[HIGH COURT OF AUSTRALIA.]

THE REGISTRAR OF TITLES . . . APPELLANT;
DEFENDANT,

AND

CHARLES SPENCER . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1909.

PERTH, *Oct.* 21, 22, *Nov.* 3.

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

Transfer of Land Act 1893 (*Western Australia*), *sec.* 207—*Wrongful registration—Life Tenant—Remainderman—Measure of damages—Trade fixtures.*

Between the executor of a tenant for life and a remainderman, trade fixtures placed on the land by the tenant for life are *primâ facie* removable by his executor.

In re Hulse, (1905) 1 Ch., 406, followed.

This rule applied in estimating damages under sec. 207 of the *Transfer of Land Act* 1893 (Western Australia) in a case where, by the wrongful issue of a certificate by the Registrar of Titles, a purchaser from a tenant for life was registered as owner in fee simple and afterwards placed trade fixtures on the land. In such a case the measure of damages is full compensation for the loss actually sustained. The person deprived of the land is to be put in the same position, so far as money will do it, as if the wrongful act had not been done, but not in a better position.

Decision of the Supreme Court of Western Australia: *Spencer* v. *Registrar of Titles*, 9 W.A.L.R., 25, reversed.

APPEAL from the Full Court of Western Australia.

THE facts are stated in the judgments hereunder.

Pilkington K.C. (with him *Northmore*), for the appellant.

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This case has been before the Privy Council on two occasions, viz., *Spencer* v. *Registrar of Titles* (1), when the plaintiff's estate was defined, and *Spencer* v. *Registrar of Titles* (2), when it was decided that, in measuring the damages, the value of the buildings on the land was to be included. The question for decision now is whether the value of the trade fixtures is to be taken into account. The test is:—What would have been the plaintiff's position if the wrongful issue of the certificate had never taken place? He was being deprived of his rights as remainderman, and as such he would not have been entitled to the trade fixtures erected by the tenant for life: *In re Hulse* (3). On that reasoning he would not be entitled to the trade fixtures erected by any person holding under the tenant for life. [He also referred to *Quinn* v. *Leatham* (4).]

Haynes K.C., *Moss* K.C., and *Alcock*, for the respondent. The test is not what has been suggested by counsel for the appellant, but what was the value of the block of land with the buildings on it on 25th July 1903, the date upon which the plaintiff became entitled: *Spencer* v. *Registrar of Titles* (2). The maxim *Quicquid plantatur solo solo cedit* applies unless some exceptional rule takes the case out of its range, as for example in *In re Hulse* (3); but where the fixtures are placed on the land by an owner in fee simple, as they were here, then the maxim does apply. The test is whether the tenant meant the machinery to remain fixed to the soil, and undoubtedly he did in this case because he was an owner in fee. [They referred to *Mather* v. *Fraser* (5); *Leigh* v. *Taylor* (6); *In re Whaley* (7); *Dudley (Ld.)* v. *Warde* (8); *Lawton* v. *Lawton* (9); *Wake* v. *Hall* (10); notes to *Elwes* v. *Maw* (11); *Crossley Brothers Ltd.* v. *Lee* (12); *Ex parte Astbury*; *Ex parte Lloyd's Banking Co.*; *In re Richards* (13).

Northmore, in reply. In this case the evidence shows that all

(1) 1906 A.C., 503.
(2) 1908 A.C., 235.
(3) (1905) 1 Ch., 406.
(4) 1901 A.C., 495.
(5) 2 Kay & J., 536.
(6) (1902) A.C., 157.
(7) (1908) 1 Ch., 615.
(8) Amb., 113.
(9) 3 Atk., 13.
(10) 8 App. Cas., 195.
(11) Sm. L.C., 11th ed., vol. II., at p. 220.
(12) (1908) 1 K.B., 86.
(13) L.R. 4 Ch., 86, 630.

the machinery was capable of being moved, and in fact machinery was specially erected on the building for the purpose of shifting. boilers and dynamos: *Leigh* v. *Taylor* (1).

