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POTTER v. BROKEN HILL PROPRIETARY CO. LTD.

O'Connor J.

without inquiring into the validity of the patent grant, and could not make that inquiry without violating a fundamental principle of the comity of nations which is binding on the Victorian Courts in the absence of any Victorian law authorizing them to make such inquiry. The case, therefore, not being justiciable in the Victorian Courts, I am of opinion that the decision of the Supreme Court was right, and the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors, for appellant, *Braham & Pirani*, Melbourne.

Solicitors, for respondent, *Moule, Hamilton & Kiddle*, Melbourne.

B. L.

HIGH COURT OF AUSTRALIA.]

AUSTIN AND OTHERS . . . . . APPELLANTS;
PLAINTIFFS,

AND

AUSTIN AND OTHERS . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *March* 6, 8, 9, 12, 13, 14.

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

Trustee—Breach of trust—Negligence—Duty of one of two executors—Custody of documents of title—Mortgage deed left in hands of solicitor—Solicitor one of executors—Mortgage not registered—Receipt of mortgage money by solicitor-executor.

It is the duty of a trustee, in managing the trust affairs, to take those precautions which an ordinary man of business would take in managing similar affairs of his own.

Executors omitted to register a mortgage given to their testator during his lifetime. They also left documents, which in the absence of registration operated as an equitable mortgage only, in the possession of a firm of solicitors acting for the estate by express authority of the will, and of which one of them was a

member, being also, as trustee of another estate, one of the mortgagors, who had undertaken personal liability under the mortgage. The solicitor executor received the mortgage money when due, and mis-applied it.

Held, hsving regard to the terms of the will and the circumstances of the case, that the first-named executor had not been proved guilty of any negligence or breach of trust for which he could be held responsible.

Decision of Supreme Court (*Austin* v. *Austin*, (1905) V.L.R., 564; 27 A.L.T., 43), affirmed, but on different grounds.

PPEAL from the Supreme Court of Victoria (*Hodges* J.).

An action was brought by Stanley Austin, John Kenny and rank Bishop, the trustees in Victoria of the will of James Austin, eceased, against Albert Austin, A. H. Bullivant and H. E. Bullivant, executors of W. H. Bullivant, deceased, alleging that the aid W. H. Bullivant, who had been one of the executors and rustees of the will of the said James Austin, had as such executor nd trustee been guilty of certain breaches of trust.

The facts are fully set out in the judgment hereunder.

Hodges J., before whom the action was heard, gave judgment or the defendants: *Austin* v. *Austin* (1).

The plaintiffs now appealed to the High Court.

Duffy K.C. and *Starke*, for the appellants. At the time Bullivant ecame executor he knew, or ought to have known, that the nortgage from Ware's executors was unregistered, and it was his luty to have taken steps to have it registered. A trustee has two undamental duties, first, to carry out every direction of the trust locument, and, secondly, to preserve the trust estate. In carrying ut the latter duty he must take such care as a prudent and vigilant man would take in looking after business of his own of a like class. As soon as Bullivant became executor he should have taken steps to find out the state of the trust property, including, of course, the securities, and to get it into the joint control of himself and his co-executor: *Underhill on Trusts*, 5th ed., p. 154; *Hallows* v. *Lloyd* (2); *Lester* v. *Lester* (3); *Macnamara* v. *Carey* (4); *Dix* v. *Burford* (5); *Low* v. *Bouverie* (6); *Wyman* v.

(1) (1905) V.L.R., 564; 27 A.L.T., 43.
(2) 39 Ch. D., 686, at p. 691.
(3) 6 Ir. Ch. Rep., 513.
(4) 1 Ir. Rep. Eq., 9.
(5) 19 Beav., 409.
(6) (1891) 3 Ch., 82, at p. 99.

