opposing side will do so and it therefore becomes merely a question as to which of the two parties may expose him. There is no reason of moral fairness which forbids the party calling him to do this.

R. v. Hunter has elucidated a hitherto confused part of the law of evidence which has not been assisted by a clumsily drafted section in the Evidence Act. If it further stimulates thought along the lines above set out to remove artificialities based on historical circumstances, its value will be handsomely increased.

CLIVE TADGELL

REAL PROPERTY – TRANSFER OF LAND ACT 1954 – EQUITABLE MORTGAGE – BY DEPOSIT OF CERTIFICATE OF TITLE – MORTGAGOR IN DEFAULT – REMEDY OF MORTGAGEE

Ryan v. O'Sullivan[1]

The plaintiff sought a declaration that certain land, the certificate of title for which the defendant, the registered proprietor, had deposited with him as security for moneys lent, was subject to an equitable mortgage in his favour, and that the land was charged with the sum lent by him to the defendant; he also claimed an order that the mortgage be enforced in default of payment by foreclosure. The defendant entered an appearance but made default in delivering a defence. Upon motion for judgment in default of defence, the declaration sought and an order for foreclosure were granted.

Dean J. assumed that an equitable mortgage had arisen in favour of the plaintiff from the deposit of the certificate of title.[2] His judgment proceeded in two stages. First, he considered whether the appropriate form of relief for an equitable mortgagee of land under the general law was an order for foreclosure or an order for sale. His Honour decided that since the decision of James L.J. in *James v. James*,[3] following the earlier but inadequately reported case of *Pryce v. Bury*,[4] it was settled that the proper order in such a case was for foreclosure. Dean J. then had to decide whether the general law principles applied to land under the Transfer of Land Act 1954. Under s. 79 of the Transfer of Land Act, foreclosure of a registered

[1] [1956] V.L.R. 99. Supreme Court of Victoria; Dean J.

[2] In *Bank of New South Wales v. O'Connor* (1889) 14 A.C. 273, 282, Lord Macnaghten said that the general rule was that a deposit of documents of title without either writing or any word of mouth would create in equity a charge *(sic)* upon the property to which the documents relate to the extent of the interest of the person who makes the deposit. In *London Chartered Bank of Australia v. Hayes* (1871) 2 V.R. (Eq.) 104, 108, and *Patching v. Maunsell* (1881) 7 V.L.R. (Eq.) 6, 10, the deposit of certificates of title was held to be of similar effect.

[3] (1873) L.R. 16 Eq. 153.

[4] (1854) 2 Drew 41.

legal mortgage is effected only by an order made by the Registrar of Titles after certain statutory conditions have been complied with. The court has no jurisdiction to issue decrees for foreclosure. His Honour was of the opinion that as an equitable mortgage by deposit of title deeds carried no implied obligation on the part of the mortgagor to execute a legal mortgage in the absence of proof that this was intended by the parties,[5] this should also be the case in respect of land registered under the Transfer of Land Act. Therefore, although the court had no power to forclose a registered legal mortgage, its jurisdiction over equitable mortgages was not affected by the Act, and it was competent for the court to issue a decree for foreclosure.

It is submitted, with the greatest respect, that the decision of Dean J. places an equitable mortgagee of land under the operation of the Transfer of Land Act 1954 in a more favourable position than a registered legal mortgagee. The right to foreclose granted to persons of the latter category by s. 79 of the Transfer of Land Act is very restricted; a registered mortgagee must state in his application that the mortgaged land has been offered for sale at public auction within a period of two years prior to the application and 'that the amount of the highest bidding at such sale was not sufficient to satisfy the moneys secured by such mortgage together with the expenses occasioned by such sale.'[6] The possibility of the mortgagee's obtaining the mortgaged land beneficially is made even more remote by subsection (3) which provides for the land's being compulsorily offered for private sale after application to the Registrar has been made.[7] The Property Law Act, on the other hand, confers a *discretionary* power upon the court in an action for foreclosure to direct a sale of the mortgaged property on such terms as it thinks fit 'on the request of the mortgagee, or of any person interested either in the mortgage money or in the right of redemption.'[8] As far as land under the Transfer of Land Act is concerned, if Dean J. is correct, it appears that equity, in the rights it grants to a mortgagee, is not following the law but is leading it.