[O'CONNOR J. referred to *Fisher* v. *Dixon* (2); *Hobson* v *Gorringe* (3).]

The argument of the respondent put forward to meet the case of *In re Hulse* (4) on the ground of intention fails because the persons here who put the trade fixtures on the land certainly did not intend that they should become the property of anyone but themselves. As to the form the order should take, see *Best* v. *Osborne* (5); *Powell* v. *Vickers, Sons & Maxim Ltd.* (6).

Cur. adv. vult.

November 3.

GRIFFITH C.J. Sec. 207 of the *Transfer of Land Act* 1893 (Western Australia) provides that any person who shall have sustained any loss or damage in or by the exercise by the Commissioner of Titles of the powers conferred on him by the *Transfer of Land Act* 1874 or that Act may bring an action against the Registrar of Titles as nominal defendant for recovery of damages, and may recover the damages awarded out of the Assurance Fund. The respondent brought this action claiming to be such person. The relevant facts upon which his claim is based lie within a very small compass. By a marriage settlement dated 6th October 1846, made on the marriage of Henry Spencer and Sarah Mayo, a parcel of land in the city of Perth was conveyed to trustees upon trusts which, as interpreted by the Judicial Committee of the Privy Council (*Spencer* v. *Registrar of Titles* (7)), and in the events which happened, were for Henry Spencer for life with remainder to the plaintiff in fee.

In July 1848 a deed of conveyance was executed, to which Henry Spencer, the tenant for life, was a party, and which purported to convey the land to one Farrelly in fee, but it was held by the Judicial Committee that this conveyance was effectual only as to Spencer's life estate.

(1) (1902) A.C., 157.
(2) 12 Cl. & F., 312.
(3) (1897) 1 Ch., 182.
(4) (1905) 1 Ch., 406.
(5) 12 T.L.R., 419.
(6) (1907) 1 K.B., 71.
(7) (1906) A.C., 503.

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In 1875 the land was brought under the provisions of the *Transfer of Land Act* on the application of Farrelly, and a certificate of title for an estate in fee simple was issued to him. In point of law, the certificate ought to have been for Spencer's life estate only, and such a certificate might have been issued under the Act. The tenant for life died on 25th June 1903, and the Judicial Committe held (S.C.) that the respondent's cause of action under sec. 207 of the *Land Transfer Act* accrued on that day. In a subsequent appeal between the same parties (1) the Judicial Committee held that the measure of damages was the value of the land with the buildings thereon on the 25th day of June 1903.

The case then came on for assessment of damages before *Burnside* J., £12,000 having in the meantime been paid into Court by the defendant.

It appeared in evidence that at the last mentioned date the land was owned and occupied by persons deriving title through Farrelly, one portion being used as an electric light station, and the other portion as an aerated water factory. On both portions there were trade fixtures of considerable value. The plaintiff claimed to be entitled under the decision of the Judicial Committee to the value of these fixtures. The defendant contended that the plaintiff was not entitled to the value of any trade fixtures which, as between the executor of a tenant for life and a remainderman, would be removable by the former. *Burnside* J. accepted this contention, and assessed the value of the land with the buildings and such fixtures as could not be removed without material injury to the freehold at £10,688, and gave judgment accordingly for the amount paid into Court. He also assessed the value of the land, buildings and fixtures together at £37,543.

On appeal to the Full Court that Court (*McMillan* J. dissenting) directed judgment to be entered for the latter sum, less the £12,000 paid into Court (2). The defendant now appeals from this decision.

