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the action up to verdict as were incurred by them by reason of that joinder, with mutual set off, and be restored as so varied. The respondents Sharpe and the company must pay the appellants one-half of their costs of the motion for judgment or new trial and of this appeal.

Order accordingly.

Solicitors, for appellants, *Atthow & McGregor.*
Solicitors, for respondents, *Thynne & Macartney.*

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Dist *Colyton Investments Pty Ltd v McSorley* (1962) 107 CLR 177

[HIGH COURT OF AUSTRALIA.]

UNION BANK OF AUSTRALIA . . APPELLANTS; DEFENDANTS,

AND

HARRISON, JONES AND DEVLIN LTD. . RESPONDENTS. PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 24, 25, 26; *Sept.* 8.

Griffith C.J., Barton, Isaacs and Higgins JJ.

Probate Act 1890 (*N.S.W.*) (54 *Vict. No.* 25), *secs.* 15, 17, 19, 20—*Judgment Creditors Remedies Act* 1901 (*No.* 8), *secs.* 10, 12—*Administration—Action against one of several executors—Sale by sheriff under fi. fa.—Effect of bargain and sale by sheriff to pass equity of redemption in real and personal estate of testator — Power of one co-executor to dispose of real and personal estate of testator.*

Under sec. 15 of the *Probate Act* 1890 real estate vests in the executors as joint tenants, in the same way as personal estate. Sec. 20 provides that an executor shall have the same rights and be subject to the same duties, with respect to real estate of the testator, that executors theretofore had or were subject to with reference to personal assets.

Held, that the intention of the Act was to place real and personal estate upon the same footing as regards actions for the recovery of debts due by the testator.

The appellants, who were mortgagees in possession under mortgages of station property and stock, brought an action against one of the two executors of the mortgagor to recover the amount due under the mortgage, and obtained judgment for want of a plea. At the date when the action was brought, and up to the time when judgment was recovered, the other executor was out of the jurisdiction. A writ of *fieri facias* was taken out by the appellants, and the sheriff, in execution of the writ, sold to the appellants the right, title and interest of the testator at the date of his death, and the right, title and interest of his executors in the real and personal property included in the mortgages. A deed of bargain and sale was subsequently executed by the sheriff in favour of the appellants. Prior to appellants going into possession, the executor who was out of the jurisdiction mortgaged his beneficial interest in the station to the respondents, who brought a redemption suit against the appellants alleging that the deed of bargain and sale executed by the sheriff was inoperative and that the appellants were liable to account as mortgagees.

Held, that the equity of redemption in the real and personal property included in the mortgage passed to the appellants.

Decision of *A. H. Simpson*, C.J. in Eq. : *Harrison, Jones and Devlin Ltd.* v. *Union Bank of Australia*, 10 S.R. (N.S.W.), 266, reversed in part, and affirmed in part.

APPEAL by the defendants from so much of the decree of *A. H. Simpson*, C.J. in Eq., as declared that a deed of bargain and sale of 18th September 1899 did not operate to vest in the appellants the lands therein mentioned, freed from all right and equity of redemption therein of Dugald Campbell McGregor, deceased, or of his executors. The late Dugald Campbell McGregor died on 12th October 1892, having previously mortgaged to the appellants his station property consisting of land and stock. At the date of his death he was indebted to the appellants under the mortgage. By his will, dated 5th September 1892, the testator appointed his sons, John McGregor and George Allen McGregor his executors and trustees, to whom probate of the will was granted in March 1893. In 1898 the appellants went into possession under the mortgage of the whole of the land and stock. In March 1899 the appellants sued John McGregor as such executor at common law, to recover

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the sum of £15,173 3s. 7d., the amount alleged to be due to the appellants as mortgagees. At the time this action was brought, and up to 22nd May 1899, George Allen McGregor, the other executor, was out of the jurisdiction. No process was served upon him, and he had no notice of the proceedings. On 22nd May 1899 the appellants recovered judgment. They subsequently took out a writ of *fieri facias* under which the sheriff sold the estate and interest of the testator at the time of his death, and the estate and interest of the executors in the station property and stock to the appellants for £5. By deed of bargain and sale, dated 18th September 1899, the sheriff conveyed this interest to the appellants. The plaintiffs in the suit, the present respondents, claimed under a mortgage to them by G. A. McGregor, dated 22nd February 1896, of his beneficial interest in the station property under the will. They alleged that the conveyance by the sheriff to the appellants was inoperative, and that the appellants were liable to account as mortgagees.

The Chief Judge held that the transfer by the sheriff passed to the appellants the equity of redemption in the stock and other chattels included in the mortgage, but that the conveyance by the sheriff of the land could not be put higher than a conveyance by John McGregor, and that one of two executors could not make a valid conveyance of the testator's real estate under the *Probate Act* 1890. He therefore held that the appellants had not acquired a good title to the real estate contained in the deed of bargain and sale (1). The respondents appealed from so much of the decree as declared that the sale was valid as to the personal estate.

The material sections of the *Probate Act* 1890 are set forth in the judgment of *Griffith* C.J.

Knox K.C. and *Harvey*, for the appellants. The sale by the sheriff, and the deed of bargain and sale, transferred to the appellants the equity of redemption in the land. The effect of the *Probate Act* 1890 is that executors are put in the same position with regard to real estate as they then occupied with regard to personal estate. At common law an action could be

(1) 10 S.R. (N.S.W.), 266.

brought against one of several executors. If the defendant wished the other executors to be made parties his only course was to plead in abatement: *Bullen and Leake*, 3rd ed., p. 472; *Ryalls* v. *Bramall* (1); *Rice* v. *Shute* (2). But this plea can only be pleaded if the co-executor is resident in the jurisdiction: *Common Law Procedure Act* 1899 (No. 21), sec. 41. The joint tenancy of co-executors is entirely different from any other joint tenancy: *Anon.* (3). Each executor had entire control over the personal estate. He could always assign or mortgage the testator's leaseholds without the concurrence of the other executors: *Jacomb* v. *Harwood* (4); *Simpson* v. *Gutteridge* (5). Executors may plead different pleas, and that which is most for the testator's advantage will be received: *Elwell* v. *Quash* (6); *Baldwin* v. *Church* (7); *Toller on Executors*, 5th ed., p. 359. Under sec. 15 of the *Probate Act* 1890 real estate vests in the executors, that is, in the executors as joint tenants, and sec. 20 says that the executors shall have the same rights, and be subject to the same duties with respect to the real estate of the testator that executors theretofore had or were subject to with reference to personal assets. These words are plain and unambiguous. "Rights" and "duties" are the widest terms that can be used. One of the executor's rights was to deal with personalty without consulting his co-executors. There is no proviso such as is contained in sec. 2 (2) of the English *Land Transfer Act* 1897, which expressly forbids one co-executor from selling real estate. But for this proviso one co-executor could have done so: *In re Pawley and London and Provincial Bank* (8). In the absence of any such proviso executors are in exactly the same position with regard to realty as personalty. The form of a judgment against executors is stated in *Chitty's Forms*, p. 713; *Chitty's Archbold*, 12th ed., p. 1230.

Langer Owen K.C. and *Rich*, for the respondents. The sale by the sheriff at most could only have had the effect of a sale by the then actual defendant. But even if a sale by the defendant would

(1) 1 Ex., 734.
(2) 5 Burr., 2612.
(3) 1 Dyer., 23 (b).
(4) 2 Ves., 265.
(5) 1 Madd., 616.
(6) 1 Stra., 20.
(7) 10 Mod., 323.
(8) (1900) 1 Ch., 58.

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bind the real estate of the testator, it does not necessarily follow that a sale by the sheriff would have this effect. The testator's estate was not the defendant in the action. To get a valid judgment against the estate all the executors who have proved the will must be joined as co-defendants: *Bullen and Leake*, 3rd ed., p. 155.

[GRIFFITH C.J., referred to *Erving* v. *Peters* (1).]

A judgment against one of several co-executors is a good judgment against the goods of the testator in his hand, but does not bind the estate as to goods in the hands of the other executors.

In order to bind the land originally it was necessary to make both the heir and devisee parties: *Maclean* v. *Dight* (2). The Statute 54 Geo. III. c. 15 rendered real estate in this Colony liable for simple contract debts as land in England was liable for debts by specialty. But in an action against an executor the sheriff could not sell the real estate of the testator: *Bullen* v. *à Beckett* (3). The judgment only binds assets in the hands of the executor: *Williams on Executors*, 10th ed., p. 1594.

[ISAACS J. referred to *In re Marvin*; *Chawter* v. *Marvin* (4).]

The provision in sec. 15 of the *Probate Act* 1890 that real estate shall vest in the executors "in the same way as personal estate now vests" does not mean that when it has vested it is subject to the same incidents as personal estate. This section merely provides for the devolution of title.

