1907.
July 1.

[Full Bench.]

Present: Sir Joseph T. Hutchinson, Chief Justice, Mr. Justice Wood Renton, and Mr. Justice Grenier.

SILVA *v.* SILVA *et al.*

D. C. Kandy, 17,764.

Heirs, rights of — Administration — Concurrence of administrator unnecessary—Vesting of property in heir—Extent of administrator's title—Conveyance by minor—Ratification after attaining majority.

Title to immovable property belonging to the estate of a deceased person does not vest in the administrator of the estate of such person; and a conveyance by the heir of the deceased without the concurrence or assent of the administrator is valid, subject to the right of the administrator to deal with the property for purposes of administration.

HUTCHINSON C.J.—The personal representative retains the power to sell the property for the purposes of administration; but his non-concurrence in the conveyance by the heirs does not otherwise affect its validity.

GRENIER A.J.—On the death of a person his estate, in the absence of a will, passes at once by operation of law to his heirs, and the *dominium* vests in them. Once it so vests they cannot be divested of it, except by the several well known modes recognized by law.

Dictum of BONSER C.J. in *Fernando v. Dochchi*[1] disapproved.

ACTION *rei vindicatio*. Don Lewis de Silva was the owner of the property in dispute; he died in August, 1903, leaving as his heirs his brother, the first defendant, and Mendis Appu, his nephew; letters of administration to his estate were granted to the first defendant by the District Court of Kandy in case No. 2,321. Mendis Appu, who was then a minor, by deed No. 7,786, dated 24th March, 1905, registered on 25th March, 1905, sold to plaintiff one-half share of the property. Mendis Appu, after attaining the age of majority, by his deed No. 1,359, dated 25th January, 1906, confirmed the sale to the plaintiff in these terms: "I do hereby declare that I have sold, assigned, and transferred the lands.....in the schedule hereto described to Gardiye Manawaduge Nonis de Silva, his heirs, executors, administrators, and assigns, and that I have no further right or interest therein, and that I shall warrant and defend the same to him and them for ever." On 6th February, 1906, the estate of the deceased was judicially settled, and Mendis Appu, as an heir of the deceased, was declared entitled to half share of the estate. The first defendant claimed title

[1] (1901) 5 *N. L. R.* 15.

to the said half share by virtue of transfer No. 7,399, dated the 5th April, 1906, executed by the said Mendis Appu; and the second defendant claimed to be a mortgagee with possession under the first defendant.

The following issues were framed at the trial:—

(1) Are the deeds pleaded by the plaintiff bad and invalid in law, and do they convey any title ?

(2) Whether the defendants are estopped from raising the objection that the plaintiff's title deeds are invalid in law ?

The District Judge (J. H. Templer, Esq.) held as follows:—

" This case is one of no little difficulty. There can be no doubt that G. P. H. Mendis Appu by his deed No. 7,786 on 24th March, 1905, conveyed his half-share in ten lands to the plaintiff. Mendis Appu, it is admitted, at that date was a minor, and he appears at that by his deed No. 1,359 of 25th January, 1906, Mendis Appu, favour for the lands in question. There can be no doubt either that by his deed No. 1,359 of 25th January, 1906, Mendis Appu, having then attained his majority, confirmed his sale of the lands in question to the plaintiff. Meanwhile he had applied for and on 6th February, 1906, he obtained from this Court an order in the testamentary suit declaring him entitled to a half share of the lands in dispute, and thereafter in fraud of his two deeds to the plaintiff he executed a conveyance of all his interest in the lands in question to his uncle S. T. D. E. S. Silva.

" Mr. LaBrooy, for the defendants, raised the legal point whether plaintiff took anything under his deed and the deed of confirmation, and this was the real issue in the case.

" Mr. Beven, for the plaintiff, has urged that section 115 of the Evidence Ordinance estops the defendants from raising this objection, and I am asked to decide this point first. I must over-rule this objection, as I do not think section 115 of the Evidence Ordinance applies to the state of facts presented in this case. And, however fraudulent the conduct of Mendis Appu may have been, it seems to me it is open to the defendants to take the objection they have taken.

