[HIGH COURT OF AUSTRALIA.]

BRICKWOOD . . . . . APPELLANT;

AND

YOUNG AND OTHERS, AND THE MINISTER FOR PUBLIC WORKS OF NEW SOUTH WALES . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *March* 20, 21. *April* 14.

Griffith C.J. Barton and O'Connor JJ.

Resumption of land—Distribution of compensation money—Tenancy in common—Improvements effected by predecessor in title of one of tenants in common—Equitable right of such tenant to compensation for improvements on distribution—Defensive equity—Effect when Court not administering whole fund—Public Works Act (N.S.W.), (No. 26 of 1900), secs. 39, 47, 48.

The equitable right of a tenant in common of real estate, who has made permanent improvements upon it while in sole occupation, to be compensated for his expenditure to the extent to which the value of the land has been increased thereby, is one which attaches to the land and passes with it to a purchaser, but is enforceable only as a defensive equity, in the event of a partition, or a distribution, amongst the tenants in common, by the Court of Equity, of the proceeds of sale of the land.

The fact that the tenant in common has already received without objection a portion of the fund does not necessarily prevent the application of this principle.

The appellant was for several years in exclusive possession and enjoyment of the rents and profits of certain land, of which he believed himself to have purchased the fee simple, whereas in fact he had acquired only an estate *pur autre vie* of the entirety, with an equitable tenancy in common with certain of the respondents in remainder, his share being one fourth. Permanent improvements had been erected upon the land by one of the appellant's predecessors in title. After the death of the *cestui qui vie* the land was resumed by the Minister for Public Works, under the *Public Works Act* (N.S.W.) 1900. The Minister paid the appellant one fourth of the compensation moneys, and, at the request of the appellant, paid the balance into Court. The appellant

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accepted the amount paid to him, without prejudice to any claim he might have in respect of the balance.

Held, that, on a petition by the other tenants in common for payment out, under sec. 48 of the *Public Works Act* (N.S.W.) 1900, the appellant was in the position of a defendant, and was entitled to assert an equitable lien upon the fund in Court to an amount equal to three fourths of the increase in the value of the land attributable to the improvements, but that, before being allowed the benefit of this equity, he should be required to account for the rents and profits which he had received while in exclusive possession after the death of the *cestui qui vie*, in order that the amount to which the other tenants were entitled in respect of them might be set off against the amount due to him in respect of the improvements.

Decision of *A. H. Simpson* C.J. in Equity, (1904) 4 S.R. (N.S.W.), 743, on this point reversed.

APPEAL from a judgment of *A. H. Simpson* C.J. in Equity of New South Wales.

The following statement of the facts is taken from the judgment of *Griffith* C.J.:—

This appeal relates to the distribution of a sum of money paid into Court by the Minister for Public Works, representing the value of land resumed by the Crown for public purposes. On 18th May, 1869, the appellant's predecessor in title, one Gannon, purchased the land in question, and took a conveyance of it from six persons, Elizabeth Young and her five children, who were all of full age. Elizabeth Young was tenant for life of the land under her deceased husband's will, and it appears to have been assumed that the other five vendors were tenants in common in remainder. In fact, however, they had only executory interests, the actual trusts of the will having been for the use of the wife for life, and after her death for such of the testator's children as should be living at her decease, but the testator directed that, in case any of them should die in the lifetime of his wife leaving issue, the share that would have belonged to any deceased child should go to his children. The fee was vested in the trustees of the will, so that the interests were equitable interests. One of the children died unmarried. Three of the others died in the lifetime of the tenant for life, leaving issue, who consequently took the shares of their deceased parents. One of the children survived the tenant for life, who died in 1890.

The result was that the deed of 18th May, 1869, only operated as a conveyance of the life estate and of the undivided fourth share in remainder of the son who survived her. Upon her death the appellant, who had by the effect of several mesne conveyances acquired Gannon's title, became an equitable tenant in common with the respondents other than the Minister, who are the children of those children of the testator who predeceased the tenant for life, his share being one fourth.

