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Nominees Pty
Ltd v Lestato
Pty Ltd (1995)
17 ACSR 239

[HIGH COURT OF AUSTRALIA.]

WOLFSON . . . . . APPELLANT;
APPLICANT,

AND

THE REGISTRAR-GENERAL OF NEW SOUTH WALES . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 23, 24; *Aug.* 7.

Rich, Starke and Evatt JJ.

Torrens System—Transmission—Partnership agreement—Provision that surviving partner absolutely entitled to partnership land—Outstanding interests—Endorsement of notification on certificates of title—Consent of interested persons—Real Property Act 1900 (*N.S.W.*) (*No.* 25 *of* 1900), *secs.* 94*, 95 (4)*, 101.*

A partnership agreement between a father and son provided, *inter alia*, that upon the death of either partner the survivor should become absolutely entitled to the partnership assets, and should be liable for all the partnership debts and obligations, subject to the payment of a specified weekly sum to the widow of the deceased partner, and of a specified lump sum to his legal representative within five years from the date of his death. Certain lands under the *Real Property Act* 1900 (N.S.W.), forming part of the partnership assets, were not to be sold during the lifetime of the wives of the partners without their consent. The father was the registered proprietor of one parcel of land, and both partners

* The *Real Property Act* 1900 (N.S.W.) provides:—By sec. 94: "(1) Executors or administrators, or other person claiming any estate of freehold in the land of a deceased proprietor, or any person having a power of disposition over the fee simple of any such land, may apply . . . to the Registrar-General in the form of the Seventeenth Schedule hereto, to be registered as proprietor of such estate. (2) Such applicant shall deposit with the Registrar-General . . . any settlement under which such applicant claims, or such evidence of his title as the applicant is able to produce . . . (4) Such application shall state the nature of every estate or interest held by other persons at law or in equity in such land within the applicant's knowledge . . . unless such estates or interests have been disclosed by or referred to in some instrument . . . deposited under this Act, or have been

were registered as proprietors as tenants in common of the other parcels. The father died in 1927. In 1933 the Registrar-General refused to register the son as proprietor of the lands by transmission without first endorsing on the relative certificates of title a notification of the abovementioned provisions of the agreement, although the son's application was consented to by the father's legal representative, and also by the wives of the partners, who agreed to the omission of any notification in respect of the agreement. There were not any partnership debts unpaid, but no part of the specified lump sum had been paid.

Held, by *Rich* and *Evatt* JJ., without deciding whether an application by way of transmission was appropriate herein, that the Registrar-General ought not to enter upon any certificate of title issued to the son a notification referring to the provisions of the agreement.

Held, by *Starke* J., that the son's application to be registered as proprietor of the lands as on a transmission was misconceived and should be dismissed.

Decision of the Supreme Court of New South Wales (*Davidson* J.): *In re Wolfson*, (1933) 51 W.N. (N.S.W.) 33, reversed.

APPEAL from the Supreme Court of New South Wales.

Jacob Wolfson applied under sec. 94 of the *Real Property Act* 1900 (N.S.W.) to be registered as proprietor by transmission of certain lands which he had become entitled to as surviving partner under a partnership agreement, which was deposited in the registry, made between himself and his father, Harris Wolfson. The agreement provided, *inter alia*, that upon the death of either of the partners during the partnership, the surviving partner should take over and be absolutely entitled to the business and the whole of the assets thereof, subject to a liability as to partnership debts and contracts, and should pay to the widow of the deceased partner a certain specified sum weekly during her lifetime, and, in addition, should pay a specified lump sum to the legal representative of the deceased

protected by caveat entered pursuant to the provisions of this Act. (5) The Registrar-General . . . shall not be concerned in nor take notice of any such prior estates or interests unless they have been disclosed or referred to or protected as herein mentioned. (6) Such application shall state that the applicant verily believes himself to be entitled to the estate in such land in respect to which he applies to be registered." By sec. 95 (4):—"Registration of the applicant as proprietor shall be effected by entering in the register-book the particulars of the transmission through which the applicant claims and by issuing to the applicant a certificate of title. . . ." By sec. 101:—"In any of the following cases, that is to say, . . . (*c*) upon the death of any person registered together with any other person as joint proprietor of the same estate or interest in any land . . . the Registrar-General may, upon the application of the person entitled and proof to his satisfaction of any such occurrence as aforesaid, register such person as proprietor of such estate or interest in manner hereinbefore prescribed for the registration of a like estate or interest upon a transfer or transmission."

