[HIGH COURT OF AUSTRALIA.]

REGISTRAR OF TITLES . . . . . APPELLANT;
DEFENDANT,

AND

CROWLE AND OTHERS . . . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *June* 18, 23.

Latham C.J., Rich, Dixon and McTiernan JJ.

Real Property—Registration—Error by Registrar of Titles—Life tenant registered for an estate in fee simple—Mortgages by life tenant—Improvements—Dealings by remaindermen with expectant shares—Assurance Fund—Claim by remaindermen—Measure of damages—Real Property Act of 1861 (*Q.*) (25 *Vict. No.* 14), *ss.* 126, 127, 128.*

In consequence of an error by the Registrar of Titles, a person entitled to a life estate in two parcels of land with remainder to her six children was registered in 1883, under the *Real Property Act of* 1861, for an estate in fee simple. She mortgaged both parcels of land by duly registered bills of mortgages to different mortgagees and erected an hotel on one piece of land. In 1902 an action was commenced by the remaindermen, three of whom were infants, against the Registrar of Titles and the life tenant. The Court ordered

* The *Real Property Act of* 1861 (*Q.*) provides:—By s. 126: "Any person deprived of any land or of any estate or interest in land in consequence of fraud or in consequence of the issue of a certificate of title to any other person or in consequence of any entry in the register book or of any error or omission in any certificate of title or in any entry in the register book may bring and prosecute an action at law in the Supreme Court for the recovery of damages against the person who derived benefit by such fraud or in consequence of the issue of such certificate of title or by such entry or in consequence of such error or omission

Provided always that no such action shall lie or be sustained unless the same shall be commenced within six years from the date of such deprivation except nevertheless that any person being under the disability of coverture or infancy or absence from the colony or of unsoundness of mind may bring such action within six years from the date on which such disability shall have ceased

Provided also that nothing in this Act contained shall be interpreted to subject to any action of ejectment or for recovery of damages any purchaser or mortgagee *bona fide* for valuable consideration of any land under the provisions of this Act although his vendor or mortgagor may have been registered as proprietor through fraud or error or may have derived from or

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that the register be rectified by a memorial that the life tenant was entitled to an estate for life with remainder to the six children subject to both mortgages. It was declared that, in default of the life tenant indemnifying the three children of age, they would be entitled to an indemnity out of the assurance fund. The judgment proceeded on the basis that no relief could be obtained against the assurance fund until the remainders fell into possession. In 1904 the three children of age gave mortgages to the same mortgagee over their respective interests in the two parcels of land. A foreclosure order absolute was made in favour of the mortgagee and a vesting order was made in 1911 vesting the lands in the mortgagee for all the estate or interest of the mortgagors. Subsequently the three remaindermen repurchased their interest in the hotel land from the mortgagee, who transferred to them his estate or interest in that land. Meanwhile in 1907 the mortgagee of the other land, on the life tenant's default, exercised a power of sale and sold and transferred the land to a bona-fide purchaser for value. After the death in 1943 of the life tenant insolvent and unable to indemnify any of the remaindermen, the action was brought on for further consideration. Judgment was entered for the remaindermen for the amount due under the mortgage of the hotel land and for the value of the other land.

Held that the remaindermen were entitled to recover damages from the assurance fund in respect of the hotel land, even though the value of the buildings erected thereon was greater than or at east equal to the amount of the mortgage debt, the measure of damages being the value of the land in the state in which it was at the time of the deprivation, including the improvements thereon free of encumbrance.

Spencer v. Registrar of Titles, (1908) A.C. 235, followed.

Held, further, that the remaindermen by their dealings with their expectant shares had not lost their right of action, as the mortgagee of their interests took subject to the mortgages given by the life tenant, and their right to be indemnified did not pass from them to the mortgagee of their interests.