In the view of the legislature, a special provision was necessary to make real estate liable for the payment of debts: sec. 17. If sec. 15 was intended to make real estate subject to all the incidents of personal estate for purposes of administration this would have been unnecessary. It cannot be suggested that real estate passed to the administrator, or the executor in partial intestacy, with all the incidents of personalty. If the Act intended that real and personal estate should be on the same footing, it is difficult to see why executors and administrators should be in a different position.

But even if one of several executors can make a contract binding real estate, the sale by the sheriff did not have this

(1) 3 T.R., 685.
(2) 5 S.C.R. (N.S.W.), 95.
(3) 1 Moo. P.C.C. N.S., 223.
(4) (1905) 2 Ch., 490.

effect. Under sec. 10 of the *Judgment Creditors Remedies Act* 1901, No. 8, the sheriff can sell the interest belonging to the person "against whom the writ of *fi. fa.* issued," that is, the executor. It required statutory power to enable an official assignee to exercise the powers of a bankrupt: the *Bankruptcy Act* 1898, sec. 58 (*d*). One of two co-executors is not bound by the agreement of his co-executor to discharge a tenant from payment of rent: *Turner* v. *Hardey* (1); or liable in an action for use and occupation by reason of the entry upon the premises of his co-executor: *Nation* v. *Tozer* (2). One executor can deal with personal assets, because such executor represents the estate, but all the executors must join in the conveyance in order to pass the title to real estate.

[ISAACS J.—An acknowledgment of a debt by one of several executors binds the estate: *In re Macdonald* (3).]

But an acknowledgment by one of two executors and trustees against the wishes of the other is not a good acknowledgment under the *Statutes of Limitations*: *Astbury* v. *Astbury* (4)].

[Reference was also made to *Scott* v. *Tyler* (5); *Morley* v. *Morley* (6).]

Knox K.C., in reply. In actions against one or more executors, except on questions of costs, they are regarded not as individuals, but as representatives of the testator. A judgment against one executor of several is a good judgment against the estate of their testator because all the executors can plead such judgment in bar to an action against them. This shows that the real defendant is the testator or his estate. Therefore the writ in this case was really issued against the testator and his estate, the nominal defendant being merely a representative of the testator, and the sheriff could take in execution and sell the equities of redemption belonging to the testator. Sec. 12 of the *Judgment Creditors Remedies Act* 1901 makes the sale as valid to pass the testator's interest as if the testator himself had conveyed. The estate of a mortgagor under the *Real Property Act* is an equity of redemption within sec. 10 of the *Judgment Creditors Remedies Act*:

(1) 9 M. & W., 770.
(2) 1 C.M. & R., 172.
(3) (1897) 2 Ch., 181.
(4) (1898) 2 Ch., 111.
(5) 2 Dick., 724.
(6) 25 L.J. Ch., 1.

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Coleman v. *de Lissa* (1). This argument is entirely independent of the rights of one executor to sell land, or to sell and convey, which exists under the provisions of secs. 15 and 20 of the *Probate Act* 1890. [He also referred to *Toller on Executors*, 5th ed., p. 293; *Comyns' Dig.*, Administrator, c. 2; *Further* v. *Further* (2); *Parker* v. *Amys* (3).]

Cur. adv. vult.

The following judgments were read :—

September 8.

GRIFFITH C.J. This is a suit by the respondents, assignees by way of mortgage of the share of a beneficiary under the will of D. C. McGregor, who died in 1892, against the appellant bank, who were mortgagees of certain real and personal property of the testator under three mortgages executed, one by himself, and two by his executors, praying for an account upon the footing of the mortgages and consequent relief. The testator appointed two executors, John McGregor and G. A. McGregor, to whom probate was granted in 1893, and who are joined as defendants.

In March 1899 the bank commenced an action in the Supreme Court against John McGregor and (apparently) Donald McGregor (who was a beneficiary under the will) to recover the amount of the mortgage debt. On 8th May an order was made by *Simpson* J. by consent of the parties that the plaintiffs should be at liberty to amend the writ, *præcipe* and appearance by striking out the name of the defendant Donald McGregor and by making all necessary consequential amendments. On the same day the declaration was delivered, stating that the plaintiffs sued John McGregor executor of the last will and testament of D. C. McGregor for that &c. On 22nd May final judgment was signed by default for want of a plea. The judgment was not formally drawn up, but an *incipitur* only was filed. On 22nd June *Owen* J. made an order on the written consent of the defendant's attorney that the plaintiff should be at liberty to amend the declaration and judgment by inserting therein after the words "John McGregor Executor" the words "with one G. A. McGregor who

(1) 6 N.S.W. L.R. Eq., 104.
(2) 1 Cro. Eliz., 471.
(3) 1 Lev., 261.

was at the time of the commencement of this action and still is absent from the Colony of New South Wales." On the same day a writ of *fi. fa.* was taken out by the bank, commanding the sheriff to levy the judgment debt upon "the goods and chattels money and securities for moneys lands tenements and hereditaments equities of redemption and equitable interests which were of D. C. McGregor deceased at the time of his death in the hands of John McGregor and G. A. McGregor executors of his will."

The sheriff in execution of the writ offered the equity of redemption and all other the right title and interest of the testator in the mortgaged property at auction, and the bank became the purchasers for the sum of £5. A deed of bargain and sale in the prescribed form was executed by the sheriff on 18th September 1899 in favour of the bank.

The only question raised for determination in the suit is whether this instrument was effectual to pass the equity of redemption in the real and personal estate of the testator. If it was not, the bank are still liable to account as mortgagees. No point was made of any iregularity in the procedure, so far as regards the amendments which I have stated, but the case was treated as if the action had been, all through, an action against one of two executors. The learned Chief Judge in Equity thought that the sale was good as to the personalty but ineffectual to pass the equity of redemption to the realty. The bank appeals from the decree so far as it is against them, and the plaintiffs have given a cross notice so far as regards the personalty. As to realty the question depends upon the effect of the *Probate Act* 1890 (54 Vict. No. 25). As regards the personalty it depends upon the common law, and it will be convenient to deal first with that branch of the case.

At common law co-executors were regarded as one person, and each of them could bind the others by disposition of the assets, by assent to legacies, and in other ways. In an action by or against executors all the executors ought in strictness to be joined, but it was settled law that the objection of non-joinder of one or more could only be taken by plea in abatement, and that if that plea was not pleaded the plaintiff could obtain a valid judgment notwithstanding the non-joinder. The form of judgment in actions

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against an executor as such was that the plaintiff "do recover against the defendant" his debt "to be levied of the goods and chattels which were of the said A.B. deceased at the time of his death in the hands of the said (defendant) to be administered," &c. If the judgment was of assets *quando acciderint* the words "and which shall hereafter come to the hands of the said (defendant) to be administered" were added; *Chitty's Forms*, 713. The principle on which a judgment in this form was based was stated by *Buller* J. in the case of *Erving* v. *Peters* (1):—"The reason on which the law has directed that the judgment shall be entered against the effects of the testator is obvious, when it is considered. The action is brought for a debt due from him; and the creditor has no right to call on the administrator or executor but in respect of the effects which he has in his hands belonging to the deceased: by law therefore the creditor is to be paid out of those effects; and unless it appear that there are none such, the proper judgment is that the debt shall be paid out of the effects in the hands of the executor." In the same case Lord *Kenyon* C.J. remarked (2) that "the judgments given in the Courts of law are the best evidence of what the law is." It was held so long ago as the time of Queen Elizabeth that a judgment recovered against one of several administrators could be pleaded in bar to a later action against all: *Further* v. *Further* (3). The principle of this decision must have been that the plaintiff was entitled under his judgment recovered in the action against one to have recourse to the assets in the hands of all. Otherwise he must *ex debito justitiæ* have been allowed to obtain such recourse in a second action against the other.

In my opinion, therefore, whether the writ of *fi. fa.* should have referred to assets in the hands of J. McGregor alone or not, all the personal assets were bound by the judgment, and the sheriff's sale was valid so far as regards the equity of redemption to the personalty.

With regard, however, to realty the law was different. Executors as such took no interest in, and had no authority over, land other than chattels real. From an early date, however, an

(1) 3 T.R., 685, at p. 689. (2) 3 T.R., 685, at p. 688.
(3) 1 Cro. Eliz., 471; 1 Sid., 334.

action could be brought against the heir on his ancestor's specialty, and in New South Wales could be brought under the Act 54 Geo. III. c. 15, sec. 4, on his simple contract debts. In such an action the judgment was special to recover the debt to be levied of the lands descended (1 *Roll. Abr.* 70 *C. pl.* 1. *Tidd New Pr.*, p. 547). So in the case of an action against devisees under the Act of William and Mary. In these cases the persons in whom the legal estate was vested were, of course, necessary parties to the action, which only lay against them because of the vesting. The reason why the heir was also joined in the case of an action against devisees is stated by Lord *Cranworth* in the case of *Morley* v. *Morley* (1).

