CASE SECTION

LEASES BY MORTGAGORS

PARKINSON v. *BRAHAM*

The question of the precise legal effect of a lease purported to be given by a mortgagor is one of importance in practice and also raises points of principle of considerable interest. Although the rules which have been evolved by the courts may be by many regarded as more honoured in the breach than in the observance, nevertheless cases frequently arise where one cannot afford to disregard the strict legal position. The situation which had to be considered by the Full Court of the Supreme Court of New South Wales in *Parkinson and Anor.* v. *Braham and Ors.*[1] was just such a case.

Leases by Mortgagors—The Common Law Rules

Before examining *Braham* v. *Parkinson* in detail, it is convenient to outline briefly the position in regard to leases purported to be granted by mortgagors before the passing of s.106 of the Conveyancing Act, 1919-54,[2] and before the introduction of the Torrens System in New South Wales, by the Real Property Act, 1900-56.[3]

The fact that a common law mortgage involves the conveyance by the mortgagor of his legal estate to the mortgagee, means that the mortgagor has no estate in the mortgaged land out of which he could grant a valid lease *at law.*[4] In fact since about the beginning of the 17th century the mortgagor has usually been allowed to remain in possession until default and in many cases this situation is governed by the mortgage deed itself.[5] Where there is no such provision, the better view appears to be that the mortgagor is in possession by virtue of a special type of tenancy at sufferance.[6] The precise nature of such possession has occasioned much debate which need not detain us here. Suffice it to say that the possession is lawful and he is entitled, where there is no contrary provision, to remain in possession until ordered to deliver up possession

---

[1] (1962) 79 W.N. (N.S.W.) 176.
[2] Act No. 6, 1919 (N.S.W.), as amended.
[3] Act No. 25, 1900 (N.S.W.), as amended.
[4] *Cuthbertson* v. *Irving* (1859) 4 H. & N. 742 at 755 *per* Martin, B.; affd. (1860) 6 H. & N. 135.
[5] See generally E. I. Sykes, *The Law of Securities* (1962) at 52-4; Coote, 1 *A Treatise on the Law of Mortgages* (6 ed., 1904) at 697. Thus the mortgage usually contains an attornment clause whereby the mortgagee leases the property back to the mortgagor subject to certain terms and conditions. However, there are already signs that in New South Wales such clauses may decrease in popularity because of s.2A of the Landlord and Tenant Act, 1899-1962, which prevents a landlord from suing in ejectment in the Supreme Court where the premises are or include a dwelling house and the rent does not exceed £12/12/0 per week. Thus the landlord in such a situation, even if the premises are not "prescribed premises", is deprived of the possibility of obtaining a speedy default judgment. (See note 35 *A.L.J.* 288.)
[6] Sykes, *op. cit.* at 53.

or possession has been demanded by or on behalf of the mortgagee.[7] The mortgagor while in possession is at liberty to manage the lands as he pleases and it is not for the mortgagee to interfere with that management unless he chooses to go into possession.[8] Such rights do not, however, constitute any interest in the land which can pass at law by virtue of a purported lease.[9]

At law, therefore, such a lease may take effect only by way of estoppel (although by the operation of the doctrine of "feeding the estoppel", the lessee might, under certain circumstances, subsequently acquire a legal interest in the land).[10] However, the lease is good as against all the world except the mortgagee, and the lessee's possession under the lease is not unlawful as the mortgagor while in possession is entitled to manage the land as he pleases and it is not for the mortgagee to interfere with that management unless he chooses to go into possession.[11] Likewise the mortgagee cannot, before foreclosure, create a lease such as to prevail over that of the mortgagor's lessee, "unless it is done to avoid apparent loss and merely in necessity".[12] In short, the lessee has a lawful, though precarious, right to possession until such time as the paramount title of the mortgagee is asserted.[13]

In equity, however, the position was otherwise. Equity regarded the mortgage as being a mere pledge or security,[14] and thus the layman's conception of a sale of the equity of redemption as being a sale of the fee simple subject to the mortgage came to represent the substance of the position.[15] The equity of redemption was regarded as an estate in the land, and the mortgagor was regarded as being the equitable seisinee in fee thereof.[16] The mortgage, it was held, did not alter the possession of the mortgagor.[17] Being thus regarded by equity as owner, the mortgagor could deal with his equitable fee simple and therefore could assign his equity of redemption. A lease by the mortgagor made the lessee to some extent an assignee of the equity of redemption. In equity anyone interested in the equity of redemption may redeem,[18] and this no matter how small his interest.[19] The lessee, being such an assignee, could therefore redeem, and equity would not allow the mortgagee to insist on his strict legal rights.[20]

Finally it should be noted that the mortgagee and mortgagor could, of

---

[7] *Casborne* v. *Scarfe* (1737) 1 Atk. 603; *Cuthbertson* v. *Irving* (1859) 4 H. & N. 742; *Corbett* v. *Plowden* (1884) 25 Ch.D. 678; *Yorkshire Banking Co.* v. *Mullan* (1887) 35 Cr.D. 125; *Tarn* v. *Turner* (1888) 39 Ch.D. 456; *Re Sir Thos. Wells* (1933) 1 Ch. 29; *Dudley & District Benefit Building Society* v. *Emerson* (1949) 1 Ch. 707; *Parker and Ors.* v. *Braithwaite* (1952) 2 All E.R. 837.