Decision of the Supreme Court of Queensland (*Stanley* A.J.): *Finucane* v. *Registrar of Titles* (*No.* 2), (1947) Q.S.R. 26, affirmed.

through a person registered as proprietor through fraud or error whether by wrong description of land or of its boundaries or otherwise "

By s. 127: "In case the person against whom such action for damages is directed to be brought shall be dead or shall have been adjudged insolvent or shall have absconded out of the jurisdiction of the Supreme Court then in such case it shall be lawful to bring an action for damages against the Registrar-General as nominal defendant for the purposes of recovering the amount of the said damages and costs against the assurance fund hereinbefore described and in any such case and also in any case in which damages may be awarded in any action against the person deriving benefit by any fraud or in consequence of the issue of any certificate of title or otherwise as aforesaid and the Sheriff shall make a return of *nulla bona* or shall certify that the full amount with costs awarded cannot be recovered from such person the Treasurer of the Colony upon receipt of a certificate of a Judge of the Supreme Court and of a warrant under the hand of the Governor as hereinafter provided shall pay the amount of such damages and costs or

APPEAL from the Supreme Court of Queensland.

On 6th July 1901, six plaintiffs brought an action against the Registrar of Titles as nominal defendant for the recovery, against the Assurance Fund established under the *Real Property Act of* 1861, of damages for the deprivation of an estate in fee simple in remainder expectant on the life estate of their mother, Johanna Finucane, in consequence of an error in an entry in the register book. The plaintiffs were the six children of William and Johanna Finucane, three of them, Mary Beatrice Finucane, Ellena Eugenia Finucane and George William Barron Finucane, being *sui juris* and the other three infants suing by their next friend, George William Barron Finucane. Both William Finucane and Johanna Finucane were joined as defendants and by consent *Griffith* C.J. stated a special case for the Full Court (*Finucane* v. *The Registrar of Titles* (1)). Judgment was given for the plaintiffs for (1) a declaration that Johanna Finucane was entitled to an estate for life only in the lands and was a trustee thereof for an estate in fee simple in remainder for the plaintiffs, (2) an order that the register book be rectified by entering upon it a memorial of the preceding declaration but that such declaration and entry were subject and without

the unrecovered balance thereof as the case may be and shall charge the same to the account of the assurance fund

Provided always that the assurance fund shall not be liable for payment of any damages after the expiration of six years from the time when the cause of action arose

Provided also that any person so absconding beyond the jurisdiction if subsequently found within the jurisdiction shall be liable to be sued in the name of the Registrar-General for the amount of the damages and costs so recovered from the assurance fund "

By s. 128: " Every action which shall be brought by any person to recover damages for or by reason of any loss or damage occasioned by any omission mistake or misfeasance of the Registrar-General or any of his officers or clerks in the execution of their duties under the provisions of this Act shall be brought against the Registrar-General as nominal defendant and in case in any such action the plaintiff recover final judgment against such nominal defendant then upon the application or motion of such plaintiff any Judge of the Supreme Court shall and he is hereby directed to certify to the Treasurer the fact of such judgment having been recovered and the amount of damages and costs recovered and thereupon or before the expiration of two calendar months after such judgment is so certified the said Treasurer upon the receipt of a warrant under the hand of the Governor shall pay the amount of such damages and costs to the person recovering the same his executors or administrators and shall charge the same to the account of the assurance fund hereinbefore described

Provided always that notice in writing of every such action and of the cause thereof shall be served upon the Attorney-General and also upon the Registrar-General one calendar month at least before the commencement of such action

Provided also that the Registrar-General shall not be personally chargeable upon any judgment recovered as aforesaid nor shall any process or notice in or relating to any such action (except as aforesaid) be served upon the the Registrar-General but all such processes and notices shall be served upon the Attorney-General for the time being "

(1) (1902) Q.S.R. 75.

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prejudice to such encumbrances liens or interests already notified and (3) a declaration that Johanna Finucane was bound to indemnify the three plaintiffs of full age against any loss which they might severally sustain by reason of any dealings in the pleadings mentioned by Johanna Finucane with the lands, and that in default of her making such indemnity the plaintiffs were to be severally entitled to a like indemnity out of the assurance fund. Further consideration of the action was adjourned.

