21 Q.B.D. 384.
(2) (1892) 2 Q.B. 330.
(3) (1888) 38 Ch. D. 112.
(4) (1902) S.R. (Q.) 35.

H. C. OF A. 1931.

AUSTRALIAN MUTUAL PROVIDENT SOCIETY v. GEO. MYERS & CO. LTD. (IN LIQUIDATION).

not a bill of sale. The course of legislation shows that, except in the case of debentures, the mortgages of companies are subject to the *Bills of Sale Acts*. These Acts are wide enough to include companies (*Great Northern Railway Co.* v. *Coal Co-operative Society* (1); *In re Standard Manufacturing Co.* (2)). The *Real Property Acts* are primarily conveyancing Acts to simplify titles to land, and are not intended to interfere with the general position of mortgagors or mortgagees, except so far as the system of titles and the method of creating mortgages are concerned. A mortgagee could make his mortgagor a tenant. If he refused to pay the rent, he could be ejected or the mortgagee could enter and receive the rents and profits (*Coote on Mortgages*, 9th ed., vol. I., p. 693). The attornment clause was only justified in so far as it secured to the mortgagee the rents and profits of the land (*Ex parte Jackson* ; *In re Bowes* (3)). The words " Besides his personal remedy " in sec. 61 of the *Real Property Act* refer to a remedy which is personal and against the mortgagor. It is a remedy against the mortgagor in person, in contrast with a real remedy, i.e., *in rem*. The Act thus preserves to the mortgagee, who now has only a charge over the land, the rights he had previously as a reversioner. A mortgagor in possession is not an occupier within the meaning of sec. 61 of the *Real Property Act* (*Hart* v. *Stratton* (4) ; *In re Ross and McNeil* (5)). It has been held that a similar clause in a transfer creates no tenancy except by estoppel, and is not binding on third parties, so that the goods of a third party on the premises cannot be seized (*Jellicoe* v. *Wellington Loan Co.* (6)). The *Real Property Acts* are conveyancing Acts to give better titles, but do not destroy the fundamental doctrines of the Courts of Equity (*Barry* v. *Heider* (7)). It is a new principle of law that a mortgagee should be able to distrain on the goods of the mortgagor. Statutes which limit or restrict common law rights must be expressed in clear and unambiguous language, and such are those which introduce a new principle of law (*Rolfe and Bank of Australasia* v. *Flower, Salting & Co.* (8)). An " occupier " is a person inferior to the mortgagor or holding under the mortgagor,

(1) (1896) 1 Ch. 187.
(2) (1891) 1 Ch. 627.
(3) (1880) 14 Ch. D. 725.
(4) (1873) 7 S.A.L.R. 84.
(5) (1886) 5 N.Z.L.R. 322.
(6) (1886) 4 N.Z.L.R. 330.
(7) (1914) 19 C.L.R. 197, at p. 213.
(8) (1866) L.R. 1 P.C. 27, at p. 48.

e.g., someone holding at will and not under any tenure. To hold otherwise would mean that the occupier's chattels are liable for distress for the amount owing, whereas a tenant's chattels, if his rent has been paid, are exempt from distress. In interpreting sec. 61 the marginal note on the *Parliamentary Roll* should be referred to (*R.* v. *Inhabitants of Milverton* (1); *In re Venour's Settled Estates*; *Venour* v. *Sellon* (2); *Sutton* v. *Sutton* (3); *In re Woking Urban District Council* (*Basingstoke Canal*) *Act* 1911) (4); *Wilkes* v. *Goodwin* (5)). No distress was levied on the goods of Geo. Myers & Co. Ltd. There was no valid seizure (*In re Marriage, Neave & Co.* (6); *In re Standard Manufacturing Co.* (7); *Evans* v. *Rival Granite Quarries Ltd.* (8)). A seizure connotes some overt act. The mere presence of a bailiff on the premises is not sufficient: there must be some intimation to the debtor (*Central Printing Works Ltd.* v. *Walker and Nicholson* (9)). It is not essential that a bill of sale should contain an express power of seizure: it is sufficient if the effect of the instrument is to give a right to seize (*Purcell* v. *Deputy Federal Commissioner of Taxation* (10)).

McGill, in reply. The contention of the respondent is to cut down the plain ordinary meaning of the word "occupier." The explanation of the word "personal" is to be found in sec. 60 of the *Real Property Act*, which forecasts the remedies given by sec. 61. "Personal" means peculiar to the mortgagor. That remedy is against the mortgagor only. The other remedy is against everybody including the mortgagor. The words "for the better recovery" show that the remedy is against the mortgagor, should he be in occupation. No assistance can be had from the marginal notes, which are also obscure. The *Bills of Sale Act* does not require registration of instruments registered under the *Real Property Acts* (*In re Standard Manufacturing Co.* (7); *Campbell* v. *Harrison* (11); *Weir* on *Bills of Sale*, at p. 318). The power to distrain given by sec. 61 of the *Real Property Act* is a power to distrain on strangers

(1) (1836) 5 Ad. & El. 841; 111 E.R. 1385.
(2) (1876) 2 Ch. D. 522.
(3) (1882) 22 Ch. D. 511.
(4) (1914) 1 Ch. 300.
(5) (1923) 2 K.B. 86.
(6) (1896) 2 Ch. 663.
(7) (1891) 1 Ch. 627.
(8) (1910) 2 K.B. 979.
(9) (1907) 24 T.L.R. 88.
(10) (1920) 28 C.L.R. 77, at p. 84.
(11) (1903) 3 S.R. (N.S.W.) 432.

H. C. OF A. 1931.

AUSTRALIAN MUTUAL PROVIDENT SOCIETY v. GEO. MYERS & CO. LTD. (IN LIQUIDATION).

who are not parties to the mortgage. The power does not flow from the document, but from the statute. It would be strange if this power were not available against the mortgagor. A debenture does not pass property to a receiver. The custody only of the property is in the receiver. The bailiff made a seizure, but permitted the receiver to go on and sell. That does not mean that he gave up possession. The overt acts were that the bailiff paid off the staff, re-engaged the staff on behalf of the mortgagee, and then sold goods.

Cur. adv. vult.

Oct. 1.

The following written judgments were delivered :—

GAVAN DUFFY C.J. I concur in the judgment of *Dixon* J.

