REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

[HIGH COURT OF AUSTRALIA.]

BURKE AND ANOTHER . . . . . APPELLANTS;
PLAINTIFFS,

AND

DAWES AND ANOTHER . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, 1937, *Nov.* 10.

1938, *Feb.* 25.

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

Torrens System—Executor—Mortgage—Long interval between death of testator and mortgage—Tenant in possession—Assumption that executor was acting in course of executorial duties—No knowledge by mortgagee that he was not so acting—Rights of mortgagee prevailing over rights of tenant in possession—Administration and Probate Act 1928 (*Vict.*) (*No.* 3632), *secs.* 8, 9, 36 (5), (10)—*Transfer of Land Act* 1928 (*Vict.*) (*No.* 3791), *secs.* 72, 179, 232.

Executor—Functions—Administration of estate.

A devised certain land of which he was the registered proprietor under the *Transfer of Land Acts* (Vict.) to B, who was living thereon before A's death and, with the consent of A's executor, remained in possession continuously thereafter. Seventeen years after the death of A his executor mortgaged the land. The mortgage interest having fallen into arrear, the mortgagee claimed possession of the land under the mortgage.

Held, by *Starke*, *Dixon* and *McTiernan* JJ. (*Latham* C.J. and *Evatt* J. dissenting), that the fact that B was a tenant in possession within the exception contained in sec. 72 of the *Transfer of Land Act* 1928 (Vict.) gave her no greater protection than she would have had if the land were under the general

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law, and that, as the mortgagee had neither express nor constructive notice that the executor in giving the mortgage was not acting bona fide in discharge of his executorial functions, the mortgage prevailed over B's interest under the will.

The nature and extent of the functions of an executor considered.

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

APPEAL from the Supreme Court of Victoria.

Thomas Waller died on 26th September 1918. At the time of his death he was registered as the proprietor under the *Transfer of Land Acts* (Vict.) of certain land upon which there was a house. By his will he devised this land as follows: "I give devise and bequeath unto Emily Cummins housekeeper to the said Thomas Waller the property situated corner of Boxhill Road and Waverley Road consisting of five acres of land house and all buildings thereon also all furniture and effects for her lifetime only." With the executor's consent Emily Cummins remained continuously in possession of the premises after the death of Thomas Waller. On 17th December 1918 probate of the will of Thomas Waller was granted to the respondent Edward John Dawes. Before the end of 1919 Dawes had discharged the debts, funeral and testamentary expenses of the testator and also the pecuniary legacies given by him. Early in 1929 part of the dwelling was accidentally destroyed by fire. After the fire Dawes and a man who boarded at his house restored and repaired the building. On 23rd May 1929 Dawes collected £450 from an insurance company under a fire policy covering the building. He paid this sum to the credit of a bank account which he opened in the name of the estate. During the next six months he drew cheques upon the account until the amount was reduced to about £60. On 14th January 1930 Dawes became registered as proprietor as executor of the land, and on the same day a mortgage of the land for £250 from Dawes to Charles John Closter was registered. This mortgage was discharged on 3rd January 1935, and on that date another mortgage for £450 over the land from Dawes to the appellants, Catherine Burke and Amelia Caroline Burke was registered and remained registered as an encumbrance on the land. The mortgage interest having fallen into arrear, Catherine Burke and Amelia Caroline Burke brought an action in the Supreme

Court of Victoria against Edward John Dawes and Emily Cummins, claiming possession of the land pursuant to the mortgage. Dawes did not appear in the action, and Emily Cummins claimed that the mortgage was not effective because Dawes had no power to make it in that it should be inferred from the passage of time and from the probate statement that Dawes had fulfilled all his other executorial functions, and that it should also be inferred that he had assented to the gift to the defendant Cummins, and that, therefore, with respect to this land he had ceased to be an executor and had become a trustee and as such had no power to mortgage, and that the evidence showed that the mortgage money was not in fact obtained for the purpose of administration. She also contended that, if the mortgage was effective, she was a tenant in possession at the time of the mortgage and that her life estate was protected under the provisions of sec. 72 of the *Transfer of Land Act* 1928 (Vict.). *Gavan Duffy* J., who tried the action, held that the last contention was correct and that her interest was protected as that of a tenant in possession under sec. 72 of the *Transfer of Land Act* 1928.

From that decision the plaintiffs appealed to the High Court.

Walker and *Clyne*, for the appellants. The judgment of *Gavan Duffy* J. was based on the effect of sec. 72 of the *Transfer of Land Act* 1928, but sec. 72 does not create rights. It only protects them. The rights of the devisee were subject to the control of the executor (*Administration and Probate Act* 1915 (Vict.), secs. 9, 10, 11, 12). The mortgagee is entitled to assume that the executor is acting in the execution of his duty. Here it must be assumed that the executor was acting in the ordinary course of administration. If he mortgaged to repair and there was a caveat by the devisee, it would be removed (*Administration and Probate Act* 1928 (Vict.), secs. 8, 36, 39). The fact that the mortgagee had notice that the life tenant was in possession with equitable rights against the executor did not affect the title of the mortgagee (*Coote* on *Mortgages*, 9th ed. (1927), vol. I., p. 422; *Ewer* v. *Corbet* (1)). *Union Bank of Australia* v. *Harrison*; *Jones & Devlin Ltd.* (2) shows that assets in the hands of an executor

(1) (1723) 2 P. Wms. 148; 24 E.R. 676. (2) (1910) 11 C.L.R. 492, at p. 507.

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are, since the *Administration Act* 1872, to be treated as personal estate (*Pagels* v. *MacDonald* (1); *Dart* on *Vendors and Purchasers*, 8th ed. (1929), vol. II., p. 746). A mortgagee is in the same position whether there is or is not a person in possession claiming under the will. There was no assent to the devise by the executor. The only way in which an executor can assent to a devise of land under the *Transfer of Land Act* is by transferring the land to the devisee. The effect of " assent " is stated in *Halsbury, Laws of England*, 2nd ed., vol. 14, p. 343 et seq. Sec. 36 of the *Administration and Probate Act* 1928 must be read with sec. 232 of the *Transfer of Land Act* 1928, which keeps the executor's title free from equities. The executor's mortgagee in due course of administration of the will has the same priorities as the testator's mortgagee would have had, and it must be assumed that the transaction is in due course of administration. Every innocent purchaser or mortgagee is entitled to assume that the executor is so acting. There is no finding as to the state of the administration, and there is no finding that the executor has been guilty of fraud or breach of trust. The devisee has only a defeasible equitable interest.

