

whether creditors are such as legatees or creditors of the testator before his death, no express trust exists. . . .

[Reference to *Cameron v. Campbell*, 7 A.R. 361, and *Thompson v. Eastwood*, 2 App. Cas. 215, distinguished those cases.]

In this case no express trust was created by the will; and, they being executors with no money and with no land or assets of any kind in their possession, there cannot be said to be, by operation of law, an express trust in the executors merely because they are authorised, if they are so authorised by the Devolution of Estate Act, to deal with the lands.

I am dealing with this case solely upon the ground that there is no express trust, and so the defendants are entitled to succeed upon their plea by reason of R.S.O. 1897 ch. 133, secs. 23 and 24. This is an action to recover a legacy out of land, or a legacy charged upon land, and it was not brought until after the expiration of ten years. The testator died on the 2nd July, 1889. The legacy became payable at latest on the 2nd July, 1894. This action was not commenced until the 28th October, 1907.

This is not merely an action against the land now claimed by Charles Harper: it is more. No question has been raised as to how far Charles may have acquired title under the conveyance to him of the 12th June, 1891, or by possession. By the payment of the annuity to his mother until her death, which did not occur until 1907, he certainly paid a large amount. It did not appear at the trial what arrangement, if any, had been made with the son William Telfer Harper. The land of the testator devised to William was charged with \$200 a year until all the legacies were paid. It was stated that William paid money each year for five years to the plaintiff on account of her legacy—that is, part of the \$400 received by her. He then sold the land devised to him, for \$3,200, and then he dropped out. He has not been made a party defendant; and none of the legatees other than the plaintiff are parties to the action. As stated, they probably have been settled with. The plaintiff, according to the correspondence, was looking only to the executors and to the defendant Charles. The plaintiff makes no complaint as to the personal estate. The executors have fully administered that, and there is nothing in their hands. The widow received the \$300 a year during her life from Charles, and the executors accepted from Charles her receipts to him.

The action should be dismissed with costs of executors to be paid by the plaintiff and with costs of the defendant Charles Harper, brother of the plaintiff, if demanded by him.