[8] *Parker* v. *Braithwaite* (1952) 2 All E.R. 837; see also *Tarn* v. *Turner* (1888) 39 Ch.D. 456; *Yorkshire Banking Co.* v. *Mullan* (1887) 35 Ch.D. 125.

[9] *Cuthbertson* v. *Irving* (1859) 4 H. & N. 742; see also cases referred to *supra* n. 4.

[10] See R. A. Megarry and H. W. R. Wade, *The Law of Real Property* (1959), 2 ed. at 633. It is not within the scope of this note to canvass the many problems which arise in the field of tenancies by estoppel. See also generally Sykes, *op. cit.*, at 165-6. For a full discussion of the especial difficulties raised by "attornment clauses" in mortgages of Torrens System land see W. N. Harrison, "Attornment Clauses in Torrens System Mortgages" (1942) 16 *A.L.J.* 64, 96.

[11] *Parker* v. *Braithwaite* (1952) 2 All E.R. 837 at 841; see also *Casborne* v. *Scarfe* (1737) 1 Atk. 603 at 605.

[12] *Hungerford* v. *Way* (1795) 9 Mod. 1. The report does not indicate the precise circumstances in which this power will become exercisable.

[13] *Dudley & District Benefit Building Society* v. *Emerson* (1949) 1 Ch. 707.

[14] *Casborne* v. *Scarfe* (1737) 1 Atk. 603 at 605.

[15] Sykes, *op. cit.*, at 62.

[16] *Casborne* v. *Scarfe* (1737) 1 Atk. 603; *Re Sir Thos. Wells* (1933) 1 Ch. 29.

[17] *Casborne* v. *Scarfe* (1737) 1 Atk. 603.

[18] *Pearce* v. *Morris* (1869) L.R. 5 App. Cas. 227, *per* Lord Hatherley; *Tarn* v. *Turner* (1888) 39 Ch.D. 456. See also *Iron Trades Employers Insurance Association, Limited* v. *Union Land & House Investors, Limited* (1937) 1 Ch. 313, where Farwell, J. (at 318) stated that the right arose when the mortgagee took steps to evict the tenant from the property.

[19] *Tarn* v. *Turner* (1888) 39 Ch.D. 456 at 465, *per* Cotton, L.J.

[20] *Idem* at 465.

course, combine to grant a full and effectual lease of the mortgaged property. Likewise the mortgagee could confirm the tenancy, which in effect created a new one.[21] It was always possible for an express power to lease to be given to the mortgagor by the mortgage deed, and, provided the terms of the power were complied with, the mortgagee could not assert his legal estate to defeat the lessee.[22]

Parkinson v. *Braham*[23] — *the facts and the decision*

Two persons named Braham sold land under Torrens Title to Mereton Elizabeth Bay Pty. Ltd. By virtue of a previous arrangement, the company mortgaged the land by registered first mortgage to Parkinson. This mortgage expressly excluded, except with the previous written consent of Parkinson, the provisions of s.106 of the Conveyancing Act, 1919-54, which gives to a mortgagor certain limited powers of granting leases binding on the mortgagee. The company then gave a registered second mortgage to the Brahams. However, prior to the registration of the two mortgages, which were granted to finance the transaction, the company granted to the Brahams a written lease containing an option to renew. The total of the periods provided for in the lease and option was less than three years. At the expiration of this lease, the company gave a further lease to the Brahams which purported to be granted pursuant to the option. Parkinson had notice of the grant of the first lease, but not of the second. The second lease was held not to constitute an exercise of the option as it contained an additional term not provided for in the option. No consent was ever given by Parkinson to the granting of either lease. During the currency of the second lease Parkinson commenced ejectment proceedings against the Brahams and the company after default under the first mortgage, which default was admitted. The company did not enter an appearance. The Brahams appeared and filed particulars of defence by which they claimed to be in possession of the land as lessees under the second lease. They also claimed that this lease was granted pursuant to the option contained in the first lease and had not been determined. A chamber judge[24] having (on grounds which are not reported) granted Parkinson leave to strike out the Brahams' particulars of defence pursuant to the summary proceedings provided for by O. XXI r.27 of the New South Wales Supreme Court Rules, the Brahams appealed to the Full Court[25] against this order. The Court dismissed the appeal on the ground that the second lease from the company to the Brahams conferred no rights as to possession on them as against Parkinson because:

1. The company's statutory power of leasing as mortgagor could be exercised only if there was compliance with the term in the first mortgage requiring the previous written consent of Parkinson to any such lease.
2. (a) that the second lease, though for a term of less than three years, was properly registrable under the Real Property Act, 1900-56.
   (b) that the company's common law power of leasing as mortgagor, if it could still exist concurrently with the operation of s.106 of the Conveyancing Act, which was doubtful, was subject to

---

[21] *Webb* v. *Austin* (1844) 7 Men. & G. 701; *Corbett* v. *Plowden* (1884) 25 Ch.D. 678; *Parker* v. *Braithwaite* (1952) 2 All E.R. 837. In the latter case Danckwerts, J. held that the mere fact of knowledge for eight months on the part of the mortgagee without taking any steps to recover possession was not such a confirmation. See generally Coote, *op. cit.*, Vol. 1 at 696ff.

[22] Coote, *op. cit.*, at 697.

[23] (1962) 79 W.N. (N.S.W.) 176. Notice of appeal to the High Court was lodged, but the appeal was not prosecuted.

[24] Brereton, J.

[25] Owen, Else-Mitchell and Nagle, JJ.

s.53(4) of the Real Property Act which was of general application to leases by mortgagors of Torrens System land and not confined by the terms of sub-s.(1) of that section to the leases therein set out.

3. that s.42(d) of the Real Property Act did not affect the above conclusion (s.42(d) is the "indefeasibility section" of the Real Property Act and the judgments, so far as they deal with this aspect of the case, are not considered in this note).

It is proposed, after outlining briefly the common law rules as to the effect of leases granted or purported to be granted by a mortgagor, to consider:

(a) whether or not, by virtue of s.53(4) of the Real Property Act, leases granted by a mortgagor for a term not exceeding three years are binding as against the mortgagee even though the requirements of that subsection have not been complied with. As a result of the difficulties arising from the interpretation of this subsection it will be necessary to examine in some detail the precise nature of the interest in the mortgaged land of a mortgagee of Torrens System land and in particular the vexed question of whether the fact that the mortgagor of such land retains the legal estate alters his substantive powers in regard to the leasing of such land.

(b) whether the provisions of s.106 of the Conveyancing Act, 1919-54, are facultative or constitute a code exclusively delimiting the leasing powers of a mortgagor.

The effect of Section 53(4) of the Real Property Act on leases for a term not exceeding three years

Section 53 of the Real Property Act, 1900-56, provides:

1. When any land under the provisions of this Act is intended to be leased or demised for a life or lives or for any term of years exceeding three years, the proprietor shall execute a memorandum of lease in the form of the Eighth Schedule hereto.

. . .

4. No lease of mortgaged or encumbered land shall be valid and binding against the mortgagee or encumbrancee unless such mortgagee or encumbrancee shall have consented to such lease prior to the same being registered.

Dockrill v. *Cavanagh*[26] establishes that leases for a term not exceeding three years are none the less capable of registration under subsec.(1) despite the fact that that subsection only refers expressly to leases for a term exceeding that period. In the instant case the Court affirmed *Dockrill* v. *Cavanagh* and therefore rejected the appellant's argument that s.53(4) could not apply to the lease in question as being incapable of registration because it was granted for a term of less than three years. It also rejected the argument that s.53(4) is limited in its operation to such leases as are expressly referred to in s.53(1) (that is, that the words "no lease" in s.53(4) must be taken to mean "no such lease as is referred to in s.53(1)"). Owen, J. could see "no warrant for thus limiting the effect of the subsection" (that is, subsec. (4)) and remarked that it would be strange indeed if the legislature had intended to give a mortgagee of land under the Real Property Act such a limited degree of protection.[27] The Court thus held that the provisions of s.53(4) apply to

[26] (1944) 45 S.R. (N.S.W.) 78 at 84.
[27] (1962) 79 W.N. (N.S.W.) 176 at 179.

leases which, though capable of registration under the Act, are not required to be so registered in order to be effective.[28]