One of his predecessors in title, one Porter, had in 1872 erected houses upon the land, by which it was alleged that its value was considerably increased. The appellant continued in possession of the land and in receipt of the rents and profits until the resumption.

When the amount of compensation had been settled, he, in the first instance, claimed the whole of the money, alleging that the title of the respondents other than the Minister was barred by adverse possession. This fact being disputed by these respondents, the appellant asked for and received payment of the one fourth to which he was admittedly entitled, and asked that the other three fourths might be paid into Court under the *Public Works Act* (N.S.W.) 1900, which was done.

A petition was then presented by the respondents, other than the Minister for Public Works, for payment of the fund to them. The appellant first claimed the whole fund on the ground above stated, but failed to establish his claim. He then claimed to be entitled to be recouped out of the fund to an amount equal to three-fourths of that by which the purchase money was increased by reason of the improvements by his predecessor in title.

A. H. Simpson C.J. in Equity rejected this claim on the grounds, (1) that there was no instance in which the Court had given effect to the equity relied on when it was not administering the whole fund, (2) that the appellant had not himself made the expenditure of which he claimed the benefit: *In re Young*; *Brickwood* v. *Young* (1). He thought that the appellant's predecessor in title, Porter, who actually made the expenditure, had received the benefit of it on his sale to his successor in title; that

(1) (1904), 4 S.R. (N.S.W.), 743.

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he could not keep the whole purchase money as owner in fee and at the same time set up an equity as tenant in common; that, if he claimed as tenant in common, he must bring into account the purchase money he received; and that as the appellant could not do this, his claim must fail.

From this decision the present appeal was brought.

Dr. Cullen K.C. (with him *Harvey*), for the appellant. The appellant had an equity to so much of the money in Court as represents three fourths of the increased price due to the improvements, and is entitled to an inquiry as to what is the amount of that increase. If Porter, the person who made the improvements, had not parted with the land before resumption he would have been entitled to set up this equity, and the appellant, having acquired by purchase, is entitled to stand in Porter's shoes. He is in the same position as if he had purchased direct from Porter. Upon the sale of the property the purchaser must be taken to have paid for the value added to the land by the improvements. The payment of the purchase money, so far from being a reason for holding that the equity was extinguished, is the fact upon which the argument for its continuance is based, for it results in the appellant being the person who has actually paid for the improvements. The principles applicable to proceedings for payment out are the same as those applied in suits for partition. The money paid direct to the appellant was admittedly his, and his acceptance of it was without prejudice to his claim against the balance. The equity is a lien on the estate itself: *Story's Equity Jurisprudence*, sec. 1234, *et seq.* It is not to be confined to suits for partition, it is to be applied to any case in which property has been sold by order of the Court, or the proceeds of its sale are being distributed by the Court: *Leigh* v. *Dickeson* (1). The person who claims the equity need not be the person who actually expended the money. Where the owner of a moiety of property, who was also tenant for life of the whole, borrowed money upon the security of the estate, and expended it in permanent improvements, it was held, in an action for partition after her death, that the present value of the improvements must be

(1) 15 Q.B.D., 60.