STARKE J. In August 1927 Geo. Myers & Co. Ltd. gave a bill of mortgage to the Australian Mutual Provident Society over certain lands under the *Real Property Acts* of Queensland. There was an attornment clause in the mortgage, at a yearly rent varying with the amount of annual interest payable under the mortgage. The *Real Property Act* 1861, sec. 61, gave a power of distress in the following terms :—" Besides his personal remedy against the mortgagor or encumbrancer as the case may be every mortgagee or encumbrancee for the better recovery of any principal sum or of any arrears of interest which may be due under any bill of mortgage or of the arrear of any annuity or rent charge or principal sum or any interest which may be due under any bill of encumbrance shall be entitled after such principal sum interest annuity or rent charge shall have become in arrear for twenty-one days and after application in writing for the payment thereof shall have been made to the occupier or tenant to enter upon the mortgaged or encumbered land and distrain and sell the goods and chattels of such occupier or tenant and to detain thereout the moneys which shall be so in arrear and all costs and expenses occasioned by such distress and sale Provided that no lessee or tenant occupying such land shall be liable to pay to any mortgagee or encumbrancee of such land a greater sum than the amount of rent which at the time of making such distress may be then due from such lessee or tenant to the

mortgagor or encumbrancer or to the person claiming the said land under the mortgagor or encumbrancer." In 1929, the Australian Mutual Provident Society claims, it distrained upon the goods and chattels on the premises mentioned in the mortgage for £20,000, being the principal sum due by Geo. Myers & Co. Ltd. to the Society. It was not a distress for rent payable under or by virtue of the attornment clause, but a distress for the principal sum. Consequently the Society is compelled to justify the distress under the power contained in the *Real Property Act*. Distress is there authorized only upon the goods and chattels of an occupier or tenant; and the first question is whether a mortgagor in possession is an occupier within the meaning of the section. It is a provision, like so many other provisions in Acts based on the Torrens system of conveyancing, upon which the general law throws, in my opinion, a flood of light. A useful statement of the general law may be found in the notes to *Keech* v. *Hall* and *Moss* v. *Gallimore* (1 Sm. L.C., 12th ed., at pp. 600, 601):—"A mortgage deed sometimes contains an express agreement that the mortgagor shall be tenant to the mortgagee at a rent; or a power enabling the mortgagee to distrain, by which no tenancy is created. The object of such provisions is generally to further secure payment of the interest, and, if so provided, of the principal. . . . The former makes the mortgagor tenant to the mortgagee and creates a rent properly so called, with all its incident remedies. . . . The latter mode operates merely by way of personal licence from the mortgagor, and affects his interest only." See also *Morton* v. *Woods* (1); *Kearsley* v. *Philips* (2); *Freeman* v. *Edwards* (3); *Davidson, Precedents in Conveyancing*, 4th ed., vol. I., pp. 96-97. The "object" of sec. 61 "is . . . to further secure payment" of the principal and interest due under the mortgage. It follows and extends the old power to distrain common in mortgages under the general law. I say the section extends the old power because it authorizes a distress upon the goods and chattels of a tenant as well as the goods and chattels of an occupier; but a proviso to the section limits the distress against tenants to the amount of rent due

(1) (1869) L.R. 4 Q.B. 293.
(2) (1883) 11 Q.B.D. 621.
(3) (1848) 2 Ex. 732; 154 E.R. 685.

H. C. OF A. 1931.

AUSTRALIAN MUTUAL PROVIDENT SOCIETY v. GEO. MYERS & CO. LTD. (IN LIQUIDATION).

Starke J.

to the mortgagor or to any person claiming under him. This proviso, and also the opening words of the section "Besides his personal remedy against the mortgagor"—which I take to mean "in addition to" or "as well as" his personal remedy against the mortgagor—make it clear that a mortgagor in possession is an occupier within the meaning of the section. Whether the word "occupier" also includes a person in possession of the mortgaged land who is a transferee (cf. *Australian Deposit and Mortgage Bank* v. *Lord* (1); *In re Burton*; *Ex parte Union Bank of Australia Ltd.* (2); *Fink* v. *Robertson* (3); *Hall* v. *Hubbard* (4)), or who is a stranger to the mortgage transaction but not a tenant of the land, are questions which do not fall for decision and upon which I express no opinion.

It was said, however, that Geo. Myers & Co. Ltd. was not in occupation of the land mortgaged by it to the Australian Mutual Provident Society, and consequently that a distress upon its goods and chattels could not be supported. The facts are as follows:— In September 1927 Geo. Myers & Co. Ltd. had issued a debenture to the Commercial Bank of Australia for the sum of £10,000. The debenture constituted a floating security over the assets of Geo. Myers & Co. Ltd. and empowered the Bank to appoint a receiver of the premises charged whenever principal moneys or interest secured by the debenture fell due, and it was stipulated that the receiver should be the agent of Geo. Myers & Co. Ltd. In September 1929 the Bank appointed one Trewerne receiver of the property charged under the debenture and he, on 4th September, entered on the premises and took charge of the business of the Company and the sale and disposal of the goods. The Bank, it is clear, had not assumed the position of a mortgagee in possession, and the legal and actual possession of the land and goods remained where it was, namely, in Geo. Myers & Co. Ltd. The position of the receiver was rather that of a protector or supervisor of the Company's business and affairs for the benefit of the Bank (*In re Marriage, Neave & Co.* (5)). The argument by no means ended here, for it was forcibly contended that no effective distress upon the goods and chattels of Geo. Myers & Co. Ltd. had ever been made. Seizure,

(1) (1876) 2 V.L.R. (L.) 31.
(2) (1901) 27 V.L.R. 437, at p. 442; 23 A.L.T. 114, at p. 116.
(3) (1907) 4 C.L.R. 864.
(4) (1931) V.L.R. 197.
(5) (1896) 2 Ch. 663.

actual or constructive, is necessary, no doubt, to complete a distress. And it was said that no seizure was ever made. The facts are :— On 29th November 1929 the Australian Mutual Provident Society authorized Trewerne (the receiver already mentioned) to distrain upon the goods and chattels of Geo. Myers & Co. Ltd. upon the premises mentioned in the mortgage to it ; Trewerne on the same day posted a notice on the premises setting forth that he had on that day, by virtue of the warrant or authority already mentioned, distrained, subject to the rights of the Commercial Bank of Australia Ltd. as debenture-holder, certain goods and chattels of Geo. Myers & Co. Ltd. upon the mortgaged premises, for £20,000, being the principal sum due by the Company to the Society. Some interviews had taken place between the officers of the Bank, the Society, and the receiver, on the subject of the distress, but, for some unexplained reason, the details of these interviews, and the arrangement, if any, then made, were never proved. All that is certain is that Trewerne posted the notice and acted upon it, without the slightest objection from anyone, maintaining, however, his position on the premises as receiver under the debenture deed until the 9th December, when he began actively to enforce the Society's distress. The position is a confused one. The intention of Trewerne to distrain, subject to the rights of the Bank, is clear enough. The Bank was not in possession of the premises or the goods—nor, if I am right, was Trewerne, as the receiver under the debenture. Consequently, " the rights of the Bank " does not mean subject to its possession, but rather subject to the rights given to the Bank in respect of the goods under and by virtue of its debenture security. No reason occurs to me why the Society should not so control its distress if it desired so to do. Apart from the difficulties created by the reservation of the Bank's claim, there is, I think, no doubt that the acts of Trewerne on the 29th November constituted a constructive seizure of the goods and an effective distress in point of law (*Cramer* v. *Mott* (1)).

Lastly, it was contended that the bill of mortgage given by Geo. Myers & Co. Ltd. to the Australian Mutual Provident Society

(1) (1870) L.R. 5 Q.B. 357.

