[HIGH COURT OF AUSTRALIA.]

MADDOCK AND OTHERS . . . APPELLANTS;

AND

THE REGISTRAR OF TITLES OF THE STATE OF VICTORIA . . . } RESPONDENT.

MILLER AND ANOTHER . . . . APPELLANTS;

AND

THE REGISTRAR OF TITLES OF THE STATE OF VICTORIA . . . } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Feb.* 23, 24, 25; *March* 8.

Griffith C.J., Barton, Isaacs and Gavan Duffy JJ.

Administration and Probate—Vesting of real estate—"Any deceased person"—Executor of executor—Executor of administrator—Registration as proprietor—Administration and Probate Act 1890 (*Vict.*) (*No.* 1060), *secs.* 6*, 7, 8, 9*, 12* *—Transfer of Land Act* 1890 (*Vict.*) (*No.* 1149), *sec.* 193.*

* Sec. 6 of the *Administration and Probate Act* 1890 provides that "Upon the Court granting probate of the will or administration of the estate or a rule to administer the estate of any deceased person, all the hereditaments or all the hereditaments then unadministered of such person, whether held by him beneficially or in trust, shall vest as from the death of such person in the executor or administrator to whom such probate or administration or rule shall be granted, as the case may be, for all the estate therein of such person, and if there shall be more than one such executor or administrator shall vest in them as joint tenants."

Sec. 9 provides that "The executor or administrator of any deceased person shall have the same rights and be subject to the same duties with respect to the real estate of such person that executors or administrators heretofore have had or been subject to with respect to personal estate."

Sec. 12 (which is identical in terms with sec. 193 of the *Transfer of Land Act* 1890) provides that "Upon the receipt of an office copy of the probate

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Held, that the words "any deceased person" in secs. 6 and 9 of the *Administration and Probate Act* 1890 and sec. 193 of the *Transfer of Land Act* 1890 do not include the deceased executor or administrator of a deceased testator or intestate as such.

Held, therefore, that the real estate of an intestate which has vested in his administrator does not on the death of that administrator testate vest in his executor.

Decision of the Supreme Court of Victoria (*Cussen J.*) affirmed.

Held, also, that, inasmuch as the executor of a deceased executor is the executor of the original testator, the real estate of a testator which has vested in his executor vests on the death of that executor testate in his executor, who, by virtue of sec. 12 of the *Administration and Probate Act* 1890 and sec. 193 of the *Transfer of Land Act* 1890, is thereupon entitled to be registered as proprietor of that real estate.

Decision of the Supreme Court of Victoria (*Cussen J.*): *R.* v. *Registrar of Titles*; *Ex parte Miller*, (1914) V.L.R., 387; 36 A.L.T., 1, affirmed.

APPEALS from the Supreme Court of Victoria.

MADDOCK'S CASE.

An application by John Henry Maddock, Emily Jane Wallis and Stephen Fitzroy Charles Willis Wallis to be registered as proprietors of certain land was refused, and the Commissioner of Titles set out the grounds of refusal in the following case:—

"1. One Edith Wallis the wife of Stephen Wallis of Bourke Street East, licensed victualler, was at the time of her decease the registered proprietor under the *Transfer of Land Act* 1890 of an estate in fee simple of the lands more particularly described in certificate of title, vol. 1583, fol. 316503.

"2. The said Edith Wallis died on 21st February 1907.

of any will or of any letters of administration or of a rule to administer granted to the Curator whereby it shall appear that any person has been appointed the executor or administrator of any deceased person, and upon the notification in the *Government Gazette* of the appointment of any succeeding Curator, the Registrar of Titles shall on an application in writing of the executor administrator or Curator as the case may be to be registered as proprietor in respect of any land therein described enter in the register book upon the leaf constituted by the grant or certificate of title of such land a memorandum notifying the appointment of such executor administrator or Curator, ... and upon such entry being made such executor administrator or Curator shall become the transferee and be deemed to be the proprietor of the estate or interest of the deceased proprietor in such land or of such part thereof as shall then remain unadministered and shall hold the same subject to the equities upon which the deceased held the same, but for the purpose of any dealings with such land every such executor administrator or Curator shall be deemed to be the absolute proprietor thereof . . ."

