[HIGH COURT OF AUSTRALIA.]

PAGELS . . . . . APPELLANT;
DEFENDANT,

AND

MACDONALD AND ANOTHER . . . . RESPONDENTS.
PLAINTIFF AND DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Mar.* 11, 12.

SYDNEY, *April* 29.

Latham C.J., Starke, Dixon, Evatt and McTiernan JJ.

Will—Construction—Real estate—Power of sale—Gift for life and then to be "divided" among children—Executorial duties completed—Whether executor has power of sale—Administration and Probate Act 1928 (*Vict.*) (*No.* 3632), *secs.* 8, 9, 39.

By his will the testator, who died in 1894, devised and bequeathed his real and personal estate, which was situated in Victoria, to his wife for her sole and separate use during her life and directed that at her death it should be "equally divided" between his youngest son and his six youngest daughters, each to have an equal share. The testator then appointed executors. The executorial duties were completed and the personal representative of the testator desired to sell the land.

Held that, by reason of the terms of the will, he was empowered to sell the land for the purpose of distribution.

Decision of the Supreme Court of Victoria (*Gavan Duffy* J.) reversed.

APPEAL from the Supreme Court of Victoria.

By his will Donald MacDonald devised and bequeathed all his rea and personal estate to his wife, Isabella MacDonald, for her sole and separate use during her life time and "at her death to be equally divided between" his youngest son and his six youngest daughters. He appointed William Edward Veale and his wife as executor and

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executrix of his will, and probate was granted to them. The executor and executrix died without fully administering the estate, and letters of administration with the will annexed of the unadministered estate of the testator were granted to his daughter, Rachel MacDonald. All the testator's children who were beneficiaries under his will, except Rachel MacDonald and Catherine MacDonald, were dead. The testator's debts, funeral and testamentary expenses were paid. The unadministered estate consisted of real estate, which the administratrix with the will annexed desired to sell, but Catherine MacDonald, the other surviving beneficiary, was opposed to a sale. The grounds of opposition by Catherine MacDonald were that the sale was not necessary or required for the purposes of administration of the estate of the testator; that the whole of the administration of the estate of the testator was completed and that the real property was held upon trust for the persons entitled to it under the devise in the will; that Catherine MacDonald and Rachel MacDonald had lived during a large part of their lives and still lived in the old home on the land; that they were both spinsters, Rachel being eighty-two years of age, and Catherine seventy-five, and the latter desired to spend the remainder of her days in the old home.

In these circumstances, Rachel MacDonald took out an originating summons, as administratrix with the will annexed of the testator's estate, to determine whether she was as such administratrix entitled to sell the real estate of the testator. The defendants to the summons were Catherine MacDonald and William John Pagels, who was sued as representing all persons interested in the estates of the children of the testator mentioned in the will other than the plaintiff and Catherine MacDonald.

The originating summons was heard by *Gavan Duffy* J., who held that the administratrix had no power of sale.

From that decision the defendant, William John Pagels, now appealed to the High Court.

Walker, for the appellant. The will, by the direction to "divide" the estate among the beneficiaries, confers a power of sale (*In re McInnes; Trustees Executors and Agency Co. Ltd.* v. *McInnes* (1)).

(1) (1925) V.L.R. 496; 47 A.L.T. 1.

It is only where there is a power of sale as distinct from a trust for sale that the matter comes within the *Settled Land Act*. It is a question between the executor and the beneficiaries whether he sells or divides the estate among them as he thinks fit (*In re Hird and Hickey's Contract* (1)). The real question is: What is the interest of each child in the land and chattels ? Is it an interest in the proceeds or in the thing itself. The Statute of Distributions and the cases thereon throw considerable light on the matter (see *Administration and Probate Act* 1928, sec. 47 (1) (*f*)). The Courts have defined the word " distribute " as meaning " divide." The executor has a power to sell and realize the proceeds (*In re the Transfer of Land Act* 1890 ; *Ex parte Equity Trustees Executors and Agency Co. Ltd. and O'Halloran* (2) ; *In re Farrell ; Flanagan* v. *Farrell* (3) ; *Vanneck* v. *Benham* (4) ; *Kelly* v. *J. T. and J. Toohey Ltd.* (5)).