" It was admitted in argument that a deed from a minor during his minority is void and not voidable, and the next question I have to decide is, Can such a deed be confirmed by the minor when he comes of age? I am of opinion that the original deed being void, it cannot be confirmed by the minor when he comes of age, and I must find this issue also against the plaintiff.

" I have now to deal with the last point taken by Mr. Beven: Does the deed of confirmation No. 1,359, which was registered on 9th April, 1906, one day before the first defendant's deed for the same lands was registered of itself, constitute a conveyance of the

1907. *July 1.*

lands in question to the plaintiff independently of that portion of the deed which confirms the conveyance No. 7,786 ? The language relied on runs as follows :—'I do hereby declare that I have sold, assigned, and transferred the lands. . . . .in the schedule hereto described to Gardiye Manawaduge Nonis de Silva, his heirs, executors, administrators, and assigns, and that I have no further right or interest therein, and that I shall warrant and defend the same to him and them for ever.'

" Now, if the language used had been ' I do hereby sell, assign, and transfer, ' that is, present instead of past, there can, I think, be no doubt that this deed would have amounted to a conveyance independently of the deed No. 7,786, and although it may be contended that the use of the past shows an intention on the part of the grantor to refer thereby to the deed No. 7,786, I think it open to the construction Mr. Beven has put upon it, and that it may be read as though it ran ' and I hereby declare that I have this day sold,' &c. The lands in dispute are all given in full in the schedule to this deed No. 1,359, and this would have been unnecessary had the sole object of the deed been to confirm deed No. 7,786. I uphold deed No. 1,359 as giving title to the plaintiff independently of the deed No. 7,786 to the lands in dispute.

" I have now to deal with Mr. LaBrooy's last objection, viz., that as Mendis Appu claimed as one of the heirs of his uncle's estate, he could not convey to the plaintiff until he himself had obtained a conveyance in his favour from the administrator, and he cited *Fernando v. Dochchi* [1] and D. C., Kandy, No. 14,383, in support of this contention. I do not think either of these cases apply to the present case. Both these cases were cases where administration had not been taken out, whilst in the present case not only had administration been taken out, but Mendis Appu had actually obtained a judicial settlement in his favour for the lands in question under chapter LV. of the Civil Procedure Code in the course of that afore-mentioned administration proceedings.

" I do not think that the fact that the actual date of the judicial settlement is 6th February, 1906, whereas the date of deed No. 1,359 is 25th January, 1906, made any difference, as on the 25th January, 1906, Mendis Appu's title, though incomplete until the Judge's order had established it, nevertheless had a marketable value as a chose in action, and the judicial settlement subsequently made would ensure to the benefit of the purchaser.

" I must presume for the purposes of this case that the procedure laid down in chapter LV. of the Civil Code has been followed in the testamentary case, and that the Judge's order of the 6th February, 1906, is equivalent to a decree under section 740 of the Civil Code.

[1] (1901) 5 *N. L. R.* 15.

1907.
July 1.

" Accordingly, I give judgment for the plaintiff with costs.

The defendants appealed.

H. A. Jayewardene (with him *E. W. Jayewardene*), for the appellants.

Van Langenberg (with him *Bawa*), for the respondent.

Cur. adv. vult.

1st July, 1907. HUTCHINSON C.J.—

The plaintiff claims an undivided half of immovable property which formerly belonged to Don Lewis de Silva. De Silva died intestate in 1903, leaving as his heirs his brother (first defendant) and his nephew Mendis Appu, and letters of administration to his estate were granted to the first defendant.

On 24th March, 1905, Mendis Appu, whilst still a minor, purported to sell and by deed of that date to convey his one-half of the property to the plaintiff. This deed was registered on the 25th March, 1905.

On the 25th January, 1906, Mendis Appu by deed of this date, after reciting this former deed and that he had since attained his majority and wished to confirm the sale, declared that ' I hereby ratify and confirm the deed No. 7,786, dated 24th March, 1905, and the sale and conveyance thereby effected; and I do hereby declare that I have sold, assigned, and transferred the lands therein mentioned, viz., ..., to G. M. N. de Silva ....., and that I have no further right or interest therein." This deed was registered on the 9th April, 1906.