William Finucane died in 1927 and the estates in remainder fell into possession on the death of Johanna on 4th May 1943. In the meantime the three plaintiffs of full age had mortgaged their expectant shares. The plaintiff Mary Beatrice Finucane married and became known as Mary Beatrice Crowle. Johanna died insolvent, unable to indemnify any plaintiff. The action was brought on before *Stanley* A.J. who gave judgment for the plaintiffs for £3,000, the amount of the mortgage debt on the lands known as the "Lands Office Hotel" lands and for £6,000, the value of lands known as the "Lilian Cooper" lands: *Finucane* v. *Registrar of Titles* (*No.* 2) (1).

From this decision the Registrar of Titles appealed to the High Court.

Further relevant facts appear in the judgment hereunder.

Fahey (with him *O'Hagan*), for the appellant. The evidence shows that the result of the expenditure of the moneys raised by the mortgage of the "Lands Office Hotel" lands in erecting an hotel thereon is a benefit of value greater than or at least equal to the mortgage debt. Therefore no losses have been sustained by reason of the dealings with the land by Johanna. The remaindermen are entitled to compensation only for a loss and not for a benefit (*Hayes* v. *Bourne* (2); *Registrar of Titles* v. *Spencer* (3)). This question was not raised or decided in the previous proceedings (*Finucane* v. *Registrar of Titles* (4)). The three remaindermen of age mortgaged their interests in the land and by the foreclosure have lost all their interests therein. They received value for those interests and ultimately suffered no loss. By reason of the foreclosure they lost their rights to the land and their right to possession on the death of Johanna and therefore lost their right to this claim. They have been deprived of the lands, not by any error on the part of the Registrar of Titles, but by their own dealings resulting in an order for foreclosure. If they are entitled to any damages, then

(1) (1947) Q.S.R. 26.
(2) (1895) 7 Q.L.J. 146.
(3) (1909) 9 C.L.R. 641.
(4) (1902) Q.S.R. 75.

any benefit they have received from their dealings should be deducted *pro tanto*.

McGill K.C. (with him *O'Sullivan*), for the respondents. The remaindermen are entitled to the "Lands Office Hotel" lands free of encumbrance. They are entitled to the lands with the buildings. It does not matter if the mortgage moneys were used for the purpose of erecting an hotel on the lands. The measure of damages is the cost of freeing the lands of the encumbrance (*Spencer* v. *Registrar of Titles* (1); *Registrar of Titles* v. *Spencer* (2)). The reasons for judgment in these cases are not inconsistent. The remaindermen's right is to have the land unencumbered. In order to indemnify them Johanna would have had to pay off the mortgage debt even though she spent the money on improvements. The three remaindermen have not lost their right of action by the foreclosure order. Their rights flow from the judgment and they never parted with those rights. If they did part with those rights, they repurchased them from their mortgagee. As to the "Lilian Cooper" lands, the foreclosure order and vesting order were ineffective being made after the mortgagee had exercised his powers of sale.

Fahey in reply.

Cur. adv. vult.

June 23.

THE COURT delivered the following written judgment:—

This appeal is brought from a judgment or order given or made on 21st October 1946 upon further consideration of an action in which the original judgment was pronounced on 11th December 1902. By the judgment under appeal the plaintiffs recovered from the assurance fund under the *Real Property Act of* 1861 indemnities amounting in all to £9,000 or thereabouts.

The plaintiffs are remaindermen or successors in title to remaindermen under limitations contained in a settlement made on 15th August 1863. Of the land subject to these limitations the successful claim against the assurance fund relates to two parcels. On one parcel the Lands Office Hotel stands, and it is convenient to refer to the parcel as the hotel land. The other parcel afterwards passed into the hands of Dr. Lilian Cooper, and it is convenient to call the parcel the Cooper land. At the date of the settlement the title to both pieces of land was under the general law. The limitations were to two grantees to uses (doubtless intended to be trustees of the

(1) (1908) A.C. 235. (2) (1909) 9 C.L.R. 641.

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settlement) to the use of the settlor for life and after his death to the use of the grantees to uses during the life of the settlor's daughter Johanna upon trust to pay the rents and profits to her for life to her separate use during coverture and subject to a restraint upon anticipation, and after her death to the use of such of Johanna's children as should attain twenty-one, or being daughters should marry under that age. Johanna had six children, and they are the remaindermen in respect of whose interest the claim is made. In the event all attained full age but three of them were still infants at the time of the original judgment in 1902.

