

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Spencer v. The Registrar of Titles, from the Supreme Court of Western Australia; delivered the 25th July 1906.*

Present at the Hearing :

THE EARL OF HALSBURY.

LORD DAVEY.

SIR ARTHUR WILSON.

SIR ALFRED WILLS.

[*Delivered by Lord Davey.*]

This is an Appeal from an Order and Judgment of the Supreme Court of Western Australia, dated the 5th April 1905. The subject of the Appeal is the title to a parcel of land at Perth, in that Colony, described as "Perth Town Lot P. No. 8," of which one Terrence Farrelly became the registered proprietor, and in respect of which a certificate of title was granted to him under the provisions of the Transfer of Land Act 1874 on the 16th December 1875. The Appellant contends that but for the grant of such certificate he would now be entitled to the land as sole existing trustee of a settlement dated the 6th October 1846, and made on the marriage of his father Henry Spencer with his mother, who was then a widow named Sarah Hannah Eyles Mayo. The Appellant is also a beneficiary under the same settlement. By his writ in the action he claims damages for being deprived of the land by the issue of this certificate to Farrelly. A special case was stated in the action. It contains a statement of the instruments

constituting the respective titles of the Appellant and Farrelly, and the questions for the consideration of the Court are, shortly,—

1. Whether the Plaintiff is entitled to claim for deprivation of title.

2. Whether the Plaintiff's alleged claim is barred by Section 211 of the Transfer of Land Act, 1893.

3. If the first question be answered in the affirmative, and the second in the negative, what is the measure of damages?

The answer to the first two questions has been treated in argument as depending exclusively on the construction of two deeds.

By a deed of feoffment with livery of seisin, dated the 20th October 1841, and made between one Thomas William Mews the younger, of the one part, and Thomas Mews the elder and Samuel Cox, described as “trustees for Sarah Hannah Eyles Mayo (which said Sarah Hannah Eyles Mayo is the wife of Louis de Mayo, but now living separate from him)” it was witnessed that Thomas William Mews the younger as well in consideration of his natural love and affection for his sister, Mrs. Mayo, as also for her better maintenance, support, livelihood, and preferment, enfeoffed to Thomas Mews the elder and Samuel Cox, in trust for Mrs. Mayo, her heirs and assigns, the parcel of land in question, to hold unto Thomas Mews the elder and Samuel Cox, their heirs and assigns for ever, upon the trusts thereafter mentioned (that is to say) in trust to receive and pay the rents, &c. of the said parcel of land, and apply the same to the use, purposes, and designs of Mrs. Mayo as she should from time to time direct, and upon further trust in the event of Mrs. Mayo's death, to grant and assign the same to such persons as she should appoint by will.

The point argued on behalf of the Appellant in the Supreme Court seems to have been that Mrs. Mayo under this deed of feoffment took a legal fee. The Court decided against this contention, and their Lordships think rightly. The first question to be answered is, what estate did the feoffees take, and this is a purely legal one. Their Lordships agree with the learned Judges that although the habendum cannot retract the gift in the premises, it may construe and explain the sense in which the words in the premises should be taken, and that it is upon a view of the whole deed that the intent of the parties must be collected. Their Lordships also agree that the want of the necessary words of limitation in the premises may be corrected and supplied by the habendum, and that the existence of a special and active trust during Mrs. Mayo's life is sufficient to show that the deed was intended to operate by the Common Law and not by the Statute of Uses. The feoffees, therefore, took the legal estate in fee. It is a totally different question what equitable estate Mrs. Mayo took, and on this question their Lordships are unable to agree with the Court below. The general trust imposed on the legal estate in fee thus taken by the feoffees is for Mrs. Mayo, her heirs and assigns. The special trust following upon the habendum to the feoffees is not in any way inconsistent with the equitable fee simple thus created, but is ancillary to it, and makes the instrument effectual for securing to the *cestui que trust* the actual enjoyment of the property during her life, and the power of disposing of it after her death. It is hardly necessary in this case to invoke the principle acted on by Lord Cottenham in *Lassence v. Tierney*, 1 Macn. and G. 551:—

“ If a testator leaves a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment of

“ it to secure certain objects for the benefit of the legatee—  
 “ upon failure of such objects, the absolute gift prevails.”

That was a case of a will, but the principle is equally applicable to a deed where there are sufficient technical words, and the intention is to be collected from a view of the whole instrument. The learned Judges seem to have treated the special trust as an exhaustive explanation of the meaning of the earlier trust, but that construction neglects and gives no effect to the words of limitation in the earlier trust. Their Lordships are of opinion that under the deed of feoffment Mrs. Mayo took an equitable estate in fee simple, subject to a trust for securing to her the enjoyment of the income for her separate use during her coverture, and a testamentary power of appointment.

