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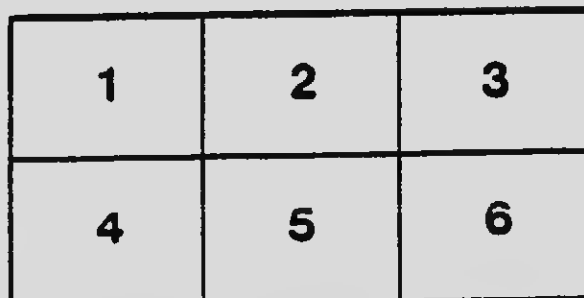
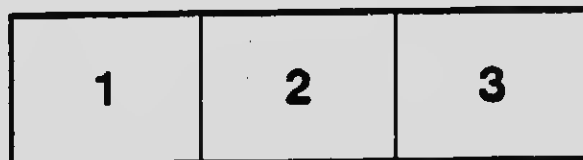
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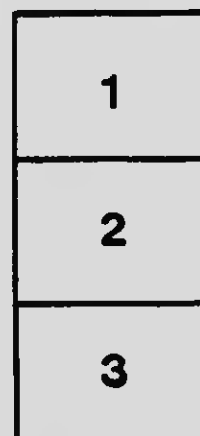
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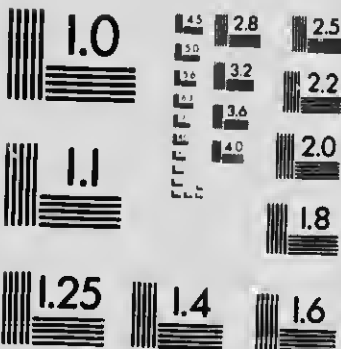
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THE LAW AND PRACTICE
RELATING TO THE PASSING OF
EXECUTORS' ACCOUNTS

BY

HIS HONOUR CHARLES HOWARD WIDDIFIELD

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"Words and Terms Judicially Defined"

TORONTO:

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PREFACE

Since the Devolution of Estates Act the practice that formerly obtained in administration actions has become almost obsolete. With the passing of this form of action the growing practice of obtaining judicial approval of executors' and administrators' accounts by an audit in the Surrogate Court has become of much more importance. That no work, either English or Canadian, covers just the ground I have attempted in this volume is some reason for its appearance.

No apology is necessary for the number of American cases referred to, more especially in the chapters dealing with testamentary expenses and allowances to and the liabilities of executors and administrators. Much of the law in this respect is grounded on habits and customs of life, and, in many respects, our habits and customs assimilate more closely to those of Americans than to those of Britons. Apart from this the decisions of the American courts, more especially those of the Eastern and South-Eastern States, are deservedly held in high repute.

I had hoped to be able to incorporate in the Appendix the new Surrogate Court Rules, but these appear to be no nearer promulgation now than a year ago.

C. H. WIDDEFIELD.

Owen Sound, April, 1916.



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ABBREVIATIONS

A. C.		Appeal Cases (1875-1890).
A. C.	(1891)	 Appeal Cases (From 1891).
A. & E.		Adolphus & Ellis (1831-41).
Al. Eq. Ch.	.....	Equity Cases Abridged.
Abbott	.....	New York Reports.
Add. Eccl.	.....	Addan's Ecclesiastical Reports.
Ala.	.....	Alabama Reports.
Allen	.....	Allen's Massachusetts Reports.
Allen N. B.	.....	Allen's New Brunswick Reports.
Ambl.	.....	Amlder's Chancery Reports.
Anstr.	.....	Anstruther's Exchequer Reports (1790-7).
A. R.	.....	Ontario Appeal Reports (1877-1900).
App. Div.	.....	Appellate Division.
Atk.	.....	Atkyn's Chancery Reports.
Atl.	.....	Athletic Reporter.
B. & Ad.	.....	Barwell & Adolphus (1831-41).
B. & B.	.....	Ball & Beatty's Irish Chy. Reports.
B. C. R.	.....	British Columbia Reports.
Barb.	.....	Barlow's Chancery Reports, New York.
Beav.	.....	Beaven's Halls Court Reports (1829-66).
Bra. C. C.	.....	Brown's Chancery Cases.
C. & J.	.....	Crompton & Jervis (1831-2).
C. & M.	.....	Crompton & Meeson (1833-5).
C. M. & R.	.....	Crompton, Meeson & Roscoe (1831-7).
C. P.	.....	Upper Canada Common Pleas (1850-80).
C. P. D.	.....	Common Pleas Division (1875-80).
C. & P.	.....	Currington & Payne (1823-41).
Cal.	.....	California Reports.
Cas. t. Lee	.....	Cases tempore Lee-Phillimore.
Ch. App. Cas.	.....	Chancery Appeal Cases (1865-70).
Ch. Chanc.	.....	Chancery Chamber Reports, Ontario.
Ch. Div.	.....	Law Reports, Chancery Division (1875-90).
Ch. D. ( )	.....	Chancery Division, From 1890.
C. L. J.	.....	Canada Law Journal.
C. L. T.	.....	Canada Law Times.
Cl. & Fin.	.....	Clark & Pimelly's H. L. Cases (1831-45).
Coll.	.....	Collyer's Chancery Cases (1811-6).
Colo. App.	.....	Colorado Appeals.
Conady	.....	New York Surrogate Reports.
Cooper	.....	Cooper's Chancery Reports (1816-8).
Cox	.....	Cox's Chancery Reports (1871-90).
Cr. & J.	.....	Crompton & Jervis (1832).
Cr. & M.	.....	Crompton & Meeson (1833-4).
Cr. & Ph.	.....	Craig & Phillips (1816-8).
Cranch	.....	Cranch's U. S. Supreme Court Reports.
Cush.	.....	Cushing's Massachusetts Reports.
Curt.	.....	Curtis' U. S. Circuit Court Reports.
D. & S. Dr. & Sim.	.....	Dewry & Simple's Chy. Reports (1860-5).
D. & War.	.....	Drury & Warren's Irish Chancery Reports.
D. L. R.	.....	Dominion Law Reports.
Daly	.....	Daly's N. Y. Common Pleas Reports.
Dec.	.....	Decisions.
D. F. & J.	.....	DeGex, Fisher & Jones (1850-62).
D. & J.	.....	DeGex & Jones (1857-60).
D. J. & S.	.....	DeGex, Jones & Smith (1862-5).
Dow.	.....	Dow's House of Lords Cases (1813-18).
Drew.	.....	Dewry's Chancery Reports (1852-9).
E. & A.	.....	Upper Canada Error & Appeal Reports (1814-66).
East.	.....	East Reports (1810-12).
Edw. C.	.....	Edward's Chy. Reports, New York.

Eq. Ab. Ch.	Equity Cases Abridged.
Exch. D.	Exchequer Division Reports (1875-80).
Exch. R.	Canada Exchequer Reports.
Ga.	Georgia Reports.
G. Cooper	G. Cooper's Chy. Reports (1810-15).
Giff.	Giffard's Chy. Reports (1858-65).
Gill.	Gill's Maryland Reports.
Gill & J.	Gill & Johnson's Maryland Reports.
Gr.	Grant's Chy. Reports (1810-81).
H. L.	House of Lords Cases (1817-90).
H. & M.	Hemming & Miller's Chy. Reports (1802-5).
Hugg.	Huggard's Ecclesiastical Reports.
Hure.	Hure's Chy. Reports (1811-51).
Hardw.	Cases C. Hardwicke, by Lee.
Hill	Hill's Reports, South Carolina.
How.	Howard's U. S. Supreme Court Reports.
Hun.	Hun's N. Y. Supreme Court Reports.
Ill.	Illinois Reports.
Ill. App.	Illinois Appeal Reports.
Ind.	Indiana Reports.
Ir. L. R.	Irish Law Reports (1870-93).
Ir. R. Eq.	Irish Reports, Equity (1806-78).
J. & K.	Johnson & Henning (1859-62).
J. & Lat.	Jones & La Touche's Irish Chancery Reports.
J. & W.	Jacob & Walker (1810-21).
Joh.	Johnson's Chancery Reports (1858-60).
K. R. (1915)	Law Reports King's Bench Div. (From 1901).
K. & J.	Kay & Johnson (1854-8).
Keen	Keen's Illinois Court Reports (1833-9).
Ky.	Kentucky Law Reports.
Kulp.	Kulp's Legal Register (Penn.).
L. J. Ch.	Law Journal Reports, Chancery. From 1831.
L. R.	Law Reports (1806-1875).
L. R. App.	Law Reports, Appeal Cases (1875-1890).
L. R. C. D.	Law Reports, Common Pleas (1806-1875).
L. R. C. P. D.	Law Reports, Common Pleas Division.
L. R. Ch.	Law Reports, Chancery Appeal Cases (1806-75).
L. R. Ch. D.	Law Reports, Chancery Division (1875-1911).
L. R. Eq.	Law Reports, Equity (1806-75).
L. H. Exch.	Law Reports, Exchequer (1806-75).
La.	Louisiana Reports.
La. Ann.	Louisiana Annual Reports.
Lee.	Lee's Ecclesiastical Reports.
Leigh.	Leigh's Virginia Reports.
Lev.	Levituz's K. B. Reports.
L. T.	Law Times Reports.
L. T. N. S.	Law Times Reports New Series. From 1860.
M. & G.	Manning & Granger (1806-5).
Madd.	Maddock's Chancery Reports (1815-22).
Mae. & G.	Macnoughten & Gordon (1835-51).
Man. R.	Manitoba Reports.
Marsh.	Marshall's Kentucky Reports.
Mass.	Massachusetts Reports.
Md.	Maryland Reports.
Me.	Maine Reports.
Mer.	Merivale's Reports (1815-17).
Met.	Metcalf's Kentucky Reports.
Mich.	Michigan Reports.
Misc.	New York Miscellaneous Reports.
Miss.	Mississippi Reports.
Mo.	Missouri Reports.
Mod.	Moreau Reports.
Moll.	Mudley's Irish Chancery Reports.
Mom.	Mompie's Kentucky Reports.
Mosley.	Mosley's Chancery Reports.
Munf.	Munford's Virginia Reports.
My. & K.	Myhre & Keen (1832-35).

- My. & Cr. Mylne & Craig (1825-11).
 Myr. Crde. Tyrle's Probate Court Reports, California.
 N. B. R. New Brunswick Reports.
 N. B. Eq. Ch. New Brunswick Equity Cases.
 N. C. North Carolina Reports.
 N. H. New Hampshire Reports.
 N. J. New Jersey Reports.
 N. J. Eq. New Jersey Equity Reports.
 N. R. (for New) New Reports (1862-7).
 N. S. R. Nova Scotia Reports.
 N. W. North Western Reporter.
 N. Y. New York Reports.
 N. Y. S. New York Supplement.
 N. Y. Supp. New York Supplement Report.
 Northam. Northampton Law Reporter (Penn.).
 Ohio Ohio State Reports.
 Ohio Dec. Ohio Decisions.
 Ont. R. (for O. R.) Ontario Reports (1881-90).
 O. L. R. Ontario Law Reports (since 1890).
 O. W. N. Ontario Weekly Notes.
 O. W. R. Ontario Weekly Reporter (1902-15).
 Ore. Oregon Reports.
 P. Probate, Pacific Reporter.
 P. R. Ontario Practice Reports (1850-1900).
 P. Wms. Peere-Williams Chancery Reports.
 Pa. (Penn.) Pennsylvania Reports.
 Pa. Co. Ch. Pennsylvania County Court Reports.
 Pa. Dist. Pennsylvania District Court Reports.
 Pa. St. Pennsylvania State Reports.
 Paige Paige's N. Y. Chancery Reports.
 Pars. Eq. Ch. Parson's Equity Cases (Pa.).
 Penke Penke's Nisi Prius Reports (1700-7).
 Phil. Phillimore's Ecclesiastical Reports.
 Pick. Pickering's Massachusetts Reports.
 Q. B. Queen's Bench Reports (1803-75).
 Q. B. D. Queen's Bench Division (1875-1900).
 R. R. Revised Reports.
 R. I. Rhode Island Reports.
 Redf. Redfield's N. Y. Surrogate Reports.
 Rett. Rettie, Crawford & Melville's Scottish Sess. Cases.
 Rich. Eq. Richardson's S. Car. Equity Reports.
 Russ. Russell's Chancery Reports (1823-9).
 R. & My. Russell & Mylne (1820-31).
 S. C. South Carolina Reports.
 S. C. R. Supreme Court of Canada Reports.
 S. E. South Eastern Reporter.
 S. & R. Sergeant & Rawle's Penn. Reports.
 S. & S. Simon & Stuart.
 S. W. South Western Reporter.
 Sch. & Lef. Schmales & Lefroy's Irish Chancery Reports.
 Sc. L. R. Scottish Law Reporter.
 Sim. Simon's Reports (1826-50).
 Stark. N. P. Starkie's Nisi Prius Reports (1811-23).
 Sm. L. C. Smith's Leading Cases.
 Sm. & G. Smule & Giffard's Reports (1852-7).
 So. Rep. (for So.) Southern Reporter.
 Sw. Swaustan's Chancery Reports (1818-9).
 Summ. Sumner's U. S. Circuit Court Reports.
 T. R. Term Reports, Danford & East.
 Tam. Tamlyn's Rolls Court Reports (1820-30).
 Tenn. Tennessee Reports.
 U. C. R. Upper Canada Queen's Bench (1811-81).
 U. S. United States Reports.
 Verm. Vermont's Chancery Reports.
 Va. Virginia Reports.
 Ves. Vesey's Chancery Reports.
 Ves. Jr. Vesey Junior (1810-18).

Ves. & B.	Vesey & Beames (1812-14).
Vt.	Vermont Reports.
W. & S.	Watts & Sergeant's Penn. Reports.
W. L. R.	Western Law Reports.
W. N.	Weekly Notes, London.
W. R.	Weekly Reporter, London.
W. Va.	West Virginia Reports.
Walk.	Walker's Penn. Reports.
Wash.	Washington Reports.
Whart.	Wharton's Penn. Reports.
Woodw.	Woodward's Reports, Penn.
Winch.	Winch's Common Pleas Reports.
Y. & C.	Younge & Collyer's Exch. Rep. (1836-42).
Younge.	Younge's Exch. Rep. (1830-2).
Y. & J.	Younge & Jervis, Exch. Rep. (1826-31).

EXECUTORS' ACCOUNTS

CHAPTER I.

JURISDICTION OF THE COURT.

The Surrogate Courts of the Province are invested with the authority and jurisdiction over executors and administrators, and the rendering by them of inventories and accounts, conferred in England on the Ordinary under 21 Henry VIII., ch. 5, except in so far as the same may have been revoked by subsequent legislation or rules. Rule 19 of the Surrogate Court Rules of 1892, as limited by the Law Courts Act, 1895, sec. 30 (now sec. 72 of the Surrogate Courts Act, R. S. O. 1914, ch. 62), seems to bring the practice back to the practice under the ancient statute of Henry VIII. According to the modern practice under this statute neither the executor or administrator, in general cases, exhibited any inventory unless he was cited for that purpose at the instance of a party interested: Williams on Executors, 9th ed., 841. In *Phillips v. Bignell* (1811), 1 Phill. 239, the practice is thus stated by Sir John Nichol: "The statute (21 Hen. VIII. ch. 5, sec. 4), requires executors and administrators to exhibit inventories as part of their duty, without any proceedings to call upon them to do so. The modern practice, however, is certainly not to render an account unless it shall be called for; but the executor must remember that he has bound himself by his oath to render a just account when he is by law required."

It is not only the duty of the executor or administrator to file an inventory and render an account when

duly called upon to do so, but it has always been his privilege to do so voluntarily in any case in which he is liable to be called upon, and in order to exonerate himself from liability it is always a most prudent thing for him to do. See *Kenney v. Jackson* (1827), 1 Hagg. Ecc. 105.

Not only is the executor or administrator himself liable to be called upon, but so also is his personal representative, although not at the same time the representative of the first testator or intestate, upon a reasonable presumption being raised that any part of the effects of the first testator or intestate has traveled into his hands; *Ritchie v. Rees* (1822), 1 Add. at p. 153. And this is so even where there is a surviving executor of the original testator. *Gale v. Lutteral* (1824), 2 Add. 234. It follows that being liable to be called upon, he may voluntarily undertake to render the inventory and account. *Cunnington v. Cunningham* (1901), 2 O. L. R. 511.

But at this starting point of jurisdiction we are confronted with a conflict of authorities which remained unsettled up to the time when the jurisdiction of the Courts Christian in matters testamentary was transferred in 1857 to the Courts of Probate in England. And it is therefore no easy matter to define the jurisdiction of the Ordinary as exercised in and after the days of Henry VIII. in this particular.

The older cases in the common law courts hold that an inventory may be falsified at the instance of a legatee, but not on the application of a creditor. That is stated in *Hinton v. Parker* (1723), 8 Mod. 168, and the reasons for the distinction are given by Holt, C.J., in *Archbishop of Canterbury v. Willis* (1708), 1 Salk. 251, and more fully at page 315. The same distinction is marked in *Catchside v. Ovington* (1766), 3 Burr. 1922, and applied in a more modern case of *Henderson v. French* (1816), 5 M. & S. 406, but with the general intimation that the duties of the Ordinary in dealing with the inventory were merely ministerial. This case was followed in *Griffiths v. Anthony* (1835),

5 A. & E. 623, which extended apparently the same restriction to the case of a legatee. The case is loosely reported, and the point of the decision may be that there was an excess of jurisdiction in the reception of *res rore* evidence, as suggested by Williams in a note. But the whole situation was reviewed in a masterly judgment by a civilian of great ability and learning, Sir John Nichol, in a case subsequent to *Henderson v. French*, in 1824, which is, strangely, not at all referred to in *Griffiths v. Anthony*; Sir John Nichol maintaining that the duties of the Ordinary are not merely ministerial, but that objections to the inventory may be entertained, though adverse evidence ought not to be received so as to falsify the inventory, though it may be amended upon the confession or admission of the executor: *Telford v. Morrison* (1824), 2 Add. Ecc. 319. The reasons given for not proceeding upon adverse evidence are of somewhat technical character, and may not prevail against the rule of court upon the Surrogate Judges of Ontario in respect of assets at the time of the death come to the hands of the executor.

Thus the law stood on the broad question of jurisdiction down to 1904, when the question came before a Divisional Court in *Re Russell* (1904), 8 O. L. R. 481. Upon the passing of executors' accounts before the Surrogate Judge the residuary legatee objected that a certain sum of money, not included in the executors' inventory of assets of the estate, should have been included. The widow of the testator, who was one of the executors, claimed the same as a gift from the testator in his lifetime. The Court held that the Surrogate Judge had no jurisdiction to pass upon the question thus raised; that all he could do was to report that a claim was made that there was another asset, stating what it was, which he was unable to investigate, and could therefore only approve of the rest of the accounts submitted to him. Meredith, J., delivered a forcible dissenting judgment.

In consequence of the judgment in *Re Russell* the Surrogate Courts Act was amended by 5 Edw. VII., ch. 14, by adding the provisions now found in subsections 3 and 4 of section 71. As the Act now stands the Surrogate Judge has "jurisdiction to enter upon and make full inquiry and accounting of and concerning the whole property which the deceased was possessed of or entitled to, and the administration and disbursement thereof in as full and ample a manner as may be done in the Master's Office, and for such purpose, may take evidence and decide all disputed matters arising in such accounting subject to an appeal under section 34." See *Oke v. Oke*, 8 O. W. N. 180, 182.

Although this language is very wide it was not intended that power should be given on an audit, or passing of accounts, to call in the creditors of the estate and adjudicate upon their claims, and, practically, administer the estate. As the Act now stands a Surrogate Judge has no jurisdiction to call upon a creditor of the estate to prove his claim and to adjudicate upon such claim, and allow it or bar it. *In re McIntyre* (1906), 11 O. L. R. 136.

There is no difference between a payment to another creditor and a retainer by an executor to pay his own claim; and the Surrogate Judge has power to investigate the claims of an executor, as between the executor and the estate, and to adjudicate upon them. *Shaw v. Tackaberry* (1913), 29 O. L. R. 490; *Union Trust Co. v. Bensley*, 12 O. W. R. 336, 1069.

Con. Rule (1913), 523 (formerly Con. Rule 642), does not apply to Surrogate Courts, but the Surrogate Judge, acting as the Surrogate Court, has inherent jurisdiction to set aside an order which he has been induced to make by the fraud of the party who has obtained it, and also to set aside or vary an order which he has made by mistake, though not, however, to correct errors which he has made in the judicial determination of any question upon which he has actually passed. The acts of the Surrogate Judge in passing

the accounts are those of the Court, and not of the Judge as *persona designata*. *In re Wilson and Toronto General Trusts Corporation* (1907), 13 O. L. R. 82.

That the Surrogate Courts are not statutory courts having only those powers which are in terms conferred upon them by the Surrogate Courts Act, follows from the decision of the Court of Common Pleas in *Grant v. Great Western Ry. Co.* (1858), 7 C. P. 438, and that of the Court of Appeal in *Cunnington v. Cunningham*, 2 O. L. R. 511. See also *Gibson v. Gardner* (1906), 13 O. L. R. 521, and *Brick's Estate* (1862), 15 Abbott's Prac. 12.

Section 69 of the Surrogate Courts Act does not confer upon the Judge of the Surrogate Court power to adjudicate upon a claim to moneys of a deceased person upon an alleged *donatio mortis causa*. The "claim or demand" referred to in sub-section 1, when that sub-section is read in the light of sub-sections 4 and 5, is clearly a claim or demand against the estate by a creditor for payment of a money demand. The claim of a person seeking to establish a *donatio mortis causa*, where something has to be done by the executor or administrator to perfect the title, such as indorsing a cheque, or giving a receipt to a bank for moneys in a savings bank account, is not only to have it declared that the property upon the death of the donor ceased to be part of his estate and became the property of the donee, but that the executor or administrator is a trustee for the donee to make the gift effectual. *Re Graham* (1912), 25 O. L. R. 5.

CHAPTER II.

THE POWERS OF A MASTER.

Although, as pointed out in *Re McIntyre, supra*, sub-sections 3 and 4 of section 71 of the Surrogate Courts Act were not intended to make an audit of trustees' accounts an administration of the estate, the powers of the Surrogate Judge have been considerably extended by these provisions. The powers of a Master on a reference, and the practice thereunder, are defined by the Consolidated Rules of 1913, and are as follows:

410. Under an order of reference, the Master shall have power:

- (a) To take the accounts with rents or otherwise;
- (b) To take account of money, rents and profits received or which, but for wilful neglect or default, might have been received;
- (c) To set occupation rent;
- (d) To take into account necessary repairs, and lasting improvements, and costs and other expenses properly incurred otherwise or claimed to be so;
- (e) To make all just allowances;
- (f) To report special circumstances;
- (g) And generally, in taking the accounts, to inquire, adjudge, and report as to all matters relating thereto, as fully as if the same had been specifically referred.

411. The Master may call parties to be examined, and to produce books, papers and writings, as he thinks fit, and may determine what books, papers and writings are to be produced, and when and how long they are to be left in his office; or

in case he does not deem it necessary that such books and papers or writings should be left or deposited in his office, he may give directions for the inspection thereof by the parties requiring the same, at such time and in such manner as he deems expedient.

417. Where an account is to be taken, the accounting party, unless the Master otherwise directs, shall bring in the same in debit and credit form, verified by affidavit. The items on each side of the account shall be numbered consecutively, and the account shall be referred to by the affidavit as an exhibit, and shall not be annexed thereto.

418. The Master may direct that in taking accounts, the books of account, in which the accounts required to be taken have been kept, or any of them, be taken as *prima facie* evidence of the truth of the matters therein contained.

419. Before proceeding to the hearing and determining of the reference, the Master may appoint a day for the purpose of entering into the accounts and inquiries, and may direct the production and inspection of vouchers, and if deemed proper the cross-examination of the accounting party on his affidavit, with a view to ascertaining what is admitted and what is contested between the parties.

420. A party seeking to charge an accounting party beyond what he has in his account admitted to have received, shall give notice thereof to the accounting party, stating as far as he is able the amount sought to be charged and the particulars thereof in a short and succinct manner. The Master may direct any party who seeks to falsify an account to deliver particulars of the item objected to. The particulars shall refer to the item by number.

The last rule, providing for a surcharge and falsification of the accounts, is one not generally acted upon on an audit of accounts in the Surrogate Court.

but it is often of great value in narrowing the issue in case of disputed accounts. A surcharge is shewing an omission for which there ought to be a credit; a falsification is shewing an item on the debit side of the account to be either wholly false or in some part erroneous.

In *Sculthorpe v. Burn* (1866), 12 Gr. 427, it was held that by the General Order of 1853 the Master had been given a greater discretion as to the conduct of references before him than that given to the Masters of the English Court of Chancery. And in *Carpenter v. Wood* (1863), 10 Gr. 354, it was held that the General Order applied to all cases where accounts were directed to be taken before the Master.

The settled practice appears now to be in England, as it has long been established here under the General Orders (now Con. Rules 409 and 411), that under a judgment or order to account the Master may inquire into, adjudge and report upon settled accounts—and this whether the judgment is by consent or otherwise, and whether the matter is referred to in the pleadings or not. That convenient practice is firmly grounded by the Court of Appeal in *Holgate v. Shutt* (1884), 27 Ch. D. 111, 28 Ch. Div. 111, and *Edinburgh Life Assurance Co. v. Allen* (1876), 23 Gr. 230, and has been recently approved of in *Gibson v. Gardner* (1907), 13 O. L. R. 521.

On a reference to a Master he always had power to go into the dealings between the executrix and her husband (the testator) before his death, and decide whether she was entitled to be paid for her services. *In re Bagwell, Anderson v. Henderson*, 17 P. R. 100.

In *Stewart v. Fletcher*, 18 Gr. 21, it was held that the Master, under the ordinary administration decree in respect of the testator's estate, had power to take an account of timber cut by the executrix on the land devised to minor children, contrary to the provisions of the will.

An executor sold real estate by auction for \$800. On passing the accounts the Probate Judge (New

Brunswick) found that the property was really sold to the executor, and that the value of the property was \$1,800. Held, that the Probate Court had no jurisdiction to set aside the sale, but it had power to charge the executor with the additional \$1,000. *Re Daly, Daly v. Brown*, 39 S. C. R. 123.

A subpoena may issue, as of course, to secure the attendance of a witness before the Master. *Hannum v. McRae*, 17 P. R. 567; 18 P. R. 185. A Master may make an order for the issue of a commission to take the evidence of witnesses out of the jurisdiction. *Horlock v. Eschweiler*, 11 O. L. R. 140; *Townsend v. Hunter*, 3 C. L. Times 310. But he cannot make such an order *ex parte*. *McLennan v. Helps*, 3 Chy. Ch. 193. He cannot order a witness or a party out of the jurisdiction, to come within the jurisdiction to be examined as a witness. *Connolly v. Connor*, 12 O. L. R. 304.

A party who is to be cross-examined on his affidavit is entitled to notice of the items on which he is to be cross-examined. *Re Lord*, L. R. 2 Eq. 605; *Re Curry*, 17 P. R. 379. It is not sufficient to inform him that all the items except one are objected to. *McArthur v. Dodgeon*, L. R. 15 Eq. 102.

Under Rule 417 the affidavit verifying the account and the production of the vouchers is *prima facie* evidence sufficient to warrant a Master in passing the accounts, and where voluminous accounts have been passed under this Rule, the pointing out of one or two items as objectionable was held insufficient to warrant the re-opening of the account. *In re Curry*, 17 P. R. 379; 25 A. R. 267.

CHAPTER III.

DUTY TO KEEP PROPER ACCOUNTS.

It is the bounden duty of an executor, or other trustee, to keep clear and distinct accounts of the property which he is bound to administer. If, therefore, he chooses to mix the accounts of the estate with his own accounts, he cannot thereby protect himself from accounting, and from producing the original books in which any part of the accounts may be inserted. It is a more difficult question, as between an executor bound to produce, and his partner in trade; but if the partners have permitted him to mix the accounts, it seems they cannot afterwards object to the production; clearly they cannot do so, in a case where the executor admits having lent to his firm part of the trust property, and that the firm has been dealing with it. *Freeman v. Fairlie*, 3 Mer. 43, 17 R. R. 7.

It is the first duty of an accounting party, whether an agent, an executor, an administrator or guardian (for in this respect they are all in the same situation) to be constantly ready with his accounts. *Pearse v. Green*, 1 J. & W. 133, 20 R. R. 258.

In *Killins v. Killins*, 29 Gr. 472, the administratrix was disallowed her costs up to the hearing where she had not kept proper books of account of matters pertaining to the estate, although no loss had resulted therefrom. Proudfoot, V.C., said: "I think that this negligence in not keeping accounts, and where the matters of the estate are left to rest to some extent in her memory, and on scattered memoranda, is sufficient to justify the institution of the suit, and therefore that the defendant (the administratrix) must pay the costs to the hearing." See also *Smith v. Roe*, 11 Gr. 311.

But where the accounts are in fact accurate, the form of them will not subject the trustee to liability

for costs, unless the confusion has been designed, or has been such as to necessitate proceedings by action or otherwise. *McMillan v. McMillan*, 21 Gr. p. 379. And an executor who discharges his duty honestly, but owing to want of business training keeps his accounts loosely and inaccurately, will not be deprived of his costs. *Hoover v. Wilson*, 24 A. R. 424. In this case the Court points out that the executor was well known to the testator, whose agent he had been for seven years before the testator's death. It is doubtful if the judgment would have been as favourable to the trustee had he been an administrator, or other volunteer trustee. See also *Smith v. Cremer*, 24 W. R. 51.

It is the further duty of the trustee at all reasonable times, at the request of the *cestui que trust*, or other beneficiary, to give full and accurate information as to the amount and state of the trust property; and permit him, or his solicitor, to inspect the accounts and vouchers and other documents relating to the estate. *Sauford v. Porter*, 16 A. R. 565.

But a trustee is not bound to render accounts on demand—only to have them ready for inspection. *Smith v. Roe*, 11 Gr. at page 323. If the beneficiary requires a copy of the accounts or documents he must pay the necessary expense himself, for it is not fair that such costs should be saddled on the estate, and the trustee is not bound to incur the expense personally. *Otley v. Gilby*, 8 Beav. 602, 68 R. R. 218. The rule is the same where one of the executors is a solicitor. *Re Bosworth*, *Martin v. Lambe*, 58 L. J. Ch. 432. In *Randall v. Burrows*, 11 Gr. 364, Mowat, V.C., held that it was the duty of a trustee to render his accounts within a reasonable time after demand.

In *re Tillott*, *Lee v. Wilson* (1892), 4 Ch. 86, Chitty, J., said: "A trustee is bound to give his *cestui que trust* proper information as to the investment of the trust estate, and where the trust estate is invested on mortgages, it is not sufficient for the trustee merely to say, 'I have invested the trust money on a mort-

gage,' but he must produce the mortgage deeds, so that the *cestui que trust* may thereby ascertain that the trustee's statement is correct, that the trust estate is so invested. The general rule, then, is what I have stated, that the trustee must give information to his *cestui que trust* as to the investment of the trust estate."

The neglect or refusal of a trustee to give proper information, or to keep proper accounts, may deprive him of his costs when the accounts are being passed, and in some cases may even subject him to the payment of costs. See under "Costs of the Audit."

An executor who refuses to give an account, or to pass his accounts when called upon to do so, may be removed from his trust. *Re Beard*, 4 O. W. N. 720.

In a case where proceedings for administration were rendered necessary by the gross and indefensible neglect of trustees to deliver accounts, Farwell, J., ordered the defaulting trustees to pay all the costs, including the costs of taking and vouching the accounts. He also held that the rule laid down in *Hewell v. Foster*, 7 Beny. 348, 64 R. R. 98, that trustees are always allowed their costs, does not represent the modern practice. *In re Skinner* (1904), 1 Ch. 289.

CHAPTER IV.

WHO OBLIGED TO PASS ACCOUNTS.

Surrogate Court Rule No. 19 provides that executors and administrators shall within a period of eighteen months after grant made, and sooner if the Judge shall so direct, pass their accounts. This Rule is now virtually abrogated by section 72 of the Surrogate Courts Act, which provides:

(1) Neither an executor nor an administrator shall be required by any Court to render an account of the property of the deceased, otherwise than by an inventory thereof, at the instance or on behalf of some person interested in such property or of a creditor of the deceased, nor shall such executor or administrator be otherwise compellable to account before any Judge.

(2) This section shall apply notwithstanding any provision to the contrary of any bond or security heretofore given by the executor or administrator.

In *Murdy v. Barr* (1901), 2 O. L. R. 310, it was held that the Judge of a Surrogate Court had no power to pass the accounts of the guardian of an infant appointed by such Court. Section 71 of the Surrogate Courts Act now provides for the audit of such accounts, and the decision is now of no effect.

It was formerly held that an executor who was also a trustee under the will, could not be required to pass his accounts in the Surrogate Court of his dealings as trustee as distinct from his dealings as executor. This is also now provided for in section 70 of the Act. But "trustee" in this Act, and in section 67 of the Trustee Act, applies only to an express trustee. For instance, the position of a surviving partner imposes certain obligations and duties which are in their nature fiduciary; but it is not every one who is subjected to these obligations and restraints who can claim to be a trustee and entitled to the privileges of a trustee. *Livingstone v. Livingstone* (1912), 26 O. L. R. 246.

The representatives of a deceased administrator may be compelled to account at the instance of an administrator *de bonis non*. *McLennan v. Heward*, 9 Gr. 178. But an administrator *de bonis non* cannot compel the representatives or sureties of a predecessor, whose office terminated by death, to account with him. *Bliss v. Scaman*, 165 Ill. 422; *Douglass v. Day*, 28 Ohio St. 175. But see *Jones v. Woolen*, 49 S. E. 915.

In *Ritchie v. Rees* (1822), 1 Add. Ecc. 158, it was held that the representatives of a deceased administrator with the will annexed, although not at the same time those of the first testator, were liable to be called upon for an account, upon a reasonable presumption being raised that any part of the effects of the first testator had reached their hands. And this without administration *de bonis non* being granted.

So the executors of a deceased executor are compellable to pass the accounts of the estate of the original testator. *Gale v. Lutterell* (1824), 2 Add. Ecc. 234.

An attorney who takes administration in the name of another may be called upon to pass his accounts at the instance of the latter. *Bailey v. Bristowe*, 2 Robert, 145. So an administrator *durante minoritate*, although his administration has expired. *Taylor v. Newton*, 1 Lee, 15.

A cessate or secondary administrator may call upon the original administrator to pass the accounts. *Botherton v. Hellicr*, 2 Lee, 131.

One of two executors may be called upon to pass his accounts at the instance of a co-executor who is also a residuary legatee. *Paul v. Nettleford*, 2 Add. Ecc. 237. There seems to be no reason why one of two or more executors might not submit his own dealings with the estate for approval, independently of the other or others. Per MacLennan, J.A., in *Cunnington v. Cunningham* (1901), 2 O. L. R. p. 516. But separate accountings by different executors should not be encouraged. *In re Smith's Estate*, 81 N. Y. S. 1035.

An executor who is a minor cannot be compelled to account. The interference of an infant named as an executor is spoken of in some cases as a wrong; but the weight of authority is against his being liable to account. In *Whitmore v. Weld*, 1 Vern. 326, a testator appointed an infant son to be executor upon coming of age. The Lord Keeper said that he could not, until he became of age, commit a devastavit.

In *Hindmarsh v. Southgate*, 5 Russ. 324, letters of administration were granted to the widow, irregularly, she being under age. The letters were recalled, and after she became of age were again granted to her regularly. In directing an account the Court distinguished between what came to her hands before, and what after she became of age. These cases were followed in *Nash v. McKay*, 15 Gr. 247, and it was held that the executor having been a minor his estate was not liable to account for the estate come to his hands. The same rule applies to an infant executor *de son tort*. *Young v. Purris*, 11 Ont. R. 597.

The fact that the executrix is entitled to the whole estate for her life does not excuse her from failure to ascertain the amount of the estate by an accounting that will fix the charges against her and the allowances to her, and settle between all parties in interest just what corpus the life-tenant is to be responsible for. *Marwell v. McCreery*, 57 N. J. Eq. 287.

In Kansas it was held that the Probate Court has power to compel an executor who has resigned, been removed, or whose letters have been revoked, to pass his accounts. *Hudson v. Barratt*, 61 P. 737. So an administrator whose appointment has been revoked because of the discovery of a will may be required to account. *Jenkins v. Jenkins*, 76 Law T. Rep. 164.

Sureties on the bond of an administrator cannot compel an accounting by their principal. *Dunnell v. Providence*, 9 R. I. 189; *McIlroy v. Hatheway*, 44 Mich. 399.

An executor *de son tort* may be compelled to account. *Damouth v. Klock*, 29 Mich. 289; *Pace v. Pace*, 73 N. C. 119; so an executor or administrator who resigns or has been removed from office. *Dunford v. Weaver*, 84 N. Y. 445.

Where an executor or administrator dies without having passed his accounts, it is for his own representatives, and not for the administrator *de bonis non*, to settle the accounts of the deceased representative. *Nowell v. Nowell*, 2 Me. 75; *In re Clark*, 119 N. Y. 427.

Although an executor may be entirely relieved from his obligation to account by the terms of the will (*Maurer v. Bowman*, 169 Ill. 586), he is not so relieved merely because the will gives him absolute discretion as to the management of the estate (*Harrison's Estate*, 12 Pa. Co. Ct. 388), or allows him a specific time in which to settle the same. *Young's Estate*, 1 Pa. Co. Ct. 513.

By The Charities Accounting Act, 1915, ch. 23, § 5 Geo. V., where under the terms of a will or any instrument in writing any property, or any right or interest therein or the proceeds thereof, are given to or vested in any person as executor or trustee for any religious, educational, charitable or public purpose, he is required to give notice thereof to the Attorney-General and to the Official Guardian, and to the person, if any, designated in the will or instrument as the beneficiary under the bequest or gift, or as the person to receive the same from the executor or trustee.

The Act applies to wills executed before the passing of the Act as well as to wills subsequently executed. The notice above referred to, in the case of a gift by will, is to be given within one month after the death of the testator, and shall state the nature of the property coming into the possession or under the control of the executor and shall be accompanied by an attested copy of the will.

Whenever required to do so by the Attorney-General or the Official Guardian the executor shall submit the accounts of his dealings with the property coming to his hand to be passed and examined and audited by the Judge of the Surrogate Court of the county or district in which he resides or in which probate was granted. If the executor refuses or neglects to comply with the provisions of the Act, or misapplies or misappropriates any such property, or fails to apply it in the manner directed by the will, the Attorney-General or the Official Guardian may apply to a Judge in Chambers for an order against the executor as set out in section 6 of the Act.

Section 7 authorizes the Lieutenant-Governor in Council to make rules respecting practice and procedure upon passing the accounts of an executor under the Act, and the tariff of fees to be applicable thereto. Except as otherwise provided by the Rules the practice and procedure of the Supreme Court, and of the Surrogate Courts, shall respectively apply to proceedings under the Act.

It will be noticed that the Act applies where any property or any right or interest therein, or the proceeds thereof, are given to or for any (1) religious purpose, (2) educational purpose, (3) charitable purpose, or (4) public purpose.

In *Ottawa F. M. C. A. v. City of Ottawa* (1910), 20 O. L. R. 567, the meaning of the word "purposes" was discussed. By the plaintiff's incorporating Act their buildings were exempt from taxation "so long as the same are occupied by and used for the purposes of the association." It was urged that "purposes" was synonymous with the word "object" used in the preamble of the Act. Riddell, J., said: "The words 'object' and 'purpose' are not etymologically or otherwise synonymous, and they are not terms of art. I see no reason for holding that the phrase 'for the purposes' means the same as 'in furtherance of the object' or 'for the work.' There is no case that I can find which restricts the meaning of 'purposes;' while such cases as *Inverarity v. County Council of Forfarshire* (1904), 41 Sc. L. R. 434, affirmed in Dom. Proc. (1906), A. C. 354, shew how far the meaning of the word may extend. *In re Sutton* (1901), 2 Ch. 640, may also be looked at. In the ordinary acceptance of the words, anything done for or by a corporation in the interest of the corporation is done for the purposes of the corporation; and I do not think that the meaning here is any more restricted."