[LATHAM C.J. referred to *In re Baker* (6), and *Mitchell* v. *Hannell* (7).]

There is no distinction drawn in sec. 39 of the *Administration and Probate Act* 1928 between the rights of an executor distributing residuary estate and an administrator distributing upon intestacy (*Lord Sudeley* v. *Attorney-General* (8)). A residuary legatee, where she is one of a number, has no right to any specific portion.

[STARKE J. referred to *Horton* v. *Jones* (9).]

If all the beneficiaries agree as to the assets, then they have the absolute interest, but not unless they agree (*In re Norwood and Blake's Contract* (10) ; *Farwell* on *Powers*, 3rd ed. (1916), p. 83, sec. 10 ; *Theobald* on *Wills*, 8th ed. (1927), p. 493.)

Clyne, for the respondent Rachel MacDonald. *In re Chaplin and Staffordshire Potteries Waterworks Co.'s. Contract* (11) shows that executors have very wide powers and are entitled to deal with the

(1) (1919) V.L.R. 717 ; 41 A.L.T. 101.
(2) (1911) V.L.R. 197, at p. 213 ; 32 A.L.T. 183, at p. 188.
(3) (1930) V.L.R. 101.
(4) (1917) 1 Ch. 60.
(5) (1899) 21 N.S.W.L.R. (Eq.) 33 ; 16 W.N. (N.S.W.) 173.
(6) (1918) 18 S.R. (N.S.W.) 596 ; 35 W.N. (N.S.W.) 172.
(7) (1885) 7 N.S.W.L.R. (Eq.) 53.
(8) (1897) A.C. 11.
(9) (1935) 53 C.L.R. 475.
(10) (1917) 1 I.R. 472.
(11) (1922) 2 Ch. 824, at p. 839.

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estate in any manner which they deem proper for the administration of the estate, and they can sell the land if they so desire. [He referred also to *Blackstone's Commentaries*, 21st ed. (1844), Book II., p. 515.]

Tait, for the respondent Catherine MacDonald. There is no implied power of sale in this will. An implied power of sale is based on the necessity of inferring that the executors have a power of sale. A power of sale is implied only if it is necessary that there should be such a power in order to carry out the testator's intention. The mere use of the word "divide" is not enough. In all cases where an implied power is spelt out of the will there is more than a mere direction to divide (*In re Hird and Hickey's Contract* (1); *Attenborough* v. *Soloman* (2); *In re McInnes*; *Trustees Executors and Agency Co. Ltd.* v. *McInnes* (3); *Halsbury, Laws of England* 1st ed., vol. 23, p. 11). In *Mower* v. *Orr* (4) there was a power to invest. So in *Davies to Jones and Evans* (5) the sums were to be invested. The *Administration and Probate Act* 1928, sec. 39, was taken from the English Act of 1925. Sec. 68 provides for the application of sec. 39 of the *Administration and Probate Act* 1928. Whether the death occurred before or after the Act, both powers are limited to the executor or administrator as such, which is not the position here, as the executorial duties were completed. The authorities cited are inapplicable because in each case there is something more than the mere direction in the will (*In re Cookes' Contract* (6); *Jarman* on *Wills*, 6th ed. (1910), pp. 913 et seq.; 7th ed. (1930), pp. 890 et seq.). It may be that there was a power in the will to sell, but in the events which have happened it is gone (*In re Dyson and Fowke* (7)).

Walker, in reply. This is a gift of the proceeds, not merely a gift of the property.

Cur. adv. vult.

(1) (1919) V.L.R. 717; 41 A.L.T. 101.
(2) (1912) 1 Ch. 451; (1913) A.C. 76, at p. 83.
(3) (1925) V.L.R., at p. 498; 47 A.L.T., at p. 2.
(4) (1849) 7 Hare 473; 68 E.R. 195.
(5) (1883) 24 Ch. D. 190.
(6) (1877) 4 Ch. D. 454.
(7) (1896) 2 Ch. 720.