On the 6th February, 1906, the District Court of Kandy made an order in the testamentary action that the administrator " render his account on the footing that he and Mendis Appu are the heirs of the deceased, and are each entitled to a half share of the deceased's estate."

On the 5th April, 1906, Mendis Appu sold and by deed of that date conveyed to the first defendant the same share which he had previously sold to the plaintiff; and on the same day the first defendant mortgaged it to the second defendant. This conveyance to the first defendant was registered on the 10th of the same month.

The defendants claimed under the deeds of the 5th April, 1906, and contended that the first conveyance to the plaintiff was void because Mendis Appu was then a minor, and that the deed of ratification was void because a void conveyance cannot be ratified, and that, moreover, both the deeds on which the plaintiff relied would have been ineffectual, even if Mendis Appu had been of full age at the date of the first of them, because no conveyance from the administrator had been obtained.

1907. *July 1.*

HUTCHINSON C.J.

The District Judge heard and decided the above points without any evidence except that of the documents. He held (1) that the defendants were not estopped by section 115 of the Evidence Code from setting up the above defence; (2) that the deed of the 24th March, 1905, was void, and therefore could not be ratified; (3) that the deed of the 25th January, 1906, amounted to conveyance; (4) that a conveyance by the administrator was not necessary. On these rulings he gave judgment for the plaintiff; and the defendants now appeal against that judgment.

No question of fraud on the part of the defendants was raised at the trial; and therefore, although the first conveyance to the plaintiff was registered a year before the first defendant's purchase, and it seemed unlikely that the defendants were ignorant of the plaintiff's purchase, we must assume that the defendants paid their money in good faith, and that this is a contest as to which of two innocent persons must suffer for the fraud of Mendis Appu. By the deed of 25th January, 1906, Mendis Appu says in effect: "The former deed was ineffectual because I was then a minor; I want to confirm it; and I accordingly declare that I have sold and conveyed the property to De Silva." In my opinion the District Judge was right in holding that it was in effect a conveyance.

The objection that it was ineffectual because the administrator did not concur in it is founded on a dictum of Bonser C.J.,[1] in which he repeats what he had said in a previous case a few days before: "It seems to me that if a person desires to prove title to property, and finds it necessary to deduce title to that property either from or through a former owner who died intestate, he must prove one of two things, either that administration has been taken out to the intestate and that the administrator has conveyed the intestate's estate to him or to his predecessor in title, or that the intestate's estate was of less value than Rs. 1,000 so that administration was unnecessary."

A grant of administration empowers the administrator, according to the common form, "to administer and faithfully dispose of the property and estate, rights, and credits of the deceased." By section 540 of the Civil Procedure Code "the power of administration, which is . . . . . conveyed by the issue of a grant of administration, extends to every portion of the deceased person's property, movable and immovable, ... and endures for the life of the administrator or until the whole of the said property is administered." Does that mean that when the administrator has discharged all the debts and liabilities and has handed over to the heirs or allowed them to take the movables and has filed his accounts and obtained a judicial settlement of them there is still something else for him to do, viz.,

[1] (1901) 5 *N. L. R.* 15.

that the immovables are still vested in him and he must convey them to the heirs? I do not find any enactment vesting the immovables in the executor or administrator. Section 547 of the Civil Procedure Code enacts that no action shall be maintainable for the recovery of any property belonging to the estate of the deceased (where the estate amounts to Rs. 1,000) unless grant of probate or letters of administration duly stamped shall have first been issued to some person as executor or administrator, and that, if any such property is transferred without probate or administration being first taken out, the transferor and transferee shall be liable to fine and to pay the costs of the stamps which ought to have been affixed to the probate or letters of administration. There is nothing there to vest the property in the executor or administrator; and in fact it has been held by the Full Court in *De Kroes v. Don Johannes*,[1] following an earlier case, that no assent on the part of the executor is required to pass to the devisee the immovable property specifically devised by the will.

We are asked to hold, not merely that an alienation by the heir without the administrator's concurrence does not deprive the administrator of his power to resort to the alienated property, if necessary, for the purposes of the administration, but that the alienation is absolutely void. The dictum of Bonser C.J. to this effect was quite unnecessary for the decision of either the case in 5 *N. L. R.* 15 or the Kandy case there referred to; in the latter case Lawrie J. founded his judgment on the short point (which had not been taken in the Court below) that the case was one within section 547, and that the action was not maintainable, because no probate or administration had been taken out; and that was the only point in either of those two cases.