The plaintiff's rights, which are created by sec. 207 of the *Transfer of Land Act*, are such as that section confers—no less

(1) (1908) A.C., 235, at p. 240 (2) 9 W.A.L.R., 25.

and no more. He must show that he has sustained "loss or damage" by reason of the issue of the certificate of title, and if he establishes that position he is entitled to recover "damages." What damages? There is only one possible answer to the question, namely, damages commensurate with the loss he has sustained, that is to say, he is to be put in the same position, so far as money can do it, as if the wrongful act complained of had not been done. In other words, he is, just as in a case of fraud in which damage is of the essence of the action, entited to full compensation. But he is not entitled to more. If he received more, he would not only be indemnified against the loss which he has sustained by reason of the wrongful act, but would profit by it.

What then would have been the plaintiff's position if the certificate of title issued to Farrelly had not been for an estate in fee simple but for an estate for Spencer's life only? On 25th June 1903 he would have been entitled to take possession of the land with such accretions to it then existing as would pass to a remainderman upon the termination of a life estate. These would, of course, include all buildings then upon the land. And this was, as I understand the decision of the Judical Committee in the second appeal, the *ratio decidendi*. The Board did not, it is true, formally refer to the rule *Quicquid plantatur solo solo cedit*, but, as it seems to me, assumed that it would be present to the mind of any person hearing or reading that judgment. This appears from their words, "the loss or damage must be measured by the value of the land in the state in which it was at the time when he was to be taken to have been deprived of it; that is, of course, with the buildings then upon it," and again, "the buildings which had been erected upon it . . . and which, in law, belong to it." (1).

No question as to trade fixtures was mooted before the Board, and it would not be right to treat their judgment as having decided anything with reference to them.

It was not disputed in argument before this Court that, as between the executor of a tenant for life and a remainderman, trade fixtures put on the land by the tenant for life are *primâ*

(1) (1908) A.C., 235, at p. 240.

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facie removable by his executor, and the case of *In re Hulse* (1) was accepted as containing a correct statement of the law on the subject. But it was contended that the foundation of the right of the executor of the tenant for life to remove trade fixtures is the intention of the tenant for life that the fixtures shall not become part of the freehold, and that this foundation is absent in the present case, since the persons by whom the fixtures in question were put on the land, being owners in fee, could not have had any such intention; and, further, that in the case of fixtures put on the land by absolute owners, no question of intention can arise, for which latter position the case of *Mather* v. *Fraser* (2) was relied upon, and this view was accepted by the majority of the Full Court. If intention is material, the persons by whom the fixtures were put on the land certainly did not intend that they should become the property of any one but themselves, and they were in fact attached in such a manner as to be easily removed.

In an action for trespass against a wrongdoer who has taken away or destroyed trade fixtures the point of intention might perhaps be material, but in the present action, which is one for compensation for actual loss, I think it is not material to inquire whether in an action against other persons (under circumstances which did not, and indeed could not, arise) the plaintiff could have relied upon it.

It happens that in the present case the fixtures were put on the land by freeholders, but, so far as the actual loss sustained by the plaintiff is concerned, this is a mere accident, and it would be manifestly unjust that the plaintiff should profit by it, with the result that he would not only receive compensation for what he actually lost, but would also obtain a further sum of £25,000 which he would not have received if the wrongful act complained of had not been done; or, in other words, that he should be compensated for the loss of what was never his, and in all human probability never would have been his. Such a result cannot by any stretch of language be called compensation. Such damages are, from another point of view, too remote.

It is suggested that this result also follows in a lesser degree

(1) (1905) 1 Ch., 406.

(2) 1 Kay & J., 536.

from his receiving the value of the buildings. But that is because buildings put on the land become (with some exceptions not here material) part of the land, whether put up by a tenant for life, tenant for years, or a trespasser; whereas trade fixtures put on land by tenants for life or years do not, or may not, become part of the land. And in assessing compensation for actual loss we must, as already said, inquire what would have been the plaintiff's position on the hypothesis that the act complained of had not been done. That hypothesis involves regarding the holders of the land during Spencer's life as hypothetical tenants *pur autre vie*, and the operation of the rule applicable in such a case is the necessary corollary.