borne rateably by the owners of both moieties: *In re Jones*; *Farrington* v. *Forrester* (1). There the representative after death made the claim. [He referred also to *Teasdale* v. *Sanderson* (2).] It is a right attaching to the land, and passes with the land. The present value of improvements due to expenditure by a tenant in common in fee of one half, and tenant for life of the other half, of real estate was allowed in distributing the surplus proceeds of sale by a paramount mortgagee among the persons entitled to the equity of redemption, one of whom was the heiress-at-law of the tenant who made the improvements: *In re Cook's Mortgage*; *Lawledge* v. *Tyndall* (3). There is no reason why the equity should not be set up equally effectively in a proceeding for distribution of money paid into Court as compensation for resumption. By sec. 39 of the *Public Works Act* (N.S.W.) 1900, all claims in respect of the land are converted upon resumption into claims for compensation. The rule was applied in the distribution of the proceeds of a sale under an administration: *Boulter* v. *Boulter* (4). The equity is analogous to that of a person who builds upon land belonging to another, in the belief that the land is his own; this was held to be assignable: *Hamilton* v. *Geraghty* (5). The fact that part of the money has been paid to the appellant does not prevent his setting up the equity. The only sum as to which there is any dispute is in Court. If the other tenants in common have any claim against the appellant in respect of the rents and profits received by him while in exclusive possession, that is a matter for inquiry, which the Court of Equity has power to order (sec. 54), and the amount to which they prove they are entitled can be set off against the appellant's present claim. Under the present order the appellant loses the benefit of his capital expenditure, and remains liable in an action at common law for rent which has been increased by that expenditure.

The order as to costs should be reversed, and the appellant should be allowed the costs of this appeal.

Knox (with him *Rich*), for the respondents other than the Minister. In the petition for payment out, the petitioners were not

(1) (1893) 2 Ch., 461.
(2) 33 Beav., 534.
(3) (1896) 1 Ch., 923.
(4) 19 N.S.W. L.R. (E), 135.
(5) (1901) 1 S.R. (N.S.W.) (E.), 81.

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invoking the Court as a Court of Equity, but as the machine prescribed by the Act (secs. 47, 48), and in such cases the Court has no power to apply principles of equity. The same steps would have had to be taken by the claimants if all the interests had been legal. It is an accident that they are all equitable in this case.

But, if the principles of equity are to be applied, the appellant has by his own act deprived himself of the right to set up this particular equity. He has accepted his share of the compensation money, and so severed the tenancy, and put it out of the power of the Court to compel him to do equity, if it should turn out on the inquiry that the balance is against him. He should have asserted this right before taking any of the money from the Crown. It is an equity that may be set up only in a suit for partition. The appellant is not asking for partition; he merely claims a certain portion of a fund, not the share of a tenant in common. If the whole fund had been paid into Court, the Court on partition could have done complete justice to all parties. There is no case in which any such adjustment as that now claimed has been made after partition has been effected. Moreover this is purely a defensive equity, and therefore the appellant, who is in the position of a plaintiff, cannot set it up.

[O'CONNOR J.—Has not the Court under sec. 54 power to consider every kind of claim or interest that may be set up in respect of the fund?]

That might be if the whole fund were in Court. The appellant should have offered to bring the sum which he had received into Court; then the proceedings could fairly have been concluded on the principles applicable to a partition suit.

[GRIFFITH C.J.—Why should the act of the Minister in paying the money into Court, *res inter alios acta*, be allowed to affect any right which the appellant had to this extra sum?]

It was not *res inter alios*, but his own act; in accepting one fourth he severed the tenancy in common, and therefore he cannot complain. But the appellant never was entitled to this equity. It is not a right which passes with the land. It only benefits the person who made the improvements, and a personal equity does not pass on conveyance. Porter had the equity and never conveyed it.

[He referred to *Leslie* v. *French* (1); *Ex parte Young* (2); *Ex parte Harrison* (3); *Kay* v. *Johnston* (4); *Fisher's Law of Mortgage*, 5th ed., p. 259.] In *In re Cook's Mortgage*; *Lawledge* v. *Tyndall* (5), the point was not argued. There is no analogy to the right of a person building on land which he believes to be his own while the real owner lies by. That is based upon estoppel; there can be no estoppel here because there is no lying by. Even if there were a lien, it is at an end, now that the appellant has received his one fourth share: *Lingen* v. *Simpson* (6); *Fisher's Law of Mortgage*, 5th ed., p. 256. But there is no lien: *Swan* v. *Swan* (7). When Porter made the improvements he was not a tenant in common. His estate was *pur autre vie*, with a remainder in fee in the entirety, liable to be defeated in the contingency of any of the persons who conveyed to him dying before the life tenant and leaving issue. There was no evidence that the buildings were erected in the belief of ownership. Only the bare conveyance was in evidence. The appellant therefore bought land with a bad title, there was no deception, and he must suffer. He had the benefit of the improvements while he held the exclusive possession, he has been paid his one fourth share of the property held in common, and is entitled to nothing more. [He referred to *Ridgway* v. *Roberts* (8); *Floyer* v. *Bankes* (9).]