T. W. Smith, for the respondent Cummins. It is admitted by the appellants that sec. 72 protects whatever rights the devisee had. Sec. 156 of the *Administration and Probate Act* 1928 makes the probate statement evidence. The admissions establish that there was a balance in hand after paying all the testator's debts, and the uncontradicted evidence shows that there was no excuse for either mortgage. At the time of the mortgage it is clear that the devisee was a tenant at will of the trustee (*Foa, Law of Landlord and Tenant*, 6th ed. (1924), p. 445). The devisee's equitable interest involves the consideration of the *Administration and Probate Act* in importing the doctrine relating to " assents " where executors are dealing with realty. The devisee's interest is an equitable interest for life, leaving the trustee a bare trustee who could have been compelled to transfer (*Administration and Probate Act* 1928, sec. 9). That section confers on the executor the same powers with respect to realty as he had formerly with regard to personalty (*Union Bank*

(1) (1936) 54 C.L.R. 519, at pp. 531, 532.

of Australia v. *Harrison, Jones & Devlin Ltd.* (1)). In the case of a specific devise of a chattel real the legal title vests in the legatee as soon as there is an assent. An assent to a life interest in a chattel real vests the remainder, and vice versa (*Sheppard's Touchstone*, 7th ed. (1821), vol. II., p. 456). If this land had been held under the general law, a legal title would have vested in the devisee immediately on an assent by the executor (*Administration and Probate Act* 1928, sec. 9). In this case there clearly was an assent. Once an assent is given, the title becomes legal and not equitable (*Williams* on *Executors*, 11th ed. (1921), vol. II., pp. 1102-1110 ; *Kemp* v. *Inland Revenue Commissioners* (2)).

[McTIERNAN J. referred to *Wise* v. *Whitburn* (3).]

The legal title in shares will not pass to a legatee on the mere assent of the executor, as registration is necessary ; but in such a case assent would make the executor a bare trustee and would enable the legatee to enforce the transfer by action. The same position obtains under the *Transfer of Land Act*. At common law assent enabled a legatee to sue in trover (*Williams* on *Executors*, 12th ed. (1930), vol. II., p. 898). Assent changed the character of the devisee's equitable interest. Until assent she could not go to court and demand a transfer of her legal interest ; but on mere proof of assent she could do so. Once there has been assent or complete administration, the court has no discretion to refuse to transfer ; there is a right in the devisee to a transfer (*In re Morgan* ; *Pillgrem* v. *Pillgrem* (4) ; *Crout* v. *Beissel* (5) ; *Powell* v. *London and Provincial Bank* (6)). The mortgagee is in no better position after registration than he was before by reason of the exception in sec. 72 of the *Transfer of Land Act*. If the will appointed Dawes as trustee of the whole estate, he changed his character from executor to trustee in 1919 (*Attenborough* v. *Solomon* (7)). Sec. 39 of the *Administration and Probate Act* 1928 is limited to the " purposes of administration." Sec. 36 (5) merely provides that notice that debts have been paid shall not invalidate a conveyance by a personal

(1) (1910) 11 C.L.R., at p. 522.
(2) (1905) 1 K.B. 581.
(3) (1924) 1 Ch. 460.
(4) (1881) 18 Ch. D. 93, at p. 101.
(5) (1909) V.L.R. 207 ; 30 A.L.T. 185.
(6) (1893) 2 Ch. 555.
(7) (1913) A.C. 76, at p. 85.

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representative. Under the general law assent would convey the legal estate (*Williams* on *Executors*, 12th ed. (1930), vol. I., p. 575).

Clyne, in reply. The executor had not completed his executorial duties. This is not done until he has conveyed the legal estate to the beneficiaries (*In the Will and Estate of Allan* (1)). Dawes thus remained an executor. Though the life tenant remained in possession, she did not do so under any assent or transfer sufficient to convey the estate (*Williams* on *Executors*, 12th ed. (1930), vol. II., pp. 894, 901). All the devisee had was possession subject to the rights of the executor to do what he liked with the land. Assent means handing over the whole legal estate and amounts to a detaching of the property from the rest of the estate so that there is nothing left in the executor with respect to the legacy assented to. *Parker* v. *Judkin* (2) shows the powers of an executor to deal with land.

Cur. adv. vult.

1938, Feb. 25. The following written judgments were delivered :—

LATHAM C.J. The plaintiffs are proprietors of a mortgage registered under the *Transfer of Land Act* over certain land of which the defendant, Dawes, is the registered proprietor. Dawes became registered as proprietor on 14th January 1930 as executor to whom probate had been granted of the will of Thomas Waller, who died on 26th September 1918. The mortgage from Dawes to the plaintiffs was registered on 3rd January 1935. Default having been made in performing the obligations of the mortgagor, the plaintiffs sued for the possession of the land. The defendant Emily Cummins was in possession of the land at the time when the mortgage was given. She has been in possession continuously since the death of Thomas Waller and, as the judge of first instance has found, has so been in possession with the consent of the executor, Dawes. The will of Thomas Waller contained the following provision : " I give devise and bequeath unto Emily Cummins housekeeper to the said Thomas Waller the property situated corner of Boxhill Road and Waverley

(1) (1912) V.L.R. 286, at p. 288 ; 34 A.L.T. 2, at p. 3.
(2) (1931) 1 Ch. 475.

Road consisting of five acres of land house and all buildings thereon also all furniture and effects for her lifetime only." The land mentioned in this provision is the land included in the mortgage. The defendant Cummins was thus entitled to an interest in the land as tenant for life. It is contended on her behalf that, as she was a tenant in possession at the time when the mortgage was given, the mortgagees take subject to her interest by virtue of the provisions of sec. 72 of the *Transfer of Land Act* 1928. The plaintiffs, on the other hand, rely upon the *Administration and Probate Act* 1928, secs. 8, 9 and 39, and sec. 10 of the *Administration and Probate Act* 1915 (kept in operation in relation to the estate of this testator by sec. 68 (2) of the 1928 Act). They contend that the executor had power to mortgage the real estate of the testator for the purpose of paying debts and that persons dealing with him were not bound to inquire whether debts had been paid, certainly when a period of twenty years had not elapsed since the death of the testator in 1918. See *In re Tanqueray-Willaume and Landau* (1). They also rely upon the *Transfer of Land Act*, sec. 232, which provides that, upon entry of a memorandum of the appointment of an executor upon a certificate of title, the executor becomes the transferee and shall be deemed to be the proprietor of the estate or interest of the deceased in the land and that he shall hold the same subject to the equities upon which the deceased held it, " but for the purpose of any dealings with such land under the provisions of this Act every such executor administrator or curator shall be deemed to be the absolute proprietor thereof." It is therefore contended that the executor was in the same position as if he were the absolute proprietor and that in accordance with general principles of law which have not been affected but have, on the contrary, been recognized by the *Administration and Probate Act*, the plaintiffs have obtained an interest which prevails over any claim or interest of the defendant Cummins.

In my opinion the provisions of the *Transfer of Land Act* provide an immediate answer to the question which comes before the court in this case. Sec. 232 of the Act places the executor, for the purpose of dealings with the land, in the same position as an absolute proprietor. A person dealing with an executor is therefore in the same

(1) (1882) 20 Ch. D. 465.