H. C. OF A. 1931.

AUSTRALIAN MUTUAL PROVIDENT SOCIETY v. GEO. MYERS & CO. LTD. (IN LIQUIDATION).

Starke J.

constituted a bill of sale under the *Bills of Sale Act* 1891 of Queensland, and for want of registration had no effect as to any chattels comprised in it. The provisions relied upon are those contained in secs. 3 (3) and 4 of the Act. They are as follows:—Sec. 3 (3)—"Every attornment, instrument, or agreement, not being a mining lease, by which a power of distress is given or agreed to be given by any person to any other person by way of security for any present, future, or contingent debt or advance, and by which any rent is reserved or made payable as a mode of providing for the payment of interest on such debt or advance or otherwise for the purpose of such security only, shall be deemed a bill of sale within the meaning of this Act of any chattels which may be seized or taken under such power of distress: Provided that nothing in this enactment shall extend to any mortgage of any estate or interest in any land, tenement, or hereditament, which the mortgagee, being in possession, demises to the mortgagor as his tenant at a fair and reasonable rent." Sec. 4—"Every bill of sale executed after the commencement of this Act shall be registered in the proper registry in the manner prescribed by this Act; and shall truly set forth the consideration for which it was given; and no such bill of sale shall have any effect as to any chattels comprised in it, whether as between the parties to it, or as against any other person, unless the consideration is truly set forth therein, nor until it has been so registered. And for the purposes of any law avoiding assignments as against creditors, the date of the first registration of any such bill of sale shall be deemed to be the date of the execution of the bill of sale." It was contended that the power of distress given by sec. 61 of the *Real Property Act* brought the bill of mortgage within the provisions of the *Bills of Sale Act*. The bill of mortgage, so it was argued, created the relationship of mortgagor and mortgagee, and from that relationship flowed the right of distress given by sec. 61 (*In re Willis* (1)). Consequently, the bill of sale was an instrument or agreement by which a power of distress "is given or agreed to be given" within the terms of sec. 3 (3). But I cannot assent to this argument. It appears to me that the provision of sec. 3 (3) contemplates a power of distress given by the volition of a party and not

(1) (1888) 21 Q.B.D. 384.

a power of distress conferred by the paramount authority of an Act of Parliament. The case of *In re Willis* (1), and other like cases, are not to the contrary, for the power of distress there relied upon depended upon the agreement or volition of the party who granted it, and not, as in the present case, upon a power expressly conferred by statute. Moreover, no rent is reserved or made payable by the statutory power as a mode of providing for interest on any debt or advance, and consequently that power does not fall within the terms of sec. 3 (3) of the *Bills of Sale Act*. But an attornment clause (clause 12) is found in the bill of mortgage which, it is said, brings the instrument within the provisions of the *Bills of Sale Act* (*In re Willis*; *Green* v. *Marsh* (2)) and makes it of no effect as to any chattels comprised in it. In the opinion of *Henchman* and *E. A. Douglas* JJ., "it is impossible to sever clause 12 from the other provisions of the instrument and say that clause 12 may be regarded as a bill of sale and void as to the chattels comprised in it, whilst the rest of the document, including the power of distress, remains enforceable as to the same chattels" (3). But in this I cannot agree with the learned Judges. The mischief which the *Bills of Sales Acts* seek to remedy is secret powers of distress, or licences to take possession of chattels. The statutory power of distress given by sec. 61 of the *Real Property Act* does not, in my opinion, fall within the mischief the *Bills of Sale Acts* seek to remedy, or, what perhaps is more important, within the scope of any of its provisions. (See *Morton* v. *Woods* (4).) The ineffectiveness, then, of provisions in the bill of mortgage, such as the attornment clause, does not and cannot affect the statutory provisions of sec. 61, which are entirely beyond and outside the scope of the *Bills of Sale Acts*.

Perhaps I should add that I agree with the conclusion of *Henchman* and *E. A. Douglas* JJ. that the *Bills of Sale Acts* of Queensland apply to the instruments of companies other than instruments of the class ordinarily known as debentures.

In the result, the appeal should be allowed and a declaration made that the Australian Mutual Provident Society is entitled to the proceeds arising from the sale of the goods the subject of its distress.

(1) (1888) 21 Q.B.D. 384.
(2) (1892) 2 Q.B. 330.
(3) (1931) S.R. (Q.), at p. 119.
(4) (1869) L.R. 4 Q.B. 293.

H. C. OF A. 1931.

AUSTRALIAN MUTUAL PROVIDENT SOCIETY v. GEO. MYERS & CO. LTD. (IN LIQUIDATION).

DIXON J.

DIXON J. Sec. 60 of the *Real Property Act* 1861 of Queensland provides that "Every bill of mortgage . . . shall be construed and have effect only as a security for the sum of money annuity or rent charge intended to be thereby secured and shall not operate or take effect as a transfer of land estate or interest intended to be thereby charged with the payment of any money but it shall be lawful for the mortgagee . . . upon default in payment of the money secured by such bill of mortgage . . . or any part thereof to enter into possession of the mortgaged . . . land by receiving the rents and profits thereof or to distrain upon the occupier or tenant of the said land under the power to distrain hereinafter contained." Sec. 61 is as follows:—"Besides his personal remedy against the mortgagor or encumbrancer as the case may be every mortgagee or encumbrancee for the better recovery of any principal sum or of any arrears of interest which may be due under any bill of mortgage or of the arrear of any annuity or rent charge or principal sum or any interest which may be due under any bill of encumbrance shall be entitled after such principal sum interest annuity or rent charge shall have become in arrear for twenty-one days and after application in writing for the payment thereof shall have been made to the occupier or tenant to enter upon the mortgaged or encumbered land and distrain and sell the goods and chattels of such occupier or tenant and to detain thereout the moneys which shall be so in arrear and all costs and expenses occasioned by such distress and sale Provided that no lessee or tenant occupying such land shall be liable to pay to any mortgagee or encumbrancee of such land a greater sum than the amount of rent which at the time of making such distress may be then due from such lessee or tenant to the mortgagor or encumbrancer or to the person claiming the said land under the mortgagor or encumbrancer." In the intended exercise of the power of distress given by this provision, the appellant Society gave a warrant of distress for the principal sum secured by a mortgage given to it by the respondent Company to distrain the goods and chattels of the Company as occupier of the mortgaged land. By adopting this course, the Society necessarily raised the question whether the power of distress conferred by sec. 61 enables the mortgagee to distrain upon the mortgagor as occupier, or is confined

to tenants and occupiers other than the mortgagor. In the Supreme Court *Webb* J., who was the primary Judge, and *Brennan*, *Henchman* and *Douglas* JJ., who composed the Full Court, interpreted the section as authorizing a distress upon the occupier, whether he was the mortgagor or not; and in this opinion I agree.

The provisions of secs. 60 and 61 are almost literally transcribed from secs. 55 and 56 of the South Australian *Real Property Act of* 1860 (No. 11 of 1860). The Queensland statute became law on 7th August 1861, but on 3rd December 1861, as a result of the report of a Royal Commission, the South Australian Legislature repealed its previous legislation and enacted the *Real Property Act* 1861 (No. 22 of 1861), which provided the material to which other Colonies afterwards looked in constructing their registration systems.