If the appellant has a good claim against the money in Court, he should be compelled to bring in also the amount he has already received, as a condition precedent to obtaining his relief. The other tenants in common have a claim against him for rents and profits which he received while in possession, and there may be a balance against him. The appellant has never offered to bring the money into Court, nor to account for the rents and profits, and is therefore to blame for the refusal of the Equity Court to grant him relief.

Street (with him *Manghan*), for the respondent, the Minister for Public Works, on the question of costs.

(1) 23 Ch. D., 552.
(2) 2 V. & B., 242.
(3) 2 Rose, 76.
(4) 21 Beav., 536.
(5) (1896) 1 Ch., 923.
(6) 1 Sim. and St., 600.
(7) 8 Price, 518; 22 R.R., 770.
(8) 4 Hare, 106.
(9) L.R., 8 Eq., 115.

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Dr. Cullen K.C., in reply. The right claimed is based upon a principle of equity upon which the Court acts, independently of any question of pleading or of offer by the parties. By sec. 39 of the *Public Works Act* 1900, every interest is converted upon resumption into a claim for compensation, and when money has been paid into Court, the Court, in distributing it, should make every inquiry which the constructing authority would have had to make in so doing : *Clissold* v. *Perry* (1).

This is not a defensive equity only; it may be set up by a plaintiff as well as by a defendant : *In re Jones*; *Farrington* v. *Forrester* (2). It is not restricted to partition suits, but may be asserted in all cases where a tenancy in common is being wound up : *Pascoe* v. *Swan* (3). There was no determination of the co-tenancy here before the petition. That can only be effected by decree or by agreement. The acceptance of the one fourth by the appellant, under the circumstances, did not amount to such an agreement.

The assignability of the right does not depend upon whether it is a lien or not. It is an interest in the land. [He referred to *Seton on Judgments and Orders*, 6th ed., vol. II., p. 1860; *Williams* v. *Williams* (4).]

The other co-tenants have no right to insist upon the appellant bringing into Court the amount already received. It was paid without prejudice to the appellant's rights as to the balance.

Cur. adv. vult.

April 14th.

GRIFFITH C.J.—[Having referred to the facts as already set out, His Honor continued :]

The doctrine relied upon by the appellant is of comparatively recent development. The earliest reported case is *Swan* v. *Swan* (5); and as late as 1883 so learned a Judge as *Fry* J. expressed doubts as to the validity of the doctrine. In *Leigh* v. *Dickeson* (6), however, decided in the following year, it is asserted by *Cotton* L.J. as follows (7): "No remedy exists for money expended

(1) 1 C.L.R., 363, at p. 376.
(2) (1893) 2 Ch., 461.
(3) 27 Beav., 508.
(4) 81 L.T., N.S., 163; 68 L.J., Ch., 528.
(5) 8 Price, 518; 22 R.R., 770.
(6) 15 Q.B.D., 60.
(7) 15 Q.B.D., 60, at p. 67.