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position as if dealing with a proprietor, but he is in no better position. If the plaintiffs had dealt with an absolute proprietor who was not an executor they would still have taken their mortgage subject to the interest of any tenant of the land in possession (*Transfer of Land Act* 1928, sec. 72). The result is that the plaintiffs in this case took subject to the interest of the defendant Cummins in the land as an equitable tenant for life. The rights which she claims are those which belong to her tenancy, and it is not necessary in this case to consider any rights in relation to the land which are not strictly part of her rights as a tenant. It has been established for many years that the rights of a tenant in possession to which a title of a registered proprietor is subject include any right in the land of a tenant which in fact he has. See *Robertson* v. *Keith* (1); *Sandhurst Mutual Permanent Investment Building Society* v. *Gissing* (2) (person in possession under contract of sale); *Commercial Bank of Australia Ltd.* v. *McCaskill* (3) (another case of contract of sale); *McMahon* v. *Swan* (4): "The possession of a tenant is notice of any right of the tenant affecting the title to the land . . . even though such right exists otherwise than under or by reason of the tenancy." The effect of sec. 72 is very far-reaching. If a tenant is in possession of the land, the interest of any person registered as proprietor of an interest in the land is subject to his rights. A person proposing to deal with any registered proprietor has the choice between making no inquiry and taking his chance as to the rights of the tenant, if any, or, on the other hand, finding out whether or not there is a tenant in possession and then deciding whether or not to proceed with the transaction. If he proceeds, whether with or without inquiry, he takes subject to the tenant's rights, whatever they are, at the time when his dealing is registered, just as he takes subject to easements which are protected by sec. 72. Sec. 72 operates in relation to him in the same way as it operated in relation to the registered proprietor with whom he dealt.

Thus, in my opinion, the plaintiffs took subject to the interest of the defendant Cummins in the land, whatever that interest was. The only question into which it is necessary to inquire

(1) (1870) 1 V.R. (E.) 11.
(2) (1889) 15 V.L.R. 329; 11 A.L.T. 62.
(3) (1897) 23 V.L.R. 10; 18 A.L.T. 175, 243.
(4) (1924) V.L.R. 397, at p. 406; 46 A.L.T. 29, at p. 32.

is the question, "What, in fact, was the interest of the defendant Cummins in the land?" The defendant's interest, whatever it was, existed before the dealing between Dawes and the plaintiffs which is represented by the plaintiffs' mortgage. Sec. 72 of the Act expressly provides that the proprietor of land or of any estate or interest in the land under the Act (including, therefore, a mortgage) shall hold the same subject to the interest of any tenant of the land. This is a positive provision to which full effect should be given. It cannot be cut down so as to diminish the protection given to a tenant in possession by reason of any circumstances arising from the relation between the registered proprietor of an estate in fee simple and the registered proprietor of any interest in land, for example, by way of mortgage, who has dealt with the owner of the fee simple. If the registered proprietor could, by entering into a dealing with a third person, diminish or postpone or abolish the interests of persons protected by sec. 72, then that section would be quite ineffectual except as against the registered proprietor himself. It is, I think, quite clear that the section is not so limited in its effect. The section has always been construed as providing that certain rights and interests, even though not mentioned on the certificate of title as encumbrances, are rights and interests to which the title of any registered proprietor is subject.

The defendant Cummins is entitled to a life interest in the land subject only to the payment of debts of the deceased and of proper costs of administration of his estate. It is not necessary to examine in detail the evidence which was adduced as to the position of the estate. In my opinion this evidence shows that no debts were owing at the time when the mortgage was given, but it is at least certain that there is no evidence that any debts were owing at that time. In the absence of such evidence the defendant Cummins must be held to be entitled to remain in possession as life tenant. The plaintiffs take subject to this right of the defendant, and therefore, in my opinion, the plaintiffs should fail in the action. The contrary view appears to me to give no real effect to the provisions of sec. 72. When the registered proprietor is an executor, it places a tenant in possession in precisely the same position as a tenant not in possession. Both such tenants would be postponed in interest to the interest of

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any person who dealt with the executor without fraud, and the fact that one was in possession and the other not in possession would be held to have no relevant significance. In my opinion such a view gives no operation at all to sec. 72 in such a case.

The decision of the Supreme Court was, in my opinion, right, and the appeal should be dismissed.

STARKE J. Thomas Waller was registered, under the *Transfer of Land Act* of Victoria, as the proprietor of an estate in fee simple of certain land situate at Oakleigh on which a dwelling-house was erected. He died on 26th September 1918 leaving a will whereby he devised the land to Emily Cummins for her life, and subject to certain pecuniary legacies and payment of all just claims against his estate he appointed Edward John Dawes sole executor and trustee for the residue of the estate.

On 17th December 1918 probate of the will was granted to the executor, Dawes. Emily Cummins, who was the housekeeper of the testator, was residing in the dwelling-house at the time of his death, and the executor Dawes told her that she could stay on in the house as the property was left to her for her lifetime. She has resided on the property ever since, paid rates and effected some repairs to the house until it was damaged by fire some eight or nine years ago. It was repaired by the executor, but Emily Cummins has not paid any rates nor effected any repairs since the fire. On 14th January 1930 a memorandum notifying the appointment of Dawes as executor was entered in the register book kept pursuant to the *Transfer of Land Act*. On 14th January 1930 a mortgage over the land from the executor to Charles John Closter was also registered, but it was discharged on 3rd January 1935. On 3rd January 1935 another mortgage over the land from the executor to Catherine Burke and Amelia Caroline Burke (now Chant) was also registered and still remains registered as an encumbrance on the land. Default has been made under this mortgage. The question in this action is whether the mortgagees are entitled to possession of the land as against Emily Cummins, the life tenant in possession thereof.

All the hereditaments of the deceased Waller, whether held by him beneficially or in trust, vested as from the death of Waller in his

executor for all the estate therein of the deceased, and were held by him according to the trusts and dispositions of the will (*Administration and Probate Act* 1915, secs. 9 and 11 (1)). The real estate of the deceased is assets in the hands of the executor for payment of duties and debts in the ordinary course of administration, and he has power to sell or mortgage it with or without power of sale and to convey the same to a purchaser in as full and effectual a manner in law as the testator could have done in his lifetime, and subject to the provisions of the Act the executor had the same rights and was subject to the same duties with respect to it as prior to 1st January 1873 executors had or were subject to with respect to personal estate (Act, secs. 10 and 12). The consolidating Act of 1928 (*Administration and Probate Act* 1928) has provisions to the same effect (secs. 8, 9, 32, 33, 39), but the 1915 Act is the one relevant to the present case.

The land, as already noticed, was under and subject to the provisions of the *Transfer of Land Act* 1928. The effect of the entry of a memorandum in the register book notifying the appointment of Dawes as executor is stated in sec. 232. He becomes the transferee and is deemed to be the proprietor of the estate or interest of the deceased proprietor in such land and holds the same subject to the equities upon which the deceased held the same, but for the purpose of dealing with such land the executor is deemed to be the absolute proprietor thereof.