In 1882, the settlor having died and one of the grantees to uses also having died, the survivor of such grantees applied to bring both parcels of land under the *Real Property Act* on the footing that he was seised of an estate in fee simple therein. This view was accepted by the Master of Titles, and the Registrar-General on 21st December 1882 issued certificates of title in the applicant's name as proprietor of an unencumbered estate in fee simple in the respective parcels of land.

On 11th January 1883 the registered proprietor who had been thus established transferred for a nominal consideration both parcels of land to Johanna for an estate in fee simple, and she became the registered proprietor.

In this action the Full Court of the Supreme Court of Queensland decided that, under the limitations, the uses in favour of the remaindermen were executed, that is as and when the remainders vested, so that they took the legal estate (*Finucane* v. *Registrar of Titles* (1)). Consequently there was no foundation for the issue of a certificate of title on the footing that the surviving grantee to uses was seised in fee simple.

Nevertheless, as Johanna took the transfer as a volunteer, the Court considered that the land vested in her upon trust after her death for the remaindermen. She, however, mortgaged each parcel of land by duly registered bills of mortgage. The mortgages were given in 1888. That given over the hotel land remains on foot, and the mortgage debt is fixed at about £3,000. The Cooper land stands in a different position. At the time of the original judgment the mortgage was still on foot, but the mortgagees afterwards exercised their power of sale, and on 20th November 1907 a transfer to the purchaser, who took bona fide and for value, was registered.

In May 1901 Johanna was adjudged insolvent and there were no available assets of her estate. In July 1902 the remaindermen

(1) (1902) Q.S.R. 75.

commenced the action as plaintiffs, the three infants by their next friends. The Registrar of Titles was at first the only defendant named, but afterwards Johanna was joined.

After the Full Court had answered certain questions raised by a special case, a judgment was pronounced in the action. It was declared that Johanna was entitled to an estate for life only in the two parcels of land, and that she was a trustee for an estate in fee simple in remainder for her three children who had already attained full age and for such other of her children who should in her lifetime attain full age, or being daughters marry under age, as tenants in common. It was ordered that the register book should be rectified by entering upon it a memorial of the declaration and a statement that Johanna was seised of an estate for life only in the lands with remainder to the persons so declared entitled as tenants in common, but that such declaration and entry were made subject and without prejudice to encumbrances, liens, estates and interests already notified by entry in the register. By this reservation the priority over the estate in remainder of the two mortgages given by Johanna was preserved.

The judgment proceeded to declare that Johanna was bound to indemnify the three children who had then attained full age against any loss which they might severally sustain by reason of any dealings in the pleadings mentioned with the lands by Johanna. Curiously enough, the declaration ignored the contingent right of the infant plaintiffs to a similar indemnity, perhaps because it was considered that no declaration should be made except in support of vested interests. The dealings by Johanna which the pleadings mentioned were the two mortgages.

Next, the judgment declared that, in default of Johanna's making the indemnity which the judgment bound her to make, the three plaintiffs, the children of Johanna who had attained full age, would be severally entitled to the like indemnity out of the assurance fund. Finally, the judgment dealt with costs and adjourned further consideration and reserved liberty to apply.

As appears from the reasons of the Full Court (1), these declarations proceed upon the footing that until the remainders not only vested but fell into possession the plaintiffs, the remaindermen, could obtain no relief against the assurance fund. The life tenant Johanna did not die until 4th May 1943. The action was brought on for further consideration.

In the meantime, however, various transfers and devolutions of the interests of some of the plaintiffs had taken place. As a result

(1) (1902) Q.S.R. 75.

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changes were made in the parties to the action which it is unnecessary further to mention. But there was one dealing of importance by the remaindermen who were of full age at the commencement of the action. In 1904 two of them by one instrument of mortgage and the third of them by another instrument of mortgage secured a mortgage debt, without personal liability, over their respective interests in both the hotel land and the Cooper land. These instruments were not registered but were protected by caveat. In 1911 a foreclosure order absolute was made in favour of the mortgagee and the judgment by which this was done included a vesting order, made as under the *Trustees and Executors Act of* 1897, by which it was ordered that the lands should vest in the plaintiff (the mortgagee) for all the estate of interest of the defendants (the mortgagors) and each of them.