The provisions of secs. 55 and 56 of the South Australian *Real Property Act* 1860 (No. 11 of 1860), which the Queensland Legislature adopted, were no more than an amended restatement of secs. 36 and 37 of the earlier South Australian *Real Property Law Amendment Act* 1858 (No. 16 of 1858). This was the second of the Torrens statutes, and contained, among other provisions, a number of sections describing the estate, rights, powers and remedies of mortgagees and encumbrancees, (a word coined to denote persons entitled to a security by way of bill of encumbrance). Secs. 36 and 37 of the South Australian *Real Property Law Amendment Act* 1858 (No. 16 of 1858) gave the power of distress for the better recovery of arrears of interest and did not extend it to principal, but otherwise they differed but little from the sections of the later statute adopted in Queensland.

To understand the scope and object of these provisions, it is necessary to remember the position occupied under the general law by a mortgagee secured by a first mortgage drawn in the usual form. He was the owner of the legal estate subject to the covenant to reconvey and to the mortgagor's equity of redemption. He was not bound by leases of the mortgaged land granted after the mortgage without his consent, and, as assignee of the reversion upon leases granted before the mortgage, he was entitled to all the remedies of the lessor. If the mortgagor, being in possession, attorned tenant to the mortgagee at a rent, a power of distress for the recovery of the rent was obtained by the mortgagee which, because he held

H. C. OF A. 1931.

AUSTRALIAN MUTUAL PROVIDENT SOCIETY v. GEO. MYERS & CO. LTD. (IN LIQUIDATION).

Dixon J.

the reversion upon the tenancy thereby created, enabled him to distrain upon the chattels found upon the mortgaged land whether they belonged to the mortgagee and those claiming under him or to a stranger. By taking an attornment reserving a rent equivalent to the interest a mortgagee could secure payment of the interest by distress, and it was usual for an indenture of mortgage to resort to this device before 1878, when the Legislature impaired its utility by sec. 6 of the *Bills of Sale Act* of that year, and the Court of Appeal discouraged its use by suggesting that it rendered the mortgagee liable for wilful default as a mortgagee in possession (*In re Stockton Iron Furnace Co.* (1)). The first principle expressed by the provisions now in question is that the mortgagee under the Torrens system shall not have the legal estate in the mortgaged land, and from this it followed that he could not enjoy the remedies which the legal estate enabled him to obtain unless they were specifically conferred upon him. Accordingly the enactment, which originated as sec. 36 of the South Australian Act (No. 16 of 1858) and stands in the Queensland statute as sec. 60, goes on to provide that, nevertheless, the mortgagee upon default may enter or may distrain and may sell or foreclose. When it speaks of distraining upon the occupier or tenant of the mortgaged land under the power to distrain hereinafter contained, those familiar with mortgages under the existing law would naturally expect to find thereinafter a power of distress giving a remedy of the same character as a mortgagee might obtain under a well drawn first mortgage under the general law. As a distress in the exercise of the power arising under such an instrument would be levied upon any chattels on the land, the expression " occupier or tenant " might or might not suggest the limitation found in the next succeeding section, to the goods of the occupier or tenant, but it does not appear to me that it would suggest that the chattels of the mortgagor himself, the person primarily liable for the interest were not distrainable although he was an occupier.

The words with which the next section begins in giving the power of distress, namely, " besides his personal remedy against the mortgagor," would be taken to refer to the rule of law which suspends

(1) (1878) 10 Ch. D. 335.

the personal liability in debt during the time a distress for rent is levied, and would be understood to mean that although the mortgagee distrained he might also enforce his personal remedy against the mortgagor.

I do not think anything appears in the provisions up to this point which affords a reason for excluding the mortgagor from distress. When the section goes on to require that application for payment should be made to the occupier or tenant, any surprise at the mortgagor receiving so much grace is tempered by the reflection that, as the distress must necessarily be upon the land, it is not possible, without putting the mortgagee to the hazard of ascertaining precisely who is the actual occupier of the land, to differentiate between a mortgagor in occupation and other occupiers and to give occupiers and tenants who are not liable on or under the bill of mortgage an opportunity of avoiding distress by payment of interest or otherwise and at the same time to withhold the concession from the occupying mortgagor. The restriction of distress to the goods of the occupier or tenant shows a purpose of excluding the goods of strangers to the land from the liability to distress which they incurred under an attornment to a first mortgagee of the legal estate. But it does not suggest the exclusion of the occupying mortgagor. Indeed, it may be said that the policy disclosed is to render those liable to distress, and those only, who have the actual enjoyment of the mortgaged premises. The expression " occupier " is perfectly general and, apart from implications, naturally includes the person in occupation whether he be the mortgagor or hold by some derivative title or otherwise. An implication excluding the goods of the person liable for the debt would scarcely be made unless necessitated by the context. The proviso appears to me to afford no such context. It takes the form appropriate for a provision which lessens in some respect the operation of the main enactment. In terms it relates to lessees and tenants in occupation and measures by the rent they owe the extent of the liability which the main enactment would otherwise impose upon them. If any distinction was intended between lessee and tenant, it probably is that between a termor under a registered lease and one holding under a tenancy created without registration. But upon ordinary principles of

H. C. OF A. 1931.

AUSTRALIAN MUTUAL PROVIDENT SOCIETY v. GEO. MYERS & CO. LTD. (IN LIQUIDATION).

Dixon J.

construction the proviso must be taken to show that occupiers who are not lessees or tenants are liable to distress, and without limitation to an amount owing by them to the mortgagor. The tendency of this consideration is rather in favour of than against the view that the debtor himself may be distrained if he occupies the mortgaged land. The decision of the Supreme Court of South Australia in *Hart* v. *Stratton* (1) was given upon provisions which had undergone important changes and is distinguishable; and this is also true of the dicta of *Williams* J. in *In re Ross and McNeil* (2).

For these reasons I think sec. 61 of the *Real Property Act* 1861 of Queensland authorized the appellant Society to levy distress upon the occupier being the mortgagor.

Due application had been made to the respondent Company for payment, and if the respondent Company was in fact the occupier the appellant Society had complied with this condition precedent prescribed by the section. But it is said that, both when the appellant Society gave its warrant of distress and when it was executed, the Company was not in fact in occupation because a receiver appointed by a debenture-holder had entered. The question whether the receiver was in control of the Company's premises in the exercise of an independent possession, or was merely in charge of the Company's undertaking on its behalf so that the Company continued in occupation, depends mainly upon the terms of the debenture deed, and perhaps to some extent upon the course actually taken by the liquidator. The considerations which should determine the effect in such a matter of debenture deeds are dealt with in the judgment of *Rigby* L.J. in *Gaskell* v. *Gosling* (3), whose view was adopted in the House of Lords (4), and also in *In re Marriage, Neave & Co.* (5). It is enough to say that, in my opinion, the true effect of the deed in this case was to render the receiver the agent of the Company and to leave its occupation or possession of its property in point of law undisturbed by his entry and by his assumption of control.