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Paterson (1). The clause in the will authorizing the appointment of Grey did no more than authorize the employment of Grey to do professional work and charge for it. The fact that Grey was one of the solicitors to the estate made it more necessary for Bullivant to get this mortgage into the joint control of himself and Grey. The further facts that Grey was one of the mortgagors and that his firm were solicitors to Ware's estate, made it negligence on Bullivant's part to allow Grey to act as solicitor for Austin's estate in connection with the matter: *Waring* v. *Waring* (2); *Fry* v. *Tapson* (3). The allowing Grey to retain possession of the mortgage is as bad as allowing him to get possession of it after it had been in the joint possession of Bullivant and Grey. In the latter case Bullivant would have been liable for Grey's dealings with the mortgage: *Candler* v. *Tillett* (4); *In re Gasquoine*; *Gasquoine* v. *Gasquoine* (5); *In re Stevens*; *Cooke* v. *Stevens* (6); *Lowe* v. *Shields* (7); *Field* v. *Field* (8); *In re De Pothonier*; *Dent* v. *De Pothonier* (9); *In re Sisson's Settlement*: *Jones* v. *Trappes* (10). Bullivant is not protected by any indemnity given by the will: *Lewin on Trusts*, 11th ed., p. 301. Nor is he protected by the *Trusts Act* 1896, as the breach of trust was a continuing one. [They also referred to *Hopgood* v. *Parkin* (11); *Williams on Executors*, 10th ed., p. 1463; *Clough* v. *Bond* (12); *In re Timmis*; *Nixon* v. *Smith* (13); *Charlton* v. *Earl of Durham* (14); *Styles* v. *Guy* (15); *Williams* v. *Higgins* (16); *Sutton* v. *Wilders* (17); *National Trustees Co. of Australasia, Ltd.* v. *General Finance Co. of Australasia Ltd.* (18).]

Isaacs A.-G., and *Weigall*, for the respondents. Grey had no personal interest in the mortgage, and therefore was not a person whom Bullivant ought not to have employed in reference to it. Knowledge that the mortgage needed registration is not to be imputed to Bullivant. He was justified in believing that all

(1) (1900) A.C., 271.
(2) 3 Ir. Ch. Rep., 331.
(3) 28 Ch. D., 268.
(4) 22 Beav., 257, at p. 263.
(5) (1894) 1 Ch., 470.
(6) (1898) 1 Ch., 162, at p. 171.
(7) (1902) 1 I.R., 320.
(8) (1894) 1 Ch., 425.
(9) (1900) 2 Ch., 529.
(10) (1903) 1 Ch., 262.
(11) L.R. 11 Eq., 74.
(12) 3 My. & Cr., 490, at p. 496.
(13) (1902) 1 Ch., 176.
(14) L.R. 4 Ch., 433.
(15) 1 Mac. & G., 422, at p. 431.
(16) W.N. (1868), 49.
(17) L.R. 12 Eq., 373.
(18) (1905) A.C., 373.

legal requirements had been complied with. It is consistent with the allegations that Bullivant was not negligent in omitting to get the mortgage registered, and it is consistent with the facts that Austin knew all the facts and believed that the mortgage was properly registered. The proper assumption is that everybody except Grey believed it was properly registered. It was a reasonable thing for Bullivant to employ a solicitor to do legal work, and to believe that Grey had properly done that work. As to any liability arising out of the fact that Grey was one of the mortgagors, no loss arose from that fact. The mortgage money was repaid to Taylor, Buckland & Gates and repayment to them was lawful. So that the employment of the solicitors was proper. See *Lewin on Trusts*, 11th ed., p. 771 (*n*), citing *Alton* v. *Harrison* (1); *Shepherd* v. *Harris* (2); *Oxley* v. *Scarth* (3); *In re Whiteley*; *Whiteley* v. *Learoyd* (4); *Learoyd* v. *Whiteley* (5); *In re Smith*; *Henderson-Roe* v. *Hitchins* (6); *In re Brier*, *Brier* v. *Evison* (7). Having appointed a proper agent, Bullivant might properly conclude that the mortgage was properly registered. Alternatively, it ought to be assumed that the mortgage was properly left unregistered. See also *Speight* v. *Gaunt* (8); *Home* v. *Pringle* (9); *Ex parte Belchier* (10); *Jobson* v. *Palmer* (11). The *Trusts Act* 1896, which was in force when the acts complained of were done, protects Bullivant. The will of Austin empowered the employment of Taylor, Buckland & Gates to act as solicitors to the estate, and, having been employed, that firm was properly entrusted with the registration of the mortgage. Bullivant had never any reason to distrust Grey until the misappropriation was found out. As to the *Trusts Act* 1896, see *Buckland* v. *Ibbotson* (12).

