

and the 1924 law there was one uniform fee of £5 for keeping such places. What constitutes "Hop Beer" is unknown in law—from the Government Analyst's certificate it may be gathered that it is a liquid and that the sample he analysed contained 5.7 per cent of proof spirits, and was therefore a "liquor" within the meaning of s. 2 of the Liquor Ordinance. Now when the Legislature imposed a licence of £15 on a person "Keeping Hop Beer Saloon", placing it in the same category as a Kava Saloon, and a Restaurant, did it intend that a liquid which is a "liquor" under the Liquor Ordinance should be sold in the Saloon, and that a person licensed to keep a Hop Beer Saloon should be authorized to sell a potable liquid which is a "liquor" within the meaning of that liquor Ordinance, the sale of which without a licence is contrary to the provisions of the Ordinance?

I can find nothing in the Licensing Ordinance, as amended by Ordinance No. 9 of 1925, to indicate any such intention. Whatever may be the ingredients contained in Hop Beer I am not prepared to hold that a person who is licensed to keep a Hop Beer Saloon is thereby authorized to sell a liquor within the meaning of the Liquor Ordinance.

Appeal is therefore dismissed and the conviction upheld with costs.

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- (a) re THE ESTATE OF H. MAUGHAN DECEASED.  
 (b) re THE ESTATE OF W. A. SCOTT DECEASED.

[Civil Jurisdiction (Maxwell Anderson, C.J.) September 28, 1929.]

*Real Property Ordinance 1876—instrument creating trust preserved in Registry—transfer subsequently presented for registration—whether it is the duty of the Registrar of Titles to see that the Trustee is acting within the terms of his trust.*

In both cases the registered proprietors were trustees and in both cases the instruments creating the trusts were preserved in the Registry in pursuance of s. 20 of the Real Property Ordinance 1876.<sup>1</sup> Upon transfers of the two properties being presented for registration the Registrar of Titles referred to the Supreme Court, under s. 97 of the Real Property Ordinance, 1876, the question whether he should refuse registration on the grounds that he had express notice of the trusts, and that in each case the transferrer's power of sale as trustee was subject to the consent of the cestui que trust.

**HELD.**—If a transfer is presented to the Registrar in proper form and duly attested the Registrar must register the instrument and the new title thereby created.

[**EDITORIAL NOTE.**—S. 20 of the Real Property Ordinance, 1876 (Rep.) was in the same words as s. 108 of the Land (Transfer and Registration) Ordinance (Cap. 120) (Revised Edition, Vol. II, p.

<sup>1</sup> Repealed. Vide Land (Transfer and Registration) Ordinance (Cap. 120, s. 108) (Revised Edition, p. 1245.)

1245). The Registrar's authority to refer questions to the Supreme Court is now in s. 179 of the Land (Transfer and Registration) Ordinance (Cap. 120) (Revised Edition, Vol. II, p. 1264.)]

REFERENCE, by the Registrar of Titles to the Supreme Court, of a question arising with regard to the Registrar's duties. The facts are fully set out in the decision.

*H. M. Scott, K.C.*, for the trustee in the estate of W. A. Scott deceased.

*R. Crompton, K.C.*, for the transferees from the trustee in the estate of H. Maughan deceased.

MAXWELL ANDERSON, C.J.—These two matters in which the same questions, viz., registration of transfer of title to lands, fall to be decided, came before the court on reference from the Registrar of Titles acting under the powers conferred upon him by s. 97 of the Real Property Ordinance 1876.<sup>1</sup>

In the case of *Maughan* there is a subsidiary issue as regards the possibility of further heirs but this may be disregarded for the purposes of the present judgment.

In each case the facts in regard to the main issue are in essence the same; the trustee of the estate purports to convey the estate or part thereof to a purchaser for value and the Registrar of Titles declines to register the transfer unless there is produced to him either an Order of Court or alternatively the consent of the cestui que trust to the said transfer.

The Registrar of Titles argues that as he has in each case specific notice of the terms of the existing trust and that as the person purporting to convey the estate is the trustee, he is debarred from registering the transfer and the title of the purchaser unless it is made clear on the face of the deed that the transferrer is acting in his fiduciary capacity and in *Scott's* case, having regard to the terms of the instrument creating the trust, *a fortiori* with the consent had and obtained of the cestui que trust.

Sir Henry Scott on behalf of the trustee in *Scott's* case argues that it is no part of the duty of the Registrar to see that a trust is properly carried out. He argues that the reason for s. 20 of the Real Property Ordinance requiring that the instrument creating the trust shall be preserved in the registry is so as to allow of a purchaser becoming aware of the trust and that whether or not a trustee carries out the trust reposed in him is a matter between the trustee and cestui que trust.

Mr. Crompton on behalf of the transferee in *Maughan's* case adopts the same arguments and contends that if a transfer is presented in proper form and duly attested to the Registrar, that officer has no option but to register such transfer.

To these arguments the Registrar replies that the trust is an encumbrance and the transferrer in each case an encumbrancer defined by the Ordinance to be the proprietor of any land or of an estate or interest in land charged with an encumbrance, the encumbrance being the interest of the cestui que trust.

<sup>1</sup> Repealed. Vide Land (Transfer and Registration) Ordinance (Cap. 120), s. 179 (Revised Edition, p. 1264.)

Now while the primary object of land registration, a short term I use to cover the whole procedure antecedent to and up to the grant of a certificate of title in favour of the proprietor of lands is that titles shall be certain and indefeasible while the secondary object is that a prospective purchaser may obtain certain and exact information as to the title of the vendor and as to any encumbrances affecting the land under process of sale. Leaving aside the question of fraud with which there is no necessity to deal, the existence of a Registrar of Titles is therefore a protection to the purchaser, and it follows that with such a document *in esse*, the maxim *caveat emptor* applies to its fullest extent. The purchaser is in a position in which he can ascertain with exactitude the nature of the title of the vendor and the vendor's interest in the land. The purchaser can ascertain the existence and the nature of each and every encumbrance on the land he proposes to acquire, and if such encumbrance there be, it is for him to ascertain, if he thinks fit, that the encumbrance is discharged and that in fact he is purchasing what the vendor purports to sell.

I cannot follow the view nor can I find any authority for the proposition that it is the duty of the Registrar of Titles to ascertain that the transferrer if a trustee is acting within the terms of his trust. To hold such a view would be to throw upon the Government the duty of ascertaining that all trusts affecting land were being carried out. I cannot find in the Ordinance any words which can even remotely be construed to hold that the legislature ever considered placing such a heavy responsibility upon the administrative department concerned.

In my view the trustee stands *vis-à-vis* the Registrar in the shoes of the cestui que trust who in the event of suffering loss or damage has recourse not to the Government or the Registrar but against the trustee.

The trustee is the legal owner, whoever the beneficial owners may be, is the only person entitled to transfer the property and cannot be regarded as an encumbrancer.

It follows then that if the conveyance or other transfer is presented to the Registrar in proper form and duly attested, the Registrar must accept and register the instrument and the new title thereby created.

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