But the respondent Company denies that after the receiver was appointed and entered, the chattels upon which the distress

(1) (1873) 7 S.A.L.R. 84.
(2) (1886) 5 N.Z.L.R. 322.
(3) (1896) 1 Q.B. 669.
(4) (1897) A.C. 575.
(5) (1896) 2 Ch. 663.

was levied remained its property. It contends that they were no longer "the goods and chattels of such occupier" within the meaning of sec. 61. The reason assigned for this view is that the floating charge created by the debenture became upon the entry of the receiver fixed or specific, as in truth it did. At the date when the warrant of distress was given by the Society the assets charged far exceeded in value the amount to be recovered under the debenture, and at a later date when it may be thought a seizure was effectively made a very small amount secured by the debenture remained outstanding. The receiver was in process of collecting book debts, and these were of such an amount as to make it certain that the balance of the liability secured by the debenture would speedily be discharged. It remains true, however, that in strictness this small sum was secured by an equitable charge over all the Company's assets. But it did not alter the legal property in the goods, which resided in the Company. Moreover, no question arises whether this charge by which the debenture-holders were secured could be overreached by a distress and sale thereunder, because, not only did they acquiesce in the distress but they in fact received their debt. In my opinion the fact that in strictness the charge extended to the goods seized did not prevent them being the goods and chattels of the respondent Company within the meaning of sec. 61.

The appellant Society selected as its bailiff the person who was acting as receiver, and its warrant was directed to him. No doubt this was done with the consent of the debenture-holders, but the identity of the person in control under the debenture with the person by whom an actual seizure was required of the goods distrained has created much difficulty in determining whether he in fact levied a distress and, if so, whether he did so before the petition was presented upon which a winding-up order was made against the respondent Company. Having regard to the assumptions which the parties appear to have adopted as to the admissibility of evidence and to the findings of the learned primary Judge, I have reached the conclusions: (i.) that at 9 o'clock in the morning of 10th December the bailiff opened the Company's premises for business with the intention of assuming possession of the goods thereon under the warrant of distress; (ii.) that the persons with him had

H. C. OF A. 1931.

AUSTRALIAN MUTUAL PROVIDENT SOCIETY v. GEO. MYERS & CO. LTD. (IN LIQUIDATION).

Dixon J.

been employed by him on behalf of the distraining Society; (iii.) that he proceeded to sell the goods in the name of the distraining Society described as mortgagees; (iv.) that he did all this with the prior knowledge both of the debenture-holders and the mortgagee, who were acting in consultation; and (v.) that a written notice which he had posted up some days before, that a seizure had been made, was still exhibited on the premises. In my opinion these acts amounted to a seizure, which I think was made at 9 a.m. I agree with the Supreme Court in thinking that the burden lies upon the Company of proving that at or before that hour the petition for winding up was presented. All that is proved is that it was presented during that day, and it follows that the distress must take priority.

So far, my conclusions are in accordance with those of *Henchman* and *Douglas* JJ. in the Supreme Court. They were, however, of opinion that the distress was void under the provisions of sec. 3 (3) of the *Bills of Sale Act* 1891 of Queensland. I agree with them in the view that this Act applies to bills of sale given by incorporated companies. But I am unable to agree with them that sec. 3 (3) operates to avoid the distress levied. Sec. 3 (3) is as follows:— "Every attornment, instrument, or agreement, not being a mining lease, by which a power of distress is given or agreed to be given by any person to any other person by way of security for any present, future, or contingent debt or advance, and by which any rent is reserved or made payable as a mode of providing for the payment of interest on such debt or advance or otherwise for the purpose of such security only, shall be deemed a bill of sale within the meaning of this Act of any chattels which may be seized or taken under such power of distress: Provided that nothing in this enactment shall extend to any mortgage of any estate or interest in any land, tenement, or hereditament, which the mortgagee, being in possession, demises to the mortgagor as his tenant at a fair and reasonable rent." "Two things must concur to bring an instrument within this section. There must be a power of distress (express or implied) to secure a debt or advance; and rent must be reserved or made payable only in order to provide for interest or otherwise for the purpose of securing the debt" (*Weir, Bills of Sale* (notes to sec. 6)). But the bill of mortgage given by the respondent Company

contains an attornment clause which reserves a yearly rent equal to and varying with the amount of the annual interest and to be accepted by the mortgagee in satisfaction of the interest. The mortgage was not registered as a bill of sale, and consequently this provision could not operate to give a power of distress. But the Full Court adopted the view that, because of its presence in the mortgage, the power of distress which sec. 61 of the *Real Property Act* 1861 would otherwise have conferred upon the mortgagee was likewise rendered inoperative. If the provision had been absent from the mortgage, the second of the two things would have been lacking which must concur to bring an instrument within the section; there would have been no rent reserved or made payable as a mode of providing for the payment of interest or otherwise for the purpose of such security. But as the attornment clause in the mortgage supplies this requirement, the Full Court considered sec. 3 (3) of the *Bills of Sale Act* applied not only to the right to distrain for interest arising from the attornment, but also to the power of distress for principal and interest given by sec. 61 of the *Real Property Act*. In answer to this view, it is suggested that the power of distress conferred by sec. 61 is not "given or agreed to be given by the attornment, instrument or agreement" within the meaning of those words in sec. 3 (3) because it is given by law and not by the instrument. But in *In re Willis* (1) *Lindley* L.J. said "that the application of this section to attornments cannot depend upon whether the attornment clause is followed by an express power of distress, but that it applies equally if there is no such express power" (see, too, per *Kay* L.J. in *Green* v. *Marsh* (2)). Possibly in the observations of *Lindley* L.J. which follow, a distinction may be discovered between the case of attornments where the power of distress arises from the relation created and "instruments" and "agreements"; but the better view appears to be that, if an instrument or agreement contains provisions from which a power of distress results, it is within sec. 3 (3) although the power is not given in express terms. In my opinion, however, sec. 3 (3) should not be construed as affecting any power given by the *Real Property Act* 1861. That statute contains a statement of the rights and

(1) (1888) 21 Q.B.D., at p. 395.

(2) (1892) 2 Q.B., at p. 335.

H. C. OF A. 1931.

AUSTRALIAN MUTUAL PROVIDENT SOCIETY v. GEO. MYERS & CO. LTD. (IN LIQUIDATION).

Dixon J.

remedies which the Legislature intended to belong to estates, interests and securities obtained by registration under its provisions and the conditions of their acquisition and enjoyment. These special provisions are not to be affected by general legislation unless its terms clearly indicate an intention of including them. Indeed, it may be said that sec. 61 confers the remedy because of registration of an instrument answering the general description of a bill of mortgage, and does not give the power to the mortgagee in virtue of the provisions of the instrument itself. But, apart from this consideration, I think the provisions of sec. 61 are not to be affected by sec. 3 (3) by reason of the fact that the bill of mortgage contains an additional conventional term satisfying its second condition, because sec. 3 (3) should not be construed to relate to distress given by the *Real Property Act*.

