

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of John Munro and others v. Charles Dilcott and another, from the Supreme Court of Natal; delivered the 14th December 1910.*

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PRESENT AT THE HEARING :

LORD MACNAGHTEN.

LORD ATKINSON.

LORD MERSEY.

LORD ROBSON.

[DELIVERED BY LORD ATKINSON.]

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This is an Appeal from a Judgment of the Supreme Court of Natal, dated the 5th of May 1908.

The facts, so far as they are directly relevant, in the events which have happened, to the sole question, for decision, are as follows :—

By an Indenture bearing date the 16th of May 1892, one Nicholas Johannes Degenaar therein described, “demised and let” to one Richard Augustine Studdert Redmayne therein also described, “all the coal and ironstone mines “within under upon or in any way appertaining “to that piece of land situate in the division of “Newcastle in the Colony of Natal, called Bal- “langeich, in extent four thousand and five “acres, for the term of six years, commencing “on the 1st day of May 1892 and ending on the “30th day of April 1898.”

This lease contained a clause entitling the lessee at any time before its termination to

require the lessor to renew the lease for a period of 50 years from the 30th of April 1898.

All the interest of the lessee became before the 21st of March 1898 vested in one Edward Walmsley, who upon that date served notice upon the lessor requiring him to grant a renewal of the lease.

By Indenture dated the 28th of May 1898, made between the original lessor and said Walmsley reciting the first mentioned lease and the covenant for renewal which it contained, " it was covenanted and agreed " by and between the lessor and the lessee that the lessor had let to the lessee (*i.e.*, Walmsley) and the lessee had hired from the lessor all the coal and ironstone mines whether under upon or in anyway appertaining to the said piece of land called Ballangeich in the division of Newcastle in the Colony of Natal, bounded as therein described, on the terms therein mentioned, of which it is only necessary to mention the following. The term was to be 50 years from the 1st of May 1898, and the rent 400*l.* per annum. The lessee was given " power " and authority to enter upon the said land called " Ballangeich to work win get carry away and " dispose of all the coal and ironstone in, under, " or upon said land contained and for the said " purposes to sink maintain erect and use any " pits adits engines engine-houses machinery " buildings coke ovens iron furnaces iron works " roads bridges railways tramways reservoirs " dams and watercourses and to store deposit " bank make into coke burn smelt convert " and manufacture the produce of the mines " hereby leased and to construct erect main- " tain and use all further and other works " whether underground or on the surface of " said land and to do and perform every other " act, matter, and thing usual or necessary in " the premises."

Liberty was also given to the lessee to erect on these lands of Ballangeich houses and other buildings of any description for the accommodation of his servants and the carrying on of his works and operations; to fence off and occupy such portion or portions of these lands not exceeding in all 50 acres as he might require for the purpose of banking or storing coal or other minerals, carrying on his works and operations, or as gardens for his servants, and to depasture and graze on the entire lands any horses, oxen, or other stock employed by him in the carrying on his works and operations. It will thus be seen that the lessor conferred upon the lessee very extensive rights over the surface of the land, including the right to the exclusive possession and enjoyment of some portions of it; though no doubt these rights were ancillary only to the main purpose—the working of the mines. In addition to these, by Clause 16 of this instrument, there was conferred upon the lessee the right to sublet to any persons or company for such rent and royalties, and upon such terms as to him might seem fit, “the whole or any portion of the “premises” thereby “let” without prejudice to the lessor’s right to the payment of the rent of 400*l.* per annum and the performance by the lessee of the covenant and conditions. The lessee was further entitled to surrender the lease at the end of each successive period of five years on giving six months’ notice. This lease was throughout the proceedings styled a ‘mining lease.’

The lessee’s interests under it were ultimately, by deed dated the 9th of April 1903, ceded or conveyed to the Newcastle (Natal) Steam-Coal Collieries, Limited, a joint stock company duly registered in England which had been formed to work these mines. Neither the Indenture of the 28th of May 1898 nor this conveyance to

the Company was ever registered in Natal. The Company, on the 26th of September 1905, duly resolved to create and issue 150 first mortgage debentures of 100*l.* each at the price of 50*l.*, bearing interest at 6 per cent. per annum. By a trust deed dated the 27th of September 1905, made between the Company and John Munro and Edward Merewether Bovill (two of the Appellants), called "the trustees," the Company, as beneficial owners of the premises let by the Indenture of the 28th of May 1898, demised the same to these trustees for all the residue of the said term of 50 years then unexpired, less the last three days thereof, to secure, with the other assets of the Company, the principal money and interest due or to become due upon these 100*l.* debentures.