The Court did not cite[29] the decision in *Bank of New South Wales* v. *Hartman*,[30] in which it was held that the section is applicable only to registered leases. In that case Hartman, being the registered proprietor of Torrens System land, mortgaged the property to the Bank. The Mortgage excluded the mortgagor's powers of leasing under ss.106-7 of the Conveyancing Act, 1919-54 unless the mortgagee's consent was obtained. Hartman purported to grant an oral lease of the premises to a third party, to which lease no consent was obtained. In ejectment proceedings brought by the Bank, Walsh, J. held that s.53(4) had no application because it applied only to registered leases. There being nothing in the Act or the general law which would render the lease valid as against the mortgagee, the Bank was therefore held to be entitled to possession of the land. (It is to be noted that in this case the judge did not indicate whether by the term "registered lease" he was referring to leases required by the Act to be registered and which in fact have been registered or whether he also included within that term leases which, although not required to be registered, are in fact registered. The case dealt with an oral lease, a type of lease which, on the generally accepted view, is incapable of registration, and consequently the above remarks must in any case, in so far as they constitute the *ratio* of the decision, be confined to leases which are incapable of registration, that is oral leases or leases in a form not substantially in the form prescribed by the Act.) Moreover, no reference was made to the dictum of Sly, J.[31] in *Daniher* v. *Fitzgerald*, that the section "contemplates a lease which is necessary to be registered". It does not appear from the report whether the above two decisions were cited to the Court, and it may be that had this been done, the decision may have been otherwise. The report does not indicate whether the lease in question was in a registrable form, but in light of the discussion of *Dockrill* v. *Cavanagh*,[32] it must, it is submitted, be taken to have proceeded on the basis that it was. In light of this, the Court must be regarded as having left open the question of the applicability of the section to oral leases and written leases in a form not registrable under the Act, and it may be argued that the absence of any express provision in the Real Property Act for consent being given by the mortgagee to such a lease in the absence of registration imported that no such lease could be rendered binding on the mortgagee. This certainly would seem a strange result, as it is precisely in the case of oral periodic leases that mortgagors most frequently wish to bind the mortgagee. On the other hand,

---

[28] The Court cast further doubt on the portion of the decision in *Arnold* v. *Wallwork* ((1899) 20 L.R. (N.S.W.) 368) which holds that oral leases are capable of registration under the Act. J. G. Beckenham and L. A. Harris (*The Real Property Act* (*N.S.W.*) (1929) at 122) are of the opinion that the decision was based on an erroneous assumption, while J. E. Hogg (*The Australian Torrens System* (1905) at 814) states that the reasoning in the case is defective. It is respectfully submitted that in principle the decision is unsupportable. It is, in the writer's view, impossible to see how an oral lease could be in the form required for registration, because if such a lease were reduced into writing and were executed by the parties and attested in the manner required by the Act, the lease would *ipso facto* cease to be an oral lease.

[29] It does not appear whether the cases referred in n. 30 and n. 31 *infra* were cited to the Court as there is no report of the argument.

[30] (1955) 72 W.N. (N.S.W.) 382. It is respectfully suggested that the commentator in a forthcoming note in *The Australian Law Journal* is in error in suggesting that this holding was merely *obiter dictum*. At least, insofar as remarks of Walsh, J. apply to oral leases, his holding was clearly necessary for the decision of the question in issue. No reason has been suggested for distinguishing between oral leases and leases in a form not registrable under the Act. As to the applicability of the observations made by Walsh, J. to leases which, though not required to be registered, are in fact made in a registrable form, see *infra*.

[31] (1919) 36 W.N. 96 at 98.

[32] (1944) 45 S.R. (N.S.W.) 78.

it may be argued that the effect of the *casus omissus* is to render such leases binding on the mortgagee without his consent. This approach is strengthened if one accepts the argument, referred to below, as to the effect on his leasing powers of the fact that the mortgagor of Real Property Act land retains the legal estate therein. It is respectfully submitted that the reasoning in *Bank of N.S.W.* v. *Hartman*[33] and *Daniher* v. *Fitzgerald*[34] has much to recommend it and that the matter is not as yet settled. If this is not so, there still remains the question as to whether the mortgagee's consent is necessary at all to render such leases binding upon him (assuming, of course, that s.106 of the Conveyancing Act has been excluded).

The nature of registered mortgages of land under the provisions of the Real Property Act

Assuming that there are some types of leases not covered by s.53(4), it then becomes relevant to consider, apart from the effect of s.106 of the Conveyancing Act, whether the retention of the legal estate by the registered mortgagor of Real Property Act land affects the common law position in regard to leases by such mortgagors. On the one hand, it is said that as such mortgagor has vested in him the legal estate, there is nothing to prevent him granting a valid lease of the mortgaged property. On the other hand, it may be strongly argued that this contention overstates the significance of this change in the mortgagor's position and that there is nothing in the Real Property Act, 1900, to compel one to the view that such a startling result must follow. Section 57 of that Act provides that "any mortgage or encumbrance under this Act shall have effect as a security but shall not operate as a transfer of the land thereby charged".[35] It has been argued that, because of this fact, the legal estate of the mortgagor would enable him, in the absence of any statutory provision to the contrary, to grant a lease binding on his mortgagee, irrespective of the consent or otherwise of such mortgagee. Beckenham and Harris support this argument.[36] Baalman[37] submits that any doubts which may have existed have now been removed by s.53(4) but, as has been submitted above, this is by no means clear.

The argument supported by Beckenham and Harris was put forward by the appellant in *Daniher* v. *Fitzgerald*.[38] In that case Gordon, J. was inclined to accept it. He stated:

> In my opinion the meaning of that section (viz. s.53(4) of the Real Property Act) is that no lease of mortgaged land which is under the provisions of the Real Property Act shall affect the rights of a mortgagee of that land by reason of being registered under the provisions of the Act, unless prior to the registration the mortgagee assents to that lease. The reason for that provision is clear. The Real Property Act had altered the position of a mortgagee of land held under that Act, and had taken from him the legal estate in the land which by virtue of his mortgage he would have held prior to the Act, and had given him in place thereof certain statutory rights. Consequently his rights as mortgagee might have been prejudicially affected by a registration of the lease unless sub-s.4 of s.53 had been passed.