But, if before the passing of the Act of 1890 a creditor of a testator had desired to obtain satisfaction of his debt from both the real and personal property of the testator by action at law, he would have had to bring separate actions, one against the executor, in which he would have had recourse to the personal estate, another or others against the heir and devisees, in which he would have had recourse to the realty.

The appellants contend that all distinction between real and personal property so far as regards recourse to such property for the satisfaction of debts by means of actions at law has been abolished by the *Probate Act* 1890. Sec. 15 of that Act provides that:—"Upon the grant of probate of the will of any deceased person after the commencement of this Act, all the real estate whether held by him beneficially or in trust shall vest as from the death of such person in the executor to whom such probate shall be granted for all the estate therein of such person, and if there shall be more than one such executor shall vest in them as joint tenants in the same way as personal estate now vests."

Sec. 17 provides that "the real as well as personal estate of every deceased person shall be assets in the hands of his executor to whom probate shall have been granted for the payment of all duties and fees and for the payment of his debts in the ordinary course of administration, and it shall be lawful for such executor for purposes of admininistration to sell such real estate or mortgage the same with or without power of sale and to convey the

(1) 25 L.J. Ch., 1.

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same to a purchaser or mortgagee in as full and effectual a manner in law as the testator of such executor could have done in his lifetime."

Sec. 19 provides that "subject to the provisions of this Act the real estate of every deceased person devising such estate by his will shall be held by his executor to whom probate shall have been granted according to the trusts and dispositions of such will."

Sec. 20 provides that "the executor to whom probate shall have been granted shall have the same rights and be subject to the same duties with respect to the real estate of his testator that executors heretofore have had or been subject to with reference to personal assets."

The appellants maintain that the effect of this Act is to put executors in the same position with regard to land as they previously held with regard to chattels, that so far as regards chattels the nature of the office of executor was one well known to the law, and carried with it certain incidents and capacities, and that when the legislature said that in future real estate should vest in them in the same way as personal estate, they meant that the nature and functions of the office should be identical so far as regarded both kinds of property. Amongst the consequences which followed from the unity of the office were, as already shown, that one of several executors could dispose of the assets, and that a judgment binding the assets of the testator could be recovered in an action against one of several executors and it is urged that, even if the technical rules of conveyancing at common law, or the statutory rules of the *Land Transfer Act*, require that a conveyance or transfer shall be executed by all the executors in whom the legal estate is vested, that circumstance is not material to the validity or effect of a judgment in an action against one only.

The respondents, on the other hand, maintain that the rule that in an action in which the title to real estate is sought to be effected all the owners of the legal estate must be parties is not altered by the Act, and consequently that a judgment against one of two joint tenants of land cannot affect the legal title of the other.

The learned Chief Judge thought that the question to be determined was whether under the *Probate Act* of 1890 each executor could "make a valid conveyance of the real estate of the testator without the concurrence of the other executors" (1). He thought that one of several executors could not do so, and thought further that the sheriff's conveyance could not be put higher than a conveyance by the executor who was defendant in the action, and was therefore ineffectual. With all respect I do not think that this is the true test.

He himself pointed out that one of several executors cannot execute a valid transfer of shares or stock: *Barton* v. *London and North Western Railway Co.* (2); *Barton* v. *North Staffordshire Railway Co.* (3). But I cannot doubt that under a judgment regularly obtained in an action against one of several executors the shares or stock of the testator would be bound, and could be taken and sold in execution. Some other foundation must therefore be sought for the learned Chief Judge's conclusion, if it can be sustained.

I have already called attention to the words of sec. 15 enacting that the real estate shall vest in the executors if more than one as joint tenants "in the same way as personal estate now vests." I do not think that these last words can be limited to qualifying the term joint tenants. The respondents contend that full effect is given to this section by construing it as merely creating a new channel of devolution, leaving unaffected all other incidents of the property which devolves. Sec. 17, however, goes further, and provides that the real estate shall be assets in the hands of the executor for payment of the debts of the testator, and that it shall be lawful for the executor to sell and convey it as effectually as the testator could have done. In this section the word "executor" must, I think, be read "executors" if there are more than one, and I cannot find anything in either of these sections to dispense with the necessity of the execution of the instrument of conveyance by all the executors. But, as I have said, I do not think that this concludes the matter. Sec. 20 provides that the executor (executors) shall have the same rights and be subject to

(1) 10 S.R. (N.S.W.), 266, at p. 270. (2) 24 Q.B.D., 77.
(3) 38 Ch. D., 458.

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the same duties with respect to the real estate that executors theretofore had or were subject to with reference to personal assets.

Now, one of the duties of executors at common law was to pay the testator's debts out of his personal estate as far as it would extend. If they did not do so an action could be brought to compel payment, by execution if necessary. I think, therefore, that it is a fair inference that the legislature intended that executors in order to pay the debts of the testator should sell his real as well as his personal estate, and that if they failed to do so the creditors' right might be enforced by action against them, and that the creditors might obtain judgment giving recourse to the real as well as to the personal estate. If so much is granted, what remains is to a great extent a question of procedure. Is the common law rule that in an action against executors to recover a debt of a testator the objection of non-joinder of all the executors is regarded as a dilatory plea not going to the merits to be applied to the case of an action in which the plaintiff seeks to assert, once and for all, all the rights which the *Probate Act* gives him? Or is the other rule, that legal estate in land cannot be affected in an action to which the owner of the legal estate is not a party, to prevail?

Rules and forms of procedure are not ends in themselves, but means to an end, which is the attainment of justice. Rules as to parties are means to secure that all persons interested in asserting or resisting a claim shall be heard before judgment is given. In simple cases the obvious means of securing this end is to require that all persons having an interest, however small, shall be present. In the Court of Chancery at one time this rule was pressed to its extremest limits, but even then the Court relaxed the rule if the circumstances were such that if all the persons interested were individually made parties the suit could not effectually proceed.

The principle was expounded by Lord *Eldon* L.C. in the case of *Cockburn* v. *Thompson* (1). In that case a plea had been put in to a bill alleging that several persons were not parties. The Lord Chancellor said (2):—"The strict rule is, that all persons, materially interested in the subject of the suit, however numerous, ought

(1) 16 Ves., 321.

(2) 16 Ves., 321, at pp. 325-326.

to be parties: that there may be a complete decree between all parties, having material interests: but that, being a general rule, established for the convenient administration of justice, must not be adhered to in cases, to which consistently with practical convenience it is incapable of application. Accordingly there are several well known cases of exception; and, without going through them all, I will mention one instance of not applying it to persons, having valuable interests in real estate: viz., where it has been held sufficient to bring before the Court the first person, having an estate of inheritance; though it cannot be denied, that, persons, having present, immediate, valuable, interests in the same real estate, may become most deeply affected by what is done here in their absence. The same principle in a great variety of cases has obliged the Court to dispense with the general rule as to persons, out of its jurisdiction; and there are many instances of justice administered in this Court in the absence of those, without whose presence, as parties, if they were within the jurisdiction, it would not be administered; as it obviously cannot be so completely, as if all persons interested were parties: but the Court does what it can:" and again (1):—"So as to partnerships: the Court will settle the account between those parties who are before it: and do all possible justice. The principle being founded in convenience, a departure from it has been said to be justifiable, where necessary; and in all these cases the Court has not hesitated to depart from it, with the view by original and subsequent arrangement to do all, that can be done for the purposes of justice; rather than hold, that no justice shall subsist among persons, who may have entered into these contracts." This judgment was cited and relied upon by Lord *Macnaghten* in *Duke of Bedford* v. *Ellis* (2) and by myself in *Barnes* v. *Sharpe* (3). See also *Williams* v. *Salmond* (4). The old rule has since been frequently relaxed by Statute in particular cases.

These considerations show that the rule relied upon by the respondents is not a rule of abstract justice which cannot be relaxed, but a rule of practical convenience adopted as a means to an end, which may be relaxed if substantial justice can be

(1) 16 Ves., 321, at. p. 329.
(2) (1901) A.C., 1.
(3) 11 C.L.R., 462, at p. 469.
(4) 2 Kay & J., 463.

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better attained by doing so. No doubt an order directed to a man personally cannot be obtained in a proceeding to which he is not a party, but the Trustees Acts afford familiar instances of cases in which substantial relief can be obtained without the presence of the person in whom a legal estate is vested.

Thus regarded, the comparison seems to be one between procedure and procedure, or between substance and form, not between justice and injustice.

In substance the interests of the estate and of the beneficiaries are equally represented by one of several executors whether the creditor seeks recourse to chattels alone, or to land alone, or both.