RELIGIOUS PURPOSES.—A building for the sessions of a Sunday-school and religious lectures is for "reli-

gious purposes " although occasionally used for fairs and other benevolent purposes. *Craig v. First Presb. Church*, 88 Pa. St. 48.

Within an exemption law a young men's Christian association was held not to be a religious corporation. *Matter of Fay*, 37 Misc. (N.Y.) 532.

When religious books or reading are spoken of, those which tend to promote the religion taught by the Christian dispensation must be considered as referred to, unless the meaning is so limited by associated words or circumstances as to shew the writer had reference to some other mode of worship. *Simpson v. Welcome*, 72 Me. 500, 39 Am. Rep. 349.

An examination of the English law will be found to establish that Christianity in general, and not simply the tenets of particular sects, is a part of the Common Law of England. *Pringle v. Napanee*, 43 U. C. R. 285.

In *Reg. v. Dickout*, 24 O. R. 250, the Court held that the Church of Latter Day Saints is a " religious denomination " within the meaning of sec. 2 (a) of the Marriage Act. " The statute does not say ' Christian ' but ' religious. ' If it said ' Christian ' it would exclude Jews. The fundamental law of the Province makes no distinction between churches or denominations. "

A bequest of a sum of money to be paid to N. W. for the use of a named church, the sum to be expended by him in the best manner calculated to advance the principles of the church, was held to be a good charitable bequest for the advancement of religion. *Re Johnson* (1903), 7 O. L. R. 459.

EDUCATIONAL PURPOSES.—A statute exempted property used or appropriated for educational purposes. It was held that a farm upon which was a school, the scholars in addition to attending school being required to work on the farm, and the products of the farm being applied to the maintenance of the school, was exempt. The Court said, " The purpose of the plaintiffs' incorporation was the education of boys.

Education is a broad and comprehensive term. It has been defined as the process of developing and training the powers and capabilities of human beings. To educate, according to one of Webster's definitions, is to prepare and fit for any calling or business, or for activity and usefulness in life. Education may be particularly directed to either the mental, moral or physical powers and faculties, but in its broadest and best sense it relates to them all." *Mt. Hermon Boys' School v. Gill*, 145 Mass. 146.

It is doubtful if "educational" is here used in the broad meaning of this definition. "If that were the meaning I think the exemption would be carried to almost any conceivable institution which taught anything conducing to education; and it is very difficult to imagine, if such a definition were adopted, what institution would be excluded. Nearly all lawful institutions teach something or other which may be advantageous to education. An institution for teaching people to make shoes, for instance, would be within the exception, because it is possible that the making of shoes extremely well would in a remote way aid the purpose of some portion of education." *Per Lord Coleridge, C.J. In re Civil Engineers, post.*

A private boarding school for girls, kept and maintained by the defendant, who employed divers teachers, and had an average attendance of 85 scholars, was held to be an "educational institution" within the meaning of an exemption statute. *Dame Mary Wylic v. Montreal*, 12 S. C. R. 384. And see *Re City of Ottawa and Grey Nuns* (1913), 29 O. L. R. 568.

The English Customs and Inland Revenue Act, 1885, imposes a duty upon property, subject to an exemption in favour of property which, or the income or profits whereof, shall be legally appropriated and applied "for the promotion of education, literature, science or the fine arts." The property of the Society of Writers to the Signet in Scotland was proposed to be assessed, and it was objected to on the ground that the Society was for the purpose of education. It was

held that the property did not come within the exemption. "The maintenance of a body of professional men with recognized privileges . . . and the object which the Society has in view is not education, literature or science, but that he shall become a member of the Society in order to practise his profession as a writer to the Signet." *Society of Writers to the Signet v. Commissioners Inland Revenue*, 14 Rett. (Sc.) 34.

This was followed in *In re Civil Engineers*, 19 Q. B. D. 610, 20 Q. B. D. 621, where it was held that the property of the Institution of Civil Engineers was not entitled to the benefit of the exemption, because it was property appropriated and applied not for the purpose of general education, but for the promotion of a particular branch of knowledge in order to enable the members of the institution to practise with more success the profession of a civil engineer.

In any satisfactory system of education it is necessary to provide for both the mental and bodily occupation of the students, and a gift to the governing body of a school for organized games as a part of the daily routine of the scholars is a good charitable bequest for educational purposes. *In re Mariette*, 1915, 2 Ch. 284.

CHARITABLE PURPOSES.—In its present usage the term charitable purposes is so broad as to include almost everything which tends to promote the physical or moral welfare of men, provided only the distribution of benefits is to be free and not a source of profit. In respect of gifts and devises, charitable uses and purposes may include not only the relief of the poor by alms-giving and the relief of the indigent sick and of homeless persons by means of hospitals and asylums, but also religious instruction and the support of churches, the dissemination of knowledge by means of schools and colleges, libraries, scientific academies and museums, the special care of children and of prisoners and released convicts, the benefit of handicraftsmen, the erection of public buildings, and reclamation of criminals in penitentiaries and reforma-

tories. Hence the word "charitable" in this connection is not to be understood as strictly equivalent to "eleemosynary," but as the synonym of "benevolent" or "philanthropic." *Beckworth v. Parish*, 69 Ga. 569; *Price v. Maxwell*, 28 Pa. 23.

In *Morice v. Bishop of Durham*, 9 Ves. 399, 7 R. R. 232, Sir William Grant, M.R., said: "Do purposes of liberality and benevolence mean the same as objects of charity? That word in its widest sense denotes all the good affections men ought to bear towards each other; in its most restricted and common sense, relief of the poor. In neither of these senses is it employed in this Court. Here its signification is derived chiefly from the Statute of Elizabeth, 43 Eliz. ch. 4. Those purposes are considered charitable, which that statute enumerates, or which by analogies are deemed within its spirit and intendment; and to some such purpose every bequest to charity generally shall be applied. But it is clear liberality and benevolence can find numberless objects, not included in that statute in the largest construction of it."

The Statute of Elizabeth enumerates the following kinds of charity: The relief of aged, impotent, and poor people, maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars in universities; repair of bridges, ports, havens, causeways, churches, sea-banks and highways; education and preformment of orphans; the relief, stock, or maintenance for houses of correction; marriages of poor maids; supportation and help of young tradesmen, handicraftsmen, and persons decayed; relief or redemption of prisoners or captives; and aid or ease of any poor inhabitants, concerning payment of fifteens, setting out of soldiers, and other taxes.

The use of the words "aged," "impotent" or "poor," is not necessary to a good charitable gift: *Att.-Gen. v. Comber*, 2 S. & S. 93; and a gift to persons "not under fifty years of age" was held to be a good charitable gift within the meaning of the statute. *Re Wall*, 42 Ch. D. 510.

"Fifteens," or fifteenths, was a tribute or imposition of money anciently laid generally upon cities, boroughs, etc., throughout the whole realm; it amounted to a fifteenth of that which each city or town was valued at, or of every man's personal estate.

A collection of English cases shewing what are, and what are not, charitable gifts, will be found in Williams and Jarman.

A devise of real estate to a bishop for the use of his diocese is not a devise to a charitable use, because it may be applied to objects that are not charitable. *Re McCauley*, 28 O. R. 610. Nor is a direction to executors to dispose of an estate as the ministers of a certain church may see fit. *Vancott v. Reid*, 3 U. C. R. 244. See also *Re Kinney* (1903), 6 O. L. R. 459.

But gifts for religious purposes are within the term "charitable use" in the Mortmain Act. *Re Barrett* (1905), 10 O. L. R. 337.

A devise of land to the trustees of a school section, on which a teacher's residence might be erected, or that might be rented for the benefit of the school funds, is for charitable purposes. *Sills v. Warner*, 27 O. R. 266. So a bequest to be expended in luxuries for the members of a county House of Refuge: *In re Brown*, 32 O. R. 323; and a bequest of money to a municipality for the benefit of poor boys and girls between 6 and 11 years of age. *Re Battershall*, 10 O. W. R. 933.

A bequest of money to promote temperance legislation, being for a lawful public and general purpose and not contrary to morality, is a good charitable legacy. *Farewell v. Farewell*, 22 O. R. 573. And a gift to promote and protect citizens of African descent in the enjoyment of their civil rights is a gift for charitable purposes. *Lewis v. Doerle*, 28 O. R. 412; 25 A. R. 206.

See the very recent case of *In re Verrall* (1916), 1 Ch. 100, for a valuable discussion as to the meaning of "charitable purposes."

PUBLIC PURPOSES.—"Public" and "general" are sometimes used as synonymous. Public is applied strictly to that which concerns all the citizens and every member of the State; while general includes a lesser, though still a larger portion of the community: 1 Greenl. Ev. 128. In the law of taxation, eminent domain, etc., this is a term of classification to distinguish the objects for which, according to settled usage, the government is to provide, from those which, by the like usage, are left to private interest, inclination, or liberality. *People v. Salem*, 20 Mich. 485.

The word "public," as used in this connection, refers to the purposes and intent of the trust as being for the benefit of the public in general, or of some object so general and indefinite in its character as to be deemed of common benefit, and not to the method of its execution.

Paving, lighting, widening and improving streets in a town are public purposes. *Atty.-Genl. v. Eastlake*, 11 Hare 205; 90 R. R. 648. To build barns would be a public purpose, but not charitable. *Per Jessel, arg. Dolan v. McDermot*, 3 L. R. Ch. 676.

A charter of a water company was granted in consideration of water to be supplied by the company for *public purposes*. It was held that water supplied for the Mayor's office, city hall, etc., was not water supplied for public purposes. The Court held that by the term *public purposes*, as thus ~~used~~, was meant for the universal public and not for ~~only~~ a portion of it. *Commercial Bank v. New Orleans*, 17 La. Ann. 190.

In *Frankfort v. Com.* (Ky. 1904), 82 S. W. Rep. 1008, it was held that the term "for public purposes" meant the same as "for governmental purposes."

By a special Act the defendant company was bound to supply water for domestic purposes at a minimum rate, which should not include a supply of water for baths, wash-houses or *public purposes*. Held, that the supply of water to the guardians of a workhouse was not a supply for "public purposes." *Liskeard Union v. Liskeard Waterworks Co.*, 7 Q. B. D. 505.

A hospital carried on by two medical practitioners, and used chiefly by patients paying fees, though to some extent by indigent persons, and in receipt of a government grant, was held to be a public hospital. *Struthers v. Sudbury*, 30 O. R. 116; 27 A. R. 217.

The maintenance of the poor is a public purpose. *R. v. Wallingford Union*, 10 A. & E. 259.

CHAPTER V.

WHO ENTITLED TO AN ACCOUNT.

By section 72 of the Surrogate Courts Act neither an administrator nor an executor shall be required by any court to render an account of the property of the deceased, otherwise than by an inventory thereof, unless at the instance or on behalf of some person interested in such property or of a creditor of the deceased.

The personal representative of a residuary legatee has sufficient interest within this section to demand an account. *Winchlow v. Smith*, 1 Lee, 417.

So the next of kin is being entitled in distribution. *Bourverie v. Maxwell*, 1 P. & D. 272.

The appearance of an interest is sufficient: *Phillips v. Bignell*, 1 Phill. 241; *Gale v. Luttrell*, 2 Add. Eec. 236; or a probable or contingent interest: *Salter v. Sladen*, Perrog. M. T. 1792; *Myddleton v. Rushout*, 1 Phill. 244; *Reeres v. Freeling*, 2 Phill. 57; *Burgess v. Marriott*, 3 Curt. 424. But in *Keene's Appeal*, 60 Pa. St. 502 it was held that a bare possibility under a will, depending on the death of the first taker without issue, is not a sufficient interest.

A creditor who swears to certain sums due from the deceased to him is entitled to an account, although

his debt is contested. *Smith v. Price*, 1 Lee, 569; *Hackman v. Black*, 2 Lee, 251.

So it has been held that a creditor of a legatee or heir, who has attached his interest, may by virtue of such attachment, cite the executor or administrator to an account: *Rader's Estate*, 10 Pa. Dist. 282; but a judgment creditor of a legatee who has not attached his interest cannot demand an accounting. *Greener's Estate*, 2 Wkly. Notes Cas. (Pa.) 292.

An assignee in bankruptcy was held entitled to an account notwithstanding that the Statute of Limitations was set up as a defence. *Phillipson v. Harrey*, 2 Lee, 344. So where the alleged debt is founded on a bond the validity of which is disputed. *Gale v. Luttrell*, 2 Add. Eccl. 234.

But where the executor or administrator admits sufficient assets to pay all the creditors' claims, or the specific legacies, and interest thereon and the costs of the action to recover the same, the Court may, in its discretion, refuse an order to bring in the accounts. *Fleet v. Holmes*, 2 Lee, 101.

In New York it was held that an undertaker who holds a claim for funeral expenses cannot maintain a petition for a compulsory accounting by an executor or administrator, since he is not a person interested in the estate, and is not a creditor of the estate. His claim is primarily against the executor or administrator or the person to whom he gave credit. *Re Shultz's Estate*, 57 N. Y. Supp. 952.

In *Re Merritt's Estate*, 35 App. Div. 337, 54 N. Y. Supp. 955, it was held that the Surrogate properly denied a petition for an order requiring an executor to account where an appeal was pending from a judgment recovered by the petitioner against the executor, and he had no other interest in the estate.

In *Root's Estate*, 8 Pa. Dist. Rep. 223, it was held that an accounting will not be granted against executors after the estate has been distributed under a family settlement by which all parties released the

executors, at the instance of an execution creditor of one of the devisees.

An order to compel an audit was refused on an application at the instance of an attaching creditor of a legatee whose legacy was contingent on his attaining thirty years of age, and then to be paid if, in the judgment and discretion of the executors, he "shall have acquired such habits of industry and business qualifications as will render it prudent to trust" him with it. *In re Locher's Estate* (Pa.), 18 Lane. Law Rev. 6.

A legatee in remainder may require an executor to pass his accounts. *In re Albertson's Estate*, 1 W. N. C. 188.

One named in a will as a *cestui que trust* in a clause which is void under the statute against perpetuities, is not an "interested person" entitled to compel an account. *Re Wood*, 15 N. Y. St. 722.

But a remainderman whose rights in the estate are vested is so interested therein as to be entitled to apply to compel an executor to account, even though the owner of the life estate be living and be entitled to make a similar application. *Re Hunt*, 8 N. Y. App. Div. 159; *Campbell v. Purdy*, 5 Redf. Sur. (N.Y.) 434.

A surviving executor may compel the executors of a deceased co-trustee to account. *Re Kreisher*, 30 N. Y. App. Div. 313.

A citation order is the proper proceeding for compelling an executor or administrator to bring in and pass his accounts. The order is obtained on filing the necessary affidavits shewing the facts entitling the applicant to have the accounts passed. The Surrogate Judge then issues a citation to the executors or administrator to bring in and pass the accounts.

CHAPTER VI.

WHEN ADDET ORDERED.

Neither the Surrogate Courts Act nor the Probate Act fixes any time within which a trustee must pass his accounts, or places any limitation on the time within which an interested party can demand an accounting. In ordinary cases the trustee must have had sufficient time, having regard to the nature of the estate and the difficulties in realizing it, to get in the assets. As a legacy, bequeathed generally, is not payable until the expiration of a year from the death of the testator, such a legatee can not, without shewing special circumstances, demand an accounting until after the expiration of the year.

In many cases where there has been a great lapse of time between the death of the testator and the time of citation, the Court has refused the order. In *Ritchie v. Rees*, 1 Add. Ecc. 144, it was held that the lapse of forty-five years afforded a reasonable presumption that the estate had been fully administered.

In *Pitt v. Woodham*, 1 Hagg. 247, where twenty-four years had elapsed after the death of the intestate, and eleven years after the youngest child attained his majority, the Court refused an application for administration and account, where facts were shewn from which it might fairly be presumed that the applicant had received his distributive share of the estate.

In *Scurrah v. Scurrah*, 2 Curt. 919, an application to compel an administrator to exhibit an inventory after the lapse of eighteen years was refused. See also *Higgins v. Higgins*, 4 Hagg. 242.

In New York it was held that an executor will not be compelled to account within twelve months after his appointment unless special circumstances are shewn, and special reasons given therefor. *Matthews v. Studley*, 17 App. Div. 303, 45 N. Y. Supp. 201.

An executor must have a reasonable time to collect and pay over rents before the Court will compel an accounting. *Cor's Estate*, 8 Mon. Co. Rep. (P.) 161.

In *Ditmar v. Bogle*, 53 Ala. 169, it was held that, after the lapse of seven years from the grant of administration, a final settlement should not be deferred at the instance of the administrator, because of outstanding debts or unsettled accounts.

CHAPTER VII.

DUTY OF AN EXECUTOR—REALIZING ASSETS.

The first duty of a trustee, whether an executor, an administrator or a guardian, is to acquaint himself, as soon as possible, with the nature and circumstances of the trust property; to make a complete inventory thereof; to obtain, where possible, the possession or control of the trust property to himself, and, subject to the provisions of the will, get in the trust money invested on insufficient or hazardous security. *Underhill on Trusts*, 4th ed., 250.

Persons who become trustees are bound to inquire of what the trust property consists and look into the trust documents and papers to ascertain the condition of the estate. *Hallows v. Lloyd*, 39 Ch. D. 691.

“Within a convenient time after the testator’s death, or the grant of administration, the executor or administrator has a right to enter the house of the deceased in order to remove the goods of the deceased; provided he do so without violence; as, if the door be open, or at least the key be in the door; and, although the door of the entrance into the hall and parlour be open, he cannot therefore justify the forcing the door of any chamber, to take the goods contained in it; but is empowered to take those only which are in such

rooms as are unlocked, or in the door of which he shall find the key. He also has the right to take the deeds and other writings relative to the personal estate out of a chest in the house if it be unlocked, or the key be in it; but he has no right to break open even a chest. If he cannot take possession of the effects without force, he must desist, and resort to his action. On the other hand, if the executor or administrator, on his part, be remiss in removing the goods within a reasonable time the heir may distrain them *damage feasant*." Wms. Exors., 9th ed., 796.

An executor's discretion is not that of an absolute owner: it is limited by the duty of bringing the assets into a proper state of investment within a reasonable time, and the onus is upon the trustee to shew that he acted *bona fide* and exercised a reasonable discretion. *In re Brogden*, 38 Ch. D. p. 571.

In deciding whether a reasonable discretion was exercised or not, the Court will look into all the circumstances of the case, such as the nature of the investments, the confidence the testator had in the investments, the efforts made by the executor to realize, the state of the market, and of course as an important ingredient, the length of time which has elapsed since the testator's death.

The rule in England is, that if the executor fails within a reasonable time to convert investments which require conversion, the end of a year is, in the absence of circumstances pointing to a different date, to be taken as the time for ascertaining the value which he ought to have got. *The Heirs Hiddingh v. De Villiers Denyssen*, 12 A. C. 624.

It is the duty of an executor to get in all the testator's estate, whether it is specifically bequeathed or otherwise; and the expenses incurred in doing so must be paid out of the general estate. *Perry v. Meddowcroft*, 4 Beav. 204.

In *Sculthorpe v. Tipper*, L. R. 13 Eq. 232, a testator gave his estate to trustees upon trust to sell immediately after his decease, or so soon thereafter as to

them might seem proper. The personal estate comprised shares in a limited banking company, which was of high standing and repute at the time of the testator's death. The trustees retained these shares for twenty-seven months, when the bank suspended payment and there was a heavy loss. Malins, V.C., said: "It was in my opinion, the duty of the trustees to sell within a reasonable time, and I am unable to fix any other time than that which is settled by the case of *Grayburn v. Clarkson*, L. R. 3 Ch. 605, which is within one year after the testator's death. It is true the words were different in that case; there the direction was to 'convert the estate with all convenient speed.' Here the direction is to sell 'immediately or so soon as the trustees shall think fit to do so.' " In the judgment it is pointed out that in the case of shares in an unlimited company the duty to sell as soon as possible is always urgent.

A somewhat similar case was recently before our own Courts, and many of the earlier cases are discussed in the judgments, and the effect of section 37 of the Trustee Act is considered. There a testator died leaving shares in the Ontario Bank. The estate was given to executors "upon trust to invest the proceeds thereof in such manner as they shall deem most advisable." The executors retained these shares for four years and there was a big loss. It was held that the will authorized the retention of the shares, and that the executors acted in good faith, and their decision to retain the shares was an honest exercise of the discretion given by the will; and their abstaining from selling, hoping for a better price, was fairly justified. After the expiration of the four years the stock was reduced by one-half, but the executors continued to hold it for many years without an attempt to realize on it, and the Court held the executors liable, following *Sculthorpe v. Tipper*. *Re Nicholls, Hall v. Wildman* (1913), 29 O. L. R. 206.

Notwithstanding a clause in a will declaring that the trustees may postpone the sale and conversion of

any part of the estate so long as they may deem proper, it is their duty to sell and convert into money as soon as they reasonably can to realize a fund which would be immediately distributable in cash, using the power of postponement to obtain a better return, but not for mere purposes of accumulation where there is no direction for accumulation in the will. *Re Caswell Estate*, 1 D. L. R. 497, 20 W. L. R. 469.

While the Court will not exact more from trustees than such conduct as a prudent man would pursue in the management of his own business, yet it requires from them full explanations of all their dealings, and the causes why outstanding assets were not collected, or property of the estate had disappeared; and a trustee who cannot satisfactorily account for the one or the other will be chargeable with them. *Chisholm v. Bernard*, 10 Gr. 479.

Generally speaking, it is the duty of executors to get in debts due to the estate; but it is not a necessary part of their duty to realize mortgage securities of their testator not wanted for the payment of funeral and testamentary expenses, and debts and pecuniary legacies. *Orr v. Newton*, 2 Cox 274; *In re Chapman* (1896), 2 Ch. 763.

It is the duty of trustees to press for payment of the trust funds owing to them, and if they are not paid within a reasonable time to enforce payment by legal proceedings. And it is especially their duty to take action promptly, if by the terms of the trust, payment has been deferred to the expiration of a specified time. The only excuse for not taking action to enforce payment is a well founded belief on the part of the trustees that such action would be fruitless; and the burden of proving the grounds of such belief is on the trustees. *In re Bryden*, 38 Ch. D. 546.

In *Clack v. Holland*, 19 Beav. 272, Lord Romilly goes a step further, and says, if the trustee "has taken no steps at all to obtain payment, but it appears that if he had done so, they would have been, or there is

reasonable ground for believing they would have been ineffectual, then he is exonerated from all liability."

But when it is shewn that a debt was owing to the deceased and formed part of the assets of the estate, the executor or administrator will be charged with the amount unless he shews that the debtor was insolvent; but until that is proved, the law assumes the fact to be the other way. *Stiles v. Guy*, 16 Sim. 230, 30 R. R. 58; *Zimmerman v. Wilcox*, 35 C. L. J. 691, 19 C. L. T. 337.

Compare *East v. East*, 5 Hare. 348, where the contrary seems to have been assumed.

Where trustees were directed to sell an estate as soon as convenient after the testator's death, and offered it for sale by auction, and an offer was made of £6,600, and refused by the desire of one of the parties interested, and some time afterwards the trustees sold it for £3,000, the Court charged them with the loss. *Taylor v. Tabrum*, 6 Sim. 281; 38 R. R. 115.

An executor is not called upon to waste the estate in attempts to collect bad debts, or where it is clear a perfect defence exists, but he must act in the utmost good faith to the estate. *Egan v. Clark*, 87 Ill. Rep. 246.

Where an executor receives money in his trust capacity from a person who is indebted to the estate, and also indebted to the executor personally, the law will apply the payment to the debt due to the estate. *In re White*, 13 Pa. Sup. Ct. 201.

Where a part of the assets of the estate consisted of a note, the maker of which was insolvent, but the indorser was solvent, and the executor granted the indorser an extension of time and the note was lost to the estate, the executor was charged with the amount. *Foster v. Foster*, 24 Ky. Law Rep. 1396.

Executors ought not, without great reason, to permit money to remain upon personal security longer than is absolutely necessary. *Powell v. Evans*, 5 Ves. 844.

If by unduly delaying to bring an action the executor or administrator has enabled a debtor of the deceased to avail himself of the Statute of Limitations, the executor or administrator will be personally liable. *Haywood v. Kinsey*, 12 Mod. 573.

Where the testator had loaned money to his solicitor on a promissory note, and the maker was in good circumstances at the time of the testator's death, but died two years afterwards insolvent, it was held that it was the duty of the executor to call in the amount due on the note, and, if necessary, to take legal proceedings for the recovery of the amount due on the note, and the loss must fall on the executors. *Carrey v. Bond*, 12 L. J. Ch. 484.

And it makes no difference that the executor can realize a larger rate of interest for the estate by allowing the note to remain outstanding. *Re Gahourie*, 15 O. R. 635.

The difficulty of collecting arrears of rent does not excuse executors for not collecting them, without some evidence that in fact they could not have been recovered. *In re Alexander*, 13 Ir. Ch. R. 137; *Chisholm v. Bernard*, 10 Gr. 479.

In considering whether evidence is sufficient to relieve an executor in respect of uncollected debts, the lapse of time and the smallness of the debt are proper to be taken into account. *McCarger v. McKinnon*, 17 Gr. 525. A delay of ten months, which resulted in the loss of a debt, was held to require explanation. *McCarger v. McKinnon*, 15 Gr. 361.

Delay in selling lands, which by the will are saleable for the payment of debts, will render the executors liable for rents and profits. *Emes v. Emes*, 11 Gr. 325.

Part of a testator's estate consisted of a note of £100, made by five persons as joint makers. The interest on this note was paid for several years, by whom did not appear. The executor then took a new note for the amount, on which nothing was subsequently paid, and it became barred by the Statute of Limitations.

It was held that the taking of the new note was equivalent to payment of the first note, and the executor was charged with the amount thereof. *Sparkes v. Restal*, 22 Beav. 587, 111 R. R. 496.

It has been held that an executor or administrator, instead of receiving payment in money, may in the exercise of good faith and due prudence, settle with the debtor by accepting other security or property. *McCarger v. McKinnon*, 17 Gr. 525; *Gardiner v. Calender*, 12 Pick. (Mass.) 374; *Stark v. Hutton*, 3 N. J. Eq. 300.

CHAPTER VIII.

WHAT CONSTITUTE ASSETS.

In this connection it may be proper to consider what are, and what are not, assets of the estate for which an executor or administrator is chargeable. The general rule is thus stated in *Touchstone*:

"All those goods and chattels, actions and commodities, which were of the deceased in right of action or possession as his own, and so continued until the time of his death, and which after his death the executor or administrator doth get into his hands as duly belonging to him in the right of his executorship or administratorship, and all such things as do come to the executor or administrator in lien or by reason of that, and nothing else, shall be said to be assets in the hands of the executor or administrator to make him chargeable to a creditor or legatee."

In an accurate and legal sense, all the personal property of the deceased which is of a saleable nature, and may be converted into ready money, is deemed assets. But the word is not confined to such property; for all other property of the deceased which is chargeable with his debts or legacies, and is applicable to

that purpose, is, in a large sense, assets. 1 Story Eq. Jur. 531.

But property never vested in the deceased may be assets, in the hands of the executor or administrator. Thus, if a lease is made to one for life with remainder to his executor for years, such remainder will be assets in the hands of the executor, though it were never in the deceased. Wms. Exors. 1519.

Money received by an executor for the good-will of a public house is assets in his hands. *Worrall v. Hand*, Penke 74. So where an administratrix sold the good-will of the intestate's business as a surgeon, it was held that although she was not bound to sell such good-will, yet having done so the proceeds were assets for which she must account. *Christie v. Clark*, 27 U. C. R. 21.

The testator was a surgeon-dentist at the time of his death. His widow, one of the executors of the will, entered into an agreement with one P. whereby she sold him the testator's instruments at a fixed sum and the furniture at a valuation. The agreement further provided that P. was to pay the widow £100 a year for five years for the good-will of the business; and she agreed to give her personal services to enable P. to retain the testator's practice. P. said he relied on the personal exertions of the widow, and if these were not given he should resist payment of the annuity. In an administration action the Master refused to charge the widow with this £500. On appeal the Court held that either the whole or a part of the sum must be considered assets of the estate, and it was referred back to the Master to ascertain and report what portion of the £500 was attributable to the personal exertions of the widow under the agreement. *Smale v. Graves*, 19 L. J. Ch. 157; 14 Jur. 662.

In *McGovern's Estate*, 2 Northam L. R. (Pa.) 194, it was held that the good-will of a liquor business did not constitute assets of the owner's estate, where he had no business at the time of his death, but simply

a claim to the return of his business after a certain debt, for which it was pledged, had been paid.

The good-will of an inn is local and does not exist independently of the building in which it is carried on, and therefore where a husband kept an inn in a house owned by his wife, and she continued it after his death, the good-will was held not to be assets of his estate. *Elliot's Appeal*, 60 Pa. St. 161.

But if a deceased innkeeper had a leasehold in the building, the good-will of the leasehold is assets in the hands of the administrator, and he is chargeable with a price offered for such good-will and refused. *Wiley's Appeal*, 6 W. & S. (Pa.) 244; *Coppel's Estate*, 4 Phila. (Pa.) 378.

If an executor or administrator carries on the business of the deceased without authority, he is chargeable with the value of the good-will as a part of the assets. *Re Randall*, 2 Connolly (N.Y.) 29; *Emeret's Estate*, 2 Pars. Eq. Cas. (Pa.) 195.

It was formerly a disputed question whether the good-will of a business conducted by a commercial partnership survives, on the death of a member of the firm, to the survivors, or whether the interest of the deceased partner therein was assets of his estate; but it is now generally held that the deceased partner's interest is assets, unless the partnership articles or agreement provides otherwise.

In *Hawmoud v. Douglass*, 5 Ves. Jr. 539, it was held that in the case of commercial partnerships the good-will survives to the survivors; but the propriety of that decision was doubted by Lord Eldon in *Crawshay v. Collins*, 15 Ves. Jr. 227; and in *Wedderburn v. Wedderburn*, 22 Beav. 84, it was held that the good-will of a partnership business did not survive to the surviving partners on the death of a partner unless it was so provided by the partnership agreement. See also *Smith v. Everett*, 27 Beav. 446. And see *Platt v. Platt*, 42 Conn. 347, where it was held that the good-will of the business, if continued, is to be valued in estimating the deceased's interest.

Partnerships between professional persons stand on a different footing, and the good-will, on the death of one of the partners, survives to the surviving partner or partners. And this is the case though the deceased partner may have paid a large sum on entering into the partnership. *Farr v. Pearce*, 3 Madd. 78.

A note payable to the deceased "or his heirs," belongs to the personal representatives, and is assets. *Doak v. Robinson*, 12 New Bruns. 278.

In *Bradshaw v. Lancashire Ry. Co.*, 10 C. P. 189, it was held that where a passenger on a railway was injured by an accident, in consequence of which he afterwards died, his executrix could recover for breach of contract against the railway company the damages to his personal estate arising, before his death, from medical expenses and losses occasioned by his inability to attend to his business. But in *Pulling v. Great Eastern Ry. Co.*, 9 Q. B. D. 110, it was held that such recovery could not be had where the deceased was injured by being struck by a locomotive at a railway crossing, since the injury in such case did not involve a breach of contract, but was tortious.

In *Noble v. Cass*, 2 Sim. 343, 29 R. R. 115, there was a devise to trustees and their heirs during the life of A. in trust for A., and after her decease to B. During A.'s lifetime the trustees recovered damages for breach of covenants in a lease granted by the testator in his lifetime and still subsisting. It was held that these damages belonged to the life-tenant and not to the inheritance.

A claim for injury to the rental value of land during the lifetime of the owner is personal and vests in the executor or administrator. *Paret v. New York El. Ry.*, 60 N. Y. Sup. C. 441.

An administrator obtained in his own name a renewal of a charter for a ferry owned by the deceased, and it was held he was bound to account for the value thereof as assets of the estate. *Huson v. Wallace*, 1 Rish, Eq. (S. Car.) 1.

Rents accruing due during the lifetime of the owner of the demised premises go to his personal representatives as assets of the estate. And, in the absence of any testamentary disposition, rents of real estate which accrue after the death of the owner, pass to the devisee of the real estate and are not assets in the hands of the executor. By the Apportionment Act (R. S. O. ch. 156) rent is now considered as accruing from day to day, and is apportionable accordingly.

Rent payable in advance accrues at the time specified for its payment, and on the death of the lessor after that time, and within the period for which the rent is reserved, it passes to the lessor's personal representatives. *Re Weeks*, 5 Dem. (N.Y.), 194; *Miller v. Crawford*, 26 Abb. N. Cas. (N. Y. Supreme Ct.) 396.

As between the personal representatives and the devisees, compensation awarded for land taken for public purposes is personal property and belongs to the executor or administrator, if the land was taken before the testator's death; but if it was taken after his death it is real estate and passes to the devisee. *Welles v. Coules*, 4 Comm. 182; *Neal v. Knorr*, 61 Me. 298; *Boynton v. Peterborough*, 4 Cnsh. (Mass.) 467.

Where land is expropriated by a municipal corporation under authority of the Municipal Act, such land is "taken" from the date of the passing of the by-law of expropriation. *Re MacPherson and Toronto*, 26 O. R. 559; *Re Davies and James Bay Ry. Co.* (1910), 20 O. L. R. 534. Where lands are taken for railway purposes they are "taken" from the date of the warrant of possession, and not from the time the owner knows he has to give up the land. *Re Clarke and T. G. & B. Ry. Co.* (1909), 18 O. L. R. 628.

As against the heirs the personal representatives are entitled to the crops growing on the lands of the deceased at the time of his death. But crops growing on lands devised by the testator pass to the devisees as against the personal representatives. The authorities are all agreed that this is the rule, but they do not

seem to be able to account for the difference between the right of the personal representative as against the heir and as against the devisee. *Spencer's Case*, Winch. 51; *Cor v. Godsalve*, 6 East, 604; *West v. Moore*, 8 East, 339.

The presumption that crops pass to the devisee may be rebutted by the words of the will that shew an intent that the crops should pass to the personal representative. Thus, where the testator gave his land to A., and to his executors all his stock on the farm, with the implements of husbandry, and all his other personal estate, to pay debts and legacies, it was held that the gift of the stock upon the farm carried the standing crops. *West v. Moore, supra*.

Arrears of military bounty payable by the United States to a volunteer who died in the service, were held to be payable to his personal representatives as part of his estate, and not to his relatives. *Seidel's Estate*, 2 Woodw. (Pa.) 259. So also arrears of payment due a soldier at the time of his death. *Maitland v. Grisinger*, 1 Woodw. 294.

The persons to whom pensions are payable are generally regulated by the pension laws, and arrears due at the pensioner's death are payable to his family, and are not assets of the estate. If, however, pension moneys have been received by the pensioner in his lifetime and deposited by him in a bank or loaned to a third person, they are assets of his estate. *Beecher v. Barber*, 6 Dem. (N.Y.) 129.

Moneys received by a public officer in his official capacity are not assets in the hands of his executor, but are trust funds for his successor in office, if they have been kept separate as an official fund, or can be traced and identified as such. *People v. Houghtaling*, 7 Cal. 348.

And the proceeds of a note given to an officer in his own name for the purpose of satisfying an execution in the hands of the officer, belong to the execution creditor, and do not go to the executor or administrator of the officer as assets of the estate. *Childs*

v. *Jordan*, 106 Mass. 321. So money of a client received by a solicitor, and not mixed with the money of the solicitor, but kept separate, is not an asset of the solicitor's estate. *Schoolfield v. Rudd*, 9 B. Mon. (Ky.) 294.

These cases proceed upon the principle that the moneys received were trust funds, and were the properties of the *cestuis que trust*, and not of the person in whose possession the monies were found. But if the money received has no earmark, and is not distinguishable from the deceased's own moneys, the person claiming to be the owner must come in as a general creditor of the estate, and the property will be assets in the hands of the personal representative.

The Court will not assist a volunteer by making effectual an incomplete gift. Where a testator intended to give his nephew certain bank shares, and in a letter to him he said that he "made a free gift of them" to him, and executed a power of attorney for transferring the shares, but they were not transferred and were in the testator's name at the time of his death, it was held these shares formed a part of the personal estate. *Weale v. Olive*, 17 Beav. 252, 99 R. R. 142. And in *Re Hyslop* (1894), 3 Ch. 522, a testator, in a letter of instructions to his executor, stated that a debt owing from the executor to the testator was cancelled. This letter was never communicated to the debtor during the testator's lifetime, nor was it properly executed as a will, and it was held it did not cancel the debt. The rule is the same in those cases where the deceased makes statements or declarations as to forgiving debts. In *Byrn v. Godfrey*, 4 Ves. 5, 4 R. R. 155, the testator held a note of the plaintiff. He had never collected interest on the note, and a few days before his death he told the plaintiff he never intended to demand payment and considered it satisfied. Notwithstanding these declarations it was held the note was a part of the assets of the estate. And see *Eden v. Smyth*, 5 Ves. 341, 5 R. R. 60.

In *Re Ainslie, Swinburn v. Ainslie*, 30 Ch. D. 485, the testator devised land on which was growing timber. Before his death a number of trees had blown down and so remained at his death. It was held that, having regard to the maxim *quicquid plantatur solo, solo cedit*, the principle applicable was that if a tree was attached to the soil it was real estate and passed to the devisee, and if severed, personalty; that the life and manner of growth of any particular tree was no test of its attachment to the soil, nor that the degree of attachment or severance was a question of fact in the case of each particular tree.

The benefit of a license to keep a cart was held to be personal estate and to pass to the personal representative. *Hunt v. Hoct*, 2 Vern. 83.

If assets come to the hands of an executor and are subsequently lost through the default of the executor he is not chargeable with such assets. In case of loss there must be something in the nature of wilful default or neglect. *Job v. Job*, 6 Ch. D. 562.

If goods of the deceased are stolen from the possession of the executor, or from the possession of a third person, to whose custody they have been delivered by the executor, the latter will not be charged with these as assets. *Jones v. Lewis*, 2 Ves. 240. So if cattle die, or buildings are wrecked by tempest.

If goods are taken out of the possession of an executor he is answerable only for the amount he may recover in an action of damages for the trespass. But if he omits to sell the goods when a good price is offered, and afterwards they are taken from him, he may be charged with the price he could have obtained unless excused under the provisions of The Trustee Act. *Jenkins v. Plombe*, 6 Mod. 181; *Hightwick v. Lord*, 6 H. L. C. 235.

The proceeds of a policy of insurance upon the life of the deceased payable to himself, his executors, administrators or assigns, provided no declaration has been made by the assured to satisfy the Insurance Act, is an asset of the estate for the payment of debts

and distribution. *Wright v. Wright*, 100 Tenn. 313. So a policy of life insurance payable merely to the "legal heirs" of the deceased, is assets of the estate: *Re Duncombe* (1902), 3 O. L. R. 510; but a policy payable to "my legal heirs as designated by my will," and the testatrix gave specific properties and legacies to her husband and three daughters by name, is not assets of the estate. *Griffith v. Howes* (1903), 5 O. L. R. 439. Compare *Re Edwards* (1910), 22 O. L. R. 367.

Profits made by an executor in speculating in claims against the estate must be charged against him as assets. *In re Rainforth's Estate*, 83 N. Y. S. 57.

Money on deposit in the name of a married woman is *prima facie* her money, for which her husband as executor or administrator of her estate must account. *Re Holmes*, 79 N. Y. App. Div. 264; *Crossitt's Estate*, 211 Pa. St. 490.

On the day before her death a woman made her will, and gave to the person therein named as executor certain money, which he deposited in his bank account. He made no claim to the money as a gift, and it was held it was assets of the estate. *In re Brintnall*, 81 N. Y. S. 250.

A debt due from an heir or legatee of the deceased is an asset of the estate, and the executor or administrator should charge himself with the full amount thereof, where the distributive share of such heir or legatee is equal to or greater than the debt. *Re Ellis* (Prob. Ct.), 5 Ohio, N. P. 207; *Hoffman v. Hoffman*, 88 Md. 60.

The Court refused to charge an administrator with the amount of a note left by the deceased in the custody of a relative, where the amount was uncertain and it had never been in the possession of the administrator, and the maker refused to account for it, claiming that the deceased delivered it to him as paid or as a gift, and there was no evidence that the debt had been lost by the delay. *Re Baker*, 42 App. Div. N. Y. 370.