Further, sec. 179 of that Act provides that except in case of fraud no person dealing with the proprietor of any registered land shall be required or in any manner concerned to inquire or ascertain the circumstances under or the consideration for which such proprietor or any previous proprietor thereof was registered, or to see to the application of any consideration money, or shall be affected by any notice actual or constructive of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge that any trust or unregistered interest is in existence shall not of itself be imputed as fraud. And see also sec. 72. Further still, as already noticed, the executor has the same rights and duties with respect to real estate as prior to 1st January 1873 executors had or were subject to with respect to personal estate.

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Real estate is treated for many purposes as if it were personal estate in the hands of an executor. And it is well settled that an executor may dispose of or mortgage the testator's assets for the general purposes of the will. "It is not incumbent on the purchaser or mortgagee of the assets to see the money properly applied although he knew he was dealing with an executor." "It is of great consequence," said Lord *Thurlow* in *Scott* v. *Tyler* (1), "that no rules should be laid down here, which may impede executors in their administration, or render their disposition of the testator's effects unsafe, or uncertain to the purchaser; his title is complete by sale and delivery; what becomes of the price, is no concern of the purchaser: This observation applies equally to mortgages and pledges" (*Williams* on *Executors*, 11th ed. (1921) vol. I., pp. 695-697). The executor "is presumed to be acting in discharge of the duties imposed on him as executor, unless there is something in the transaction which shows the contrary" (*In re Venn and Furze's Contract* (2); *Watkins* v. *Cheek* (3); *Solomon* v. *Attenborough* (4)).

All these considerations prima facie establish the right of the mortgagees to possession. But the life tenant, Mrs. Cummins, disputes this right on several grounds. First, she claims the protection of sec. 72 of the *Transfer of Land Act* as a tenant in possession of the land. By that section the estate of the registered proprietor is with some exceptions paramount. One of these exceptions is, where the possession is not adverse, the interest of any tenant of the land, notwithstanding that it is not notified on the certificate of title to the land. Emily Cummins is in possession of the land under the terms of the will. She is in the position of a tenant for life under a will let into possession. She holds under and subject to the will. She has only an equitable interest: the executor is the registered proprietor of the land, and in him is therefore vested the legal estate. She is, however, a tenant of the land. In law she is at least a tenant at will of the executor. And, according to a decision of the Supreme Court of Victoria in *Sandhurst Mutual Permanent Investment Building Society* v. *Gissing* (5), the word "tenant" must be deemed to include

(1) (1788) 2 Dick. 712, at p. 725; 21 E.R. 448, at p. 453.
(2) (1894) 2 Ch. 101, at p. 114.
(3) (1825) 2 Sim. & St. 199, at p. 205 57 E.R. 321, at p. 324.
(4) (1912) 1 Ch. 451, at pp. 455, 456-459; (1913) A.C. 76.
(5) (1889) 15 V.L.R., at p. 331; 11 A.L.T., at p. 64.

at least every tenant who is in actual occupation and holds under some landlord, and every interest in the land of such a tenant which grows out of, and is not disseverable from, his right to continue in occupation as a tenant, is protected by the terms of this provision against the claim of a person registered as the proprietor of any land or interest under the Act. In my opinion the section affords no protection to Emily Cummins. She takes and is in possession as a beneficiary under the will, and her interests rise no higher. They are and must be subject to the rights and duties of the executor for the general purposes of the will and the administration of the testator's estate. It was said that the mortgages given by the executor were not given in a due course of administration. But that is nothing to the point, for the mortgagees were dealing with an executor and with a person who as such executor was registered as the proprietor of the land. The mortgagees were entitled to assume that the executor was acting in discharge of the duties imposed upon him, and in any case did not know that he was not so acting. Indeed, the certificate of title itself disclosed a mortgage of the land from the executor to Closter which was apparently due and fell to be repaid.

Secondly, Emily Cummins contended that the executor had long before the mortgages discharged his executorial functions and had assented to the gift to her and stood in the position of a trustee for her and those otherwise entitled under the will (*Solomon* v. *Attenborough* (1); *In re Timmis*; *Nixon* v. *Smith* (2); *In re De Sommery*; *Coelenbier* v. *De Sommery* (3); *In re Grosvenor*; *Grosvenor* v. *Grosvenor* (4)). It is true that the executor had, before the end of 1919, discharged the debts, funeral and testamentary expenses of the testator and also the pecuniary legacies given by him. It follows that the moneys raised on mortgage were not raised in a due course of administration, and most of it appears to have been converted by the executor to his own use. But still the executor was not *functus officio*. He never ceased to be executor, and he was registered as such executor as the proprietor of the land, and he still had duties to perform. The life interest given to Emily Cummins had not been transferred to her, and she had only been let into or allowed to remain

(1) (1912) 1 Ch. 451; (1913) A.C. 76.
(2) (1902) 1 Ch. 176.
(3) (1912) 2 Ch. 622.
(4) (1916) 2 Ch. 375.

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in possession of the land as the equitable tenant for life. The executor had duties with regard to the land and its ultimate division amongst those entitled thereto according to the will of the testator.

The argument that the executor had assented to the gift to Emily Cummins and was a bare trustee for her cannot, I think, be supported. He had allowed her to remain in possession, but the property in the land had never passed from him and he remained and still remains as such executor the registered proprietor thereof.

Moreover, the provisions of the *Transfer of Land Acts* 1915 and 1928 make a transfer of the land to Emily Cummins registered under the Act necessary to divest the executor and vest the land in her, and the *Administration and Probate Act* 1928, sec. 36, affirms the necessity of such a transfer.

In my opinion the appeal should be allowed and the appellants declared entitled to the possession of the land by virtue of the mortgage from the executor to them.

DIXON J. We are concerned in this appeal with a question of priority between two interests in certain land. The question arises between an equitable tenant for life in possession whose estate is created by a will and the registered proprietors of a mortgage given by the executor of the will.

The testator died on 26th September 1918, and probate of his will was obtained shortly after his death by one Dawes, the executor named therein. At the time of his death he was registered proprietor of an unencumbered estate in fee simple in a piece of land of about five acres upon which a dwelling and some outbuildings were erected. The then value of the premises was £800. Apparently he cultivated the land as a market garden. He had about £344 at his credit in a savings-bank account and this, with the land and some furniture, constituted the assets of his estate. He owed a few debts, and these, together with the duty and the costs of obtaining probate, were discharged out of the moneys in the savings bank.

By his will the testator devised and bequeathed the land, the dwelling and the furniture therein to the respondent Emily Cummins for life. He bequeathed two small pecuniary legacies, and these also

were paid out of the moneys in the savings bank, which were thus almost exhausted. The will then appointed Dawes "sole executor and trustee for the residue of my estate of this my will." The testator made no other devises or bequests. Possibly he intended Dawes to take the residue beneficially, but, as the will is expressed, Dawes cannot take otherwise than as executor or trustee. After the life estate to Emily Cummins the land is undisposed of. On her death it would become the duty of the executor to sell the land and distribute the proceeds among the statutory next of kin of the testator, unless they agreed amongst themselves to take it in specie.