in repairs by one tenant in common, so long as the property is enjoyed in common; but in a suit for partition it is usual to have an inquiry as to those expenses of which nothing could be recovered so long as the parties enjoyed their property in common; when it is desired to put an end to that state of things, it is then necessary to consider what has been expended in improvements or repairs: the property held in common has been increased in value by the improvements and repairs; and whether the property is divided or sold by the decree of the Court, one party cannot take the increase in value, without making an allowance for what has been expended in order to obtain that increased value. . . . . There is, therefore, a mode by which money expended by one tenant in common for repairs can be recovered, but the procedure is confined to suits for partition." The application of the doctrine was extended in *In re Jones*; *Farrington* v. *Forrester* (1) to a case of an expenditure by a tenant for life in entirety, who was also owner in remainder of a moiety in fee; and in *In re Cook's Mortgage*; *Lawledge* v. *Tyndall* (2), to a case of division of funds in an administration suit. In *Boulter* v. *Boulter* (3), the same learned Judge from whose decision this appeal is brought, held that the rule applies in suits for administration as well as in suits for partition, and when the improvements are made while the estate of the tenant in common is only an estate in remainder, as well as when his estate is an estate in possession. In the present case the person who made the improvements was tenant *pur autre vie* of the whole, and also tenant in remainder of an undivided fourth. It appears from the case of *Leigh* v. *Dickeson* (4) that the equity in question is not one which can be asserted actively, except in a suit for partition or administration, in which all the parties are equally regarded as actors, but is what was called in argument a defensive equity. And this point was relied on by Mr. Knox for the respondents, who contended that the appellant, having accepted his own fourth of the purchase money payable on the resumption, must be considered as an actor in respect of the other three fourths paid into Court. He also contended that this payment to the appellant operated as a partition

(1) (1893) 2 Ch., 461.
(2) (1896) 1 Ch., 923.
(3) 19 N.S.W. L.R. (E.), 135.
(4) 15 Q.B.D., 60.

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of the land and an allotment to the appellant of his one fourth share, so that the fund in Court represents only the other three fourths to which he has no title.

With regard to the second ground of the learned Judge's decision, I cannot regard the equitable right of a tenant in common to compensation as against his co-tenants as merely personal to the individual tenant who effects the improvements. The principle appears to be that the making of permanent improvements by one tenant in common in sole occupation gives rise to an equity attaching to the land, analogous to an equitable charge created by the owners for the time being, but enforceable only in the event of partition or a distribution of the value of the land amongst the tenants in common. There can be no reason why such a charge should not run with the land in favour of purchasers from the person originally entitled to it. It is clearly a right incidental to the possession of the land, and cannot be asserted until that possession is disturbed. It appears to me, therefore, that the equity passes with the land, and may be asserted by the possessor for the time being, who, I think, may claim the benefit of the improvements effected by his predecessor in title. It is true that Porter, who made the improvements, has been paid for them, but not by the respondents. The purchase money which the appellant paid for the land *primâ facie* included the enhanced value, and I can see no reason why he should not stand in the place of Porter, whose rights he acquired for valuable consideration. This view was acted on without objection in *In re Jones*; *Farrington* v. *Forrester* (1), where the claim to compensation was successfully asserted by the heir-at-law of the person who made the improvements. And in *Williams* v. *Williams* (2), mentioned in *Seton's Judgments and Orders*, 6th ed., Vol. II., p. 1860, the right of the tenant in common in possession to take advantage of the expenditure of his predecessors in title was allowed, apparently as a matter of course. In my opinion this objection fails. With regard to the other objection, regard must be had to the substance rather than to the form of the matter. When the land was resumed, the appellant was in possession as tenant in common, and the respondents could only have asserted their title against

(1) (1893) 2 Ch., 461. (2) 81 L.T., N.S., 163; 68 L.J. Ch., 528.