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partner within five years of that partner's death. A further provision was that certain lands under the *Real Property Act* 1900, forming part of the partnership assets, were not to be sold during the lifetime of the wives of the partners without their consent. Harris Wolfson was the registered proprietor of one of the parcels of land, and he and the applicant were the registered proprietors as tenants in common of the other parcels. Harris Wolfson died on 8th October 1927, during the term of the partnership. At the date of the application, 25th July 1933, all the debts of the partnership had been paid, but no part of the specified lump sum had been paid to the legal representative of the deceased partner.

The Registrar-General notified approval of the application for transmission, with the qualification that a notification would be made on the certificates of title that the lands were subject to the provisions of the partnership agreement, because he was not satisfied, *inter alia*, that the agreement did not create interests in the lands included in the application in favour of the legal representative and the widow of the deceased partner. The applicant obtained the consent of the deceased partner's legal representative to the application, and also that of the two ladies, who agreed to the omission from the certificates of title of any notification in respect of the provisions of the agreement.

A summons by the applicant under sec. 121 of the *Real Property Act* 1900, calling upon the Registrar-General to substantiate and uphold the grounds of his refusal to register the application without the entering of a notification on the certificates of title was dismissed by *Davidson* J., on the ground that the attitude adopted by the Registrar-General was correct (*In re Wolfson* (1)).

From that decision the applicant now, by special leave, appealed to the High Court.

Flannery K.C. (with him *Barwick*), for the appellant. As regards title to land under the *Real Property Act* 1900, transmission under settlement consequent on the death of the proprietor has been registrable for very many years (*MacDermott's Manual of the Practice of the Land Titles Office, Sydney* (1904), pp. 70-73). The alternative

(1) (1933) 51 W.N. (N.S.W.) 33.

would be a suit for a vesting order. An equitable fee is registrable under sec. 14 of the Act. The agreement between the parties takes the matter out of the operation of the common law. It is clear from the agreement that the partners were joint owners of the partnership property. Clause 17 of the agreement operates as a distribution of the assets in specie to the surviving partner, who upon the death of the other partner became absolutely entitled thereto. Clause 18 indicates that these capital assets were to be preserved as land. The transaction was in no sense a sale. A creditor is not entitled to exercise his right to follow his money by causing a notification to be made upon the register, nor is the Registrar-General entitled to anticipate any trusts (*Oliff* v. *O'Neil* (1); *Ex parte Saunders* (2)), but where a debt is charged on land the creditor may cause a caveat to be entered. Here a caveat has not been registered. The appellant's position is strengthened by the provisions of sec. 94 of the Act. The existence or otherwise of a vendor's lien, that is, a constructive trust, must be determined at the time it is insisted upon. Here it was not insisted upon. Even though a constructive trust could be subject to a notification on the register, a constructive trust has not been established against the appellant, nor in any person seeking by litigation or otherwise to set up such a trust against the appellant. The executor was entitled under sec. 49 (1), (2), of the *Trustee Act* 1925 (N.S.W.) to abandon his lien.

[STARKE J. referred to *Ex parte Wisewould* (3), and *In re Fairbrother to Allen* (4).]

Those cases support the position with regard to sec. 49 of the *Trustee Act* 1925. For the meaning of sec. 12 (*e*) of the *Real Property Act* 1900, see *Stuart* v. *Kingston* (5). The provisions of clauses 17 and 18 of the agreement do not constitute or create an encumbrance within the meaning of sec. 33 (2) of the Act. The provisions of sec. 95 (4) of the Act are procedural only.

E. F. McDonald, for the respondent. Whatever the practice of the Registrar-General may have been, the provisions of sec. 94 of

(1) (1896) 17 N.S.W.L.R. (Eq.) 1; 12 W.N. (N.S.W.) 83.
(2) (1900) 21 N.S.W.L.R. (L.) 291; 17 W.N. (N.S.W.) 203.
(3) (1890) 16 V.L.R. 149; 11 A.L.T. 182.
(4) (1896) 15 N.Z.L.R. 196.
(5) (1923) 32 C.L.R. 309; (1924) 34 C.L.R. 394.