"3. On 19th December 1907 letters of administration with the will annexed of the estate of the said Edith Wallis were granted to Stephen Wallis of 18 Gower Street, Kensington, licensed victualler.

"4. Pursuant to an application under sec. 193 of the *Transfer of Land Act* 1890 the said Stephen Wallis as such administrator as aforesaid became registered as the proprietor of the said land. The memorandum of registration endorsed on the said certificate was in the terms following:—'Memo. No. 40668.—Stephen Wallis of 18 Gower Street Kensington licensed victualler is registered as proprietor of the within described land as administrator to whom administration with the will annexed of the estate of Edith Wallis (who died on 21st February 1907) was granted 19th December 1907. Dated 11th March 1908.'

"5. On 6th November 1913 John Henry Maddock, Emily Jane Wallis, Stephen Fitzroy Charles Willis Wallis, lodged an application in writing dated 5th November 1913 whereby they 'being the executors and executrix to whom probate of the will of Stephen Wallis late of Gower Street Kensington gentleman deceased who died on 24th June 1913 was granted by the Supreme Court of Victoria in its probate jurisdiction on the 15th August 1913' applied to be registered as the proprietors of the said land, and the said probate was lodged in support of the application. The application for registration was refused.

"Pursuant to a requisition for grounds of refusal to register, and without admitting any right on the part of the applicants to ask for such grounds, the following are stated as the grounds of such refusal:—

"(1) The applicants are not the personal representatives of the said Edith Wallis deceased and have no power or authority to administer her estate of which the said land forms part.

"(2) Sec. 193 of the *Transfer of Land Act* 1890 is intended to provide the necessary machinery for the registration of the personal representatives of deceased persons and of their successors in office.

"(3) The executors of an administrator do not succeed to the office of administrator. An administrator is appointed by the

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Court and is required to give security for the due administration of the estate, and cannot by making a will and appointing executors transmit the administration of the estate of which he was administrator to them. His successor as administrator must be appointed by the Court and give security.

"(4) It is submitted that sec. 193 is not intended to change the law in this respect in the case of land under the *Transfer of Land Act* and should not be construed to authorize or require the registration of any persons who are not the personal representatives of the estate to which the land belongs."

Thereupon a rule *nisi* was obtained for a mandamus to the Registrar of Titles to proceed with the application and register the applicants as proprietors of the land.

On the return of the rule *nisi Cussen* J. discharged it.

The applicants now, by special leave, appealed to the High Court from that decision.

MILLER'S CASE.

An application by Margaret Miller and John Henry Maddock to be registered as proprietors of certain lands having been refused, the Commissioner of Titles stated the grounds of refusal in the following case :—

"1. One Margaret Miller was at the time of her death registered as the proprietor of an estate in fee simple of the land described in certificate of title, vol. 1506, fol. 301143, and vol. 1372, fol. 274351, and vol. 2627, fol. 525271.

"2. The said Margaret Miller died 17th September 1905.

"3. Each of the three certificates of title is endorsed with a memorandum in the words and figures following :—'Memo. No. 35664. Daniel Miller of 20 Queen's Parade North Fitzroy gentleman is registered proprietor of the within described land as executor to whom probate of the will of Margaret Miller (who died 17th September 1905) was granted 19th October 1905. Dated 4th January 1906.'

"4. By writing dated 22nd October 1913 and lodged at the Office of Titles on 26th November 1913 Margaret Miller and John Henry Maddock 'being the executrix and executor to whom probate of the will of Daniel Miller late of 198 McKean Street North Fitzroy gentleman deceased who died on 12th May 1913 was

granted by the Supreme Court of Victoria in its probate jurisdiction on 22nd July 1913 (and who was the executor of the will of Margaret Miller deceased)' applied to be registered as the proprietors of the said lands.

"5. The applicants lodged in support of the application probate of the will of Daniel Miller, described therein as formerly of 20 Queen's Parade North Fitzroy but late of 198 McKean Street North Fitzroy.

"6. On the 28th November 1913 the Registrar of Titles requisitioned for production of the probate of the will of the said Margaret Miller.

"7. The applicants by their solicitors replied that they were unable to produce the probate of the will of Margaret Miller as it was not in their possession. They alleged that Daniel Miller was the sole executor of the will of Margaret Miller, and claimed that they as the executors of the sole executor of the will of Margaret Miller were entitled to be registered as proprietors.