[They also referred to *Phillips* v. *Munnings* (13); *Trustee Act* 1893 (56 & 57 Vict. c. 53); *In re Grindey* (14); *Trusts Act* 1901.]

Starke, in reply. The whole case comes down to the question, what was Bullivant's duty? He must have had some duty. Even

(1) (Unreported).
(2) (1905) 2 Ch., 310.
(3) 51 L.T. N.S., 692.
(4) 33 Ch. D., 347, at p. 350.
(5) 12 App. Cas., 727, at p. 731.
(6) 42 Ch. D., 302.
(7) 26 Ch. D., 238.
(8) 9 App. Cas., 1, at p. 29.
(9) 8 Cl. & F., 264, at p. 286.
(10) 1 Amb., 218.
(11) (1893) 1 Ch., 71.
(12) 28 V.L.R., 688; 24 A.L.T., 132.
(13) 2 My. & Cr., 309.
(14) (1898) 2 Ch., 593.

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if there was no duty owing by Bullivant to have the mortgage registered, there was a duty to take proper care of the unregistered document by getting it into the joint control of himself and Grey. That document was a security, and the mortgage debt was accessory to it. Without the document Grey could not have obtained the mortgage money, so that the result of Bullivant not getting the document into his control was that the money was obtained by Grey and was lost to the estate, and for that Bullivant is responsible. If the loss might have been prevented by Bullivant doing his duty, he is liable. A reasonable and prudent man would never leave an unregistered mortgage in the hands of his co-owner. The proximate cause of the loss was the neglect of Bullivant to protect the security. It ought not to be assumed that Grey collected the mortgage debt under his power as one of two executors. It was collected by Taylor, Buckland & Gates, that is, by Grey with the aid of the document which was wrongly left in his control. It was wrong to employ a solicitor to hold the document or to collect that money in respect of it. When collected it was a breach of trust on Bullivant's part to leave it in the hands of Taylor, Buckland & Gates, or of Grey. Bullivant knew, or ought to have known, that it was paid. It was his duty to have collected it on 4th August, 1897, and that must be imputed to his knowledge. He could let it stand out only if it could not be collected without sacrifice, and those circumstances did not arise. The money was lost by leaving it outstanding, and for that Bullivant is liable. An equitable mortgage is not an investment authorized by the will, and it was therefore not proper to leave this money on equitable mortgage. [He also referred to *Archer's Case*; *In re North Australian Territory Co.* (1); *In re Weall*; *Andrews* v. *Weall* (2); *Lord Shipbrook* v. *Lord Hinchinbrook* (3); *In re Stuart*; *Smith* v. *Stuart* (4); *In re Turner*; *Barker* v. *Ivimey* (5); *London General Omnibus Co. Ltd.* v. *Lavell* (6).]

The judgment of the Court was read by

GRIFFITH C.J. This is a suit by the present representatives of James Austin, who died in March, 1896, against the executors of

(1) (1892) 1 Ch., 322, at p. 341.
(2) 42 Ch. D., 674.
(3) 11 Ves., 252.
(4) (1897) 2 Ch., 583.
(5) (1897) 1 Ch., 536.
(6) (1901) 1 Ch., 135, at p. 142.

ne W. H. Bullivant, who died in January, 1901, and who was ne of the original executors and trustees under Austin's will, to ecover a sum of £7,000 alleged to have been lost through the vilful neglect and default of Bullivant as executor and trustee of ustin's will.