him by a suit for partition, in which he could have set up his equity to compensation for the improvements. Upon the resumption the land was represented by the purchase money. By sec. 56 of the *Public Works Act* the appellant, as the person in possession of the land, is to be deemed to have been lawfully entitled to the land until the contrary is shown. It is the respondents, therefore, who are in the position of actors, asserting a claim to that which *primâ facie* is the property of the appellant. The equity set up by him is, therefore, a "defensive" equity, namely, to claim compensation before effect is given to the better title of the respondents. Having regard to the principle of the doctrine invoked by the appellant, it seems quite immaterial that he has already received without objection part of the property to the whole of which he is *primâ facie* entitled. The parties asserting the adverse claim are in either case equally bound to do equity. Nor, in my judgment, can the payment of one fourth of the purchase money to the appellant affect his right to set up this equity. No one disputed his right to receive it, and his solicitor's letter to the Crown Solicitor of 13th October, 1903, which asked for payment of the one fourth, and contained a request that the other three fourths should be paid into Court, added "upon which I would made application for payment out." It is clear that under these circumstances no abandonment of the appellant's right to the three fourths or any part of it can be inferred, any more than if, on an application for payment of part of a fund in Court to a person admittedly entitled to it, it were ordered to be paid to him without prejudice to his right to claim the residue, he could be said to have abandoned his claim to the residue.

For these reasons it appears to me, both on principle and authority, that the appellant, who is defending his *primâ facie* claim to the fund representing the three fourths, is entitled to assert his lien upon it for the value of the improvements. It was, however, contended that he is debarred from doing so, because it may turn out that he is indebted to the respondents, in respect of three fourths of the rents and profits received by him since the death of the tenant for life, in an amount greater than that which he is entitled to claim under his lien, and that in that event the respondents ought to be in a position to take the difference out of

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his fourth share which he has already received. The indebtedness is not disputed. The claim to recover from him three fourths of the rents and profits existed before the resumption, and is not affected by it. The respondents had no lien for it upon the land, and the payment into Court of the three fourths did not give them any lien upon the sum paid in, and, *a fortiori*, gave them none upon the other fourth. No doubt the Court may, and I think ought to, impose as a condition of allowing the appellant to assert his equity in respect of the improvements that he shall account for the rents and profits so far as they may exhaust the amount of his charge: see *Teasdale* v. *Sanderson* (1). I doubt whether in this proceeding any more onerous terms could be imposed upon him without his consent; but, as he is willing to submit to pay any amount that may be found due from him upon a balance of accounts, it is not necessary to express any opinion on the point.

In my opinion, therefore, the learned Judge ought to have directed an account of the money expended by the appellant or his predecessors in title in permanent improvements on the land since the deed of the 18th May, 1869, and an inquiry as to the extent to which the compensation money paid on resumption was increased by such expenditure, and there should have been a declaration that the appellant is entitled to a lien upon the fund in Court for an amount equal to three fourths of the amount of such increase. There should then have been directed an inquiry, prefixed by the appellant's submission, as to what sum is due by the appellant to the respondents, in respect of three fourths of the rents and profits of the land received by him since the death of the tenant for life, with a direction that the amount so found due shall be set off against the amount found due to him in respect of the improvements, and that the resulting balance, if in his favour, shall be paid to him out of the fund in Court, and, if against him, be paid by him into Court in augmentation of the fund before any claim is made by him to receive costs out of the fund. The order for payment of costs by the appellant must be omitted, and an order substituted for payment of his costs and those of the Minister occasioned by adverse litigation between adverse claimants out of the fund. The order appealed from must be

(1) 33 Beav., 534.

varied accordingly. The appellant's costs should be paid out of the fund.

BARTON J. I have had the opportunity of reading the judgment which has just been delivered by the Chief Justice, and I entirely concur in it.

O'CONNOR J. [Having shortly stated the facts His Honor proceeded.] It was admitted by the respondents' counsel that if the appellant had during his possession of the land made the improvements, and if the one fourth share of the compensation money had not been paid over to him, he would have been entitled to be recouped to the extent claimed, less certain deductions which I shall mention later on; but they contended that under the circumstances existing there were two fatal obstacles in his way—the first, that the moneys disbursed for improvements had been expended not by him but by his predecessor in title, who had been reimbursed for that expenditure in the purchase money he had received. The second, that the appellant's receipt of the one fourth of the compensation money was a severing of the tenancy in common which disentitled him from making this claim in the distribution of the fund.