In my opinion, therefore, the judgment of *Burnside* J., with which *McMillan* J. agreed, was right and should be restored.

BARTON J. This was an action brought against the Registrar of Titles as nominal defendant under sec. 207 of the *Transfer of Land Act* 1893. The plaintiff, Charles Spencer, now respondent, is trustee under a marriage settlement, under the trusts of which also he has a beneficial interest. The issue of the certificate to Terence Farrelly in fee on 16th December 1875 deprived the plaintiff, as trustee, of a remainder in fee in the land expectant on the life estate of Henry Spencer, who died on 25th June 1903. By sec. 207 any person sustaining loss or damage by the wrongful exercise of the Commissioner's power to issue a certificate, not having himself been party to the application therefor, may "bring an action against the Registrar as nominal defendant for recovery of damages, and may recover the damages awarded, together with the costs of the action, out of the Assurance Fund." In the present action, before pleadings were delivered, there were two appeals to the Privy Council, arising under a special case stated by the parties. In 1906 the Judicial Committee, allowing an appeal, determined that the estate which Farrelly took, under circumstances which are now familiar, was merely an estate for Henry Spencer's life, that the certificate in fee was wrongly issued to him, and that the plaintiff was entitled to claim for deprivation of title (1). In January 1908 the Board, allowing a second

(1) (1906) A.C., 509.

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appeal, varied the judgment of the Supreme Court of this State by declaring that the plaintiff was entitled to the value of the buildings erected on the land up to the death of Henry Spencer, as well as the value of the land itself at the time of his death, when the plaintiff's action first became maintainable. The "loss or damage," their Lordships held, "must be measured by the value of the land in the state in which it was at the time when he was to be taken to have been deprived of it; that is, of course, with the buildings then upon it" (1).

On the 22nd May 1908 the plaintiff filed his statement of claim for damages sustained by the deprivation, and, at the defendant's request, furnished the following particulars:—"The damage suffered by the plaintiff is deprivation of title to Perth Town Lot P. 8, and the plaintiff's claim is for the value thereof together with the buildings erected thereon as on 25th of June 1903."

The loss consequent upon this deprivation is therefore the basis of the plaintiff's action. The question is, what is the extent of his loss—in other words, of what has he been deprived, and what is its value?

Following the judgments of the Privy Council, we must take it that he lost by the issue of the certificate to Farrelly in 1875 the title in remainder to Lot P. 8, and that he must have the equivalent of that title, which was a right to have the land and the buildings thereon as at the date of the death of Henry Spencer.

The question of fixtures, now involved, was never raised before the Judicial Committee, whose judgment therefore does not deal with it.

The plaintiff claims that certain fixtures go with the land, and that he is to have their value—£25,543—in addition to the £12,000 which the Registrar of Titles has paid into Court as the value of the land and the buildings on the land as at the date named. These fixtures, consisting of machinery, were placed upon the land between the date of Farrelly's certificate and the death of the life tenant; as to one part by the lessees of one Crowder, to whom the land had passed by transfers under the certificate to Farrelly, and as to the other part by the Perth Gas Company,

(1) (1908) A.C., 235, at p. 240.

who also derived their title from the certificate. They were attached to the land, as *Burnside* J., who tried the case, has found, for the purposes of the businesses or trades carried on upon the land. The plaintiff claims that the value of these fixtures is included in the value of the land in the state in which it was when Henry Spencer died; and that the present case stands as if the machinery had been affixed by an owner in fee, and that on being so affixed it became part of the land. The defendant rests his answer on the contentions that the plaintiff cannot claim to have anything more than he would have had if the deprivation had not taken place, that in that event he would have had merely the land and the buildings that were on it at the time when Henry Spencer died, being the time when the deprivation took place and the cause of action arose; that he would not have been entitled to claim these fixtures, being a remainderman, as against the executors of the tenant for life; and therefore that he cannot have their value in this action. The case must be considered, the defendant urges, as if the title of the plaintiff had never been disturbed, and hence it is not material to consider it as if the machinery had been affixed by an owner in fee. *Burnside* J. adopted the defendant's view. He assessed at £10,688 the value of the land and buildings, together with such improvements as could not have been removed without material injury to the freehold, and which only, his Honor held, the remainderman could have retained as against the executor of the tenant for life. He therefore gave judgment for the plaintiff for the £12,000 paid into Court, but in case of a successful appeal assessed the value of the trade fixtures at £25,543 beyond the £12,000.