The following written judgments were delivered :—

LATHAM C.J. The last will of Donald MacDonald was in the following terms :—" After payment of all my just debts funeral and testamentary expenses I give devise and bequeath unto my beloved wife Isabella MacDonald all my real and personal estate for her sole and separate use during her life time and at her death to be equally divided between my youngest son . . . and my six youngest daughters " (each named) " each to have an equal share."

An appointment of executors completed the will.

The testator's widow occupied the land of the testator during her life. She died in 1918. Letters of administration with the will annexed of the unadministered estate of the testator were granted to Rachel MacDonald, the plaintiff, in 1935. The question submitted for the determination of the Supreme Court of Victoria was whether the administratrix was entitled to sell the real estate of the testator. With one exception all the beneficiaries interested desire that there should be a sale. Catherine MacDonald, one of the daughters of the testator, objects to the real estate being sold. *Gavan Duffy* J. held, following the decision in *In re Hird and Hickey's Contract* (1), that the real estate was held by the administratrix upon the terms of the will and that the only obligation of the administratrix was to convey the property to the beneficiaries.

It is conceded that if the will expressly or impliedly directs the executors to sell the land, no difficulty arises. In the first place, therefore, I propose to consider the terms of the will.

The only gift to the children of the testator is contained in the words " and at her death to be equally divided between " the children " each to have an equal share." There is thus no direct gift of the real and personal estate to the children. There is a direction that the real and personal estate is to be equally divided between them. The question submitted to the Court relates only to the real estate. If the real estate is transferred to the children as tenants in common in equal shares they will each hold an undivided interest, and no division will have taken place. Accordingly I am of opinion that the direction to divide the land implies that the

(1) (1919) V.L.R. 717 ; 41 A.L.T. 101.

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executors should sell the land and divide the proceeds. On this ground, therefore, I am of opinion that the question submitted to the Court should be answered in the affirmative.

I am not prepared to accept any of the alternative arguments urged in support of this conclusion. These arguments become important in this case only upon the assumption that the terms of the will did not direct or authorize a sale, and that the gift to the children after the death of the testator's wife was to be construed simply as a direct gift to them. In my opinion, if the gift had been a gift to " A, B and C," the executors would have no power to sell. Such a gift would be a specific gift of the land, and, if funeral and testamentary expenses and debts had been paid without recourse to the land, the only duty of the executors would be to convey the land in accordance with the terms of the will. The only right of the beneficiaries would be to have the estate duly administered in accordance with the terms of the will, and if the will did not direct or authorize a sale, they would have no right to have the property sold.

There is much apparent divergence of authority upon this subject. The cases of *Cooper* v. *Cooper* (1) and *Blake* v. *Bayne* (2) were carefully considered and explained in the case of *Vanneck* v. *Benham* (3). In *Cooper* v. *Cooper* (4) the House of Lords held that residuary legatees had a direct and tangible interest in the residue of the estate of a testator, and in *Blake* v. *Bayne* (2) the Judicial Committee of the Privy Council held that in the circumstances of that case the whole estate, subject to the payment of debts, was the absolute property of the next of kin. *Younger* J. (now Lord *Blanesburgh*) explained in *Vanneck* v. *Benham* (3) that in *Cooper* v. *Cooper* (4) the real decision was that the residuary legatees had a sufficiently definite interest in the residuary estate to raise a question of election, and that in *Blake* v. *Bayne* (2) all the next of kin had actually agreed, as their conduct showed, to enjoy the estate of the intestate in specie. *Younger* J. adopted and applied the law as expounded by the House of Lords in *Lord Sudeley* v. *Attorney-General* (5), where it was held that the residuary legatee had an interest in the residuary

(1) (1874) L.R. 7 H.L. 53, at p. 64.
(2) (1908) A.C. 371.
(3) (1917) 1 Ch. 60.
(4) (1874) L.R. 7 H.L. 53.
(5) (1897) A.C. 11.

estate of a testator only in a loose sense (see, per Lord *Halsbury* L.C., (1)) and that the real right of the residuary legatee was a right to have the estate properly administered so that it could be conveyed to her when funeral and testamentary expenses and debts had been paid.