Whatever may have been the operation of this vesting order in relation to the mortgagors' remainders in the hotel land, it clearly had no effect in relation to their interests in the Cooper land, which, as already stated, had previously been sold by the mortgagee of the fee simple in pursuance of the power of sale conferred by Johanna's mortgage, the priority of which to the remainders was preserved by the declarations in this action. Presumably the sale did not realize the amount of the mortgage debt and in relation to the three remaindermen's interests in the Cooper lands it is hard to see how any effect at all could be given to the foreclosure order. Subsequently, in 1922 to be precise, the three remaindermen repurchased their interests in the hotel land from their mortgagee, who gave them a transfer as tenants in common of all his estate and interest in that piece of land.

Upon the foregoing facts, Johanna having failed to indemnify any of the six remaindermen, the plaintiffs now representing their interests claimed that they were entitled to receive from the assurance fund, in respect of the hotel land, the amount of the mortgage debt secured over it by Johanna's mortgage, and in respect of the Cooper land, the value of the land, which was fixed at £6,000.

In answer to this claim the Registrar of Titles made several contentions, all of which were overruled by *Stanley* A.J., who heard the action. The learned Judge awarded in respect of each of the six remaindermen £1,000 as representing his or her interest in the Cooper land, and one-sixth of the amount necessary to clear off the encumbrance over the hotel land, i.e. about £500 each or £3,000 in all. On appeal from the judgment of *Stanley* A.J. the Registrar

of Titles did not rely on all the contentions raised before him. The position which the Registrar took up was briefly as follows.

First, he maintained that none of the remaindermen could recover anything in respect of the hotel land, on the ground that the mortgage money raised by Johanna had been applied by her in erecting the hotel thereon and that the value which the buildings so erected continued to give to the land at the time of the death of the life tenant, Johanna, in 1943 was greater than, or at least equal to, the amount of the mortgage debt.

Next, the Registrar contended that the three remaindermen who had mortgaged their interests in 1904 and whose interests so mortgaged had been foreclosed in 1911 could recover nothing either in respect of the hotel land or of the Cooper land, on the ground that no right to recoupment from the assurance fund accrued until their interests fell into possession upon the death of Johanna and that at that date they had lost their interests. The repurchase and transfer to them of the hotel land was, in the Registrar's contention, the acquisition of a new and original title which was irrelevant. It should be remembered that the three remaindermen in question were adult at the time of the original judgment, which expressly mentions them as entitled to an indemnity, and does not refer to three children who were infants. But the Registrar of Titles conceded that, as to the Cooper lands, there must be paid out of the assurance fund in respect of each of the three last-mentioned children whose remainders have since vested, the value of the land as at the death of Johanna, that is £1,000 each.

It is convenient to deal first with the contention that the mortgage by the three remaindermen first mentioned of their interests in the two pieces of land and the subsequent foreclosure and vesting order precludes any recovery from the assurance fund on account of their interests.

The rights of these plaintiffs or the plaintiffs representing their interest against the assurance fund depend, strictly speaking, upon the judgment, though in saying this it is not intended to suggest that the result would be any different if they still directly depended upon ss. 126-128 of the *Real Property Act*. But by the declaration the rights of these remaindermen as at that date passed into judgment against the Registrar-General. They were declared upon the the default of Johanna in indemnifying the three remaindermen to be entitled to the same indemnity from the assurance fund. It may seem curious that a declaration of an obligation to indemnify was made against an insolvent and that the contingency of her default was made the basis of the liability of the assurance

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fund. Doubtless the reason for this is in part to be found in the terms of ss. 126-128 and in part in the fiduciary character apparently ascribed to Johanna. But at all events so it was.

Now the remaindermen's right to the indemnity under the declaration is not an interest in land. It is the right arising from the loss of or prejudice to an interest in land and it is a right to have a money sum paid over, or at all events provided and applied.