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the Act operate only where there is a true transmission. The agreement neither evidences nor creates a transmission. It is not a settlement, but is a contract of sale as from a future event, namely, the death of either of the partners. In effect it is a sale of that partner's share (*Hordern* v. *Hordern* (1)). It is immaterial whether the share of a partner in the assets of the partnership, which consist partly of real estate, is personal estate or not. The vendor's lien would apply just as much to the personal estate as to the real estate. As to what constitutes a transmission, see *Stewart* v. *James Keiller & Sons Ltd.* (2). Whatever interest the deceased partner had in the property passed, in pursuance of the provisions of the *Wills, Probate and Administration Act* 1898 (N.S.W.), to the executor, and if the Registrar-General were compelled to register by the mere consent of the executor, he would be placed in an invidious and embarrassing position. The Registrar-General sought to protect the interests of other persons who were not consenting parties. The Registrar-General is not bound to assume bona fides. As the agreement is an agreement for the sale of the deceased partner's interest in the partnership, there is a vendor's lien enforceable in respect of the moneys payable. The Registrar-General is entitled to note on the relevant certificates of title a general charge in respect to debts (*Ex parte Webb* (3)).

[EVATT J. referred to *Holt* v. *Deputy Federal Commissioner of Land Tax (N.S.W.)* (4).]

The executor has a statutory power of sale.

[EVATT J. The executor should have been registered as proprietor by transmission from the deceased person.

[STARKE J. It would be better if the executor took the responsibility of making the transfer.]

In the case of an executor selling for the payment of debts, the Registrar-General and the Crown Solicitor are absolved by sec. 153 of the *Conveyancing Act* 1919 (N.S.W.) from making any inquiry as to whether or not the sale is for that purpose. Here it would seem that the appellant is endeavouring to obtain title to the land without paying the purchase money therefor. The Registrar-General should

(1) (1910) A.C. 465, at p. 473.
(2) (1902) 39 Sc. L.R. 353, at p. 362.
(3) (1879) 2 S.C.R. N.S. (N.S.W.) 180.
(4) (1914) 17 C.L.R. 720, at pp. 725, 726.

not be put in the position of having to resolve a doubt (*In re Chard* (1)). The power of the Registrar-General to make the notification now challenged is to be found in sec. 33 or sec. 95 (4) of the *Real Property Act* 1900. A transmission may be absolute or conditional. The particulars of the transmission include all facts and circumstances which in any way affect the alleged title of the transmittee, e.g., if the title of the applicant to the fee simple of the land is subject to a charge or vendor's lien, then that is one of the particulars of the transmission which the Registrar-General is bound to note under sec. 95 (4). Here the position is as if the appellant had actually executed a document of charge to cover the lien (*In re Stucley*; *Stucley* v. *Kekewich* (2)). As to sec. 12 (*e*) of the *Real Property Act* 1900, see *Beckenham and Harris* on *The Real Property Act* (*N.S.W.*), (1929), p. 19. The rights and liabilities of members and their representatives upon the dissolution of a partnership on the death of a member is as provided in secs. 20, 39, 42 and 43 of the *Partnership Act* 1892 (N.S.W.). (See also *Lindley* on *Partnership*, 9th ed. (1924), p. 429.) In the absence of a contrary intention the surviving partner is treated by the Court as being the sole person interested in the partnership property (*In re Bourne*; *Bourne* v. *Bourne* (3)). There is nothing in the agreement to show an intention of excluding a vendor's lien. The use of the word " absolutely " is not sufficient for that purpose. It is a common term in documents relating to partnerships and their dissolution. A question arises as to whether this matter comes within the provisions of sec. 121 of the *Real Property Act* 1900.

Flannery K.C., in reply. Sec. 121 of the *Real Property Act* 1900 provides for particular litigation of the nature involved here. Sec. 119 of the Act has a bearing upon the question of settlement. A trust in favour of a third person may subsequently arise out of an arrangement between partners which in no way forms part of a deceased's partner's estate (*In re Flavell*; *Murray* v. *Flavell* (4)).

Cur. adv. vult.

(1) (1933) 50 W.N. (N.S.W.) 220.
(2) (1906) 1 Ch. 67, at p. 80.
(3) (1906) 2 Ch. 427, at p. 432.
(4) (1883) 25 Ch. D. 89.