It appears to me to be clear on principle that when a testator gives property by his will, the only right of the beneficiaries is to receive that property itself in specie if it is not required for the payment of funeral and testamentary expenses or debts—subject to the doctrine of marshalling. They are not entitled to have the property sold and the proceeds divided. The case is quite different in Victoria in the case of an intestate, because sec. 33 of the *Administration and Probate Act* 1928 now provides that "on the death of a person intestate as to any real or personal estate, such estate shall be held by his personal representatives—(*a*) as to the real estate (including chattels real) upon trust to sell the same; and (*b*) as to the personal estate upon trust to call in sell and convert into money such part thereof as may not consist of money."

Thus I do not agree with the proposition that in the supposed case of a direct gift the beneficiaries acquire an immediate actual interest in the real and personal estate by virtue of the direct operation of the will itself.

The rights and duties of the personal representative in respect to real estate are identical with those which exist in the case of personal estate (*Administration and Probate Act* 1928, sec. 9). In the case of personal estate bequeathed by will the legatees do not by virtue of the will alone acquire an interest in the personal estate of the testator. If, for example, a legatee were to take possession of any part of the personal estate bequeathed to him without the assent of the executor, the executor could successfully sue him in trover (see *Williams* on *Executors*, 12th ed. (1930), vol. 2, p. 894). If a stranger were to take possession, without authority from the executor, of any part of the testator's personal property, it would be the executor and not any legatee who would be entitled to sue in trover (see *Williams* on *Executors*, 12th ed. (1930), vol. 1, p. 528). If the executor wrongfully converted to his own use any of the personal

(1) (1897) A.C., at p. 15.

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chattels of the testator the remedy of the beneficiaries would not be found in trover in the case of chattels, or in ejectment in the case of real property, but in an action for administration in a Court of equity. All these considerations support the conclusion reached in *Lord Sudeley* v. *Attorney-General* (1) that beneficiaries do not in the case of personal property (or in Victoria in the case of real property) acquire in a strict sense any legal interest in the property of the testator in the absence of assent or conveyance by the executor. Sec. 36 of the *Administration and Probate Act* 1928 relating to the effect of assent or conveyance by a personal representative clearly recognizes this position. So also sec. 39, which, "for purposes of administration," imposes a trust for sale (defined in sec. 4) upon personal representatives, expressly recognizes in sub-sec. 2 the right of persons to whom property has been bequeathed or devised to obtain the assent of or a conveyance from an executor.

When the executor has performed all his executorial functions he may become a trustee in various ways (*Halsbury, Laws of England*, 1st ed., vol. 28, pp. 60, 61): he may become a trustee by merely continuing to hold property after his functions as executor have been performed (*In re Timmis*; *Nixon* v. *Smith* (2)). When the executor becomes a trustee of ascertained property, the beneficiaries then become owners of equitable interests in that property. Thus a beneficiary under a will does not, by reason of the will alone, obtain any title, legal or equitable, to any asset forming part of the testator's estate. When he does obtain such a title, he obtains it as a result of the administration of the estate of the testator according to law and in accordance with the dispositions of the will.

Thus the *Administration and Probate Act* does not interfere with the dispositions of a will except in so far as it is necessary to apply the estate of deceased persons towards the payment of funeral and testamentary expenses or debts in the ordinary course of administration. Subject to proper provision for such liabilities being made, the estate is to be administered in accordance with the will, and no general power of sale is conferred by law upon executors for the purpose of making what some parties may regard as a convenient distribution of the estate among beneficiaries. Thus if a testator

(1) (1897) A.C. 11.

(2) (1902) 1 Ch. 176.

leaves a watch to "A and B," "A and B" are entitled to become joint owners of the watch, and neither of them is entitled to require the executor to sell it and divide the proceeds of the sale between them, though, of course, both may agree to a sale. Similarly when land is left to "A, B and C" they take the land as joint tenants and if it is left to them in shares they take as tenants in common. They are not entitled to require the executor to sell it and divide the proceeds. They may, if they choose, dispose of their interests, thus making a severance in the case of a joint tenancy, or they may bring a partition action, or in certain cases they may obtain a sale under the *Settled Land Act* 1928.

