

A "PIG IN A POKE" ?

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It is sometimes said that the purchaser at a sheriff's sale buys a "pig in a poke," and can never be certain that he is getting a good title. This is certainly true as regards land under the general law. Is it equally true in the case of land under the Transfer of Land Act ?

The position with regard to land under the Act is put by Wiseman¹ in the following words: "A purchaser from the sheriff does not enjoy the advantages which a purchaser from a registered proprietor enjoys under section 179; nor does he when registered enjoy a title of the same absolute nature as those of other registered proprietors . . . for his title is subject to prior unregistered equities affecting the title of his predecessor." Is this a correct statement of the position ?

In considering this question it is desirable, as is so often the case, to first understand the position as it is under the general law. In such a case all that the sheriff sells at his auction and later conveys is the estate or interest of the judgment debtor in the land, "if any." If the judgment debtor is a trustee holding the bare legal estate, that estate is all that the sheriff sells at the auction, and on the legal estate being duly conveyed by the sheriff, the purchaser from him will take the bare legal estate subject to all equities except those coming into existence after the registration of the writ in the Registrar-General's Office². It should be noted that it is not a question of notice or no notice of equities—the purchaser from the sheriff buys nothing more than the estate which the judgment debtor himself possessed, and the conveyance which the sheriff executes preserves this position by conveying to the purchaser only "all the right title and interest (if any) of the said defendant in All That *etc.*" Further, the sheriff does not enter into covenants for title, and expressly conveys "without any warranty of title."

Is this position altered in the case of land under the Transfer of Land Act ? So far as the auction sale itself is concerned, the position is exactly the same—the sheriff sells merely the estate or interest of the judgment debtor "if any," and if the judgment debtor in fact holds the land as trustee, then the purchaser will purchase in effect the bare legal estate only.

But it is contended that the effect of a registered transfer from the sheriff under the Act is quite different from that of the corresponding conveyance under the general law. It cannot be denied that if the judgment debtor were in fact a trustee, then (in the absence of fraud) upon the registration of a transfer to a purchaser from the judgment debtor himself the rights of the beneficiaries will be destroyed, so far as the land is concerned³.

This is a basic principle of the Act. Does it apply equally in the case of a transfer, not from the judgment debtor himself, but from the sheriff ? It is contended that it does so apply. The first part of section

1. *The Transfer of Land Act* (2nd Ed.), p. 299.

2. See the *Property Law Act* 1928, section 209, and *Hunniford v. Horwood*, (1879) 5 V.L.R. (E.) 250.

3. See the *Transfer of Land Act* 1928, section 72 and *Templeton v. Leviathan Proprietary Limited*, (1921) 30 C.L.R. 34.

178 of the Act says quite unequivocally that a transfer from the sheriff "shall have the same effect as if made by the proprietor" and that, on the entry of registration of the transfer being made, "the purchaser shall become the transferee and be deemed the proprietor of such land." Further, the form of transfer under the Act transfers to the purchaser from the sheriff "all the estate and interest" of the judgment debtor in the land, without being in any way qualified by the addition of such words as "if any." Finally, under the Act a Certificate of Title is indefeasible, except as expressly provided, and, stopping at this point, there would seem to be no doubt that a registered transfer from the sheriff must have exactly the same effect in destroying unregistered interests as would a registered transfer from the judgment debtor himself.

Does the proviso to section 178 alter this position in any way? The proviso reads "until such service (*i.e.* of the copy writ on the Registrar) no sale or transfer under any such writ shall be valid as against a purchaser for valuable consideration" Does this mean, for example, that if the judgment debtor sells under a contract of sale—before the service of the copy writ, such sale—remaining as it does a mere unregistered interest, a mere equity—takes priority over the estate taken by a *registered* transferee from the sheriff? Does the proviso to the section upset the whole principle of indefeasibility of title in the case of a purchaser from the sheriff? It is contended that it does not, and that the effect of the proviso is merely that so far as purchasers for valuable consideration from the judgment debtor are concerned, it is a condition precedent to the validity or priority of a sale or transfer by the sheriff that the copy writ shall first have been served on the Registrar. There is nothing in the proviso which alters the basic principles of the Act in the case of the title taken by a registered transferee from the sheriff instead of direct from the judgment debtor.

Before dealing with the cases bearing on the point the writer must emphasise that he is speaking of the position of a purchaser from the sheriff *who gets registered* and who is not guilty of fraud, and not of the case where there is competition between the purchaser from the sheriff who has lodged his transfer but who has not yet got registered, and some other equity. All the decided cases fall into the latter category, and there is no case where it has been directly held that a *registered* transferee from the sheriff holds subject to the equities which affected his predecessors title.

