[HIGH COURT OF AUSTRALIA.]

HARRIS AND ANOTHER . . . . APPELLANTS;

AND

THE MINISTER FOR PUBLIC WORKS, NEW SOUTH WALES . . . } RESPONDENT.

SUSAN MARY NEWTON HARRIS . . APPELLANT;

AND

THE MINISTER FOR PUBLIC WORKS, NEW SOUTH WALES . . . } RESPONDENT.

WILLIAM HENRY HARRIS . . . APPELLANT;

AND

THE MINISTER FOR PUBLIC WORKS, NEW SOUTH WALES . . . } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Dec.* 3, 4, 15, 16, 19.

Griffith C.J., Barton and Isaacs JJ.

Land—Resumption by Crown—Compensation—Valuation—Land held in successive interests—Separate valuation of interests—Land vested in executors—Life tenant and remainderman—Public Works Act 1912 (*N.S.W.*) (*No.* 45 *of* 1912), *secs.* 42, 43, 45, 102, 103.*

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* The *Public Works Act* 1912 provides as follows :—

By sec. 42, that "for the purpose of carrying out any authorized work, if the Governor directs that any land required for such work shall be taken under this Division of this Act, he may, by notification to be published in the *Gazette* . . . , declare that the land described in such notification has been appropriated (if Crown land) or resumed (if private property) for the public purpose therein expressed."

By sec. 43, that upon such notification the land shall be vested in the Constructing Authority on behalf of the

When land which is taken by the Crown for public purposes under the *Public Works Act* 1912 is held by different persons for successive estates, or the total interest is otherwise divided, the compensation payable by the Crown in respect of the land taken is to be assessed once for all, and the individual owners of estates or interests in the land are not entitled to separate assessments of the value of their individual estates or interests.

So *held* by *Griffith* C.J. and *Barton* J., *Isaacs* J. dissenting.

The legal estate in a block of land which was compulsorily acquired by the Crown by notification in the *Gazette* pursuant to sec. 42 of the *Public Works Act* 1912, was vested in the executors of a will by which one portion of the block was devised to a life tenant and a remainderman and the other portion was devised to trustees upon certain trusts. Separate claims for compensation were made—by the executors in respect of the whole block, by the life tenant in respect of her interest, and by the remainderman in respect of his interest; and the Crown made one valuation of the whole block.

Held, that mandamus should not go to compel a separate valuation of the interest of the trustees, the life tenant, or the remainderman:

By *Griffith* C.J. and *Barton* J., on the ground that under the Act the Crown was only concerned with the value of the physical object taken and that that value was to be ascertained once for all, as had been done;

By *Isaacs* J., on the ground that, a claim in respect of the whole block having been made by the owners of the legal estate with the authority of the trustees, the life tenant and the remainderman, and a valuation of the whole block having accordingly been made by the Crown, the Crown was under no duty to make any valuation of the separate interests.

Decision of the Supreme Court of New South Wales: *Ex parte Harris*, 14 S.R. (N.S.W.), 109, affirmed.

Crown in fee simple in possession, freed from all trusts, &c.

By sec. 45, that "(1) The estate and interest of every person entitled to lands resumed under this Division of this Act or any portion thereof and whether to the legal or equitable interest therein shall by virtue of this Act be deemed to have been as fully and effectually conveyed to the Constructing Authority as if the same had been conveyed by the persons legally or equitably entitled thereto by means of the most perfect assurances in the law. (2) Every such estate and interest shall, upon the publication of such notification as aforesaid be taken to have been converted into a claim for compensation in pursuance of the provisions hereinafter contained. (3) Every person shall upon asserting his claim as hereinafter provided and making out his title in respect of any portion of the said resumed lands be entitled to compensation on account of such resumption in manner hereinafter provided."

By sec. 102, that "every person claiming compensation in respect of any land resumed under any such notification . . . shall," within a prescribed time, "serve upon the Constructing Authority and upon the Crown Solicitor a notice in writing setting forth . . . the nature of the estate or interest of the claimant in such land, together with an abstract of his title."

By sec. 103, that "the Constructing Authority . . . shall . . . (unless no *primâ facie* case for compensation is disclosed) cause a valuation of the land, or of the estate or interest of the claimant therein, to be made in accordance with the provisions of this Act."