Thus, in my opinion, the rights of the beneficiaries in this case, where all the funeral and testamentary expenses and debts have been paid, are determined entirely by the will, and if I did not find in the will an implied direction to sell the property for the purpose of distribution, I would agree with the judgment of the Supreme Court in answering the question in the negative. In view, however, of the opinion which I have formed as to the true construction of the will, I think that the question ought to be answered: Yes.

STARKE J. The Chief Justice has stated the terms of the will and the facts of the case, and I shall not, therefore, repeat them. In Victoria, the real and personal estate of a deceased person vests in the legal personal representative. His main duties consist in paying debts and expenses and distributing the property of the deceased amongst the persons entitled thereto. He may dispose of the assets of the deceased in the course of administration, and they cannot be followed by the creditors of the deceased. But this case concerns a division of real property which is not required for any purpose of administration other than a distribution amongst those entitled under the will of the deceased. Must the division be in specie, or has the legal personal representative power to sell the property and distribute the proceeds amongst those entitled? In my opinion, the question depends upon the proper interpretation of the will. If it is plain that there is to be "a division of the property; that the property to be so dealt with is to go—not the land in specie, and the money in specie—but to go among certain

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persons in certain shares and proportions, without any distinction as to land or money," then the legal personal representative must have power to effectuate the purposes of the will and sell the property (cf. *Farwell* on *Powers*, 3rd ed. (1916), pp. 81-87, and cases there cited). The inconvenience in this case of a sale postponed until after the death of the wife of the testator, when all other proceedings relating to the estate have been completed, has some weight (*Bentham* v. *Wiltshire* (1)). But under the terms of the will the realty and personalty are blended, and directed to be divided amongst a somewhat numerous class. Such a direction makes it clear, I think, that the testator intended a sale, and that the legal personal representative of the testator should effect his purpose and sell and divide the proceeds of the property amongst those entitled thereto (*Flux* v. *Best* (2) ; *Carlisle* v. *Cooke* (3) ; *Mower* v. *Orr* (4) ; *Cornick* v. *Pearce* (5)). Consequently I agree that this appeal should be allowed, and an order made in the terms proposed by the Chief Justice.

DIXON AND EVATT JJ. The testator, a farmer, died in 1894. His widow died in 1918. By his will the testator, after payment of debts, gave devised and bequeathed to her all his real and personal estate for her sole and separate use during her lifetime and after her death to be equally divided between his youngest son and his six youngest daughters, whom he named, each to have an equal share. He appointed his widow and another person, now dead, his executrix and executor. An administratrix *c.t.a.* of the testator's unadministered estate has been recently appointed. No liabilities have been left undischarged. The estate includes land and she desires to sell it. The question is whether upon the proper interpretation of the will she has a power of sale.

In our opinion the powers belonging to the executors included a power of selling the real and personal estate for the purpose of distribution among the seven children after the widow's death. The direction to divide the real and personal estate among the seven children does not mean, we think, that an equal division in specie

(1) (1819) 4 Madd. 44 ; 56 E.R. 625.
(2) (1874) 23 W.R. 228.
(3) (1905) 1 I.R. 269.
(4) (1849) 7 Hare 473 ; 68 E.R. 195.
(5) (1848) 7 Hare 477 ; 68 E.R. 197.

is to be made of the land and chattels of which the testator's estate was composed, nor does it mean that the seven children are upon their mother's death to stand possessed of the chattels in co-ownership and by transfer or conveyance obtain estates in fee simple as tenants in common. It is a residuary gift of mixed realty and personalty among a number of persons and the natural construction of the word "divide," together with the reference to equality of shares, is as a direction to distribute proceeds.

Under secs. 6, 8 and 9 of the *Administration and Probate Act* 1890 the real estate vested in the executors to hold according to the trusts and dispositions of the will with the same rights and the same duties as they would hold personal estate.

Under secs. 8 and 9 of the *Administration and Probate Act* 1928 the real estate vested in the administratrix *c.t.a. de bonis non* with the same rights and subject to the same duties as in the case of personalty.

Under sec. 39 she obtained the same powers and discretions as, under the old law, a legal personal representative had with respect to the personal estate and all the powers, discretions and duties of a trustee holding land on an effectual trust for sale.