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The following written judgments were delivered :—

RICH AND EVATT JJ. This appeal is from an order of *Davidson J.* dismissing with costs an application under sec. 101 of the *Real Property Act* 1900 calling upon the Registrar-General to substantiate and uphold his grounds for refusing, in substance, a transmission, except subject to the notification of an encumbrance to which the applicant, who is a transmittee, objected.

The transmittee is one, Jacob Wolfson. He seeks the registration of a transmission from his late father, Harris Wolfson, who died 8th October 1927. On 5th August 1926, he and his father had entered into articles of partnership. The partnership assets included three parcels of land, of one of which the father was sole registered proprietor, and of two of which he was registered as proprietor as a tenant in common with his son. These are the interests of which the transmission is claimed. It is claimed under a provision by which, upon the death of one partner, the surviving partner became entitled to the business and the whole of the assets thereof. The provision is contained in clauses 17 and 18 of the partnership deed, which are as follows :—

" 17. If during the continuance of the partnership either partner shall die become bankrupt or by mutual agreement retire the remaining partner shall take over the said business and the whole of the assets thereof and shall be absolutely entitled to the same and shall be liable for all the debts contracts and engagements thereof and in case the surviving or continuing partner shall be the said Harris Wolfson he shall pay to Rebecca Wolfson (the wife or widow of the other partner as the case may be) the sum of Thirty Pounds (£30) per week during her lifetime and also in addition pay to the other partner or his legal representatives Twenty thousand pounds (£20,000) without interest within five years from the date of either of the aforesaid occurrences and in case the surviving or continuing partner shall be the said Jacob Wolfson he shall pay to Dora Wolfson (the wife or widow of the other partner as the case may be) the sum of Fifteen pounds (£15) per week during her lifetime and also in addition pay to the other partner or his legal representatives the sum of Twenty thousand pounds (£20,000) without interest within five years from the date of either of the aforesaid occurrences.

18. It is hereby agreed that the properties situated in George Street Sydney and King Street Newtown described in the Schedule hereto shall not be sold during the lifetime of the said Dora and Rebecca Wolfson without the consents of the said Dora and Rebecca Wolfson and the consent of the survivor of the said Harris and Jacob Wolfson."

The Registrar-General had no difficulty in treating the surviving partner as a person entitled to the land by transmission, and raised no question that he was a transmittee whom he should register as proprietor. In adopting this attitude he was following the settled practice of the office. In the Supreme Court neither he nor the applicant contested the correctness of this practice, and merely insisted that there should be entered upon the applicant's certificate of title a notification that it was held subject to the provisions of clauses 17 and 18 of the partnership agreement. He says: "My reason for refusing to register the applicant as proprietor of the land comprised in the application, without entering on the relative certificates of title a notification referring to the provisions of clauses Nos. 17 and 18 of the Partnership Agreement, dated 5th August 1926 between Harris Wolfson and Jacob Wolfson, is that I am not satisfied (1) that clause No. 17 did not create interests in the land included in the application in favour of the legal representatives and the widow of Harris Wolfson, deceased, or either of them, and (2) that the applicant can sell such land during the lifetime of Dora Wolfson and Rebecca Wolfson without their consent."

The applicant contends that no equitable rights in the land subsist as a result of these clauses, and that no such encumbrance should be notified. He has obtained the consent of his father's executor to the transmission, and also of the two ladies mentioned in clauses 17 and 18, who agreed to the omission of any notification in respect of those clauses.

Davidson J. decided that the surviving partner took the assets under clauses 17 and 18 subject to an equity affecting them in the nature of a lien to secure fulfilment of his obligations thereunder. In this we do not disagree with him. He considered also that the consents did not amount to an abandonment of this lien sufficient to destroy it. Perhaps not; but, apart from the question whether,

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Rich J. Evatt J.

as between himself and his beneficiaries, the executor's consent to the transmission was justified, the consents would, we think, be warrant enough for the Registrar-General to ignore the lien.