"The Registrar of Titles thereupon asked for other proof of the allegation that Daniel Miller was the sole executor of the will of Margaret Miller and not merely the only executor who had proved of several executors appointed by the will. The applicants refused to furnish any such proof, and contended that inasmuch as Daniel Miller had been registered as proprietor they as his executors were entitled to be registered. The Registrar of Titles thereupon refused to register the applicants as proprietors of the said lands.

"Pursuant to a requisition by the applicants for the grounds of his refusal, but without admitting the right of the applicants to ask for such grounds, the following are stated as the grounds of refusal:—

"(1) The Registrar has no duty or authority to register the applicants unless it is proved that they are now the executors of the will of Margaret Miller, and they have refused to furnish any such proof.

"(2) Proof of the death of Daniel Miller who was registered as executor of the will of Margaret Miller and that they are the executors of his will is not of itself sufficient to entitle them to

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be registered as proprietors of land belonging to the estate of Margaret Miller.

"(3) The memorandum of registration of Daniel Miller as executor to whom probate of the will of Margaret Miller was granted is quite consistent with the said Daniel Miller having been the only proving executor of the will of Margaret Miller and leave may have been given to other executors to come in and prove and one or more of such other executors may have come in and proved or may still have the right so to do, in either of which cases the executors of Daniel Miller would not become the executors of the will of Margaret Miller unless the executors to whom leave was so reserved have died or have renounced or have been cited to come in and prove and have failed.

"(4) The applicants refused to furnish any proof that Daniel Miller was the sole executor appointed by the will of Margaret Miller."

Thereupon a rule *nisi* was obtained for a mandamus to the Registrar of Titles to proceed with the application and register the applicants as proprietors of the land.

On the return of the rule *nisi Cussen J.* discharged it: *R.* v. *Registrar of Titles*; *Ex parte Miller* (1).

The applicants now, by special leave, appealed to the High Court from that decision.

The two appeals were heard together.

Starke, for the appellants in both cases.

Gregory, for the respondent in Maddock's Case.

Latham, for the respondent in Miller's Case.

During argument reference was made to *In re O'Connor* (2); *Dryden* v. *Dryden* (3); *In re Thomas and McKenzie's Contract* (4); *Union Bank of Australia* v. *Harrison, Jones &*

(1) (1914) V.L.R., 387; 36 A.L.T., 1.
(2) 24 V.L.R., 896; 21 A.L.T., 5.
(3) 1 V.L.R. (Eq.), 4.
(4) (1912) V.L.R., 1; 33 A.L.T., 141.

Devlin (1); *Permezel* v. *Hollingworth* (2); *In the Will of Allan* (3); *In re Timmis*; *Nixon* v. *Smith* (4); *In re Philpott* (5); *Hosken* v. *Danaher* (6); *Williams on Executors*, 10th ed., pp. 180, 474 *et seq*; *Administration and Probate Act* 1890, secs. 5, 6, 7, 8, 9, 12; *Transfer of Land Act* 1890, secs. 4, 42, 138, 193, 225, 227; *Administration and Probate Act* 1907, sec. 2; *Conveyancing Act* 1904, sec. 7; *Trusts Act* 1890, sec. 3.

Cur. adv. vult.

March 8.

GRIFFITH C.J. read the following judgment:—

Griffith C.J.

The *Administration and Probate Act* 1890 is a Consolidation Act. The relevant provisions upon which the questions for decision arise are, except as to one section, a verbal re-enactment of corresponding provisions (contained in sections bearing the same numbers) of Act No. 427, passed in 1872, which altered the law as to the devolution of land upon the death of persons who did not die intestate. The law as to the devolution of land of intestates had been previously altered by Act No. 230 passed in 1864. The Act of 1872 prescribed a general rule applicable to all cases, and altered the procedure in the case of intestate estates. The title of the Act was "An Act for amending the Law relating to the Administration of the Estates of Deceased Persons." The preamble recited that it was expedient "to provide for the administration of the real estates of deceased persons by their executors or administrators and otherwise to amend and simplify the laws relating to the administration of such estates and the practice of granting probates and administrations."

Sec. 5 provided that the Supreme Court should have jurisdiction to grant probate of the will or administration of the estate of any deceased person leaving property whether real or personal within the Colony of Victoria.