The disfavour with which pleas in abatement (now abolished in most parts of the British dominions) were always regarded shows that in early times substance rather than form was considered, however that view may have been modified in later days.

If the appellants' contention is accepted, a creditor of a testator can have recourse to the real and personal property of his debtor in a single action, although it may be impracticable to serve one of several executors with process. The same safeguards exist with respect to both classes of property, and there is no real reason to apprehend a miscarriage of justice from the omission of the executor sued to plead in abatement in the case of real estate, any more than in the case of personal estate. In the opposite view, if only one of several executors is within the jurisdiction the creditor can only obtain immediate judgment against him, and only a judgment giving recourse to the personal estate. If he also seeks recourse to the real estate he must bring another action against all the executors, the judgment in which might be indefinitely delayed. In such an action an interesting question would arise whether the judgment in the first action could be pleaded in bar, as in *Further* v. *Further* (1). If it could, gross injustice would be done, which might be sufficient reason for holding that it could not be so pleaded. But the anomaly would remain that, despite the *Probate Act* 1890, it would still be necessary, as before, for the creditor to bring two actions instead of one to enforce the same rights in

(1) 1 Cro. Eliz., 471.

respect of the same debt against the same persons, in whom all the property of the testator is declared to vest in the same manner, and who have the same duties, viz., to make it available for the payment of debts, with respect to all of it.

On the whole, I have come to the conclusion that the intention of the legislature was not only to alter the channel of devolution of real estate, but also to assimilate the rights of creditors with respect to real and personal estate for all purposes, including the procedure to be taken by them for the enforcement of their rights, and that the difficulty arising from technical or statutory rules of conveyancing does not stand in the way of this conclusion any more than in the case of stock or shares.

I have not dealt with the question of the power of one of several executors to make a valid contract binding the property of the testator as distinct from a transfer of it, which was left undecided by the Court of Appeal in Chancery in *Sneesby* v. *Thorne* (1), and seems to be still undetermined. If it were necessary to determine it the observations of *Stirling* J. in *In re Ingham* (2) would deserve careful attention. If the power were affirmed the objections to the effect of a judgment obtained against one of several executors would be materially diminished.

For these reasons I think that the bank's appeal must be allowed, and the suit dismissed with costs.

BARTON J. The matter to be determined is the precise operation of the deed of bargain and sale, whereby the sheriff of New South Wales conveyed to the appellants, the purchasers, in pursuance of a writ of *fieri facias* sued out by the appellants as judgment creditors of John McGregor, executor of D. C. McGregor deceased. The levy and sale were of the right, title and interest of the testator and of his executors, John McGregor and George Allen McGregor, to and in the equity of redemption to the land, live stock and chattels included in the several mortgages.

The respondents in their statement of claim contend that this deed, made under the *Judgment Creditors Remedies Act* 1901, did not pass to the defendants, now appellants, the equity of redemption, either to the real or the personal estate of the

(1) 7 D.M. & G., 399. (2) (1893) 1 Ch., 352.

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testator. The Chief Judge in Equity held that the personalty passed, but the equity of redemption in the mortgaged lands did not pass, and ordered the appellants to account as mortgagees. From the decree as it affects the real assets, the defendants appeal, and the plaintiffs, now respondents, have given a cross notice impugning the decree as to its operation on the personalty.

The latter is the question I shall discuss first, as it involves the right of the appellants to take anything at all by their purchase at the sheriff's sale.

"Nothing is clearer," says *Sir John Strange* in *Jacomb* v. *Harwood* (1), "than this, and I never knew it questioned in case of executors, that each executor has the entire control of the personal estate of the testator, may release, or pay a debt, or transfer any part of testator's property, without concurrence of the other executor." Clearly, then, as he goes on to point out, one executor may dispose of and appropriate the testator's estate to the discharge of any just demand without asking the assent of the other or others. This right of disposal had long before been declared as to chattels real by the Court of King's Bench; see *Anon.* (2), where the report reads as follows:—"Knightley asked this question: If two executors have a term, and one grants to a stranger all that belongs to him, how much of the term shall pass? And the Court thought, that the whole term passed, inasmuch as each of them has an entire authority and interest in the term, as executor; but of other joint-tenants of a term it is otherwise; so there is a diversity."

"Co-executors are regarded in law as an individual person; and, by consequence, the acts of every one of them, in respect to the administration of the effects, are to be deemed to be the acts of all; for they have a joint and entire authority over the whole property. Hence a release of a debt by one of several executors is valid, and shall bind the rest. So a grant or a surrender of a term by one executor shall be equally available:" *Toller, Executors*, p 359. John McGregor, then, could have sold the personalty without the concurrence of G. A. McGregor, his co-executor. But upon judgment in an action against him alone as executor for a debt of his testator, does the sheriff's deed of bargain and sale pass

(1) 2 Ves., 265, at p. 267. (2) 1 Dyer, 23 (*b*).

to the execution creditors, the now appellants, the personal estate of the testator, including the equity of redemption to the live stock and chattels? The Chief Judge in Equity has answered this question in the affirmative, and I think correctly. Although in actions against executors all should in strictness be sued, yet the non-joinder of any could only be the subject of a plea in abatement by an executor defendant. It was never a bar to the action. Where the non-joinder of a defendant is pleaded in any action, the *Common Law Procedure Act* 1899 makes it necessary to state in the plea that the person not joined is resident within the jurisdiction of the Court; otherwise the non-joinder cannot be objected to. Here the declaration as amended alleges him to be outside the jurisdiction, and there is no plea at all. John McGregor therefore waived the objection he could have raised by dilatory plea. The appellants' judgment against him is not open to objection on that score; and the judgment by default was of course an admission of assets: *Erving* v. *Peters* (1). The action is brought for a debt due from the testator, and therefore the judgment is against his effects in the hands of the executor: (2). In *Further* v. *Further* (3) it was held, and it is still law, that a recovery against one administrator shall bind all; and a joint administrator stands on the same footing as a co-executor: *Jacomb* v. *Harwood* (4). The judgment must be satisfied, though recovered against one executor only out of several. This seems to proceed on the principle, stated by *Toller*, at p. 133, that an executor "is not entitled in his own right, but in *autre droit*, the right of the deceased. He is entrusted merely with the custody and distribution of the effects." The inclusion of the other executor or executors in the action would give the estate no greater protection. As the judgment is to be satisfied out of the goods of the testator, the writ of *fieri facias* would properly direct levy of the effects which were of the testator at his death, in the hands of the executor sued, to be administered. This writ, however, commands levy to be made of the effects, lands, equities of redemption and equitable interests which were of the deceased at the time of his death "in the hands of John McGregor and

(1) 3 T.R., 685, at p. 691.
(2) 3 T.R., 685, at p. 689.
(3) 1 Cro. Eliz., 471.
(4) 2 Ves., 265.

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George Allen McGregor, executors of the last will and testament of the said . . . deceased to be administered." I do not think this vitiates the writ, as it does not include more or less personalty than was in the hands of the defendant, against whom the judgment was obtained. Moreover, as the learned Chief Judge pointed out, there is no allegation or evidence that the assets seized and sold were not in the hands of John McGregor as executor. All the personal assets come to the hands of each as well as both of the executors. Assets in the hands (*entre mains*) of an executor are merely personal assets by another name. In *Further* v. *Further* (1) the Court said :—"If the recovery be for a true debt, it is not reason but that the administrator might suffer it to pass by default; and it is reason it should be allowed to all the others." But the reason that it should be allowed to all the others can only be that it must be satisfied out of the personal assets generally—the assets in the hands of one being the assets in the hands of all. If it were not so there would be a multiplicity of suits imposed on creditors to ascertain and follow assets in the physical possession of different personal representatives even if an action could be brought against the other executor after judgment and execution against one of them. In the case cited the action was against one of joint administrators, but as has been said, administrators and executors are on the same footing in this respect.

In my opinion then the judgment bound all the personalty, and the sale of the equity of redemption in it is good.

The other question is whether the same execution and the consequent deed of bargain and sale were effectual to pass the equity of redemption in the realty. The learned Chief Judge thinks they were not. With great respect I have come to a different conclusion, because I think the effect of the *Probate Act* 1890 is not so limited as his Honor considered it.