From the death of the testator until the present time the respondent Emily Cummins has remained in exclusive occupation of the land and the dwelling. Dawes desired her to live there, and she has done so, paying all outgoings. Early in 1929 part of the dwelling-house was accidentally destroyed by fire. After the fire Dawes and a man who boarded at his house restored and repaired the building. Possibly £200 was represented by the labour and materials which went into the work, not more. But, on 23rd May 1929, Dawes collected £450 from an insurance company under a fire policy covering the building. He paid this sum to the credit of a bank account which he then opened in the name of the estate. During the next five or six months he drew cheque after cheque upon the account until the amount was reduced to about £60. Except in so far as these cheques paid or recouped expenditure incurred in repairing the burnt portion of the house, the proceeds must have been applied by Dawes to his own use.

On 19th December 1929 Dawes raised another £250 by borrowing on the security of the land, over which he gave a registered mortgage. The certificate of title still stood in the name of the testator, but for the purpose of enabling the registration of the mortgage Dawes lodged an application under sec. 232 of the *Transfer of Land Act* 1928 to be registered as proprietor and a memorandum notifying his appointment as executor and the day of the death of the testator was accordingly entered on the folium in the register book. Four years later Dawes discharged this mortgage. To do so he borrowed £450 from the appellants on the security of the land. The difference between the amount owing on the earlier mortgage and the sum lent

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by the appellants was converted by Dawes to his own use. He gave the appellants a registrable mortgage over the land, and, with the discharge of the earlier mortgage, it was registered on 3rd January 1935. Default having been made under the appellants' mortgage, they took steps to enter into possession of the land. On 1st July 1936 they brought an action in the Supreme Court of Victoria to recover the land, making Dawes the defendant. He did not enter an appearance, and judgment was signed against him. Thereupon the respondent applied under Order XII., rule 25, for leave to appear and defend as a person in possession of the land. The judgment was not set aside completely, as appears to have been the old practice in such circumstances (*Doe d. Mullarky* v. *Roe* (1)). But, following language used in *Minet* v. *Johnson* (2), an order was made setting it aside " so far as the same affects Emily Cummins " and adding her as a defendant. It appears from the *Annual Practice* that when one of several defendants in an action for the recovery of land fails to enter an appearance a judgment may be signed against him which prevents his afterwards appearing but is not a final judgment for the recovery of the land, and that this course was pursued under the provisions of the *Common Law Procedure Act* which correspond to the present rules. The procedure seems strange and is not easy to reconcile with Order XIII., rule 8, which authorizes the entry of judgment in default of appearance only when there is no appearance at all to the writ. However, the order made in the present case produces a result which accords with what is stated as the practice when there is more than one defendant to such an action, and it is not suggested that it prevents full effect being given to the respondent's claim to retain possession of the land.

Her claim to do so rests primarily upon the fact that at the time when the appellants took their mortgage from Dawes she was in actual possession of the land. No one doubts that the appellants dealt with Dawes in good faith. Under sec. 232 of the *Transfer of Land Act* 1928 the entry upon the folium made him transferee of the land with the consequence that he was to " be deemed to be the absolute proprietor thereof." The respondent, as tenant for life, had a beneficial title which would have supported a caveat, but none was

(1) (1840) 11 A. & E. 333; 113 E.R. 442. (2) (1900) 63 L.T. 507; 6 T.L.R. 417.

lodged. So far as Dawes was concerned, in giving the mortgage and applying the proceeds to his own use he acted in fraud of the respondent's beneficial title. However, except for the fact that she was in possession of the land, there could be no doubt that as the appellants' mortgage was registered and was taken in good faith it would overreach the respondent's beneficial interest as equitable tenant for life (See secs. 72, 179 and 232). But the interests of a tenant in possession are amongst the exceptions which sec. 72 makes to the general rule that the proprietor of land or of any estate or interest in land under the operation of the Act shall hold the land subject to such encumbrances as are notified on the folium of the register book constituted by the certificate of title but absolutely free from all other encumbrances whatsoever. The exceptions expressed in sec. 72 have always been treated as implied in sec. 179. The particular exception now in question is framed in a curious way. The section enumerates the classes of rights to which land included in a certificate of title or registered instrument is subject. After saying that the land shall be subject to any rights subsisting under any adverse possession of such land, it parenthetically mentions rights of quite a different kind, and then goes on "and also where the possession is not adverse to the interest of any tenant of the land."

In Victoria these words have received an interpretation and an application as a result of which any person in actual occupation of the land obtains as against any inconsistent registered dealing protection and priority for any equitable interest to which his occupation is incident, provided that at law his occupation is referable to a tenancy of some sort, whether at will or for years. Thus, a purchaser under a contract of sale, who at law is in possession as tenant at will of the vendor, has been held protected in respect of his equitable ownership as purchaser (*Robertson* v. *Keith* (1); *Sandhurst Mutual Permanent Investment Building Society* v. *Gissing* (2)), a lessee in respect of an option of purchase contained in his lease (*McMahon* v. *Swan* (3)) and a wife in respect of an equitable life interest claimed under an unsigned separation agreement made

(1) (1870) 1 V.R. (E.) 11. (2) (1889) 15 V.L.R. 329; 11 A.L.T. 62.
(3) (1924) V.L.R. 397; 46 A.L.T. 29.

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with her husband (*Black* v. *Poole* (1)). *a'Beckett* J. decided the last named case in deference to previous decisions and against his own opinion, which he stated to be that " those words were intended to refer to a tenancy as ordinarily understood arising out of an agreement under which the person in possession was allowed to occupy in consideration of some kind of rent or service of which the proprietor was to have the benefit." The cases are collected and criticised by the late Dr. *Donald Kerr* in his work on *The Australian Lands Titles* (*Torrens*) *System* (1927), at pp. 75 et seq. But the interpretation has stood for nearly seventy years, and it would, I think, be most undesirable now to undertake the re-examination of its correctness.

For the purposes of our decision, I accept the view that under sec. 72 the respondent's occupation of the land confers upon her equitable life estate a protection against the paramount effect otherwise produced by an inconsistent dealing under the registration system. No doubt in point of law, as distinguished from equity, she is a tenant at will of the executor, in whom the legal estate is vested. I entertain some doubt, however, whether, even so, sec. 232 does not intend to clothe the executor whose appointment is notified on the register book with a special position in respect of the interests of his beneficiaries. For it says that for the purpose of any dealings with such land under the provisions of the Act he shall be deemed to be the absolute proprietor thereof. Possibly the effect of this express provision is to entitle those dealing with an executor to disregard the rights of beneficiaries, notwithstanding that otherwise they might be protected by possession. But, in the view I take of the matter, this possibility can be put on one side. For, in my opinion, if the land were under the general law and not under the *Transfer of Land Act*, the appellants' mortgage would obtain priority. This opinion I base upon the fact that the mortgage was given by Dawes as executor to persons who had no notice that he was not acting bona fide in the exercise of his executorial power of alienation, unless the respondent's occupation of the mortgaged land amounted to constructive notice.

(1) (1895) 16 A.L.T. 155.