In our opinion, however, such an encumbrance has no place on the register. When land is brought under the Act, and is then subject to equities, other considerations apply. But the declared policy of the system is to keep trusts off the register, and it appears to us that the notification of such special and elaborate equities as those involved in the present case as encumbrances is within the very evil to which the Act was directed. The register was not to present a picture of legal ownership trammelled by all sorts of equitable rights in others, which those who dealt with the registered proprietor must take into account. Sec. 95 (4) affords no justification for putting them upon the register. Such rights must be protected by caveat, not by notification.

We therefore think the Registrar-General was wrong in the direction which he gave, and that it cannot be substantiated and upheld within the meaning of sec. 101. We are not called upon to consider whether an application by way of transmission is appropriate to the present case. All we are asked to decide is whether, when a transmission is registered, it should be subject to a notification.

We think we should allow the appeal, set aside the order of *Davidson* J., and declare that the Registrar-General ought not to enter upon any certificate of title he issues to the applicant a notification referring to the provisions of clauses 17 and 18 of the partnership agreement dated 5th August 1926. The costs in the Supreme Court and of this appeal should be paid by the respondent.

STARKE J. This was a summons calling upon the Registrar-General of New South Wales to substantiate and uphold the grounds of his refusal to register Jacob Wolfson as proprietor in fee simple of certain lands, on a transmission application, and for an order that the Registrar-General be directed to pass the application according to the tenor thereof, and to register Jacob Wolfson as proprietor in fee simple of the said lands. The transmission application was an application to be registered under the *Real Property Act* 1900 of New South Wales, sec. 94, as proprietor by transmission, and claimed

that Jacob Wolfson was entitled to an estate in fee simple in the land described in certificates of title vol. 4011, fol. 79; vol. 2857, fol. 26; and vol. 2522, fol. 202, and had become so entitled as the surviving partner pursuant to the terms of a partnership agreement dated 5th August 1926, made between Jacob Wolfson and his father Harris Wolfson, who had died in 1927. The summons refers to sec. 101 of the Act, but this seems due to some mistake. Harris Wolfson was registered as the proprietor of an estate in fee simple in an undivided moiety or half share in the lands described in the certificates of title, vol. 4011, fol. 79; and vol. 2857, fol. 26, subject to the reservations and conditions (if any) contained in the Crown Grant, and subject also to the encumbrances, liens and interests notified on the certificates. Both these certificates are marked "Tenancy in Common." Harris Wolfson was also registered as the proprietor of an estate in fee simple in the land comprised in the certificate of title, vol. 2522, fol. 202, subject to similar reservations, conditions, encumbrances, liens and interests. It appeared that Jacob Wolfson and his father Harris Wolfson entered into partnership as fancy goods warehousemen and general importers, and that the assets of the partnership included the lands already mentioned. Clause 17 of the partnership agreement, already referred to, was as follows:

"17. If during the continuance of the partnership either partner shall die become bankrupt or by mutual agreement retire the remaining partner shall take over the said business and the whole of the assets thereof and shall be absolutely entitled to the same and shall be liable for all the debts contracts and engagements thereof and in case the surviving or continuing partner shall be the said Harris Wolfson he shall pay to Rebecca Wolfson (the wife or widow of the other partner as the case may be) the sum of Thirty Pounds (£30) per week during her lifetime and also in addition pay to the other partner or his legal representatives Twenty Thousand Pounds (£20,000) without interest within five years from the date of either of the aforesaid occurrences and in case the surviving or continuing partner shall be the said Jacob Wolfson he shall pay to Dora Wolfson (the wife or widow of the other partner as the case may be) the sum of Fifteen Pounds (£15) per week during her lifetime and also in addition pay to the other partner or his legal representatives the

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sum of Twenty Thousand Pounds (£20,000) without interest within five years from the date of either of the aforesaid occurrences." Clause 18 was as follows: "18. It is hereby agreed that the properties situated in George Street Sydney and King Street Newtown described in the Schedule hereto shall not be sold during the lifetime of the said Dora and Rebecca Wolfson without the consents of the said Dora and Rebecca Wolfson and the consent of the survivor of the said Harris and Jacob Wolfson."