Wearing apparel of the testator will not be charged against his executor where it is not proved to have

been converted to his own use by him, and a sale of it was not necessary for the payment of debts and legacies. *McCall v. Peachy*, 3 Munf. (Va.) 288; *Carrol v. Cornet*, 2 Marsh. (Ky.) 204. The wearing apparel of a married woman is not generally considered as assets. See *Re Hall*, 70 Vt. 458, *post*, under "What are not Assets."

Chattels specifically bequeathed are assets for the payment of debts, and in case of a deficiency of assets for payment of debts, the executor is chargeable in his accounts, though in other cases it seems they need not appear in the account. Where it does not appear in the account what has been done with articles specifically bequeathed it will be presumed they have been disposed of in accordance with the terms of the will. *Re Pollack*, 3 Redf. (N.Y.) 100.

The modern doctrine as to the effect of appointing a debtor of the testator executor of his will is that payment of the debt is presumed to have been made, and the executor is chargeable in his accounts with the amount of the debt as cash in hand. This seems to be the invariable rule if he was solvent at any time during the term of his office, and in some jurisdictions it is the rule without regard to any question of his solvency or insolvency. 11 Am. & Eng. Ency. 1203.

The rule is thus stated in 18 C. Y. C.: "At common law the appointment of one's debtor as executor was held to extinguish the debt, and the rule was applied even where the executor died before probate or was one of several joint debtors. In equity, however, the effect of the appointment of a debtor to the office of executor was that the debt due from the debtor executor was considered to have been paid by him to himself and upon this supposition the rule was established in equity that the executor was accountable for the amount of his debt as assets. In the United States the rule is well settled that debts owing from executors stand upon the same footing with debts due the decedent's estate from other sources and are to be regarded as assets. An administrator who is indebted to his intestate must account for the debt, and even

at common law his appointment, not being through the act and favour of his creditor, does not appear to have extinguished his debt. It is sometimes said that when a debtor becomes executor or administrator of the estate of his creditor the debt is extinguished at law, but becomes at once assets in his hands, and the representative is chargeable with the amount thereof as cash, as under such circumstances equity will raise a trust or presume that the debt is paid," pp. 177, 178.

This rule is, however, subject to some limitations. While the debt must be treated as money in the executor's hands for the purposes of administration it will not for all purposes stand on the same footing as if he had actually received so much money. If wholly unable to pay the money in pursuance of the order of the Surrogate Court on account of his insolvency, he cannot be attached and punished for contempt as he could be if the money had actually been received from some other debtor. *Baucus v. Storer*, 89 N. Y. 1; *In re Rugg*, 3 N. Y. St. 224. It is also clear that an executor unable to pay his own debt, and thus unable to comply with the order of the Surrogate Court charging him with it as so much money in his hands, would not be guilty of embezzling the money and could not be convicted of crime as if the money actually came to his hands. *Baucus v. Storer, supra*.

The rule applies where the debt is due the estate from the executor named in the will, and from a firm of which he is a member. The amount of the debt must be treated as assets, although he and his firm were insolvent at the time when he accepted the trust. *Leland v. Felton*, 1 Allen (Mass.) 531.

The indebtedness of an insolvent executor will be applied in the discharge of any compensation allowed him. *Freeman v. Freeman*, 4 Redf. Surr. (N.Y.) 211.

Where a note is made by the testator and executor jointly the burden is on the executor to shew that the note does not represent his debt. *Bard's Estate*, 13 Pa. Dist. 552.

As to property over which the deceased had a power of appointment, see the next chapter.

CHAPTER IX.

WHAT ARE NOT ASSETS.

Under the Execution Act, R. S. O. 1914, ch. 80, certain specified goods and chattels are exempt from seizure. Sections 6 and 7 of the Act are as follows:

6. Chattels exempt from seizure shall, after the death of the debtor, be exempt from the claims of his creditors, and his widow shall be entitled to retain them for the benefit of herself and her family, or, if there is no widow, the family of the debtor shall be entitled to them.

7. The debtor, his widow, or family, or, in the case of infants, their guardian, may select out of any larger number the chattels exempt from seizure.

The exempted chattels are set out in sections 3 and 4 of the Act. In *Re Tatham* (1904), 2 O. L. R. 343, it was held that these exemptions are not, except as to funeral and testamentary expenses, assets in the hands of an executor or administrator for the payment of debts; that the effect of section 6 is to give the widow (or children where there is no widow) a parliamentary title to the exempted goods.

Of course the executor or administrator has no right to sell the exemptions for payment of funeral or testamentary expenses where there are any other assets applicable to payment. The widow, or children, would be entitled to have the assets marshalled for payment of these debts so as to relieve the exemptions.

The right to select exempted chattels is, by section 7, given to the debtor, "his widow or family"; and the right to claim \$100 in lieu of the tools and implements of trade is a right given to the debtor personally; and the distinction may well have been inten-

tional. The general exemptions which may be selected are articles used not alone by the debtor, but also by his family. The tools of the debtor's trade are given to him personally, but are not generally of value to the widow. *Pickering v. Thompson* (1911), 24 O. L. R. 386.

Those gifts of money by the husband to the wife for clothes, or to purchase ornaments, or for her separate expenditure, which are usually called pin-money, are ~~not~~ assets of the estate. For an elaborate statement of the law as to pin-money see *Howard v. Digby*, 2 C. L. & Fin. 634, 37 R. R. 276.

Somewhat analogous to pin-money are the profits made by the wife from the sale of butter, eggs, poultry, fruit, etc., where the husband allows the wife to dispose of such produce. Where a wife had, from such savings, made a loan to her husband, it was held she was entitled to prove a claim against his estate for the amount, there being no deficiency of assets to pay debts. *Slanning v. Style*, 3 P. Wms. 339.

So the savings of a wife out of her allowance for housekeeping belong to the wife and not to the husband's estate. *Mangey v. Hungerford*, 2 Eq. Cas. Abr. 156.

The wearing apparel of a married woman is presumed to belong to her husband, in the absence of evidence to the contrary, and need not be accounted for by her executor. *In re Hall*, 70 Vt. 458. In *Coffinberry v. Madden*, 30 Ind. App. 360, it was held that a watch, chain and charm, a ring and a diamond stud, worth \$500, were not within the meaning of a statute providing that wearing apparel of the deceased should not be considered as assets.

Money voted to executors as officers of a corporation in which the estate was largely interested, and the testator an officer at the time of his death, as extra compensation for their services as such officers, in accordance with a usage of long standing, was held not to be assets of the estate. *Re Schaefer*, 65 N. Y. App. Div. 378, reversing 34 Misc. 34.

An executor is not chargeable with assets which never come to his hands and of which he has no knowledge. *O'Brain v. Wilson*, 33 So. (Miss.) 946.

Property disposed of by the deceased by a valid gift *mortis causa* is not assets of the estate to which the executor is entitled. *Deneff v. Helms*, 42 Or. 161; unless such property is required for payment of debts of the deceased.

Section 57 of The Trustee Act provides that "property over which a deceased person had a power of appointment, which he might have exercised for his own benefit without the assent of any other person, shall be assets for the payment of his debts where the same is appointed by his will; and, under an execution against the personal representatives of such deceased person, such assets may be seized and sold after the deceased person's own property has been exhausted."

This is but a re statement of the law as laid down in *Fleming v. Buchanan* (1853), 3 D. M. & G. 976, 98 R. R. 401, where it was held that freehold estates over which a testator has a general power of appointment, and which he appoints by his will, are assets for the payment of his debts, but are only applicable for that purpose after all the testator's own property has been previously so applied.

Property appointed by will under a general power is assets for the payment of debts of the appointor, and is not regarded as the property of the donor of the power distributable by the donee thereof. In such a case the property is treated as assets of the testator exercising the power, and the assets so appointed are regarded as property bequeathed by him. Where, therefore, the donee of a general testamentary power of appointment over a fund borrowed money, and as security covenanted with the lender that he would make a will appointing that the loan should be a first charge on the fund, and made a will accordingly, it was held that the lender was not entitled to priority as

regards the fund over the appointor's general creditors. *Beyfus v. Lawley* (1903), A. C. 411, affirming *In re Lawley* (1902), 2 Ch. 797.

The power must, of course, be exercised; but, provided the power is exercised, the estate becomes assets.

CHAPTER X.

ADVERTISING FOR CREDITORS.

Having collected the assets of the deceased, one of the first and principal duties of the executor or administrator is the payment of the debts and liabilities of the deceased. What is the proper performance of the duties of an executor or administrator in this respect? It is ascertaining the debts and liabilities due or owing by the deceased's estate, the payment of such debts and liabilities, and the legal and proper distribution of the estate among the persons entitled. Per Jessel, M.R., *Sharp v. Lush*, 10 Ch. D. 468.

Much of the learning in the English text books on the order of administration of assets is of no importance here, owing to the fact that priority among different classes of debts has long been abolished in Ontario. See section 53 of The Trustee Act. But because the deceased must be decently and properly buried, and because the executor or administrator is personally liable for the costs of and incidental to the proper administration of the estate, these expenses are a first charge upon the moneys come to the hands of the personal representative.

Before the debts or legacies are paid, or, in cases of intestacy, before any distribution is made, the executor or administrator should see that the proper advertisement for creditors' claims is published. Section 56

of The Trustee Act provides for the personal representative giving "such or the like notices" as would have been directed to be given by the Supreme Court in an administration suit, and for distribution of the assets among the persons entitled thereto, and for the protection of the personal representative acting pursuant to such advertisement.

"In my opinion a prudent and reasonable executor ought to advertise for creditors as soon as possible after the testator's death, and when he has notice of any claim, *prima facie*, he ought not to proceed to pay the legatees without making due provision for all the claims of which he has had notice." *Romer, J. In re McKay, Mosley v. McKay* (1897), 2 Ch. 518.

The advertisement should, as far as possible, follow the words of the Act. Besides calling for claims against the estate, it should state that the effect of non-compliance with it will be the exclusion of persons failing to comply therewith from participation in the estate to be divided. A notice stating that "Parties having claims against the estate are also required to file the same by said date," is not sufficient. *Stewart v. Snyder*, 30 Ont. R. 110, 27 A. R. 423. A form of advertisement will be found in the Appendix.

An advertisement under section 56 of The Trustee Act, calling upon "creditors and others" to send in their claims against the estate, is broad enough to cover next of kin; and the statute is applicable to claims for distributive shares of the assets, as well as to claims for debts and demands in the nature of debts. *Re Ashman* (1908), 15 O. L. R. 42; *Newton v. Sherry*, 1 C. P. D. 246; *Re Moore*, 9 O. W. N. 282.

In England it is the practice to insert the advertisement in the *London Gazette* in addition to a newspaper having a local circulation, and in *Wood v. Wightman*, L. R. 13 Eq. 434, it was held that the executors were not entitled to the protection of the statute where this was not done. This is not, however, the practice in Ontario, and in *Re Cameron, Mason v.*

Cameron, 15 P. R. 272, Boyd, C., held it was not necessary to advertise in the *Ontario Gazette*, "as few persons see or read the *Gazette*." See also *Re Ashman* (1908), 15 O. L. R. 44.

In a subsequent case Street, J., said the notice should be "published in the localities where claimants against the estate resided, or else in the *Ontario Gazette* if their residence were unknown." *Stewart v. Snyder*, 30 Ont. R. 110. As far as this relates to the necessity of publication in the *Gazette* it would seem to be a mere dictum, as the case went off on the insufficiency of the advertisement. Where there is a probability of the deceased having creditors to whom notice in a local paper would be of no value, for instance in the case of a merchant, it might be prudent to advertise in the *Gazette* in addition to a local paper.

Not less than three insertions, generally four, are ordered, and a month's notice should be given from the first publication and the time fixed for distribution. *In re Bracken, Doughty v. Townson*, 43 Ch. D. 1. Three weeks notice was considered too short a time. *Wood v. Weightman, supra*.

An advertisement for creditors' claims does not exonerate an executor or administrator if he had actual notice of a claim before distribution, even though the creditor has not filed a claim in response to a notice asking him to do so. *The Carling Brewing Co. v. Black*, 6 Ont. R. 441; *Scottish Equitable v. Beatty*, 29 L. R. Ir. 290; *In re Land Credit Co. of Ireland v. Ireland*, 21 W. R. 135.

Under the similar English Statute it was held that an executor who had distributed the assets of his testator after issuing advertisements and taking the steps pointed out by the Act, had the same protection as if he had administered the estate under a decree of the Court; and if he should have retained any legacies as trustee after appropriating them for the benefit of the *cestui que trust*, he will no longer be under any liability *qua* executor. *Olegg v. Rowland*, 1 L. R. 3 Eq. 368; *Hunter v. Young*, 4 Exch. Div. 256.

Where an executor has properly advertised for creditors, and has sufficient to pay all claims of which he has notice, and pays them in full, but another creditor subsequently appears whose claim added to the others would have created a deficiency, the executor is protected. The unpaid creditor's only remedy is to compel the other creditors to refund rateably the amount which they received in excess of the amount which would have been payable to them had all the claims been known to the executor. *Leitch v. Molsons Bank*, 27 Ont. R. 624; *Doner v. Ross*, 19 Gr. 229; *Chamberlain v. Clark*, 9 A. R. 273.

The advertisement for creditors must be in the English language. The Legislature of New Jersey required that notice of all judicial sales be advertised in a German newspaper. The Chancellor held that notwithstanding this Act, the advertisement must be printed in English, quoting from 4 and 6 Geo. II., which provides that all judicial proceedings after 1733 shall be published in the English language. 27 C. L. J. 492.

In re Ringwall, 5 Ohio N. P. 496, it was held that the advertisement must be printed in the English language although the deceased was a German and nearly all his business transactions had been made with Germans. And see the remarks of MacLennan, J.A., in *Uffner v. Lewis*, 27 A. R. p. 249.

CHAPTER XI.

PAYMENT OF DEBTS.

A creditor of an estate cannot be prejudicially affected by the terms of a will. His rights are fixed and determined by the law and not in any manner controlled by the will of his debtor. A creditor's rights

to be paid out of the assets of his debtor's estate does not depend upon testamentary provisions, but is secured by the law, and is the same and none other, both in testate and intestate estates. Both the executor and administrator take the property of the deceased person precisely as it was left at the time of decease, whether such condition is the result of the operation of law or the act of the party himself. *Richardson v. Richardson*, 87 Ill. App. 354.

The duty of an executor or administrator is, after paying the funeral expenses and collecting the assets, to pay the just debts and satisfy the just claims against the testator's estate. But it is clearly his duty not to waste an estate not his own, which he is administering for the benefit of others, in satisfying demands which are equally untenable in law and in equity. Per Bowen, L.J., in *In re Rowson, Field v. White*, 29 Ch. D. 363.

Section 52 (1) of The Trustee Act provides that "A personal representative may pay or allow any debt or claim on any evidence that he thinks sufficient." Sub-sec. (2) deals with the power of such representative to compromise claims, and will be dealt with hereafter. Notwithstanding the broad language of the above section a personal representative has not an absolute power to pay every claim presented, and must use ordinary common sense, and exercise a reasonable discretion in the consideration of claims made against the estate. In *Re Williams*, 27 Ont. R. 405, the executors had paid a note of the testator for \$2,000, although they knew the note was made without consideration and was a gift by the testator to the payee, and therefore not legally enforceable. The Judge of the Surrogate Court held the note was a "claim," and the executors were protected under the statute; but a Divisional Court reversed the judgment and held the statute did not authorize the payment, "for they had evidence before them rebutting the *prima facie* presumption arising from the signature of the testator, and they had no further evidence to sustain the claim."

An executor or administrator may pay a bona fide claim against the estate although the Statute of Limitations would be a valid defence, but he would commit a *devastavit* if he paid a debt to a creditor who is prevented from enforcing it by the Statute of Frauds. And for the same reason an executor or administrator cannot retain as such a debt due to himself. There is this difference between a case under the Statute of Limitations and a case under the Statute of Frauds. The Statute of Limitations does not destroy the debt but only the remedy, and it has been held that an executor may waive that defence in the case of a debt which existed and appears to be well founded. *Norton v. Frecker*, 1 Atk. 526. But a parol contract within the Statute of Frauds, though not void to all intents and purposes as a valid agreement, is incapable of being enforced in an action either directly or indirectly. And if you have a contract which is not capable of being enforced either at law or in equity it does not create a debt or liability against the estate of the deceased. *In re Rowson, Field v. White*, 29 Ch. D. 358.

The privilege given to a personal representative of paying statute barred debts is an anomaly and ought not to be extended, and in *Midgley v. Midgley* (1893), 3 Ch. 282, the Court held that an executor could not pay such a debt after it had been judicially declared by a court of competent jurisdiction that it was barred by the statute.

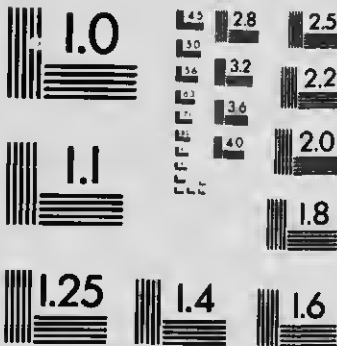
And where a creditor brings an action to recover a debt, to which the Statute of Limitations might be a bar, the beneficiaries of the estate have a right to insist upon the statute as a defence thereto. *Re Ruthertford*, 9 O. W. N. 32, 34 O. L. R. 395. In the American courts the general rule is that a creditor whose claim is not barred by the Statute of Limitations is entitled to interpose the statute against claims which are barred, where the assets are not sufficient to pay all in full. *Re Kendrick*, 107 N. Y. 104.

An executor will not be allowed for the payment of a debt of the testator which appears on its face to



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be illegal, e.g., to have been given for money lost at gaming. *Carter v. Cutting*, 5 Munf. (Va.) 223. But notes given by the deceased for gaming debts and paid by the executor without knowledge on his part at the time of payment of the illegal consideration, will be allowed. *Coffee v. Ruffin*, 4 Coldw. (Tenn.) 487.

Although section 12 of The Evidence Act requires some corroborative evidence to support an action against the estate of a deceased person, if an executor or administrator is satisfied that the claim is just and proper it may be allowed without such corroboration. *Rawlinson v. Scholes*, 79 L. T. 350; *In re Griffen*, 79 L. T. 442.

On an audit of an executor's accounts the Judge is not bound to disallow payments made by the executor because there was no corroboration in support of the creditor's claim. The responsibility for payment falls upon the executor; he must use care and judgment in considering the claims presented to him, and if he does so fairly and honestly, and in the interest of the estate, he will, on passing his accounts, be allowed such as he thought fit to pay. *Re Blank Estate*, 5 Terr. L. R. 230.

With respect to contingent debts and liabilities, a question of great importance formerly arose; namely, whether an executor can safely make payments of legacies or deliver over a residue where there is an outstanding covenant of the testator which has never yet been broken, and which may not be broken hereafter. The question was discussed in several early cases, and the result seems to be that an executor, with notice of even a possible liability, cannot safely make payment of legacies or distribute the residue. If he does he will have to answer to the claim of the creditor whose contingent claim has ripened into a certain claim. Thus in *Taylor v. Taylor*, L. R. 10 Eq. 477, it was held that where executors of a shareholder in a joint stock company, which was a going concern at the time of the testator's death, paid a legacy without providing for any contingent liability in respect of the

shares, they were liable to pay the amount of the legacy in satisfaction of calls thereafter made.

Where such contingent liabilities exist the executor is entitled to retain sufficient assets to meet them, or to be indemnified against them. *Simmons v. Bollard*, 3 Mer. 547. In *Williams v. Heald*, 4 Giff. 505, 141 R. R. 302, in an administration suit, the executors claimed to retain a part of the residue as an indemnity against possible liability in respect of unregistered mining shares. The Court refused the claim, but required the residuary legatee to undertake to answer such liability.

The liabilities of an executor or administrator in respect of covenants in leases, and in conveyances, is provided for in sections 34 and 35 of The Trustee Act.

Creditors of the deceased domiciled abroad are entitled to be paid *pari passu* with the local creditors. *Milne v. Moore*, 24 Ont. R. 456.

It is the duty of an executor to pay interest bearing debts as early as possible, and he may be liable if he does not do so unless he can shew that the assets were insufficient to pay the debts immediately. *Seaman v. Ererard*, 2 Lev. 40. So if an executor may save the penalty of a bond by payment of a less sum than that specified in the condition, or by other performance of the condition, and he neglect to do so, it will be a devastavit in him if he have assets. 1 Saund. 333.

Generally speaking interest is not allowable where from the nature of the claim filed against the estate no interest is due; and the claims of creditors with whom settlement is made in the ordinary course of administration are usually dealt with on the footing they occupied in this respect at the death of the deceased. Claims bearing interest by their terms should be paid with interest accruing before and after the deceased's death, according to their tenor; but interest is not usually allowed on unliquidated claims. *Re Kirkpatrick*, 10 P. R. 4; *Reber's Estate*, 143 Pa. St. 308. Where the estate is insolvent interest is not computed beyond

the death of the deceased. *Koepler's Estate*, 4 Pa. Dist. 346.

Where an executor is in funds, a debt due to himself must be considered as paid and can no longer draw interest. *Schryng v. Keith*, 2 Hill (S.C.) 340. But he cannot be prevented from charging interest up to the time of final settlement where he has no right to retain any part of the assets in payment of his claim until it has been allowed by the Court on a final accounting. *Re Saunders*, 4 Misc. (N.Y.) 28. He cannot, however, prolong the running of interest on his claim by delaying the settlement of the estate, and he will be allowed interest only for the period within which, by the exercise of due diligence, he might have settled the estate. *In re Richmond*, 2 Pick. (Mass.) 567.

Where the testator's son was directed to pay the debts and to pay the widow \$150 per year during her life, and the real estate was devised to the same son, it was held that the effect of this was to charge the payment of both the debts and annuity upon the land so devised to the son. *Re Thomas* (1901), 2 O. L. R. 660. He received the fund out of which the payment was to be made. *Robson v. Jardine*, 22 Gr. 420, 425.

Where an executor or administrator pays debts in full the presumption arises that he had sufficient assets to pay all the debts of the estate. *Godkin v. Watson*, 9 O. W. N. 251.

CHAPTER XII.

FUNERAL EXPENSES.

Funeral expenses, says Lord Coke, according to the degree and quality of the deceased, are to be allowed of the goods of the deceased, before any debt or duty whatever. But an executor or administrator is not justified in incurring such as are extravagant, even

as it respects the legatees or next of kin entitled in distribution. 3 Inst. 202. Nor, as against creditors, is he warranted in spending more than that which is absolutely necessary. In strictness, says Lord Holt, no funeral expenses are allowed in the case of an insolvent estate, except for the coffin, ringing the bell, and the fees of the parson, clerk and hearers; but not for the pall or ornaments. *Stackpole v. Stackpole*, 4 Dow. 227.

The rule appears to be, that the executor is entitled to be allowed reasonable expenses according to the testator's condition in life; and if he exceeds those he is to take the chances of the estate turning out insolvent. No precise sum can be fixed to govern executors in all cases. It must obviously vary in every instance, not only with the station in life of each particular testator, but also with the price of the requisite articles at the particular place. Wms. Exors. 838; *Hancock v. Podmore*, 1 B. & Ad. 260.

An executor who gives no order for the funeral of his testator, is liable only to the extent of the expenses of a funeral suitable to the rank and circumstances of the testator. *Brice v. Wilson*, 3 N. & M. 512; 40 R. R. 461. But if he sanctions an expensive funeral he is liable for the expense. *Lucy v. Walrond*, 3 Bing. N. C. 841, 43 R. R. 815. This means that as between the undertaker and the executor the executor is liable. The sum paid by the executor may still be questioned on an audit of the accounts.

Only such sums will be allowed for funeral expenses, costs of cemetery lot, erection of a monument, etc., as will bear a just, fair and reasonable proportion to the amount of the estate of the deceased and his station in life. Undertakers assume the risk of the estate proving insolvent, in which case, as against creditors, they will be held strictly to the requirements of the rule. *Cullen's Estate*, 8 Pa. Sup. Ct. 494.

In *Foley v. Brocksmil*, 119 Iowa, 457, the estate amounted to \$5,000, and the executors spent \$526 for

funeral expenses. The Court refused to allow more than \$150.

In *Matter of Kiernan* (Surrogate Court) 38 Misc. (N.Y.) 394, an outlay of \$490 for a casket and box out of an estate of six or seven thousand dollars, was held unreasonable, and the administrator was only allowed \$175 therefor.

In *Matter of Ogden*, 41 Misc. (N.Y.) 158, a charge of \$495 was allowed out of a personal estate of about \$40,000.

In *Howard's Estate*, 27 Pa. Co. Ct. 608, out of an estate of \$2,800, \$800 was allowed, there being no known heirs or unpaid creditors, the funeral being large and the necessary expenses considerable.

Where the estate was \$2,842, and the next of kin not near relatives, the Court refused to disturb an allowance of \$200 for undertaker's fees, in addition to \$58 for a burial lot and church services, and \$30 for carriages. In *re Campbell's Estate*, 24 Pa. Co. Ct. 480.

Where the deceased had no relatives in the city where he had lived, and for a number of years had been janitor in railroad offices, and his associates were generally labouring men, and his estate less than \$5,000, an allowance of \$455 to the undertaker for funeral expenses charged at \$526, was held to be excessive. *Foley v. Broeksmit*, 93 N. W. 344.

An administrator paying doctor's bills and funeral expenses of an adult child of the intestate cannot be allowed therefor out of the estate, though the child was an invalid and lived with the intestate's family. He may have a charge on the child's distributive share of the estate, but it is not funeral expenses of the estate. In *re Murphy's Estate*, 30 Wash. 9, 70 P. 109.

The law casts upon a husband the duty of burying his wife, but he is entitled to retain the sums expended in her funeral out of her separate estate as against creditors. In *re McMyn*, 33 Ch. D. 575. This case was not followed in Manitoba, where it was held that a husband cannot recover from his wife's estate moneys disbursed for the expense of her funeral unless she

has charged them by will upon her estate, or unless there is some statute making them a charge upon her separate estate. *Re Montgomery, Lumbert v. Montgomery*, 20 Man. R. 44, 17 W. L. R. 77.

But in *Re Gibbon*, 31 O. R. 252, Rose, J., followed *Re McMyn*. He said: "I see no reason why, when a married woman dies seized of separate estate, that estate should not be charged with the burthen of her funeral expenses, as well as where a man dies leaving an estate." This is the law in New York. *Pache v. Oppenheim*, 93 App. Div. 221; *Re Very's Estate*, 53 N. Y. Supp. 289; and in New Jersey: *Doll v. Cash*, 61 N. J. Eq. 108.

Where the wife has no separate estate the estate of her husband is liable for her funeral expenses, though at the time of her death she is living apart from him and has separate maintenance. *Bertie v. Chesterfield*, 9 Mod. 31.

In Indiana it was held that the funeral expenses of a deceased minor are not a charge against the infant's estate where he leaves a father able to pay them. *Rowe v. Raper*, 36 C. L. J. 1. See also *Blair v. Robinson*, 108 Pa. St. 249; *Sullivan v. Horner*, 41 N. J. Eq. 299. Where the parent has no estate the estate of the infant is liable for its funeral expenses.

Funeral expenses are not maintenance. Where a widow was given a certain yearly sum for maintenance, it was held her funeral expenses must be paid out of her own estate and not out of that of her husband. *Re Swayze*, 3 O. W. N. 621.

Expenses for a cemetery lot and a monument were held not to be funeral expenses within the meaning of a statute limiting funeral expenses to \$300. *Sinnott v. Kenady*, 27 Wash. L. Rep. 82, 14 App. D. C. 1. This decision appears to have been based on the statute mentioned. Apart from the statute, the decisions in other States of the Union are to the contrary.

In *Birkholm v. Wardell*, 42 N. J. Eq. 337, it was held that the cost of a burial lot is allowable as an item of

funeral expense, if reasonable in amount, regard being had to all the circumstances.

In *Clemes v. Fox*, 6 Colo. App. 377, it was said: "The right to purchase a lot in which to bury a deceased person rests on very similar principles to those which control the administrator's right to pay funeral charges and the expenses which are immediately attendant after the death and burial."

Where the testator had in his lifetime purchased a burial lot, credit for the expense of a lot in another place was not allowed. *Matter of Woodbury* (Surrogate Court), 40 Misc. N. Y. 143.

In *Tuttle v. Robinson*, 33 N. H. 104, and *Borclay's Estate*, 11 Phila. (Pa.) 123, the cost of improving a burial lot was not allowed. But in *Allen v. Allen*, 3 Dem. (N.Y.) it was held that where the burial place had become undesirable, an administrator should be allowed credit for the reasonable expense of disintering the body of the deceased and reburying it in another place. But not where the place of burial was suitable and had been selected by the deceased. *Watkins v. Romine*, 106 Ind. 378. And in *Matter of Furniss*, 86 N. Y. App. Div. 96, a credit of \$50 expended by executors for the perpetual care of the cemetery lot in which the deceased was buried was allowed.

A reasonable amount for services and expenses incurred in transporting the body of the deceased from a foreign country, where he died, is properly payable out of the estate. *Re Parry's Estate*, 41 Atl. R. 384. An allowance of \$650 for funeral expenses incurred in the transportation of the bodies of the deceased and his wife from Texas to New York, and their burial, was held not an unreasonable allowance. *Sullivan v. Hanner*, 41 N. J. Eq. 299. And in *Jennison v. Hapgood*, 10 Pick. (Mass.) 77, the travelling expenses of the family going to the place where the deceased was stricken with his last illness, were allowed.

An executor or administrator will not be allowed for his personal expenses, or for his time, in attending the funeral. *Lund v. Lund*, 41 N. H. 355; nor for the

sums paid to an organization, of which the deceased was a member, for parading at the funeral, where it did not appear that such organization required any payment for parading on such occasions. *Matter of Reynolds*, 124 N. Y. 388; nor for the costs of a portrait of the deceased painted after his death. *McGlinsey's Appeal*, 14 S. & R. (Pa.) 64. But religious ceremonies, when in accordance with the faith of the deceased and the custom of the family, are proper, and the expenses of them, if reasonable, will be allowed. 11 Am. & Eng. Ency. 1265.

On the same principle a reasonable sum expended for flowers is a proper charge against the estate. *O'Reilly v. Kelly*, 22 R. L. 151; 84 Am. St. Rep. 833. A suit of clothes for burial was allowed in *Steger v. Friczel*, 2 Tenn. 369. Carriage hire for the funeral, if reasonable, is proper. *McDonald v. McWhorter*, 44 Miss. 124.

The cost of a dinner may be allowed where necessary for friends and relatives coming from a distance; but not otherwise where the credit is objected to, though customary at country funerals. *Bard's Estate*, 13 Pa. Dist. 552.

One of the frequent items of disbursements in the accounts of executors and administrators is that of merchants' accounts for mourning goods for the widow and children of the deceased. In *Johnson v. Baker*, 2 C. & P. 207, 31 R. R. 663, it was held that the costs of mourning goods is not funeral expenses and cannot be claimed against the estate by the executor if he gives the order for it. In *Paice v. Canterbury*, 14 Ves. 364, a payment for mourning rings was allowed, but this appears to have been because of the discretion given by the will to the executors.

On the other hand, in *Pitt v. Pitt*, 2 Cas. temp. Lee, 508, Sir George Lee allowed a widow for her mourning in her account, as administratrix, in the Ecclesiastical Court.

The American cases favour reasonable payments for mourning. * Mourning apparel for the family is

generally allowed as an item of the funeral expenses, because custom requires mourning to be worn at funerals as a mark of proper respect for the dead, and providing such apparel may be considered as a necessary part of the preparation for the funeral, but there are cases to the contrary." 11 Am. & Eng. Ency. of Law, 1264.

"The wearing of suitable mourning apparel is commonly regarded not only as proper, but almost indispensable mark of affection and evidence of grief; the distribution of a decedent's estate among his next of kin without providing therefrom for the usual and conventional ceremonies in memory of the dead would seem not only parsimonious, but utterly repugnant to one's conception of justice and propriety." *Matter of Wachter*, 16 Misc. Rep. (N.Y. Surrogate) 137.

Charges for mere kindly offices, or for use of one's house for funeral services, if by a relative, are looked upon with disfavour. *Hewitt v. Bronson*, 5 Daly (N.Y.) 1; *McHugh's Estate*, 152 Pa. St. 422.

CHAPTER XIII.

TESTAMENTARY EXPENSES.

Testamentary expenses, Administration expenses and Executorship expenses are synonymous terms. "I cannot distinguish between 'executorship expenses' and 'testamentary expenses.' As I understand the words 'executorship expenses,' they are the expenses incident to the proper performance of the duty of the executor in the same way as testamentary expenses are, neither more or less." Per Jessel, M.R., *Sharp v. Lush*, 10 Ch. D. 470.

The term "executorship expenses" in a will means expenses incident to the proper performance of the

duty of an executor, and includes costs incurred by executors in obtaining the advice of solicitors and counsel as to the distribution of their testator's estate; also the costs of the executors and other parties in an action, whether instituted by the executors themselves, or by the beneficiary, for the administration of the estate; also the testator's funeral expenses; also expenses incurred by the executors for the protection of specific legacies, e.g., for warehousing furniture specifically bequeathed pending the distribution of the assets, and payments by the executors in discharge of debts falling due from the testator's estate after his death, e.g., rent due after the testator's death for a house of which he was tenant from year to year. *Wms. Exors.* 851.

The term may be extended to expenses of administration under an intestacy. *In re Clemon, Yeo v. Clemon* (1900), 2 Ch. 182. These expenses are a first charge upon the estate, whether the estate is administered in or out of the Court. *Loomes v. Stoherd*, 1 S. & S. 458.

Testamentary expenses do not include succession duties. Such duties are neither debts of the deceased, nor testamentary expenses. *Re Bolster* (1905), 10 O. L. R. 591; *Re Holland* (1902), 3 O. L. R. 406; *Manning v. Robinson*, 29 Ont. R. 483; *Re Watkins*, 12 B. C. R. 97.

The plaintiff's costs of unsuccessfully impeaching the validity of a will are not "testamentary expenses." In *Re Prince, Godwin v. Prince* (1898), 2 Ch. 225. But the costs of executors in defending such an action, and the costs of proving a will in solemn form, come within the term. *Ib.*

The costs of a special case to obtain the opinion of the Court on the true construction of the will were held not to be testamentary expenses within a provision of the will directing such expenses to be paid out of a specific fund. *Gilbertson v. Gilbertson*, 34 Beav. 354, 145 R. R. 545. But testamentary expenses include costs incurred in administration proceedings. *Penny v. Penny* (1879), 11 Ch. D. 440. And where a testator

directs that a particular fund is to be charged with the payment of his testamentary expenses that fund must bear the costs of an administration action. *Miles v. Harrison*, 1 L. R. 9 Ch. 316, 323.

The costs of raising a fund, including counsel fees, auctioneer's charges, commissions, etc., fall upon the fund and are not chargeable as costs of administration. *Teaf's Estate*, 7 Pa. Co. Ct. 463.

A direction in a will for payment of "testamentary expenses" out of the estate is not sufficient to entitle a specific devisee to be relieved at the expense of the estate of payment of any succession duty to which the devise to him is subject. *Re Cust*, 18 D. L. R. 647, 29 W. L. R. 716.

It is the duty of executors to get in property specifically bequeathed at the expense of the general estate. In *Perry v. Meddowcroft*, 4 Beny. 197, 55 R. R. 49, the executors had incurred expenses in getting in some costs due to the testator, these costs having been specifically bequeathed. Lord Langdale, M.R., said: "I consider it part of the duty of executors to get in all the testator's estate, whether specifically bequeathed or otherwise, and I know of no instance in which the expenses have not been paid out of the general estate as part of the expenses of administration."

A claim of an administrator whose appointment had been revoked, for reimbursement of moneys expended and services rendered in good faith pursuant to his appointment, were allowed as a part of the expenses of administration in *Brown v. McGee*, 117 Wis. 389.

Credit will not be allowed to an executor for expenditures made in connection with a contest over a will which is still pending, as the liability for such costs cannot be fixed until the contest is determined. *Tilley's Estate*, 11 Pa. Co. Ct. 625.

The expenses of an heir, incurred after an administrator is appointed, in hunting up other heirs or next of kin, are not testamentary expenses. *In re Glynn*, 57 Minn. 21.

CHAPTER XIV.

SUCCESSION DUTY.

If the estate of the deceased is liable to succession duty the personal representatives must ascertain and pay this duty before the payment of legacies or distribution. The Succession Duty Act, and the Rules and Regulations under the remainder, will be found in the Appendix hereto.

In *Woodruff v. Attorney-General for Ontario* (1908), A. C. 508, the Privy Council held that it is *ultra vires* of the Legislature of any province to tax property not within the province. "The powers of the Provincial Legislature being strictly limited to direct taxation within the province, any attempt to levy a tax on property locally situated outside the province is beyond their competence." In this case the property in dispute consisted of a quantity of debentures of municipal corporations in the United States, which a testator (a resident of Ontario) had always left in the possession of his agents in the United States.

Where the assets are debts the situs of such assets is not always an easy question to determine. In *Treasurer of Ontario v. Patten* (1910), 22 O. L. R. 184, the deceased resided in Windsor, Ontario, and at the time of his decease had a number of mortgages upon real estate in Michigan, executed by mortgagors who were residents of Michigan. At the time of his death the mortgage deeds were in the possession of the deceased in Windsor. It was held that, by the artificial rule of law, these mortgages were *bona notabilia* in Ontario, and as such were comprised in the properties held by the personal representatives upon his application for letters in Ontario. Had the mortgage deeds been located in Michigan at the time of the testator's

death it is quite probable the rule laid down in the *Woodruff Case* would have prevailed.

In *Hope's Case* (1891), A. C. 476, it was held that the locality of a specialty debt is attributable to the place where the deed is found at the time of the creditor's death; and it was said that the locality of a simple contract debt is attributable to the place of residence of the debtor. A mortgage debt being a specialty debt comes within the rule laid down in *Hope's Case*. See also *Re Fisher*, 7 O. W. N. 754, where a testator died in Ontario, having mortgages on property in British Columbia. At his death the mortgage deeds were in Toronto. His estate was called upon to pay succession duty in British Columbia, but it was held this did not relieve the estate from paying duty in Ontario.

Property which can only be administered within Ontario is properly situated within the province. *Attorney-General v. Newman*, 31 Ont. R. 340.

Life insurance, payable by the policy to the deceased's wife, forms a part of the "aggregate value" of the estate for determining the amount of the succession duty, although the amount of the insurance money is itself exempt from duty. *In re Shambrook Estate* (1908), 44 C. L. J. 461; 28 C. L. T. 575.

In establishing the "aggregate value" of the property for succession duty purposes, the debts due by the deceased should be deducted. *Receiver-General of New Brunswick v. Hayward*, 35 N. B. R. 453. The case of *Attorney-General for Ontario v. Lee* (1905), 9 O. L. R. 9, is no longer applicable. Section 4 of the Act provides that an allowance shall be made "for reasonable funeral expenses, debts and encumbrances and Surrogate Court fees (not including solicitor's charges)" in determining the dutiable value of the property.

Money on deposit in a branch of a bank in the province where the deceased resided is liable to succession duty, although the head office of the bank is out of the province. *The King v. Lovitt*, 1 E. L. R. 513.

In England there is a definite meaning attached to the expression "legacy duty"; but in Ontario there is

only the one inheritance tax. The statute calls this "succession duty." It is a duty imposed upon all property devolving upon death; and it is a tax which has to be borne by the legatee, unless the will contains some provision casting the burden upon the residuary estate. Where a testatrix, domiciled in Ontario, and speaking with reference to a bequest within Ontario, directs that it shall be free from "legacy duty," this means succession duty, which is the only legacy duty known to Ontario law. *In re Gwynne*, 3 O. W. N. 1428.

Succession duty does not come within the description either of a debt or a part of the testamentary expenses. It cannot be a debt of the testator, for it does not arise as a liability until after his death. It is not testamentary expenses, because it is not payable upon the grant of probate or administration. A special direction in a will to pay the testator's debts does not operate to make the duty a charge on the residue. *Re Bolster* (1905), 10 O. L. R. 591; *Re Holland* (1902), 3 O. L. R. 406; *Re Cust*, 29 W. L. R. 716.