By sec. 9 of the *Administration and Probate Act* 1928, which applies (See sec. 10), the executor has the same rights and is subject to the same duties with respect to the real estate as formerly he had or was subject to with respect to personal estate. The executor has, therefore, a power of alienation of realty analogous to that which belonged to him in respect of chattels real. These he could sell or mortgage for any purpose of administration, notwithstanding that they were specifically devised (*Thorne* v. *Thorne* (1); *In re Morgan*; *Pillgrem* v. *Pillgrem* (2)). Administration includes much else besides payment of the debts contracted by the testator and the expense of obtaining probate. "It is not merely the debts of the testator which the executor has to pay; he may have incurred expenses of administration and he may have to raise money by pledge or mortgage of the personal property of the testator, and these are matters for which it is essential that he should retain the power of dealing with the assets of the testator" (per *Kay* J. in *In re Whistler* (3)). This power remains until the executor has divested himself of the property in the chattel real, or has effectually changed the capacity in which it is vested in him. By assenting to a specific bequest of a pure chattel or a specific devise of a chattel real he may vest it in a legatee or devisee. If the chattel or chattel real is bequeathed or devised to him as a trustee, he may do some act showing an unequivocal intention to separate it from the assets he has been administering as executor and thereafter to hold it as trustee upon the trusts specifically declared by the provisions of the will relating thereto. If so, he ceases to hold it as executor. If the legatee or devisee is a stranger, then after assent the executor cannot alienate the chattel or chattel real, for the simple reason that the property is no longer vested in him. If it is devised or bequeathed to him as trustee, and he makes the chattels over to himself as trustee, the validity of his attempted alienation must be tested by the terms of his trust and the ordinary rules of law affecting purchasers with notice and putting them upon inquiry. But an executor in whom property remains vested in that capacity stands in a different position from that of an ordinary trustee. Alienation by an executor in the

(1) (1893) 3 Ch. 196.
(2) (1881) 18 Ch. D. 93.
(3) (1887) 35 Ch. D. 561, at p. 566.

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course of administration may quite properly overreach the title which a legatee or devisee might otherwise have. The debts of the testator, the duties payable to the Crown, and the costs, charges and expenses of administering the estate may make it necessary to sell or mortgage property which otherwise residuary or even specific legatees or devisees would take unencumbered. It is, no doubt, for this reason that a clear distinction has been long observed between the obligations of purchasers for value from executors or administrators and from trustees. The distinction even prevails in the case of devises upon trust to pay debts or subject to a charge to pay debts. " It is of great consequence," said Lord *Thurlow*, " that no rules should be laid down here, which may impede executors in their administration, or render their disposition of the testator's effects unsafe, or uncertain to the purchaser ; his title is complete by sale and delivery ; what becomes of the price, is no concern of the purchaser : This observation applies equally to mortgages and pledges, and even to the present instance, where assignable bonds were merely pledged, without assignment " (*Scott* v. *Tyler* (1)).

Thus, when personal representatives (not at that time being real representatives) were devisees upon trust to pay debts, a purchaser from them was bound to inquire whether debts remained unpaid, if twenty years had elapsed from the time of sale (*In re Tanqueray-Willaume and Landau* (2)). But no such rule applied to a sale by an executor in that capacity (*In re Venn and Furze's Contract* (3)). The general principle was stated by *Leach* V.C., as follows :— " So a mortgagee or purchaser, from the executor, of a part of the personal property of the testator, has a right to infer that the executor is, in the mortgage or sale, acting fairly in the execution of his duty, and is not bound to inquire as to the debts or legacies. But if the nature of the transaction affords intrinsic evidence that the executor, in the mortgage or sale, is not acting in the execution of his duty, but is committing a breach of trust, as where the consideration of the mortgage or sale is a personal debt due from the executor to the mortgagee or purchaser, there such mortgagee or purchaser, being a party to the breach of trust, does

(1) (1788) Dick., at p. 725; 21 E.R., at p. 453.

(2) (1881) 20 Ch. D. 465.

(3) (1894) 2 Ch. 101.

not hold the property discharged from the trusts, but equally subject to the payment of debts and legacies as it would have been in the hands of the executor" (*Watkins* v. *Cheek* (1)).

In the present case the mortgage to the appellants took place sixteen years after the testator's death; but, apart from lapse of time, there were no circumstances of suspicion. If matters stopped there, I should think that no answer appeared to the claim of the appellants to take priority. But it is said that the respondent had been let into possession on the footing that she was absolutely entitled to the enjoyment of her life estate and that Dawes as repository of the legal title was nothing but a dry trustee for her, and he was, of course, acting in truth not in the intended exercise of a power for the administration of the estate but in fraud of her rights. It is said that, because of her position as equitable tenant for life in occupation and entitled to call for a transfer of the legal estate for life, the mortgagees cannot rely upon the executorial powers of their mortgagor. The answer, in my opinion, lies in the fact that Dawes held the title as executor and was bound to hold the title to the fee simple until the respondent's death. Upon her death Dawes' prima facie duty was to sell the land and furniture and distribute the net balance among the next of kin. In letting the respondent into possession, he acted in conformity with his duties as executor and he did not end them. If an estate or interest in land under the *Transfer of Land Act* is devised, the assent of the executor can be given effectively only by a transfer under that Act (See sec. 36 (10) of the *Administration and Probate Act* 1928). It is by that means alone that the legal title can be divested from the executor and invested in the devisee. The case, therefore, bears no resemblance to those in which, although the office and the powers and duties of an executor continue to belong to the vendor, the property in, for instance, a chattel real has passed from him to the devisee or to himself in the capacity of devisee-trustee. This class of case is illustrated by *Solomon* v. *Attenborough* (2). Lord *Haldane* there acknowledges the truth of the "bare proposition" "that persons dealing with executors have not got to inquire whether the debts

(1) (1825) 2 Sim. & St., at p. 205; 57 E.R., at p. 324.
(2) (1912) 1 Ch. 451; (1913) A.C. 76.

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are paid, and must assume that their powers are operative." "But," he continued "the question which goes to the root of this case is one which renders such a proposition wholly beside the point. If I am right, there is no question here of an executor acting in the execution of his powers, so far as this residue is concerned. The executors had long ago lost their vested right of property as executors and become, so far as the title to it was concerned trustees under the will. Executors they remained, but they were executors who had become divested, by their assent to the dispositions of the will, of the property which was theirs *virtute officii*; and their right *in rem*, their title of property, had been transformed into a right *in personam*,—a right to get the property back by proper proceedings against those in whom the property should be vested if it turned out that they required it for payment of debts for which they had made no provision. My Lords, that right always remains to the executors and they can always exercise it, but it is a right to bring an action, not a right of property, and not such a right as would enable such a pledge as this to be validly made" (1). See, further, *Parker* v. *Judkin* (2), and cp. sec. 36 (5) of the *Administration and Probate Act* 1928.