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APPEAL from the Supreme Court of New South Wales.

Certain land in Sydney, New South Wales, known as "Block 35 Ultimo Estate" was resumed by the Crown by notification in the *Government Gazette* pursuant to sec. 42 of the *Public Works Act* 1912. The land formed part of the estate of William Henry Harris, deceased, who by his will devised portion of Block 35, being the mansion house and grounds attached thereto and known as Livingstone House, to his wife, Susan Mary Newton Harris, for life, and after her death to his son, William Henry Harris and his heirs for ever. The other portion of Block 35 passed under a gift of the residue to certain trustees upon certain trusts. At the date of the resumption the trustees were Susan Mary Newton Harris, Ada Mary Harris and William Henry Harris. At that date Livingtone House was in the occupation of the life tenant, Mrs. Harris, and the remainder of Block 35 was in the occupation of various tenants. The testator appointed George Harris, Ada Mary Harris and William Henry Harris executors and executrix of his will, and probate had been granted to them. George Harris had since died. Three separate claims for compensation each in the form of the Sixth Schedule to the *Public Works Act* 1912 were made. The first was by "Susan Mary Newton Harris, Ada Mary Harris and William Henry Harris, executors of the will of the late William Henry Harris," and was in respect of the whole of Block 35; the second was by "Susan Mary Newton Harris, tenant for life," and was in respect of Livingstone House and grounds; and the third was by "William Henry Harris, remainderman," and was also in respect of Livingstone House and grounds.

A notice of valuation was sent by the Crown addressed to "Susan Mary Newton Harris and William Henry Harris as life tenant and remainderman respectively, Susan Mary Newton Harris and Ada Mary Harris as trustees, and Ada Mary Harris and William Henry Harris as executrix and executor, of the will of the late William Henry Harris"; and it set out a specified sum as being the value of the whole of Block 35 which was stated to embrace all items of claim. Thereupon three rules *nisi* for mandamus were obtained, the first by Susan Mary Newton Harris, Ada Mary Harris and William Henry Harris, described

as "trustees of the will of the late William Henry Harris," to compel the Minister for Public Works to make a valuation of "the claim of the above-named trustees"; the second by Susan Mary Newton Harris, to compel the Minister for Lands to make a valuation of her life interest; and the third by William Henry Harris, to compel the Minister for Lands to make a valuation of his interest as remainderman.

On the return of the rules *nisi* the Full Court ordered them to be discharged: *Ex parte Harris* (1).

From that decision the above-named trustees, the life tenant and the remainderman now separately appealed to the High Court, and the appeals were heard together.

The nature of the arguments appears from the judgments herein.

Campbell K.C. and *Rolin* K.C. (with them *Pitt*), for the appellants.

Knox K.C. (with him *Blacket* K.C. and *Pike*), for the respondent.

During argument reference was made to *Perry* v. *Clissold* (2); *Kelland* v. *Fulford* (3); *Abrahams* v. *London Corporation* (4); *Edwards* v. *Commissioner for Railways* (5); *Frank Warr & Co. Ltd.* v. *London County Council* (6); *Re Harris* (7); *Clayton* v. *Montgomery* (8); *Perpetual Trustee Co.* v. *Holt* (9); *Williams* v. *Permanent Trustee Co. of New South Wales Ltd.* (10); *Askew* v. *Woodhead* (11).

Cur. adv. vult.

Dec. 19.

GRIFFITH C.J. read the following judgment:—The substantial question raised in these appeals is whether, when land which is taken by the Government for public purposes is held by different persons for successive estates, or the total interest is otherwise divided, the compensation payable by the Government in respect

(1) 14 S.R. (N.S.W.), 109.
(2) (1907) A.C., 73.
(3) 6 Ch. D., 491.
(4) L.R. 6 Eq., 625.
(5) 12 S.R. (N.S.W.), 117.
(6) (1904) 1 K B., 713.
(7) 22 W.N. (N.S.W.), 187.
(8) 18 N.S.W.L.R. (Eq.), 171.
(9) 15 N.S.W.L.R. (Eq.), 18.
(10) (1906) A.C., 249.
(11) 14 Ch. D., 27, at p. 35.