In a case reported very shortly in *Ram.* 195 (1866) the administrator was ordered to join in a conveyance, because "nothing has occurred to divest the administrator of the legal estate which is vested in him by the letters of administration"; but it does not appear what the property was, and no reasons are given.

In *Ram.* 273 (1867) the Supreme Court said that, since the Charter of 1833, which gave power to District Courts to appoint administrators and grant probates, the law of executors and administrators is the English Law. And the Judicial Committee of the Privy Council in the judgment in *Gavin v. Hadden*[2] said: "It is stated in the judgment in Ceylon (and the form of the probate and all the proceedings in this case with which they have been furnished show their Lordships that it is correctly stated) that an executor in Ceylon has the same power as an English executor, with the addition that it extends over all real estate, just as in England it extends over chattels personal."

[1] (1905) 9 *N. L. R.* 7. [2] (1871) 8 *Moore's P. C. Cases* (*N. S.*) 90.

1907.
July 1.
HUTCHINSON C.J.

In *Vanderstraaten* 273 (Full Court, 1871) the Court said that the lands of a deceased person "pass to his representatives in the same manner as his personal property"; but that "we wish not to be understood as implying any intention to break in upon the long-established course of law here, according to which our Courts have given validity to conveyances made by the heirs and widows of intestates, although there has been no grant of administration." And in that action, which was brought by a purchaser from an heir of an undivided share for declaration of title to and possession of the purchased share, one of the defendants being the administrator, the Court, finding that all the debts had been paid, gave judgment for the plaintiff.

In *Fernando v. Perera*,[1] the heirs of an intestate had sold and conveyed to A a part of the intestate's land, and with the proceeds of sale paid off mortgages on the land. Afterwards the plaintiff took out administration and sued A in ejectment for recovery of the land. The majority of the Court held that the conveyance passed the land to A.

In *P. Chettiar v. C. Pandary* [2] it was held that purchaser from the heir took title, subject to be avoided by the legal representative.

In *Tikiri Menika v. T. M.* [3] the plaintiff, claiming to be one of the heirs of an intestate, sued the co-heirs for declaration of his title; the defendants disputed the plaintiff's legitimacy. Burnside C.J. and Dias J. held that the plaintiff could sue without taking out administration, as the judgment dealt only with the title and made no order for possession, and did not conflict with the administrator's right to deal with the property.

In *Tikiri Banda v. Ratwatte* [4] the intestate died in 1883; administration was taken out in 1884; the heir sold in 1886; then the administrator sold, but not for the purposes of the administration; Lawrie and Withers JJ. held that the purchaser from the heir was entitled.

In *De Kroes et al. v. Don Johannes* [5] the plaintiffs sued in ejectment. The Court found that under the will of W. M. de Kroes the property was vested in his son G, and had to be divided after G's death amongst his children. G having died, his widow and children brought this action. The Court, following *Cassim v. Marikar*,[6] held that, the devise being specific, the concurrence of G's executor was not necessary.

There are several cases (*Moysa Fernando v. Alice Fernando* [7] *Gunaratne v. Hamine*,[8] *Ponnamma v. Arumogam*[9]) deciding that, since section 547 of the Civil Procedure Code, the Court ought,

[1] (1887) 8 *S. C. C.* 54 (*F. B.*)
[2] (1889) 8 *S. C. C.* 205.
[3] (1890) 9 *S. C. C.* 63.
[4] (1894) 3 *C. L. R.* 70.
[5] (1905) 9 *N. L. R.* 7.
[6] (1892) 1 *S. C. R.* 180.
[7] (1900) 4 *N. L. R.* 201.
[8] (1903) 4 *N. L. R.* 299.
[9] (1905) 8 *N. L. R.* 223.

for the protection of the revenue, to insist on administration being taken out, notwithstanding any admissions by the parties as to the value of the estate; but these cases do not seem to have any bearing on the present question.