Sec. 6 was and remains as follows:—"Upon the Court granting probate of the will or administration of the estate or a rule

(1) 11 C.L.R., 492.
(2) (1905) V.L.R., 321; 26 A.L.T., 213.
(3) (1912) V.L.R., 286; 34 A.L.T., 2.
(4) (1902) 1 Ch., 176.
(5) 4 V.L.R. (Eq.), 20.
(6) (1911) V.L.R., 214, at p. 246; 32 A.L.T., 141, 190.

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to administer the estate of any deceased person, all the hereditaments or all the hereditaments then unadministered of such person, whether held by him beneficially or in trust, shall vest as from the death of such person in the executor or administrator to whom such probate or administration or rule shall be granted, as the case may be, for all the estate therein of such person, and if there shall be more than one such executor or administrator shall vest in them as joint tenants."

Sec. 7 provided that the real estate of every deceased person should be assets in the hands of his executor or administrator for the payment of duties and fees payable on the estates of deceased persons and for the payment of his debts in the ordinary course of administration.

Sec. 8 of the Act of 1890 provides that subject to the provisions of the Act the real estate of every deceased person shall be held by the executor or administrator of such person as follows:—"(1) If such deceased person devised such estate by will such real estate shall be held by the executor or administrator according to the trusts and dispositions of such will." "(5) In all other cases such real estate shall be held and applied by the executor or administrator as if the same were personalty."

Pars. (2) (3) and (4) are not relevant to the present inquiry.

Sec. 9 of the Act of 1890 is as follows:—"The executor or administrator of any deceased person shall have the same rights and be subject to the same duties with respect to the real estate of such person that executors or administrators heretofore have had or been subject to with respect to personal estate."

Sec. 12 (sec. 14 of the Act of 1872) prescribed the mode in which an executor or administrator might become registered as proprietor of land held under the *Transfer of Land Act* 1890.

It is to be noted that the legislature did not purport to alter the character of the office of executor or administrator, but, taking those offices as they found them, they vested in the holder of the office the real as well as the personal estate of the deceased, and cast upon him identical duties with respect to both.

At common law the power and estate of an executor was regarded as founded upon the special confidence and actual

appointment of the testator. His estate was therefore regarded as transmissible. It was held to be transmitted from a sole or last surviving executor to his own executor, but not from one of several executors to whom alone probate had been granted. So long as the chain of representation was unbroken the ultimate executor was regarded as the executor, and, as such the representative, of the original testator: *Williams on Executors*, 10th ed., p. 180.

An administrator, on the other hand, was merely an officer of the Court, and upon his ceasing to hold his office it was necessary to appoint a new administrator, the grant being commonly spoken of as a grant of administration *de bonis non*. The words "the hereditaments then unadministered" in sec. 6 are a distinct recognition of and reference to this practice. They are indeed meaningless except by such reference.

The subject matter of the legislation is "estates of deceased persons leaving property in Victoria," by which I understand property held by them in their own right, and not in a representative character, such as the character of official assignees, executors or administrators. Sec. 6 provides that the real estate of any such person, whether held by him beneficially or in trust, shall vest in his executor or administrator as from his death "for all the estate . . . of such person," *i.e.*, of the deceased person leaving estate. It follows that the estate vests in the person of whom it can for the time being be predicated that he is the executor or administrator of that person. In the case of an executor, since the office of executor is transmissible, the estate of the testator unadministered at the death of the executor is, if the chain is unbroken, transmitted at his death to his executor, if any. In the case of an administrator, the office not being transmissible, a fresh grant must be made as to the hereditaments "then unadministered."

Another possible view is that the words last quoted import that in the case of an executor also, if the estate of his testator has not been fully administered, a fresh grant must be made. The legislature, however, when altering the common law are not taken to have altered it further than appears from their express

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language or necessary implication from it. I do not find any such necessary implication.

The same conclusion may, perhaps, be drawn from the introductory words of sec. 8, which, I think, should be read as meaning the executor for the time being, and perhaps also from the words of sec. 9, which seems to be intended to assimilate for all purposes the incidents of real and personal property in the hands of an executor, but I prefer to rest it on the grounds I have stated. The *Transfer of Land Act* contains ample provision for registering the title of any person acquiring it by transmission by operation of law.

To these reasons it may be added that the construction contended for by Mr. *Starke* would give no effect to the words "then unadministered."