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of the land taken is to be assessed once for all, or whether the individual owners of estates or interests in the land are entitled to separate assessments of the value of their individual interests. Alternatively, the claim is made that if one particular form of procedure is adopted by the Government in taking the land this consequence follows, whether it does or does not follow if a different form of procedure is adopted.

The subject is now regulated by the *Public Works Act* 1912, which is entitled "An Act to consolidate the Acts relating to Public Works," and is itself, so far as regards the present question, a re-enactment of the *Public Works Act* 1900, which was a consolidation of several earlier Statutes.

That Act, like the present Act, permitted the acquisition of land by either of three methods: purchase by agreement, compulsory taking after notice to treat, and taking by notification of resumption published in the *Government Gazette*. The first two of these methods have been familiar for many years. A complete statutory code relating to such matters was formulated in the United Kingdom by the *Lands Clauses Consolidation Act* of 1845, the provisions of which were substantially adopted in New South Wales with regard to Government railways by the Act 22 Vict. No. 19. A limited power of resumption of land for military purposes had been conferred by an earlier Act, 18 Vict. No. 10, but the provisions of that Act, which were repealed by the Act next to be mentioned, do not throw any light upon the question now under consideration.

A general power to take land for public purposes was first conferred on the Government by the Act 44 Vict. No. 16 (1880) called the *Lands for Public Purposes Acquisition Act*, which enacted (sec. 6) that whenever certain conditions had been fulfilled the Governor might by notification published in the *Gazette* and a local newspaper or newspapers declare that the land described in it had been resumed for the public purposes therein expressed, and (sec. 8) that upon such publication the land so described should forthwith be vested in the Minister on behalf of the Crown for an estate of inheritance in fee simple in possession free from all other estates, interests or claims whatsoever. Sec. 11 provided that the estate or interest of any

person entitled to land so resumed, whether legal or equitable, should by virtue of the Act be deemed to have been effectually conveyed to the Minister and to have been converted upon the publication of the notification into "a claim for compensation," and that every person upon asserting his claim in the prescribed manner and making out his title "in respect of any portion" of the resumed lands should be entitled to compensation on account of the resumption in manner provided by the Act.

The claimant was required (sec. 12) to assert his claim by serving notices in writing upon the Minister and the Crown Solicitor in a prescribed form (Sched. 1), by which the claimant was required to state the nature of his interest "whether tenant for life in tail or otherwise," after which the Minister was required (sec. 13) to cause a valuation to be made "of the land or of the estate or interest of the claimant therein." If no agreement as to the amount of compensation was come to within ninety days it was to be determined by a jury in proceedings in the nature of an action. Sec. 20 enacted that notwithstanding the foregoing provisions the Minister might agree with the owners or any of the persons empowered by the Act to sell the land for the absolute purchase for a money consideration of the land and all estates and interests in it of any kind whatever.

Then followed provisions, practically the same as those in the *Lands Clauses Consolidation Act*, empowering certain specified persons having limited interests in the land, or being under a disability, to convey the land to the Minister, and for paying the price into Court.

By a later Act (51 Vict. No. 37), of which the short title is the *Public Works Act of* 1888, it was enacted (sec. 19) that the Governor might direct that any land required for any authorized work might be acquired either by taking it under the *Lands for Public Purposes Acquisition Act*, or under the provisions of Part III. of the *Public Works Act*. Part III. was, in effect, a re-enactment of the provisions of the former Act with extended application, followed by an enactment of the provisions of the *Lands Clauses Consolidation Act*, which, as already said, had previously been adopted so far as regards lands taken for rail-

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ways, under which the amount of compensation, in the absence of agreement, was to be settled by arbitration.

All these provisions were re-enacted in the Acts of 1900 and 1912 with such variations in language as to make them more in conformity with modern parliamentary drafting.

The first observation that it occurs to me to make is that the object of the legislature was to facilitate the acquisition of land by the Crown, and that it was no part of its purpose to make any substantial change in the rights of the owners of the land taken as between themselves, except so far as was involved in the change of the property from land to money. The second observation I will make is that it was no part of the purpose of the legislature to make the substantial rights of the owners of the land to share in the money substituted for it dependent upon the mode adopted by the Crown for making the acquisition. These positions appear to me to be elementary. The first of them is illustrated by the case of *Askew* v. *Woodhead* (1).