It appears therefore that, since the Charter of 1833, the executor or administrator in Ceylon has the same power as regards the immovables as an English personal representative had at that date as regards chattels. And under the English Law a conveyance by the personal representative was not essential, but only his assent, to the validity of a conveyance of chattels, including chattels real, by the next of kin or devisee.

And in my judgment the cases which I have quoted establish that a conveyance by the heir or devisee of his share of the immovable property of the deceased is not void. The personal representative still retains power to sell it (with the special authority of the Court, if the terms of the grant of administration so require) for the purposes of the administration; but his non-concurrence in the conveyance does not otherwise affect its validity.

I see that by section 79 of the new Registration Ordinance, No. 5 of 1907, on the death of a registered owner his legal representative "shall be registered as the owner." What the effect of this enactment may be on the law as laid down in *De Kroes v. Don Johannes* and the other cases above quoted I need not now consider.

In my judgment this appeal should be dismissed with costs.

GRENIER A.J. —

The two main questions argued before us on this appeal were: (1) whether it was competent in law for heirs to alienate immovable property without the assent or concurrence of the administrator, and (2) whether such an alienation was absolutely void. In determining these two questions it is necessary to bear in mind prominently that there is no distinction observed in Ceylon between movable and immovable property in the administration of a testate or intestate estate, and executors and administrators are entitled to deal with either kind of property in the due course of administration. The introduction of the English Law relating to executors and administrators did not, in my opinion, as submitted by Mr. Van Langenberg for respondent, affect, much less destroy, the distinctive character, status, and rights of the heir as the term is understood both in the Roman Law and the Roman-Dutch Law. Administration as known to English Law formed no part of the jurisprudence either of the Roman Law or its later development the Roman-Dutch Law at any stage. The most that can be said is that an executor under the English Law corresponds to the *heres designatus* or *testamentarius* in the Civil Law as to the goods, debts, and chattels of the testator. The heir, however, by undertaking

1907.
July 1.
GRENIER, A.J.

administration, made himself personally liable for the debts of the deceased's estate. This liability he was afterwards allowed to avoid by means of the benefit of Inventory and the Act of Deliberation. The benefit of Inventory and the Act of Deliberation, I need hardly say, have no place now in our law. In applying therefore the English Law of Administration we must, in the absence of special legislation as there is in South Africa, take into account certain conditions relating to the Common Law rights of the heirs of an intestate, more especially those rights which accrue by succession and inheritance. On the death of a person his estate, in the absence of a will, passes at once by operation of law to his heirs, and the *dominium* vests in them. Once it so vests they cannot be divested of it except by the several well-known modes recognized by law.

Such being the position of heirs, the point which next arises for determination is, what relation an administrator bears to them when such a person is appointed by the Court. It is clear that the title cannot be in both the administrator and the heirs at one and the same time. Indeed, this is rendered impossible by the title having passed already to the heirs on the death of the intestate. An administrator is invariably appointed some time after the death of the intestate, and if by the mere fact of his appointment the title passes to him, then it means that the heirs have been divested of it in a manner which is not recognized or supported by any rule of positive laws relating to the transfer of immovable property. Besides, in strict law, it is impossible to conceive a state of things by which title to immovable property is temporarily suspended, or is vested in no one, for that is what will inevitably result if the heirs do not become vested with the title of their intestate immediately on his death, and there is an interval of time, long or short, between that event and the appointment of an administrator.

Clearly a grant of administration, viewed by itself, is not a conveyance or assignment by the Court to the administrator of the title of the intestate. The very terms of a grant negative such a contention.

Now, there is express provision in the Civil Procedure Code, sections 331 to 333, which enables the Court, in cases where the decree is for the execution of a conveyance and the judgment-debtor neglects or refuses to comply with the decree, to execute and pass a conveyance to the judgment-creditor in the form prescribed by section 333; such a conveyance has the same legal effect as one executed by the party ordered to execute the same, although not attested by and executed before a notary public.

A practice, not uniform perhaps as to details only, has, in consequence of the anomalous position which an administrator occupies as regards the immovable property of intestate, grown up in our Courts, and which I think may correctly be described now as

inveterate, by which the Court, where it has ordered the sale of immovable property belonging to an intestate estate, permits and sometimes expressly orders the administrator to execute the necessary conveyances.