In the first appeal the appellants claimed to be registered as the executors of a deceased administrator of a registered proprietor. For the reasons I have given their claim fails. It is necessary in such a case to obtain a fresh grant of administration as to the land left unadministered by the deceased administrator.

In the second appeal probate had been granted to the appellants as executors of Daniel Miller, who had been registered as proprietor of the land in question as executor of a deceased registered proprietor. The Registrar of Titles required production of the probate of the will of the deceased original proprietor in order to show that Daniel Miller was her sole executor, and that the chain of representation was therefore complete. The appellants refused to furnish this proof, and contended that they were not bound to do so. It is not quite clear whether they at that time claimed to be registered as executors of the original testatrix or as executors of Daniel Miller, their own testator, who had been registered as proprietor, but before *Cussen* J. they put forward the latter contention, and their case before this Court was based upon it. For the reasons already given, this contention fails. It is now admitted by the appellants that Daniel Miller was the sole executor of the deceased proprietor, and that if that fact had been proved the Registrar of Titles would have accepted their application. If that fact had been brought to the notice of the Court on the application for special leave I do not think that it

would have been granted. When leave is obtained under such circumstances, the Court may either rescind the leave or dismiss the appeal (*Ibrahim* v. *Rex* (1)). The result is the same in either case. On the whole, I think it better to dismiss the appeal.

BARTON J. The case seems to me amply to warrant the conclusion at which the Chief Justice has arrived, and I agree with it.

ISAACS J. read the following judgment:—

MADDOCK'S CASE.—I agree with Mr. *Starke's* argument that sec. 193 of the *Transfer of Land Act* 1890 must receive the same construction as sec. 12 of the *Administration and Probate Act* 1890, and that therefore sec. 6 of the last mentioned Act is an important aid in the construction. But I am not able to adopt his conclusion that when their context is considered the words "any deceased person" in sec. 193 of the *Transfer of Land Statute* include the deceased executor or administrator (as such) of a deceased testator or intestate.

Sec. 5 of the *Administration and Probate Act* is the jurisdiction section, and is limited to wills and estates of deceased persons leaving property in Victoria. What is meant by "leaving property" is shown very clearly by the next section. Sec. 6 provides as to the estate of a deceased person that all the hereditaments or all unadministered "of such person," whether held by him beneficially or in trust, shall vest as from his death in his executor or administrator, and the section goes on to say "for all the estate . . . of such person."

I observed during the argument that the true intent of the section depends on the force to be given to the words "of such person", and further consideration has confirmed me in that opinion. I assent to the view that an ordinary trustee is a person "leaving property," even although not a penny of what is in law formally vested in him, really belongs to him; he is, nevertheless, a person leaving property within the meaning of sec. 5. I also assent to the argument that the words "any

(1) (1914) A.C., 599, at p. 615.

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deceased person" are in themselves unlimited. I am also of opinion that the phrase "beneficially or in trust" are in themselves wide enough to cover the case of the trusts undertaken by an executor or administrator. Indeed, in the case of *Harding* v. *Howell* (1) Lord *FitzGerald*, for the Privy Council, said as to an administrator under the Act of 1872—the present Act being only a consolidation—that "the estate passed to him, not beneficially, but as a trustee of his wife's assets."

But however wide all those phrases may be in themselves, the operation of sec. 6 is controlled by the words "of such person," and these words also show what is meant by "a person leaving property" in sec. 5. The property, left by him, must be *his*—that is, it must be his at law. If it is his at law, it does not matter whether he holds it beneficially or in trust. If, however, in law he holds *in auter droit*, and if in other words the property is not his personally, but only in a representative capacity, public or private, so as to descend with the capacity itself, the case does not fall within either of the sections. Sec. 6 vests the realty in the executor or administrator as such.

It would be impossible that property held by virtue of an office and descending by law with that office, could be vested in another person not filling the office "for all the estate of" the deceased. That last phrase at once eliminates the administrator; and the first—namely, "of such person"—equally eliminates the case where he has in his lifetime held as executor.

Sec. 9 provides that executors and administrators shall have the same rights and be subject to the same duties with respect to real estate of such person, executors or administrators, theretofore had with respect to personal estate.

They are to have the same rights, and no more. I think that sec. 6 and sec. 9 taken together are sufficient to determine the position, though sec. 8 points in the same direction.

