

that the sons who had been over-paid were not trustees for the excess they had received over their sisters, nor bound to refund it in order to equalize the shares of the latter; but as the excess paid to one of the sons was larger than the amount of his costs, he was held not entitled to be paid them out of the residue of the estate.

PRACTICE.—THIRD PARTY PROCEDURE.—ORIGINATING SUMMONS.

*In re Wilson, Attorney-General v. Woodall*, 45 Chy.D., 266, North, J., held that the third party procedure could not be resorted to in proceedings commenced by an originating summons. We presume the same rule would apply to proceedings commenced under our practice in a summary way (see Ont. Rules, 965, 989, 992, etc.)

WILL.—POWER OF APPOINTMENT.—DEATH OF ONE OF OBJECTS IN LIFETIME OF DONEE, EFFECT OF—COVENANT TO SETTLE WIFE'S PROPERTY.

*In re Ware, Cumberlege v. Cumberlege-Ware*, 45 Chy.D., 269, is another case on the law of powers. In this case the question arose on the construction of the will of a testator, who had left two sums of £10,000 to his nephew John, and niece Ann, for life, with power to them to appoint the capital "to their brothers or sisters, Charles, Samuel, and sister Catharine," and in default of appointment, then the money was to be equally divided between the three persons named, or their respective representatives. The objects of the power all survived the testator, but Catharine died during the lifetime of the donees of the power—John and Ann. John, by will, appointed one-third of his £10,000 to Charles, and the other two-thirds to Samuel, both of whom survived him. Ann, by her will, appointed her £10,000 to Charles and Samuel, in equal shares. Samuel survived her, but Charles predeceased her. The trustees of the will of the original testator now applied for the opinion of the court as to who was entitled to the £20,000. The first question was whether the power could be exercised at all, and if at all, whether as regards the whole fund, or two-thirds only. Stirling, J., held, that notwithstanding Catharine having died in the lifetime of the donees, the power continued in force and extended to the whole fund, and that the appointment was valid, except as to the share appointed by Ann, in favor of Charles, which had lapsed. This being the case, the question then arose as to who were entitled to this £5,000, as to which the appointment failed, and this depended on the meaning to be attached to the word "representatives," and Stirling, J., decided that it meant the executors or administrators of the person represented—and not his next of kin (see, however, *Burkett v. Tozer*, 17 Ont., 587, where the context was held to give the word "representatives" the meaning of "next of kin"). Consequently the personal representatives of Charles, Samuel, and Catherine, were held entitled to the £5,000. As regards Catharine's share of this fund, a further question arose: By her marriage settlement, made in 1843, her husband had covenanted to settle all "other personal estate which, upon the said intended marriage, or at any time during the said intended coverture, shall come to or vest in the said husband in right of his intended wife, or in her, the said wife, by bequest, gift, or otherwise." Catharine died in 1867, her husband surviving her.