For these reasons I think the appeal should be allowed.

The cause should be remitted to the Supreme Court to do what is right in accordance with the order of 8th June 1930 consistently with this judgment.

EVATT J. Sec. 61 of the *Real Property Act*, passed by the Legislature of Queensland in 1861, confers a qualified power upon the mortgagee of land brought under that Act, to enter upon the land and distrain and sell the goods of the "occupier or tenant." Is the mortgagor in personal occupation an "occupier" within the meaning of the section? If not, this appeal should fail.

The statute in question, describing itself as "an Act to simplify the laws relating to the transfer and encumbrance of freehold and other interests in land," introduced the Torrens system into the then Colony. It encouraged dealings in registered land by the creation of a certified register of titles, and by making it necessary to register transactions; but it was not intended to make drastic alterations in the general law of real property. This is well illustrated by the Legislature's treatment of mortgages of Torrens land.

If persons intended to secure a loan upon any estate in registered land, the intending mortgagor was required to execute a "bill of mortgage" (secs. 3, 56 and Schedule). The form scheduled in the Act enabled the parties to enter into any special covenant. Certain

covenants, implied by the statute, could be negatived or modified by express declaration in the instrument (secs. 69, 70, 71, 76).

Secs. 3 and 56 indicated that a bill of mortgage was designed to operate merely as a charge upon the registered estate or interest of the borrower, and this design was made explicit in sec. 60. That section plainly declared that the bill of mortgage was not to give the mortgagee any estate or interest in the mortgaged land.

This involved an alteration of the legal situation which had existed under the old system of conveyancing, and, but for the qualification, which, in sec. 60 itself and in sec. 61, was at once made upon the opening declaration of sec. 60, the mortgagee would have been confined to the power to sell, already given in sec. 57.

In my opinion secs. 60 and 61 should be regarded as an attempt to give the money lender a continuous right of recourse to his security in the event of the borrower's default. That security covered, not the goods or chattels of the mortgagor, but the land and its rents and profits. Accordingly, sec. 60 gave the mortgagee, in case of default, the power to enter into possession of the land by receiving its rents and profits; it foreshadowed the related power given in sec. 61 to distrain upon the "occupier or tenant," and it permitted ejectment at law to obtain possession, or equity proceedings to foreclose the equity of redemption.

Sec. 61 is in the following terms:—

> "Besides his personal remedy against the mortgagor or encumbrancer as the case may be every mortgagee or encumbrancee for the better recovery of any principal sum or of any arrears of interest which may be due under any bill of mortgage or of the arrear of any annuity or rent charge or principal sum or any interest which may be due under any bill of encumbrance shall be entitled after such principal sum interest annuity or rent charge shall have become in arrear for twenty-one days and after application in writing for the payment thereof shall have been made to the occupier or tenant to enter upon the mortgaged or encumbered land and distrain and sell the goods and chattels of such occupier or tenant and to detain thereout the moneys which shall be so in arrear and all costs and expenses occasioned by such distress and sale
>
> Provided that no lessee or tenant occupying such land shall be liable to pay any mortgagee or encumbrancee of such land a greater sum than the amount of rent which at the time of making such distress may be then due from such lessee or tenant to the mortgagor or encumbrancer or to the person claiming the said land under the mortgagor or encumbrancer."

H. C. OF A. 1931.

AUSTRALIAN MUTUAL PROVIDENT SOCIETY v. GEO. MYERS & CO. LTD. (IN LIQUIDATION).

Evatt J.

The power conferred by sec. 60 is described as that of "distress," which is the ordinary legal remedy exercisable by a landlord. In sec. 60 this power was treated as one of the powers given to the mortgagee by way of compensating him for deprivation of the legal estate. This fact at once suggests that the object of sec. 61 was to confer upon the mortgagee a power of distraint corresponding to such rights to distrain for rent as could no longer, in the absence of the legal estate, be acquired by agreement with the borrower. What rights were previously available to the lender? If the land was leased, before the mortgage, the mortgagee, as assignee of the reversion, could by notice and demand, insist upon the payment of rent to himself, and, in case of default, distrain. The mortgagor's tenant became his tenant. And, although a lease granted by a mortgagor after the mortgage did not bind the mortgagee, who could treat the tenant as a trespasser upon his land, a new tenancy might be created as between mortgagee and mortgagor's tenant. If so, the right to distrain would at once arise.

The first declaration in sec. 60 made it no longer possible for the mortgagee to distrain for rent if the registered land was occupied by tenants or sub-tenants of the mortgagor. But the statutory retention of the legal estate in the mortgagor did not—in 1861—prevent the mortgagee, either from creating a tenancy between himself and the mortgagor operating by way of estoppel and covering a power of distress on the goods of the mortgagor, or from covenanting for any rights to seize his goods in case of default. This points to the exclusion of the mortgagor himself from the scope of the compensating statutory power.

I think that this view is borne out by the terms of sec. 61 itself. The whole of the first paragraph consists of one sentence, and the phrase "mortgagor or encumbrancer" is used in contradistinction to the phrase "the occupier or tenant." The mortgagee is regarded as having remedies against the mortgagor on one hand, and the occupier or tenant on the other. The requirement of a written application by the mortgagee to the "occupier or tenant," as a condition precedent additional to that of default by the mortgagor for twenty-one days, suggests that the "occupier or tenant" does not know the state of account between the borrower and lender.

The opening words of sec. 61, "Besides his personal remedy against the mortgagor," strongly support the exclusion of the mortgagor from the class of "occupier or tenant," if the remedy of distress given by the section can be described as "personal." It is a personal remedy. Distress cannot be directed to the goods of a stranger. The proviso to sec. 61 speaks of the "lessee or tenant occupying," in relation to the power to distrain, as being "liable to pay" money to the mortgagee. This is the ordinary language of a direct personal obligation.

If the power of distress in sec. 61 is construed as a general right of the lender to seize the goods of the borrower who is occupying, the bill of mortgage would be extended from a security over the land and its rents and profits to a security over goods and chattels, and to an extent bearing no relation to the rents and profits of the land. This is not a reasonable construction of the section, and it tends to ignore the fact that the Legislature seems to have given the statutory right of distress as a return for depriving the mortgagee of the legal estate, and the right to distrain for rent.

It is true that the proviso to sec. 61 uses the words "lessee or tenant," prima facie suggesting that the power of distress could be exercised against an "occupier" who is not a "lessee or tenant." Even if this construction were accepted, I think that the mortgagor would not be caught by the word "occupier," which would then be directed to the case of a person allowed the user of the land by the mortgagor or the mortgagor's tenant, under circumstances pointing to a collusive attempt to prevent recourse by the mortgagee to his security. In such a case, the absence of any limitation of the occupier's liability under sec. 61 would probably result in the coming into existence of some tenancy.