It was forcibly observed by Mr. *Knox* that no instance is to be found of a claim for compensation by a tenant for life being made the subject of a separate assessment as distinguished from an assessment of the value of the land, or of an adjustment either by arbitration or a jury of the respective rights of a tenant for life and remainderman. The only cases referred to in *Halsbury's Laws of England*, vol. VI., under the head of "Compulsory Purchase and Compensation" tend to exclude the notion of such an adjustment. Thus, in *In re Ware and The Regent's Canal Co.* (2) it was contended that an arbitrator appointed under the *Lands Clauses Consolidation Act* should have apportioned the rent when part only of leasehold premises taken under the Act had been taken. The Court of Exchequer held that he had no power to do so, because the landlords were no party to the submission, "and of course no apportionment of the rent would have been binding upon them."

Similarly, in the case of tenant for life and remainderman, if an appointment of the capital money were made on the claim of the tenant for life it would not be binding upon the remainderman, and *vice versâ*. It is clear, indeed, that if land is taken by

(1) 14 Ch. D., 27. (2) 9 Ex., 395.

the procedure commonly called "Notice to Treat" such a question could not arise, for the resuming authority would take a conveyance from one of the persons authorized by the Act to convey, and the money would be paid into Court under the provision which stands as sec. 54 of the *Public Works Act* 1912, when the respective rights of the tenant for life and remainderman would be determined by the Court under the provision which stands as sec. 55 of that Act, by which until such determination the income would be payable to the party who would for the time being have been entitled to the rents and profits. This seems to me expressly to negative the idea that the tenant for life could claim a portion of the capital sum paid by way of compensation. This view is strongly confirmed by the provisions of sec. 58, which allows the Court in special cases to make a special allotment of a portion of the capital sum to the tenant for life.

It is said in *Halsbury's Laws of England*, vol. VI., at p. 67, that each party on whom a notice to treat has been served is entitled to have the compensation as regards his own particular interest assessed separately. The cases cited in support of this position are *Fotherby* v. *Metropolitan Railway Co.* (1), in which the claim was in respect of an entire and undivided interest, and *Abrahams* v. *London Corporation* (2), which was a case of a lease with several underleases. The distinction between the estate of a tenant for life and the estate of a lessee, so far as regards assessment, is so plain as not to require elaborate exposition. The value of the lessee's interest in his term does not depend upon any apportionment of a lump sum, while, on the other hand, in the case of a life estate the total value of the land, which is a single sum payable by the resuming authority, must, if the argument is correct, be apportioned between the tenant for life and remainderman. Either, therefore, the resuming authority is entitled to say that there shall be a single assessment and that the competing claimants to the amount assessed must settle their differences between themselves, or there must be separate assessments by separate juries, in which neither claimant is bound by the verdict of the jury in the case to which he is not a party, with the result that the authority may be

(1) L.R. 2 C.P., 188. (2) L.R. 6 Eq., 625.

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called upon to pay a sum in excess of the total value of the property.

Further, it appears to me that the value of the estate of a tenant for life, which depends on conditions personal to the tenant is not a proper subject matter of a valuation to be made by the resuming authority, which is only concerned with the value of the physical object taken. Nor can it be said with truth that to give the tenant for life part, and the remainderman the rest, of the compensation money would not be to make a substantial variation in their respective rights. That of the tenant for life is to the usufruct only, that of the remainderman to the enjoyment of the corpus after the determination of the life estate. Under some circumstances and for certain purposes it may be necessary to capitalize the present value of the usufruct and ascertain the present value of the futurity, as in the case of annuities given by a testator whose estate is deficient, but there is no like necessity in such a case as the present.

For these reasons I am of opinion that in the case of land taken by notice to treat a single assessment only can be made.