By deed bearing date the 12th of January 1906, the Company ceded or conveyed or assigned to the trustees all the lessee's interest under the said mining lease in trust to secure the payment to the debenture holders of all sums due, or to become due, to them upon the 100*l.* debentures. Neither this deed nor the trust deed of the 27th of September 1905, was ever registered in Natal. In the interval between the date of these two instruments, 100 of the said debentures were issued, 60 to John William Taylor and Edward Merewether Bovill, one of the Appellants, and the remaining 40 to others. The Registrar of Joint Stock Companies in England duly granted his certificates of the registration of the trust deed and of the debentures.

On the 19th of October 1905 the solicitors and agents for the Company handed over to the solicitors for the trustees the indenture of the 28th of May 1898, together with the several conveyances, assignments, or instruments of cession, as they are styled, by which the interest of the lessee under the lease first mentioned became vested in the Company.

Their Lordships gave leave to the Appellant to use on the hearing of this Appeal evidence not before the Supreme Court of Natal. Mr. Lawrence, on behalf of the Respondents, having examined the evidence, frankly admitted that delivery of the mining lease of the 28th of May 1898 to the solicitors of the trustees took place in such a manner and under such conditions that a mortgage by pledge of the lessee's interest would thereby have been created, if under the statute and common law of Natal it would have been possible under the circumstances of the case to have incumbered that interest by such a method. He contended, however, first that the Indenture of the 28th of May 1898, though a mining lease, was still a lease within the meaning of Law 19, 1884, of Natal; that the case was governed by the provisions of Sections 2 and 3 of that statute, and that therefore no mortgage could be created by pledge in the manner contended for by the Appellants, which would give to the equitable mortgagee priority over the unsecured creditors of the mortgagor; and secondly, that, even if this instrument were not a lease within the meaning of this statute, it granted, conveyed, or ceded to the so-called lessee an estate or interest in land of such a nature that in the absence of registration no equitable mortgage of the kind contended for could, under the common law of Natal, be created by a pledge or deposit such as that alleged to have taken place. The Appellants, on the other hand, contended that the Indenture of the 28th of May 1898 was not a lease within the meaning of this statute, though it might be a lease within the meaning of several statutes dealing with mines and mining rights passed some years later, and that therefore a good and valid equitable mortgage had been created by

deposit which gave the mortgagees priority over the unsecured creditors of the mortgagor.

These are the only questions calling for decision on this Appeal. They emerge from litigation instituted both in England and Natal dealing with the affairs of this Company. It is unnecessary to enter at any length into the details of the litigation or of the transactions which took place subsequent to the 12th of January 1906. It will suffice to mention the matters following.

A debenture holder's action was instituted in England against the Company; and Alexander George Parker, one of the Appellants, was on the 13th of January 1906 appointed receiver over the undertaking of the Company. On the 23rd of January 1906 resolutions were passed by the Company that it should be wound up voluntarily, and the same Alexander George Parker was appointed liquidator. On the 6th of June 1906 it was ordered by the Supreme Court of Natal that the Company should be wound up for the benefit of its creditors, and by a further order of the same Court, dated the 15th of January 1907, the Respondents were appointed official managers of the Company, an office presumably resembling that of official liquidators in this country. This so-called mineral lease and plant, part of the assets of the Company, were, with the concurrence of Parker, sold by the official managers under the direction of the Supreme Court for a sum of 15,500*L*. By order of that Court, dated the 21st of February 1907, it was amongst other things directed that the sum of 10,500*L*., portion of the 15,500*L*. should be retained by the Master of the Court, that the balance should be paid to the present Respondents, and that proceedings should be forthwith commenced by the present Appellants for a declaration of the rights of the parties.

In obedience to this order the action out of which this Appeal arises was brought to try the question whether the trustees as equitable mortgagees, are entitled to be paid the sum so retained in trust for the debenture holders in priority to the unsecured creditors of the Company, or are only entitled to rank as unsecured creditors on the ground that their equitable mortgage is void. This was the question in controversy in the suit, and this again turns on the questions already indicated.

By the 11th Section of the Act 19, 1884, of Natal, it is enacted that the word mortgage shall, unless the context otherwise require, include "any pledge or hypothec or charge or deposit or mortgage bond."