At common law executors did not derive from the will any authority to meddle with the real estate of the testator. Even the heir of an intestate was not bound to pay the ancestor's debts—save in the case of a debt of the Crown—unless the deed or specialty of the ancestor expressly naming the heir bound him

(1) 1 Cro. Eliz., 471.

to do so, and then of course so far only as the value of the assets by descent would extend. When it became lawful to dispose of lands by will, a debtor, even after binding his heirs by specialty, could devise his land to a person other than the heir, and so frustrate the operation of his deed. Except in the cases of testamentary trusts and charges for the payment of debts, this iniquitous state of the law was endured till the Statute of 3 Wm. & Mary c. 14 made void all devises of land as against creditors by specialty in which the heirs were bound, excepting devises for the payment of debts, and in substance made lands liable in the hands of devisees in the same way as in the hands of the heir named in the ancestor's specialty. Whether the action was against the heir as so named (in which case the amount of the judgment was to be levied on the assets by descent) or against the devisee under the Act of William and Mary, for satisfaction out of the lands devised, it lay against the one or the other simply because the legal estate in the lands to be made liable was vested in that person. By the Statute 54 Geo. III., c. 15, sec. 4, real estate of debtors in New South Wales was made assets for the satisfaction of all just debts of any kind, and made subject to the like remedies and process for seizing and selling it in satisfaction of debts as personal estate. But this did not vest the land in the executor so as to make it legal assets in his hands. A creditor was bound after the Statute, as before it, to proceed in respect to the real estate against the person in whom the property was vested, that is, the heir or devisee: *Bullen* v. *à Beckett* (1), decided in 1863. A plaintiff had obtained judgment against an executor for his testator's debt and had sued out a *fieri facias*; it was held that, notwithstanding the enactment, the sheriff could not under this writ sell and convey to a purchaser land of the testator, as the land did not pass to the executor by sec. 4 so as to become legal assets in his hands. So it remained necessary for a creditor desiring to obtain a satisfaction of his debt out of a testator's estate to bring two actions, if the personal estate was insufficient to discharge the debt: one against the executor so as to secure execution upon the personalty, the other against the heir or the devisee to give him recourse to the realty, joining both heir and

(1) 1 Moo. P.C.C.N.S., 223.

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devisee in cases of devisees within the Act of William and Mary. A step further was taken in this State in 1863, when by the Act 26 Vict. No. 20 it was enacted that real estate whereof the owner died intestate should pass to and become vested in his personal representative as in the case of chattels real, and be disposable in like manner as other personal assets. The effect of this Act was not to convert realty into personalty, but to alter the succession in cases of intestacy by substituting the next of kin for the heir at law.

But the law as to the rights of creditors in respect of lands devised remained as the Act of Geo. III. had left it until the *Probate Act* 1890 came into force. By it the Act of 1863 was repealed, and by sec. 32 in the case of intestacy as to real estate it is to become vested in the administrator or in the case of partial intestacy in the executor, &c., and such personal representative is to hold the land in trust for the payment of the debts of the deceased, and subject thereto as if devised in trust for the same persons as tenants in common as would be entitled in the case of personal property. Secs. 15, 17, 19 and 20 have been set out already. This Act, the appellants contend, puts an end to the distinctions which previously existed between real and personal assets where a creditor brings an action at law to obtain payment of a debt of the testator out of his estate. The real estate, it will be observed, is by sec. 15 to *vest* in the executor for all the testator's estate therein, and that removes from the time of the Statute the ground on which the decision in *Bullen* v. *àBeckett* (1) proceeded. If there be more executors than one the estate is to vest in them as joint tenants "in the same way as personal estate now vests." On this the appellants say that the section meant to leave no difference in the powers and obligations of co-executors whether the assets are wholly personal or wholly real, or partly the one and partly the other. They point out that sec. 17 provides that the real as well as the personal estate shall be assets for the payment of debts, and may for purposes of administration be sold or mortgaged and conveyed as effectually as the testator could have done it. They urge that as one of several executors could sell, and (as we have seen) a judg-

(1) 1 Moo. P.C.C. N.S., 223.

ment recovered against one of them binds all the personal assets, the same effect was intended as to real assets, so that one executor only need now be sued, subject to the risk of a plea in abatement, and if judgment be recovered against him alone, execution and sale may follow as to all the assets which have come to his hands to be administered, and these will now include all the real assets. They say that the Act will have this effect even if in the case of an ordinary sale or conveyance all in whom the legal estate is vested, that is all the executors, must join in the execution of the deed as a matter of conveyancing or because so required by any Real Property Act. On the other hand, the respondents insist that the Act does not disturb the rule that, in an action in which the title to real estate is sought to be affected, all persons in whom the legal estate is vested must be joined. They say therefore that if a judgment be obtained against one of the co-executors, being as they are called in sec. 15 joint tenants, it does not divest the estate of the other executor or executors. They say that sec. 15 does not do more than alter the devolution, and therefore the property itself is unaffected otherwise. If the matter rested entirely on secs. 15 and 17 the respondents would be in a strong position, for as they point out, "executor" must be read in the plural if the case requires it. But then sec. 20 adds something material. It provides that the executor or executors shall have the same right and be subject to the same duties with respect to the real estate of the testator that executors have hitherto had or been subject to with reference to personal assets.

As it is the duty of the executors to pay the debts out of the personalty, and if they fail to pay, the non-performance of the duty gives a right of action to the creditor, who can have execution against the assets, I think it was intended that the same consequences should ensue upon the non-performance of the duties assigned to the executors by the Statute, the same duties as to real estate to which they were subject in respect of the personalty.

Then is the non-joinder of other executors to be treated as if it were matter for a plea in abatement to a creditor's action as in the case of personalty, or is it to be rigidly held that all in whom legal estate is vested are of necessity to be joined in the action

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as in a conveyance? The reason for the continuance of this rule in such suits has in my judgment vanished as the result of the change in the law. It could only survive as a dry rule of conveyancing without necessity behind it. I am therefore led to the conclusion that of the two interpretations open the former, being the more reasonable, should be adopted, and I cannot but think that the necessity which existed under the former law was one of those trammels which the legislature intended to do away with. I am therefore of opinion that the judgment, execution and sale are as valid in the case of the realty as in the case of the personalty.

I think, therefore, that the appeal should be allowed.

ISAACS J. In my opinion, the judgment appealed from was right as to the personalty, but wrong as to the realty.

Mr. *Owen's* arguments centred on the words "joint tenants" in sec. 15 of the Act of 1890, and he contended that united action on their part was necessary for a voluntary conveyance of title to the lands, and that similarly essential to a valid transfer *in adversum* was the conjoint character of the process against all the executors who had proved.

In order to understand the effect of the Statute the nature of an executor's position apart from the enactment must first be understood. When that is made clear, it will be apparent, I think, that the construction contended for is not only unnecessary, but most improbable, because it would lead to incongruity and destroy some of the recognized qualities of the office of executor.

The foundation of the modern executorship is stated in the case of *Necton* v. *Gennet* (1), in these words, "*Executors* represent the person of their testator." The complete passage in the case referred to is a direct authority for nearly every material step in the present case. It is as follows:—"Executors represent the person of their testator, and *therefore* if a release be made by one of them, this shall bind all; and so if an action is brought against one executor where there be divers executors, and he admit the writ, and confess the action, this shall bind all the goods of the dead as well as if they were all named."

(1) Gould., 141.

Sheppard's Touchstone, which was the work of Mr. Justice *Doddridge*, who also wrote *Wentworth on the Office of Executors*, says of an executor (at p. 401):—"He shall be charged and chargeable for so much as is committed to him as the testator or intestate himself: *for this cause* the executor . . . . is said to represent the person of the testator . . . . for as to the estate committed to his trust, he . . . . may charge others, and be charged himself, sue and be sued, as the testator might. And the estate he . . . . hath by his executorship is said to be in him to the use of the testator and in his right: and that which he doth in the disposition of his estate is said to be in the right and to the use of the testator also."

So long as any portion of his duties remains to be performed, the estate is held by him in *autre droit*, that is in the right of his testator: *Wentworth*, p. 196, and 1 *Rolle*, 147; and he is "but the minister and dispenser and distributor" of the testator's property: *Wentworth*, p. 197. He represents (1 *Inst.*, 209) more actually the person of the testator than the heir represents the ancestor, and it is from this conception that all the rights and duties appertaining to the office arise.

So strongly is this doctrine of personal representation embedded in the executorial character, that even where a testator makes a will, merely appointing an executor but giving no legacy, it is a good testament so far as concerns the creation of a representative, though as to all beneficial purposes there is an intestacy: see *Touchstone*, 7th ed., p. 406; and *per Sir James Hannen* in *Brownrigg* v. *Pike* (1).

The representation of a testator by an executor is of a peculiar nature, owing its special character and attributes to the circumstances in which it originated and the purpose it was designed to serve.

Death, while removing the individual, leaves the property, debts, and claims of the deceased still remaining. His nomination of an executor is a request to represent him for certain purposes including the payment of debts, and to do what he can no longer do for himself. *Wentworth* (p. 9), says that the *office* of executors is "to execute the mind, will, and intent of their

(1) 7 P.D., 61, at p. 64.