Section 3 of the Transfer of Land Act 1954 states that any act or rule of law relating to land shall apply to land under the operation

[5] *Sporle v. Whayman* (1855) 20 Beav. 607; 52 E.R. 738 was cited as authority for this proposition.

[6] S. 79 (2) (d).

[7] Transfer of Land Act 1954, s. 79 (3): 'Upon such application the Registrar shall cause notice to be published once in each of three successive weeks in at least one newspaper published in the city of Melbourne offering such land for private sale, and shall appoint a time not less than one month from the date of the first of such advertisements upon or after which he will issue to such applicant an order for foreclosure unless in the interval a sufficient amount has been obtained by the sale of such land to satisfy the principal and interest secured and all expenses occasioned by such sale and proceedings.'

[8] Property Law Act 1928, s. 91(2).

of the Act unless it is either expressly or by necessary implication excluded.

Division 9 of the Act, which deals with mortgages, contains no express references to equitable mortgages, and every section referring to mortgages except s. 79 is expressly limited to legal mortgages. It is submitted that s. 79[9] – dealing with foreclosure – also applies only to land mortgaged by means of the statutory instrument of mortgage; otherwise, the Registrar would have no means of investigating an applicant's *bona fides.*

Section 86 of the Property Law Act provides that only ss. 87, 102, 109, 110, 111 and 112 of the Act shall apply to 'mortgages under the Transfer of Land Act 1928 *effected by instruments of mortgage under that Act.*' An equitable mortgage is not within the terms of this section. Therefore, *prima facie,* all the sections of Division 3 of the Property Law Act continue to apply to equitable mortgages of land which is under the Transfer of Land Act unless they are excluded by some other consideration, for instance by necessary inference from the nature of the transaction.

The form of a legal mortgage effected by s. 74 of the Transfer of Land Act must be considered. Unlike a general law mortgage it is not a transfer of the legal title subject to the mortgagor's equity of redemption, but is merely a security in the form of an interest in land.[10] Therefore, it would appear that a deposit of title deeds is not strictly analogous with the deposit of a certificate of title. The effect of the transaction in each case is different because the interest of the mortgagee is different. As there is no conveyance of title to a legal mortgagee under the Act, in reality he has only a security by way of charge.[11] The Property Law Act does not confer a right of foreclosure: this is left to general equitable principles. In equity, a foreclosure decree absolute operates to extinguish the mortgagor's equity of redemption.[12] A foreclosure order made pursuant to s. 79 of the Transfer of Land Act cannot have this effect because it acts as a conveyance of the mortgaged land free of any interest of the mortgagor. Until the order is made the legal estate remains vested in the mortgagor. It may be argued that this statutory remedy is an exceptional and anomalous right which apart from the express

[9] The section begins: 'Wherever default is made in payment of the principal sum or interest secured by *a mortgage* . . .'

[10] See s. 74(2).

[11] See *Tennant v. Trenchard* (1869) L.R. 4 Ch. App. 537, 542, where Lord Hatherley L.C. discusses legal charges and the remedies available to chargees.

[12] In *Carter v. Wake* (1877) L.R. 4 C.D. 605, 606, Sir George Jessel M.R. explained the effect of a foreclosure decree: 'The principle upon which the Court acts . . . is that in a regular legal mortgage there has been an actual conveyance of the legal ownership, and then the Court has interfered to prevent that from having its full effect, and when the ground of interference is gone by the non-payment of the debt, the Court simply removes the stop it has itself put on.'

provision would not be available as a matter of general principle to a person having the kind of interest represented by a legal mortgage under the Act. If this is correct, an equitable mortgagee of land under the Act should be entitled to an order for sale.