The importance of registration is indicated in the following passage from the decision in *In re Shears and Alder*⁴ "The purchaser from the sheriff buys a charge on the judgment debtor's interest, that charge being subject to any equitable or legal charge existing before the service of the copy writ on the Registrar, and it is only when the transfer from the sheriff is entered in the Register Book that the purchaser becomes the transferee and is to be declared the proprietor."

This passage emphasises the change in the position of the purchaser which is brought about by registration—a change from that of a purchaser of a mere equitable charge to that of a registered transferee who, as

4. (1891) 17 V.L.R. 316.

is here contended, is entitled to regard himself as the proprietor, free from all encumbrances save those set out in section 72.

The effect of the provisions of the Act in bringing about the destruction of equities seems to have been overlooked by Madden C.J. when in *National Bank of Australia v. Morrow*⁵ he said "But although the Transfer of Land Act for the preservation of its scheme, excludes the registration or recognition of trusts in such a scheme, it nowhere indicates any such revolutionary intention as to abolish rights under trusts . . ." So far as the land itself is concerned, the Torrens system was revolutionary in just this regard, for it abrogated the doctrine of notice, and instead of avoidance of equities being the responsibility of purchasers, their preservation through the system of caveats became the responsibility of the persons entitled to them.

In *Morrow's Case* the Court also said of the position of a purchaser from the sheriff "There may be cases in which his title may be impugned and he may be ordered to reconvey to an earlier purchaser for valuable consideration of whose charge and encumbrance he has had notice." This observation may refer to a case where there has been fraud on the part of the purchaser from the sheriff, for in such a case the purchaser would be in exactly the same position as any fraudulent purchaser from a registered proprietor. It is submitted that it was fraud on the part of the purchaser from the sheriff which the Court had in mind when in *Equity Trustees Executors and Agency Co. Ltd. v. Rowe*⁶ it was said "Assume for a moment that the plaintiff had in fact been registered as proprietor . . . then on the authority of *Morrow's Case* and many other decisions of this Court, he could have been clearly compelled to reconvey the legal estate to the defendant Company."

The latest case dealing with sales by the sheriff is *Bruce v. Woods*⁷ and again this case deals with competing equities, and not with the position of a registered purchaser from the sheriff. The primary facts were these: King, the registered proprietor, in January 1949, sold land under a contract of sale to Woods. On 10th March a copy writ against the land was lodged at the Titles Office, and later on the same day a caveat was lodged by Woods. On 19th March King was paid off by Woods, and the transfer from King to Woods was lodged for registration on 21st March. On 2nd May the sheriff sold to Bruce, and on 4th May the transfer from the sheriff was lodged for registration. Which of the two competing transfers was entitled to registration? Or, to put it in another way, did Bruce, the purchaser from the sheriff (his transfer not yet being registered) take subject to the prior equity in Woods?

Bruce contended that he did not take subject to the prior equity in Woods for two reasons. Firstly, that the completion of the sale to Woods on the 19th March was nugatory, since the land was then "bound" by the service of the copy writ, and accordingly that Bruce was entitled to the benefit of King's vendor's lien which existed on the date of the service of the copy writ. Secondly, that as a result of certain facts the

5. (1887) 13 V.L.R. 2.

6. (1895) 21 V.L.R. 762.

7. [1950] A.L.R. 740.

contract of sale between King and Woods had in fact been cancelled and replaced by a contract entered into on a date *subsequent* to the service of the copy writ. Herring C.J. found against Bruce on both these grounds, and, holding that Bruce was entitled to acquire the bare legal estate only (in effect, that he took subject to the equity of Woods), ordered that the transfer to Woods be registered.

His Honour in his judgment set out four conclusions which he considered could be drawn from the provisions of section 178 of the Act and the cases decided upon it. The fourth of these is as follows:—

“That the sale under the writ does not affect the rights of any purchaser for valuable consideration whose right has accrued before the service of the copy writ, even though such purchaser has actual or constructive notice of the lodgment of the writ of execution; *National Bank v. Morrow*.”

With this conclusion the writer respectfully agrees, but it must be pointed out that His Honour refers to “the sale under the writ,” and not to the transfer from the sheriff. So long as the purchaser from the sheriff remains a purchaser under a mere contract of sale, he may be threatened by prior equities (unless they have accrued since the date of the service of the copy writ) like any other purchase, but it is contended that once his transfer is registered, then, in the absence of fraud, he acquires an indefeasible title.