The argument for the appellants is mainly based upon some expressions used in the *Public Works Act* 1912 relating to resumption by notification. It is contended that, even if the construction which I adopt correctly expresses the law as applicable to land taken by notice to treat, the law is different as to land taken by notification. I have already pointed out the improbability of the legislature having intended that the substantial rights of persons having partial interests in land taken should be affected by the mode adopted by the resuming authority in making the resumption. This view is strongly fortified, if not indeed completely established, when regard is had to the structure of the Act itself. Sec. 54, which requires the compensation money to be paid into Court when land is taken from persons having partial interests only in the land or persons under disability, and secs. 55 and 58 which deal with the application of the money paid into Court, are included in Part VI. of the Act, which consists of a group of sections, numbered 50 to 100 inclusive, and headed "Provisions applicable to every case where land is taken under this Act." The effect of this grouping

was considered by the Judicial Committee in the case of *Williams* v. *Permanent Trustee Co. of New South Wales Ltd.* (1), the effect of which is that the whole of the provisions of this group of sections apply, if otherwise applicable, to land taken by notification as well as to land taken by notice to treat. If the money must in any case be paid into Court and disposed of as provided by the sections just referred to, the notion that separate assessments are to be made is excluded. The express enactments particularly relied on are secs. 45 and 102.

Sec. 45, after providing that upon the publication of the notification of resumption the estate and interest of "every person" entitled to lands resumed or any portion thereof shall be deemed to be conveyed to the Constructing Authority and shall be taken to have been converted into a claim for compensation, enacts that any person shall upon asserting his claim as hereinafter provided and making out his title in respect of "any portion" of the resumed land be entitled to compensation. The word "portion," which plainly refers to a separate physical entity and not to an undivided estate or interest, is not unimportant, for it is settled that the proceedings for assessing compensation have no reference to title. (See *Halsbury's Laws of England*, vol. VI., p. 76). Sec. 102 provides that every person claiming compensation in respect of any land resumed by notification shall within the prescribed time serve a notice upon the Constructing Authority and Crown Solicitor setting forth the nature of his estate or interest in the land with an abstract of his title. A form of notice is given in the Sixth Schedule, which requires particulars to be given, specifying the nature of his interest whether tenant for life, in tail or otherwise, and specifying separately the amount claimed for "value of property" and for "compensation." I note in passing that he is not required to specify the value of his estate or interest in the property—unless, indeed, that is implied by the word "compensation." Sec. 103, however, requires the resuming authority within a prescribed time (unless no *primâ facie* case for compensation is disclosed) to cause a valuation "of the land, or of the estate or interest of the claimant therein," to be made. If an agreement is not then come to the claimant may

(1) (1906) A.C., 249.

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institute proceedings in the Supreme Court in the form of an action for compensation.

The words "or of the estate or interest of the claimant therein" give rise to an apparent difficulty. There is no doubt, I think, that every person who has any estate or interest in the land is entitled to make a claim, and to have the value of the land assessed. But the question is whether each such person is entitled to insist upon a separate assessment of the value of his interest.

I have already pointed out the inconveniences that would follow from such a construction. It is obvious that the rational course in such a case, if there are more claimants than one, would be to consolidate the actions, and to give the carriage of the consolidated action to one or more of them. It is said that the Rules of the Supreme Court of New South Wales do not provide for such a course; but that fact, if it be one, cannot affect the construction of the Act, nor can I entertain any doubt that the powers conferred upon the Court by the Act, and which it is therefore required to exercise, include an implied power to make all such orders as are necessary for its efficient execution, whether by general rule of Court or special order in any particular case.

In my opinion the difficulty is solved and effect is given to all the provisions of the Act by construing the words "or of the estate or interest of the claimant therein" as referring to cases in which the claimant has an estate or interest, such as a lease of part of the land or an easement over it, the value of which is quite independent of the value of the land itself.

To sum up, I am of opinion that the only question with which the resuming authority is concerned under the Act is the value of the physical object taken, that that value, in the absence of agreement, is to be ascertained once for all, by arbitration in the case of resumption by notice to treat, and by a jury in the case of resumption by notification, that the distribution of the amount awarded or assessed by the jury, so far as not specifically provided for, is left to the ordinary modes for settling conflicting claims between parties, that any person interested in the land is entitled to be heard on the assessment, and that the Court is both

authorized and bound to make any such order as may be necessary for that purpose.

I am, therefore, of opinion that the appellants in the second and third appeals are not entitled to require separate valuations to be made of their separate interests.