Personalty is left to the well known operation of the law. Realty is expressly assimilated to personalty. The law of executorship as applying to personalty is left to its full operation with the additional field of realty considered for that purpose as personalty, the two classes of property being united in the same

(1) 14 App. Cas., 307, at p. 316.

hands for the administration of the whole estate. Then we have to consider what was the relevant law of executorship with regard to personalty, and I follow, as far as it goes, the line of reasoning and the authorities in my judgment in *Union Bank of Australia* v. *Harrison, Jones & Devlin* (1). The executor represents the person of his testator, and, as Lord *Dunedin* recently said in a Scottish case, he is *eadem persona cum defuncto*: *Taylor* v. *Glass* (2). His personality for the purpose of holding and dealing with the testator's property, which only comes to him as an adjunct of his office, is in law that of the testator himself. That is the keynote of the whole matter because that principle is the one underlying the provisions of the Statute.

The consequence is that, though the executor has during his lifetime the fullest powers of dealing with the property of the estate, it is only because and therefore so long only as he holds the office: on his death, as the office passes so does the property. If he dies intestate, he does not pass the office, and so the Court must. An administrator *de bonis non*—not of the executor but of the original testator—must be appointed. If he dies leaving a will he does pass the office, because his executor becomes the original testator's executor, and takes the goods simply because he is appointed executor.

In *Brownrigg* v. *Pike* (3), Sir *James Hannen* adopted *Swinburne's* statement that "to appoint an executor is to place one in the stead of the testator, who may enter into the testator's goods and chattels."

He also held expressly that although the will in that case did not in fact dispose of the personalty—indeed, it dealt only with realty—yet the personalty vested. He says that by the mere appointment of an executor, personal estate vests in him, to be got in by him and applied either according to the provisions of the will or as the law directs.

And it is important to remember that the title of an executor is derived not from the probate, but from the will, which is trite law, and has received the confirmation of the Privy Council in *Chan Kit San* v. *Ho Fung Hang* (4).

(1) 11 C.L.R., 492, at pp. 514 *et seqq.*
(2) (1912) S.C., at p. 169.
(3) 7 P.D., 61, at p. 64.
(4) (1902) A.C., 257, at p. 260.

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It naturally follows that when an executor dies leaving a will such property as he holds belonging to the estate, passes to his executor, but not as part of his estate, either beneficially or in trust.

The clearest and best exposition of this is found in a passage in the old case of *Bransby* v. *Grantham* (1). It is specially authoritative, because the judgment represents not only the unanimous opinions of all the Justices of the King's Bench, but also, as the Chief Justice there said, the opinion of several Justices of the Common Bench with whom he had spoken of the matter. The passage deals with the point we are now considering so decisively that I quote it:—"That which a man has as executor, he cannot devise to another. For as soon as he is dead, the thing goes on to the use of the first testator, and his executors shall have it as executors to the first testator, and to his use, and not as executors to the last testator, nor to his use. For the goods which were the first testator's shall not be put in execution for the debt of the last testator, and the last executors have them by relation as immediate executors to the first testator. So that the property which the last testator had in them is taken away by the relation, and the goods are in such plight as if they had never been in him. And yet in his lifetime he had the disposal of them, for then he had authority over them, and had the whole property as executor, but by his death that authority ceases, and is transferred to others, viz., to his executors, who shall be executors to the first testator, and as executors to the first testator only they shall hold the goods, for they cannot have them as executors to both the testators. So that inasmuch as the property which the last testator had was in respect of the executorship, which is an office that ceases by his death, and is then instantly transferred, together with the things which he had, to another, his devise of them is absolutely void. For no man can devise any thing but what he has to his own use."

So in *Wentworth on Executors*, at p. 193, it is said of a person who holds the office of an executor: "all his goods reacheth not to his goods as executor."

The same view is taken by *Grose* J. in *Farr* v. *Newman* (2)

(1) 2 Plowd., 525.

(2) 4 T.R., 621, at p. 629.

where he says:—"Why may not the executor devise the testator's goods? Why may not his administrator take them? Why are they not forfeited to the Crown on the attainder? Why are they not liable to be seized under a commission of bankrupt against the executor? The answer and reason is, I think, obvious. It is because they are not *his goods*: he is only the distributor and dispenser of them for the benefit of the creditors, the legatees, and the next of kin of the testator."