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testator," and though the will, "which is but the expression of a man's testamentary wishes" (see *Douglas-Menzies* v. *Umphelby* (1), gives no legacy and appoints nothing to be done by the executors, yet it is an effectual will. And for this reason that "the main and principal part of an executor's office, and that which concerns the soul of a testator (as our books speak) is the payment of his debts: now who knows not that the very making of an executor is the constituting of such a person who is to pay all debts." And then comes the passage (p. 10), "So as the naming of A. and B. executors, is by implication a gift or donation unto them of all the goods and chattels, credits and personal estate of the testator, and the laying upon them an obligation to pay all his debts, and making them subject to every man's action for the same."

If the person nominated complies with the request in the manner required by law, he thereby becomes an executor, and undertakes the office. That office carries with it well understood rights and duties with all incidental powers to effectually exercise and discharge them.

The office is one and indivisible, no matter whether it is executable by one or several. When it is said that co-executors are to be regarded as an individual person, it is not meant that all must unite in the performance of each act, but that their official personality is not divisible or distinguishable, and that they have individually and collectively all the rights and duties of the office they undertake.

Perhaps no other authority so forcibly illustrates the completeness of this personal representation as the case of *Whitehead* v. *Taylor* (2) in the year 1839, which shows that an executor can ratify the act of a person who after the testator's death assumes to act for him though non-existent. But where there are several executors, however numerous, each of them represents the testator.

Touchstone says (p. 484):—"All the executors, where there are more than one, be they never so many, in the eye of the law are but as one man; in which respect the law doth esteem most *acts done by or to any one of them, as acts done by or to all of*

(1) (1908) A.C., 224, at p. 233. (2) 10 A. & E., 210.

them. And therefore the possession of one of them of the goods and chattels of the deceased, is esteemed the possession of all." Then follows an enumeration of instances illustrating the principle stated. And in *Hudson* v. *Hudson* (1) Lord *Hardwicke* L.C. said that executors have severally the power to release a debt or *convey an interest*, so as to bind the other, "and the reason is," said the Lord Chancellor, "that each executor is considered as entirely representing the testator." And see *Jacomb* v. *Harwood* (2).

This principle had already been carried to its full extent in *Pannel* v. *Fenn* (3), where one of two executors sold to the plaintiff a term of years of which the testator had died possessed, and then the other executor sold the same term to the defendant. The plaintiff sued in trespass, and it was held he got a good title. See *Viner's Abridgt.*, Executors O. (p. 271). Other authorities are *Nation* v. *Tozer* (4); *Sneesby* v. *Thorne* (5); *Cole* v. *Miles* (6); *Scott* v. *Tyler* (7), where Lord *Thurlow* is distinct, and *Simpson* v. *Gutteridge* (8), and in which *Sir Thomas Plumer* was equally explicit.

The defence to actions brought by creditors to recover debts due by the testator is an official act, and within the rule by which one may bind the rest. The cases of *Further* v. *Further* (9), *Parker* v. *Amys* (10), both cited by Mr. *Knox*, and the case of *Necton* v. *Gennet* (11), to which I have already referred, are clear authorities that a judgment against one of several executors binds them all.

If one be sued he may under the system still existing in New South Wales plead non-joinder in abatement, but as said by *Comyns* (Dig. Abatement F. 10, pl. 10) "the non-joinder can only be objected by plea in abatement." And see *Wentworth*, p. 226, and *Leake on Contract*, (ed. 1878), p. 1264.

There is one aspect which at this point needs attention. Instances are found where the plea of one executor confessing the debt does not prevail, The fact is, however, illuminative of

(1) 1 Atk., 460.
(2) 2 Ves., 265, at p. 267.
(3) 1 Cro. Eliz., 347.
(4) 1 C.M. & R., 172.
(5) 7 D.M. & G., 399; 1 Jur. N.S., 1058, *per Wood* V.C.
(6) 10 Ha., 179.
(7) 2 Dick, 724.
(8) 1 Madd., 616.
(9) 1 Cro. Eliz., 471.
(10) 1 Lev., 261.
(11) Gould., 141.

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the whole position. In *Midgley* v. *Midgley* (1) the Court of Appeal approved of the rule laid down as far back as *Chaffe* v. *Kelland* (2) that where there are several executors defendants, who plead different pleas affecting the liability of the estate, that plea shall be received by the Court which is most to the advantage of the estate. And, in the first place, this is quite consistent with the cases above cited establishing the binding character of a judgment against one executor. The doctrine of *Chaffe* v. *Kelland* (2) applies before judgment, and may prevent an adverse judgment, or even if entered such a judgment may be set aside: *Elwell* v. *Quash* (3)). But in the next place it indicates that a judgment against an executor as such is not against him personally, but in his representative capacity, and once pronounced is binding on the estate he represents, and consequently though the forms of pleading permit him to plead in abatement for non-joinder of a co-executor, yet if he does not, but suffers judgment, it is as binding a judgment against the whole estate as if all were joined.

The result so far is that, whether an official act be done by one, or some, or all of the executors, it is equally binding upon all, because in each case the office is discharged, and the testator is fully represented.

Now, if the judgment so obtained be a good judgment against the defendant as executor, and if it binds all the executors, and if as shown all the executors represent, and each and every of them represents the testator, does it not mean, putting it shortly, that such a judgment *binds the testator's estate*, whatever that estate may consist of? This phrase, "binding the estate" is frequently and advisedly used by judicial tribunals. It was the form of expression employed by *Wood* V.C., in *Sneesby* v. *Thorne* (4), and by *Stirling* J., in *In re Macdonald*; *Dick* v. *Fraser* (5), and most important of all by Lord *Macnaghten*, speaking for the Privy Council, in *Mohamidu Mohideen Hadjiar* v. *Pitchey* (6). The central point of Mr. *Owen's* argument, as already stated, was the expression "joint tenants" in sec. 15. He said that the

(1) (1893) 3 Ch., 282.
(2) 1 Roll. Abr., 929.
(3) 1 Stra., 20.
(4) 7 D.M. & G., 399; 1 Jur. N.S., 1058.
(5) (1897) 2 Ch., 181, at p. 187.
(6) (1894) A.C., 437.

sweeping change, which it must be conceded was made by the legislature with respect to realty, did not include the individual power or authority of each several executor, which existed in the case of personalty, but at that point a difference was created by the use of these words, "joint tenants," assisted by the second limb of sec. 17.

He supported this contention by subsidiary arguments, including the main point relied on by the Chief Judge in Equity, namely, the interpretation of sec. 20. His Honor thought the case turned chiefly on that section, and he came to the conclusion that the rights of the executors over real estate thereby conferred were given to them as a body in relation to third persons and not *inter se*. He referred to the English *Land Transfer Act* 1897 c. 65, and to *In re Pawley and London and Provincial Bank* (1), decided under it. The verbiage of the enactments is different, and the decision may therefore be immaterial. But if it be material, I would greatly hesitate to adopt it in view of what I have said as to the way in which a person nominated as executor becomes personal representative, and particularly in view of the Privy Council judgment in *Mohamidu Mohideen Hadjiar* v. *Pitchey* (2) on that subject, which *Kekewich* J. had before him. Now, it is true that sec. 20 refers to "rights" and "duties," and does not expressly refer to the individual authority of any one executor. But what are the rights and the duties of executors with respect to personal assets? The duties are, broadly speaking, to bury the deceased, and for that purpose to have possession of the body, obtain probate of the will, to get in the estate, preserve it from waste, pay the debts due by the deceased, and distribute the residue as directed by the will or by law: *In re Fraser* (3); *Farr* v. *Newman* (4); *Hiddingh* v. *Denyssen* (5); 2 *Stephen's Commentaries*, p. 214.

His rights are correlative, some as, for instance, retainer being consequent on his legal position; and when the duties are discharged and nothing further remains to be done as executor, when in other words his office is wholly fulfilled, he has a right

(1) (1900) 1 Ch., 58.
(2) (1894) A.C., 437.
(3) L.R. 2 P. & M., 183, at p. 186.
(4) 4 T.R., 621.
(5) 12 App. Cas., 624, at p. 638.

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to retain the residue for his own benefit: *Attorney-General* v. *Jefferys*; *In re Gluckman* (1).

As already shown, the law in the case of several executors in order to enable them to perform those duties gives them a joint interest in all assets. That joint interest differs from an ordinary joint tenancy because, not only are all the executors seized of the entire interest, but so is each one. It is a joint tenancy, but of a special kind. The case *Anon* (2) puts it plainly that if one of two executors grants to a stranger all that belongs to him in a term vested in two, "the whole term passed, inasmuch as each of them has an entire authority and interest in the term, as executor; but of other joint tenants of a term it is otherwise, so there is a diversity." So also in *Simpson* v. *Gutteridge* (3), *per Sir Thomas Plumer*.