These orders are really in effect decrees of Court, and are bound to be carried out. In a generality of cases, if not in all, there is attached to the conveyance by the administrator the order of Court authorizing the sale, obviously in order to prevent any future question as to the power of the administrator to sell.

Apart from this practice, however, the Court has undoubtedly the power to require an administrator, or even an auctioneer duly appointed by it, to convey; and the very terms of the conveyance executed on all such occasions sufficiently indicate the source from which the authority to convey is derived. At the same time, in the case of all such conveyances the requirements of the law in regard to notarial attestation of all instruments affecting land or other immovable property are strictly complied with.

It is a fallacy therefore to suppose, as urged by appellant's counsel, that an administrator obtains an absolute title to the estate of his intestate. What happens is that, on letters of administration being granted to him by the Court, he is entrusted and charged with the estate of the deceased for purposes connected with the proper administration and settlement of it; the *persona* of the deceased is, by a legal fiction, continued in him until under the provisions of chapter LIV. of the Civil Procedure Code the estate is finally settled by the Court, or a distribution of the same is made amongst the heirs.

An administrator, as the same is understood in the English Law, cannot deal with any part of his intestate's property as if it were his own absolute property, or, to use the language of the Roman-Dutch Law, as if he had the *dominium* or the *plena proprietas*, the right of full and complete ownership. He cannot sell, mortgage, or in any way alienate except for the payment of debts, and when he does so, he has almost invariably, according to the practice which has obtained amongst us for considerably over half a century, to obtain the permission of the Court. The necessity for this permission is accentuated by the language employed in grants of administration, and in my own experience, which now covers a period of nearly one-third of a century, an administrator, as a rule, seeks the permission of the Court before dealing with immovable property, although perhaps, in some instances, the grant may be absolute and unfettered.

There is a very old definition in English Law of the term "administrator," which is very suggestive of his powers and duties, viz., "He that hath the goods of a man dying intestate committed to his charge by the Ordinary, for which he is accountable when thereto required." It goes without saying that the rights, powers, and

1907. *July 1.* GRENIER A.J.

duties of executors and administrators are in many respects similar. Originally the Ordinary was bound to pay the debts of the intestate, so far as his goods would permit, as executors were bound in case of a will. In order to prevent the continued abuse of the power which the Ordinary had over the residue in his hands, Statute 31, E 4, C 11, A.D. 1357, was enacted, which provided that, in case of intestacy, the Ordinary shall depute the nearest and most lawful friend of the deceased to administer his goods; and administrators were placed on the same footing with regard to suits and to accounting as executors. The next and most lawful friend was interpreted to mean the next of blood who was under no legal disabilities. The Statue 21, H 8, C 5, enlarged the power of the Ecclesiastical Judge, and permitted him to grant administration either to the widow or the next of kin, or to both of them, at his discretion. Under our law the widow of the intestate is, as a rule, preferred to all others.

There is nothing in the English Law to support the contention for the appellant that the assent of the executor is required to pass immovable property specifically devised, nor does that law require the assent of the executor to pass title to chattels real and personal such as leases for years, rent due, corn growing and cut, grass cut and severed, &c., cattle, money, plate, household goods, &c. Certainly no assent in the shape of a conveyance is necessary. But when lands are devised to executors to be sold for payment of the testator's debts, and they are sold for this purpose, the executor has then to execute a conveyance in favour of the purchaser for obvious reasons. An administrator in Ceylon deals with immovable property as well as with movable property, and applying the English Law it seems clear that no conveyance from an administrator is necessary to pass title to the heirs, for that has already passed by operation of law.

Thus far I have stated certain propositions which, in my humble opinion, are beyond controversy, as they appear to me to be supported both by the Common Law so far as the legal position of heirs is concerned, and by the English Law in relation to the powers and duties of administrators and executors. The point of practice I have referred to must be regarded as the inevitable resultant of the introduction of a system of mixed law and procedure into a system which was ill-adapted to receive it in its entirety, much less to assimilate it, for the simple reason that in English Law an administrator only deals with the personal estate of the intestate, and the necessity for a conveyance is thus obviated. The property in the goods and chattels of the intestate, when sold for payment of debts, passes, I presume, by delivery. The immovable property in case of intestacy is governed by the law of primogeniture, and therefore never falls to be administered.