With regard to the first appeal the respondent has already made the valuation demanded, but it is conceded that the request should have been for two separate valuations, one of the property to which the appellants in the second and third appeals are entitled for successive estates, and the other for the remainder of the property. I understand that he is willing to make such a valuation now, if so requested.

In my opinion the appeals should be dismissed.

BARTON J. I have had the advantage of reading the judgment of the Chief Justice, and I concur in it.

ISAACS J. read the following judgment:—The respective rights and duties of the parties in a case of this nature depend entirely on the terms of the Statute of 1912. The case of *Williams* v. *Permanent Trustee Co. of New South Wales Ltd.* (1) decides that "it is not necessary or proper to resort to, or consider, the earlier legislation on the subject"; that is, of course, for the purpose of learning the legislative will, there being no contest as to the meaning of any of the statutory terms.

One question is whether the tenant for life and the remainderman are severally entitled to make independent claims for compensation. It is contended for the Minister that such a right can never exist where, as here, the whole undivided dominion of the land is taken at a stroke. The view presented is that the trustee —if he has the power of sale—or, in a case like the present, the executor, who under sec. 44 of the *Wills, Probate and Administration Act* 1898 has the legal estate, and has a power of sale, even though it is "for purposes of administration" (sec. 46), must always make the claim and get the compensation settled. *Cullen* C.J. and *Sly* J. are opposed to so sweeping a rule. The argument in support of the contention is that from the nature of the case it

(1) (1906) A.C., 249, at p. 252.

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must be so. That is to say, a tenant for life cannot ride off with a separate portion of the capital, and therefore it is said it would be inconsistent to attempt to assess in his favour a lump sum of compensation. I fail to follow that argument. Granting that the interest of the tenant for life in the trust property does not extend to the permanent annexation of corpus, yet his interest such as it is has a money value. The circumstances that he cannot share the corpus affects and lessens the value of his interest, but when the true value of his interest such as it is has been reduced to the amount it would fetch, whether by private sale or statutory arbitration, that amount is his, and does not represent any portion of the corpus. The interest of the remainderman is computable in like manner, and is worth so much the more that the tenant for life is unable to touch corpus. The two values added together make up the money value of the fee simple, and there is no double valuation of any portion of the property taken.

Inherently, therefore, there is no reason for denying the right, if the primary construction of the Act declares it. To ascertain that, we must turn to the relevant sections. Sec. 39 declares that land may be "taken" either under Division 1 of Part V. or under Division 2 of the same Part. And compensation for such land shall be ascertained and dealt with in all respects pursuant to the provisions of the Act "applicable in either case respectively." In other words, the respective methods of acquisition entail respective methods of ascertaining and dealing with compensation.

Division 1, under which this land was taken, is a method not found in the English Acts. It either "appropriates" Crown land, or it "resumes" private property, which once was Crown land. From early times in Australia certain powers of resumption were inserted in Crown grants, but this enactment places the power on a broad statutory footing, and regulates its exercise. In a sense it is compulsory purchase (*Williams* v. *Permanent Trustee Co. of New South Wales Ltd.* (1)), but it is a special mode of acquisition, carrying its own consequences. It is confined to the acquisition of the fee simple (sec. 43), that is to say, so much of the complete ownership as the Crown has not already got. The land as physical substance is needed for some public purpose

(1) (1906) A.C., 249.

which requires complete ownership, and so all individual rights whatever cease.

By sec. 45 (1) the estate and interest of every person entitled to land resumed, or any portion thereof, passes to the Crown by force of the Act, as if they had been conveyed by the persons "legally or equitably entitled thereto" by means of the most perfect assurance known to the law. If, therefore, an area of territory consisting of several tenements, owned respectively by A, B and C, and in C's case as trustee for others, is resumed, all legal and equitable interests in the whole area pass. The second sub-section of sec. 45 declares that "every such estate and interest" is "converted into a claim for compensation" (see *Starr* v. *London Corporation* (1)). I attach importance to that word "converted." It is an express conversion of a right to realty into a right to a money compensation which represents it, and which by sub-sec. 3 the person is entitled to get on two conditions. Those conditions are: (*a*) assertion of claim as provided, and (*b*) making out "his title in respect of any portion of the resumed lands." Those last-mentioned words do not conclusively militate against the appellants' view. Sec. 47, dealing with notice to treat, which admittedly includes equitable interests, refers in sub-sec. 2 to "an abstract of their title to such lands," which is stronger. Unless something else can be found in the Act cutting down the natural effect of those provisions, I can see no reason for denying the right of everyone whose property—whatever his estate or interest might be, legal or equitable—was taken forcibly from him to get its worth in cash value from the Government. "Claim" for compensation means a claim against the Government. What, then, is there found against it?