The Full Court of this State has by majority increased the damages by adding the £25,543, *McMillan* J. dissenting. That learned Judge, agreeing with *Burnside* J., held that the plaintiff could not be compensated for that which, had no wrong been done him, would not have been his. He could not be said to have lost it. The judgment of the Board, he considered, must be read in the light of the facts then before them. The majority of the Court, namely, the Chief Justice and *Rooth* J., upheld the contention for the plaintiff substantially expressed above.

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The case of *In re Hulse* (1), cited by Mr. *Pilkington* is, I think, in point. There the tenant for life granted a lease for 21 years of a steam-mill and machinery. The lessee covenanted that he would at the end of his tenancy sell to the lessor all the machinery then on the premises, other than the demised machinery, and the lessor covenanted that he would pay for it. The tenant brought additional machinery into, and affixed it to, the mill. On the expiration of the tenancy the tenant for life bought this machinery under the provisions of the lease. He died, and his executrix claimed the machinery thus bought. *Buckley* J. held that, as between tenant for life and remainderman, chattels affixed to the soil by the tenant for life as accessory to purposes of trade did not become part of the freehold, and might be removed by him. The question must be determined by the intention of the person by whom the chattels were attached; and in the absence of evidence to show that the tenant for life intended to make a present to the remainderman, his executrix was entitled to the machinery. In the course of his judgment, after adverting to the general rule, that where the freeholder affixes chattels and dies, his heir and not his executor takes them, he pointed out that the case is different when the two claimants are not alike persons deriving title under a previous owner of the freehold who attached the chattels, as, for instance, where the question is between tenant and landlord, or between tenant for life and remainderman. He said (2): "The old maxim, *Quicquid plantatur solo solo cedit* was as between tenant and landlord long since relaxed for the benefit of trade. . . . As between tenant for life and remainderman the same principle is applicable. It is advantageous that the tenant for life should be in such a position as to be able to improve the estate for his own enjoyment without being thereby compelled to make a present to the remainderman. The remainderman is not injured if the person deriving title under the tenant for life removes the fixtures, leaving the remainder with the freehold in the same state as it would have been if the chattels had never been affixed."

When Farrelly became entitled to hold for Henry Spencer's life, a certificate for that estate should have been issued to him.

(1) (1905) 1 Ch., 406.

(2) (1905) 1 Ch., 406 at p. 410.

The wrong done was to the plaintiff, not to the tenant for life. Treating the matter therefore as if right had been done, we should deal with fixtures placed on the land after the issue of the certificate as if they had been affixed by a tenant *pour autre vie*. I see no distinction in principle between such a case and that of chattels affixed by a tenant for life. It is equally advantageous that the tenant for the life of another person should be able to improve the estate for his own enjoyment without being thereby compelled to make a present to the remainderman. To measure the plaintiff's loss, then, we must place him in the position that he would have occupied had Farrelly's certificate been for the estate he really purchased. An intention on his part to improve the inheritance for the benefit of the remainderman or to make the fixtures a present to him cannot be inferred. In fact the intention with which they were affixed was not his intention at all. The case is an exception to the maxim, and the removal of the fixtures by the personal representative of the tenant *pour autre vie* on the death of Henry Spencer would have been no injury to the remainderman. They would have been removable by the executor of Farrelly had the proper certificate been issued to him, just as they would have been removable by the executor of the tenant for life had there been no sale to Farrelly and no certificate at all. The case differs entirely from that of the buildings. They necessarily became part of the soil. Fixtures do not always become part of the soil, though they generally do so, and in such a case of trade fixtures as the present, I do not think they become part of it.