But the prima facie inference from the proviso must be counterbalanced by the absence of precise phraseology in the rest of the section. The words "or tenant" in the phrase "occupier or tenant" are not necessary if all persons occupying are aimed at, and "distress" is not treated as relating to a tenancy. And the words "or tenant" in the phrase "lessee or tenant" are also open to verbal criticism. It must be remembered that it was intended to give recourse against tenants from the mortgagor's tenant and

H. C. OF A. 1931.

AUSTRALIAN MUTUAL PROVIDENT SOCIETY v. GEO. MYERS & CO. LTD. (IN LIQUIDATION).

Evatt J.

that a sub-tenant is not naturally referred to as a " tenant." Torrens statutes of the other Australian Colonies which were passed at or about the same time as that of Queensland, provide a number of instances where the word " occupier " is used, in relation to a right of distress analogous to that of sec. 61, to indicate an occupying tenant, and no other occupier.

Webb J. has pointed out that the marginal note in the original statute shows that the " occupier " referred to in sec. 61, was an occupying tenant. Some Interpretation Acts exclude a reference to marginal notes in the case of ambiguity in the body of the enactment, but that is not so in connection with Queensland statutes.

There is some conflict of judicial opinion as to the rights of a Court of interpretation in cases of difficulty to pay attention to the marginal notes. It is often said that they are merely the notes of the parliamentary draftsman. No doubt, marginal notes often come from that source in the first instance, but they may assume practical importance in the course of the consideration of a Bill by Parliament. Whilst reference to such notes will seldom be of assistance, it is difficult to understand the embargo against referring to all parts of the document which formally expresses the will of the King in Parliament. It is unnecessary to pursue the matter further at present. I have arrived at my opinion without reliance on the marginal summary.

In my opinion this appeal should be dismissed.

McTIERNAN J. I agree in the opinion of the Supreme Court given in this case that, upon the proper construction of sec. 60 and sec. 61 of the *Real Property Act of* 1861 of Queensland, the mortgagee of lands under the provisions of the Act is entitled to enter upon the subject lands and distrain and sell the goods and chattels of the mortgagor, if he is the occupier of such lands.

The word " occupier," which occurs in sec. 60 and sec. 61, is apt to describe a mortgagor of lands under the provisions of the Act who is in occupation of the subject lands. It was contended, however, on behalf of the respondent, that, upon the proper construction of sec. 61, a mortgagor standing in that relationship to the mortgaged lands is not embraced by the term " occupier " in the sense in which it

is used in the section. It is of interest to note, in passing, that the meaning of the word " occupier " in the context in which it was found in certain statutes was discussed in the following cases :—In *R.* v. *Assessment Committee of St. Pancras* (1) *Lush* J. said :—" It is not easy to give an accurate and exhaustive definition of the word ' occupier.' Occupation includes possession as its primary element, but it also includes something more. Legal possession does not of itself constitute an occupation. The owner of a vacant house is in possession, and may maintain trespass against anyone who invades it, but as long as he leaves it vacant he is not ratable for it as an occupier. If, however, he furnishes it, and keeps it ready for habitation whenever he pleases to go to it, he is an occupier, though he may not reside in it one day in a year." In *M'Clean* v. *Prichard and Tillstone* (2) Lord *Coleridge* C.J. said : " But ' occupation ' is a technical term, and means legal, not mere physical occupation." While in *Le Lievre and Dennes* v. *Gould* (3) *Bowen* L.J., speaking of the liability of an owner or occupier to persons lawfully entering on his premises, said : " It is because he has the conduct and control of premises which may injure persons who he knows are going to use them, and who have a right to do so, that he is bound to take care to protect those persons who will thus be brought into connection with him." The use of the words " or tenant " in sec. 61 after the word " occupier " suggests that the Legislature had in mind some limitation upon the meaning which would ordinarily be attributed to the word " occupier." But in this case I think it is sufficient to say that, in my opinion, there is nothing in the context to limit the meaning of the word so as to exclude from the operation of the section the goods of a mortgagor who is occupying the mortgaged lands.

Mr. *Macrossan* relied upon the introductory words in sec. 61 for his contention that it was not lawful to levy distress upon the goods and chattels of the mortgagor, who was in occupation. Those words are : " Besides his personal remedy against the mortgagor or encumbrancer as the case may be." He contended that they showed that the intention of the Legislature, in creating the

(1) (1877) 2 Q.B.D. 581, at p. 588. (2) (1887) 20 Q.B.D. 285, at p. 287.
(3) (1893) 1 Q.B. 491, at p. 502.

H. C. OF A. 1931.

AUSTRALIAN MUTUAL PROVIDENT SOCIETY v. GEO. MYERS & CO. LTD. (IN LIQUIDATION).

McTiernan J.

remedy contained in the section, was to provide the mortgagee with a remedy against persons other than the mortgagor. In my opinion, the words quoted have not that effect. Sec. 69 of the Act provides that in every bill of mortgage there should be implied against the mortgagor a covenant that he will pay the principal money and interest thereby secured after the rate and at the times mentioned without any deduction whatsoever. The power created by sec. 61 is expressed to be exercisable upon the happening of an event, which gives rise to a right of action upon the covenant relating to the payment of principal and interest. In my opinion, the object of the Legislature, in using the words which have been quoted, before it proceeded to give the mortgagee the power contained in the section was to remove the possibility of any question arising whether that power was cumulative upon his personal remedy against the mortgagor, consisting in a right of action on the covenant. Having mentioned the mortgagor and encumbrancer at the outset of the section, the omission of the Legislature to include the mortgagor and encumbrancer respectively, by express words in the category of persons against whose goods and chattels execution may be had under the section, has no doubt rendered necessary a scrutiny of the section in order to determine whether the mortgagor or encumbrancer respectively is within the scope of the word "occupier." But it would be strange, as Mr. *McGill* said in argument, if a power which is expressed to be given to the mortgagee for the better recovery of any principal sum or any arrears of interest which may be due under any bill of mortgage, was available against the goods of persons who are strangers to the covenant to pay such moneys, but not available against the goods of the person bound by the covenant. I do not think that the language of sec. 61 requires that the goods and chattels of the mortgagor who is the occupier should be immune from the power, which is given to the mortgagee.