If residuary personalty is bequeathed to a number of legatees in aliquot shares and there is no indication in the will of an intention that they shall take it specifically, and no agreement among them to do so, the executor's power of sale is exercisable for the purpose of converting it into money and distributing the proceeds (see *Attorney-General* v. *Lord Sudeley* (1), and cf. *In re West*; *West* v. *Roberts* (2)).

Now that realty vests in the executors, like personalty, the former difficulty of implying a power of sale in them in order to give effect to a direction to divide realty has, we think, altogether disappeared. Even in a case where the testator died before the *Land Transfer Act* 1897, *Astbury* J. thought that a power of sale might well be conferred impliedly upon executors in whom the testator had vested the legal estate, because the will contained a direction to divide his real and personal estate among a class in equal proportions, except

(1) (1896) 1 Q.B. 354, per *Kay* L.J. at pp. 364, 365, 367; (1897) A.C., per Lord *Davey* at p. 21.

(2) (1909) 2 Ch. 180, per *Swinfen Eady* J., at p. 186.

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that one was to receive £30 more than the others (*In re Hailes and Hutchinson's Contract* (1)).

In ascertaining the powers of executors of a will made in Victoria after 1872, we do not think we should proceed by interpreting the will as if it was made in the former state of the law when executors, as such, were not concerned with realty, and then inquire what additional powers does the statute give them. The directions contained in such a will should be interpreted as intended to apply where the executor is both a real and personal representative and where, moreover, there is no distinction between personalty and realty in the discharge of liabilities or in succession upon intestacy. Inasmuch as it is the function of the executor to administer the whole estate of the testator, and for that purpose he has the same powers of conversion in respect of realty and personalty, expressions contained in the will referring to division, distribution, or the like, or importing, according to their prima facie meaning, some active dealing with assets, may properly be understood as implying a direction to the executor both in the case of personalty and of realty.

In the present case, the will requires a division after payment of debts of the whole of an estate which must have been composed of assets of divers descriptions, including live stock, plant and land. This appears to us to imply conversion. The case is in this respect unlike *In re Hird and Hickey's Contract* (2), where there was a separate gift of realty " to become the property of " the remaindermen " to be by *them* " (i.e. the remaindermen) "disposed of so as to be equally divided among themselves." The Court accepted the view that the duty of the executors was to convey the property to the remaindermen as tenants in common. It is true that there seems to have been no devise to the executors ; the duty so to convey would appear to arise out of the office of executor and to be executorial. But the will indicated an intention that the devisees should take in specie.

In the present case it was open to the executors to convert before the death of the tenant for life and we think that in the absence of agreement among the beneficiaries to take in specie, conversion became imperative when the period of distribution arrived. But at

(1) (1920) 1 Ch. 233, at p. 237.

(2) (1919) V.L.R. 717 ; 41 A.L.T. 101.

that date both the executor and the executrix were dead and the survivor had appointed no executor.

We are concerned upon this originating summons only with the powers arising as a result of the terms of the will. The beneficiaries went on without a representative of the estate for a period of upwards of seventeen years; but whether anything has taken place among them to affect the exercise of the power does not appear.

In our opinion a declaration should be made in answer to the first question in the originating summons to the effect that by reason of the directions contained in the will the powers of the executors included that of selling the real estate for the purpose of distribution.

We think the appeal should be allowed and an order made that the costs of all parties should be paid out of the estate, those of the administrator as between solicitor and client.

McTIERNAN J. The question for decision is whether the administratrix *cum testamento annexo* of the unadministered estate of a testator who died in 1894 in Victoria leaving real and personal estate, has power to sell his residuary real estate. After payment of his debts and funeral and testamentary expenses, the testator devised and bequeathed to his widow who died in 1918, all his real and personal estate for her sole and separate use during her life and at her death he directed his estate "to be equally divided between his son and six daughters," named in the will, "each to have an equal share." There are no debts to be paid, but the residue is wholly undistributed and, as it would appear from the material before the Court, has not been completely ascertained.