Succession duty on the amount of the legacies and the value of the real estate devised, is properly deducted from the legacies or payable by the devisees, and should not be paid out of the residue, and the personal representatives have no discretion to pay such duty out of the residue. *Kennedy v. Protestant Orphans Home*, 25 Ont. R. 235; *Manning v. Robinson*, 29 Ont. R. 483; *Ross v. The Queen*, 32 Ont. R. 143; *Re Watkins*, 12 B. C. R. 97; *Re Sharp* (1906), 1 Ch. 793.

A testator possesses the general power to relieve the legatees and devisees from the payment of succession duty by throwing it on the residue of the estate, where it is sufficient to make payment, but an intention that a devise or bequest shall be "free" of the tax as between the estate and the legatee or devisee must clearly appear. A mere declaration that it is to be clear of all charges or incumbrances or other legal demands is not sufficient. *Dos Pasos on the Law of Collateral Inheritance*, 210.

In New Brunswick it was held that legacies given to executors in lieu of commission were not liable to succession duty. *In re Chubb*, 32 C. L. J. 294. But it would appear such legacies would be liable to pay duty in Ontario. See sec. 4 (d).

In a very recent case it was held, following *In re Turnbull* (1905), 1 Ch. 726, that where a legacy is given "free of all duty," that the legacy duty was payable out of the general estate, but that the operation of the gift must be determined with reference to the duties imposed in respect of the legacy *at the date of the death of the testator*, and ought not to be extended to duties created or imposed by the legislature subsequent to that date. *In re Snape, Elam v. Phillips* (1915), 2 Ch. 179.

CHAPTER XV.

TAXES AND INSURANCE.

The taxes upon any land are a special lien on the land in priority to any other incumbrances. Sec. 94, The Assessment Act.

In British Columbia it was held that where a testator allowed municipal taxes to accumulate on certain lands and then devised these lands, and by his will directed his executors to pay his debts out of a certain fund, that these arrears were payable out of the fund; that to allow taxes to fall into arrears does not charge the land by way of mortgage so as to bring it within the operation of Locke King's Act (see sec. 38, ch. 120, R. S. O. 1914). *Re Watkins*, 12 B. C. R. 97. This is not the law in Ontario. In *Mackay v. Mackay*, 4 O. W. N. 300, the Court held the devisees took the land with the burden of the accumulation of taxes. The report of the case does not clearly shew the facts, but they were the same as in *Re Watkins*.

The person entitled to possession is the person to pay the taxes yearly chargeable on the property, and the fund out of which the taxes are ordinarily payable is the rents of the land. *Fountainaine v. Pellett*, 1 Ves. Jr. 337.

The charge of taxes is one of the things which should be paid by the tenant for life, so as to protect the property for the remainderman. As between him and the remainderman the Court will not allow him to receive rents from part of the property, while he allows taxes to accumulate on another part. *Re Denison*, 24 Ont. R. 197. See also *In re Cameron* (1901), 2 O. L. R. 756. And see *post*, under Life-Tenant and Remainderman.

The legal presumption is that personal property belonging to the estate is, during the settlement of the estate, at the place where the deceased died. As between the administrator or executor and those beneficially entitled to the estate, it is taxable in the hands of the former so long as the estate is in process of settlement and before distribution; but when there is no further need of an administrator or executor, and the distributee or beneficiary can legally demand his share, the property is no longer taxable to the personal representative. 27 Am. & Eng. Ency. 653.

If an executor neglects to pay taxes which it is his duty to pay, he is responsible for any loss that may result from his neglect. *Re Harteman*, 73 Cal. 545; *Stubbs v. Stubbs*, 4 Redf. (N.V.), 170; but the duty to pay taxes and the corresponding liability for neglect to do so, depends on whether the executor has, or ought to have, money with which to do it. *Thompson v. Thompson*, 77 Ga. 692.

A testator appointed his wife executor and devised to her the use of his dwelling house for life, directing that it should be kept in repair out of his estate. It was held she was not entitled to charge the estate for taxes assessed on the house when in her possession under the will. *Wiggen v. Swett*, 6 Mete. (Ky.), 194.

Section 23 of The Trustee Act gives a trustee power to insure any buildings of the trust estate and to pay the premiums for such insurance out of the income without the consent of the person entitled to the income. The section does not apply to any property which a trustee is bound forthwith to convey absolutely to any beneficiary upon being requested to do so.

Prior to this enactment a trustee could not insure the trust property without the consent of the tenant for life. Lewin on Trusts, 8th ed. 580.

It has been held that a trustee is not bound to insure the trust property, and not chargeable with neglect in case of a loss by fire. *Bailey v. Gould*, 4 Y. & C. Ex. 221; *Fry v. Fry*, 27 Beav. 146; 122 R. R. 354.

The American authorities seem to hold that the failure to keep trust property insured is not consistent with ordinary care in the management of the trust estate, and that the trustee is bound to take this precaution against loss. Having regard to the almost universal practice among business men, in our day, this would seem to be the prudent rule. The trend of modern English text writers is more in accordance with the American decisions than with the older English cases. In Beven on Negligence, it is said:—"The question seems really to turn on what, in the existing state of opinion, and with reference to contemporary modes of life, is the reasonable thing to do; and whatever may have been the case in the year 1840, it would be a hard saying at the present day, and with the immensely diminished rate of insurance, to affirm that a prudent business man would not insure his property," p. 1490.

In *Henderson Trust Co. v. Stuart*, 108 Ky. 167, it is said that a failure to insure is not necessarily such negligence as, in case of loss, will render the personal representative liable for its value, but the liability for such failure is a question to be determined from the facts of each particular case; the cost of insurance, value of the property, its liability to destruction by

fire, and whether or not the representative has money in his hands that could be used for the purpose, are the cardinal elements to be considered. Where the property is already insured the failure of the executor to take out a vacancy permit on its becoming unoccupied is such negligence in the care of the property as will make him liable for the injury resulting therefrom.

Trustees who failed to keep alive policies of life insurance have been held liable to the beneficiaries. *Garner v. Moore*, 24 L.J. Ch. 687; but only if they have funds in hand, or can procure funds to pay the premiums. *Hobday v. Peters*, 28 Beav. 603, 126 R. R. 262.

A trustee insuring trust property and receiving rebates from the insurance company with whom he effects the risk, has no right to appropriate these rebates to his own use; and this notwithstanding that the estate is not charged with more than it would have had to pay if the rebates had not been allowed to the trustee. *In re Wilson and Toronto General Trusts Corporation* (1908), 15 O. L. R. 614.

Premiums paid for insurance on personal property will be allowed as a disbursement for the protection and preservation of the estate. *Cornwell v. Deck*, 2 Redf. (N.Y.), 87.

"I do not think the tenant for life is bound to keep the furniture insured; in point of fact she has no interest in the furniture except to use it. If she does not insure the furniture and it be burnt, she can no longer enjoy it; but I think she, as executrix and trustee, ought to insure it at the expense and for the benefit of the estate; that is because the furniture belongs, subject to the tenancy for life, to the estate." Per North, J., *In re Betty* (1899), 1 Ch. 821, 829.

CHAPTER XVI.

HOUSEHOLD EXPENSES.

Executors must be allowed a reasonable time for breaking up the testator's domestic establishment and discharging his servants. In *Field v. Peckett*, 29 Beav. 576; 131 R. R. 721, the matter was discussed by the Master of the Rolls. In that case the testator left a large estate and had twenty-one servants. The household establishment was continued for two months and an expense of 402 pounds incurred. Sir John Romilly said: "With reference to the housekeeping it is a very trifling matter, and I will mention to what extent I think it is to be allowed. There can be no question that some little time must be allowed to executors to look about them and to consider what is to be done. An executor is not, the moment he hears that his testator is dead, to discharge all the servants, by giving them a month's wages, but he must be allowed some reasonable time for that purpose, and the only question really is, whether it was necessary to keep them there for two months, because, before that time, and probably in the course of a fortnight or three weeks, he would have known how many servants were required, and their board would not have been the same, though their wages might have been. The expense of housekeeping for the two months was a considerable amount, and if all the servants were not really required, he might have discharged those who were not required upon giving them a month's wages, and have thus saved the expense of their board." In the event the whole sum was allowed the executors.

In this connection it may be proper to refer to the widow's right to quarantine, which is thus stated in an old authority:—"Quarantine is where a man dyeth seized of a manor-place and other lands, whereof the wife ought to be endowed; then the woman may abide

in the manor-place and there live of the store and profits thereof the space of forty days, within which time her dower shall be assigned." *In re Bennett*, 11 C. L. T. 305. See also sec. 2 of The Dower Act.

It is a right to reside in the dwelling house concurrently with the heir, and to receive her reasonable maintenance during forty days after her husband's death; but she is not entitled to possess any portion of the premises beyond the dwelling house. *Callaghan v. Callaghan*, 1 C. P. 348.

Quarantine is not merely a personal right. The widow is entitled to have a reasonable and proper attendance and companionship. But if the widow marry within the forty days she loses her quarantine. *Lucas v. Knox*, 3 O. R. 453. But she cannot assign her right. *Norton v. Norton*, 94 Ala. 481; and her privilege dies with her. *Clancy v. Stephens*, 92 Ala. 577.

On the administration of an estate the widow claimed to be relieved from accounting for certain quantities of wheat, potatoes, pork, apples, pickles, preserves and firewood—all of the value of \$31.58—used by her for her maintenance on the farm of the testator during the forty days, and it was held she was not chargeable therewith. *Re Bennett, supra*.

Where a farm was devised to the widow for life, and at the time of the testator's death a quantity of grain was sown in the ground, it was held that the widow and not the executors was entitled to the crops. *Cudney v. Cudney*, 21 Gr. 153.

In dealing with the question of assets, *ante*, it was pointed out that the widow has a statutory title to her husband's exemptions; and under Funeral Expenses the decisions relating to the expenses incurred for mourning are considered.

Where a widow is entitled to dower out of the lands of her deceased husband the personal representative has power to compromise the same for a cash sum under section 52 of The Trustee Act. *Re McIntyre* (1904), 7 O. L. R. 548.

In general, the right extends only to the house and land of which the widow is dowable. *Callahan v. Nelson*, 128 Ala. 671; and in which the deceased died at the time of his death. *King v. King*, 155 Mo. 406; but it is not necessary that the widow should have resided in the mansion-house at the time of her husband's death, *King v. King, supra*. Where a portion of a building was rented as a store and the remainder occupied as a dwelling, it was held the widow was not entitled to remain in possession of the rented portion. *Davis v. Lowden*, 56 N. J. Eq. 126. Nor does the privilege extend to mortgaged premises as against the claim of the mortgagee. *Young v. Estes*, 59 Me. 441.

It has been held that if the executor or administrator rents the premises which is subject to the widow's quarantine, she is entitled to the rents and profits for the period she is entitled to the occupation thereof. *Reeves v. Brooks*, 80 Ala. 26; *Orrick v. Pratt*, 34 Mo. 226; *Conger v. Attwood*, 28 Oh. St. 134.

CHAPTER XVII.

TOMBSTONE.

“Upon the general question whether an executor procuring a gravestone or slab to the memory of his testator, suitable to his degree and estate, can charge the same against his estate, I do not think there can be much doubt. The charges attending a funeral are allowed to an executor (except as against creditors) even where the expenses are considerable, provided they are suitable to the degree and estate of the deceased, and they are allowed, not as being necessary, but because they are so suitable. They are sanctioned as customary marks of respect, as proper to be allowed, because they are so; and it does appear to me that the

principle upon which such expenses are allowed applies with still more force and with better reason to an expense incurred, if not immoderate, for a permanent memorial of the deceased. Not only is it usual and considered a proper mark of respect, and its omission in some degree a reproach to survivors, but it is useful as marking the place of burial and as furnishing evidence of pedigree. But if it be proper and usual, that I conceive is sufficient to authorize an executor in incurring the expense, and therefore in being allowed for it out of the estate. In Roger's Ecclesiastical Law, citing 3 Inst. 102, it is said 'concerning the building or erection of tombs, sepulchres or monuments for the deceased in church, chancel, common chapel, or churchyard, it is lawful, for it is the last act of charity that can be done for the deceased;' and in 2nd Comyn's Digest, under the head 'tomb, monument, etc.,' it is said, 'So an heir or executor may erect or set up a tombstone or other monument in a convenient place within the church or churchyard, for the honour of his ancestor there buried.' " Per Spragge, C., *Menzies v. Ridley*, 2 Gr. 544.

"The remaining item is the charge for a gravestone. No creditors intervene. Such an expense was allowed in *Menzies v. Ridley*, as a charge attending a funeral, not as necessary, but as suitable, as a customary mark of respect, and proper to be allowed, because it is so. The whole reasoning in that case proceeds on the ground of their being properly funeral expenses, and not merely charges against the estate, which will be allowed to an executor in passing his accounts. See *Wood v. Vanderburg*, 6 Paige R. 277, 288." Per Proudfoot, V. C., *Smith v. Rose*, 24 Gr. 440.

A testator provided for "a suitable tablet" over his grave "not to exceed \$1,500," and also for tablets or stones over the graves of his deceased wives, with no limit as to the costs of these. He died worth \$200,000, and the executors removed the remains of the deceased's three wives to the same burial place as that of the testator and built one monument in respect of

the whole four at a cost of \$3,000. *Held*, not an improper expenditure. *Archer v. Severn*, 13 O. R. 316.

In *Sinnott v. Kenaday*, 14 App. Cas. 1 (D.C.), \$575 for a tombstone out of an estate of \$36,000 going to collateral heirs was upheld as reasonable.

In *Conway's Estate*, 10 Pa. Dist. 509, \$700 out of an estate of \$25,000 going to collateral heirs, was held not to be an extravagant allowance.

But \$1,050 for a monument and the expenses incidental thereto, where the value of the estate was only \$2,500, was held to be unreasonable. *Matter of Smith*, 75 N. Y. App. Div. 339; 78 N. Y. S. 130.

By the will the executor was directed to erect certain tombstones over the graves of the deceased and certain members of his family. He also made several bequests of specific legacies. To have carried out the direction as to the tombstones would have exhausted the estate and left an insufficient amount to pay the legacies. *Held*, that as the direction to erect the tombstones if carried out would probably exhaust the estate and prevent the executor paying any legacies, and as none of the next of kin insisted on such direction being carried out, the executor might disregard such direction. *In re Thomas L. Carley*, deceased, 4 S. L. R. 280.

In two American Courts it has been held that where the widow of the deceased ordered and paid for a tombstone, if the claim is reasonable and one which the administrator could have contracted, she was entitled to be subrogated to the right against the estate of the person who furnished the monument. *Pease v. Christman*, 158 Ind. 642; *Hector v. Lavery*, 51 N. Y. App. Div. 74:

CHAPTER XVIII.

REPAIRS AND IMPROVEMENTS.

It is difficult to say just how far an executor or administrator is justified in expending money in repairs to the trust property. Unless there is express provision in the will it is clear he is not justified in making extensive repairs without the direction of the Court. He is bound to see that trust premises do not fall into decay for want of repair. But when the property has fallen into bad repair, the question will of course arise whether it is worth while to do the repairs. Where it is a question between a tenant for life and remainderman, the latter is not entitled to throw the burthen of the repairs on the tenant for life by paying for them out of the rents. *In re Hotchkiss*, 32 Ch. D. 408.

Where trustees were authorized to make repairs to the dwelling house it was held they were to keep it in habitable state, but not to make ornamental repairs. *Macdaren v. Stainton*, cited Lewin on Trusts, 8th ed. 576. And a power to repair does not give authority to rebuild. *Bleazard v. Whalley*, 2 Eq. Rep. 1093.

Where the mansion-house burned down and the trustee applied a large sum, in addition to the insurance monies, in restoring it, the Court held it had no power to order a sale or mortgage to recoup the trustee; but it appearing that the estate had benefited to the full amount of certain funds in Court, which had arisen from a sale of a part of the settled estates, Kay, J., sanctioned the application of those funds towards recouping the trustee, on the ground that the trustee having *bona fide* expended money for building on the estate, under a reasonable expectation that the Court would sanction the expenditure, and having improved the estate to the full amount of the funds in

Court, might be recouped the amount so expended. *Jesse v. Lloyd*, 48 L. T. N. S. 656.

If the trust be to make repairs out of *rents*, and the trustees borrow money to make the repairs, and then repay themselves out of the rents, they will not be allowed the interest on the money borrowed, for the trust was to apply the rents after they had accrued. *Fazakerley v. Culshaw*, 19 W. R. 793.

That it is not always safe to anticipate the protection of the Court in making expenditures is shewn by *Tyse v. Foster*, L. R. 8 Ch. App. 309. There the testator devised his estate upon trust for sale. His executors were advised that a few acres might be sold more advantageously if their value was developed by building a villa thereon. They accordingly built one at a cost of £1,600. On passing the accounts, Bacon, V.C., disallowed the expenditure, but on appeal it was held that, as the executors had, in the *bona fide* exercise of their judgment, expended this sum in improving the estate, they could, at most, only be disallowed the amount of loss (if any) occasioned to the estate by the expenditure.

In an earlier case a trustee was allowed for substantial improvements if the property sold for the original price, plus the costs of improvements. In *Ex p. Hughes*, 6 Ves. 617; 6 R. R. 1.

In *Beris v. Boulton*, 7 Gr. 39, it was held that where a trustee expends his money, and thereby increases the value of the estate, it would be inequitable to wrest it from him without re-paying the expenditure by which the estate has been substantially improved.

The widow of an intestate obtained letters of administration and remained in possession of the farm. From the rents and profits she spent a considerable sum in improvements on the farm. Spragge, V. C.: "The only point debated at the hearing was the plaintiff's claim for improvements. For the claim *Beris v. Boulton* was cited; but that case, and the cases upon the authority of which it was decided, were cases in which the question was, upon what terms the Court

would deprive parties defendants of the land upon which they had made improvements, in favour of an equity established by the plaintiff, and are not authorities for a direct claim for improvements in the shape in which it is made by the bill." And the widow was not allowed for the improvements. *Barry v. Brazil*, 11 Gr. 253.

An executrix, who had an annuity charged on the income of the testator's real and personal estate, expended money in good faith in improving the real estate, and in other unauthorized ways, and was in consequence found indebted to the estate. It was held that the expenditure in improvements should be allowed in reduction of her indebtedness, so far as the expenditure had enhanced the value of the estate and benefited those interested in it. *Morley v. Matthews*, 14 Gr. 551. See also *Smith v. Bonniesteel*, 13 Gr. at p. 35, where the same limited relief was given.

A tenant for life is not liable to repair, whether he be without impeachment of waste, or impeachable for waste. *Lausdowne v. Lausdowne*, 1 J. & W. 529; *Re Cartwright*, 41 Ch. D. 532. On the other hand, the life-tenant is not entitled to have repairs done at the expense of the estate. *Brunskill v. Caird*, L. R. 16 Eq. 493; nor is he entitled to a charge on the estate for repairs done by himself. *Hamier v. Tilsley*, Joh. 486. And it makes no difference from what cause the repairs are made necessary, or whether they are rendered necessary during the life tenancy or by dilapidations existing at the time the life-tenant comes to his estate. *Hibbert v. Cooke*, 1 Sim. & St. 552; *Re De Teissier* (1893), 1 Ch. 153.

When the estate is managed by trustees, ordinary current repairs are paid out of income; but if substantial repairs are necessary for the preservation of the property, the Court will, on the application of the trustees, allow the cost to be raised out of capital. *Re Hatchkys*, 32 Ch. D. 408, 415.

In *In re Freeman* (1898), 1 Ch. 28, trustees applied to the Court to determine how the costs of repairs

ought to be borne, the property being an estate occupied by a life tenant. North, J., said: "Then there is the question, what is to be done about the repairs? What was pointed out in *In re Hotchkys* as the right thing to be done is the right thing to be done here. The property ought to be kept in repair. As was pointed out there, it must be done by an equitable arrangement between the tenant for life and remainderman. I think the right thing to do in this case is this: That the money required for the repairs should be borne by capital; but of course the tenant for life will have to keep down the interest upon that capital. If the money is taken out of other personal estate, the tenant for life will get so much less income, because this investment will not produce income. If, on the other hand, the money is borrowed on mortgage for the purpose from some outside lender, the interest on the mortgage will have to be kept down by the income, and the tenant for life will have his or her income reduced by the provision which will have to be made to keep down the interest on the mortgage."

CHAPTER XIX.

MISCELLANEOUS ALLOWANCES.

No rule can be laid down which will catalogue or classify the various kinds of expenditures which will be allowed an executor or administrator. Much will depend upon the nature of the estate and upon the character of the services for which the charge is made. *Re Willard*, 139 Cal. 501. Those actual and necessary expenses for which an executor must be reimbursed are those which are contracted in good faith and with reasonable judgment, whether with or without the advice of counsel. *Re Stanton*, 41 Misc. (N.Y.) 278.

On the other hand credit will not be allowed for any disbursements unless they are necessary or proper to protect the estate or carry out the provisions of the will. *Johnson v. Henagan*, 11 S. Car. 93. On this principle credit will not be allowed for the costs of removing and renovating the tombstone of the deceased's parents. *Brantz v. Brantz*, 52 Md. 686; or for disbursements on account of an appeal which was not for the protection or benefit of the estate, but which was prosecuted by the administrator for his own benefit and to relieve himself from accounting for funds in his hands. *McCleland v. Bristow*, 9 Ind. App. 543.

If expenses have been unnecessarily incurred, credit will not be refused for that reason alone. The right to credit in such cases depends on the good faith and prudence of the executor, and the burden is on him to shew that he had good reason to believe at the time that the expenditures for which he claims credit were necessary for the benefit of the estate. *Robbins v. Wolcott*, 27 Conn. 234.

In *Chisholm v. Bernard*, 10 Gr. 479, a retaining fee paid to a solicitor was allowed, as it was not, in the circumstances of the case, an unreasonable disbursement for the executors to make in view of the trouble in administering the estate.

In *re Quin*, 1 Connoly (N.Y.), 381, it was held that where executors refused a reasonable price for land which they were directed by the will to sell, instead of selling it to the highest bidder as they should have done, they were not entitled to credit for the expenses of offering it for sale a second time, or for insurance and taxes accruing after the time when it was first offered for sale.

Expenses incurred by one of the next of kin in hunting up the others, though at the suggestion of the administrator, are not for the benefit of the estate, and therefore are not allowable as an expense of administration, *In re Glynn*, 57 Minn. 21; so too, fees paid by an executor to a surveyor for designating the lines

between parcels of land devised by metes and bounds will not be allowed. That is something that interests the devisees alone. *McGougan v. Hall*, 21 S. Car. 600.

In California it was held that an administrator was not entitled to an allowance for expenditures in having an examination made of a mine, in which the estate held stock, for the purpose of ascertaining its value. *In re Bell's Estate*, 79 P. 358, 145 Cal. 646; nor was he entitled to an allowance for money paid to a detective to watch the executors, who had been removed at his suit, because they had not turned over all the papers and he believed them dishonest. *Ib.*

The fact that the administrator is interested in the estate does not affect his right to credit for money necessarily expended in looking after the interest of the estate. *Williams v. Petticrew*, 62 Mo. 460. But the costs of insuring individual property of the executor which is security for a debt due from him to the estate, cannot be allowed as an item of administration expense. *Good's Estate*, 150 Pa. St. 307.

An administrator was allowed the cost of keeping a horse which could not be sold. *Branham v. Com.*, 7 Marsh (Ky.), 190. But the expense of maintaining the deceased's favorite horse as long as he lived, such expense not being provided for by the will, was disallowed, though it was the request of the testator. *Matter of Teyn*, 2 Redf. (N.Y.) 306.

Credit will be allowed for payments made to an auctioneer for his services in selling the property of the estate. *Pinckard v. Pinckard*, 24 Ala. 250; and to a broker in cases of sale requiring unusual exertion. *Ballentine's Estate*, Myr. Prob. (Cal.) 86. But not for money expended by the executor or administrator for ardent spirits used at an auction sale of the goods of the deceased, though it was shewn to be customary to furnish spirits on such occasions. *Griswold v. Chandler*, 5 N. H. 492.

The proper expenses for necessary advertisements will be allowed the executor or administrator. *Re Smith*, 1 Misc. (N. Y. Surr. Ct.) 269.

In New York it was held that where an executor removes from the State after undertaking the duties of his office, and afterwards comes into the State on the business of the estate, he is not entitled to credit for the travelling expenses so incurred. *Marsh v. Gilbert*, 2 Redf. 465; *Re Dunn*, 8 N. Y. St. Rep. 766; *Re Ingersoll*, 6 Dem. 184. But in *Ererts v. Ererts*, 62 Barb. (N.Y.) it was held that travelling expenses, including board, should be allowed to a non-resident executor who necessarily came into the State to prove the will.

An executor is entitled to credit for travelling expenses necessarily incurred in taking a journey to be examined as a witness in a suit brought by him to foreclose a mortgage held by the estate. *Elliot v. Lewis*, 3 Edw. Ch. (N.Y.) 40.

Unnecessary travelling expenses, as where nothing could be accomplished by the journey which could not have been done by correspondence, will not be allowed. *In re Barber*, 12 N. Y. Supp. 538.

Livery bills, when necessarily incurred and reasonable in amount, will be allowed as travelling expenses. *Re Ingersoll*, *supra*. But the use of the executor's horse and wagon will not be allowed for, because a sound policy forbids that he should make any profit out of his dealings with the estate, and he would be subject to the temptation of making more frequent journeys than are necessary if he were paid for the use of his horse. *Pullman v. Willets*, 4 Dem. (N.Y.) 536.

Office rent has been allowed as an expense of administration where it was just and equitable, and the circumstances of the estate were such as to require it. *Newell v. West*, 149 Mass. 520; *Bronson v. Bronson*, 48 How. Pr. (N.Y.) 481. In *Maffet's Estate*, 7 Kulp. (Pa.) 153, it was held proper for executors to employ a superintendent and furnish him with an office, where the estate was large and was composed of lands, coal mines and stocks.

The hire of a safe deposit box in which to store the papers of the estate is an expense incident to the performance of the duty of an executor to care for the

property of the deceased. *Hartson v. Eldon*, 58 N.J. Eq. 478.

In *Mecker v. Crawford*, 5 Redf. (N.Y.) 450, the estate amounted to more than a million dollars, invested in various securities, and it was held that the employment of a clerk at \$600 a year was calculated to be beneficial to the estate, and that the amount paid should be allowed as a reasonable charge. But the fact that the executors are busy men and have not as much time to give to the management of the estate as other individuals, cannot be permitted to affect the rule that executors must perform, within reasonable limits, the actual manual labour requisite to the due execution of the trust; nor can such rule be affected by the fact that the executors in employing a book-keeper and fixing his compensation acted precisely as they would have done in the management of their own affairs. *Re Harbeck*, 81 Hun. (N.Y.) 26.

An executor, in finishing the growing crops of the deceased, is not personally bound to discharge the duties of an overseer, but he may employ and pay out of the assets in his hands the necessary costs of an overseer as may be necessary for the completion and preservation of the crops. *Lee v. Lee*, 6 Gill & J. (Md.) 316; *Sullivan v. Tuck*, 1 Md. Ch. 65.

Vindication of the deceased's character is not a matter in regard to which the administrator may employ counsel at the expense of the estate. *Woodard v. Woodard*, 36 S. Car. 118. Nor will allowance be made for fees paid to counsel to prosecute a person charged with the murder of the deceased. *Lusk v. Anderson*, 1 Mete. (Ky.) 429.

Executors were allowed the amount paid by them on a mortgage on which the testator was not personally liable, notwithstanding that the property was finally lost to the estate and it received no benefits from the payments, where at the time of the payments it was held under an executory contract of sale, and the executors were justified in believing that the purchaser would fulfil his covenant, in which case the payments

would have benefited the estate. *Re Horsford*, 27 App. Div. 427, 50 N. Y. Supp. 550.

An executor retained in his hands funds that he might have distributed among the legatees. On the accounting it was contended he was not entitled to credit for income taxes paid on such funds. The Court, however, allowed the payments since it was presumed the funds would have been assessed to the legatees in their hands. *In re Sudds*, 66 N. Y. S. 231.

If a testamentary scheme of distribution involves the keeping of numerous complicated accounts, and extending over a considerable period, the administrator will be allowed the expense of a bookkeeper. *Merritt v. Merritt*, 161 N. Y. 634.

Money expended by a successful party in an action as to who should administer the estate cannot be allowed as a charge against the estate, as such action is personal between the two litigants. *Cole v. Cole* (Ch. App.), 43 S. W. 365.

CHAPTER XX.

RIGHT OF RETAINER.

In England an executor may pay one of several creditors of equal degree in preference to the others. So it is his privilege to retain for his own debt due to him from the deceased, in preference to all other creditors of equal degree. This is usually referred to as an executor's right of retainer. By section 53 of our Trustee Act, in case of deficiency of assets, all debts are to rank *pari passu*, including debts to the personal representative of the deceased. In *Clark v. Chamberlain*, 1 O. R. 135; 9 A. R. 273, it was held that the effect of this section is to disable an executor from giving a preference to one creditor over another: so that if he

pays one in full, the presumption is that he has sufficient funds to pay all the creditors in full.

In *Willis v. Willis*, 20 Gr. 396, the executor had paid out more than had come to his hands, and claimed to be reimbursed, but it was held that he could not by paying off creditors create a demand in his own favour that would give him a right of retainer in priority to other creditors, and that he was only entitled to be paid *pro rata*. See also *Re Ross*, 29 Gr. 385.

As an executor or administrator is not bound to set up the Statute of Limitations as a defence, it should seem that he may retain a debt due to himself though it may be more than six years old. *Stahlschmidt v. Lett*, 1 Sm. & G. 415; *In re Ackerman*, L. R. (1891), 3 Ch. 212. But as against an executor claiming as a creditor, another creditor has the right to set up the Statute of Limitations. *Re Ross*, 29 Gr. p. 391.

An executor or administrator cannot, however, retain a debt due to himself if it is such as he is prevented from enforcing by reason of the Statute of Frauds. *Re Rounson*, 29 Ch. D. 358.

The phrase "right of retainer" is sometimes used to denote the right which an executor or administrator has of retaining out of the share of a beneficiary a debt due by such beneficiary to the estate. This right is not one of "set-off" or "retainer" in the proper sense of these terms, but it is, viewed from the side of the beneficiary, his right to receive payment of the legacy, having regard to the amount of the debt due the testator's estate; and viewed on the side of the executor, his right to be paid out of the fund in hand. *Tillie v. Springer*, 21 O. R. 585, 588.

This right does not depend on the right of preference, and therefore has not been abolished by the provisions of The Trustee Act. The Devolution of Estates Act has rather enlarged it so that the executor can retain out of the proceeds of land. *Tillie v. Springer, supra*. Whether it would apply to the case of a specific devise is doubtful. In England it has been held not to apply. See *Re Taylor*, 1894, 1 Ch. 671. In

Ontario the doubt arises on the effect of The Devolution of Estates Act, which vests all the estate in the executor or administrator, and in this respect is different from the English law.

In the converse case, the benefit taken by a defaulting executor under a will can be retained to make good his default, whether that benefit came to him by original or derivative title. A testator appointed D. one of his executors, and gave a legacy of £2,000 to D.'s wife. The wife died without having been paid her legacy, and D. was her sole executor and legatee. On D.'s death it was found he had appropriated £215 of the testator's estate. It was held the surviving executor was entitled to retain the £215 from the wife's legacy. *In re Dacre, Whitaker v. Dacre* (1915), 2 Ch. 480.

CHAPTER XXI.

LEGACIES AND ANNUITIES.

For the convenience of the executor, in order that he may ascertain the debts and assets of the testator, he has one year from the death of the testator in which to pay legacies. An executor cannot be compelled to pay a legacy before the expiration of the year, notwithstanding a direction in the will that payment should be made sooner. There is, however, no rule which prevents an executor, if he thinks proper, paying legacies or handing over the residue within the period of one year. *Pearson v. Pearson*, 1 Sch. & Lef. 12; *Gartshore v. Charlie*, 10 Ves. 13; *Re Holland* (1902), 3 O. L. R. 406.

A bequest of an annuity, unless otherwise directed, commences from the death of the testator, and the first payment is paid at the end of the year from the testator's death. *Gibson v. Bott*, 7 Ves. 89, 96.

Where the annuity is payable monthly, the first payment is made at the end of a month after the testator's death. *Houghton v. Franklin*, 1 S. & S. 390.

But where an annuity was directed to be paid quarterly, the first payment to be made within eighteen months after the testator's death, it was held the annuity did not commence till fifteen months from the death of the testator. *Irvine v. Ironmonger*, 2 R. & My. 531.

Where the will directs an annuity to be purchased, the annuitant has a right to take its value in cash, instead of the annual sum, and should he die before the annuity is purchased his legal representatives are entitled to the sum which at his death would have purchased the annuity. *In re Ross* (1900), 1 Ch. 162; *Re Robbins* (1906), 2 Ch. 648. This is on the ground that the annuity is in the nature of a legacy and becomes vested at the death of the testator, and the subsequent death of the annuitant is immaterial. *Beeley v. Bishop*, 9 Ves. 6; *Fates v. Compton*, 2 P. Wms. 308; *Barnes v. Rowley*, 3 Ves. 305.

Where the testator directed his executors to invest in good securities such sum as would pay a certain annuity, and the income of the fund was insufficient to pay the annuity, it was held that the annuitant was entitled to be paid the deficiency out of the corpus or capital. *Anderson v. Dougall*, 15 Gr. 405.

Under the Apportionment Act (R. S. O. 1914, ch. 156), moneys payable as annuities are considered as accruing from day to day and are apportioned in respect of time accordingly. Sec. 4. And see *Cuthbert v. North American Life Assurance Co.*, 24 O. R. 511.

A statutory guardian is entitled to the possession of all the property in which the infant is interested, and for which by law, or express contract, or other provision, no other custody has been provided. Such a guardian is entitled to receive legacies given to infant legatees, and presently payable, and the receipt of the guardian is a good discharge to the executor. *Higgins v. Law*, 14 A. R. 383.

But where the legacies are not to be paid to the infants until they attain their majority the rule does not apply, because that is a clear indication that the executor was the party intended by the testator to act as trustee for the infants until they attained that age. *Ib.* 385; *Galbraith v. Duncombe*, 28 Gr. 27.

A guardian appointed by a foreign Court has no right to receive such legacies, even though the infants are residing within the jurisdiction of the country where the guardian is appointed. In such case the money should be paid into Court and not to the foreign guardian. *Flanders v. D'Evelyn*, 4 O. R. 704; *Re Lloyd* (1914), 31 O. L. R. 476.

In *re Sinclair, Allan v. Sinclair* (1897), 1 Ch. 924, the question to be determined was, what are the rights of an annuitant in the case of a deficiency of assets to meet the annuity. In *Seton on Judgments*, 5th ed., 1384, it is laid down: "Where assets are deficient an annuity should be valued, and abate proportionately, and the apportionment belongs to the annuitant absolutely; *Wroughton v. Colquhoun*, 1 D. G. & Sm. 357, unless given subject to condition; *Carr v. Ingleby*, 1 D. G. & Sm. 362." In the present case the annuity in question was given to the annuitant for life "or until the annuitant should do or suffer some act or thing whereby, or by means whereof, the said annuity, or any part thereof, if belonging to him absolutely, would become vested in or payable to some other person or persons, whichever should be the shorter period." The fund out of which the annuity was payable was deficient, and the annuity had been valued, and the amount of the valuation was represented by a sum in Court. The annuitant applied for payment out of the fund to him. Kekewich, J., with some hesitation made the order, refusing to follow *Carr v. Ingleby, supra*. It is to be noted that although the annuity was given until the happening of the event above mentioned, yet there was no gift over, and the covenantor's estate could have no claim on the fund. These circumstances appear to have weighed with the Court.

Where an annuity is charged upon both income and capital, and the income for any one year is insufficient to pay the annuity for that year, the capital cannot afterwards be recompensed for the deficiency out of the surplus income of any subsequent year. *In re Croxon, Ferrers v. Croxon*, (1915), 2 Ch. 290.

It is not necessary in all cases that pecuniary legacies or distributive shares should be paid in cash. Any mode of payment may be adopted with the consent of the legatee or heir. This is the general rule in regard to what constitutes payment. Thus the investment of money in the name of a legatee has been held a payment of the legacy, *pro tanto*, so as to vest the title in him and pass to him the right to the accruing interest. *Sullivan v. Winthrop*, 1 Summ. (U.S.) 1. So, too, a credit on a distributive share of the price of property purchased by the distributee at the administrator's sale is a valid payment. *Wilson v. Randall*, 37 Ala. 74; *In re Beverley* (1901), 1 Ch. 681; *Re Hall*, 87 L. T. N. S. 560, W. N. (1902) 208, reversed on other grounds (1903), 2 Ch. 226.

On the other hand it has been held that a distributive share was not paid merely by purchasing a bank draft for the amount and sending it to the party entitled, who proceeded with due diligence to collect it, but the bank failed in the meantime and the draft was not paid. *State v. Wagers*, 47 Mo. App. 431; or by the deposit of the amount of the share in a bank without notice to or the assent of the party entitled. *Scott v. Fox*, 14 Md. 388.

In *Durling v. Neigh*, 15 S. & R. (Pa.) 114, it was held that the personal responsibility of the executor was not substituted for that of the estate by the giving of the executor's notes for the legacy and the execution of a receipt for the notes as in full of all demands against the estate "when paid."

And the individual note of an administrator to the guardian of an infant for the amount of the infant's distributive share, payable to the guardian individually, cannot be claimed as a payment of such share. *Edwards v. Williams*, 39 S. Car. 86.

Where a testator takes shares in a company and specifically bequeaths such shares before they are fully paid up, any payments remaining due at or becoming due after his death, which are necessary to constitute him a complete shareholder, must be borne by his general estate; but if he was a complete shareholder at the time of his death, payment of calls made afterwards must be borne by the specific legatee. *Day v. Day*, 1 Dr. & Sm. 261, 127 R. R. 92.

Where an executor receives notice that a legatee has charged his legacy in favour of a stranger, or has assigned it for value, the executor is bound to withhold all further payments to the legatee, unless made with the consent of the mortgagee or assignee of the legacy. All rights of set-off and adjustment of equities between the executor already existing at the date of the notice have priority over the charge or assignment, and may properly be deducted from the amount of the legacy; but the executor can create no new charge or right of set-off after that time. *Stephens v. Venables*, 30 Beav. 625, 132 R. R. 442.

ABATEMENT OF LEGACIES.

If the estate is insufficient to pay the debts and all the legacies in full, the general legacies must abate in equal proportions. If there are specific and general legacies, generally speaking, nothing shall in such cases be abated from the specific legacies.

Where a legacy is given to an executor expressly as a compensation for his trouble, and there is a deficiency of assets, such a legacy does not abate with legacies which are mere bounties, even though the legacy somewhat exceeds what the executor would otherwise be entitled to demand. *Anderson v. Dougall*, 15 Gr. 405; *Hellem v. Serers*, 24 Gr. 320.

So a legacy given to a widow for the relinquishment of her dower. *Heath v. Dendy*, 1 Russ. 543; *Norcott v. Gordon*, 14 Sim. 258; *Becker v. Hammond*, 12 Gr. 485. The widow is treated as a purchaser of the legacy in giving up her dower, but that is hardly satisfactory as

a reason. There is really no other. *In re Wedmore* (1907), 2 Ch. 277; *Darves v. Bush*, 3 Young, 341. See however the judgment of Middleton, J., in *Re Rispin*, *post*, where he says it is based upon the doctrine of election.

But the right or interest must be subsisting at the time of the testator's death, and if there is no dower to be satisfied, the legacy will abate. *Darenhill v. Fletcher*, 1 Amb. 244; *Darves v. Bush*, *supra*; *In re Greenwood* (1892), 2 Ch. 295.