In the very recent case of *Attorney-General* v. *Jefferys*; *In re Gluckman* (4) the executors, in the absence of next of kin, were held entitled beneficially to the undisposed of residuary personal estate, the will showing no contrary intention. Now the point where that touches the present case is this: that it shows that executors take even personal estate *jointly*. See *per Cozens-Hardy* M.R. (5), and *per Buckley* L.J. (6). The decision was affirmed (1). But while possessing this quality in common with ordinary joint tenants, the law makes the distinction that each has, by virtue of his office, and therefore so long as that office continues, and by reason of his personal representation of the testator, such an interest and authority, and power, as enables him to deal with the whole estate, for the purposes of the administration.

All these incidents of the office of executor were well known, and must be presumed to have been well known to the legislature when enacting the Statute. Consequently, unless there is some compelling force to the contrary in the language employed, we must read into the term executor, and into the references to rights and duties, all that the law would ordinarily imply. And it is plain that there is no inconsistency in applying to executors the term joint tenants, particularly when it is followed by the

(1) (1908) A.C., 411.
(2) 1 Dyer, 23 (*b*).
(3) 1 Madd., 616.
(4) (1908) 1 Ch., 552.
(5) (1908) 1 Ch., 552, at p. 556.
(6) (1908) 1 Ch., 552, at p. 558.

unmistakeable words "in the same way as personal estate now vests." Those words are decisive, whichever way they are read, but I should come to the same conclusion without them.

No reason can be suggested for making the authority of executors different as to realty and personalty, or as between the sale of a lease for a term of years and the mortgage of a freehold. If we conclude they are all required to join in a binding contract to give such a mortgage, was it likewise the intention of Parliament that they should be similarly hampered in applying the proceeds, for after all it is the application of the purchase money or the loan which is the chief object of the power? That incongruous result could scarcely have been reached by design. Of course it could not have been intended that the executors should stand precisely in the position of ordinary joint tenants, because that would imply a power at any time to sever their joint interest and create a tenancy in common. See *National Society for the Distribution of Electricity by Secondary Generators* v. *Gibbs* (1). And that must follow unless the second branch of sec. 17 is to be read as excluding all other powers in respect of the land. I am not sure what on that contention the executors could do with land already mortgaged by the testator, but of which the mortgagee had not taken possession.

The real fact is that, notwithstanding they are declared to be joint tenants, they are also and primarily executors, and the nature of the office of executor is left untouched by the Act. The legislature found realty already assets for debts of testators, but in different hands from those which administered the personalty, and it introduced uniformity, simplifying procedure and facilitating remedies, placing real estate and personal estate in the same hands. It provided—whether for protection of revenue or not—that as to realty it should not devolve upon an executor unless and until the probate was granted, and I say nothing as to what effect sec. 17 may have on the vesting of personalty or the powers of executors with respect to it before probate.

As to sec. 20, I am of opinion that when the legislature—possibly for mere precaution' sake — declared that executors should have the same rights and duties in both cases, it meant

(1) (1899) 2 Ch., 289, at p. 300.

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those rights and duties to carry with them in each case the same implications of power. With respect to personalty the implications are clear: *Pickering* v. *Towers* (1).

In *Farr* v. *Newman* (2), *Grose* J. says:—"The power of selling or disposing of the goods of the testator the executor must have: it is necessarily incident to his office: without that power his trust cannot be executed; nor can the purposes for which it is given be answered." At p. 632 he refers to *Jacomb* v. *Harwood* (3) as proving that one of several executors may exercise that power.

And at p. 633 he observes that in giving this power to an executor it assumes he will do what is right, that he will not act in fraud of his trust. A strong additional circumstance evidencing the intention of the legislature to assimilate the executors' powers with respect to both classes of property is the concluding language in secs. 18, 20 and 39.

So the matter stands that the power of each executor to sell, and otherwise to represent the testator in the performance of executorial duties, has been for centuries a recognized incident of the office and accompaniment of the duties which the law requires of an executor, and which necessarily are to be performed in relation to third persons.

I see no reason for excising the power in the case of realty. The executor equally represents the person of the testator; the debts still require to be paid, the judgment is equally conclusive, and the necessity of individual action, strikingly exemplified in the present case, is equally urgent as if the fund were wholly personal.

Nor do I see any difficulty with respect to registered title. *Wood* V.C. in *Sneesby* v. *Thorne* (4) said he could well suppose a case where the Court of Chancery would order the contract of one of several executors for the sale of real property to be carried into effect. Neither that case nor *Lepard* v. *Vernon* (5) militates against the position of the appellants. They are cases where—as *Stirling* J. said in *In re Ingham* (6)—the Court refused its

(1) 2 Cas. tem. Lee, 401.
(2) 4 T.R., 621, at p. 630.
(3) 2 Ves., 265.
(4) 7 D.M. & G., 399; 1 Jur. N.S., 1058.
(5) 2 V. & B., 51.
(6) (1893) 1 Ch., 352, at 360.

assistance to persons seeking to enforce in equity rights claimed by virtue of what has been done by a single executor contrary to the wishes of the co-executor. But here no such case is made. The sheriff sold under the provisions of sec. 10 of the *Judgment Creditors Remedies Act* (No. 8 of 1901). In my opinion that sale upon execution of the sheriff's deed passed a good title to the purchaser. The person against whom the writ was sued out was a person representing the testator and his whole estate, and possessing by law that estate in entirety. Reading secs. 10 and 12 together with the *Probate Act* and the common law behind it, the transfer is in my opinion complete. Whatever difficulty could be imagined with regard to estates in fee is equally present when dealing with leases, and it has not been suggested that any obstacle exists as to them.

The share cases referred to by the learned Chief Judge in Equity depend entirely on the provisions of the Acts under which they were decided. The decree should therefore be varied with respect to the realty.

HIGGINS J. The question is, did the interest of the testator McGregor in the lands which he had mortgaged to the bank vest in the bank by virtue of the sheriff's sale in execution? If it did, it is not denied by the respondents that the chattels vested also, and that the suit must be dismissed.

The facts, so far as material from my point of view, are as follows. D. C. McGregor executed mortgages of lands and chattels in favour of the bank in July and August 1887. He died in 1892; and his sons John and George Allen McGregor proved his will as executors. In March 1899 the bank brought an action for the moneys due under the mortgages; and, according to the declaration as amended, the defendant was "John McGregor executor with one George Allen McGregor who was at the time of the commencement of this action and still is absent from the Colony of New South Wales of the last will and testament of Dugald Campbell McGregor deceased." The defendant entered an appearance but did not plead; and final judgment by default for want of a plea was signed on 22nd May 1899 against the defendant—the defendant being described as in the declara-

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tion. On 22nd June 1899 a writ of *fieri facias* was issued, commanding the sheriff as follows:—"That of the goods and chattels moneys and securities for money lands tenements and hereditaments equities of redemption and equitable interests in your bailiwick which were of Dugald Campbell McGregor deceased at the time of his death in the hands of John McGregor and George Allen McGregor, executors of the last will and testament of the said Dugald Campbell McGregor deceased to be administered you cause to be levied the sum of . . . which the Union Bank of Australia Ltd. lately in our Supreme Court at Sydney . . . recovered against the said John McGregor." As in pursuance of this writ, the sheriff on 8th August 1899 caused a levy to be made, and caused all the interest of the deceased "of in and to all that the equity of redemption all other (*sic*) the right title and interest of them the said Dugald Campbell McGregor John McGregor and George Allen McGregor in and to all that (*sic*) the lands tenements and premises," &c., to be put up for sale, and the bank became the purchaser. The sheriff's deed of bargain and sale is dated 18th September 1899. Since then the bank has sold the lands and the chattels; and this is a suit for accounts and payments of the surplus (after satisfaction of the mortgage debt) so far as G. A. McGregor would be entitled thereto as a beneficiary. The plaintiff contends that the sale under the execution on a judgment against one of the two executors was ineffectual to pass to the bank the whole interest of the deceased.

The only power enabling the sheriff to sell these interests was, in 1899, that contained in sec. 31 of the *Advancement of Justice Act*—5 Vict. No. 9—(compare now the *Judgment Creditors' Remedies Act* 1901). The words, so far as material, are as follows:—"It shall be lawful for the sheriff to whom any writ of *fieri facias* issued out of the Supreme Court shall be directed . . . to take in execution and cause to be put up for sale and sold under any such writ any equity of redemption or other equitable interest or any chose in action of or belonging to the defendant therein named and every such sale . . . shall be as valid and effectual to pass all such defendant's right and title to and interest in such equity or equitable interest or chose in

action as if the same had been conveyed or assigned to the purchaser by such defendant himself." Now, the writ of *fieri facias* was in the form which I have stated. Counsel on both sides treat the property of the testator to be fitly described as "belonging to" the executors, whoever they may be; for instance, if John McGregor were the sole executor, they treat it as "belonging to" John McGregor executor &c., as if John McGregor executor were a different person from John McGregor, as if he were the testator represented in person. If this position is not correct, the case of executors would appear to be omitted in the Act. Another difficulty that might arise under sec. 10 is that some of the lands are under the Real Property Acts, and the phrases "equity of redemption" and "equitable interest" are not in strictness applicable to the interest of a mortgagor in such lands. But no argument has been addressed to us on either of these subjects; and for the purposes of this case I shall assume that sec. 10 would enable the sheriff to sell all the interests of the deceased held by John and G. A. McGregor as executors, under a judgment signed against them *both* as executors. The question remains, can the sheriff give title under a judgment signed against one of the two executors?