It may be safely asserted that there is no legislative enactment in Ceylon which vests immovable property in an administrator in

the sense that he is the absolute owner of it and is at liberty to deal with it in any way he pleases. Mr. Jayewardene in the course of his argument referred us to section 547 of the Civil Procedure Code in support of the position he took up on this part of the case. That section was primarily intended for the protection of the revenue, as it had been long the practice for large estates to be unadministered and for heirs to convey their interests without reference to the debts and liabilities of their ancestors. I would read the section as recognizing the existence of a right in certain persons, presumably the heirs, to transfer immovable property belonging to an intestate estate; and the section was intended to prevent the exercise of that right without probate or administration having been first taken out. The word " first " connotes that if administration or probate has been taken out transfers may be effected.

Now, it is clear that the words" grant of probate of letters of administration to some person as executor or administrator " can only mean, taking them with the context, an act of the Court by which it gives certain persons certain powers with reference to a testate or intestate estate. The section cannot possibly be taken to mean as enacting that the immovable property vests in some particular person, nor can it be said with any reason that the mere grant of probate or letters of administration has this effect. There are absolutely no words of vesting anywhere in the whole of the section, and I have no hesitation in holding against the appellant's counsel on this point.

We are thus reduced to a consideration of the effect of some decisions of this Court bearing on the two questions I have stated. But before I deal with them I should like to point out that in cases where an estate is under the value of Rs. 1,000, and administration is not compulsory, the heirs can deal with it by transfer or assignment, and the title that they pass is recognized by our law as a good title. In such cases it is manifest that the rule of our Common Law regulating intestate succession applies, and on the death of the intestate the heirs by operation of law become vested at once with his title. Now, it can hardly be said that the mere grant of probate or letters of administration results directly in divesting the heirs of their title simply because their intestate has left an estate of the value of Rs. 1,000 and upwards. If in the one case the heirs are not divested of their title, with equal reason may it be asserted, in the absence of any express provision of the law vesting the title in the administrator, that in the other case, too, the same rule of law applies. The argument that was founded on this aspect of the case appeared to be irrefutable. The law surely did not intend to make a distinction between the two cases, but only required, in the interests of the revenue, that large estates should not go unadministered, because that would mean loss of stamp duty on probate and letters of administration.

1907.
July 1.
GRENIER, A.J.

I am confirmed in this view by the terms of section 547 of the Civil Procedure Code, which enacts that where property is transferred without probate or administration being first taken out to estates amounting to Rs. 1,000 the transferor and transferree shall be liable to fine and to pay the costs of the stamps which ought to have been affixed to the probate or letters of administration.1

As regards local decisions, the case of *De Kroes v. Don Johannes*, [1] which was heard before the Full Court, of which I was a member, is in point. The Court held there, that the devise being specific, the assent of the executor was not necessary to vest title in the devisee.

The Full Court followed in this respect the decision of another Full Court in the case of *Cassim v. Marikar*, [2] and there is therefore undoubted authority in support of the position which the respondent has taken up on this appeal.

In *Cassim v. Marikar* [2] Burnside C.J. was of opinion that the case was one *primæ impressionis*, and therefore dealt with it on principle rather than on any decided authority.

He held, following apparently some previous rulings, to which no specific reference is made, that on the death of an intestate his immovable property passes to his administrator, and that in cases of testacy, immovable property, the title to which is not derived or specially appropriated by the will, passes to the executor as against the heir, but as regards immovable property specially devised the title to it passes to the devisee, but subject to the right of the executor to deal with it in due course of administration. I cannot gather either from the judgment of Burnside C.J. or Withers J. what precisely were their views in regard to the nature and extent of the estate or title of the executor and administrator. But, in the result, Withers J. held that the assent of the Ceylon executor or administrator is necessary to pass title to the heirs appointed in the will, because they have this title on the death of the testator or intestate, subject to the suspension of enjoyment pending administration. He seemed to have thought, however, that the executor had a limited estate or title which could be extracted out of the inheritance and given by operation of law to him. If he meant by this that the executor or administrator when he entered into possession of the testator's or intestate's estate under the grant of probate or letters of administration had full and complete control over it for purposes of administration, I am quite in accord with him.