Section 2 enacts that "any lease" shall be capable of registration in the circumstances therein detailed, and then proceeds to provide "that if any lease be derived or carved from out of any other lease to be made after this law shall have come into operation, such derived lease shall not be capable of registration unless and until such other lease shall have been registered."

It is not disputed that the interest in the lands and mines conveyed or ceded to or vested in the trustees by the trust deed of the 27th of September 1905 was derived or carved from out of the interest of the lessee under the Indenture of the 28th of May 1898.

Section 3 of the same statute provided that any mortgage of any lease not then registered to be made after the Act came into operation should only have the effect of a general mortgage, which means that as between mortgagor and mortgagee it should not be void but should not give to the mortgagee any priority over the unsecured creditors of the mortgagor.

Some question was raised as to the meaning of the word "then" as used in this section.

Their Lordships are clearly of opinion that it means not registered at the time the mortgage was made.

And the 4th Section enacts that any mortgage of any title deed of a lease shall have no greater effect than if the interest in the lessee were freehold in nature.

Lord Cairns, in dealing, in *Gowan v. Christie*, 2 Sc. App. 273, with a mining lease very similar in its terms to the lease of the 28th of May 1898, at page 283, is reported to have expressed himself thus —

“I should doubt extremely whether dicta of this kind  
 “apply at all to leases of mineral subjects; for although we  
 “speak of a mineral lease, or a lease of mines, the contract  
 “is not, in reality, a lease at all in the sense in which we  
 “speak of an agricultural lease. There is no fruit; that is  
 “to say there is no increase, there is no sowing or reaping  
 “in the ordinary sense of the term; and there are no  
 “periodical harvests. What we call a mineral lease is really,  
 “when properly considered, a sale out and out of a portion  
 “of land. It is liberty given to a particular individual, for a  
 “specific length of time, to go into and under the land, and  
 “to get certain things there if he can find them, and to take  
 “them away, just as if he had bought so much of the soil.”

This no doubt may be in reality the true nature of the transaction embodied in the instrument of the 28th of May 1898; but Mr. Lawrence contends that whichever of the two constructions of that document be adopted, the Appellants must fail, inasmuch as, if it amounts to, in reality, a purchase of portion of the soil, as Lord Cairns suggests, the lessee must be seized or possessed of an interest in land; and an interest in land, other than a leasehold interest, can by the common law of Natal only be effectually mortgaged by an instrument registered in the Registry of Deeds. The case of *Anderson v. Grieg*, 6 Natal Quarterly Reports, 83, cited by the Chief Justice in his judgment, decided that the interest of the lessee under such a mining lease as this is an interest in land; so that



the Appellant must fail unless the rights created by this lease are merely incorporeal rights. The authorities cited by the learned Chief Justice go far to show that such rights are not merely incorporeal; and certainly if they be not, and indeed to some extent even if they be, it does not appear to their Lordships that there is anything in the nature of the thing itself to show why provisions such as those contained in the statute should not apply to a lease such as the present, quite as reasonably as to an agricultural lease or a lease of a house.

The objects of all registration are among, other things, to afford to the public the means of knowing to whom the ownership of the land of a country belongs, what are the interests carved out of it, and what are the charges upon and incumbrances affecting it, so that these owners may discharge the liabilities ownership entails, that those who deal with them may be protected, and in many cases, that the transfer to others of their proprietary interests may be easily and inexpensively effected. All these considerations apply as directly and as forcibly to mining leases as to leases of the surface above the mines, and there does not, therefore, seem to be any reason why the legislature should necessarily exclude mining leases from the operations of this statute. The words used are general, "any lease." It is, in their Lordships' opinion, clear that the Indenture of the 28th of May 1898 must either be a lease or a deed of purchase and sale of portion of these lands, and that the rights it confers are not merely incorporeal rights. If it be a lease at all, it is not disputed that it must be a lease in "*longum tempus*." In either of the first two events the Appellants must fail, since the mortgage was not, indeed could not, be registered.

The Chief Justice and Mr. Justice Beaumont in their elaborate Judgments have examined all the authorities. They have come to the conclusion that they were justified in holding that this mining lease of the 28th of May 1898 was, a lease within the meaning of this Natal Statute 19 of 1884. Their Lordships see no reason to disagree with that conclusion. On the contrary, they think that on the whole it is right, and are therefore of opinion that the Appeal should be dismissed. They will humbly advise His Majesty accordingly. The Appellants must pay the costs of the Appeal.

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In the Privy Council.

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JOHN MUNRO AND OTHERS

v.

CHARLES DIDCOTT AND ANOTHER.

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