In both *Williams* and *Theobald* it is stated that legacies given in payment of debts do not abate with legacies given to mere volunteers. In the recent case of *In re Wedmore*, *supra*, Kekewich, J., seems to doubt that the cases relied on by these learned authors extend the rule to debts, and expressly decides that it did not extend to an ascertained debt. 'I have already referred to the case of *Darves v. Bush* as the only one that purports to extend it, but when you look into that decision it does not go so far. Lord Lyndhurst does not decide the point, and he expresses the opinion in language which entirely relieves me from treating it as a binding authority here. There the legacy was given in release of a right of account. There had been an account between the testator and a legatee, and the Court was satisfied that it was not worth while taking the account because nothing was due to the legatee, whose case fell through for that reason; and the Lord Chief Baron says: 'If no debt was due, and the release was required merely for the sake of peace, then, unquestionably, the legatee cannot be treated as a purchaser.' That is exactly on the same lines as the decision of Chitty, J., in *In re Greenwood*. And he goes on: 'If any debt were really due, then I am inclined to think that the present comes within the principle of those cases which have been decided.' He does not decide that it was; he only expresses an indication of his opinion. How can I bring a case of this kind within the rule? This is a legacy in satisfaction of an ascertained debt. There is no doubt that in one sense the

legatee may be considered a purchaser. If he elects to take under the will, he gives up the debt and takes the legacy, but still it is not at all like the case of a legatee taking a legacy in lieu of a right to dower out of land. We know precisely what the debt was— it was £1,000. We also know precisely what the legacy was—it was £3,000, payable to the same person; but it seems to my mind impossible to apply to that state of circumstances the considerations which apply to a case of dower. The legatee elects to take the larger sum and gives up the debt, and taking the larger sum the legatee takes it by way of bounty. She says, in effect, 'Rather than insist upon my covenant I will accept the testator's bounty.' I cannot see myself how legacies accepted in that way differ in any way from other general legacies which are mere bounties. In saying that I have practically decided a by-point which must not be overlooked, as it was argued, namely, that the legatee must be considered to have taken the £1,000 as debt and £2,000 only as bounty; but that distinction cannot be upheld. The debt was gone in exchange for the legacy, and the legatee takes the whole £3,000 as a legacy. The result is, no doubt, that she loses something out of the debt of £1,000. She might have avoided that by electing to claim against the will, but she claims under the will, and she takes the whole legacy subject to the usual rules of administration which affect all legacies."

The same point came before our own Courts recently in *Re Rispin* (1914), 6 O. W. N. 669. The testator gave a number of pecuniary legacies, one being a legacy of \$1,500 to Dr. T., who had been attending him during his last illness. This legacy was to be taken in satisfaction of the doctor's bill against the testator, which amounted to \$300. The estate proved insufficient to pay all the legacies in full. The Surrogate Judge declined to follow *In re Wedmore*, deeming it to be in conflict with the principles enunciated in a number of earlier cases. On appeal, Middleton, J., reversed the judgment of the Surrogate Judge. "With

all respect to those who entertain the contrary view, the decision in question commends itself to me. The law by which a legacy to a widow in lieu of dower is entitled to priority is now too well settled to admit of question. It is in truth based upon the doctrine of election. The testator desiring to dispose of property which is not his, namely, his wife's dower interest, in effect offers her a price which he is willing to pay for it. Before those claiming under his will can take a benefit under his will which deals with this property sought to be purchased from the widow, they must pay the price.

"This has no application whatever to the case of a creditor. The testator is not purchasing anything from him; and, although his failure to rank as a creditor may benefit the legatees, it cannot be said that any assets pass from him to the testator or his estate. He takes the legacy by the bounty of the testator. The testator has chosen to limit his bounty by directing that it is conditional upon the creditor waiving his claim as creditor. The bounty is so much the less, because part of the money received in truth represents a debt. The creditor should have the right, and no doubt has the right, to decline to receive the legacy upon these terms. He could then assert his claim, but I can conceive no foundation for the statement that because a debt, which may be trivial in amount, has to be forgiven as a condition of the receipt of the legacy, the legatee, therefore, acquires priority."

Re Rispin was affirmed 7 O. W. N. 507. Riddell, J., delivering the judgment of the full Court, said it was suggested that probably the right decision would be to allow the appellant the amount of his bill in full and let him share *pro rata* for the balance; but that course is negatived in *In re Wedmore*.

Near relationship, or that a man is morally bound to provide for his widow and children, does not of itself give to such a legatee priority over mere strangers, if the estate is insufficient to pay all the legacies in full. *Re Schweder's Estate* (1891), 5 Ch. 44.

A pecuniary legacy and a provision for maintenance abate rateably. *Cook v. Noble*, 12 O. R. 81. So a pecuniary legacy and annuity not payable out of corpus. *Hilson v. Dalton*, 22 Gr. 160.

A preferred legatee, even though the legatee be considered a purchaser, is not entitled to payment until after all the debts are satisfied. *Re Lawley* (1902), 2 Ch. 799, 808.

Prima facie, all general bequests are upon an equal footing, and those who claim priority of payment in full, in case of deficiency of assets, must positively and clearly establish that it was the intention of the testator that the bequests should not abate rateably. This is in substance the test supplied by Knight-Bruce, V.C., in *Thrailes v. Foreman*, 1 Coll. C. C. 414. *In re Battershall*, 10 O. W. R. 933, the testator gave a number of specific legacies, and added: "The above legacies to be paid in full one year after my decease." He then gave other specific legacies without any direction as to payment. Boyd, C., held that this indicated a clear intention that the preceding legacies should not abate. "The words 'in full' cannot be explained away, and express a manifest intention to provide for the payment in full of these legacies." See *Marsh v. Evans*, 1 P. Wms. 668; *Johnson v. Johnson*, 14 Sim. 313.

INTEREST ON LEGACIES.

It is a general rule that interest is not payable on a legacy, whether vested or not, until it is actually due and payable; interest is given for delay in payment. *Re Scadding* (1902), 4 O. L. R. p. 638.

A legacy bequeathed generally, without assigning any time for payment, bears interest only from a year after the death of the testator, though the fund out of which it is to be paid is yielding interest. And if the executor has assets, pecuniary legacies bear interest from the expiration of the year, although the assets have not been productive. *Pearson v. Pearson*, 1 Sch. & Lef. 10; *Toomey v. Tracey*, 4 O. R. p. 711.

A legacy to a person in his capacity of executor is not due unless he accepts the office and duties of an executor. If the legatee should be an infant, as he cannot accept office until he is of age, it follows that a legacy to an infant as executor does not carry interest until he is twenty-one. *Re Gardner* (1892), 67 L. T. 552.

Legacies were given to grandchildren when they attained twenty-one, but subject to a widow's life interest. Both the grandchildren attained the age of twenty-one before the death of the widow and it was held that the legatees were entitled to interest only from the death of the widow, because until her death the legacy was not payable. *Re Scadding* (1902), 4 O. L. R. 632.

Where a legacy was directed to be paid out of the proceeds of land which was to be sold at any time within two years after the death of the testator, and the land was not sold within the two years, it was held the legacy bore interest from the expiration of the two years. If the land had been sold before the two years, interest would have run from the date of the sale. *Re Robinson, McDonnell v. Robinson*, 22 O. R. 438; *M'Mylor v. Lynch*, 24 O. R. 639.

But where the whole estate is to be converted into money, the proceeds invested and such investments continued until the whole property is realized; and from and out of the fund so realized and invested certain legacies are to be paid, the legatees are not entitled to interest until the whole is realized. But the period is not to be extended beyond the time when the realization might, with due diligence, be effected. *Smith v. Seaton*, 17 Gr. 397.

A testator gave legacies to his daughters "to be paid in seven years from the date hereof." He lived more than seven years after the date of the will. It was held the legatees were only entitled to interest as in an ordinary case. *Miller v. Miller*, 25 Gr. 224. And see *Re Scadding, ante*.

An exception to the rule that interest is not payable on a legacy until the legacy is due and payable, is in the case of a legacy given to an infant child of the testator and no other means of maintenance is provided.

A testator bequeathed to his two infant sons \$4,000 each, contingent upon their attaining 25 years of age; the only other provision for them was a gift to each of a share of the residuary estate. *Held*, that these legacies carried interest from the death of the testator. *Re McIntyre* (1904), 7 O. L. R. 548; (1905), 9 O. L. R. 408. "The well settled rule is that where a legacy is given to a minor by a parent or by a person *in loco parentis* payable at a future period, if no other provision is made for maintenance, interest will be allowed for that purpose even though by the terms of the will the legacy is contingent on the legatee living to the period which is mentioned for the payment of the legacy." *Ib.* 412, per Moss, C. J. O.

In *Haughton v. Harrison*, 2 Atk. 329, Lord Hardwicke stated the rule, "If a legacy is left upon no condition but to be paid at the age of 21, and not given over, it is a legacy vested and transmissible; but still no interest can be demanded unless in the case of a child who had no other maintenance or provision, for a parent is bound by nature to support a child."

Again he stated it in *Heath v. Perry*, 3 Atk. 101, and in *Hearle v. Greenbank*, 3 Atk. 716. In the latter case he observes, "But in all these cases the ground the Court goes on is giving interest by way of maintenance." And in that case he held that inasmuch as the testatrix had allotted maintenance for her daughter from the general funds of her personal estate there could be no allowance of interest on a contingent legacy to the daughter.

So in *Wynch v. Wynch*, 1 Cox 433, Lord Kenyon, M. R., said, "It is very clear that when a father gives a legacy to a child, whether it be a vested legacy, or not, it will carry interest from the death of the testa-

tor, as a maintenance for the child; but this will be only where no other fund is provided for such maintenance; for it is equally clear, that when other funds are provided for the maintenance, then if the legacy be payable at a future day, it shall not carry interest, until the day of payment comes, as in the case of a legacy to a perfect stranger."

Nearly 90 years later the rule and exceptions were compendiously stated by James, L. J., *In re George*, 5 Ch. D. 837. He said: "But the rule of law is well established that a contingent legacy does not carry interest while it is in suspense, except in the case of a legacy by a parent or one standing *in loco parentis* to the legatee; and that exception is subject to another exception, that the rule giving interest to the child does not take effect when the testator has provided another fund for his maintenance, so that the income of the legacy is supposed not to be required for the purpose."

In *Binkley v. Binkley*, 15 Gr. 649, Spragge, V.C., said: "It is clear law that a legacy given by a parent to an infant child, payable upon coming of age, or upon that event or marriage, the will being silent as to interest upon the legacy, stands upon a different footing from a legacy to a stranger, the latter not carrying interest; while in the case of a legacy to a child, the child is entitled to maintenance to the extent, if necessary, of interest upon the legacy—this is a general rule—it is otherwise when other provision is made by the will for the maintenance of the infant." To the same effect, Mowat, V.C., in *Sparks v. Perrin*, 17 Gr. 519, and Prondfoot, V.C., in *Rees v. Fraser*, 26 Gr. 233.

In the recent case of *In re Bowlby*, *Bowlby v. Bowlby* (1904), 2 Ch. 685, the question to what extent is a child, to whom a legacy payable *in futuro* or contingent is given, entitled to the interest which the legacy bears or carries—whether to the whole interest as such or only to so much as may be necessary for maintenance—was fully discussed in argument and

considered by the Court of Appeal. Although Vaughan Williams, L.J., argued strongly that the effect of giving interest at all was to entitle the infant to the whole, the conclusion of the Court was that, by the practice of the Court, the infant is only allowed so much as is necessary for maintenance, thus affirming the view expressed by Spragge, V.C., in *Binkley v. Binkley*, *supra*, that a child is entitled to maintenance to the extent, if necessary, of the interest upon the legacy.

But where there is in the will an express provision for maintenance from some other source, and the amount is specified, the legacy will not bear interest for the purposes of maintenance even though the provision made should be deemed insufficient for the purpose. This is upon the principle that as interest is allowed in other cases because it will not be assumed that the father intended no maintenance, there is no ground for the assumption where a provision is made. *Re McIntyre*, 9 O. L. R. p. 413.

So where the amount of the maintenance is specified that is in general the limit. *Simpson on Infants*, 2nd ed 304.

Where there is a general provision for maintenance and no amount specified there seems to be no absolute bar to recourse, if necessary, to interest upon the contingent legacy. Much less should there be where there is no express provision of any kind. The amount of the allowance in such cases must be governed by a consideration of the other circumstances, and a due regard to such other sources or funds as may be properly resorted to for maintenance. *Re McIntyre*, p. 414.

If an infant has other property of his own sufficient for his maintenance, he can have no right to interest upon a contingent legacy. *Rees v. Fraser*, 26 Gr. 233. In this case the legatee was a grandson of the testator. He was born in the testator's house and resided there until the testator's death, and afterwards with his

grandmother. The Court held that the testator intended to put himself *in loco parentis*, in reference to the father's duty of making provision for the child.

The exception to the rule does not extend to a provision for an adult child. *Wall v. Wall*, 15 Sim. 513; or a wife. *Re Crane* (1908), 1 Ch. 372. Nor does it apply where in the case of a bequest by a person who does not stand to the legatee in the relation of a parent. *Martin v. Martin*, L. R. 1 Eq. 369. A parent is bound to provide for the maintenance of his children, and the Court infers that for that purpose he meant to give interest, though he has not expressly said so.

The costs and expenses of taking care of a specific legacy before such legacy is assented to, are payable out of the specific legacy, or by the specific legatee. *Re Pearce* (1909), 1 Ch. 819.

CHAPTER XXII.

AGENTS.

Section 22 of The Trustee Act is as follows:

22.—(1) A trustee may appoint a solicitor to be his agent to receive and give a discharge for any money or valuable consideration or property receivable by the trustee under the trust.

(2) A trustee may appoint a banker or solicitor to be his agent to receive and give a discharge for any money payable to the trustee under or by virtue of a policy of assurance or otherwise.

(3) A trustee shall not be charged with a breach of trust by reason only of his having made or concurred in making any such appointment.

(4) Nothing in this section shall exempt a trustee from any liability which he would have incurred if

this Act had not been passed, in case he permits any such money, valuable consideration, or property to remain in the hands or under the control of the banker or solicitor for a period longer than is reasonably necessary to enable the banker or solicitor to pay or transfer the same to the trustee.

(5) This section shall apply only where the money or valuable consideration or property was or is received on or after the 4th day of May, 1891.

This is similar to section 17 of The Trustee Act, 1893. In England the appointment of the solicitor is sufficiently made by entrusting him with a deed containing a receipt. In Ontario it may be evidenced in any manner shewing an appointment.

In *re Brier*, 36 Ch. D. 243, L. C. Selborne said this section does not substantially alter the law as it was administered by Courts of Equity, but gives it the authority and force of statute law, and throws the *onus probandi* on those who seek to charge an executor or trustee with loss arising from the default of an agent when the propriety of employing an agent has been established.

In order to bring into operation sub-section (4) the circumstances must be such that the trustee either knew or ought to have known of the receipt of the money by the banker or solicitor. Two executors were told by their solicitor that a mortgage, forming part of the trust property, would shortly be paid off and the money placed to the joint credit of the executors at a bank; and they accordingly sent the solicitor an executed reconveyance of the mortgaged property, which contained the usual receipt of the mortgage money. The solicitor then proceeded, on the mortgagor's behalf, to sell the mortgaged property off in lots, and he from time to time received the purchase money of the lots, which he ultimately misappropriated. In the meantime one of the executors had died, and it was sought to make the survivor liable. About four months elapsed between the time of the delivery of the deed and the discovery of the misappro-

priation. Parker, J., said the authority given to the solicitor was a continuing one intended to be acted on when the transaction was ripe for completion--that the defendant was justified in expecting that it might be completed any day and not withdrawing the authority by withdrawing the deed from the solicitor's custody, and that being unaware of the solicitor's misconduct, he acted neither unreasonably or dishonestly in believing what he was told by the solicitor, and ought not to be held liable for a breach of trust because he was deceived by a man whom he had no reason to distrust. *In re Sheppard* (1911), 1 Ch. 50.

It will be noticed that sub-section (1) does not authorize a trustee to appoint anyone to receive and give a discharge for any money or valuable consideration or property receivable by the trustee under the trust, except a solicitor. In *Flower v. Metropolitan Board of Works*, 27 Ch. D. 592, it was held that one of several trustees cannot in general be authorized by his co-trustees to receive trust moneys and give a good receipt. This decision appears to still hold good, though it may be that when one of the trustees is a solicitor he may be appointed agent under sub-section (2).

Where trustees are expressly authorized to retain or invest in securities payable to bearer, with coupons attached, they may deal with them in the way usual with prudent men of business, and may deposit such securities in their joint names with the estate bankers. But such securities should not be allowed to remain in the hands of the solicitors for the trustees. It is no part of a solicitor's duty to cut off the coupons and collect them, while that is the duty of a banker. *In re De Pothonier* (1900), 2 Ch. 529.

An executor who employs a solicitor as agent is bound to supervise his management of the matters entrusted to him and to take all due precautions, and cannot escape liability for the misappropriation of trust funds committed by such agent, although he was of excellent standing prior to the misappropriation. *Low v. Gemley*, 18 S. C. R. 685.

If trust property be put within the control of persons who ought not to be entrusted with it, and a loss is thereby sustained, the executor will be liable to make it good, however unexpected the result, and however free such conduct may have been from any improper motive. Necessity, which includes the regular course of business in administering the property, will exonerate him. But if without such necessity, he is instrumental in giving to the person who makes default, he will be liable, although such person be a co-executor. *Clough v. Dixon*, 8 Sim. 594; *Langford v. Gascoigne*, 11 Ves. 333.

Where a trustee, a solicitor, allowed a confidential clerk and cashier of the firm of solicitors, of which he was a member, to receive occasionally in the trustee's absence, moneys payable to the estate, and give receipts for the same, and the clerk embezzled the same, McDougall, Sur. Judge, held the trustee was not liable to make good the loss to the estate. *Re McM-Trust*, 28 C. L. J. 502.

The general doctrine, as laid down in the cases, is that a trustee is only bound to conduct the business of the estate in the ordinary and usual way in which similar business is conducted by mankind in their own transactions. "It never could be reasonable to make a trustee adopt further and better precautions than an ordinary prudent man of business would adopt, or to conduct the business in any other way." *Re Speight v. Gaunt*, 22 Ch. D. 740; 9 A. C. 1.

In *Ex parte Belchier*, 1 Amb. 218, Lord Hardwicke said that where trustees act by other hands, either from necessity or conformably to the common usage of mankind, they are not answerable for losses, and Jessel, M.R., commenting on this passage in *Re Speight v. Gaunt*, *supra*, says: "Now, what is meant by either from necessity or conformably to the common usage of mankind? It means that in the ordinary course of business transactions an agent is employed." He instances the case of the appointment of a rent collector to collect rent, though the trustee might

collect them in person; but he does not do so because it is the common usage of mankind to employ an agent to do so; he also instances the employment of stock-brokers to buy or sell stock. Then, as to the moral necessity from the usage of mankind, he quotes approvingly Lord Hardwicke's definition of this expression as being the case of a trustee acting as prudently for the trust as for himself and according to the usage of business. Lord Hardwicke gives as instances the case of a trustee appointing the payment of rents to a banker in good credit who subsequently fails and the money is lost—there would be no liability on the part of the trustee; so also the appointment of stewards and agents. And he points out that none of these instances may properly fall under the head of cases of necessity, but there is no liability because the trustees acted in the usual method of business.

Jessel, M.R., further cites the case of *Bacon v. Bacon*, 5 Ves. 331, where it was held an executor was not liable for the loss of money transmitted to an attorney, who was a co-executor, to pay debts, and who had misappropriated the money; and Lord Loughborough there lays down the rule that if the business was transacted in the ordinary manner, unless there was some circumstance of suspicion, the allowance of the payment was fair. Suppose he had paid the money to his own clerk, and the clerk had run away, he puts as being within the same principle of protection. And the Master of the Rolls sums up the effect of *Bacon v. Bacon* as being that when you must necessarily employ an agent, or where you might reasonably in the ordinary course of business employ an agent, and you use due diligence in the selection of your agent, you are not liable for the consequences.

In *Re Weall, Weall v. Andrews*, 42 Ch. D. 678, Kekewich, J., says: "A trustee is bound to exercise discretion in the choice of agents, but so long as he selects persons properly qualified he cannot be made responsible for their intelligence or their honesty; he does not in any sense guarantee the performance of their

duties." It would not, of course, be a proper exercise of discretion to employ an agent whose honesty is open to question.

Because a man is imprudent in the management of his own affairs it does not follow that he will escape liability, as a trustee, by being imprudent in the trust matters committed to his care. In *Rae v. Meek*, 14 A. C. 569, Lord Herschell, speaking of *Leary v. Whiteley*, 12 A. C. 727, and *Knorr v. MacKinnon*, 13 A. C. 753, said: "I think these cases establish that the law requires of a trustee the same degree of diligence that a man of ordinary prudence would exercise in the management of his own affairs;" and this test may now be regarded as established.

Generally speaking, executors are not allowed to employ an agent to perform those duties which, by accepting the office of executors, they have taken upon themselves; but there may be very special circumstances in which it may be thought fit to allow them such expenses as they may have incurred in the employment of agents. *Weiss v. Dill*, 3 My. & K. 26; 41 R. R. 2; *Hopkinson v. Roe*, 1 Beav. 180; 49 R. R. 335.

Trustees are entitled to choose the solicitor and banker they employ. *In re Cleveland* (1902), 2 Ch. 350; and it is said they are not bound to regard the direction of their testator in this respect. *Foster v. Elsley*, 19 Ch. D. 518. And see *Fry v. Tapson*, 28 Ch. D. 268.

B. was solicitor for the testator, and continued to act for the executors. By the will the executors were directed to invest \$5,000 for the widow. The testator had told the executors that B. had invested this \$5,000, and after the testator's death B. told the executors he had invested this sum on mortgages. B. died, and it was then discovered that the mortgages never existed—that he had probably done away with the \$5,000 before the testator's death. The executors, relying on the statement made to them by B., distributed the balance of the estate. In an action by the widow against the executors it failed on the defence of the Limitations

Act (now ch. 75, sec. 47, R. S. O. 1914), but Moss, J.A., said that B. was not the agent of the executors so as to render them responsible for his fraudulent acts, which were done neither by their authority, nor with their privity, nor for their benefit. *Clark v. Bellamy*, 27 A. R. 435, 442.

Executors may employ an accountant where their accounts are of a complicated nature, and the occasion is one in which, according to the usage of business, a prudent man, acting for himself, would employ such a person. *New v. Jones*, 1 M. & G. 668; *Henderson v. M'Tree*, 3 Mad. 275. But of course executors are not entitled to have their books of account kept by an accountant merely in order to save themselves trouble. *Re Harbeck*, 81 Hun. (N.Y.) 26.

In *Edmonds v. Peake*, 7 Benv. 239, it was held that executors may, where that is the ordinary business usage, allow an auctioneer who is selling the trust property, to receive the deposit money; but they must not allow it to remain in the auctioneer's hands for an unreasonable time.

Executors should deposit trust moneys in a bank pending investment, and will not be liable for the failure of the bank, unless the money is left there for an unreasonable time. *Johnson v. Newton*, 11 Hare, 160. Where executors deposited monies with the same person the testator entrusted his money with, though not bankers, they were held not liable for loss. *Dorchester v. Effingham*, Tam. 279; 31 R. R. 97.

But if executors unnecessarily leave trust moneys in a bank when they ought to have invested them, and the bank fails, they will be liable. *Challen v. Shipman*, 4 Hare, 555; *Rehden v. Wesley*, 29 Beav. 213. In one case it was held that moneys should not be left on deposit for more than six months without investment. *Cum v. Cum*, 51 L. T. 770. This must, however, depend on the circumstances of each particular case; the amount of cash on hand, amount required for distribution, the period of distribution, etc.

Executors may employ a solicitor or debt collector in collecting debts owing to the estate, where such is the usual course of business, or where the collection can be done better by adopting this course; and if money is lost by reason of the collector's insolvency, the executors are *prima facie* not responsible. *Re Brier*, 26 Ch. D. 238.

If an executor deposits trust funds in a bank to his own account, and mixes it with his own funds, and the bank fails, the executor is liable to make good the loss. *Fletcher v. Walker*, 3 Mnd. 73; 18 R. R. 195.

An executor will not be liable if the trust property be stolen, provided he has taken reasonable care of it, even though the thief be his own servant, if, on the facts proved, it appears that the executor was justified in deputing the custody of the property to such servant. *Jones v. Lewis*, 2 Ves. 240; *Job v. Job*, 6 Ch. D. 563; *Johnson v. Palmer* (1893), 1 Ch. 71.

Where executors sent money to their solicitor to obtain probate they were held not responsible therefor, but were held liable for money sent to him prematurely to pay legney duty. *Castle v. Warland*, 32 Beav. 660.

CHAPTER XXIII.

LIABILITIES OF AN EXECUTOR.

Purchasing Estate Property.

There is no principle of equity more firmly established than that which forbids a trustee, no matter how the trust is created, from making a profit out of the trust estate. And to this end, a trustee who is selling is absolutely and entirely disabled from purchasing the trust property, whether the purchase be made in his own name or in the name of another, whether the sale be made by himself as a single

trustee or with the sanction of his colleagues. *Ex p. James*, 8 Ves. 353; 7 R. R. 56; *Whichcote v. Lawrence*, 3 Ves. 740.

The rule does not apply to a person named as a trustee who has disclaimed without having acted in the trust. *Stacey v. Elph*, 1 M. & K. 195; 36 R. R. 304; nor to a person named as trustee who has never accepted the trust. *Clark v. Clark*, 9 A. C. 733. Nor does it apply where there is an express power, in the document creating the trust, to purchase; or where the purchase is made with the leave of a competent Court. *Farmer v. Dean*, 32 Beav. 327; 138 R. R. 755.

It follows from the foregoing that wherever an executor or administrator has so dealt with the trust property, he will, if the transaction is allowed to stand, be chargeable with the actual value of the property he has purchased.

At one time it was said that to invalidate such a purchase it was necessary to shew that the trustee had gained some advantage in the transaction, but in *Ex p. James*, *supra*, Lord Eldon repudiated such a doctrine, and however fair the transaction it may be set aside.

By an arrangement between the executors one of them took goods of the estate at the price of \$515, after the same had been valued by appraisers at \$733. The Court ordered the executors to be charged with \$733 and interest thereon. *Cudney v. Cudney*, 21 Gr. 153. An executor cannot buy the debts for his own benefit. *Ex p. Lacey*, 6 Ves. 625; 6 R. R. 9.

An executor sold property of the estate for \$800 to his wife. On passing the accounts the Judge of Probate (New Brunswick) found as a fact that the property was worth \$1,800, and ordered the executor to account for the difference, and the judgment was affirmed by the Supreme Court of Canada. *Re Daly, Daly v. Brown*, 39 S. C. R. 122.

As a lease of an estate is a sale of a partial interest in it, the trustees cannot demise it to one of themselves. If a trustee accepts a lease he is bound to pay the rent; or he may, at the option of the *cestui que trust*, be

made to account for the profits. *Ex p. Hughes*, 6 Ves. 617, 6 R. R. 1.

It makes no difference that the sale is by public auction and the highest bid obtained, if the property is bought in by the trustee or by an agent for the trustee. *Shaw v. Tackaberry* (1915), 29 O. L. R. 490.

It is a settled rule that a trustee or agent, authorized to make a purchase for his *cestui que trust* or principal, cannot make the purchase from himself without disclosing the fact. Such transactions are so dangerous that they are wholly forbidden, and are not merely declared void where damage has arisen from them, or fraud is mixed up with them. Thus where an agent was authorized to invest in bank stocks, and appropriated some of his own shares to his principal and rendered an account as if he had purchased these shares for her, she was held entitled, many years afterwards on the fact coming to her knowledge, to repudiate the transaction. *Harrison v. Harrison*, 14 Gr. 586.

Where an executor, having assets in his hands sufficient to pay unpaid taxes on lands of the estate, permitted the lands to be sold for taxes and bid them in and took the deed thereof in his own name, he was held guilty of fraud. *Kelly v. Pratt*, 83 N. Y. S. 636.

In case of a purchase by a partner of the executor, with partnership funds, the executor is liable for the full amount of the profits resulting from the purchase, and not merely for his share of the profits. *Wilbanks v. Crosno*, 112 Ill. App. 503.

For a full collection of authorities on "Trustee as Purchaser of Trust Estate," see 3 C. L. Times, 415.

Profit out of the Estate.

Analogous to the rule which prevents a trustee from purchasing trust property, is that which compels an executor or administrator to account for all profits made by or out of the estate.

Whenever a trustee violates his duty, and deals with the trust estate for his own behalf, the rule is,

that he shall account to the *cestui que trust* for all the gain which he has made. All the losses are charged to the wrongdoer, while no profit can ever accrue to him. Per Lord Brougham, *Docker v. Somes*, 2 My. & K. 655; 39 R. R. 317.

In *Sugden v. Crossland*, 3 Sm. & G. 192; 107 R. R. 73, it was held that an executor who retired from his trust in consideration of a money payment to enable another to be appointed in his place, was bound to account to the estate for the sum so paid.

Where a trustee invested trust funds on mortgage, and the mortgagor devised the equity of redemption to the "mortgagee," it was held that, though the mortgagor did not know the mortgagee was trustee, yet the devise belonged to the trust, and not to the trustee beneficially. *Re Payne*, 54 L. T. 840.

An executor and trustee, who acted as auctioneer in the sale of the trust property, was held not entitled to charge a commission on the sale. *Kirkman v. Booth*, 11 Beav. 273; 83 R. R. 158. But a company acting as executor can recover a sum paid to one of its directors as an auctioneer. *Bath v. Standard Land Co.* (1911), 1 Ch. 618.

In an administration action, the solicitors for the executors were paid their costs, and by reason of some agreement between the solicitors and one of the executors, they paid this executor half the profit costs. North, J., held he had no power on the motion then before him to compel the executor to repay the money, but said: "If an action is brought by the other executor, or by some one beneficially interested in the estate, for an account of the profit received by the executor, I do not see what answer he would have to it." *In re Thorpe* (1891), 2 Ch. 361.

So where executors received commissions or rebates in respect of insurance on properties belonging to the estate, these were held to be assets of the estate. *In re Wilson and The Toronto General Trusts Corporation* (1906), 13 O. L. R. p. 86. See also *Re Prillie Trusts*, 12 O. W. R. p. 268.

So an executor, who is one of a banking firm, cannot charge the ordinary banker's commission against the testator's estate. *Heighington v. Grant*, 5 M. & Cr. 258, 48 R. R. 297. Nor is an agent, who is appointed executor of his principal, entitled to charge commissions on business done subsequently to the testator's death. *Sheriff v. Aye*, 4 Russ. Ch. Cas. 33.

But where a hotel-keeper directed his business to be carried on by his executors, who were brewers and spirit merchants, who had been in the habit of supplying the deceased in his lifetime, and continued to supply after his death, the Court refused to hold the executors were entitled to the cost prices only, but directed an enquiry as to the necessity of the supplies and the market prices. The M. R. said that he could not suppose that the testator, who had himself directed his business to be carried on by these defendants, expected they would be deprived of the usual fair profit. *Smith v. Langford*, 2 Beav. 362; 50 R. R. 207.

Where a will provides for payment of commission, charges or other profits, the executor will be allowed the usual charges. Where there was such a provision in the will, a land surveyor, who was a trustee, was allowed his charges. *Willis v. Kibble*, 1 Beav. 559; 49 R. R. 453. So where a trust is before the Court, and the trustee has, before accepting the trust, expressly stipulated for such remuneration. *Moore v. Froud*, 3 M. & Cr. 48. But in such cases the trustees will be strictly limited to the charges indicated by the settlor. *Re Carsellis*, 34 Ch. D. 675. See *post*, as to the costs of a solicitor-trustee.

Where executors improperly dealt with a portion of the trust funds by allowing one of their number to retain it in his hands at a low rate of interest, the Court refused them their costs of an action prior to decree. *Ashbough v. Ashbough*, 10 Gr. 430. And executors may be deprived of their costs, in such a case, though not guilty of any wilful misconduct. *Kennedy v. Pingle*, 27 Gr. 305.

The widow and executrix of a saloon-keeper was charged with the value of the good-will and remainder of the term of a license, where she obtained a renewal of the license in her individual capacity, and continued to keep the saloon open. *Mueller's Estate*, 190 Pa. 601. So where an administrator obtained in his own name a renewal of a charter for a ferry owned by the deceased, it was held he was bound to account for the value thereof as assets of the estate. *Huson v. Hallace*, 1 Rich. Eq. (S. Car.) 1.

Profits made by an executor in speculating in claims against the estate must be charged against him as assets. *In re Rainforth's Estate*, 83 N. Y. S. 57.

An incidental benefit derived by an executor as a stockholder of a corporation, from the sale of assets of the estate to a syndicate which such corporation helped to form, does not make him liable to account to the estate for the profits ultimately derived from the purchase of such assets. *Owen v. Potter*, 115 Mich. 556.

Where part of the assets of an estate consisted of stock in a corporation which had a plant that was an unpromising investment, and the executor induced another corporation to buy the plant, it was held he was guilty of no wrong in personally taking stock in the purchasing corporation to the amount necessary to buy the plant, and selling it at figures realizing him a considerable interest on the investment, the transaction being in good faith and promotive of the interest of the estate. *Houghteling v. Stockbridge*, 99 N. W. 759, 11 Detroit Leg. N. 100.

Whenever a trustee charged with the duty of investing money belonging to and for the benefit of another, invests it in such a way as to make it possible for him to profit by the investment individually, he makes himself personally liable for any loss which may occur by reason of such investment. *Carr's Estate*, 24 Pa. Sup. Ct. 369.

In New York it was held that there may be circumstances under which it would be wise and prudent for

executors to employ one of their number to perform non-executorial duties to the estate, and payment for such services may be allowed. *Russell v. Hilton*, 80 N. Y. App. Div. 178. So the employment by an executor of a member of his family to perform services for the estate, where such services, if rendered by a disinterested person, would pass without question, may be sanctioned; but such a course is always open to suspicion and merits investigation. *Re Wagner*, 40 Misc. (N.Y.) 490.

Mixing Trust Funds.

If an executor deposits estate money to his own bank account, and mixes it with his own money, and afterwards draws out sums by cheques in the ordinary manner, the rule in *Clayton's Case*, 1 Mer. 572, attributing the first drawings out to the first deposits in, does not apply; and the executor must be taken to have drawn out his own money in preference to the trust money. The rule in *Clayton's Case* may apply if the contest is between two *cestuis que trust* whose money the executor has mixed with his own. *In re Hallett's Estate*, 13 Ch. D. 696. The judgment of Jessel, M.R., in this case, contains an elaborate review of the cases, shewing the extent to which trust funds can be followed where there has been a mixing of funds. See also *Godkin v. Watson*, 5 O. W. N. 811.

It is equally clear that in a case where funds have been mixed, when any of the money drawn out has been invested, and the investment remains in the name or under the control of the trustee, the rest of the balance being afterwards dissipated by him, he cannot maintain that the investment represents his own money alone, and that what remains has been spent and can no longer be traced and recovered, was the money belonging to the estate. In other words, when the private money of the trustee and the money of the estate have been mixed in the same banking account,

from which various payments have from time to time been made, then, in order to determine to whom any remaining balance or any investment that may have been paid for out of the account ought to be deemed to belong, the executor must be debited with all the sums that have been withdrawn and applied to his own use so as to be no longer recoverable, and the trust money in like manner be debited with any sums taken out and duly invested in the name of the executor. *In re Oatway* (1903), 2 Ch. 356.

If a trustee, partly with his own money and partly with the trust funds, purchases property and it cannot be predicated of any particular part of the property that it was purchased with the trust money, yet the *cestui que trust* has a lien upon the whole for the amount that has been misemployed. *Lane v. Dighton*, Amb. 409; *Lewis v. Maddocks*, 17 Ves. 48, 7 R. R. 10.

If an executor deposits trust funds in a bank to his own account, and mixes it with his own funds, and the bank fails, the executor is liable to make good the loss. *Fletcher v. Walker*, 3 Mad. 73; 18 R. R. 195.

Miscellaneous.

An executor or administrator may commit a devastation in many other ways; not only by an abuse of his powers, but also by negligence in exercising his powers, and wrongful administration.

In *Doe d. Woodhead v. Fallows*, 2 C. & J. 481, it was held that an administratrix who applied the assets of the estate in satisfaction of her own debt, was liable.

An executor or administrator will also incur liability by misapplying the assets in undue funeral expenses. *Stag v. Punter*, 3 Atk. 119; *Hancock v. Podmore*, 1 B. & A. 260; 35 R. R. 287.

Where an executor, believing the assets were amply sufficient for the payment of the testator's debts, permitted specific legatees to retain or possess themselves of the articles bequeathed to them, they were held liable for the value thereof on a deficiency of assets.

Spode v. Smith, 3 Russ. Chy. Cas. 511; *Davies v. Nicholson*, 2 DeG. & J. 693; 119 R. R. 300. In such a case the executor or administrator would be protected if he had given the proper notice under section 56 of The Trustee Act. And see *In re Kay*, *Mosley v. Kay* (1897), 2 Ch. 518, under "Honestly and Reasonably."

An executor is guilty of a devastavit who surrenders, or otherwise fails to preserve the residue of a term, where the land is of greater yearly value than the rent. *Thompson v. Thompson*, 9 Price, 476.

Or applies the assets in payment of a claim which he is not bound to satisfy, e.g., if he makes disbursements in the schooling or clothing of the children of the deceased without authority under the will or from the Court. *Giles v. Dyson*, 1 Stark N. P. C. 32; 18 R. R. 743.

Or by paying a sum in fulfilment of a merely moral obligation where there is no legal liability. *Shullcross v. Wright*, 19 L. J. Chy. 443; *Godson v. Good*, 2 Marsh 300. But this does not apply where the claim could be defeated only by setting up the Statute of Limitations as a defence. *Re Rowson*, 29 Ch. D. 358.

But he is liable if he pays a statute-barred debt after a judicial decision that the debt is not recoverable. *Midgley v. Midgley* (1893), 3 Ch. 282. Or if he pays a creditor who is prevented from enforcing his claim by the Statute of Frauds. *In re Rowson*, *supra*.

Where an executor or administrator, having ample assets on hand to discharge all liabilities of the estate, delays paying interest-bearing debts, he is liable. *Seuman v. Everad*, 2 Lev. 40. So if he may save the penalty of a bond by payment of the less sum specified in the condition, or by the performance of the condition, and neglect to do so. 1 Saund. 333a.

Or by delay in bringing an action, where the delay has enabled the debtor to successfully defend the action by pleading the Statute of Limitations. *Huyward v. Kinsey*, 12 Mod. 573.

Where there has been delay in collecting debts, and the debtors have become bankrupt, the executor is

liable for the amount lost to the estate. *Powell v. Evans*, 5 Ves. 839; *Tebbs v. Carpenter*, 1 Madd. 290; 16 R. R. 224.

And executors were held chargeable with neglect in allowing assets to remain outstanding in an improper state of investment, notwithstanding that the will contained the usual indemnity clause. *Stiles v. Gay*, 1 M. & G. 422; 80 R. R. 58.

An executor or administrator will be personally responsible if he lends money of the estate upon promissory notes or other personal security. See further under "Investments."

A testator devised his farm to his minor children and directed that his executors should rent the same; that no timber should be cut except for use on the premises; and that the executors should have full power to carry the will into effect. The widow was one of the executors, and she cut and sold a large quantity of timber. The Court held that the provisions of the will imposed a duty on the executors as trustees to see that no timber was taken except for the use of the premises, and that they were jointly liable. *Stewart v. Fletcher*, 18 Gr. 21.

CHAPTER XXIV.

CARRYING ON BUSINESS.

One of the perplexing questions that often confronts an executor is that of his right or obligation to carry on the trade or business of the testator. His duty, as well as his liability, will vary with the circumstances. If the will gives no authority to carry on the business, then, as is hereafter pointed out, his power is very limited. If the will gives such authority, then much depends on the limit of the power so given. If the business of the testator was a partnership business

then the authority may depend not only on the power given by the will, but upon the provisions of the partnership articles.

The general principle is that a trade is not transmissible, but is put an end to by the death of the trader, and an administrator (or executor, where the will gives no authority to carry on the business of the deceased) has no legal authority to carry on the business without the direction of the Court. *Barker v. Barker*, 1 T. R. 295. If he does so he must account for all profits made in continuing the business, and if it proves a losing concern he will be personally responsible for the debts contracted in the business since the death of the deceased. *Ex p. Garland*, 10 Ves. 119; 7 R. R. 352; *Re Johnson*, 15 Ch. D. 548.