The point was not dealt with by Sly, J., but Ferguson, J., who concurred,

---

[33] *Supra* n. 30.
[34] *Supra* n. 31
[35] The section then provides machinery for the mortgagee to take steps in order to exercise his power of sale.
[36] *Op. cit.* at 127.
[37] *The Torrens System in New South Wales* (1951) at 234.
[38] (1919) 36 W.N. (N.S.W.) 96 at 99.

must be taken as having accepted it. On the other hand, Walsh, J.[39] in *Bank of New South Wales* v. *Hartman*, after stating that s.53(4) is applicable only to registered leases, and therefore has no application to oral leases, went on to observe that there is nothing in the Real Property Act or the general law which could render such leases binding as against the mortgagee.[40] In the instant case, the Court, because of the interpretation placed by it upon s.53(4), did not find it necessary to discuss this aspect of the matter.

Thus it will be seen that the point is still open to argument. It is thought that, on principle, a strong argument might be put forward that the fact of the mortgagor retaining the legal estate should make no difference to the mortgagee's rights. True it is that the doctrinal reason for the inability of the mortgagor to grant leases binding upon his mortgagee at common law arose from the fact that the mortgagor retained no legal estate out of which he could grant a lease valid as against the mortgagee. This position was not affected by the tender regard shown to the interests of mortgagors by the Court of Equity, which treated the mortgagor as the true owner of the mortgaged land and which would in some cases restrain the mortgagee from insisting on his strict legal rights. Nonetheless, it is suggested that the matter should be regarded in a wider perspective. The Act does transform the interest of a registered mortgagee from a legal estate in fee simple, to that of a legal charge. However, it is clear that the Act was not intended to render the interest of the mortgagee analogous to that of a mere equitable charge, and some such assumption may possibly be inherent in the argument now being rejected. It must be remembered that, despite the revolutionary change in strict legal theory made by the Act in regard to the nature of a legal mortgage, the interest of a mortgagee under the Act is nonetheless a registered (and, therefore, "legal") interest. The Act makes provision for the mortgagee to exercise his rights as to foreclosure and sale thus enabling him to deal with the full "legal" and beneficial interest in the mortgaged property.

> The difference between the characters of mortgages of old system title land and R.P. Act land respectively is more important in theory than in practice, since the R.P. Act gives the mortgagee practically all the powers and remedies which a mortgagee of old system title land has either by virtue of his legal estate or by statute.[41]

It must be remembered that the interest of the mortgagee is a registered one, to which, at least *prima facie*, are subject all subsequent interests, registered or not, created in the land. The value of the mortgagee's security would obviously be endangered should the suggested power of the mortgagor exist, and it would be strange if the legislature had intended so radically[42] to alter

---

[39] (1955) 72 W.N. (N.S.W.) 382 at 384.

[40] It must be admitted that the argument is not reported in this case and it may be that the contrary argument was not put to the Court.

[41] B. A. Helmore, *The Law of Real Property in New South Wales* (1961) at 129.

[42] It might be objected that this very fact indicates that a legal mortgage of land under the provisions of the Act is an entirely new creature, and that had the legislature wished to retain the concept of a mortgage existing in regard to land under common law title, it could have provided for the mortgagee to have a registered legal interest with the mortgagor obtaining a registered equitable interest. It is further said that by allowing the legal estate to remain with the mortgagor the legislature obviously intended to strengthen his position and give full effect to the view of equity that that mortgagee's interest in the mortgaged land was that of a security only, and not one of full ownership. As against this there is the fact that there is no room, in the scheme provided by the Act, for differing types of *registered* interests. Moreover, the proponents of this argument have failed, in the present view, to demonstrate precisely how the mortgagor's position has been improved (apart, of course, from the certainty of the fact of ownership of registered interests, a point which, it is submitted, has no effect on the matter at present under discussion.) No satisfactory evidence has, in the present view, been adduced to indicate that the legislature desired to

the position of the mortgagee without an express indication of intention so to do. It is submitted that, despite the technical reasons for the origin of the common law position, the inability of the mortgagor to grant leases binding on the mortgagee without his consent may well be thought to have been supported by deeper considerations of policy. This view is supported by the fact that, despite the numerous ways in which it refused to be bound by strict common law doctrine in regard to the respective interests and rights of mortgagors and mortgagees, the Court of Equity never went so far as to interfere with the mortgagee's common law rights in this regard.