When we turn to Part VII., Division 1, beginning with sec. 101 we find the provisions for getting at the compensation. The claimant must set out in a notice in writing (sec. 102 (*a*)) "the nature of the estate or interest of the claimant in such land," and the Sixth Schedule is referred to. Singularly enough, the Sixth Schedule in its first column, requiring names and descriptions of parties claiming, gives "tenants for life" as an example of "*their interests.*" Sec. 103, under which the question before us directly

(1) L.R. 7 Eq., 236.

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arises, requires the Constructing Authority to "cause a valuation of the land, or of the estate or interest of the claimant therein" to be made, and the claimant is to be informed.

So far from weakening the *primâ facie* meaning of the earlier part, these later sections emphasize it. Up to this point the claim, and consequently the valuation, may cover the whole fee simple or any less interest, according to what the claimant's interest was.

As against that, reliance was placed on a group of sections contained in Part VI., namely, secs. 51 to 55 inclusive. It was said very truly by Mr. *Knox* that *Williams* v. *Permanent Trustee Co. of New South Wales Ltd.* (1) decided that the heading of the Part is important. He argued from that, that sec. 54 is general and applies to land "taken," whether under Division 1 or Division 2. If it can be applied to a case arising under Division 1 it should be so applied. But whether it can be so applied depends on its own terms, and the circumstances to which it is sought to be applied. Its terms, so far as material, apply where land or any interest therein is purchased or "taken from" a tenant for life or certain others "not entitled to sell or convey the same except under the provisions of this Act." What is the meaning of "taking land from" a tenant for life in that connection? For that, we first turn to sec. 47. That gives power to give notice of the lands taken either "to all parties interested in such land" or "to the parties enabled by this Act to sell and convey or release the same." Then the parties so notified are required to deliver particulars of their "estate and interest," and their claims.

The Fifth Schedule shows the form of claim, which may be used either for the full fee simple, or (as is shown by the fourth description of claimant at foot, viz.: "I have a leasehold interest for.....years") for a limited interest. Then sec. 49 requires the person notified to (*a*) treat and (*b*) agree either for the interest in such lands belonging to such party, or "which he is by this Act enabled to sell," otherwise the disputed compensation procedure applies.

This shows that a notice to a tenant for life may be for his

(1) (1906) A.C., 249.

own interest only, in which case sec. 54 would not apply to him, even in a case of acquisition under Division 2, because the fee simple of the land would not be "taken from" him. It might be taken from the trustee or *vice versâ*. An instance of this distinction is found in *In re Pigott and Great Western Railway Co.* (1). See also *Kelland* v. *Fulford* (2) and *Stone* v. *Yeovil Corporation* (3). Where, however, the whole fee simple is "taken from" a tenant for life, the money represents the whole land, and is substituted for it: *Askew* v. *Woodhead* (4).

In my opinion, sec. 54 cannot be called in aid in this case. The notification was for the whole of Block 35. Even if sec. 54 could have application to a notification under Division 1, a point I leave open, none of the parties ever proceeded on the basis that it was to be applied. The Crown clung to the entirety of Block 35. The appellants partly recognized that entirety, and only departed from it to insist on their own individual interests. The middle course of the tenant for life dealing with the whole fee of Livingstone House as a separate property, was not suggested by anyone, and the tenant for life could not do more. The trustees as such were ignored. The principle of *Abrahams* v. *London Corporation* (5) and *Starr* v. *London Corporation* (6) therefore applies, unless there is something to qualify it. And so far I see nothing to qualify it. There is no constructive re-conversion, as Sir *George Jessel* termed it in *Kelland* v. *Fulford* (7); no undoing of the express statutory conversion worked by sec. 45.