But this means that an executor or administrator is not to buy or sell. There are many cases where executors not only may, but are bound to continue the business to a certain extent: Thus if a party contracts for himself and his executors to build a house, and dies, the executors must go on, and they will be liable in damages for not completing the work. So, if a party engages for himself alone to build a house, and having procured all the necessary material, it should seem that his executors ought to complete the work, and not dispose of the material at a loss to the estate. So if the deceased has partially completed a work, his representatives are not bound to sacrifice the property by selling it in an imperfect state. *Wms. Exrs.* 1689.

If the contract is personal to the testator or intestate the executor or administrator is not bound to complete the contract. For instance, if the deceased undertook to write a book, and died before completing it, his representatives are discharged from the contract.

If the business of the deceased is of such a nature as to justify his executor or administrator in continuing the same for a reasonable time, if this should be requisite for the purpose of selling the business as a going concern, or otherwise, the trustee will not be

charged with any loss in employing the assets in so continuing the business, if they act *bona fide*, and according to the best of their judgment. *Garrett v. Noble*, 6 Sim. 504; 38 R. R. 166.

So in the case of a farmer. If he die before the crop is harvested, the executor or administrator must reap and harvest the crop. But if he die before any crop is sown the executor or administrator would not be justified, except under exceptional circumstances, in carrying on the usual farming operations. And he is justified in feeding and caring for the live stock of the deceased until it can be advantageously sold, and this will not be considered a carrying on of the business. *In re Fernandez*, 119 Cal. 579.

In some jurisdictions it is held the executor has a sound discretion as to completing contracts of the deceased and will not be charged with loss if he acts reasonably. *Allan's Estate*, 199 Pa. St. 573.

"I think it is a rule without exception, that, to authorize executors to carry on a trade, or to permit it to be carried on with the property of a testator held by them in trust, there ought to be the most distinct and positive authority and direction given by the will itself for that purpose." Per Langdale, M.R., *Kirkman v. Booth*, 11 Beav. 273; 83 R. R. 158.

A direction in the will that the testator's trade shall be carried on does not of itself authorize the employment in the trade of more of the testator's property than was employed in it at his decease; nor does such a direction, coupled with a direction that the testator's debt shall be paid, authorize a mortgage of his real estate not employed at his death in the trade, for the purpose of carrying it on. If the executors find they have not the means of carrying on the trade according to the directions contained in the will, they should apply to the Court for directions to know what they are to do in the administration of the estate. *McNellie v. Acton*, 4 D. M. & G. 756; 102 R. R. 360.

But where in addition to a direction to carry on the trade, the testator has specifically appropriated other assets for that purpose; the trustee, though personally liable for the debts which he contracts in the course of the business, has a right to be paid out of these specific assets, and the trade creditors are not to be disappointed in payment so far as the assets so appropriated are concerned. But the creditors' right cannot extend beyond that, either in administration or bankruptcy. *Strickland v. Symons* (1884), 26 Ch. D. 245.

Where an administrator continued to carry on the business of the intestate, maintaining the family out of the receipts, and in administration proceedings it was found the assets were not sufficient to pay all the debts, it was held that the creditors in respect of the goods supplied for the business were not entitled to prove against the estate in priority to creditors of the deceased or otherwise. *M'Aloon v. M'Aloon* (1900), 1 Ir. R. 367.

So a person supplying goods to an executor for the purpose of carrying on the testator's business for the benefit of the estate, under authority given by the will, has no right of recovery against the estate, but he may sue the executor, and he has also the right to be subrogated to any right of indemnity which the executor has against the estate. *Braun v. Braun* (1902), 14 Man. R. 346. See also *Lorell v. Gibson*, 19 Gr. 280, where it was held that the assets of a deceased person were not liable for debts incurred by an executor or administrator in carrying on the trade or business of the deceased.

In re Brooke, Brooke v. Brooke (1894), 2 Ch. 600. Kekewich, J., held that where trustees improperly carry on the trade or business of the deceased, and the creditors of the deceased stand by and allow this to be done, they must be treated as assenting to the wrongful conduct of the trustee, and if there is a conflict between the original creditors of the deceased and the creditors of the business, the former must suffer. This

judgment was overruled, on this point, in *In re Osley* (1914), 1 Ch. 604, and it was held that merely standing by with knowledge that the business was being so carried on and abstaining from interference with it were not of themselves sufficient to bind the original creditors of the testator by the acts of the executors.

If a testator's business is carried on by his executors, in accordance with the provisions of the will, the executors are entitled to a general indemnity out of the estate as against all persons claiming under the will. But they have not the same right as against creditors of the testator, except where they properly carry on the business for a reasonable time to enable them to sell it as a going concern. *Dourse v. Gorton*, 1891, A. C. 190; *Re Chancellor*, 26 Ch. D. 42.

The profits made from continuing the testator's business are as much assets of the estate as those which were in the testator's possession at the time of his death, and the creditors of the testator have a right to resort to such after acquired assets, even at the expense of the executors. *Abbott v. Parfitt*, L. R. 6 Q. B. 346; *Dourse v. Gorton*, *supra*.

An executor properly continuing the business in pursuance of the provisions of the will, is entitled to be paid his costs and expenses in priority to the debts incurred by him in carrying on the business. *In re Owen, Frisby v. Owen*, 66 L. T. 718.

The executors or administrators of a deceased partner cannot be compelled to become a partner personally, even where by the articles of partnership the partners covenant that they and their executors and administrators will continue as partners for a certain time, though the covenant is binding on the estate of the deceased partner in the hands of such executors or administrators. *Davies v. Collins*, 6 Hare, 418; 77 R. R. 171.

A testator's directions to carry on business with his surviving partners, does not authorize the executors to embark any new capital in the business. "All that a will, which directs the testator's business to be

carried on, authorizes the executors to do, is, to continue in it so much of the testator's estate as may be embarked in it at the time of his death." *Smith v. Smith*, 13 Gr. 81.

The testator was a partner in a firm of distillers. By his will he authorized his executors to continue the business for one year after his death. A few months after his death the surviving partner and the executors formed a joint stock company and the interest of the estate in the business was valued and put in us so much stock, and remained therein for seven years. *Held*, this was a breach of trust under the terms of the will. *Worts v. Worts*, 18 O. R. 332.

A surviving partner, who is also the executor of the deceased, is not entitled to an allowance for carrying on the business after his partner's death, for the benefit of the estate. *Stocken v. Dawson*, 6 Beav. 371; 43 R. R. 116. In one case he was allowed expenses actually incurred under an erroneous conception that he was sole proprietor by purchase from his co-executor, but which purchase was set aside as a breach of trust, though *bona fide*. *Burden v. Burden*, 1 Ves. & B. 170; 12 R. R. 210.

In Ontario, the work of an executor in such a position might be taken into consideration in fixing his compensation for his care, pains and trouble. In England, no such compensation is paid an executor unless provided for by the will.

A testator directed that his business should be carried on by one E.P. The executors, from the confidence thus reposed in E. P. by the testator, permitted him to get in the outstanding debts due to the estate. E. P. did not pay over the amounts collected and it was held the executors were liable. A direction to carry on business could not be extended to the collection of debts. *Pistar v. Dunbar*, 1 Anstr. 107; 3 R. R. 561.

An authority to the executors or executor acting under the will to carry on the testator's business, if they should see fit, does not authorize an administrator

with the will annexed to carry on the business. *Lambert v. Rendle*, 3 N. R. 247; 143 R. R. 891.

The rule that an executor is liable for all profits made in carrying on the testator's business is subject to some limitation where the executor is also the residuary legatee, or the business has been specifically bequeathed to him. In such a case the executor is liable only for the actual value of the assets and not for the profits. *In re Mullon*, 14 N. Y. 98; *Re Van Houten*, 18 N. Y. App. Div. 301.

CHAPTER XXV.

COMPOUNDING CLAIMS.

Section 52 of The Trustee Act is as follows:—

52.—(1) A personal representative may pay or allow any debt or claim on any evidence that he thinks sufficient.

(2) A personal representative, or two or more trustees acting together, or a sole acting trustee, where by the instrument, if any, creating the trust, a sole trustee is authorized to execute the trusts and powers thereof may, if and as he or they may think fit, accept any composition or any security real or personal, for any debt or for any property, real or personal, claimed, and may allow any time for payment for any debt, and may compromise, compound, abandon, submit to arbitration or otherwise settle any debt, account, claim or thing whatever relating to the testator's or intestate's estate or to the trust, and for any of these purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, or other things as to him or them seem expedient without being responsible for any loss occasioned by any act or thing done by him or them in good faith.

Sub-section (1) has been dealt with under the heading of "Payment of Debts."

Section 52 is founded on the English Act known as Lord Cranworth's Act, which is now embodied in section 21 of The Trust Act, 1893. The English Act provides that the section applies only if and as far as a contrary intention is not expressed in the instrument creating the trust.

Even before the passing of this Act a trustee was allowed to compound or release debts where it appeared to have been for the benefit of the trust estate. For instance, where a tenant was in arrears for rent, and became insolvent, and to regain possession the executor released the arrears, and paid a sum to obtain possession, *Blue v. Marshall*, 3 P. Wms. 381. An administrator obtained judgment against a debtor, who being in gaol, petitioned to be discharged under The Insolvent Act. The debtor offered less than the costs incurred in the action, and the Court held the administrator was not chargeable with the debt. *Pennington v. Healey*, 1 Compt. & M. 402. And in *In re Houghton* (1904), 1 Ch. p. 625, it is said that the statutory authority really adds nothing to the common law powers of executors.

In *Irwin v. Toronto General Trusts Company*, 24 A. R. 484, it was held that an administrator had no power to compromise a claim for dower by conveying to the widow another property, a portion of the intestate's real estate. The judgment appears to proceed on the ground that at that time an administrator was not within the Act. In 1899 the Act was amended so as to include administrators. In *Re McIntyre* (1904), 7 O. L. R. 548, a widow claimed dower out of lands of her deceased husband which he, in his lifetime, had contracted to sell for \$2,000. The executors, desiring to complete the sale, compromised the claim by paying the widow \$390, and Street, J., said the section seemed sufficient to cover what they did and to justify their action. There was an appeal on another point, but as to the power of the executors to compromise the claim

for dower, the judgment of Street, J., was not questioned.

There may be a compromise of a claim against an estate although, in the result, the party making the claim gets all he demands. In *In re Houghton* (1904), 1 Ch. 622, the defendant and the widow of the testator were joint executors. Before probate was granted the widow took from the testator's safe securities valued at £1,180, claiming that these securities, or the moneys represented by them, were her property. Subsequently the widow produced receipts shewing beyond question that £820 belonged to her, and the defendant did not press the balance of the claim. The question was whether the defendant could compromise this claim by allowing it in full. Kekewich, J., said: "I use the word compromise advisedly. No doubt there was no give and take. Esther Houghton had all she claimed, and in that sense there was no compromise. On the other hand she had possession of the securities; they could only be got from her by discussion, and perhaps litigation. It was entirely for those representing the estate to say whether there should be litigation, with delay and costs, or whether the claim should be acceded to. That is a compromise. Very little was given up, but there was a reason for the transaction, when the possibility of litigation and its consequences are considered. I think therefore that, if honest, it was a compromise."

This case is also an authority for the proposition that it is competent for an executor, in a proper case, to compromise a claim by his co-executor against the estate; but it was there said: "The position, however, is a delicate one, and an executor in that position would do well to apply to the Court for directions as to whether he is at liberty to make the compromise."

It is said that one of several executors may compromise a claim although the others dissent, and in the absence of fraud, the settlement will be binding. *Smith v. Everett*, 27 Beav. 446; but if the effect of the compromise is to relieve an executor from a liability

to the estate, which he is under jointly with the creditor, the compromise is a fraud on the estate and not binding. *Stott v. Lord*, 31 L. J. Ch. 391.

An executor may compromise the claim of a legatee. *Re Warren*, 32 W. R. 916.

A claim was made against an estate for \$1,000. There was no evidence to corroborate the claimant's account and the executors refused to pay it. After negotiations and attempts at settlement, the executors paid \$250 in full, and it was held the executors had a right to make such a compromise. *Re Robbins*, 23 Gr. 162.

But where trustees accepted \$250 in discharge of a debt of \$300, and gave no evidence to explain the reason of this, it was held, that, in the absence of such evidence, the Master was right in charging the trustees with the loss. There must be some reason shewn for the compromise. *Baldwin v. Thomas*, 15 Gr. 119.

Executors, in the exercise of a prudent discretion, may accept real estate in payment of a debt owing to the estate. *McCarger v. McKinnon*, 17 Gr. 525.

An executor or administrator may, as such, refer to arbitration causes of action which arose in the lifetime of the testator, so as to bind the estate, and without making himself personally responsible. *Reid v. Reid*, 16 C. P. 247. The power of an administrator to submit to arbitration is said to be based upon the fact that he has power to prosecute or defend suits. *Cogswell v. Concord Ry. Co.*, 68 N. H. 192. In *District of Columbia v. Bailey*, 171 N. S. 161, it is said the power arose by reason of the full dominion which the law gives to an executor or administrator over the assets, and the full discretion which is vested in him for the settlement and liquidation of all claims due to and from the estate.

CHAPTER XXVI.

INVESTMENTS BY TRUSTEES.

In recent years the authority of trustees to make investments from trust funds has been materially enlarged, and now executors are allowed, apart from the directions of the will or deed of trust, a considerable choice of investments which formerly the Courts would not approve of. The provisions relating to investments by trustees are now contained in sections 28-34 of The Trustee Act (R. S. O. 1914, Chap. 121), and these should be carefully considered by executors who may be called upon to invest trust funds.

Section 28.—(1) A trustee having money in his hands, which it is his duty, or which it is in his discretion, to invest at interest, may invest the same in the stock, debentures or securities of the Dominion of Canada, or of Ontario or of any of the other Provinces of Canada or in debentures or securities the payment of which is guaranteed by the Dominion of Canada or by Ontario or by any of the other Provinces of Canada or in the debentures of any municipal corporation in Ontario, including debentures issued for public school purposes, or in securities which are a first charge on land held in fee simple in Ontario, Manitoba, Saskatchewan or Alberta, provided that such investments are in other respects reasonable and proper.

(2) Subject to the proviso in sub-section 1 any money already invested in any such stock, debentures or securities shall be deemed to have been lawfully and properly invested.

By 4 Geo. V. ch. 21, sec. 28, the above section was extended so as to include securities which are a first charge on land in British Columbia; and by Geo. V., ch. 20, sec. 15, the following words were added to sub-section 1: "or he may entrust the same to a trust company incorporated under the laws of Ontario to invest

as his agent in any of the above-mentioned securities in the manner contemplated by sub-section 2 of section 17 of The Loan and Trust Corporations Act."

In this Act the word "trustee" includes an executor, administrator and a trustee however appointed and several joint trustees. Sec. 2 (1).

Section 28 corresponded with section 1 of the English Act, The Trustee Act, 1893, except that the latter provides that "a trustee may, *unless expressly forbidden* by the instrument (if any) creating the trust, invest any funds," etc. It will be noticed the Ontario Act gives the trustee power to invest funds "which it is his duty, or which it is in his discretion," to invest. *In re Burke* (1908), 2 Ch. 248, it was held that a discretion to keep trust funds and invest them in one particular way does not "expressly forbid" investment in any of the investments authorized by the Act. In that case the will provided: "My trustees shall keep my trust estate and invest the same on deposit with" a named bank at interest. There seems to be no reason for thinking the Ontario Act would receive a narrower construction.

In *Re Richardson*, 3 O. W. N. 1473, 5 D. L. R. 449, the will directed "my executor to deposit the proceeds of such sale in some chartered bank and keep such proceeds so deposited until M.R. shall have attained the age of twenty-one years." The executors filed a petition asking, *inter alia*, permission to disregard the provision of the will and invest the money instead of paying it into a bank. Riddell, J., held that where no discretion is given to the executor the Act does not apply—that here the executor had no discretion—and that if he disregarded the express direction of the will he made himself responsible for any loss.

In a case before the Act was passed it was held that where a testator authorized his trustees to invest in "public securities" this did not authorize an investment in municipal debentures. *Ewart v. Gordon*, 13 Gr. 40,

Although the range of trust investments has been greatly extended, the Court still scrutinizes, with considerable jealousy, any direction to invest in securities not authorized by the legislature. Thus where a settlor empowers his trustees to invest the trust funds "at their discretion," it seems to be the better opinion that the discretion of the trustees is limited to a discretion as to which of the several forms of security *authorized by law* they shall invest in, and does not give them power to invest in securities not so authorized; such, for instance, as ordinary railway stock. *Bethell v. Abraham*, 17 Eq. 24; *Re Brown, Brown v. Brown*, 29 Ch. D. 889. And indeed the word "invest" seems to point to a loan, and not to an employment in a trading speculation, as also does a direction to place out at interest, or on security. *Worts v. Worts*, 18 O. R. 332; *Harris v. Harris*, 29 Beav. 107; *Underhill on Trusts*, 4th ed. 326; *Spratt v. Wilson*, *infra*.

Where a settlement authorized the trustees to "invest" in real estate, this was held to authorize an actual purchase of real estate. "So far as the word 'invest' is concerned, in connection with money, I am satisfied it may well apply to the cause of a purchase of land as distinguished from a mortgage of land. It has been of long and familiar use in this sense." *Re Barwick*, 5 O. R. 710.

In *re J. H.* (1911), 25 O. L. R. 132, executors were empowered to invest "in such reasonably safe income-producing securities as—they may approve without rendering themselves liable for any loss." The testator had stock in banks and insurance companies. Riddell, J., held that by "securities" the testator meant stocks similar to the stocks the testator held at the date of his death. He points out, however, that power was intended to be given to invest in securities beyond those given by the Act; otherwise there would have been no need for giving the executors indemnity.

In the absence of clear and express direction, even where trustees have a discretion, they cannot, without a breach of trust, lend trust funds on personal secur-

ity, or personal property, or invest it on trade security, e.g., in the shares of a public company. *Child v. Child*, 20 Beav. 50; *Harris v. Harris*, 29 Beav. 107. "The rule is well settled, where moneys are left by testamentary instrument to be invested at the discretion of an executor or trustee, that he is to invest in such securities as are sanctioned by the Court. The general discretion so given does not warrant investment in personal securities, and it would be disregarding fixed standards of decision to lay it down that such a discretion can be exercised otherwise than by law." Per Boyd, C., *Spratt v. Wilson*, 19 O. R. 28. In the last named case the executors were directed to invest in such securities as they should think fit, and apply the interest for the maintenance of the infants until their majority. Instead of investing the funds the executors deposited them in a savings bank at 3½ per cent., and the Court held they did not conform to their duty, and were liable for the difference between the rate earned and legal interest.

A power to invest on such good security as the trustee may think fit will not justify an investment on personal security; or in securities in which it is not usual for a prudent man to invest. *Knorr v. MacKinnon*, 13 A. C. 753; and where there is a power to invest on personal security it must be exercised with great caution. *Pickard v. Anderson* (1872), L. R. 13 Eq. 608. A power to invest in such securities as the trustee "shall think fit" means "shall honestly think fit." *Re Smith, Smith v. Thompson* (1896), 1 Ch. 71.

In an able article in 9 C. L. T. 77 on Trust Investments, by R. S. Cassels, K.C., it is said: "The chief rule to be deduced from the cases is that, without the clearest and most express authority in the instrument creating the trust, the trustees cannot safely make investments upon securities of a personal or possibly speculative character. Even power to invest upon 'any securities' is not sufficient to justify the trustee in accepting personal securities. *Lewis v. Nobbs*, 8 Ch. D. 591; and wide discretionary powers as to invest-

ment do not authorize an investment upon speculative securities. *Burritt v. Burritt*, 27 Gr. 144; *Smith v. Smith*, 23 Gr. 114; *New London & Brazilian Bank v. Brocklebank*, 21 Ch. D. 302; *Stretton v. Ashmull*, 3 Drew. 9; *Re Brown*, 29 Ch. D. 889. In the last case there was power to invest in such modes as trustees should in their uncontrolled discretion think fit; yet a *bona fide* investment in the bonds of a foreign government was directed to be realized as soon as possible. Where there is a power to invest upon personal securities it is most strictly construed. Thus in *Langston v. Ollivant*, G. Coop. 33, executors had power to place out funds upon such real or personal security as should be thought good and sufficient. The executors lent to a man in trade, the husband of the *cestui que trust*, £500 of the trust funds upon his bond, at the same time lending him £600 of their own money. At this time the man was in good credit, but he afterwards failed and a loss occurred. The trustees were held liable for the loss on the ground that the transaction was not really an investment but merely an accommodation loan. Instances of a similar nature might be multiplied, but the cases can be readily referred to in the text books."

Strict compliance with the provisions of an investment clause is in all cases necessary. Thus in *Webb v. Jonas*, 39 Ch. D. 660, trustees were held liable where the trust deed authorized them to invest "in their or his names or name" on "real securities," and they invested in a contributory mortgage of freeholds, the Court being of opinion that it was of the very essence of the investment clause that the security should be in the name of the trustees alone. An analogous decision is that of *Consterdine v. Consterdine*, 31 Beav. 330; 135 R. R. 451. In that case three trustees were appointed with an absolute discretion to sell and invest. It was held they were not justified in investing in the shares of a company in which only one trustee could be registered as owner, and where, therefore, there might be danger of loss through want of joint control.

What may be a perfectly justifiable investment at one time may at another under different circumstances be an entirely unjustifiable one. In *Re Maberlay*, 33 Ch. D. 455, trustees were given certain funds upon trust to invest them in freehold land in Ireland. It was held that owing to the then unsettled condition of that country it would be a breach of trust, notwithstanding this direction, to invest funds there. So in *Boss v. Godsall*, 1 Y. & C. C. C. 617; 57 R. R. 473, trustees under a marriage settlement were empowered and required at the request of the wife to advance part of the funds to the husband on the security of his bond. The husband became insolvent, and the wife then required the trustees to make a loan to him. It was held there was such a change in circumstances that the clause was inapplicable and that the trustees were justified in refusing to make the loan. Upon the converse question, whether a trustee is justified in making investments upon securities that are proper, e.g., in consequence of statutory authorization, at the time the investment is made, but were not proper at the time the trust was created, there has, in England, been some conflict of authority. Our statute, however, probably removes any difficulty of this kind.

Where an improper investment is made the trustee is liable for all subsequent consequences, however unexpected, or however remotely connected with the original breach of trust. In *Kellaway v. Johnson*, 5 Beav. 319, there was an unauthorized sale and investment, and the trustees were held liable for a subsequent loss, the root and cause of the loss being the original unauthorized sale. In *Fyler v. Fyler*, 3 Beav. 550, trustees obtaining an unauthorized but ample security, were held liable for a future loss traceable to that first error. In *Cocker v. Quayle*, 1 Russ. & My. 535; 32 R. R. 275, trustees had power to lend on bond with the consent in writing of a certain person. They lent with oral consent and without taking a bond. The borrower subsequently became bankrupt and a loss occurred. It was held that as the original loan was

made in an unauthorized way they were liable for all future loss, though in the result the position would have been exactly the same. Had they complied, in making the loan, with the terms of the trust deed, a bond debt and a simple contract debt would have been in the same position in the bankruptcy proceedings. And it is laid down in *Clough v. Bond*, 3 My. & Cr. 490, 45 R. R. 314, that where a line of duty is not strictly pursued and loss is eventually sustained, the trustees are liable, however unexpected the result, however unlikely to arise, and however free from improper motive their conduct may have been. So in *Grayburn v. Clarkson*, L. R. 3 Ch. 605, it is said that where there is a breach of trust the trustee is liable for all consequences, though they do not develop themselves until long afterwards. And in *Caffrey v. Darby*, 6 Ves. 488, it was held that trustees are responsible for all loss if they are once guilty of a breach of trust, no matter what the cause of the immediate loss may be. They would not be relieved even if the actual and immediate cause of the loss were accidental. Even if the loss is caused by the negligence of his legal adviser the trustee is not excused. *Hopgood v. Parkin*, L. R. 11 Eq. 74.

It is no answer to the claim upon trustees to make good a loss incurred in respect of one fund to say that owing to their care and foresight a great improvement has taken place in another fund, nor can they be allowed to set off such improvement against the loss. *Wiles v. Gresham*, 2 Drew. 258. Nor is the fact that the quantum of interest of an attacking *cestui que trust* is very small, any ground for allowing the trustee to escape liability. *Walcott v. Lyons*, 54 L. T. N. S. 786.

Sometimes a trustee who has made an improper investment seeks to escape liability by shewing acquiescence on the part of the *cestui que trust*. This defence, however, is a difficult one to support successfully. The *cestui que trust* is entitled to place reliance on the trustee, and is not bound to make enquiries unless something is done to excite his suspicion. *Re Vernon*, 33 Ch. D. 402. Where acquiescence is set up as a bar it

must be shewn that the *cestui que trust* was *sui juris* and acquainted with the facts: *Sawyer v. Sawyer*, 28 Ch. D. 595; *Spratt v. Wilson*, 19 O. R. 28; and the intention to waive rights by the *cestui que trust* must be clear. *Re Cross*, 20 Ch. D. 109. The *cestui que trust* is not estopped from objecting to the account of the trust fund on the ground of acquiescence merely because he does not dispute its correctness while his interests are reversionary, especially where he is not in full possession of the facts. *Inglis v. Beatty*, 2 A. R. 453; *Smith v. Smith*, 23 Gr. 114.

Where a trustee is authorized to invest in either of two specified modes, and by mistake he invests in neither, the measure of his liability is the loss arising from his not having invested in the less beneficial of the authorized modes. *Paterson v. Lailey*, 18 Gr. 13.

Where a *cestui que trust* is of full age and competent to act for himself, and gives his sanction to an unauthorized investment, he cannot afterwards seek to make the trustee liable. Under these circumstances there is no duty cast on the trustee to advise against such an investment. *Harrison v. Harrison*, 14 Gr. 586.

Sec. 29.—(1) A trustee may deposit money with any of the societies or companies hereinafter mentioned, or may invest any money which it is his duty, or which it is in his discretion, to invest at interest, in terminable debentures or debenture stock of any such society or company, provided that such deposit or investment is in other respects reasonable and proper, and that the debentures are registered, and are transferable only on the books of the society or company in his name as trustee for the particular trust estate for which they are held, and that the deposit account in the society's or company's ledger is in the name of the trustee for the particular trust estate for which it is held and the deposit receipt or pass book is not transferable by endorsement or otherwise:

- (a) Any incorporated society or company authorized to lend money upon mortgages on real

estate, or for that purpose and other purposes, having a capitalized, fixed, paid up and permanent stock not liable to be withdrawn therefrom of not less than \$400,000; and a reserve fund of not less than 25 per cent. of its paid-up capital, and the stock of which has a market value of not less than 7 per cent. premium; or

- (b) Any society or company heretofore incorporated under Chapter 164 of the Revised Statutes of Ontario, 1877, or any Act incorporated therewith, or under Chapter 169 of the Revised Statutes of Ontario, 1887, having a capitalized, fixed, paid up, and permanent stock not liable to be withdrawn therefrom of not less than \$200,000, and a reserve fund of not less than 15 per cent. of its paid-up capital, and the stock of which has a market value of not less than 7 per cent. premium.

(2) Clause (a) shall not apply to any society or company which has not the approval of the Lieutenant-Governor in Council as one coming within the provisions of that clause, and as one in the debentures or debenture stock of which trustees may invest or with which they may deposit money.

(3) Such approval shall not be given with respect to any society or company which does not appear to have kept strictly within its legal powers as to borrowing and investing.

(4) An Order-in-Council made under the authority of sub-section 2 may at any time be revoked.

The following is a list of Loan Corporations approved by Order-in-Council in the debentures of which trustees may make investments:

British Mortgage Loan Company of Ontario.
Canada Land and National Investment Company,
Limited.
Crown Savings and Loan Company.
Canada Permanent Mortgage Corporation.

Central Canada Loan and Savings Company.
 East Lambton Farmers Loan and Savings Com-
 pany.

Guelph and Ontario Loan and Savings Society.
 Great West Permanent Loan Company.
 Hamilton Provident and Loan Society.
 Huron and Erie Loan and Savings Company.
 Industrial Mortgage and Savings Company of
 Sarnia.

London Canadian Loan and Agency Company.
 Landed Banking and Loan Company, Hamilton.
 Lambton Loan and Investment Company.
 Land Security Company.
 London Loan and Savings Company of Canada.
 Midland Loan and Savings Company.
 Ontario Loan and Debenture Company.
 Oxford Permanent Loan and Savings Society.
 Royal Loan and Savings Company.
 Southern Loan and Savings Company.
 Toronto Savings and Loan Company.
 Toronto Mortgage Company.

Victoria Loan and Savings Company, Lindsay.

The Chapters referred to in the sub-section (b) are
 the Acts respecting Building Societies.

Sec. 30. A trustee may from time to time vary or
 transpose any securities in which money in his hands
 is invested, whether under the authority of this Act
 or otherwise, into or for any other securities of any
 nature authorized by this Act.

The English Act, after specifying the authorized
 investments, adds: "and may also from time to time
 vary any such investments." In *Re Dick Lopes v.*
Hume (1891), 1 Ch. 423; 1892 A. C. 112, it was held
 that these words are not confined to investments made
 under the power given by the Act, but extend to any
 investment, whenever made, whether before or after
 the death of the testator, upon any such stocks, funds
 or securities as are mentioned in the section.

In *Re Outhwaite* (1891), 3 Ch. 494, it was held that the power given to invest trust funds in any of the stocks therein mentioned, does not extend to authorizing trustees to set apart or appropriate any of such stocks to answer a particular purpose, as, for instance, to provide for an annuity given by a will, so as to facilitate the distribution of the rest of the testator's estate. It was suggested that the same result might be arrived at by the exercise of the power to vary investments, but Kekewich, J., said: "If I am right in regard to the inability of the trustees to appropriate under the powers of the Act, I doubt whether they could first invest in a stock expressly authorized by the will and appropriate that for the annuity, and then, under the power of variation given by the Act, reinvest in a stock authorized by the Act. However, it is unnecessary for me to decide that question now."

The Court has no jurisdiction to sanction an agreement by which executors propose to concur in converting into a limited company a business in which the testator was a partner, where, by the terms of the agreement, the testator's share in the business will be exchanged for shares and debentures which the executors are not authorized by the will to hold. "In substance it amounts to one of two things: either it is a sale of an investment of the proceeds in unauthorized securities, or it is an exchange of property of the testator for other property which the trustees are not authorized to hold." *In re Morrison* (1901), 1 Ch. 701. And see *Worts v. Worts*, 18 Ont. R. 332.

Sec. 31. A trustee lending money upon the security of any property upon which he may lawfully lend shall not be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made, if it appears to the Court that in making the loan the trustee was acting upon a report as to the value of the property made by a person whom the trustee reasonably believed to be a competent valuator, instructed and employed independently of any owner

of the property, whether such valuator carried on business in the locality where the property is situate or elsewhere, and the amount of the loan does not exceed one-half of the value of the property as stated in the report and that it was made under the advice of the valuator expressed in the report.

This section corresponds with section 8 (1) of the English Act, except that the latter permits a loan up to two-thirds, where our Act limits it to one-half of the value as stated in the report. The English Act requires the report to be made by "an able and practical surveyor and valuer," where our Act speaks of "a competent valuator." In other respects there is no difference.

In *In re Solomon* (1912), 1 Ch. 261, Warrington, J., said: "It has been recognized in several cases, and amongst them I will only mention the case of *In re Stuart* (1897), 2 Ch. 583, before Stirling, J., that this provision of the Trustee Act . . . was intended to relieve trustees from a burden previously cast upon them by the Court, and which the Legislature conceived was too heavy a burden to be cast upon them, in other words that the Act was intended to be a relieving Act, and as such Act, it ought to be construed liberally in favour of the persons whom it is sought to relieve, and adopting in effect what was said by Jessel, M.R., in *In re Speight* (1883), 22 Ch. D. 727, 746, I think the Court ought not to be astute to find means of excluding trustees from the relief which the Legislature has thought ought to be extended to them."

In *Palmer v. Emerson* (1911), 1 Ch. 758, it was held that the section being a relieving one, it does not impose a statutory obligation upon trustees to take a valuation, and the neglect to do so does not exclude them from the benevolent operation of section 3 of The Judicial Trustee Act, 1896, corresponding with sec. 37 of our Trustee Act.

But *prima facie*, the requirements of The Trustee Act constitute a standard by which reasonable conduct

is to be judged, although non-compliance with these requirements is not necessarily a fatal obstacle to an application for relief; it is also a matter for consideration whether the trustee would have acted in the same way if he had been lending money of his own. *In re Stuart, supra*.

Notwithstanding that this section authorizes a loan to the extent of one-half of the value as stated in the report of the valuator, trustees are not authorized in lending to that extent on unproductive or speculative property. Where the property is exclusively or mainly used for the purposes of trade, no prudent investor can be in a position to judge of the amount of margin necessary to make a loan for a term of years reasonably secure, until he has ascertained not only its present market price, but its intrinsic value apart from those trading considerations which give it a speculative and, it may be, a temporary value. *Learoyd v. Whiteley* (1887), 12 A. C. 727.

Before the Act it was held that trustees should not lend as much as one-half on buildings used in trade. *Slickney v. Sewell* (1835), 1 M. & Cr. 8; 43 R. R. 129; or for manufacturing purposes. *Royds v. Royds*, (1851), 14 Beav. 54; 92 R. R. 18.

"It has undoubtedly become the practice of valuers, thinking they are thereby complying with the requirements of the Act, to advise practically in every case that trustees may safely advance two-thirds of the value, and that practice appears to be based on the fact that, so far as the liabilities of the trustees are concerned, the Act makes no distinction between one kind of property and another; it only requires that they shall not advance more than two-thirds part of the value of the property. That, I think, is a mistake. It is the duty of the valuer to consider not only the value of the property, but the proportion which, in his opinion, as an expert and a practical man, the trustee would in each particular case, be justified in advancing." *In re Solomon* (1912), 1 Ch. p. 261. In this case it was held that it is not improper for trustees to lend

on property let on weekly tenancies, but the amount which they may safely lend on such properties must depend on the circumstances of each particular case.

Trustees may lend on unfinished buildings if due security is taken for their completion, but the buildings should be of the character which experience shews will be constantly let in the neighbourhood, and not buildings of an experimental character. *Rue v. Meek* (1889), 14 A. C. 558.

Where a loan was made on cottage property in a town, the value of which depended on shifting circumstances, Fry, L.J., said the fact that at the time of the mortgage some of the houses were unfinished and not strongly corroborated the view that the investment was improvident. *In re Salmon*, 42 Ch. D. p. 370. In *Shaw v. Cates* (1909), 1 Ch. p. 396, Parker, J., said: "I am not prepared to lay down any general rule that trustees ought not to invest on the security of newly erected houses in a residential neighbourhood or on houses which are not quite completed, though these circumstances may, and indeed ought, to be taken into account in determining the amount which may properly be so invested."

Where a trustee was directed to invest the trust funds "in his own name or under his legal control," and he invested it in a contributory mortgage, this was held to be a breach of trust, and not protected by the Act. *In re Dyer* (1909), 1 Ch. 328. Trustees not having any power expressly given them, are bound to invest on a mortgage where they have the entire control in their own hands, and where they can exercise their own discretion for the benefit of their *cestui que trust*, and not where they are bound to consult others, or where, if they do consult others, they are bound to act for others as well as for themselves. It robs them of that control which is an essential part of the propriety of the security. *Webb v. Jonas*, 39 Ch. D. 660.

In *Budge v. Gummow*, 42 L. J. Ch. 22, L. R. 7 Ch. 719, it was held that, in the circumstances of that case, that a loan on hotel property was not a proper investment.

"The value of a hotel is necessarily of a very speculative character, and may, like the property in *Stickney v. Sewall*, 1 My. & Cr. 8, arise from accident." Such property is probably more speculative in Ontario than in England. See also as to hotel property, *In re Partington*, *Partington v. Allen*, 57 L. T. 654, where a loan on hotel property proved disastrous and the trustees were held liable.

Where a trustee, in making a loan seeks the protection of the Act, section 31 requires that he acted upon the report of a person whom the trustee (1) reasonably believed to be a competent valuator; (2) that the valuator was instructed and employed independently of any owner of the property; (3) that the loan does not exceed one-half of the value of the property as stated in the report; and (4) that it was made under the advice of the valuator expressed in the report.

(1) It will be noticed that the section dispenses with the necessity of employing a valuator carrying on business in the locality where the property is situate or elsewhere. But the fact that a valuator has no local knowledge is a circumstance to be considered on the question of the trustees' reasonable belief in the valuator's competency. *Bicknell & Kappele*, Prae. State, 403. See also *Budge v. Gummow*, L. R. 7 Ch. 719; *Fry v. Tapson*, 28 Ch. D. 279. A reasonable belief would be a belief formed by the mind of a reasonable man—a belief founded on reason. *U. S. Express Co. v. Donahue*, 14 O. R. 333. See also *Peek v. Derry* (1887), 37 Ch. D. 541; 14 A. C. 337.

In re Chapman (1896), 2 Ch. 763. Lindley, L.J., said: "It is true that the trustees did not consult professional surveyors or valuers; but there was nothing special in the nature of the property, as there was in *Learoyd v. Whiteley*, 33 Ch. D. 347; 12 A. C. 727, to render the assistance of an expert really necessary for the guidance of a prudent man. A man need not be a special surveyor or valuer to form a trustworthy opinion of the value of ordinary agricultural land, and the law is not so stringent as to compel us to say that

the trustees were guilty of dereliction of duty in not seeking advice from such a person." This, however, was a case of trustees retaining securities authorized by their trust, and the statement, so far as it relates to investments made by the trustees themselves, can be considered only as *dicta*.

The words "believed to be," in section 31, do not govern the words "instructed and employed independently of any owner of the property;" and therefore, in order to entitle a trustee lending money on the security of property, to the protection of the statute, he must be able to shew that the valuator (i) whose report he acted was in fact so instructed and employed. *In re Somerset* (1894), 1 Ch. 231; *In re Walker* (1901), 1 Ch. 386.

(2) Prior to The Trustee Act the duties of trustees investing trust money were well known. They were entitled to rely on expert advice as to the value of the property, but if they did so, it was their duty to see that the expert was properly instructed—that he knew for whom and with what object he was advising, and that he was acting independently of the mortgagor, these being precautions which a prudent man of business might reasonably be expected to take in the conduct of his own affairs. Having thus been advised as to value, they had themselves to determine, and could not delegate it to a third party (even an expert) to determine, what amount they could prudently advance on the security in question. *Shaw v. Cates* (1900), 1 Ch. 389.

Where a valuator was selected by a firm of solicitors who acted for the mortgagor, and his fee was paid by the mortgagor, it was held the valuator was not instructed and employed and acting independently of the mortgagor. *Shaw v. Cates, supra*.

"What is meant by 'instructed and employed independently of any owner of the property'? I think it means this: that the relation existing between employer and employed must exist as between the trustees and the valuer, and between them only—that the

valuer must be entitled to look for his remuneration to the person who employs him, and, on the other hand, must be responsible to that person only for the due performance of his duty as valuer. When you have that he is responsible and employed independently of the owner. I do not think it is incumbent on the trustee to enquire into all the previous business transactions of the valuer and to find out whether he has at any time recently or long before advised or acted for the mortgagor;" Per Warrington, J., *In re Solomon* (1912), 1 Ch. p. 281.

A trustee is not entitled to the protection of the Act unless the report or valuation which ultimately proves insufficient, was made upon his own instructions and directed to the particular investment. Nor is the trustee entitled to such protection unless the investment which has proved deficient, was a proper investment at the time in all respects other than value. *In re Walker*, 59 L. J. Ch. 386; 62 L. T. 449. See also *Blyth v. Fladgate*, 63 L. T. 546, (1891) 1 Ch. 337.

In *In re Partington*, 57 L. T. 654, trustees loaned money on hotel property and cottages and houses which were principally let at weekly rents. Valuers were employed and the particulars of the several properties as furnished by the mortgagors, were submitted to them, but the trustees did not make enquiries for the purpose of verifying the statements as to the value, income, etc. In their instructions to the valuers, they told them the mortgagees were trustees, but they did not tell them, according to the rule laid down for trustees in lending on the security of house property, that they did not desire to lend more than one-half of the value. Neither did they call the attention of the valuers to circumstances which might affect the value. They also omitted to instruct the valuers to ascertain whether the particulars were correct, or what were the outgoing or average amount of repairs. It was held that the investment was improper and the valuers not properly instructed.