By an indenture dated the 28th May 1842, to which Thomas Mews and Samuel Cox (the trustees under the deed of feoffment), Mrs. Mayo, Henry Spencer (described as her “ next friend ”), and Thomas William Mews (the feoffor) were parties, Mrs. Mayo purported to convey, and the trustees at her request conveyed, and Thomas William Mews confirmed, “ Perth Building Lot No. 8 ” to one Thomas Helms in fee, subject to a proviso for redemption on payment by Mrs. Mayo, or Henry Spencer, or her trustees, to Helms of 50*l.* and interest.

Mrs. Mayo was still under coverture at the date of this mortgage, but her husband was not a party to it, and her execution was not witnessed by a Justice of the Peace, nor does it appear that she was first separately examined as required by the Act of 1833, 2 Will. IV., No. 7. The deed was not therefore effectual to pass her equitable fee. But the legal estate became vested in Helms.

Mrs. Mayo’s first husband seems to have died shortly after the execution of the mortgage

to Helms, and on the 7th October 1846 she was married to Henry Spencer.

Previously to and in contemplation of this marriage a settlement dated the 6th October 1846 was made whereby "Perth Building Lot No. 8" was conveyed by Mrs. Mayo to Thomas Helms and Alfred Hawes Stone, their heirs and assigns, to the use of Henry Spencer for life, with remainder to the use of Mrs. Mayo for life, and after the death of the survivor of them, upon trust to sell the land and divide the proceeds between all the children of Mrs. Mayo before marriage to Henry Spencer and to her children after the then intended marriage, to be vested as therein mentioned.

This settlement was registered in the then Office for the Registration of Deeds on the 13th October 1847. Mrs. Mayo was, at the date of the execution of the settlement, *sui juris*, and could release the trusts for her separate use during her life, and her testamentary power of appointment created by the deed of feoffment. She was therefore competent to convey the equitable fee simple. The mortgage is not recited in the settlement, and the conveyance is not made subject to it, yet, oddly enough, Helms, the mortgagee, is one of the trustees. As already observed, however, the mortgage did not in fact bind her estate.

By a deed dated the 8th January 1848, to which Henry Spencer and his wife, the trustees under the deed of feoffment, the feoffor himself, and Terrence Farrelly were parties, after a recital that Spencer, at the request of his wife, had agreed with Farrelly for the sale to him of the land in question for 70*l.*, out of which Helms' mortgage was to be paid off, it was witnessed that Helms, by the direction of Spencer and his wife, and Spencer by her direction, and the trustees of the deed of feoffment at her request,

and Thomas William Mews, the feoffor, purported to convey the parcel of land called "Perth Building Lot No. 8," to Farrelly, to uses equivalent to the fee simple in his favour, and it was declared that for the protection of Farrelly from all mesne charges (if any), whether he had any actual or constructive notice thereof or not, the mortgage debt, interest, and security, should henceforth be considered as being still on foot and unmerged. It should be added that Spencer entered into full covenants for title as if he were vendor.

This deed was registered on the 11th January 1848, and on the passing of the Transfer of Land Act, 1874, the land which is the subject of it was brought under the operation of that Act, and a certificate of title was issued to Farrelly as already mentioned.

The legal estate in the land passed from Helms to Farrelly, and no doubt Spencer's life estate under the settlement also passed by the conveyance to Farrelly. Spencer survived his wife and did not die until the 25th June 1903, so that she never acquired any estate or interest in possession under the settlement. The interests of those entitled in remainder after the death of the survivor of the husband and wife were (in the view taken by their Lordships) unaffected by the conveyance. The result is that Farrelly acquired no beneficial estate or interest in the fee simple, and the certificate was wrongly issued to him.

It is stated in the Special Case that one of the contentions made on behalf of the Respondent was that Farrelly was a purchaser for value without notice. But the Special Case does not find either that Farrelly had, or that he had not, notice of the settlement. The point, though mentioned in the Respondent's case, was not relied on by his Counsel before their Lordships.

Their Lordships are further of opinion that the title of the Appellant to commence this action accrued on the death of Spencer when the trust for sale of the property came into operation. And in that case the learned Counsel for the Respondent admitted that the Appellant was not barred by Section 211 of the Transfer of Land Act, 1893.

The third question in the Special Case relates to the measure of damages. This question has not been argued before their Lordships.

Their Lordships will therefore humbly advise His Majesty that the Order of the Full Court, dated the 5th April 1905, and the Judgment of the same date, be discharged, and that instead thereof it be ordered that the first question be answered in the affirmative, and the second question be answered in the negative, and that the costs of the hearing of the Special Case in the Full Court be costs in the Cause, and that all further proceedings in this action be remitted to the Supreme Court of Western Australia. The Respondent will pay the costs of this Appeal.

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