Dean J., however, argued upon the authority of *Sporle v. Whayman*[13] that, since an equitable mortgage by deposit of title deeds carried no implied obligation on the part of the mortgagor to execute a legal mortgage in the absence of evidence of intention to do so, an equitable mortgagor of land under the Act was not obliged to execute an instrument of mortgage. It is submitted that *Sporle v. Whayman* does not support such a broad proposition. The transaction in that case was a deposit of title deeds to indemnify the plaintiff who stood as surety to a loan obtained from a benefit society by the defendant. Although the defendant had regularly paid instalments in repayment of the loan and the plaintiff had not been called upon, he asked the court for an order directing the defendant to execute a legal mortgage. In a reserved judgment, Sir John Romilly M.R. said that he was satisfied from the affidavits that there had been no intention by the parties that a formal mortgage deed should be executed. His Lordship referred to the cost and unnecessary trouble that would be involved, and directed the defendant to sign a memorandum specifying the terms upon which the title deeds were deposited. Waldock regards the case as establishing the proposition that no mortgage can be established where the deposit is made by way of indemnity without any agreement for a mortgage,[14] and from the tenor of the remarks of the Master of the Rolls it is doubted whether the plaintiff would have been entitled to foreclose had the defendant subsequently made default. Even if this last contention is wrong, it is submitted that the case only establishes that, in so far as general law land is concerned, on the principle that equity regards as done that which ought to be done, an equitable mortgagee is treated as if he were a legal mortgagee without the mortgagor's being required to execute a legal mortgage.[15]

These principles cannot be applied by analogy to land under the Transfer of Land Act. An equitable mortgage is not within the ambit of s. 79, and an equitable mortgagee cannot be placed in the position of a legal mortgagee by the Registrar, who has no jurisdiction in equity.

Accordingly, if the court finds that the intention of the parties was that a legal mortgage should be executed, it would be appropriate for it to order specific performance of the mortgage so as to enable

[13] (1855) 20 Beav. 607; 52 E.R. 738.

[14] C. H. M. Waldock, *The Law of Mortgages* (2nd ed., 1950), p. 49.

[15] This view is supported by the remarks of Sir George Jessel M.R. in *Carter v. Wake* (1877) L.R. 4 C.D. 605, 606, 'Where there is a deposit of title deeds, the Court treats that as an agreement to execute a legal mortgage, and therefore as carrying with it all the remedies incident to such a mortgage.'

the mortgagee to apply to the Registrar under s. 79. Otherwise, the plaintiff should be granted an order for sale. In making the order, the Supreme Court should not grant it free from the restrictions which would affect it were it sought by a legal mortgagee. This is consistent with treating as done that which ought to be done. Section 77 of the Transfer of Land Act, which regulates the right of sale, does not, by its terms, apply to equitable mortgages, but s. 103 of the Property Law Act, which would apply, appears to be just as restrictive. In order to achieve the result required, a vesting order under s. 90 of the Property Law Act would presumably be granted in addition to an order for sale. If this course were followed, it is submitted that the remedies of an equitable mortgagee would correspond with those of legal mortgagees and not be in excess of them.[16]

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[16] Dean J., at 100: 'I think the obligation on the mortgagor is to do all that is necessary to vest the legal title in the mortgagee in case of default, and to give the mortgagee all the rights he would have if the mortgage were legal . . . The remedy of the mortgagee should correspond as nearly as possible with those of legal mortgagees.'

LANDLORD AND TENANT – DESERTED WIFE REMAINING IN MATRIMONIAL HOME – AFTER LICENCE TO REMAIN TERMINATED – LANDLORD AND TENANT ACT 1948, s. 2 (2)

Adamson v. Busch[1]

This case before the Supreme Court raised the question of the effect of the deserted wife's remaining in possession of the matrimonial home, in relation to the creation of a statutory tenancy. The premises in question were let by the owners Mr and Mrs A to Mr B, the husband of the defendant. Mr B deserted his wife on 5 October, leaving her with enough furniture 'to enable her to carry on', and, on 21 October, he gave the owners notice to quit on the 31st, when he handed Mr A the key. Mrs B, however, continued to occupy the premises and refused the owners' demand for possession; whereupon the latter sought an order for recovery of possession against her. The motion for an interlocutory injunction restraining the defendant from remaining in possession came before Herring C.J. who gave judgment for the plaintiffs.

The plaintiffs claimed possession by virtue of Mr B's termination of the tenancy on 31 October. His Honour agreed that since Part III of the 1948 Landlord and Tenant Act did not affect the *lessee's* right to give notice to quit, therefore unquestionably the lease had been validly determined on 31 October.

So far the case is straightforward; but, because the contractual tenancy had been determined, Mrs B contended that by virtue of

[1] [1956] A.L.R. 259. Supreme Court of Victoria; Herring C.J.