The selection of a valuator should not be left to the solicitors employed by the trustees. It is not the part

of the ordinary business of a solicitor to choose a valuator for trustees intending to invest trust money on mortgage. If asked to name a valuator the ordinary course is for the solicitor to submit a name or names to the trustees, and to tell them everything which the solicitor knows to guide their choice, but to leave the choice to them. Where trustees did not exercise their own judgment as to the choice of a valuer, but accepted the suggestion of their solicitors that a city surveyor who had introduced the security to them, and was in fact the agent of the mortgagor with a pecuniary interest in the completion of the loan, should value the property, it was held the trustees were liable for a loss on the loan, and it was no defence that they had acted on the advice of their solicitors. *Fry v. Tapson*, 28 Ch. D. 268; *In re Stuart* (1897), 2 Ch. 583.

Before The Trustee Act it was held that if trustees lent money on mortgage and employed the same solicitor as the mortgagor, they were bound to take the utmost precaution; if they trusted implicitly in the solicitor, however high his reputation, they were responsible for any loss occasioned by his fraud, and the indemnity clause usually inserted in the trust deed did not protect them. *Sutton v. Wilders*, L. R. 12 Eq. 373; *Frech v. Graham*, 10 Ir. Ch. R. 522.

(3) Whether a trustee is liable for lending more than one-half the value of the property as stated in the valuator's report, does not appear to have been expressly decided. In England, before the passing of The Trustee Act, certain well-defined rules, limiting the amount to be advanced on mortgage, had obtained. For instance, it was laid down that in the case of ordinary agricultural land the loan should not exceed two-thirds of the value, whereas in cases where the subject of the security derived its value from buildings on the land, or its use for trade purposes, the margin ought not to be less than one-half. But it was held these were not hard and fast limits up to which trustees would invariably be safe, and beyond which they could never safely lend, but as indicating the lowest margin

which in ordinary circumstances a careful investor of trust funds ought to accept. *Leaoyd v. Whiteley*, 12 A. C. 727. Where land was valued at £7,000, and a trustee loaned £400 more than the two-thirds, Bacon, V.C., refused to hold him liable. *In re Godfrey*, 23 Ch. D. 483.

In a subsequent case the same Judge said: "There is one clear, homely, intelligible, but inflexible rule which has never been departed from in times ancient or modern, viz., that a trustee is bound to act in the execution of his trust as a prudent man would in dealing with his own property. Applying that rule to the present case, can it be said that any prudent man, having to invest nearly £7,000 upon leasehold property with a view to present income, would venture his money to the extent of more than one-half the estimated value of the property, when the property consisted of houses recently built, unoccupied, not wholly finished, producing no fixed certain rents, etc." And the trustees were ordered to make good the loss. *Smethurst v. Hastings*, 30 Ch. D. 490.

And where trustees loaned less than one-half on the security of a freehold brickfield, with buildings, machinery, etc., and there was a loss, the trustees were made liable because the value of the property depended mainly on the success of a speculative and fluctuating business, a business largely dependent on the energy and solvency of those working it. *Leaoyd v. Whiteley*, 32 Ch. D. 196; 12 A. C. 727. See also *Stickney v. Sewell* and *Fry v. Tapson*, *supra*.

But where trustees slightly exceeded the amount, but acted honestly and as prudent men would have done in dealing with their own funds, they were protected by the Court and allowed their costs. *Jones v. Lewis*, 3 DeG. & Sm. 471; *Re Godfrey*, *supra*; *Re Pearson*, 51 L. T. N. S. 692.

"I dissent entirely from the position taken up by some of the defendants' expert witnesses, that once they have ascertained the value of the property they are, whatever its nature and whatever method of valu-

ation they have adopted, at least *prima facie* justified in advising an advance of two-thirds of its value. Such a position in my opinion defeats the object of the section by making what the Legislature has recognized as the standard of the minimum protection which a prudent man will require into a standard of the normal risk which, whatever the nature of the property, a prudent man will be prepared to run; and it deprives the expert advice on which the trustee is to rely as to the margin of protection to be required of all its value. It is true now, as it was before the Act that the maximum sum which a prudent man can be advised to lend upon a mortgage depends on the nature of the property and upon all the circumstances of the case. If the property is liable to deteriorate or is specially subject to fluctuations in value, or depends for its value on circumstances the continual existence of which is precarious, a prudent man will now, as much as before the Act, require a larger margin for his protection than he would in the case of property attended by no such disadvantages, and an expert who does his duty will take this into consideration." Parker, J. *Shaw v. Cates* (1909), 1 Ch. pp. 398, 399.

The object of trustees must ever be to make a permanent investment, that is, one which will be maintained for a considerable period, and which will not only during that period yield the stipulated income, but will ultimately and whenever required, realize the full sum advanced. In *Leavoyd v. Whiteley*, 12 A. C. 732, the Lord Chancellor dwells on the importance of securing the capital sum, but did not intend to place in the background the importance also of securing the income, which may be, and often is as essential to the welfare of the remainderman as it is to that of the tenant for life. Trustees, therefore, must regard any advice given to them respecting value from this double point of view, and cannot be absolved from liability for loss arising in a particular transaction by shewing that their advance was within the allowed limits as

regards capital, if they were exceeded as regards income, and the income was insufficient to pay the stipulated interest. *In re Somerset* (1894), 1 Ch. p. 247.

There is no fixed rule that in all cases, where a portion of the mortgaged premises is utilized for business purposes, trustees would be guilty of a breach of trust in advancing more than one-half the value of the property; but if the mortgaged premises and the business are so inseparable that the discontinuance of the business may result in depreciation of the premises, trustees ought not to advance more than one-half. If the security is really a business plus the premises upon which it is carried on, trustees are well advised to have nothing to do with it. *Palmer v. Emerson* (1911), 1 Ch. 758.

(4) Since the Act a trustee has been, and is, justified in acting on expert advice, not only as to the value of the property, but also as to the amount he may properly advance thereon, provided the advice be given in such manner, and by such person, as is contemplated in the section, and that, whatever be the nature of the property, the amount advanced is not more than two-thirds (in Ontario one-half) of its value. The principle involved seems to be that within the limits of what is often called the "two-thirds" rule a prudent man may, as to the amount which can properly be advanced on any proposed security, whether the property be agricultural land or houses or buildings used for trade purposes, rely on expert advice obtained with certain precautions, it being of course assumed that in giving the advice the expert will consider all the circumstances of the case, including the nature of the property, and will not advise a larger advance than under all the circumstances can prudently be made. *Shaw v. Cates, supra*.

This was followed in *In re Solomon* (1912), 1 Ch. 261, where the trustees were charged with not having themselves made any inquiries as to the details regarding the nature of the property, the amount of the out-

goings, etc. Warrington, J., said: "Now with reference to that matter, I think that, before the Act, it would have been the duty of the trustees to satisfy themselves as regards all those matters, and, as I have already said, it is hardly contended that, but for the Act, they would not, in these respects, have been guilty of negligence, the consequences of which might have been visited upon them. But since the Act, I think the trustees are in a very different position, and that they are justified now, as Parker, J., said in *Shaw v. Cates*, in assuming that the valuer, whose duty it is to advise them, will satisfy himself of the facts which are necessary in order to enable him to make a proper valuation, and that the trustees are therefore relieved from that part of the burden which was cast upon them by the Court before the Act was passed."

The valuator's report should state the value of the property, and not merely the sum the trustees are entitled to advance on the property. If a portion of the value is made up of buildings, the value of the land and buildings should be stated separately; and if the value includes any sum for plant, machinery, goodwill, etc., these should be specifically mentioned and full particulars given. *In re Stuart* (1897), 1 Ch. 583; *In re Whiteley*, 33 Ch. D. 347.

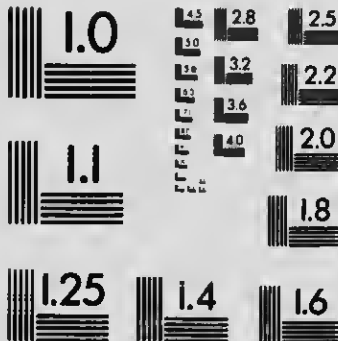
Where the proposed security consists of house property, or other buildings, the report should shew the average rentals or other income, and all the outgoings, including taxes, insurance, probable repairs, etc. The section clearly indicates that the report is to be in writing, and not a mere verbal statement.

It has been held in cases of trustees acting under trust deeds containing indemnity clauses as wide as the provisions of this Act, that such indemnity clauses afford no protection to trustees, who from motives laudable in themselves act in plain violation of the duty which they owe to the individuals beneficially interested in the funds which they administer. They do not protect against positive breaches of duty.



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Seton v. Dawson, 4 Ct. Sess. 2nd series, 310; *Knox v. MacKinnon*, 13 A. C. p. 765; *Rae v. Meek*, 14 A. C. 558.

How far trustees, investing trust funds on mortgages on real estate, can rely on the personal character or means of the mortgagor, seems open to question. In *In re Somerset*, 1894, 1 Ch. at p. 247, Kekewich, J., said: "On the question how far, if at all, trustees may properly rely on the position of the borrower, there is, as far as I am aware, no authority. Men of ordinary care and prudence managing their own affairs would, no doubt, take this into consideration, and, in the mercantile world, it is frequently treated as equally important with the value of the security. It is impossible, I think, to exclude it from the consideration of trustees, who are bound to have regard to all the circumstances connected with any proposed advance on security, and it would not be difficult to put cases in which the solvency or insolvency of the borrower would properly influence them in making an advance somewhat in excess of the limits generally allowed, or declining the transaction altogether; but where the object is to make a permanent investment of trust money on mortgage on real estate it seems to me wrong to advance a sum largely in excess of what is otherwise right, because it is believed that the borrower is now, and it is anticipated that he will remain, capable of paying the principal and interest, or such part thereof as cannot be realized from the security."

In *Shaw v. Cates*, *supra*, where the loan was made on house properties, some only partly finished, Parker, J., seems to have thought it was an element to be taken into consideration. He says: "On the other hand, at the date of the mortgage he was, or at any rate was reputed to be, a man of substance, able to undertake, and from time to time undertaking, large contracts, and not financially dependent on borrowed moneys." In *In re Solomon*, *supra*, it was contended that the trustees failed to take into consideration the personality of the mortgagor, and Warrington, J., expresses the opinion that that was a question for the valuer to determine upon, and that since the Act the trustees

are entitled to assume that the valuer has considered the personal equation in arriving at the value.

Sec. 32. Where a trustee has improperly advanced money on a mortgage security which would, at the time of the investment, have been a proper investment in all respects for a less sum than was actually advanced the security shall be deemed an authorized investment for such less sum, and the trustee shall only be liable to make good the sum advanced in excess thereof with interest.

Corresponds with section 9 of the English Act. See *Shaw v. Cates* (1909), 1 Ch. 389. This section points to an investment which would have been proper in all other respects, except as to the amount advanced. Such an investment stands on an entirely different footing from an investment of an unauthorized description, which the *cestui que trust* must either accept or reject. *In re Salmon, Priest v. Uppleby*, 42 Ch. D. 351.

If the *cestui que trust* ratify an unauthorized investment it becomes a part of the trust estate and the trustee will be exonerated; if he reject it he may assert a lien upon it for the trust money invested therein, and after realization compel the trustee to make good the deficiency. *Thornton v. Stokill*, 1 Jnr. N. S. 751.

The mode of enforcing liability for a deficiency on an insufficient security depends on the circumstances of the particular case. In some cases justice will be done by realizing the security and making the trustee pay the deficiency; but in some cases it may be right to make him pay at once the whole sum improperly invested, and let him take the benefit of the security. *In re Salmon, Priest v. Uppleby, supra*.

The rule of equity that trustees who have caused a loss by investing trust funds on an unauthorized security cannot be required by the *cestui que trust* to make good the loss without having the security transferred to themselves, does not apply where the *cestui que trust* is an infant, and by reason of his infancy cannot make the transfer; he being entitled to have the

trust fund made good by the trustees notwithstanding the security cannot be transferred. *Head v. Gould*, 1898, 2 Ch. 250.

Sec. 33. Sections 31 and 32 shall apply to transfers of existing securities as well as to new securities and to investments made as well before as on and after the 4th day of May, 1891, unless some action or other proceeding was pending with reference thereto at that date.

4th May, 1891, was the date "The Trustee Act, 1891," was assented to.

Sec. 34. A trustee shall not be chargeable with a breach of trust by reason only of his continuing to hold an investment which has ceased to be an investment authorized by the instrument of trust or by the general law, and this provision shall apply to cases arising either before or after the passing of this Act.

Same as the English Act, as amended by the Trustee Amendment Act, 1894. There appears to be no reported decision where this section has been under discussion. In *Re Nicholls, Hall v. Wildman post*, Latchford, J., said the section had no application to that case, and, on appeal the point was not raised or discussed. There are, however, many cases where executors have been authorized by the will to retain investments, and it has been held that such authority is not absolute protection where they have not acted prudently or reasonably.

A general power to retain stocks in which the testator has already invested, does not differ in its scope from a general power to invest in these stocks. What the trustees can do in one case by making a new, they can effect in the other by retaining the old, investment. *Fraser v. Murdock*, 6 A. C. 855, 877. And a direction in a will, or other trust instrument, to retain investments, places them in the list of authorized investments. *In re Bates* (1907), 1 Ch. 22.

A mortgage security is unlike an ordinary instrument, inasmuch as it consists of a debt which can be enforced by action, and also of a security which can

be realized by sale or foreclosure. A trustee of a mortgage security is, therefore, liable for loss sustained by his wilful default in not obtaining payment in either of these ways. But a trustee is not a surety, nor is he an insurer; he is only liable for some wrong done by himself, and loss of trust money is not *per se* proof of such wrong. *In re Chapman* (1896), 2 Ch. p. 774.

There is no rule of law which compels the Court to hold that an honest trustee is compelled to make good loss sustained by retaining an authorized security in a falling market, if he did so honestly and prudently, and in the belief that it was the best course to take in the interest of all parties. Trustees acting honestly, with ordinary prudence and within the limits of their trust, are not liable for mere errors of judgment. Any loss sustained by the trust estate under such circumstances falls upon and must be borne by the owners of the property—i.e., the *cestis que trust*—and cannot be thrown by them on their trustees, who have done no wrong, though the result may prove that they might possibly have done better. *Learoyd v. Whiteley*, 33 Ch. D. 347; 12 A. C. 727. A clear authority to this effect; so are *Burton v. Burton*, 1 My. & Cr. 80; 43 R. R. 138; and *Marsden v. Kent*, 5 Ch. D. 598. *In re Chapman, supra*, p. 776. See also *Rawsthorne v. Rowley*, (1909), 1 Ch. 409.

In *In re Medland*, 41 Ch. D. 476, the testator empowered his trustees to continue certain investments as long as they should see fit, with an indemnity against liability if they continued the same in the same state of investment as at the time of the testator's death. There were three mortgages on real estate, the value of which had much depreciated. North, J., held that where the value of the mortgaged property had fallen so that there was not a margin of one-third, it is not the absolute duty of the trustees at once to call in the mortgages, but they have a discretion which they must exercise as practical men with a due regard to all the

circumstances of the case, such as the position and solvency of the mortgagor.

In *Re Nicholls, Hall v. Wildman* (1913), 29 O. L. R. 206, the testator died in 1878, giving his estate to executors "upon trust to invest the proceeds thereof in such manner as they shall deem most advisable." Part of the estate consisted of 125 shares of Ontario Bank stock of the par value of \$5,000. In 1882 the par value was reduced one-half, and in 1896 by one-third, and later on an order was made to wind up the bank, and a claim made against the estate for double liability. The executors took no steps to realize upon the stock. The Court held that the power to invest given in this will was equivalent to a power to retain such securities as they might invest in; that the executors acted in good faith, and their discretion to retain the shares was an honest exercise of the discretion given by the will, and they were fairly justified in not selling from 1878 to 1882, but they had not acted reasonably in not selling or endeavouring to sell, after 1882, and were liable to make good the loss to the estate, viz., the par value of the stock after the first reduction.

Where absolute discretion is given to the executors they are not bound by the ordinary rule, and although where the discretion is to be actively exercised it must be honestly and intelligently exercised, yet, where there is a discretion to remain supine, culpable negligence or dishonesty must be shewn to render the trustee liable. *Sculthorpe v. Tipper*, L. R. 13 Eq. 232. But see *Re Johnson*, W. N. (1886), 72, where it seems to be recognized that, even in such a case, reasonable discretion must be exercised.

The mere fact that the investment was one made by the testator himself is no reason for the executor delaying to take proper steps to secure the money. If there is a danger of loss the executor must exercise prudence and watchfulness to prevent loss. *Burritt v. Burritt*, 27 Gr. 143.

In *Re Gabourie*, 13 O. R. 635, the testator at his death held a promissory note against W. bearing a

high rate of interest. Instead of calling in the assets, as directed by the will, the executor retained the note, and renewed it, honestly believing that W. was good for the amount, and that it was in the interest of the estate. W. failed, and the Chancellor held this was a plain breach of trust and that executor was liable, but credited him with the interest received beyond the legal rate.

See "Realizing Assets."

CHAPTER XXVII.

INTEREST—CHARGING EXECUTORS WITH.

There are two grounds on which an executor or administrator may be charged with interest: 1st. That he has been guilty of negligence in omitting to invest money for the benefit of the estate; 2nd. That he himself has made use of the money, or has committed some other misfeasance, to his own profit and advantage.

With respect to neglect on the part of an executor in not investing balances, it must be observed that it frequently may be necessary and justifiable for an executor to keep large sums in his hands to answer the exigency of the testator's affairs, especially in the course of the first year after the decease of the testator; in which case such necessity is so fully acknowledged, that according to the ordinary course of the Court, the fund is not considered distributable until after that time. But if the executor keeps money dead in his hands without any apparent reason or necessity, then it becomes negligence and a breach of trust, and the Court will charge the executor with interest. *Wms. on Exors.* 1750.

In cases of simple neglect to invest, in order to give a claim for interest there must be a clear case of improper retention of balances to a considerable or sub-

stantial amount. In *Miles v. Durnford*, 2 Sim. (N.S.) 241; 89 R. R. 274, the balance amounted to £96, and the Court refused to charge the executor with interest. In *McLennan v. Heward*, 9 Gr. 178, \$400 was considered a reasonable sum for this purpose. In *Thompson v. Fairbairn*, 11 P. R. 333, after an administration order appears to have been made, the executors retained \$1,100 in their hands to meet claims against the estate, and were not called upon to pay it into Court. It was held the amount was not unreasonable, and that the executors were not chargeable with interest in respect of it.

Under the changed conditions of the present time, when banks are so readily available and willing to pay interest on current balances, there is no reason why bank interest should not be earned on all balances in the hands of trustees, notwithstanding these decisions.

Where the will contains no trust to invest, and the money is subject to distribution at any time, executors are justified in depositing moneys in a bank, and will be charged with bank interest only. *Re McIntyre* (1904), 7 O. L. R. 548.

But where moneys are left by will to be invested at the discretion of the executor, he does not conform to his duty by depositing the funds in a savings bank; and his neglect to invest exposes him to pay the legal rate of interest for the money. Where the beneficiaries are infants the acquiescence of their guardian, not being for their benefit, does not bind them. *Spratt v. Wilson*, 19 O. R. 28.

In *Re Honsberger* (1885), 10 O. R. 521, the Master had charged executors with interest at 6 per cent. per annum, with annual rests upon moneys belonging to the estate in their hands. On appeal, Boyd, C., said: "The more modern rules developed in the English Courts relating to the award of interest against executors and trustees appear to proceed upon these main lines: (1) When the money is kept in the executors' hands without sufficient excuse, the offense is deemed an act of negligence, and the usual Court rate of inter-

est will be charged at four per cent. (2) When the executors are not only negligent but commit an act of misfeasance by expending the funds for their own benefit or in any other way using them, the higher rate of five per cent. will be charged. (3) If the act of misfeasance is of such a character as to lead to the conclusion that more than this rate of interest has been made out of the money, as for instance, if it is employed in ordinary trade or in speculation, the beneficiaries will be allowed the option of either having an account of the profits or having the interest taken with rests. *Burdick v. Garrick*, L. R. 5 Ch. 241; *Liquidators of Imperial, etc., Association v. Coleman*, L. R. 6 H. L. 209. The latest English rules of decision were in effect adopted by our Court of Appeal in *Inglis v. Beatty*, 2 A. R. 453, and the result has been to modify some of the earlier decisions on questions of interest in the reports. It is very distinctly laid down that the punitive element in awarding interest is now to be discarded and the compensatory principle is declared to be that which governs. *Gilroy v. Stephen*, 30 W. R. 745; *Re Jones*, 49 L. T. N. S. 91; *Price v. Price*, 42 L. T. N. S. 626.

"The gradation recognized in English practice may, however, be approximated here in some such way as this: by charging an executor who negligently retains funds which he should have paid over or made productive for the estate at the statutory rate of six per cent.; by charging him who has broken his trust by using the moneys for his own purposes (though not in trade or speculation) at such a rate of interest as is the then current value of money; and by charging him who makes gain out of his trust by embarking the money in speculation or trading adventures, with the profits or with compound interest, as the case may be.

"The evidence in this case shews that the executors not only kept considerable and constantly increasing balances in their hands from year to year, but also allowed the acting executor to use that money as he pleased. It was not employed in trade nor was it

proved that any profit was made out of it. There is, however, no special evidence to shew what were the current rates of interest during this period; it appears that the notes and mortgages held by the executors bore interest for the most part at six per cent. If any evidence had been given that money was worth more than this, I should have charged the executors at the higher rate, but at present I see no safe ground on which to place the interest at more than six per cent. yearly. Some of the earlier authorities might have warranted the Master in awarding compound interest, but I think that such a charge is opposed to the spirit of the decision in *Inglis v. Beatty*, *supra*, and could only be upheld as being in the nature of a penalty imposed on the executors."

Since *Re Honsberger* was decided the legal rate of interest has been reduced to five per cent. except as to liabilities existing at, or prior to, 7th July, 1900. R. S. C. ch. 120, sec. 3.

In a case coming within the third branch of the rule laid down in *Re Honsberger*, where an executor is charged with profits, it is not the course of the Court to charge him also with interest on such profits. *Silkstone & Haigh Moor Coal Co. v. Edey* (1900), 1 Ch. 167, a case of setting aside a sale by the trustee of trust property to himself, the trustee being charged with rents and profits, but not with interest thereon.

Inglis v. Beatty, 2 A. R. 453, contains an elaborate review of the authorities. It is there laid down that the principle upon which the Court acts in charging executors with interest is not that of punishment, but of compensating the *cestui que trust*, and depriving the trustee of the advantage he has wrongfully obtained; that an executor will not necessarily be charged with compound interest in all cases, except those in which there is neglect to invest; that where an executor retains a portion of the trust money under an honest belief that it is his own he will be charged with simple interest only unless he has used the money in trade. Moss, C.J.A., delivering the judgment of the Court,

said: "The cases I have cited from our own Court effectually dispose of the contention that the charge of compound interest depends upon a mere rule of practice: The Court is to be governed by the English decisions, with due regard to the circumstances of the country. The rule is one of law, as contradistinguished from one of practice, just as much as is the principle upon which damages should be assessed in an action at common law."

In *Boys' Home of Hamilton v. Lewis*, 4 O. R. 18, Boyd, C., said: "The next ground of appeal is on the question of interest. By the usual course of the Court, interest is not chargeable against an executor till after the end of the first year. *Prima facie*, the fund is then distributable, and if he keeps moneys thereafter in his hands without reason he will be charged with interest. The pendency of an administration suit (*Holgate v. Haworth*, 17 Beav. 259; 90 R. R. 147), the retention of moneys though the executor has not used the fund in business (*Dawson v. Massey*, 1 B. & B. 230), the withholding on the ground of uncertainty as to claims upon the fund, or as to who is entitled to it, and giving notice to beneficiaries who abstain from asking for an appropriation or an investing of the money (*Melland v. Gray*, 2 Coll. 295; 70 R. R. 229; *Monsley v. Carr*, 4 Beav. 49; 55 R. R. 13), readiness and willingness to pay, but inability to do so till it should be ascertained by decree of the Court who are the parties entitled (*Sutton v. Sharp*, 1 Russ. 146): none of these exempt the executor from paying interest on moneys which he has kept unproductive to the beneficiaries. In *Re Erans Estate*, *Erans v. Erans*, 1 W. N. 1876, p. 205, administrators who claimed to be beneficially entitled to funds in their own hands and failed for want of evidence, were charged with interest. In cases of improper retention of balances the Court awards interest, when the sums are of a considerable or substantial amount. *Jones v. Morrall*, 2 Sim. N. S. 241. There is no good reason for not charging the executors with interest in this case upon the residue

in their hands after the time when it was distributable. As the residuary estate was ascertained or got in from time to time it became money in their hands held for the use of residuary legatees. The annual rate of interest should be charged upon it from the time it might properly have been distributed or appropriated down to the time of its actual payment, or if not yet paid, down to the present time."

But an executor retaining money in his hands under a *bona fide*, though mistaken belief, that it is his own, may be exonerated altogether from payment of interest. *Brucere v. Pemberton*, 12 Ves. 386; or he may be ordered to pay simple interest. *Inglis v. Beatty*, *supra*. But in *Meander v. McCready*, 1 Moll. 119, the executor was charged where he retained a balance under a fair misapprehension of his right to it.

In *Taylor v. Gerst*, Mosely, 99, it was said that if money placed out at interest be called in by an executor without any cause, he shall pay interest for it. But in *Newton v. Bennett*, 1 Bro. Ch. C. 361, Lord Thurlow said that an executor had an honest discretion to call in a debt bearing interest, if he thought the same in hazard. See also sec. 30 of The Trustee Act, and *Smith v. Roe*, 11 Gr. 311.

If an executor has employed trust money in trade or in speculation, the *cestui que trust* has the option of taking either interest or the profits which have arisen from the trade or speculation: *Wedderburn v. Wedderburn*, 22 Beav. 100; but he must elect to take either the profits for the whole period, or the interest for the whole period. In *Fyfe v. Foster*, L. R. 8 Ch. 309, a case in which a daughter of the testator, a beneficiary under the will, was asking for an account of profits, having been credited with interest at 5 per cent. on her share of trust moneys, which consisted of the ascertained share of the testator left in breach of trust in the business in which he had been a partner, James, L.J., says: "It has been distinctly laid down that a plaintiff cannot claim both interest and profits in respect of the money employed in trade, but must

elect between them, and it might be a grave question whether the plaintiff must accept either adopt or repudiate the terms on which the successive partnerships were willing to hold her money. If she repudiates the arrangement, it might be considered that she would have to elect between interest and that share only of the profits made in respect of her capital which actually came into the hands of her trustees, as appears to have been held in *Jones v. Forall*, 15 Beav. 388. The application, however, of that rule as to election between interest and profits to the case of an actual loan by a trustee in breach of trust to himself and others, would, we think, require very full consideration before the Court came to a final decision on it."

An executor, who, being a trader, mixes the trust moneys with his own in his bank account, and uses this fund for business purposes, must be considered as having employed the money for his own profit, and will be charged accordingly. *Treves v. Townshend*, 1 Bro. Ch. C. 385; *Rocke v. Hart*, 41 Ves. 67.

Where the Master charged a trustee with legal interest on yearly balances, on appeal, M^{rs}. J.A., held that in view of the manner in which the trustee dealt with the estate, keeping no accounts and making no endeavour to keep separate the plaintiff's money, but making use of all that came to her hands and dealing with it and treating it as her own, the Master was justified in holding her to account on the footing of interest, at the legal rate, upon the yearly balances in her hands. *Zimmerman v. Wilcox*, 35 C. L. J. 688.

Where trust money has been loaned to one of the executors, the executors will be charged with the highest rate of interest that could have been obtained for the money. *Smith v. Roe*, 11 Gr. 311.

The widow of the intestate married again and allowed her husband to use the moneys of the estate in her hands. The Master charged her with interest at ten per cent., but the Court reduced it to simple interest, it not being shewn that more could have been

realized on investment. *Fielder v. O'Hara*, 14 Gr. 223.

In *Sovereign v. Sovereign*, 15 Gr. 559, it was held that executors may be charged with interest as well as principal in respect of sums lost through their misconduct, though the principal never reached their hands. *Vanston v. Thompson*, 10 Gr. 542, and *Blain v. Terryberry*, 12 Gr. 222, were not acted upon.

Executors paid a legatee certain sums on account, and, on a further demand for payment, denied having funds sufficient to pay the balance. On taking the accounts many years afterwards it was found the executors had sufficient funds for the purpose, and they were ordered to pay the legatee the accrued interest on the legacy. *Sovereign v. Freeman*, 25 Gr. 525.

An executor who transfers funds of the estate from a bank where they are bearing interest to his own bank where they do not draw interest will be charged with the amount of interest lost by the transfer, but he is not answerable for profits. *Dick's Estate*, 183 Pa. 647.

CHAPTER XXVIII.

EXECUTORS' COSTS.

"Nothing ought, I think, to be adhered to more sacredly than the general principle, which is that a trustee or executor having done his duty, having faithfully accounted, and having brought forward the estate committed to his charge, should not be deprived of his costs upon light grounds." Per Lord Westbury, *Birks v. Micklewait*, 34 L. J. Ch. 364.

The following have been held to be included in costs, charges and expenses: Costs of proceedings by an administrator against a defaulting solicitor, taken *bona fide* for the benefit of the estate. *Re Davis*, 57

L. T. 755; the costs of an action properly defended by a trustee. *Re Llewellyn*, 37 Ch. D. p. 327; costs of a sale properly made by trustees under a power. *Re Mansel*, 54 L. J. Ch. 883; costs of former trustees paid to the executors of the survivor in consideration of his paying over the trust property. *Harvey v. Oliver*, 57 L. T. 239.

An executor on passing his accounts is not entitled without question to sums paid by him to his solicitor for costs; and the bill, although not submitted to a regular taxation, can be moderated by the Judge by disallowing such items as are irregular or excessive. *Johnson v. Telford*, 3 Russ. 477, 27 R. R. 116; *Allen v. Jarvis*, L. R. 4 Ch. 616; *McCargar v. McKinnon*, 17 Gr. 525. And an executor will not be allowed the charges of his solicitor for doing things which the executor ought strictly to do himself, such as attendances to pay premiums on policies, attending at the bank to make transfers, attendances on valuers, auctioneers, legatees and creditors. *Harbin v. Darby*, 28 Beav. 325, 126 R. R. 150.

Where costs have been *bona fide* paid to a solicitor he cannot be made to refund them if it turns out that the executor cannot get them out of the estate. *Re Blundell*, 58 L. T. 933; *Brinsden v. Williams* (1894), 3 Ch. 185.

Fees paid to counsel for legal advice, on matters affecting the estate, is a proper allowance to an executor. *Hayes v. Hayes*, 29 Gr. p. 99; so too a retainer fee paid to solicitors in a proper case. *Chisholm v. Barnard*, 10 Gr. 479.

Where in an action between a trustee and his *cestui que trust* the Court, in the judgment drawn up, makes "no order as to the costs of the action," such adjudication is final, and the trustee cannot afterwards retain his costs of the proceedings out of the trust estate. Lindley, L.J., said: "It seems to me that this is a common form of order perfectly familiar to us all, and it means that the Judge, having had his attention called

to the matter, and being asked to make an order for the payment of the costs, declines to do so. It is not the same as if he had said nothing; and the effect is that each must pay his own costs." *Re Hodgkinson* (1895), 2 Ch. 190.

In *Story v. Dunlap*, 13 Gr. 375, Mowat, V.C., seems to have gone a step further and held that where the executor seeks to retain such costs out of the estate the judgment or order in the action should contain a reservation to that effect. It will be noticed that in *Re Hodgkinson*, Lindley, L.J., said: "it does not mean the same as if he had said nothing." In *Story v. Dunlap* an executrix appealed against a Master's report, and being successful in part only, the appeal was allowed without costs, and there was no reservation of costs as against the estate. On further directions the Court refused to order the costs payable out of the estate, the V.C. saying: "If I made the order now asked for I would be giving costs which another Judge of co-ordinate authority has refused to give." It will be noticed that, in this case, all the proceedings were in the same action.

The very recent case of *Re Dingman*, 9 O. W. N. 272, requires careful consideration when considering the effect of the foregoing cases. It was an appeal from the Judge of a Surrogate Court under section 34 of the Surrogate Courts Act. The appellant had brought an action against the executor and recovered \$1,000 and costs. As far as the report of the case shews the judgment in that action made no reference to the executor's costs by reservation or otherwise. On the audit of the executor's accounts the Surrogate Court Judge allowed the executor his costs of defending the action as well as the costs paid to the plaintiff, and it was in respect of these items that the appellant complained. Riddell, J., delivering the judgment upon appeal, said it was one of the disadvantages of an executor's position that if he defend an action brought against him as such executor and fail, he may be forced to pay the costs out of his own pocket: *Macdonald v. Balfour*

(1893), 20 A. R. 404; but he is entitled to be allowed all reasonable expenses which have been incurred in the management of the estate, and these include the costs of an action reasonably defended. Of course he could not be allowed the costs of improperly defending an action: *Chambers v. Smith* (1846), 2 Coll. 742; *Smith v. Chambers* (1847), 2 Ph. 221; but to disentitle him there must be something proved to shew the unreasonableness; and nothing was established here. (Reference to in *Re Beddoe*, *infra*; *In re Love*, *post*.) "The fact that there was no provision in the judgment in the action for the executor's costs was *nihil ad rem*. It is doubtful whether a direction in the judgment that the executor's costs should be paid out of the estate would be valid: see sec. 19 of The Surrogate Courts Act—but, in any case, these are not costs in the action. When allowed by the Surrogate Court Judge, they are allowed as 'charges and expenses.' "

In *Re Williams*, 22 A. R. 196, the administrators for the deceased assignee for creditors defended in good faith an action brought by his successor in the trust to recover damages for breach of trust by the intestate. They were unsuccessful, and had to pay the costs of the plaintiff's solicitor and of their own solicitor. They were held entitled to credit for these costs in passing their accounts. Where it is plain that a dispute can be settled only by litigation it is not necessary for a trustee to ask the advice of the Court before defending. See also *Griffith v. Patterson*, 20 Gr. 618; *McKeller v. Prangle*, 25 Gr. 545.

Executors were given the costs of opposing an unsuccessful appeal, out of the estate, in the event of their not being able to make them out of the appellant. *Re Cassie*, 17 P. R. 402.

The general rule is that in the absence of misconduct a trustee shall be recouped his costs, charges and expenses out of the trust estate, even in cases of unsuccessful litigation. *Smith v. Beal*, 25 Ont. R. 368; *Pitts v. La Fontaine*, 6 A. C. 482; and even if the trustee proceeds without the sanction of the Court, yet the costs

will be allowed out of the estate if it appears that the defence or action would have been authorized had prior application been made. *In re Beddoe, Cottam v. Beddoe* (1893), 1 Ch. p. 557.

This rule presupposes a fund in the trustee's hands out of which costs could be paid. Where an executor, without direct authority or obtaining indemnity, brought an action to recover a sum of money alleged to be due to the testator, and the action was dismissed with costs, the personal estate being insufficient to pay the costs of the defendant, it was held that the executor could not resort to specifically devised estate. *In re Champagne* (1904), 7 O. L. R. 537.

The rule that a trustee's costs are payable as between solicitor and client is not confined to cases where he is brought into Court against his will. *Blakeley v. Ingram* (9 C. L. Times, 143).

An executor has a right to have his accounts taken in Court, and the mere neglect, as distinguished from pertinacious refusal, to render his accounts, is not sufficient to deprive him of his costs. *White v. Jackson*, 15 Beav. 191, 92 R. R. 379; *Gresham v. Price*, 35 Beav. 47, 147 R. R. 16; *Hench v. Scard*, 24 W. R. 51. See *ante* under "Duty to Keep Proper Accounts."

The mere fact of executors being charged with interest on balances in their hands, or any mere negligence, is not of itself a sufficient ground for visiting them with the costs of an action, or even refusing them costs. *Flanagan v. Nolan*, 1 Moll. 84; *Travers v. Townsend*, 1 Moll. 496; and an executor who has not been guilty of dishonesty, and who has made good to the estate the deficiency arising from an improper investment made by him, will not be ordered to pay costs. *Peacock v. Colling*, 54 L. J. Ch. 743; *Re Whiteley*, 33 Ch. D. 347.

But if the executors' accounts are falsified, or they have been guilty of gross or wilful negligence, or have acted from fraudulent or interested motives, they are generally ordered to pay costs, or so much of it as has been occasioned by their misconduct; or may be dis-

allowed their costs. *Tebbs v. Carpenter*, 1 Mad. 290, 16 R. R. 124; *Gilbert v. Lee*, 13 W. R. 1012.

If the inquiry has been occasioned by the executor not keeping accounts, he must pay the costs. *Pearse v. Green*, 1 J. & W. 135, 20 R. R. 258; or he may be refused costs. *Payne v. Evans*, 18 Eq. 356.

Where the action would have been necessary independently of an alleged breach of trust, and the executor a necessary party, he may be allowed his general costs, though he may have to pay the costs occasioned by the breach. *Pride v. Fooks*, 2 Beav. 430, 50 R. R. 227; *Tebbs v. Carpenter*, *supra*. But where the sole object of the action is to make the executors answerable for a breach of trust, and the judgment is against them, it will be, almost invariably, with costs. *Earl Poulett v. Herbert*, 1 Ves. Jr. 497; *Whistler v. Newman*, 4 Ves. 129. If, however, the action has enabled the Court to administer the estate, or the audit has resulted in a proper passing of the executors' accounts, the executors may be allowed their costs, less the costs directly attributable to their conduct. *Taylor v. Hargarth*, 8 Jur. 135; *In re Honsberger*, 10 Ont. R. 54.

If executors by their unfounded claims, or by their supineness, negligence or misconduct, occasion an administration suit to be brought, they *prima facie* subject themselves to liability for the general costs of it. *McGill v. Courtice*, 17 Gr. 271; see also *Simpson v. Horne*, 28 Gr. 1, where an executor was refused costs down to the decree and ordered to pay the subsequent costs.

Where administration proceedings were rendered necessary by gross and indefensible neglect of the trustees to deliver accounts, they were ordered to pay all the costs of taking the accounts. *In re Skinner* (1904), 1 Ch. 289; *Eglin v. Sanderson*, 3 Giff. 434, 133 R. R. 156.

Where rents were allowed to fall in arrear in consequence of disputes between the trustees, the Court made them pay the costs of a suit by the tenant for life

for payment of the income. *Wilson v. Wilson*, 2 Keen, 249, 44 R. R. 238.

In an administration action executors were charged with so much of the expenses of the reference as was incurred in the Master's office in establishing charges which they disputed. *Stewart v. Fletcher*, 18 Gr. 21.

Where executors are brought into Court to determine the rights in a fund, or otherwise, they will be allowed their costs, although they make a claim, if it is merely by way of submission. *Rashleigh v. Master*, 1 Ves. Jr. 201.

As between executors and creditors, the executors are entitled to their full costs, charges and expenses out of the estate in priority to the payment of debts, although the estate is insolvent, unless they improperly deny assets. *Lodge v. Pritchard*, 4 Giff. 294, 141 R. R. 213; *Dodds v. Tuke*, 25 Ch. D. 617.

Where two or more executors are implicated in a breach of trust, the Court, in making an order for costs, will not distinguish between the relative degrees of culpability. *Lawrence v. Bowle*, 2 Ph. 170, 78 R. R. 54. But a solicitor-trustee to whom the management of the trust has been left as the acting trustee, is liable to indemnify his co-trustee against the costs of an action caused by his negligent conduct. *In re Linsley* (1904), 2 Ch. 78.

Where executors are allowed costs out of the estate such costs are allowed in the ordinary way, i.e., as between solicitor and client, unless it is established that they have been guilty of some misconduct which would justify the Judge in depriving them of costs. And this rule applies where the executors are entitled to two sets of costs, as in *Re Love*, 29 Ch. D. 348, where one executor brought an action against his co-executor for administration, no misconduct being alleged against the defendant.