Now, the sheriff could give title to all the estate that was vested in John McGregor as executor. If John McGregor was a mere joint tenant with G. A. McGregor, the sheriff could only give title to the undivided moiety of John McGregor. If John McGregor had the interests vested in him as an entirety, the sheriff could give title to the entirety. The form of the action, as *Simpson* C.J. in Eq. pointed out, is correct. If there are two executors, and one is sued, judgment may be signed against that one unless he plead in abatement; and even the plea in abatement will not stand if the co-executor is out of the jurisdiction. But although the action and the judgment be correct in form, the sheriff could not under sec. 31 of the *Advancement of Justice Act* sell any interests which do not "belong to" John McGregor as executor. The sheriff cannot sell more than John McGregor as executor has. The next step is to find what John McGregor executor has.

This depends on the *Probate Act* 1890—the Act which was in

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force at the time of the death and at the time of the sale. Sec. 15 provides that on a grant of probate all the real estate shall vest as from the death "in the executor to whom probate shall be granted . . . . and if there shall be more than one such executor shall vest in them as joint tenants in the same way as personal estate now vests." Sec. 20 provides that "the executor to whom probate shall have been granted shall have the same rights and be subject to the same duties with respect to the real estate of his testator that executors heretofore have had or been subject to with reference to personal assets." The object was evidently to put executors in the same relation to realty as to personalty. Already by an Act (26 Vict. No. 20) which was repealed by the *Probate Act*, land *not devised* passed to the personal representatives (administrators or executors) "in like manner as is now the case with chattel real property." This Act —the *Probate Act* 1890—went further in the same direction; it made devised land also pass to the executors and gave to the executors power of sale, &c., for purposes of administration. This meant a further assimilation of the law as to realty to the law as to personalty; and there is certainly not the slightest indication of any desire to change the law as to personalty, but to assimilate thereto the law as to realty.

What, then, was the position as to personalty before 1890? It is clear that one of two executors could give title to a testator's horse or any ordinary chattel; but what about chattels real? Chattels real—terms of years, &c.—are personalty; but as they are interests in land, they bear many analogies to realty. The case of chattels real would present to the mind of a conveyancer many of the difficulties which the case of realty presents. Yet if a lessee die during his term, one of his two executors can grant a sub-lease; and that sub-lease, though in the name of an executor only, is as efficacious as if both had jointly demised: *Doe* v. *Sturges* (1). One of two executors can sell—and assign—a term, and the assignment is valid: *Anon.* (2); *Pannel* v. *Fenn* (3); and see *per* L.C.J. *Holt* in *Stonor's Case* (4). In truth, the position of executors is very exceptional. They have a joint and

(1) 7 Taunt., 217.
(2) 1 Dyer, 23 (b).
(3) 1 Cro. Eliz., 347
(4) Wentworth Off. Ex., 224.

entire interest in the property. Each can alienate any asset; and in this respect their interest differs from that of joint tenants, where the grant of one operates only on the share of the granting party (*Platt, Leases*, 367). Each executor can release a debt, can surrender a term, can confess judgment, can attorn tenant (see notes to *Anon.* (1). The executors cannot partition a chattel, whereas joint tenants can. In *Simpson* v. *Gutteridge* (2) it was pointed out that where one of several joint tenants executes a deed it passes only the share of the party executing; but that a gift, or sale, or surrender, or payment, or release, or judgment confessed by one of two executors is effectual. In that case only one of the two executors had executed the assignment of the term; but it was held that, the executors not being entitled in moieties, not being joint tenants, each having the entire interest, the assignment operated on the whole term (see also *Jacomb* v. *Harwood* (3)). The law on the subject is well summed up in *Wentworth's Office of Executor*, 14th ed., p. 213 :—"Each executor hath the whole of the testator's goods and chattels, be they real or personal, and each may sell or give the whole. One of them cannot give nor release to the other his interest; and if he do, it is void, and he who releaseth shall have still as much interest as he to whom he releaseth, because each had the whole before. Upon this reason, long since, when one of the two executors released but his part of the debt, it was held that the whole was discharged. And so, if one executor grant his part of the testator's goods, all passeth, and nothing is left to the other; for that each hath the whole, and there be no parts or moieties between executors. Therefore, also, though a lease for 1,000 years, of 1,000 acres of land, come to two executors or more, no partition or division can be made between them, because it is not between them as between joint lessees of land, where each hath but a moiety in interest, though possession of or through the whole."

As to the cases relating to shares under the *Companies Clauses Consolidation Act*, they actually recognize the rule that one of two executors can transfer the testator's property; but in each case the executors had, under the provisions of the Act, become

(1) 1 Dyer, 23 (b). (2) 1 Madd., 616. (3) 2 Ves., 265.

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the stockholders in the place of the testator, and therefore they had to be treated as any ordinary joint holders, not as executors: *Barton* v. *London and North Western Railway Co.* (1); *Barton* v. *North Staffordshire Railway Co.* (2). I have dealt with this subject, the nature of executors' property in personal assets, at what may seem unnecessary length, in order to show that the words "as joint tenants," used in sec. 15 of the *Probate Act* 1890, must either be treated as used in a general, popular sense, as distinguished from the strict technical sense, or else must be treated as used by mistake. I am aware that in one case Lord *Halsbury* L.C., when delivering a dissenting judgment, used language which seems, on first reading, to favour a quaint doctrine of infallibility of the legislature in matters of law. In *Commissioners for Special Purposes of the Income Tax* v. *Pemsel* (3) his Lordship said: "I do not think it is competent for any Court to proceed upon the assumption that the legislature has made a mistake. Whatever the real facts may be, I think a Court of Law is bound to proceed upon the assumption that the legislature is an ideal person that does not make mistakes." But the real meaning of these words, so flattering to the "ideal person," must, I think, be found in their application, in the sentence which follows: "It must be assumed that it has intended what it has said." That is the whole point—the intention. We must find the intention from the words used; and we have no right to refuse to give effect to the intention, even if we are convinced that the legislature acted under a mistake as to the existing law. There is indeed ample authority for saying that the words of an Act are by no means conclusive as to the existing state of the law; and ample authority even for eliminating words which would defeat the real object of the Act: *Mollwo, March & Co.* v. *Court of Wards* (4); *Salmon* v. *Duncombe* (5); *per* Lord *Cranworth* in *Mitcalfe* v. *Hanson* (6); *Ex parte Lloyd* (7); *per Patteson* J., in *Green* v. *Wood* (8); *per* L.C.J. *Cockburn* in *Shrewsbury* v. *Scott* (9); *per Willes* J. *obiter*, in *Mills* v. *Mayor of Colchester* (10); *Maxwell*, 4th ed., pp. 355, 380, 462, *et seq.*

(1) 24 Q.B.D., 77.
(2) 38 Ch. D., 458, at p. 464.
(3) (1891) A.C., 531, at p. 549.
(4) L.R. 4 P.C., 419, at p. 437.
(5) 11 App. Cas., 627.
(6) L.R. 1 H.L., 242.
(7) 1 Sim. N.S., 248.
(8) 7 Q.B., 178.
(9) 29 L.J.C.P., 34, at p. 53.
(10) 36 L.J.C.P., 210.

In this case, when one examines the recitals and the nature and scope of the *Probate Act*, it is perfectly clear (1) that there was no intention to disturb the existing law as to personalty, and the right of the executors with regard thereto; and (2) that the intention was to assimilate the law as to realty to the law as to personalty, so far as regards probate and executors. And as it is clear from an examination of the authorities (3) that executors are not joint tenants of personalty in the technical sense, it follows that the words "as joint tenants" used in describing the title of executors in sec. 15 ought to be regarded as referring to the "joint and entire" interest, the "joint and entire authority" which executors admittedly have, and not to joint tenancy in the strict sense. The alternative is to treat the words as an obvious blunder as to existing law—a blunder not affecting the enactment.

In the result, as the entirety of the property was vested in John McGregor as executor, the entirety of the property was sold by the sheriff under the execution against "John McGregor executor," and passed to the purchaser.

For these reasons, I am of opinion the bank's appeal should be allowed, and the suit dismissed with costs.

Appeal allowed.

Solicitors, for appellants, *Minter, Simpson & Co.*

Solicitors, for respondents, *Sly & Russell.*

C. E. W.