This is quite consistent with the old rule as to the surplus after his executorial duties were fully performed, vesting in him beneficially. The rule was altered in 1830, but even apart from that, so long as the office was active, because some portion of the executor's duty remained unperformed, the goods on the death of the executor passed to the derivative executor, *ratione officii* and not as a gift to him by the immediate executor.

This being the relevant law of executorship, the matter stands thus. The *Administration and Probate Act* vests the realty of the original deceased in his executor, and regards it henceforward for the purposes of administration as personalty. It forms no part of the executor's estate when he dies, but passes by operation of law to the person whom he appoints as his executors; it passes to the latter as representing the original testator, and passes as still being the property of the original testator.

Sec. 193 of the *Transfer of Land Statute*, and sec. 12 of the *Administration and Probate Act*, therefore in speaking of the "estate or interest of the deceased proprietor" mean the estate or interest of the original testator or intestate, who is merely represented by his executors or administrator.

This result is not only in accordance with strict law, but avoids incongruities of an absurd and mischievous character.

The appeal therefore should be dismissed.

MILLER'S CASE.—This appeal should be dismissed, and in my opinion solely on the ground that the appellants have failed to prove that Daniel Miller was the sole executor of Margaret Miller, and therefore they have not brought themselves within the law just laid down in the previous case. I am strongly of

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opinion that the dismissal ought not to be on the ground that we rescind the leave.

If this were a criminal case, I should, of course, be bound on the authority of *Eather's Case* (1)—so long as that decision stands, and the relevant statutory provision remains unaltered—to hold that leave should be rescinded, because the rule of the Privy Council which that case adopts is clear and simple, namely, that before a criminal appeal is entertained "it must be established clearly that justice itself in its very foundations has been subverted." Of course, no one could say that of the decision of *Cussen* J. even if it were wrong.

But as the case is a civil one, and I do not find a pronouncement of this Court which binds me as I am bound in criminal matters, I hold to the view that if the decision impeached were wrong, then affecting, as it does, very important questions of property law, there is no reason for rescinding the leave, and that it is a proper case to entertain. But entertaining it, the evidence of sole executorship asked for by the Registrar was refused, and its absence is fatal to the appellants' case.

I feel bound to say, however, that even if it were not fatal, and even if in its absence the appellants were entitled to succeed, yet I fully accede to the view expressed during the argument by my learned brother *Gavan Duffy*, that the Registrar's request for the evidence was so reasonable that it ought to have been given. The comparative cost was trifling, having regard to general principles of not creating unnecessary litigation, and particularly to the special provisions as to costs contained in sec. 209 of the *Transfer of Land Act*. I should in the event of the appellants' success have seriously considered the question of allowing them costs at all. As it is, the risk was deliberately run, and it has ended in a total loss.

GAVAN DUFFY J. read the following judgment:—

MADDOCK *v.* REGISTRAR OF TITLES.—I agree with the other members of the Court in thinking that the words "any deceased person" in secs. 6 and 12 of the *Administration and Probate Act* 1890 and sec. 193 of the *Transfer of Land Act* 1890 do

(1) 19 C.L.R., 409.

not apply to the deceased executor or administrator of a deceased testator or intestate as such. That is sufficient to dispose of the appeal.

MILLER *v.* REGISTRAR OF TITLES.—In this case it is urged for the appellants that, even if the words "any deceased person" in the two Statutes do not apply to the executor Daniel Miller to whose will they have obtained probate, yet, as they are his executors, they are therefore the executors of the will of his testatrix, Margaret Miller, and are entitled as such to her property real and personal and to the desired registration. Assuming this to be so, the only question at issue is whether the Registrar of Titles was justified in making the requisition he did make for the purpose of satisfying himself that the appellants were in law executors of the will of Margaret Miller. I think he was. For reasons stated during the course of the arguments I am disposed to think that special leave to appeal should not have been given, and having been given should be rescinded. But the various points of law raised by the appeal have been fully discussed, and the same result is reached by dismissing the appeal.

Appeals dismissed with costs.

Solicitors, for the appellants, *Maddock, Jamieson & Lonie.*

Solicitor, for the respondent, *E. J. D. Guinness*, Crown Solicitor for Victoria.

B. L.