We have noted above some of the bold inroads made by the Court of Equity into the common law doctrines in regard to mortgages, and in particular the notion, despite the conveyance to the mortgagee of the legal estate in the mortgaged land, that the mortgagor was the real seisinee in fee thereof. Equity did not consider it desirable to extend to the mortgagor some power of granting leases binding on the mortgagee when he had not consented thereto. Had Equity wished to develop such a doctrine, certainly the common law rule that the mortgagor had no estate out of which he could grant such a lease, would not have prevented that court from restraining the mortgagee from treating his mortgagor's tenants as trespassors. Yet such a step was never taken.

The question of whether the legal estate of the mortgagor of land under the provisions of the Real Property Act enables him to grant a valid leasehold interest in the land has thus never been directly decided. However, it must be admitted that the decisions on the question of whether an attornment clause in such a mortgage is valid, indicate that the courts might well be unfavourably disposed towards the view above presented. Thus in *Partridge* v. *McIntosh & Sons Ltd.*,[43] the High Court held that an attornment clause in a Torrens System mortgage could operate only by way of estoppel as such a mortgagee no longer has the legal estate vested in him. A similar view was taken by Jordan, C.J. when expressing the judgment of the New South Wales Full Supreme Court in *Ex parte Jackson, Re Australasian Catholic Assurance Co. Ltd.*[44] Thus, in dealing with attornment clauses, the courts have held that the fact that a mortgagee of Torrens System land does not have the legal estate vested in him, prevents him from granting a lease to the mortgagor binding otherwise than by way of estoppel. The courts here have looked to the change in the type of the estate of the mortgagee without looking further. Because of this, it may be objected, there is no reason to believe that they would not adopt a similar approach in dealing with leases granted by a mortgagor to a third party. However, it is submitted that the considerations of policy which, it has been suggested above, arise with regard to the power of a mortgagor to grant interests binding on third parties as against his mortgagee, do not arise in the case of attornment clauses (which are, of course, dealings as between mortgagor and mortgagee), and that it may still not be too late in the day to adopt the view now presented.

It should be noted that the wording of s.53(4) is, to say the least, curious. On a strict literal view, which is possibly that which influenced the Court in *Braham* v. *Parkinson*, the effect of the words "prior to the same

---

make any fundamental change in the substance of such an important type of commercial transaction. On the other hand, it must be admitted that there is much to be said for the contention that if the legislature had not intended the full consequences of its alleged radical alteration of the nature of mortgages, it would have stated explicitly what protection the mortgagee was to have. Indeed, this line of reasoning would say further that such explicit protection is to be found in s.53(4), and that the maxim *expressio unius alterius est exclusio* applies.

[43] (1933) 33 S.R. (N.S.W.) 69.

[44] (1941) 58 W.N. (N.S.W.) 228. See generally Harrison, *op. cit.*

being registered" would by implication provide that no oral lease or lease in an unregistrable form could ever be made binding on the mortgagee, irrespective of whether or not he consented thereto. Such an effect would seem strange as a section which provides machinery for making certain leases binding against the mortgagee, would deny this binding quality in precisely the type of situation in which such effect is most frequently desired, that is in the case of oral short term or periodic tenancies. It is true that in the case of such tenancies the mortgagor very frequently purports to lease nonetheless, with at least the tacit approval of the mortgagee, but it was surely not intended to force the mortgagor and mortgagee to rely on such a flimsy basis to support the transaction in cases where both desire to place such leases on a sounder footing. It is clear from s.53(1) that the draftsman contemplated that there would be some types of leases to the validity of which registration was not essential, and it is submitted that the views expressed in *Bank of New South Wales* v. *Hartman* and *Daniher* v. *Fitzgerald* are the correct ones.

As we have seen, if s.53(4) of the Real Property Act renders a lease by a mortgagor binding on his mortgagee only if such lease is consented to prior to registration (irrespective of whether such lease is capable of registration), then *cadit quaestio*. If, however, as has been submitted above, the section has no application to certain leases, then one must consider whether the legal estate of the mortgagor enables him to grant binding leases of such a type. This question has not been settled by the courts, and indeed, does not appear to have been expressly considered. In the present view the more satisfactory solution, and one which the courts may still be free to adopt, is that the mortgagor is not enabled to bind his mortgagee's interest in this way. In the event, however, of this view being rejected by the courts, such leases will be binding on the mortgagee unless the provisions of s.106 of the Conveyancing Act exclusively delimit the powers of the mortgagor in this regard.

Is Section 106 of the Conveyancing Act facultative or exclusive ?

In the light of this context, it is necessary to examine the provisions of s.106 of the Conveyancing Act. That section provides:

> (1) A mortgagor of land while in possession shall have by virtue of this Act power to make from time to time any such lease of the mortgaged land, or any part thereof, as is in this section described and authorised. For the purposes of this subsection the expression "mortgagor" does not include an encumbrancee deriving title under the original mortgagor.
>
> . . .
>
> (3) The lease which this section authorizes is — A lease for any term not exceeding five years.
>
> . . .
>
> (11) This section applies only if and as far as a contrary intention is not expressed by the mortgagor and mortgagee in the mortgage deed, or otherwise in writing, and shall have effect subject to the terms of the mortgage deed, or of any such writing, and to the provisions therein contained.
>
> . . .
>
> (17) This section applies to land under the provisions of the Real Property Act, 1900, subject to mortgage or incumbrance under that Act; section fifty-three subsection four of that Act shall not apply to leases authorized under this Division of this Part.