In November, 1889, Austin, who had been a resident of Victoria, ut then resided in England, executed a power of attorney by vhich he appointed Bullivant, who was his son-in-law, and one . H. Grey, a member of a firm of solicitors who carried on ractice at Geelong under the name of Taylor, Buckland & ates, and who had for some time been Austin's solicitors, to be is attorneys and agents, with large powers of disposition over ustin's lands in Victoria and full authority to deal with any ebts owing to him. The power of attorney included an authority to accept or join in accepting any mortgage . . . or security . . over any real or personal estate that may for any purpose e executed to me." Acting under this power, Bullivant in 1893 n concurrence with Grey agreed to advance a sum of £7,000 to he executors of one Ware on the security of land subject to the *Transfer of Land Act*. Grey and one C. E. Gates, another nember of his firm, were two of Ware's executors, the third being ne Shannon. At this time both Grey and his firm enjoyed a igh reputation, and they continued to do so until the year 1899, vhen Grey, who was then the sole surviving member of the firm, bsconded. Of the £7,000 a sum of £5,000 was to be advanced n April, 1893, and the remaining £2,000 in the following July. Ware's executors, including Grey, accordingly executed a mortgage n duplicate in favour of Austin in the form prescribed by the *Transfer of Land Act*, and the duplicates were forwarded to Bullivant by Taylor, Buckland & Gates for signature by him as ttorney for the mortgagee. It appears that Bullivant on or bout 5th April took these documents, duly signed by him, to Taylor, Buckland & Gates, and gave that firm a cheque for the £5,000. The mortgage, which contained a stipulation that Ware's executors should not be personally liable on the covenants, was never registered, but remained in the custody of Taylor, Buckland & Gates, who in fact always acted as solicitors for Ware's executors, and conducted their financial business, as well as acting

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for Bullivant in his capacity of Austin's attorney. The sum of £2,000 to be advanced in July was in fact paid by Bullivant to Grey on behalf of Ware's executors, but Grey misappropriated it, and the estate never received the benefit of it. Taylor, Buckland & Gates, however, regularly accounted to Bullivant for the interest on the whole sum of £7,000, which was payable in February and August of each year. The principal was by the terms of the mortgage repayable on 4th August, 1897. It does not appear whether Bullivant formally reported to Austin the making of this loan, or whether any arrangement was made between Bullivant and Ware's executors that the mortgage should not be registered, or whether Austin ever received any information on that subject. The complaint now made against Bullivant does not relate to his conduct as attorney in making the advance, or in failing to see to the registration of the mortgage as such attorney, although the propriety of his conduct in the latter respect comes incidentally in question, as will be afterwards seen. In the absence of any evidence on the point we think that the proper inference to be drawn, if either fact is material, is that Bullivant informed Austin that he had advanced the £7,000 to Ware's executors, and that Austin knew that Grey and Gates were two of those executors.

Austin by his will appointed two gentlemen, practising in partnership as solicitors, as his English executors and trustees, and appointed Bullivant and Grey as his Australian executors and trustees. The trusts of the will as to the Australian estate were "that my Australian Trustees shall as soon as conveniently may be after the sale and conversion of my personal estate in Australia or elsewhere out of Great Britain either remit the net proceeds of such sale and conversion and also such part of my personal estate in Australia or elsewhere as shall consist of money to my English Trustees or shall account for the same to them as they shall direct." The will, however, contained the following provision: "I authorize and empower the acting executors or executor for the time being of this my will both in Great Britain and Australia and so that the powers next hereinafter contained may be exercised by such respective acting executors or executor with regard to the property in respect of which they . . . are . . .

ppointed executors or executor without the concurrence of any ther acting executors or executor . . . to accept any security eal or personal for my debts owing to me or my estate and to llow such times for the payment of any such debts . . . ither with or without taking security for the same as to them r him shall seem reasonable." The will also contained the ollowing clauses :—