As to the first objection, I entirely agree with my learned brother the Chief Justice in his statement of the principles to be applied in such circumstances as this, namely, that the making of permanent improvements by one tenant in common in sole occupation gives rise to an equity attaching to the land analogous to an equitable charge created by the owners for the time being, awaiting enforcement pending partition or distribution of the value of the land as against the tenants in common. If the resumption had taken place during the possession of the person, who actually expended money on the improvements, the respondents would have been bound to recoup him. But in the purchase money which the appellant paid for his interest a sum representing that expenditure must have been included. It is difficult to see on what principle the respondents are entitled on distribution to get the benefit of that expenditure without any obligation to reimburse anyone. As to the other objection it seems to me that a complete

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answer is to be found in the provisions of the *Public Works Act* 1900. Under secs. 36, 37, and 39 the notification of resumption vested in the Minister the estate and interest of every person interested, and converted that estate and interest into a claim for compensation to the extent of the interest.

At the date of the resumption the appellant was tenant in common with the respondents in the land resumed, and his interest in the compensation money was two-fold—first his fourth interest in whole sum as tenant in common, and second, the right to be reimbursed out of the respondents' share to the extent of three fourths of the value added to the compensation by the permanent improvements. If the whole compensation money had been paid into the Equity Court there can be no doubt that the Court would have been bound, apart from other objections, to give effect to both of those rights. I do not see how the appellant can lose one of them—the right to reimbursement out of that portion of the compensation money—which belongs to the respondents, because before the money had been paid into Court he accepted, without prejudice to his rights, that portion of the compensation money which admittedly belonged to him. In other words the rights of all parties interested are fixed and stereotyped as at the date of resumption, and the compensation money must be distributed in accordance with those rights subject to proper allowances for part payments if any made before final adjustment. In my view, therefore, the appellant was entitled to make his claim for reimbursement, notwithstanding the fact that the improvements were made by his predecessor in title, and that he was paid his fourth share of the compensation before the fund was paid into Court. I agree with the Chief Justice that the principle laid down by Lord Justice *Cotton* in *Leigh* v. *Dickeson* (1), and which has been applied in the distribution of the fund in partitions and administration, ought to be applied to the case of a distribution of compensation for land resumed under the *Public Works Act*. It is true that the principle applied as what is called a defensive equity, but it is properly raised here. The respondents in this appeal are the moving parties in this proceeding for distributing the fund. The appellant, who came into Court to deny the respondents' right to

(1) 15 Q.B.D., 60, at p. 67.

any of the fund, is at least entitled to set up this defensive equity as to portion of it. He is entitled to say: "Although I have no right to more than the one fourth of the compensation money, which I have received, you are not entitled to take the enhancement of your compensation money brought about by my expenditure without reimbursing me." In order to effectually exercise this right the appellant is entitled to the inquiry he asks, and I concur with the Chief Justice that it should be on the lines indicated in his judgment, proper provision being made for the inquiry as to appellant's indebtedness to the respondents in respect of rents and profits. I do not think that the appellant is bound to bring his one fourth share of the fund into Court as a condition precedent to his right to the inquiry claimed by him. But, as it might turn out on the inquiry that the amount of rents and profits for which the appellant is accountable to the respondents exceeds the amount of reimbursement for improvements, thus turning the balance against him, I think it should be made a condition of his right to get any costs out of the fund that he bring into Court the amount of the balance, if any, found against him.

Appeal allowed. Order of the Chief Judge in Equity varied accordingly. Costs of the appellant to be paid out of the fund.

Solicitor for the appellant, *A. W. E. Weaver.*

Solicitor for respondent Minister, *The Crown Solicitor of New South Wales.*

Solicitors for respondents other than the Minister, *Perkins & Fosbery.*

C. A. W.