The object of the Act was, as is stated in *Hogg's Australian Torrens System*, at p. 30, the "authorization of simple statutory forms of instruments for use in dealings with any registered estate in land, implying rights and liabilities instead of requiring these to be stated

in full in the instruments." A bill of mortgage and a bill of encumbrance under the Act have effect only as a security for the sum of money, annuity or rent charge intended to be thereby secured and do not operate or take effect as a transfer of the land, estate or interest intended to be thereby charged with the payment of any money (sec. 60). The Legislature would have taken a somewhat unexpected course if, in giving the mortgagee the remedy mentioned in sec. 61, it depreciated his security by excluding the goods of the mortgagor from execution under it. This view of the section does not result in placing an entirely novel remedy in the hands of the mortgagee. "Formerly an annuity deed usually contained express power of distress and entry upon the lands charged with the annuity, and a demise of the land to trustees for a term of years upon trusts to secure the annuity" (*Coote, Law of Mortgages*, 8th ed., p. 38). By sec. 44 of the *Conveyancing and Law of Property Act* 1881 (44 & 45 Vict. c. 41), a power of distress was given as a remedy for the recovery of annual sums charged on land. Sec. 6 of the *Conveyancing Act* 1911 (1 & 2 Geo. V. c. 36) provided that the powers and remedies conferred by sec. 44 should be exercisable, whether the charge was created before or after the Act of 1881. (See now sec. 121 of the *Law of Property Act* 1925 (15 Geo. V. c. 20).) In *Searle* v. *Cooke* (1) it was decided that the remedies given by sec. 44 of the *Conveyancing and Law of Property Act* did not prevent the owner of the rent charge from having recourse to other remedies for recovering the moneys due under his rent charge. Another criticism that may be made of the view of sec. 61, for which Mr. *Macrossan* contended, is that while the mortgagee could not distrain upon the goods of the mortgagor, who was in occupation, he would be empowered to distrain upon those goods in the hands of the mortgagor's personal representative, if the mortgagor died and his personal representative became the occupier of the subject lands.

I do not agree in the view of the Supreme Court of Queensland that the power conferred upon the mortgagee by sec. 61 was ineffective because the bill of mortgage was not registered as a bill of sale under the *Bills of Sale Act of* 1891 of Queensland. Sec. 3, sub-sec. 3, of that Act is in these terms:—"Every attornment,

(1) (1890) 43 Ch. D. 519.

H. C. OF A. 1931.

AUSTRALIAN MUTUAL PROVIDENT SOCIETY v. GEO. MYERS & CO. LTD. (IN LIQUIDATION).

McTiernan J.

instrument, or agreement, not being a mining lease, by which a power of distress is given or agreed to be given by any person to any other person by way of security for any present, future, or contingent debt or advance, and by which any rent is reserved or made payable as a mode of providing for the payment of interest on such debt or advance or otherwise for the purpose of such security only, shall be deemed a bill of sale within the meaning of this Act of any chattels which may be seized or taken under such power of distress: Provided that nothing in this enactment shall extend to any mortgage of any estate or interest in any land, tenement, or hereditament, which the mortgagee, being in possession, demises to the mortgagor as his tenant at a fair and reasonable rent." The difference between an express power of distress and a power of distress incident to an attornment is discussed by *Lindley* L.J. in *In re Willis*; *Ex parte Kennedy* (1):—" Sometimes a mortgage deed is made without any attornment clause, but it contains an express power for the mortgagee to enter and distrain. Such a power is not so beneficial to the mortgagee as the power of distress which is by law incident to an attornment clause. Under an express power of distress the mortgagee can only take the mortgagor's goods; under the implied power of distress the mortgagee can, as a landlord, take any goods he finds on the demised premises. The consequence is that express powers of distress are not so common as they used to be; the attornment clause has taken their place to a great extent." In the view, which I have taken as to the interpretation of sec. 61, the power conferred by that section has a wider field of operation than an express power of distress, which is contained in a mortgage deed. In the result the power of a mortgagee under sec. 61 is more like a power of distress which flows from an attornment clause in a mortgage. It was conceded that the application of sec. 61 alone to the bill of mortgage does not require that it should be " deemed to be a bill of sale." But it was contended that the combined effect of sec. 61 and clause 12 of the bill of mortgage is to render the bill of mortgage an instrument by which (1) a power of distress is given by the mortgagor to the mortgagee by way of security for a debt, and (2) by which rent is reserved or made payable as a mode of

(1) (1888) 21 Q.B.D., at p. 395.

providing for the payment of interest on such debt or otherwise for the purpose of such security only. If this be right, the consequence would be that the bill of mortgage must be deemed a bill of sale within the meaning of sec. 3, sub-sec. 3, of any chattels which may be seized or taken by virtue of it under the power contained in sec. 61. The words " power of distress " in sub-sec. 3 no doubt describe in a general way the power conferred upon a mortgagee by sec. 61. But the true nature of sec. 61 is that it is a special legislative provision defining the rights of a mortgagee under the *Real Property Act of* 1861. It contains a declaration of certain conditions which are to be implied in a bill of mortgage, and subject to which the land will be liable as security unless those conditions are negatived or modified by express declaration (see sec. 43 and sec. 76 of the *Real Property Act of* 1861). I do not think that sec. 61 of the *Real Property Act* is affected by the *Bills of Sale Act* (see *Garnett* v. *Bradley* (1)). In my opinion, the rights of the mortgagee under the section have not been destroyed or diminished because the bill of mortgage was not registered as a bill of sale.

The question whether the mortgagee had distrained on the goods of the mortgagor before the petition was presented for the winding-up order, is somewhat complicated because the mortgagee employed, as its bailiff, the person who was acting as receiver for the debenture-holder. In my opinion, the evidence shows that the bailiff acting for the mortgagee had duly distrained the goods of the mortgagor at 9 a.m. on the 10th December. The onus of proving that the petition for winding up was presented before that time, in my opinion, rests on the Company.

The remaining questions, which were argued, were whether the *Bills of Sale Act* applies to a bill of sale given by an incorporated company, whether the mortgagor was the occupier of the mortgaged premises notwithstanding the entry by the receiver for the debenture-holder, and whether in view of the action taken by the receiver under the debenture, the goods upon which the mortgagee's bailiff levied a distress were the goods of the mortgagor. I agree in the conclusions which have been arrived at by my brother *Dixon* on

(1) (1878) 3 App. Cas. 944, at pp. 950 *et seqq.*

H. C. OF A. 1931.

AUSTRALIAN MUTUAL PROVIDENT SOCIETY v. GEO. MYERS & CO. LTD. (IN LIQUIDATION).

these matters, and do not wish to add anything to the reasons he has given.

I am of the opinion that the appeal should be allowed.

(1) *Appeal allowed.* (2) *Orders of the Supreme Court of Queensland set aside.* (3) *Declare, subject to clause 5 hereof, that the Australian Mutual Provident Society is entitled to the proceeds arising from the sale of the goods the subject of its distress set forth in the notice dated 29th November* 1929, *on the premises mentioned in the bill of mortgage from Geo. Myers & Co. Ltd. to the said Society.* (4) *Order that the Public Curator of Queensland do pay the costs of the Australian Mutual Provident Society of the proceedings in the Supreme Court of Queensland and of this appeal out of the assets in his hands of Geo. Myers & Co. Ltd. so far as the same will extend.* (5) *Reserve for the consideration of the Supreme Court of Queensland what (if any) sum should be allowed to the Public Curator for his costs and expenses in or in connection with the sale or realization of goods the subject of the said distress pursuant to the orders herein of 8th January* 1930 *and declare that the Public Curator shall be entitled to deduct the same from the proceeds of sale or realization.* (6) *Remit matter to the Supreme Court of Queensland with liberty to apply to that Court.*

Solicitors for the appellant, *Macnish, Macrossan & Dowling.*
Solicitors for the respondent, *Fitzgerald & Walsh.*

B. J. J.