"I declare that any trustee (whether English or Australian) of his my Will may in the conduct of the trust business instead of cting personally employ and pay an agent whether being a olicitor or any other person to transact all business and do all cts required to be done in the trusts including the receipt and ayment of money And I expressly declare that the said dward Bath and Stanley Austin" (the English executors) "who re now in co-partnership as solicitors at Glastonbury aforesaid nay by themselves or by their firm act as solicitors or attorneys or or in relation to my estate or my executors or executor or rustees or trustee for the time being whether English or Australian and that the said Joseph Henry Grey who is practising as solicitor at Geelong aforesaid may by himself or his firm similarly act as solicitor or attorney for or in relation to my estate or my executors or executor or trustees or trustee for the time being whether English or Australian and that the said Edward Bath Stanley Austin and Joseph Henry Grey shall respectively be entitled to charge and shall be paid for all business done by them respectively as such solicitors or attorneys (including acts which an executor or trustee could have done personally) and shall be entitled to receive the usual commission on all rents and interest received by them respectively in the same manner as if they respectively had not been appointed executors or trustees."

Probate was granted to Bullivant and Grey in 1896. At this time the mortgage from Ware's executors, which being unregistered operated only as an equitable charge upon the land comprised in it, was still in the custody of Taylor, Buckland & Gates, of which firm at that time Grey and Gates were the only members. Gates died in May, 1898. Bullivant took no steps to remove the mortgage from the custody of the firm or to procure its

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registration. Shortly before the time appointed for repayment, 4th August, 1897, it was verbally arranged between Bullivant and Grey that the £7,000 should remain outstanding on the same security. This arrangement, in which Grey seems to have professed to act as representing Ware's executors, was in fact made without the concurrence of his co-executors; for on 30th September a cheque for £5,164, representing the £5,000 and interest, and drawn upon their bank, was received by Grey, either acting as an executor of Austin or as solicitor for himself and Bullivant as joint executors, and placed to the credit of his firm in their bank. It does not appear what became of the mortgage security. Grey misappropriated the money thus received, but his firm paid interest, represented to have been received from Ware's executors, to Bullivant on the full sum of £7,000 up to February, 1898, and credited him in their accounts with interest up to the time of Grey's absconding. Bullivant being dead, this action was brought against his executors. The breaches of duty alleged against him as executor and trustee are—(1) That he negligently permitted Grey or his firm to have the sole custody and control of the mortgage security; (2) That he negligently omitted to see to the repayment of the £7,000 on and after 4th August, 1897; (3) That he negligently omitted to inquire or make any provision for the safety of that sum on and after the same date; (4) That he negligently authorized or allowed the firm of Taylor, Buckland & Gates to act on behalf of the Australian executors and trustees of Austin's will in the matter of the repayment.

The learned Judge from whose decision this appeal is brought gave judgment for the defendants. We have unfortunately not had the advantage of his considered opinion on the questions of law raised on the facts, for, according to the report of his judgment (1), he considered himself bound to follow a rule which he supposed to have been laid down by this Court in *Marshall* v. *Colonial Bank of Australasia* (2), although he thought that rule inconsistent with principle and authority. The passage referred to by the learned Judge is as follows:—"If the rule is put in the form that he (the drawer of a cheque) must use reasonable care

(1) (1905) V.L.R., 564; 27 A.L.T., 43.

(2) 1 C.L.R., 632, at p. 660.

to prevent forgery, the question arises what is meant by reasonable care. Usually in considering whether a thing is reasonable or not all the circumstances must be taken into consideration. In this view what would be reasonable care in an illiterate farmer might not be reasonable care in a skilled accountant. A rule which would make the question depend upon the capacity or education of the drawer of the cheque can hardly form part of the Mercantile law." It is sufficient to say that in this passage this Court did not purport to lay down any rule or principle of law. They stated a proposition which is no more than a truism for the purpose of showing the fallacy of an argument which had been addressed to them in that case, and which they rejected. The question of the degree of care required under an implied contract to use reasonable care in the performance of an act requiring personal skill is obviously quite a different question from that of the reasonable prudence required by law from persons in a fiduciary position. The learned Judge however went on to add, *obiter*, some expressions of opinion as to the merits of the case.