It is true that in the present case the will appoints Dawes "executor and trustee for the residue." But I do not think that this makes possible a change from the executorial character in which he holds the fee simple acquired as a result of the grant of probate. Cases may be imagined in which an executor has completed the entire administration of the estate except that he has failed to transfer to a devisee a piece of land under the Act, because he and the devisee are content that the executor should remain the repository of the dry legal title. In such a case it is possible that a question may arise whether the executor might be considered as having converted his title into that of a trustee, and then perhaps the result might depend on the effect of sec. 232 of the *Transfer of Land Act* 1928. But, however that may be, in the present case the executor's duties were incomplete, and he retained the title in the capacity in which he had acquired it, that is, in virtue of his office of executor. The case is a hard one because it concerns the incidence among the

(1) (1913) A.C., at p. 85.

(2) (1931) 1 Ch., at p. 491.

innocent of the loss caused by the apparently dishonest acts of the executor. But, in my opinion, the loss must fall upon the respondent and not upon the appellants. I think that the appeal should be allowed.

The action is presumably brought under sec. 151 of the *Transfer of Land Act*. The respondent has, in my opinion, no answer to an application on the part of the appellants for judgment for recovery of possession, or, at any rate, none appears. Possibly, however, they desire to do no more than establish the paramountcy of their mortgage. In the circumstances I think that it would perhaps be better for this court to make a declaration that the appellants' mortgage confers upon them as against the respondent all the rights of a mortgagee under a first registered mortgage under the *Transfer of Land Act* and is paramount over the respondent's interests under the will and with that declaration to remit the cause to the Supreme Court to be dealt with according to law.

EVATT J. As against the respondent's equitable tenancy for life the appellants are claiming paramountcy for their mortgage over the same land. This mortgage to the appellants was executed by Dawes, the executor and trustee of the testator, on December 20th, 1934—many years after he had put the respondent in possession of the land. The mortgage was duly registered under the *Transfer of Land Act*.

The Supreme Court rejected the appellants' claim of paramountcy, regarding sec. 72 of the *Transfer of Land Act* as of decisive importance. Elsewhere, sec. 72 has been described as "the key section of the Act"; and sec. 179 as "explanatory of and complementary to sec. 72" (*Clements* v. *Ellis* (1)). In the same case I emphasized that "the special statutory exemptions" contained in sec. 72 cut across the general scheme of indefeasibility of title resulting from statutory registration (2). One of the special exceptions is that, where the possession is not adverse, a registered proprietor's interest in land under the Act is "subject to" (*inter alia*) "the interest of any tenant of the land."

(1) (1934) 51 C.L.R. 217, at pp. 268, 269. (2) (1934) 51 C.L.R., at p. 266.

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The interpretation of this section is now well settled.

"Tenancy at will is an interest within the section. . . . An unregistered lease may be treated as an agreement for a lease for the term therein specified, and if the agreement is one of which specific performance would be enforced in a court of equity, i.e., if there is a good equitable title to a lease, the rights of such equitable lessee in possession will be protected under sec. 72. . . . Possession is in itself notice of the title under which such possession is retained. . . . The 'interest of any tenant' means every interest in the land of such a tenant which grows out of, and is not disseverable from his right to continue in occupation as a tenant, e.g., where possession is taken under a contract of sale. . . . The 'interest of any tenant' includes a 'tenancy for life'" (*Wiseman, Transfer of Land*, 2nd ed. (1931), pp. 107, 108).

Pollock pointed out that under a system of officially registered title to land the importance of possession tended to diminish and might even "become a vanishing quantity" (*First Book of Jurisprudence*, 6th ed. (1929), p. 192). Accordingly, if such a system is worked out to its strict logical conclusion, the exceptions of the character which we are now considering would find no place in it. But, as has been said by a leading authority on the Torrens System—dealing with "Possession superior to registration",—"Victoria and Western Australia exhibit this phase in its extreme form" (*Registration of Title to Land Throughout the Empire*, by *Hogg* (1920), p. 76). *Hogg* adds that "the interest of a tenant has been construed so as to include every kind of occupation, from tenancy at will to a right to the fee simple, so that the enactments saving the rights of those in possession—adversely or non-adversely—in effect provide for all cases of possession, whether it be that of a mere intruder or of a person claiming as of right under a title good at law or in equity."

It is obvious that the exception in favour of a tenant must apply to cases where there is a competition for priority between a person like the respondent, i.e., a tenant at will who has been let into possession as equitable tenant for life, and a person who (like the appellants) has subsequently accepted a mortgage from the executor and registered it. Admittedly the respondent is a "tenant of the land." Therefore the executor (Dawes) held the land subject to her "interest," and so do the appellants, although registered mortgagees. By sec. 232 of the *Transfer of Land Act* the entry makes the executor's holding "subject to the equities upon which the deceased held the same"; but, for the purpose of dealings,

he is deemed to be the " absolute proprietor." This " deeming " is common form under the Torrens System. Thus in New South Wales it is contained in sec. 96. In my opinion, *Beckenham and Harris* correctly state the effect of it as follows : " With regard to persons dealing with the applicants on the faith of the register and for value, such persons, on registration, will be entitled to the protection afforded by sec. 42 " (*Real Property Act* (*N.S.W.*) (1929), p. 216).

It should be mentioned that sec. 42 of the New South Wales Act corresponds in the main with sec. 72 of the Victorian Act. Similarly under sec. 232 of the Victorian Act, persons dealing with the executor on the faith of the register attain the protection of sec. 72, but such indefeasibility is made subject to the title of any person who is a tenant.

In my opinion the effect of the exception in favour of every tenant of the land is to deprive the proprietor of the registered interest of the paramountcy which registration would normally confer. It follows that, in determining the competition between the tenant and the proprietor of the registered interest, the latter must be regarded as having been stripped of the benefit conferred by the fact of registration and as having been remitted to the position of holding an unregistered interest. This hypothesis is made solely for the purpose of determining the priority of the tenant's interest. If such question is determined in the tenant's favour, the proprietor of the registered interest still holds an interest which is valid and effective and registered ; but which must yield priority to the interest of the tenant.

If the fact of registration has not the normal operation of creating indefeasibility as against the unregistered or equitable interest of the tenant, the resulting competition is analogous to any other competition between two unregistered interests in the land. In resolving such competitions, the fact that the tenant has failed to lodge a caveat against dealings may be regarded as fatal to his claim for priority (*Abigail* v. *Lapin* (1)). But the exception in sec. 72 makes the failure to lodge a caveat of no moment, because it takes away from the registered proprietor that paramountcy which

(1) (1934) A.C. 491 ; 51 C.L.R. 58.

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actual registration confers; and the only purpose of a caveat is to prevent such registration.

Treating the appellants' interest as an unregistered one, as the Act requires, I think that the fact that they took from the executor, and that under the general law their interest would or might be regarded as paramount to that of the respondent, does not prevail against the overriding fact of the respondent's possession when the mortgage was given.