The section places a number of restrictions as to the nature of the lease which is authorized (for example, by subsec.(5) it must be made to take effect in possession not later than three months after its date). Various formalities are prescribed and certain savings, which are not relevant here, are enacted.

Is the mortgagor able, because s.106 does not disturb his general law powers, to do that which he could have done had the section not been passed, or is s.106 a code setting out in full the leasing powers of the mortgagor?

In *Parkinson* v. *Braham*, Owen, J. was "disposed to think"[45] that s.106 is exclusive, but it was unnecessary for him to decide the question. Else-Mitchell, J.[46] stated that the section was exclusive:

> I should have thought that this concluded the whole question against the appellants because it seems to me that the object of Pt VII of the Conveyancing Act, and s.106 in particular, was to prescribe a code of uniform rules for the leasing of mortgaged land whether it be under the Real Property Act or the general law and regardless of the nature of the mortgage (see definition of "mortgage" in s.7). This policy of uniformity appears quite clearly in my view from the terms of Pt VII and is evident in other provisions of the Conveyancing Act which apply to land under the Real Property Act and replace provisions to a like effect under that Act; e.g. ss. 73, 80, 81, 84, 85, 86, 88, 98.

However, in the next paragraph he also stated that:

> It was contended, however, that the difference between a mortgage under the Real Property Act and one under the general law avoided this result because a mortgage of land under the Torrens system is a charge only which allows the mortgagor to retain the legal estate, whilst a mortgage under the general law operates as a conveyance of the legal estate in the land to the mortgagee subject to a proviso for redemption. On this basis it is said that s.106 of the Conveyancing Act should be treated as merely a facilitating provision which does not exclude any powers of leasing which the mortgagor had at common law and that the section has no application to a lease by a mortgagor who retains the legal estate in the mortgaged land (cf. *Iron Trade Employers Insurance Association Ltd.* v. *Union Land & House Investors Ltd.)*. There may be some ground for saying that that is the position where an equitable mortgage is granted of land under the general law so that the mortgagor retains the legal estate whilst divesting himself only of an equitable interest, but, so far as Torrens title land is concerned, s.53 of the Real Property Act must be considered.[47]

In view of his decision as to the effect of s.53(4), His Honour found it unnecessary to decide this question finally, and his qualification in the last passage quoted must, it is submitted, be taken as having left the question open.

The leading authority on this point is the decision of Farwell, J. in *Iron Trades Employers Insurance Association Limited* v. *Union Land and House Investors Limited*.[48] There the defendants, by way of legal charge, mortgaged a property to the plaintiffs. The mortgage contained a covenant not to exercise without the mortgagee's consent the power conferred by the

---

[45] (1962) 79 W.N. (N.S.W.) 176 at 179.
[46] (1962) 79 W.N. (N.S.W.) 176 at 181.
[47] *Idem* at 181-2. It might be thought that the attitude of Else-Mitchell, J. in *Parkinson* v. *Braham* was intended to apply only so far as concerned the rights of the tenant *vis-a-vis* the mortgagee, and not in regard to the rights of the tenant *vis-a-vis* the mortgagor. However, the reference therein made to the *Iron Trades Case* seems to indicate that this is not so, as Farwell, J. was there mainly concerned with the question of the effect of the section on the mortgagor's common law power of leasing.
[48] (1937) 1 Ch. 313.

equivalent of s.106. The defendants leased the property by a yearly tenancy without obtaining such consent. It was held that the defendants in so leasing were not exercising the statutory power and had not committed a breach of their covenant. The section did not in terms say that the only power of granting leases was to be the statutory one, and the mortgagor's common law power of granting a lease operating by estoppel only was not abrogated. It was argued that the true interpretation of the covenant was that the mortgagor had power to grant a lease under the statute without the mortgagee's consent, although by so doing he would commit a breach of covenant. Farwell, J., however, rejected this view and held that the effect of the covenant was "to impose a further and additional term on the obligations which are contained in the Act itself, and that the exercise or purported exercise of a power for which no previous consent has been obtained is not an exercise of the statutory power at all, because, as a result of the agreement made between the parties, the only power of leasing given by the Statute is the power of leasing with the consent of the mortgagee".[49] It is, it is suggested, difficult to quarrel with the result reached by Farwell, J. in this case, although it might well be asked whether the power of the mortgagor existing at common law to grant a lease binding by estoppel only is in fact a "power" to "lease", and not rather the result of the operation of the evidentiary doctrine of estoppel, therefore being outside the section on any view. However, we have seen that even at common law a lessee under such a lease obtained lawful possession of the property, and when we look further to the doctrine of equity in this regard, we may fairly state that such power as the mortgagor had prior to the Statute was traditionally treated in equity, and possibly at common law,[50] as a power to lease and to pass some rights in regard to the land.