The defendant's position does not appear to be shaken by the case of *Mather* v. *Fraser* (1). The plaintiff's counsel relied on it to show that any relaxation of the law in favour of trade fixtures fails to apply where the party who affixes them is himself owner of the fee. Taking the present as in a sense such a case, I do not think it lies in the plaintiff's mouth to urge such a reason for his claim. That would be to deal with the case on a basis inconsistent with the real origin and foundation for his claim. Nor do I think that any reason or authority has been advanced to show that in a case like the present a remainderman is entitled to be

(1) 2 Kay & J., 536.

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placed in the position claimed by the plaintiff, having regard to the clear purpose of sec. 207. In the result the plaintiff will gain the equivalent of all that he has lost, but he will not be awarded the enormous profit which, without warrant as it seems to me, he demands. I agree with the conclusions of *McMillan* J. and with those pronounced at the trial by *Burnside* J., whose judgment, in my opinion, ought to be restored.

O'CONNOR J. Charles Spencer, the respondent, was plaintiff in the Court below in an action under sec. 207 of the *Transfer of Lands Act* 1893, wherein he sought to recover against the Assurance Fund damages for the wrongful issue of a certificate whereby he was deprived of a certain portion of land in Perth, to which he was entitled as transferee and beneficiary under a deed of settlement. It is conceded that a certificate of title was wrongfully issued, that the plaintiff was thereby deprived of the land, and that his right to possession would, but for the certificate wrongfully issued, have accrued in June 1903. The land at that date was occupied as two separate holdings. On one was erected the buildings, plant, and machinery of an electric lighting business, on the other the buildings, plant, and machinery of an aerated water business. On the first appeal to the Privy Council that tribunal held that the plaintiff was entitled to recover damages for loss of the land, fixing the date when the loss was to be computed as in June 1903, and remitted the case to the Supreme Court for the assessment of the damages. The Supreme Court held the measure of damages to be the value of the land at the time mentioned without the buildings thereon. The Privy Council, on appeal, held that the value of the buildings must be included in the measure of damages, and again remitted the case to the Supreme Court. Neither in the Supreme Court nor in the Privy Council was any mention made of plant and machinery being in the buildings, nor was any question raised in reference thereto. In laying down the measure of damages, the Privy Council could not have had that question in mind, and its judgment cannot be taken to involve even indirectly a determination of the matter now in controversy. In

pursuance of the order of the Privy Council, the case came before Mr. Justice *Burnside* for further assessment of damages. Then, for the first time, the respondent claimed that he was entitled not only to the land and buildings, but also to all the plant and machinery thereon. That learned Judge assessed the land, buildings and such portion of the plant as would not be removable under the heading of trade fixtures at £10,688, and the machinery, which would be removable as trade fixtures, at £1,855 in the case of the aerated water business, and at £25,000 in the case of the electric lighting business; but, holding that the plaintiff was entitled only to the value of the land, buildings and unremovable portions of the plant, entered judgment for £12,000, the amount paid into Court by the defendant. The plaintiff appealed to the Full Court. The question then to be determined was whether judgment for the plaintiff should stand in accordance with Mr. Justice *Burnside's* view, or whether it should be increased in accordance with the plaintiff's contention. The Supreme Court by a majority, Mr. Justice *McMillan* dissenting, held that the plaintiff was entitled to have the value of the plant and machinery added to the other damages found. This Court has now to determine whether that decision is right. The guiding consideration in the assessment of these damages is that the plaintiff is entitled to compensation, and no more, for the loss he has sustained by being deprived of his title. He cannot get back the land, because the title has been indefeasably vested in another, but he is to be restored, as far as money can restore him, to the position in which he would have stood, if at the time when the prior life estate was determined in June 1903 his title was still subsisting. In other words, his claim to have the value of the machinery and plant awarded to him as part of the value of the land at that period can be no greater than that of a remainderman to retain as against the executor of the life tenant trade fixtures lawfully placed on the land by the life tenant during his occupancy. The principle on which a remainderman may sometimes be entitled to retain possession of trade fixtures as against the executor of the tenant for life has long been settled. It is unnecessary to go beyond the judgment of Mr.