In a competition between two unregistered interests in registered land, the fact of possession will often be decisive. This is illustrated by *National Bank of Australasia Ltd.* v. *Joseph* (1), where Lord *Buckmaster* said for the Privy Council :—

> "It is quite true that in the same statement of facts it appears that the bank received the certificates of title without notice or knowledge of or inquiry as to the said agreement, or of any alleged claim or equity of the church. But this statement must be taken as subject to whatever notice would be created by the fact of possession. There is nothing that will distinguish this case from the ordinary case of possession of real estate, and it has always been held that such possession is in itself notice of the title under which such possession is retained, which anyone dealing with the property cannot, without risk, ignore. The cases of *Daniels* v. *Davison* (2), and *Cavander* v. *Bulteel* (3), are sufficient to show the permanence of this doctrine and the wide scope of its application. It must, therefore, be assumed that the bank did, in fact, have the knowledge that inquiry as to the nature of the possession held by the church would have made plain, that is, knowledge of the agreement of 15th February 1916 and the contemporaneous transfer; if, therefore, the effect of these documents is to establish or retain any outstanding equity in the church, it must be subject to such equity that the bank's title has arisen " (4).

In particular reference to sec. 72 of the *Transfer of Land Act*, *Weigall* A.J. in *McMahon* v. *Swan* (5) said :—

> "Mr. *Dixon*, for the plaintiff, while recognizing that there was no obligation which could be described as 'running with the land,' contended that the plaintiff's right under the option represented an interest of a tenant in possession, which, on such authorities as *Sandhurst Mutual Permanent Investment Building Society* v. *Gissing* (6), and *Black* v. *Poole* (7), should be held to be preserved by sec. 72 as an encumbrance now affecting M. A. Swan's title. As to this, I think that the plaintiff's contention should prevail. It is strengthened, I think, by authorities establishing that, under the general law, the possession of a tenant is notice of any right of the tenant affecting the title to the land

(1) (1922) S.A.S.R. 578.
(2) (1809) 16 Ves. 249; 33 E.R. 978.
(3) (1873) 9 Ch. App. 79.
(4) (1922) S.A.S.R., at p. 584.
(5) (1924) V.L.R., at pp. 405, 406; 46 A.L.T., at p. 32.
(6) (1889) 15 V.L.R. 329; 11 A.L.T 62.
(7) (1895) 16 A.L.T. 155.

—*Hunt* v. *Luck* (1)—even though such right exists otherwise than under or by reason of the tenancy: *Daniels* v. *Davison* (2); *Allen* v. *Anthony* (3)."

In my opinion the appeal should fail. This conclusion depends upon the fact of the respondent's tenancy, and it is nothing to the point that, in cases where there is no tenancy, the mortgage of a person dealing with the executor would be allowed to prevail as against a devisee. Sec. 72 tells persons proposing to deal with registered land that even registration will not suffice against the interest of any tenant of the land, and that a proposing mortgagee, in all cases, whether he is dealing with an executor or any other registered proprietor, who fails to investigate the title or interest of all tenants of the land does so at his peril.

The appeal should be dismissed.

McTIERNAN J. In my opinion the appeal should be allowed. I agree with the conclusion of *Gavan Duffy* J. that as between the respondent, the *cestui que trust*, and the appellants, the mortgagees, the mortgage must be regarded as a valid exercise of the executorial power of the mortgagor, but I am unable to agree with his Honour's conclusion that sec. 72 of the *Transfer of Land Act* 1928 gave priority to any interest of the respondent over the interest of the appellants as mortgagees.

I agree with the judgment of my brother *Dixon* on both questions. On the question whether the respondent can successfully impugn the validity of the mortgage, I shall add only a reference to the case of *Oliff* v. *O'Neil* (4). In this branch of the case the question which is not whether the mortgagees had notice that the respondent's interest was that of a tenant in possession of the estate with the executor's consent. It is whether they were aware that the mortgage was not for any purpose of administration. On this question I find it impossible to arrive at a conclusion adverse to the appellants.

As I have arrived at a conclusion different from that of *Gavan Duffy* J. on the other branch of the case, I add some observations. The proviso to sec. 72 of the *Transfer of Land Act* 1928 enumerates various interests to which land included in a certificate of title or a registered

(1) (1902) 1 Ch. 428.
(2) (1809) 16 Ves. 249; 33 E.R. 978.
(3) (1816) 1 Mer. 282; 35 E.R. 679.
(4) (1896) 17 L.R. (N.S.W.) (Eq.) 1; 12 W.N. (N.S.W.) 83.

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instrument is deemed to be subject notwithstanding that such interests respectively are not notified on the certificate or instrument. The relevant part of the proviso is as follows: "Provided always that the land which is included in any certificate of title or registered instrument shall be deemed to be subject . . . where the possession is not adverse to the interest of any tenant of the land, notwithstanding the same respectively are not specially notified as encumbrances on such certificate or instrument." The section makes it unnecessary to notify any interest that is within its terms on the certificate of title or a registered instrument transferring any estate or interest in the land, as a condition of its existence and continuance. The respondent was entitled to a life estate in the land under the will, but she derived her right to the possession of the land from the executor, not from the testator. Nothing was done to vest the land in her under sec. 36 of the *Administration and Probate Act* 1928. Sec. 72 of the *Transfer of Land Act* operated to protect only such interest as she had as a tenant in possession of the land with the executor's consent. It did not operate to convert a defeasable interest into an indestructible interest. The respondent's interest was not absolute. She was let into possession by the executor of land which was part of the assets in his hands for the payment of the debts of the testator and which the executor had a statutory power to mortgage for purposes of administration. It would be inconsistent with the assumption which must be made in favour of the mortgagees that the executor's power to mortgage was exercised for purposes of administration, to say that at the time the mortgage was given the mortgagor had ceased to be an executor and held the land as trustee for the respondent. Her interest as a tenant in possession was at the time of the mortgage subject to the statutory power of the executor to mortgage the land for any purpose of administration and was liable to be set aside by the exercise of that power. It follows that the interest which the respondent sets up against the mortgagees ceased when the land was mortgaged. Sec. 72 cannot be called in aid to keep it alive after that time. Her interest as the devisee of a life estate which is derived from the will is of course to be distinguished from her possession of the land with

the executor's assent. That estate is clearly subject to the interest of the appellants as mortgagees of the land.

Appeal allowed with costs. Judgment of the Supreme Court set aside except in so far as it reserves to the plaintiffs liberty to apply and directs an amendment of the name of the second plaintiff. In lieu thereof declare that the mortgage of the plaintiffs-appellants confers upon them as against the defendant-respondent Emily Cummins all the rights of a mortgagee under a first registered mortgage under the Transfer of Land Act and is paramount over the interests claimed by her under the will of Thomas Waller deceased or otherwise. Remit the cause to the Supreme Court to be dealt with consistently with this declaration. Respondent Cummins to pay appellants' costs of action in Supreme Court from 23rd July 1936. Appellants and respondent Cummins to abide their own costs of the summons reserved by the order of 23rd July 1936.

Solicitors for the appellants, *R. A. Warming, Hayes & Co.*
Solicitors for the respondent Cummins, *Snowball & Kaufmann.*

H. D. W.