When these three remaindermen in 1904 mortgaged their remainders those interests were subject to the two respective mortgages given by Johanna which took priority over and were encumbrances upon all the estates in remainder. The mortgagee of the interests in remainder therefore took subject to these encumbrances. But the indemnity given by the judgment was in respect of these very encumbrances. Accordingly not only did the right to the indemnity not pass to the mortgagees of the interests of the remaindermen but the interest the mortgagees took by way of security was diminished by the very charge or encumbrance against which the mortgagors were indemnified. The right to be indemnified did not, therefore, pass from the remaindermen.

It may be conceded that the event upon which the remainders would fall into possession must occur before the indemnity became enforceable. But it does not follow that a claimant against the assurance fund for deprival of a future interest must at the time when the interest falls into possession still retain some interest in the land. The very ground of his claim is that he has been deprived of an interest and that might well mean his whole interest. Therefore in the present case it cannot be necessary that the remaindermen should retain until the death of the life tenant those interests which survived in them in spite of the dealings which call for the indemnity and which expose the assurance fund to liability. It is enough that the remaindermen or the plaintiffs claiming under them have not assigned or transferred or otherwise parted with the right to be indemnified.

These reasons are not the same as those of *Stanley* A.J. for deciding this defence against the Registrar-General, but we agree in his conclusion.

It is convenient now to go back to the first defence, which relates only to the hotel lands but covers all the interests therein in remainder. In our opinion this defence also fails and substantially for the reasons given by *Stanley* A.J.

It is established by the decision of the Privy Council in *Spencer* v. *Registrar of Titles* (1) that the loss or damage to which a claimant

(1) (1908) A.C. 235, at p. 236.

against the assurance fund is entitled is to be measured by the value of the land in the state in which it was at the time when he is taken to have been deprived of it and, if before that date buildings have been erected thereon, though not at his expense, that means with the buildings on it.

If then the life tenant had built the hotel out of her own moneys and by her dealings the remaindermen had suffered a total deprival of the land, they would have been entitled to the value of the land and buildings. Again, if she had built the hotel at her own expense and there had been no unwarranted dealings by her prejudicing the remaindermen's interests, on her death they would have been entitled to the land as improved by the buildings without any charge or recoupment of the expense to her estate. In the third place, it is clear that they are entitled to the land free from any encumbrance created by her and that she was bound to clear off the encumbrance which she created.

Why in these circumstances should she be entitled to offset the amount by which she increased the value of the land by erecting the buildings against the amount she must otherwise make good ? If she cannot do so, why should the plaintiffs be in a worse position as against the assurance fund ?

We think that it is clear that in working out their rights against Johanna the plaintiffs would have been entitled to insist that she clear off the mortgage and that had she done so, either as a result of their insistence or as a result of the mortgagees enforcing her personal covenant, she could not have charged the remaindermen with any part of her expenditure upon the hotel. That was her affair and must be considered an independent act on her part the consequential gain enuring in fact to the remaindermen being no necessary consequence of the wrong done to them or their interests. We do not think that this is any the less so because she included in the mortgage a covenant on her part to build the hotel. The hotel might have been built out of any money. It might have been burned down or demolished. It might have been rebuilt. It might have fallen into disrepair and have ceased to give the land any additional value. Prima facie, the amount of the mortgage debt is the measure of damages in such a case as this : see *Queensland Trustees* v. *Registrar of Titles* (1).

The issue of the certificate to the surviving grantee to uses is the erroneous step to which the loss of the remaindermen is attributable, but the loss was mitigated by the possibility of fixing Johanna, as a voluntary transferee from him, with a trust in favour of the

(1) (1893) 5 Q.L.J. 47, at pp. 50-51.

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remaindermen and rectifying the register to preserve their remainders. The mitigation could not or did not extend to the removal or discharge of either mortgage and no reason has been shown why the real loss of the plaintiffs in respect of the hotel lands should not be considered to be the equivalent of the mortgage.

The appeal should be dismissed with costs.

Appeal dismissed with costs. Declare such costs are recoverable by plaintiffs against the assurance fund and that appellant is entitled to be indemnified out of the said fund in respect of such costs and of his costs of appeal as between solicitor and client.

Solicitor for the appellant, *H. T. O'Driscoll*, Crown Solicitor for Queensland.

Solicitors for the respondents, *L. B. Moynihan & Vicary.*

B. J. J.