The rule to be applied in cases like the present is clearly settled. In *Speight* v. *Gaunt* (1), Lord *Blackburn* thus expressed it: "The authorities cited by the late Master of the Rolls I think show that as a general rule a trustee sufficiently discharges his duty if he takes in managing trust affairs all those precautions which an ordinary prudent man of business would take in managing similar affairs of his own." We proceed to apply this rule to the facts of the present case. The first point that arises is whether Bullivant acting as attorney was guilty of any negligence in not seeing to the registration of the mortgage. For, if he was, he must, we think, be taken to have discovered when he became executor that the security was in an unsafe condition, and must be held responsible for not doing what an ordinary prudent man of business would have done to make it safe by registration. But can it be said that there was a want of ordinary prudence in not getting the mortgage registered? We think not. No evidence was offered to show that a loan on sufficient security by way of equitable mortgage was imprudent as between Austin and his

(1) 9 App. Cas., 1, at p. 19.

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attorney, even if the former did not know of the non-registration. Nor, so far as we can use our knowledge of Australian conditions, could such a proposition have been established by evidence. Was it then imprudent to leave the deeds and equitable mortgage in the possession of the solicitors for the trust after Austin's death? We will first consider the matter apart from the circumstance that those solicitors were also, in their capacity of Ware's executors, joint mortgagors. It is common knowledge that in Australia trustees do in fact habitually leave securities in the hands of their solicitors, and we do not know of any authority to show that this may not prudently be done in the case of equitable mortgages. Ordinarily an equitable mortgage will not be discharged by the mortgagor without a return of the security and an acknowledgment from the mortgagee, but the mere custody of a security does not afford any evidence of authority in the custodian to receive the debt. It was attempted to draw an analogy between equitable mortgages and what are called "bearer" securities, but the analogy fails for the reason just given, the possession of a bearer security being sufficient proof of authority to receive the debt evidenced by it. Does then the circumstance that both members of the firm of Taylor, Buckland & Gates were at this time two of Ware's executors, and consequently nominally mortgagors although not personally bound by the covenants in the mortgage, alter the case? In the first place the employment of that firm as solicitors for Austin's executors was expressly authorized by the will, and in our opinion their employment as such solicitors also justified the leaving of the security in their hands. On the assumption, however, that it did not, then, if, by reason of the security being improperly left in their hands, it had been lost to Austin's estate, and the debt had become irrecoverable from Ware's estate, Austin's executors would have been liable to make it good. But this did not happen: the debt was paid by Ware's estate, and after such repayment had been made it became quite immaterial whether the security had originally been good or bad, or whether proper care had or had not been taken of the securities. In this respect the case in the events that happened does not differ from a debt due on personal security. Executors may be guilty of negligence in not getting in such a debt with proper diligence,

but when it has once been paid, since no loss has occurred by reason of the want of security, no claim can be made against the executors for their technical breach of trust from which no loss arose.

It follows from the foregoing considerations that the plaintiffs' claim in the present case must be based, not upon the negligent custody of the securities, but upon Bullivant's permitting the £5,000 to come into the hands of Grey or of Taylor, Buckland & Gates. It was pressed upon us that he and his firm could not have received the money if they had not been in possession of the securities. But this is not by any means certain. Grey as one of Austin's executors had authority to receive and give a discharge for the £5,000, and the independent executor Shannon might well have been contented to pay him and take his receipt, leaving the return of the deeds to follow at convenience. There is no evidence of what actually took place when the mortgage was paid off; but it is not improbable, having regard to the fact that Taylor, Buckland & Gates were solicitors for Ware's executors as well as for Austin's executors, and that Grey transacted the legal and financial business of the former, that nothing was said about the custody of the security, and that, if Shannon took any active part in the matter, he contented himself with taking Grey's receipt, assuming that the deeds would thereafter be held for Ware's estate. It does not appear whether the receipt, which it must be supposed was given, was signed by Grey as executor or in the name of Taylor, Buckland & Gates. If anything turns on this point we think the onus is on the plaintiffs to establish the actual fact. Assuming, however, that Grey could not have obtained payment of the debt if he had not had possession of the security, the question to be considered is: Ought Bullivant to have taken steps to prevent him from receiving payment? As executor Grey had authority to receive the debt and give a valid discharge for it. Bullivant had no reason to suspect his probity, even if he had known (which he did not) that Ware's executors intended to pay off the loan. Moreover, he was expressly authorized by the will to appoint an agent to receive moneys. In making such an appointment he was, of course, bound to use due care, but Grey was a person specially