Harris Wolfson died on the 8th October 1927, and probate of his will was granted on the 8th March 1928 to Emanuel Berkman, one of the executors named therein, who consented to the transmission application. But the Registrar-General refused to register Jacob Wolfson as the proprietor of the lands mentioned in his transmission application, without entering on the relative certificates of title a notification referring to the provisions of clauses 17 and 18 of the partnership agreement, because he was not satisfied (*a*) that clause 17 did not create interests in the land included in the application in favour of the legal representatives and the widow of Harris Wolfson deceased or either of them; and (*b*) that the applicant could sell the land during the lifetime of Dora Wolfson and Rebecca Wolfson without their consent. Whereupon both Dora and Rebecca Wolfson consented to the transmission application, and requested and directed the Registrar-General to issue certificates of title to the applicant without any notification or reference to clause 18, and they further consented to Jacob Wolfson selling or disposing of the lands as he thought fit. But the Registrar-General still refused the application, and *Davidson* J., who heard the summons, dismissed it. The learned Judge said (1): "In my opinion . . . when it appeared to the Registrar-General that the applicant for transmission, who based his claim on the agreement of partnership, had not the whole estate thereunder, but was or might be subject to the equitable estate or mortgage in the form of the vendor's lien, he was bound to notify on the certificate the relevant provisions of the agreement." The formal order declared that the attitude adopted by the Registrar-General in connection with the transmission application was correct, and ordered that the summons be dismissed. Special leave to appeal from that decision was given by this Court.

(1) (1933) 51 W.N. (N.S.W.), at p. 34.

In my opinion, the applicant, the Registrar-General, and the learned Judge all misconceived the true position, and the summons should have been dismissed without any declaration.

The *Real Property Act* 1900 of New South Wales provides for transfers and transmissions. A transfer is the passing of any estate or interest in land under the Act, whether for valuable consideration or otherwise, by means of an instrument called a transfer (sec. 3, and Part VII.). A transmission is the acquirement of title to, or interest in land, consequent on the death, will, intestacy, bankruptcy, insolvency or marriage of a proprietor (sec. 3, and Part XI.). Transmission in its strictest sense is the devolution of property upon some person by operation of law, unconnected with any direct act of the party to whom the property is transmitted—as, by death, bankruptcy, insolvency or marriage (*Chasteauneuf* v. *Capeyron* (1); *Holt* v. *Deputy Federal Commissioner of Land Tax (N.S.W.)* (2)). But the *Real Property Act* is not quite so restricted. (See sec. 101, Part XI.) By sec. 94 it is enacted that executors or administrators or other person claiming any estate of freehold in the land of a deceased proprietor, or any person having a power of disposition over the fee simple of any such land, may apply in writing to the Registrar-General, in the form of the seventeenth schedule thereto, to be registered as the proprietor of such estate. The form in the seventeenth schedule is described as an "Application to be registered under the *Real Property Act*, 1900 (section ninety-four) as proprietor by transmission." All real and personal property which any person dies seised or possessed of or entitled to in New South Wales passes to and becomes vested in his executor for all his estate and interest therein (*Wills, Probate and Administration Act* 1898, sec. 44). The devolution of real estate upon an executor or administrator is thus a true instance of transmission. "Any person having a power of disposition over the fee simple of any such land" is not a true instance of transmission. But the Act treats the land which is the subject of a power of disposition over the fee simple as property passing to or vested in the donee of the power. "Or other person claiming any estate of freehold in the land of a deceased proprietor." This is a true instance of transmission. Heirs at law and devisees

(1) (1882) 7 App. Cas. 127, at p. 134. (2) (1914) 17 C.L.R. 720.

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whose claims arise prior to the Act vesting the real estate of a deceased person in his executor or administrator, might no doubt avail themselves of this provision. But, since that Act, devises in wills are given effect to by the executor or administrator becoming the registered proprietor, and then transferring to the devisees the land devised by the will (*Guest* on the *Transfer of Land Act*, 1890 (Vict.), sec. 225, p. 208). Transmissions by virtue of testamentary dispositions or intestacy are practically gone, for the real estate of a deceased person devolves upon and vests by force of law in his executor or administrator. The provision is, however, still effective, I apprehend, in the case of a transmission arising on the death of a registered proprietor by virtue of a succession of estates or interests created by and coming into effect on the death of such proprietor, under some settlement or other instrument. But in all cases the estate or interest in the land must pass, devolve and be transmitted upon the death of the proprietor, unconnected with any direct act of the party to whom the estate is transmitted. Registration merely records the estate or interest that has devolved upon or been transmitted to the applicant. This brings me to the present case.