I think, therefore, the two separate claims—of tenant for life and remainderman—supposing they were the only ones made, could be insisted on.

A third claim, however, was made by the very same persons and another, the three being the executors. And this gives rise to the question of how far it affects the other two.

This third claim was in respect of the whole block. I do not think estoppel in the ordinary sense arises. For instance, if that claim had been withdrawn as an error before it was acted on, and the two others insisted on, I do not think it would have

(1) 18 Ch. D., 146, at p. 149.
(2) 6 Ch. D., 491, at p. 494.
(3) 2 C.P.D., 99, at p. 118.
(4) 14 Ch. D., 27.
(5) L.R. 6 Eq., 625.
(6) L.R. 7 Eq., 236.
(7) 6 Ch. D., 491.

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Isaacs J.

made any difference whatever. The statutory duty of the Constructing Authority could not be released by a slip. (See *R.* v. *East London Railway Co.* (1)). But the combined claim was not withdrawn. It was made necessarily with the individual authority of the separate claimants, because they made it themselves. Regarding it not as estoppel, but as a valid claim by the legal owners of the land, acting in that regard with the full and deliberate authority of the equitable owners, and therefore in protection and enforcement of their interests, it was such a claim as is contemplated by sec. 45. Legal estates are certainly as much converted into claims for compensation as equitable, and it cannot be doubted that, under the executors' claim, in this case the full value of the whole property including every equitable interest in it was intended to be stated, and in case of disagreement to be enforced. In response to that claim, on the face of it made under sec. 102, the Constructing Authority did cause a valuation of the "land," the value of which was claimed in its entirety, to be made and notified to the claimants. The addition of the names of the equitable owners and the trustees was surplusage, which does not hurt. But the combined claim of the executors, when met with a valuation which it demanded, was not surplusage. The condition of sec. 103 was satisfied, for I do not think it requires more than one claim to be answered so long as that claim stands and is insisted upon. In other words, I do not think a claimant can by putting in various and divergent claims require valuations to each and every of them. The executors' claim, so far from being abandoned, is still insisted upon. The claim for mandamus as to that is answered by the fact that the Constructing Authority has performed its statutory duty with regard to that particular claim. And as the interests of the individual claimants are with their consent fully represented by that claim, they are not entitled to a mandamus to compel a further valuation on a different claim, which would certainly give rise to an embarrassing, complicated, expensive and perhaps contradictory position.

From the reasons I have independently stated, it will be seen

(1) 17 L.T. (N.S.), 291.

I am practically in accord with the views of *Cullen* C.J. and *Sly* J., and agree that these appeals should be dismissed.

I would add that the offer voluntarily made to proceed to separate assessment in respect of the Livingstone House property and the residue property was very fair.

Appeals dismissed with costs.

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Solicitors, for the appellants, *Bradley & Son.*

Solicitor, for the respondent, *J. V. Tillett*, Crown Solicitor for New South Wales.

[HIGH COURT OF AUSTRALIA.]

B. L.

BARRY . . . . . APPELLANT;
PLAINTIFF,

AND

HEIDER AND ANOTHER . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 17, 18; *Nov.* 19, 20, 23, 24, 25; *Dec.* 16.

Griffith C.J., Barton and Isaacs JJ.

Land—Transfer obtained by fraud—Transfer not registered—Equitable interest created by transferee—Mortgage—Rights of mortgagee—Caveat—Right of solicitor to withdraw—Attestation of instruments—Proof of instruments—Attestation by solicitor—Real Property Act 1900 (*N.S.W.*) (*No.* 25 *of* 1900), *secs.* 2 (4), 41, 72, 107, 108.*

* The *Real Property Act* 1900 provides:—

Sec. 2 (4) "All laws, Statutes, Acts, ordinances, rules, regulations, and practice whatsoever relating to freehold and other interests in land and operative on the first day of January one thousand eight hundred and sixty-three are, so far as inconsistent with the provisions of this Act, hereby repealed so far as regards their application to land under the provisions of this Act, or the bringing of land under the operation of this Act."

Sec. 41 (1) "No instrument, until registered in manner hereinbefore prescribed, shall be effectual to pass any estate or interest in any land under