In the case of *Pasupathy Chettiar v. Cantar Pandary* [3] the Full Court held that although the purchaser of a deceased person's property who takes from any other than a legal representative takes a title which may be avoided by the administrator in the due course

[1] (1905) 9 *N. L. R.* 7. [2] (1892) 1 *S. C. R.* 180.
[3] (1889) 8 *S. C. C.* 205.

of administration, yet when a *bona fide* alienation had been made by the heirs and a legal representative appointed, who after a considerable times sought to reach the property alienated as assets necessary to be applied in payment of outstanding debts, he should make out a *primâ facie* case showing that it was necessary to resort to the particular piece of property in question.

In the case of *Tikiri Banda v. Ratwatte*, [1] Lawrie and Withers JJ. were of opinion that succession to the estate of an intestate devolved immediately upon his death, and that it was competent for the heirs at law to alienate the property pending the administration of the estate, and that such alienation vested good title in the alienee, subject only to be defeated by any disposition of it by the administrator in due course of administration.

The learned author of " The Laws of Ceylon," on page 299, vol. II., says, that it may now be accepted as settled law that if a person desires to prove title to property deduced through a former owner, he must prove either that administration has been taken out and that the administrator has conveyed the intestate's estate to him or to his predecessor in title, or that the intestate's estate was of less value than Rs. 1,000. A close examination of the authorities cited by him has not helped me to come to the same conclusion as regards conveyances by administrators being the sole media for the transmission of title.

In the case of *Fernando v. Dochchi*, [2] Bonser C.J., without referring to any authorities, laid it down broadly that title to property can only be proved in one of the two ways just mentioned above. I can only regard what he said as mere *obiter* and of no binding effect. There is, however, an old case reported in *Vanderstraaten* 203, in which it was held by the Full Court consisting of Creasy C.J. and Templer and Lawson JJ., that the immovable property belonging to a deceased person passed to his representatives in the same manner as his personal property, but the Judges were careful to add: " We wish not to be understood as implying any intention to break in upon the long-established course of law here, according to which our Courts have given validity to conveyances made by the heirs and widows of the intestates, although there has been no grant of administration."

I apprehend that since this important pronouncement was made by the Full Court in 1871 there has been no change whatever in our law either by legislative enactment or by an uninterrupted series of judicial decisions establishing the contrary view. Possibly it may be advisable to amend the law on the subject and make conveyances from executors and administrators the only means for transmission of title, but so long as the law remains unaltered, I cannot see how it can be laid down that it is not competent for heirs

[1] (1894) 3 *C. L. R.* 70. [2] (1901) 5 *N. L. R.* 15.

1907.
July 1.
GRENIER, A.J.

to alienate immovable property without the assent or concurrence of the administrator, and that such alienations are absolutely void. I shall only refer to one other case, 222, D. C., Galle, 6,398, [1] in which Layard C.J. avoided pronouncing any opinion as to whether the property of the intestate vested in the administrator and a conveyance from him was necessary, although Wendt J., who sat with him, expressed an opinion to that effect.

The reason given by Layard C.J. was that until the point was properly raised and argued, he would not decide it. In the case now before us we have had the benefit of an exhaustive argument, and at the conclusion of it the learned counsel for the appellant seemed unable to support the appeal.

I would dismiss the appeal with costs.

WOOD RENTON J.—

I concur. Mr. Van Langenberg's clear and able argument has convinced me reluctantly that the dictum of Bonser C.J. in *Fernando v. Dochchi*,[2] to which my Lord the Chief Justice and Grenier J. have referred, is not good law. On grounds of policy I would have adopted it if I could. I have been unable to find any direct English authority on the point. But the view that we are now taking appears to me to derive some support by way of analogy from the arguments and the judgment in the recent case of *Kemp v. Inland Revenue Commissioners*.[3]

Appeal Dismissed.

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[1] *S. C. Min. Oct.* 10, 1903. [2] (1901) 5 *N. L. R.* 15.
[3] (1905) 1 *K. B.* 581.