The legal estate in the land, and in the undivided moiety of the lands of which Harris Wolfson was registered as proprietor, devolved upon his executor. The partners were not jointly seised, so the legal estate did not devolve upon the surviving partner, Jacob Wolfson (*Partnership Act* 1892 of New South Wales, sec. 20; *Lindley* on *Partnership*, 7th ed. (1905), pp. 378, 379; 9th ed. (1924), pp. 428, 429). The land devolved upon the executor in trust so far as necessary for the persons beneficially interested therein, and was applicable exclusively for the purposes of the partnership. The surviving partner had authority to get in and realize the assets of the partnership, pay its debts, and wind up the affairs of the partnership. Apart from special provisions in the partnership agreement, the partnership assets should be converted into money, and after payment of debts, the balance is divisible among the partners, or their representatives, in the shares in which they may be entitled to it. But there is no transmission of estate or interest in land from the deceased to the surviving partner; all that either is entitled to, upon the death of the other or at any time, is his proportion of

the existing assets to which he would be entitled if the whole were realized and converted into money, and after all the then existing debts and liabilities of the partnership had been discharged (*Lindley* on *Partnership*, 7th ed. (1905), p. 377; 9th ed. (1924), p. 427; *Pollock's Digest of the Law of Partnership*, 11th ed. (1920), p. 77).

Turning now to the special provisions contained in clauses 17 and 18 of the partnership agreement. A contract, it must be remembered, is not a conveyance or grant of an estate in land; it does not operate directly on the land, but creates contractual rights and obligations. And clauses 17 and 18 of the partnership agreement are plainly matters of contract, not of conveyance or grant of land or other property taking effect as such upon the death of Harris Wolfson. In other words, no estate or interest in land is transmitted to or devolves upon Jacob Wolfson on the death of Harris Wolfson by force of these clauses. It follows that an application on the part of Jacob Wolfson to be registered as the proprietor of the lands in question here, as on a transmission, is misconceived and should be dismissed. As well might a person who purchased land under a contract of sale, and who had paid his purchase money, apply to be registered as a proprietor of land as on a transmission: a transfer of the land from the registered proprietor to the purchaser is the method of giving effect to such a contract. It is the executor of Harris Wolfson to whom is transmitted the estate or interest in the land and in the undivided moiety of the lands registered in the name of Harris Wolfson, and Jacob Wolfson must obtain a transfer of the lands from the executor if he is to become registered as their proprietor. His right to such a transfer depends upon the proper construction and effect of the partnership agreement, but the case seems to present no difficulty in this connection, for both Rebecca and Dora Wolfson are content that Jacob Wolfson should be registered as the proprietor of the land and the undivided moiety of the lands standing in the Register Book in the name of Harris Wolfson. It would not be the function or duty of the Registrar-General to question or challenge an act of the executor regular and proper on its face. (See *Templeton* v. *The Leviathan Pty. Ltd.* (1).) It could not be said with any show of reason that the executor and Rebecca

(1) (1921) 30 C.L.R. 34, per *Higgins* J., at p. 64.

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and Dora Wolfson are not capable of protecting their own rights and interests. That the Registrar-General should interfere for any such purpose is therefore undesirable; it is "not only not required by any apparent necessity" but would be "apparently inexpedient in its character, and possibly in its effects." (See *Ex parte Wisewould* (1).)

The declaration of *Davidson* J. (2), "that the attitude adopted by the Registrar-General" in connection with this above-mentioned transmission application "was correct" should be deleted, but otherwise the judgment should be affirmed, and this appeal dismissed with costs.

Appeal allowed. Order of Davidson J. set aside. Declaration that the Registrar-General ought not to enter upon any certificate of title he issues to the applicant a notification referring to the provisions of clauses 17 *and* 18 *of the partnership agreement dated* 5*th August* 1926. *Respondent to pay the costs of this appeal and in the Supreme Court.*

Solicitor for the appellant, *C. M. P. Horan.*

Solicitor for the respondent, *J. E. Clark*, Crown Solicitor for New South Wales.

J. B.

(1) (1890) 16 V.L.R., at p. 152; 11 A.L.T., at p. 183.
(2) (1933) 51 W.N. (N.S.W.), at p. 35.