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Justice *Buckley* in the case of *In re Hulse*(1) for a full and accurate statement of the law on this point. The general maxim is *quicquid plantatur solo solo cedit.* But its operation may be excluded where the things affixed to the soil are such as have come to be known as trade fixtures. If they have been affixed by the tenant for life under circumstances which indicate that they have been so affixed for the better enjoyment of the freehold and for its benefit, the maxim will not be excluded and the fixtures will become part of the soil. But where the circumstances indicate that the things have been affixed for the purposes of trade and for their more convenient and effective use in trade, the maxim will not apply, the things affixed will become trade fixtures removable by the tenant for life, and will not go as part of the soil to the remainderman. Mr. *Haynes* relied on the circumstance that the machinery was in fact affixed to the soil for the benefit of the freehold. But that circumstance is quite irrelevant on this inquiry. The whole basis of the assessment is an assumption. The value of the land in June 1903 is used merely as measure of the amount of compensation on the assumption that the plaintiff as remainderman had at that time title to the land. But the assumption must equally be made that the tenant for life could give no one the right to deal with the land as a holder in fee simple. Under these circumstances the assumption must, I think, be made that the fixtures were placed on the land by the tenant for life for the purpose of their use in trade and not for the purpose of making them a present to the freehold. For a tenant for life does not unless under exceptional circumstances affix trade fixtures to land for any purpose other than their convenient and effective use in the carrying on of a business. Under these circumstances it is in my opinion clear that, in using the value of the land in June 1903 as a measure of the amount of compensation to which the plaintiff is entitled, the value to be brought into the calculation must be the value to him as a remainderman, on the assumption that the trade fixtures had been lawfully affixed to the soil by the tenant for life in the ordinary way of business. For these reasons I agree that Mr. Justice *McMillan* took the right view of the case, that the appeal

(1) (1905) 1 Ch., 406.

must be allowed, the decision of the majority of the Court must be set aside, and the judgment of Mr. Justice *Burnside* must be restored.

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Appeal allowed.

Solicitor, for appellant, *Barker*, Crown Solicitor.
Solicitor, for respondent, *Haynes & Canning*.

H. V. J.

[HIGH COURT OF AUSTRALIA.]

INCORPORATED LAW INSTITUTE OF NEW SOUTH WALES . . . APPELLANT;

AND

RICHARD DENIS MEAGHER . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 15, 16, 17, 18, 26.

Griffith C.J. Isaacs and Higgins JJ.

Special leave to appeal—Judicial order—Solicitor struck off roll—Order for re-admission—Exercise of discretion—Question of fact—The Constitution (63 & 64 *Vict.* c. 12), *sec.* 73—*Judiciary Act* 1906 (*No.* 3 *of* 1906), *sec.* 49.

The Court has jurisdiction to entertain an appeal from an order of the Supreme Court of a State re-admitting to practice a solicitor who had been struck off the roll for misconduct.

Attorney—Misconduct—Re-admission to roll—Onus of proof—Discretion of Court—Fit and proper person—Conditional promise by Court—Charter of Justice (*N.S.W.*), *sec.* 10.

By sec. 10 of the *Charter of Justice* the Supreme Court of New South Wales has power to admit any "fit and proper person" to act as attorney and solicitor of that Court. In 1896 the respondent was struck off the roll of solicitors for being a party to a conspiracy to pervert the course of