The residuary realty became vested in the present administratrix upon the grant of administration to her, and she has the same rights and duties with respect to the testator's real estate as executors and administrators had under the old law with respect to personal estate (*Administration and Probate Act* 1928, secs. 8 and 9). Under sec. 39 of this Act she has for the purposes of administration the same powers and discretions as the personal representative had under the old law with respect to the personal estate vested in him, and all the powers discretions and duties conferred or implied by law on trustees holding land under an effectual trust for sale. Under

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these provisions the administratrix *qua* personal representative may sell the residuary realty for the purposes of administration (*Union Bank of Australia* v. *Harrison, Jones & Devlin Ltd.* (1); *In re Chaplin and Staffordshire Potteries Waterworks Co.'s Contract* (2). See also *Attenborough* v. *Solomon*, per Viscount *Haldane* L.C. (3)). There the Lord Chancellor agreed with the judgment of *Fletcher Moulton* L.J. in the Court of Appeal, who, although he disagreed with the conclusion of *Joyce* J. in the Court below, said that he did not differ from his statement of the law as to what an executor may lawfully do in the execution of his authority as executor notwithstanding the lapse of years. The statement of *Joyce* J. is as follows: —"It is quite true that for many purposes an executor in certain circumstances is or is deemed to be or become a trustee, but an executor does not cease to be executor as soon as the debts, pecuniary legacies, and funeral and testamentary expenses are paid or discharged, especially if the residue be not ascertained and distributed. So far as concerns personal estate not previously alienated and excluding chattels comprised in a specific bequest to which the executor has assented an executor may sell, mortgage, or pledge any part of it, even after twenty years, and if he does so will be presumed to be acting in the exercise of the duties imposed upon him by the will, so that the purchaser or mortgagee or other assignee will be under no liability to creditors or legatees" (4).

The will in the present case does not express or imply a wish on the part of the testator to give a specific part of the residuary estate to his son and each of his daughters in the form of real or personal property other than money, or if any part of the estate remained unrealized after the payment of debts, to give such part in specie to his son and daughters as co-owners (cf. *Sheppard's Touchstone*, 7th ed. (1821), vol. 2, at p. 480). The direction that after the death of the life tenant the residue was "to be equally divided" between the children named, "each to have an equal share," was given with respect to property which might consist of mixed realty and personalty or of either of these classes or of the balance of the proceeds

(1) (1910) 11 C.L.R. 492, at pp. 520-521 per *Isaacs* J., and at p. 529, per *Higgins* J.
(2) (1922) 2 Ch., at pp. 839, per *Scrutton* L.J., and 844, per *Younger* L.J.
(3) (1913) A.C., at p. 83.
(4) (1911) 2 Ch. 159, at p. 164.

of sale after payment of debts. This direction is no more than an expression of the testator's wish that the executor should distribute the residue in equal shares between the children named. It does not direct that the whole or any part of the residue, if it consisted of land or chattels, should be appropriated in specie. The executor is the "minister and dispenser and distributor" of the testator's property (*Wentworth* on *The Office of Executors*, 14th ed. (1829), p. 197, quoted by *Isaacs* J. in *Union Bank of Australia* v. *Harrison, Jones & Devlin Ltd.* (1). The intended sale is to be made for the purposes of distribution, and the authority to make it is incident to the office of administratrix *c.t.a.* of the unadministered estate.

The appeal should be allowed, costs of all parties from the estate, costs of the administratrix as between solicitor and client.

Appeal allowed. Judgment of Supreme Court of Victoria varied by striking out the declaration that the plaintiff is not entitled to sell the real estate of the testator, and declaring in answer to the first question that by reason of the directions contained in the will of the testator the powers of the administratrix c.t.a. of the testator's unadministered estate included that of selling the real estate of the testator for the purpose of distribution in accordance with the terms of the will. Costs of all parties on this appeal to be paid out of the estate. Costs of administratrix as between solicitor and client.

Solicitor for the appellant, *Bernard Nolan.*

Solicitor for the respondent Rachel MacDonald, *G. Lee Archer.*

Solicitors for the respondent Catherine MacDonald, *Doyle & Kerr.*

H. D. W.

(1) (1910) 11 C.L.R., at p. 515.