The reasoning of Else-Mitchell, J. in *Braham* v. *Parkinson* is not, it is respectfully submitted, entirely satisfactory, for he gives no reason as to why he might be prepared to agree with the argument of the appellants in the instant case in the situation where an equitable mortgage of land under common law title has been given and the mortgagor subsequently purported to grant a lease. It is true that s.106 would have a curious result were it to be regarded as exclusive, as a lease not authorized by the section would be of no binding effect on the equitable mortgagee and a tenant taking *bona fide* for value and without notice of the equitable mortgage would have no priority over the mortgagee's interest in the land despite the fact that the lessee would, under the general law, have obtained a legal estate in the land. It is not satisfactory to reply that the section deals only with legal mortgages as there is nothing to indicate an intention to so restrict the meaning of the term. Moreover, by s.7(1) "unless the context or subject matter otherwise indicates or requires . . . 'mortgage' includes a charge on any property for securing money or money's worth", an interest which, in respect of land under common law title, could exist only in equity. There is nothing in the subject matter of the section or the context in which the word "mortgage" is used which would indicate or require another interpretation, and it is submitted that the interpretation contended for would require a clear indication of legislative intent in order for it to be supportable.

It is not clear from Else-Mitchell, J.'s judgment whether or not, by regarding s.106 as exclusive, he meant to indicate that he would regard the section as having abrogated the general law rules granting a limited effect

---

[49] *Idem* at 322.

[50] See *Dudley & District Benefit Building Society* v. *Emerson* (1949) 1 Ch. 707 at 714-5 *per* Vaisey, J.; *Iron Trades Case* (1937) 1 Ch. 313 at 317-8 *per* Farwell, J.

to leases by mortgagors. Certainly this result has not been suggested in the many cases decided on the point since the introduction of s.106 or its equivalent. His Honour's reference to the *Iron Trades Case*[51] seems to indicate that he might not agree with that decision, which would have the somewhat curious effect of negativing the mortgagor's power to assign his equity of redemption to a limited extent in equity by way of lease. It is thought that such a severe limitation on the rights of the mortgagor and tenant *inter se* in a situation not, at least in regard to Old System land, affecting the rights of the mortgagee, would require a very clear intention. It must be admitted, however, that the Court was not here concerned with the question of leases by estoppel and it is possible that the reference by Else-Mitchell, J. to the *Iron Trades Case*[52] was not meant to indicate that he disagreed with that decision. The correct interpretation of His Honour's remarks may be that he would regard s.106 as leaving unaffected the rules as to leases by estoppel. Perhaps His Honour would regard s.106 as being "exclusive" only in regard to Torrens System land for it is difficult to see that there is any purpose in distinguishing, at least in regard to common law mortgages, between the mortgagor's powers under the section and those which would obtain under the general law, if they were not abrogated by the section, as apart from such powers as he had by virtue of the doctrine of leases by estoppel, the general law gave him no leasing rights at all.

Conclusions

In the light of present authority the position is that s.53(4) of the Real Property Act applies to leases made by a mortgagor for a period exceeding three years, and also to leases for a lesser period which are in a registrable form. Apparently the section has no application to leases for such lesser period where the leases are either oral or in a form not registrable under the Act. Where s.106 does not apply (either because it has been excluded by the mortgage instrument or because the formalities of the section have not been complied with), and no power of leasing is granted by the mortgage instrument itself, then the question of whether these latter types of leases are binding on the mortgagee is one of doubt. Such authority as there is tends to say that the leases are binding on the mortgagee. In the present view the most satisfactory conclusion, and one which may still be open to the courts, is to the contrary. It would seem that on any view such a lease may operate by way of estoppel between the parties and that the rights given by equity to a lessee under such a lease would still prevail. In regard to land under common law title, a lease by a mortgagor under a legal mortgage operates by way of estoppel unless it comes within s.106 or unless the mortgagee consents thereto. In regard to an equitable mortgage of common law land where the mortgagor retains the legal estate, the effect of a lease by such a mortgagor must be considered to be doubtful, although it is respectfully submitted that the better view is that it is binding as against the mortgagee.

It will be seen, therefore, that it cannot be assumed that a lease for less than three years of Real Property Act land which is verbal or in a form not registrable (and possibly a registrable lease for less than three years) made by a mortgagor under a mortgage excluding the powers given by s.106 of the Conveyancing Act, will not be binding as against the mortgagee. The settling of the various points involved in this problem will be of much interest, both from the point of view of practice and of legal theory.

D. J. HARLAND, B.A., Case Editor — Fourth Year Student.

---

[51] (1937) 1 Ch. 313.
[52] *Supra* n. 51.