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designated by the testator as a fit person to be appointed as agent. We cannot see any reason for holding that Bullivant was guilty of any negligence in not communicating personally with Shannon, or that he was bound to warn Shannon not to pay the debt except to himself. If Bullivant had known in August, 1897, that the £5,000 had been received by Grey, he would, no doubt, have been bound to take steps to get it under their joint control. And, if he ought to have known, and negligently failed to acquire the knowledge, he would be in no better position. But Grey, being both one of the nominal mortgagors and a co-executor, had told him that it was desired that the repayment should be deferred, and Bullivant had assented to giving time. Having regard to the course of dealing in Austin's lifetime and afterwards, we cannot see any reason why he should have disbelieved Grey, or have communicated with Shannon to ask if what Grey said was true. He was therefore justified in agreeing to give time to Ware's executors for payment of the debt, and since interest on the full sum of £7,000 continued to be paid or credited to Austin's executors' account, he had no reason to suspect that the principal had been paid. The case, therefore, is simply one in which one of two co-executors has received a debt due to the estate without the knowlege of the other, and under such circumstances as to justify that other in not enforcing payment and not inquiring whether the debt has been paid or not. Under such circumstances no negligence can be imputed to him.

If, however, the £5,000 ought to be taken to have been received by Taylor, Buckland & Gates as solicitors for Austin's executors, and not by Grey as one of the executors, then we think that the appointment of that firm to receive the money would have been justified by the terms of the will, and that a general authority to the firm to receive all debts due to the estate may be inferred from the course of business as disclosed by the evidence.

If Grey and Gates had been actual and not merely nominal debtors to Austin, or if the employment of Taylor, Buckland & Gates as solicitors for the Australian executors had not been expressly authorized by the will, very different considerations would arise. But under all the circumstances we are unable to point to anything left undone by Bullivant which an ordinary

prudent man of business would have done in managing similar affairs of his own.

If knowledge of the receipt of the £5,000 by Grey in August, 1897, ought to be imputed to Bullivant, the defendants would be entitled to discharge themselves of their liability by showing that any steps which could then have been taken by Bullivant to recover the money from Grey would have been ineffectual: *Mucklow* v. *Fuller* (1).

So far as regards the £2,000, the plaintiffs' case rests on a different basis, namely, negligence in not ascertaining as executor that that sum had not, in Austin's lifetime, reached the hands of Ware's executors. This part of the case was not pressed before us, and we say nothing about it.

For these reasons we think that the appeal fails.

Appeal dismissed with costs.

Solicitor, for appellants, *C. J. McFarlane.*

Solicitors, for respondents, *McConkey*, Melbourne, for *Harwood & Pincott*, Geelong.

B. L.

[HIGH COURT OF AUSTRALIA.]

COUSINS . . . . . PLAINTIFF;

AND

THE COMMONWEALTH . . . . DEFENDANT.

The Constitution, secs. 52, 84—*Commonwealth Public Service Act* 1902 (*No.* 5 *of* 1902), *secs.* 2, 51, 60, 78, 80—*Public Service Act* 1900 (*Victoria*) (*No.* 1721), *secs.* 1, 3, 4, 8, 16, 19, 20—*Public Service—Officer in transferred department —Salary, right of Commonwealth to reduce.*

Sec. 19 of the *Public Service Act* 1900 (Victoria) was a merely temporary provision to fix the status of the officers therein referred to when they should be transferred with their departments to the Commonwealth.

(1) Jac., 198; 23 R.R., 29.