An executor is not entitled to credit for services rendered by a solicitor in advising him concerning his right to compensation, because such service is for the

personal benefit of the executor and not for the estate. *In re McAlpin*, 8 Ohio Dec. 654.

Credit will not be allowed a personal representative for expenditures made in connection with a contest over the will which is still pending, as liability for such expenditure cannot be fixed until the contest is determined. *Tilton's Estate*, 11 Pa. Co. Ct. 625.

See further under "Practice on Audit."

CHAPTER XXIX.

SOLICITOR-EXECUTOR.

Section 67 (4) of The Trustee Act provides as follows:—

Where a barrister or solicitor is a trustee, guardian or personal representative, and has rendered necessary professional services to the estate, regard may be had in making the allowance to such circumstances, and the allowance shall be increased by such amount as may be deemed fair and reasonable in respect of such services.

The "allowance" here referred to is the compensation to which a guardian or personal representative is entitled to for his care, pains and trouble, and his time expended in and about the estate. Although the statute says that regard *may* be had to these circumstances, the word "may" is here used to give an authority and not a discretion. *Fensom v. New Westminster*, 5 B. C. R. 624; 2 C. C. C. 52. Where a statute confers an authority to do a judicial act upon the occurrence of certain circumstances, and for the benefit of a certain party, the exercise of the judicial authority so conferred is imperative and not discretionary.

Atcheson v. Mann, 9 P. R. 473; *Fonseca v. Schultz*, 7 Man. R. 464; *Darby v. Toronto*, 17 O. R. 554.

Mr. Holmsted, in his Ontario Judicature Act, says:

Having regard to the provisions of The Trustee Act and The Solicitors Act above referred to, it would seem to be clear that the former rules prohibiting solicitor trustees, or mortgagees, from recovering profit costs from their *cestuis que trust* or mortgagors are, in effect, abrogated, and this right to remuneration being now recognized by statute, the quantum will be the ordinary taxable charges.

There is, however, a broad distinction between the provisions of section 68 of The Solicitors Act and section 67 (4) of The Trustee Act. A solicitor mortgagee is "entitled to receive the same charges and remuneration as he would be entitled to receive if such mortgage had been made to a person not a solicitor." In other words, in the case of a solicitor mortgagee, as far as costs are concerned, the solicitor is entitled to recover his charges as if the relation of solicitor and mortgagor did not exist. Such costs and charges can be taxed under The Solicitors Act the same as any other bill of costs. In the case of a solicitor trustee, the solicitor does not recover for professional services as in the case of solicitor and client. His fees would appear not to be subject to the provisions for taxation found in The Solicitors Act. All The Trustee Act does is to enable the Surrogate Court Judge to have regard to the necessary professional services the executor has given to the estate and increase the allowance by a fair and reasonable amount for such services. In ascertaining what "may be deemed fair and reasonable in respect of such services," there appears to be no other guide than the tariff allowed to solicitors for similar services.

Section 67 (4) of The Trustee Act came into force on 12th June, 1903 (3 Edw. VII., ch. 7, sec. 27). The law before this enactment is concisely stated in *In re*

Williams (1902), 4 O. L. R. 501, as follows:—"The general rule is that a trustee-solicitor is not entitled to charge the estate with any professional services, for to allow him to do so would be to violate the rule that a trustee is not to be placed in a position where his duty and his interest conflict. An exception, however, which is not to be extended, has been established by the decision of Lord Cottingham in *Cradock v. Piper* (1850), 1 M. & G. 664, under which a solicitor-trustee who brings or defends proceedings in Court for himself and his co-trustee is entitled to recover profit costs and therefore to charge such costs to the estate, but such costs are not to be increased by the fact that he is himself a party beyond what they would have been had he acted for his co-trustee only. This exception is not to be extended to proceedings to professional services rendered to the estate out of Court: see *In re Corsellis, Larton v. Elwes* (1887), 34 Ch. D. 675; *Broughton v. Broughton*, 5 D. M. & G. 160; *Re Doody, Fisher v. Doody* (1893), 1 Ch. 129, 138, 139, 141; *Re Mimico Pipe & Brick Mfg. Co.*, 26 O. R. 289; *Lewin on Trusts*, 10 ed." See also *In re Leckie Estate*, 36 C. L. J. 136.

In England, when a solicitor is named as executor, it is usual to insert a clause in the will empowering him to charge for his professional services. In *Re Fish* (1893), 2 Ch. 413, where the will contained such a provision, it was held that the executors could not settle the amount payable out of the estate for such services to one of themselves, so as to bind the *cestui que trust* and preclude his right of taxation. Where the parties are *sui juris* there is nothing to prevent them agreeing on the amount to be retained by the executors as compensation; but the Court would view such an agreement with suspicion where a portion of the allowance consists of claims for professional services, where the *cestui que trust* has no independent professional advice.

In *Re White* (1898), 1 Ch. 297, an executor was empowered by the will to charge for his professional services. The estate proved insolvent and it was held

his right to charge for his services was in the nature of a legacy, and could not be asserted in competition with creditors. In Ontario, the remuneration being by way of extra allowance for care, pains and trouble, it would be a preferential lien. *Harrison v. Patterson*, 11 Gr. 105.

A solicitor-executor is entitled to charge only for services strictly professional, and not for matters which an executor ought to have done without the intervention of a solicitor, such as attendance to pay premiums on policies, attending at the bank to make transfers, attendances on proctors, auctioneers, legatees and creditors. When a solicitor is appointed an executor the Court must necessarily make a distinction between those things which properly belong to his office of executor, and those which relate to his character of solicitor. *Harbin v. Darby*, 28 Beav. 325; 126 R. R. 150; *In re Chapple*, 27 Ch. D. 584. It will be noticed that the section of our Act speaks of the "necessary professional services."

And a provision in a will providing that a solicitor-executor shall be allowed "all professional and other charges for his time and trouble," was held not to authorize him to charge for work which was not professional work, although it was such work as he might have charged for against a client who was not a trustee. *In Re Chalinder & Herrington* (1907), 1 Ch. 58. See also *Clarkson v. Robinson* (1900), 2 Ch. 722.

CHAPTER XXX.

MAINTENANCE OF INFANTS.

One of the problems confronting a trustee, whether executor or administrator, is to know how far he is justified in applying money to which an infant may become entitled, in or towards the maintenance of such infant. Where maintenance is given by a will the limit of authority will generally be governed by the terms of the will; when no such authority is given recourse must be had to the law as laid down in the decisions of the Courts. In *Williams on Executors* the law is thus stated: "It must be observed that generally an executor cannot, without risk, pay any part of a legacy bequeathed to an infant, either to the infant or to any person for his use. Therefore the executor is not, as a rule, justified in applying any part of the capital of the legacy for the maintenance of the child, nor indeed of the interest except under the conditions hereinafter appertaining. But the Court will in some cases, upon application being made for its sanction, authorize the application of part of the capital for maintenance, if either the total fund is small, or there is no other means of providing for the support of the child. And it appears that the executor may do the same on his own authority, if he does no more than the Court would have directed if it had been resorted to in the first instance. For the principle is established, that if an executor do, without application, what the Court would have approved, he shall not be called upon to account, and forced to undo that, merely because it was done without application. At the same time it is the prudent course for an executor in every case to apply to the Court before devoting any part of the capital of a legacy to maintenance": pp. 1264, 1265.

In England the power of applying the interest of a legacy to the maintenance of an infant is now prin-

cially regulated by The Conveyancing and Law of Property Act, 1881, which repealed section 26 of Lord Cranworth's Act. There is no corresponding Act in Ontario.

As a general rule the Court will not allow maintenance to an infant during the lifetime of the infant's father, if the father is able to support the infant. The father's ability must be understood in the sense of ability to maintain and educate according to the fortune and expectations of the infant, and the infant's needs must be considered with reference to the same standard of fortune and expectation.

When maintenance is allowed for an infant, it includes ordinary medical attendance, but not the expense of an unusual or protracted illness. *Smith v. Rose*, 24 Gr. 438; *Howe v. Carlaw*, 15 O. R. 697.

Unless the estate is exceptionally large nothing in the shape of expenditure for luxuries will be allowed. *Bridge v. Brown*, 2 V. & C. 181; *Zimmerman v. Wilcox*, 35 C. L. J. 688.

As against creditors an administrator cannot be allowed for disbursements in schooling, feeding or clothing of the intestate's children subsequently to his decease. *Giles v. Dyson*, 1 Sturkie 32; 18 R. R. 743.

The Court will permit the use of the *corpus* of an infant's estate, or so much of it as may be necessary, where the doing so is for the benefit of the infant; and it will do so where it is proper for past as well as for future maintenance. *In re Howarth*, L. R. 8 Ch. App. 418; *Ashbrough v. Ashbrough*, 10 Gr. 430.

There is no doubt that the Court has power to employ the *corpus* of an infant's estate for his maintenance; and that the Court exercises this power whenever that course is shewn, to the satisfaction of the Court, to be more for the infant's benefit, than to preserve the property intact until the infant comes of age; and it is the modern doctrine, that payments made by trustees or executors out of the *corpus* without the previous sanction of the Court are to be allowed where the Court considers the payments reasonable and

proper; and such allowances may be made whether the payments were for advancement or maintenance, though payments by way of advancement are more readily allowed than payments by way of maintenance. In all cases payments made without previous authority are made at the risk of the parties; and the allowance afterwards is for the discretion of the Court in view of all the circumstances." *Edwards v. Durgan*, 19 Gr. 101.

This was approved of in *Goodfellow v. Rannie*, 20 Gr. 425, as a general exposition of the law. But in *Edwards v. Durgan*, where a father gave to his widow all his goods and chattels absolutely, an annuity, and the use of his real estate during widowhood, and she married again and then claimed to be paid for past maintenance of the infants out of the *corpus* of the estate devised to them, Mowat, V.C., refused to allow the claim. See also *In re Renwick*, *Renwick v. Crooks*, 14 P. R. 361; *Re Blain Infants*, 14 P. R. 220.

But the Court does not sanction the employment of the *corpus* of an infant's estate for maintenance unless satisfied that such a course is more beneficial to the infant than that of preserving his property intact until he comes of age. *Goodfellow v. Rannie*, 20 Gr. 425.

The rule is stated even more strongly by Boyd, C., in *Crane v. Craig*, 11 P. R. 236, where he says: "It is a primary rule that the principal of the infants' estate is not to be encroached upon, unless for unavoidable reasons falling little short of necessity." *Walker v. Wetherell* (1801), 6 Ves. 473; *Ex p. McKay* (1810), 1 B. & B. 405."

These cases were approved of and followed in the recent case of *Re Randle* (1914), 32 O. L. R. 312. There an orphan boy became entitled at the age of nineteen to his mother's estate, of the value of about \$9,000. A trust company was appointed guardian of the boy's estate, and during the two years of his minority expended on his behalf for board, education, medical fees, travelling expenses, and paid to him for clothing, pocket-money and other expenses, sums

amounting in the aggregate to \$1,100 more than the income of his estate. On the audit of the guardian's accounts the Surrogate Judge allowed these disbursements, but on appeal, Mulock, C.J., delivering the judgment of the Court, said: "Had the company made application to the Court for sanction to such expenditure out of the capital, previous to its being made, and had frankly informed the Court as to the infant's situation in life, and other circumstances that should be considered, such sanction would, I think, have been refused, except to the extent of a reasonable allowance whilst the infant was at college. The company, however, made the expenditures without previous sanction and at their own risk. A large portion thereof was not necessary or in the infant's interests, but on the contrary, proved hurtful and should not be approved of by the Court. It would be reasonable to sanction payment to the infant during the time that he was at St. Andrew's College to the extent of \$100. With this exception, there should be no encroachment on the capital in respect of the various sums allowed or paid by the company to the infant for maintenance; and to this extent the appeal is allowed." Affirmed 52 S. C. R. 407.

In *Crane v. Craig*, 11 P. R. 230, the intestate left a widow and five children from 3 to 12 years old, and personal estate only, of which the infants' share would aggregate \$11,500. The Master allowed the widow \$9,504 for five years past maintenance, but on appeal, Boyd, C., reduced this to \$6,600. The mother had employed a resident governess at \$400 a year, had spent \$48 a year on music lessons, and \$500 a year for clothing. The Chancellor said: "Not questioning the propriety of these things if they could be defrayed out of the yearly income of the infants' estate, I think the Court should, in the interest of the infants, proceed upon the basis of a more economic expenditure when the capital has to be reduced."

Where two daughters aged 18 and 16 were entitled to \$1,700 and \$1,900 respectively, and were living with

their mother, who had no means of her own, the Court authorized an encroachment upon the *corpus* of the estate, each being "old enough to appreciate the folly of reducing their small means more than reasonably can be avoided." Meredith, C.J.C.P., said: "It is, of course, one of the first and highest duties of a guardian to provide for the maintenance and education of his wards, in a manner befitting their condition in life, limited, of course, by the means at his command available for the purpose, and as much of it as may be needed for the purpose it is his duty to apply to it. In strictness he ought not to encroach upon the principal without the authorization of the Court; but if he do, he may be reimbursed in passing his accounts; in effect that which the Court would have authorized beforehand may be subsequently ratified: the result being that the guardian takes the risk in not getting authorization beforehand. The expenditure should be for that only which is reasonably needed: and it is not needed when otherwise provided: or can, and should be, earned by the infant." *Re Adkins Infants* (1915), 33 O. L. R. 110.

In *Re Havey* (1913), 29 O. L. R. 336, two infants were entitled to \$500, their deceased father's share of life insurance; and upon their mother's application, she was appointed trustee of this sum, and it was ordered that the whole of it should be paid to her, on her undertaking to apply it for their maintenance and benefit.

The Court has a discretion to make an order for payment of infants' money for past maintenance, but such an order will be made only in exceptional cases. *Re Hollis*, 2 O. W. N. 1447; *Re Lloyd*, 31 O. L. R. 476; *Fenwick v. Fenwick*, 29 Gr. 381; *Stewart v. Fletcher*, 16 Gr. 235.

A testator bequeathed to his grandson his farm, implements, etc., and provided that until the grandson attained the age of 21 years the executors should keep, control and manage the farm, and expend the net revenue arising therefrom in the management and

cultivation of the land, without accounting to the grandson or anyone else for such revenue. The grandson applied to have an allowance made to him for his support and education. The application was dismissed on the ground that the testator having directed the surplus to be used in the improvement of the farm, the money could not be diverted to another purpose. *Re Estate Waddell* (1902), 35 N. S. R. 435.

The plaintiff was two years old when her father died in March, 1877. Her mother, the defendant, was appointed administratrix and guardian. The plaintiff continued to live with her mother until 1895, when she married. In an administration action the Master allowed defendant for the daughter's maintenance, \$60 a year until the plaintiff was twelve years old, \$75 a year for the next four years, and \$35 a year for the following four years, or \$1,040 in all. The plaintiff did the work usually done by a girl of her age living upon a farm with her parents, and for several years there was no hired female assistant, all the women's work being done by the defendant and the plaintiff. The defendant kept no account of her disbursements. On appeal by the defendant it was held that, having regard to the fact that the parties were living together on a farm for the greater part of the time where the chief outlay would be for clothing and pocket money, and to the facts that the plaintiff attended the public school free of expense, and that the outlay for school books was trifling, the finding of the Master could not be interfered with upon the evidence, although he might well have allowed a larger sum. The Master disallowed \$125, the cost of an organ which the defendant alleged was bought for the plaintiff when she was eight years old. Held, that for an eight-year-old daughter of a deceased farmer, living on the farm with her mother and step-father, an organ costing \$125 was not a necessity. *Zimmerman v. Wilcox*, 35 C. L. J. 688.

In re Brazil, Barry v. Brazil, 11 Gr. 253, the widow of the deceased was appointed administratrix. She got in the personal estate and remained in occupation of

the farm, maintaining the infant heirs, to whom no guardian had been appointed. It was held that the personal estate and proceeds or profits of the real estate must be applied first in payment of debts, and then to reimburse the administratrix for sums spent in the infants' maintenance.

It has long been settled that interest as a means of maintenance is payable out of the general residue, upon a legacy which is merely contingent, when the legatee is an infant child of the testator, and no other maintenance is provided. The cases establishing this are numerous and uniform. *Heath v. Perry*, 3 Atk. 101; *Chambers v. Goldwin*, 11 Ves. 1, 8 R. R. 61; *Martin v. Martin*, L. R. 1, Eq. 369; *Binkley v. Binkley*, 15 Gr. 649.

But where the testator is not the parent of, or one standing *in loco parentis* to, the legatee, the general principle is that payment may be made for maintenance out of the income of a legacy only where the legacy is vested in possession: *Collis v. Blackburn*, 9 Ves. 470; not when it is vested and payable *in futuro*: *Descrambles v. Tompkins*, 4 Bro. C. C. 149; nor where it is contingent: *Butler v. Freeman*, 3 Atk. 58.

In *Re McIntyre* (1904), 7 O. L. R. 213, two infants were given a legacy of \$4,000 each, contingent upon them attaining 25 years of age, and one-tenth of the residuary estate. It was contended that the infants were not entitled to interest on the pecuniary legacies—that the gift to them of a share in the residue of the estate took the case out of the rule of construction above stated, as being a provision for their maintenance. Street, J., said: "No authority was cited in support of this contention, and the case of *In re Moody* (1895), 1 Ch. 101, is a strong authority against it. The question is not whether the infant is entitled to some other fund, either under or apart from the will, which might be made available for the maintenance of the infant during minority, but whether upon the face of the will the testator has shewn a clear intention that the infant shall look for maintenance to some particular

fund other than his legacy. If he has not, then the presumption of an intention that he should have interest on his legacy by way of maintenance at once arises." And the executors were directed to apply the income of each legacy for the benefit of the infants during minority to the extent required for their maintenance. See further as to interest on legacies for maintenance, under "Legacies and Annuities."

CHAPTER XXXI.

RELIEF OF TRUSTEES.

Section 37 of The Trustee Act provides for the relief of trustees committing a technical breach of trust. Under this section of the Act where it appears to the Court that a trustee is or may be personally liable for any breach of trust, whenever the transaction alleged or found to be a breach of trust occurred, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust, and for omitting to obtain the directions of the Court in the matter in which he committed such breach, the Court may relieve the trustee either wholly or partly from personal liability for the same.

This is a reproduction of section 3 (1) of the Judicial Trustees Act, 1896 (England), and the decisions under that Act are applicable to our Act.

This Act was passed to afford greater protection to trustees, was made retrospective, and was "meant to be acted upon freely and fairly in the exercise of judicial discretion." *In re Turner*, (1897), 1 Ch. 536.

It is not sufficient that the trustee acts honestly, he must also act reasonably. *In re Barker*, 77 L. T. 712; and the question of reasonableness is where most of the difficulty is encountered. *In Smith v. Mason* (1901).

1 O. L. R. 594, Boyd, C., said that the nearest approach to a working rule is found in the judgment of Lopes, J., in *In re Chapman, Cocks v. Chapman* (1896), 2 Ch. at pp. 777, where he says: "It is very easy to be wise after the event; but in order to exercise a fair judgment with regard to the conduct of trustees at a particular time, we must place ourselves in the position they occupied at that time, and determine for ourselves what, having regard to the opinion prevalent at that time, would have been considered the prudent course for them to have adopted."

In the same case Lindley, L.J., said: "Trustees acting honestly, with ordinary prudence and within the limits of their trust, are not liable for mere error of judgment."

In *Learoyd v. Whiteley* (1887), 12 A. C. 732, the duty of trustees is said to be to use ordinary care and caution, and they must be supposed to possess ordinary care and prudence. The trustee does not entitle himself to relief by proving that he has acted reasonably and honestly. He must shew that under all the circumstances he ought fairly to be excused for his breach of trust.

In cases since the Act the Judges have invariably refused to interpret "reasonably," saying that the course of conduct pursued in each individual case would have to be pronounced upon as it came up. The Court, no doubt, has to be satisfied by sufficient and proper evidence that the trustee has acted reasonably as well as honestly, but that has been by giving evidence of what was done by him, what enquiries he made, the condition of affairs contemporaneously, and other matters to enable the Court to put itself in the situation of the trustee at the time. *Smith v. Mason, supra*. In this case it was held that the Act does not render competent as evidence the opinions of bankers or other financial men as to whether the trustee so acted in the course he has taken or omitted to take in respect of collecting a debt due the estate. The general rule of evidence still applies that mere personal

belief or opinion is not evidence, and the test of reasonableness is that exhibited by the ordinary business man or the man of ordinary sense, knowledge and prudence in the conduct of his own affairs.

Whether a trustee has acted reasonably must be determined in the light of all the surrounding circumstances, not as they would appear in the eyes of lawyers and Judges, but as they would appear in the eyes of ordinary prudent business men, and if he acted under such circumstances, as they so appeared, as a majority of ordinary prudent men would have acted under the like circumstances, he ought to be held to have acted "reasonably as a trustee." *Dover v. Denne* (1902), 3 O. L. R. p. 677.

The rule is, that where the Court finds that the trustee has acted both honestly and reasonably, there is then a case for the Court to consider whether the trustee ought fairly to be excused for the breach of trust, looking at all the circumstances. *Re Nicholls, Hall v. Wildman* (1913), 29 O. L. R. 206.

The burden lies upon the trustee to shew that he has acted reasonably. *Re Stuart* (1897), 2 Ch. 583, 590.

When Relief Granted.

In the following cases the Court granted relief:

Where an executor of a solicitor believing, and on grounds that justified that belief although erroneous, that the deceased had no right of action against a client personally for costs incurred in certain administration proceedings, took no steps to recover such costs. *Re Roberts* (1897), 76 L. T. 479.

An executor paid an immediate legacy of £300 for maintenance to the widow, and allowed her to receive the income from the estate. The assets amounted to £22,000, and the only known debt was one of £100. Six months after the death of the testator an action for an account of moneys received by the testator as plaintiff's agent was commenced and the estate was found indebted to the plaintiff in £26,000. The executor was

relieved as to the £300 legacy and the income paid up to the issue of the will, but not as to sums paid thereafter. *In re Kay, Mosley v. Kay* (1897), 2 Ch. 518.

A testator gave his estate to executors upon trust "to maintain the same and every part thereof in the like mode of investment." Part of the estate was a promissory note for £166 payable on demand. The executors, believing the debtor to be a man of good credit, neither called in nor applied to the Court for directions as to this debt, and the debtor died insolvent 18 months after the testator. Held, that, having regard to the terms of the will and the amount of the debt, the executors might reasonably have thought they were not bound to call in the debt or apply for directions. *In re Grindley, Clews v. Grindley* (1898), 2 Ch. 593.

Where the trustee has acted honestly the terms of the will may be looked at to judge of the reasonableness of his conduct. If an ordinary business man might reasonably entertain a particular view of the construction of the will, and the action of the trustee would have been justified if that view had been the true one, the trustee cannot be said to have acted unreasonably merely because this view of the construction is wrong. *In re Mackay* (1911), 1 Ch. 300; *Henning v. Maclean* (1900), 2 O. L. R. 169 *post*.

So where trustees erroneously assuming they had power to sell, sold leaseholds and thereby diminished the income of the plaintiff, though the sale would have been a proper one had the trustees in fact possessed a power of sale. *Perrins v. Bellamy* (1899), 1 Ch. 797.

So where trustees, acting on the advice of solicitors, invested on mortgage without an actual valuation, but at a value calculated at a rate at which adjacent property had sold for by auction in a previous year, they were relieved except to the extent of the excess over two-thirds of the actual value. *Waite v. Parkinson* (1901), 85 L. T. 456. But see *Re Stuart* (1897), 2 Ch. 583, *post*.

Under The Trustee Act the advice of competent counsel and the opinion of the Court, even if erroneous, may afford sufficient protection to the honest trustee. *Elgin Loan Co. v. National Trust Co.* (1903), 7 O. L. R. p. 18. And see *In re Allsop* (1914), 1 Ch. 1 *post*.

In one case it was said that the test is "Did the trustees act as an ordinary prudent man would have done in regard to his own business?" *McDonuld v. Trusts and Guarantee Co.*, 1 O. W. N. 886; *In re Turner* (1897), 1 Ch. 536; *In re Stuart* (1897), 2 Ch. 583. But the fact that he has acted with equal foolishness in both cases will not justify relief under the Statute. *In re Lord de Clifford's Estate* (1900), 2 Ch. 707.

Sec. 31 of the Act is a relieving section, and does not impose a statutory obligation upon trustees to take a valuation, and the neglect to do so does not exclude them from the benevolent operation of section 37. *Palmer v. Emerson* (1911), 1 Ch. 758.

Money was advanced by executors to their solicitors to pay necessary debts and disbursements, and for other administration purposes, in reliance on the solicitors' statements that these sums were required for these purposes, and the solicitors did not apply all the moneys received in such payments. The Court found the executors had acted honestly and reasonably and ought fairly to be exensed for making the payments in reliance on the solicitors' statements. *In re Lord de Clifford's Estate* (1900), 2 Ch. 707.

So executors acting honestly and reasonably, upon a mistaken construction of a will, where the trial Judge took the same view of it as they did, were relieved. *Hennig v. Maclean* (1901), 2 O. L. R. 169.

One of three executors was a solicitor, and the will provided that in the administration and management of the estate he should be entitled to professional remuneration. The testator had perfect confidence in the solicitor, who up to the time of his death was reputed to be a person of integrity and wealthy. The whole management of the estate was left to the solicitor, and at his death it was found he had, without the

knowledge of his co-executors, misappropriated moneys of the estate, and that his own estate was insolvent. The evidence shewed that it was the intention of the testator that the solicitor should continue to manage the estate after his death just as he had managed it in the testator's lifetime, and this intention was communicated by the testator to the executor Denne. Held, that the executor Denne acted honestly and reasonably and was relieved. *Dorer v. Denne* (1902), 3 O. L. R. 664.

Section 37 of The Trustee Act is not confined to cases where the breach of trust arises from some executive or administrative blunder, but may extend to cases where money is paid to a person not entitled according to the true construction of the will. Thus in *In re Allsop* (1914), 1 Ch. 1, the trustees acting upon the erroneous advice of their solicitor as to the effect of the will, paid the income to a person not entitled. Warrington, J., took the view that relief ought to be confined to cases where there has been an error merely of administration, and ought not to be extended to a case where money due to one person has been wrongfully paid over to another. The Court of Appeal reversed this judgment. Cozens-Hardy, M.R., said: 'I can see no ground for narrowing or limiting the application of the wide words of the section. "Any breach of trust" are emphatic words. The statute was obviously designed to protect honest trustees, and ought not to be construed in a narrow sense. I shrink from holding that, where trustees have divided an estate between A. and B. after taking competent advice that A. and B. are alone entitled, they cannot plead this section in answer to a subsequent claim by C. So to hold would be to render the relief given by the section almost nugatory. There have, however, been several authorities to which it is necessary to refer. Kekewich, J., in *Davis v. Hutchings* (1907), 1 Ch. 365, says: "If a trustee has, without any default of his own, employed a defaulting agent, whom he believed to be a competent man, to do certain work and, whether com-

petent or not, the agent turns out to be fraudulent and gets the trustee into a scrape, the trustee cannot shelter himself behind that. Why ought he to be let off? A trustee who employs an agent must, according to the ordinary rules of law, be responsible for the acts of the agent. I do not believe it was the intention of the Legislature that he should be let off that. This case occurs to me: A question arises on the construction of a will whether, on a gift to nephews and nieces, the nephews and nieces of the wife as well as of the testator are intended to be included. The trustee takes the opinion of eminent counsel, and is advised that the class is restricted to the nephews and nieces of the testator. No doubt he might take the opinion of the Court, and perhaps be held liable for omitting to take it; but does the taking of the opinion of eminent counsel save him from any liability if, in the event, it be determined that the nephews and nieces of the wife, on the proper construction, are included in the gift? I cannot conceive that the Act was intended to apply to a case of that sort.' With great respect I am unable to accept this view. The decision upon the facts of that particular case may have been right, but the general principles thus laid down cannot, I think, be supported. It is somewhat strange that Kekewich, J., in support of his view referred to a case in the Privy Council of *National Trustees Co. of Australia v. General Finance Co.* (1905), A. C. 373, which turned upon a section of a Colonial Act corresponding with the section now under discussion. There a company, whose business it was to act as trustees for reward, divided an estate wrongly upon the advice of their solicitor. It was first held that the advice of the solicitor was not a defence to the action, and the Court then proceeded to consider all the circumstances and in the exercise of their discretion declined to relieve the trustees. In my opinion that case is an authority that the Court has jurisdiction to relieve when payment has been made to a wrong person, although the Court declined to exercise that jurisdiction, otherwise

the inquiry into the circumstances would have been irrelevant. In *In re Kay* (1897), 2 Ch. 518, Romer, J., took a wider view and held that executors, who had paid beneficiaries certain sums which an unpaid creditor sought to make them liable for, were entitled to be relieved. It is true that this was not a question of the construction of a written document, but it was in some respects stronger, for the creditor had a claim prior to any of the beneficiaries. Parker, J., in *In re Mackay* (1911), 1 Ch. 307, used language which I respectfully desire to adopt: 'If an ordinary business man might reasonably entertain a particular view of the construction of the instrument and the action of the trustee would have been justified if that view had been the true one, that trustee cannot be said to have acted unreasonably merely because this view of the construction of the instrument is wrong. Even where a trustee has distributed an estate on an erroneous construction of a will he has been relieved under the Act.' It may be that there is no reported case in which this has been done, but in the opinion of all the members of the Court this may be done in a proper case. Warrington, J., held that the Act has no application where a trustee has misconceived his duty and paid moneys to a person not entitled. With great respect I think he was wrong in this. The jurisdiction is from its very width one which must be exercised with great caution. It certainly is not enough for a trustee to say 'I thought A.B. entitled and I paid him accordingly.' He cannot be considered to have acted reasonably if he has neglected to obtain skilled advice. In considering what is reasonable, regard must be had to the estate of which he is trustee. In a large estate it may be only reasonable that he should consult counsel of the first rank or apply by originating summons for the direction of the Court, whereas it would not be reasonable to insist upon all this where the estate is small."

In the following cases the Court refused to grant relief:

Where loans were made on unauthorized securities. *Chapman v. Browne* (1902), 1 Ch. 785; *In re Dire* (1909), 1 Ch. 328; *In re Turner* (1897), 1 Ch. 536.

Where trustees paid the share of a beneficiary to their solicitor in reliance upon his statement that he was the assignee of the share and without relying upon him to prove his title. The solicitor had an assignment, but it created a prior charge which would have been discovered if they had examined the deed of assignment. *Davis v. Hatchings* (1907), 1 Ch. 356.

Trustees, under the advice of their solicitors, paid two-thirds of a fund to the children, when in fact the whole fund was the property of the husband. The fact that such payment was made through the bad advice of the solicitors was held no defence. And where the trustees had made no attempt to replace the fund in whole or in part, nor explained the reason for their abstention, the Court refused relief. "It is very material circumstance that the appellants are a limited joint stock company, formed for the purpose of earning profits for their shareholders; part of their business is to act as trustees and executors; and they are paid for their services in so acting by a commission which the law of the Colony authorizes them to retain out of the trust funds administered by them, in addition to their costs. . . . Without saying that the remedial provisions of the section should never be applied to a trustee in the position of the appellants, their Lordships think it is a circumstance to be taken into account." *National Trust Co. of Australasia v. General Finance Co. of Australasia* (1905), A. C. 373. But the liability of a trustee would appear not to be increased by the fact that he is paid for his services. *Jobson v. Palmer* (1893), 1 Ch. 71; *Shepherd v. Harris* (1905), 2 Ch. at p. 318.

In the matter of investments, *prima facie* the provisions of The Trustee Act (sections 28-32) constitute a standard by which reasonable conduct is to be judged, although non-compliance with these requirements is

not necessarily a fatal obstacle to an application for relief. A trustee in lending money on mortgage security, should not act upon the opinion of his solicitor alone in a question of the value of the security, nor on the opinion of a valuer who acts for the mortgagor alone; and where this was done the Court refused relief. *In re Stuart* (1897), 2 Ch. 583; *Shaw v. Cates* (1909), 1 Ch. 389.

So where executors distributed the assets without proper advertisement for creditors' claims the Court refused relief. "I think it would be most dangerous to hold that an executor acted reasonably and ought fairly to be excused, if he distributed the assets among the beneficiaries without taking the steps always taken by the Court and by careful executors, to give an opportunity to creditors and others having claims on the estate to bring forward their claims." *Stewart v. Snyder*, 30 O. R. 110, 27 A. R. 423.

A trustee who does nothing, accepts without enquiry what is said by his co-executor, and is satisfied with any explanation given by him, does not act "honestly" within the meaning of the Act. *In re Second East Dulwich Building Society*, 68 L. J. Ch. 196. Even though the co-executor is a solicitor and has been nominated by the testator. *Re Turner* (1897), 1 Ch. 536.

A testator died in 1878 owing 125 shares of Ontario Bank stock of the par value of \$5,000. The executors had power "to invest the proceeds in such manner as they shall deem most advisable." In 1882 the par value of the stock was reduced by one-half; in 1896 it was further reduced, and subsequently an order was made for the winding-up of the bank. The Court held that the will authorized the retention of the shares as an investment, but the executors had not acted reasonably in not selling after 1882. *Re Nicholls, Hall v. Wildman* (1913), 29 O. L. R. 206.

An executrix without consulting a solicitor, but on the advice of a commission agent who had been a

friend and adviser of her deceased husband, postponed for fourteen years the sale of some shares instead of selling them within the year after the testator's death. Her conduct was held not reasonable and relief was refused. *Re Baker* (1898), 77 L. T. 712.

CHAPTER XXXII.

PROTECTION AND INDEMNITY.

Sections 35 and 36 of The Trustee Act limit the extent of the liability of trustees in certain cases, and deserve attention. Section 35 is as follows:

35. A trustee shall be chargeable only for money and securities actually received by him, notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects or defaults, and not for those of any other trustee, nor for any banker, broker or other person with whom any trust money or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through his own wilful default; and may reimburse himself or pay or discharge out of the trust property all expenses incurred in or about the execution of his trust or powers.

This section is from Lord St. Leonard's Act, and is now embodied in sec. 24 of the English Trustee Act, 1893. It adds little or nothing to the security of a trustee, as before the Act the provisions of this section were virtually implied. *King v. Hilton*, 29 Gr. 381, 384. The effect of the section seems to be to shift the onus of proof. If a case comes *prima facie* within this section, the onus is thrown on the person attacking the trustee to shew that he is liable. *Re Brier*, 26 Ch. D. 238.

In most of the cases it will be found that the result hinged on whether "wilful default" was proved. If wilful default on the part of the trustee is once shewn, and loss has happened to the estate by reason of such default, the section affords no protection. In several cases "wilful default" has been defined. Thus in *Elliott v. Turner*, 13 Sim. 477, 60 R. R. 381, it was said that neglect or default may have been wilful though it may have been unintentional and have arisen from forgetfulness. Wilful means—not arising from external circumstances over which there is no control—and therefore the default may be wilful, although merely passive. And in *Connelly v. Connelly*, 17 Ir. Ch. R. 208, it is said that mere negligence or imprudence may be wilful default. It does not imply deliberate or intentional default. In *Blount v. O'Connor*, 17 Ir. L. R. 620, it is said that wilful default is improper failure to realize assets, and that mere loss without negligence would not be wilful default.

"Default is purely a relative term, just like negligence. It means nothing more, nothing less, than not doing what is reasonable under the circumstances—not doing something which you ought to do, having regard to the relations which you occupy towards the other persons interested in the transaction. The other word which it is sought to define is 'wilful.' That is a word of familiar use in every branch of law, and although in some branches of the law it may have a special meaning, it generally, as used in courts of law, implies nothing blameable, but merely that the person of whose action or default the expression is used, is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this, that he knows what he is doing, and intends to do what he is doing, and is a free agent." Bowen, L.J., *In re Young and Harston's Contract*, 31 Ch. D. 174.

In *King v. Hilton*, 29 Gr. 381, H. and C. were executors. H. took upon himself the actual management of the estate with the knowledge and consent of

but not under any express agreement with, C. H. applied a sum of money to his own use, without C's knowledge. The will contained an indemnity clause to the effect of sec. 35. It was held that C. was not liable for the sum appropriated by H.

An executor is not liable for a loss under these circumstances, provided he has not intentionally or otherwise contributed to it; the testator's misplaced confidence as to one shall not prejudice the other. He is not responsible for the assets come to the hands of his co-executor. If indeed he does any act, for instance, handing over the assets in his hands to his co-executor, who then misapplies them, he will be generally responsible for them, just as if he had handed them over to a stranger. But if he is merely passive, by not obstructing his co-executor from getting the assets into his possession, he is not responsible. If by *agreement* among the executors, one is to manage one part of the estate, and the other another part, each is answerable for the whole. Here each receives a part by agreement with the other; and it is the same as if both had received. *Gill v. The Attorney-General*, Hardr. 314. And so where all join in the sale of a testator's goods, and one was allowed to receive the money, the others were liable. *Burrows v. Walls*, 5 D. M. & G. 233, 104 R. R. 95. And where several took out administration to an intestate, and united in appointing one to be the acting administrator, and directed the debtors to pay their debts to him, and he became insolvent, the others were made liable for the loss to the estate. *Lees v. Sanderson*, 4 Sim. 28. In all these cases there was an active intermeddling with the estate, and the defaulter had been enabled to receive the assets by their agreement for that purpose.

If having the means of knowledge by the exercise of ordinary vigilance, one executor stands by and permits a breach of trust to be committed by a co-executor, he is liable. *Sovereign v. Sovereign*, 15 Gr. 559.

In *McCarter v. McCarter*, 7 O. R. 243, the will contained an indemnity clause providing "that each of the executors should be responsible for his or her acts only, and irresponsible for any loss unless through wilful neglect or default." The three executors sold real estate, and C., one of the executors, who was entitled to the annual income of the proceeds, took the most active part in the management of the estate, and employed a solicitor who received the purchase money. Both of the other executors lived at a distance, but they were aware of the employment of the solicitor and that the purchase money was in his hands. The money remained in the solicitor's hands several years, when he absconded and there was a loss to the estate of \$1,960. Boyd, C., held all three executors liable. The co-executors knew the money was in the hands, or under the control of their co-trustee to be invested, and they allowed it to remain for years without any inquiry or any assurance that the trust was being properly administered. This was wilful neglect and default which they would not have been guilty of in the management of their own affairs.

McCarter v. McCarter was discussed and distinguished in *Re Crowter*, 10 O. R. 159, where all the executors in some degree acted in their executorial capacity, but by tacit consent one of them took the active management of the estate and received the proceeds of a sale of land. H., one of the executors, joined in the conveyance for conformity, but did not receive any of the purchase money, and did not know there was any balance in the hands of the active executor after paying debts, etc. It was held that H. was not guilty of wilful default and not liable.

Archer v. Severn, 13 O. R. 316, was before the same Judge (Ferguson, J.), who heard *Re Crowter*, and when the latter decision was pressed upon him he said: "In that case I was somewhat troubled by authorities as to the rule where one executor has enabled another person wrongfully to get money." In *Archer v. Severn* one of two executors used a portion of the personal

estate in his own business. His co-executor knew of this and took no steps to have the personal estate placed in better custody and invested according to the directions contained in the will. He was held to have acquiesced in the acts of the other executor and jointly liable. So in *Bacon v. Clarke*, 3 My. & Cr. 294, a trustee was held liable for loss when he had allowed trust money to remain in the hands of his firm, though there was a provision protecting him, except in case of wilful default or neglect.

In *Robdard v. Cooke*, 36 L. T. N. S. 504, 25 W. R. 555, the will contained a clause providing that the trustees should be responsible only for such moneys as they should actually receive, and not for any involuntary loss of any part of the trust funds. Two trustees received certain funds which were duly deposited and credited to the trust account. One trustee was, however, given power to draw upon this account, and drew and misapplied a considerable sum. It was held that the clause in the will did not relieve the co-trustee as the loss was not involuntary but had arisen from his giving the defaulting trustee improper power.

In *McPhaden v. Bacon*, 13 Gr. 591, S., one of two executors was indebted to the estate on a mortgage given to the testator. B., the other executor, was aware of this, but allowed S. to retain the mortgage deed and took no steps to compel payment, and S. executed a discharge of his own mortgage and registered it. B.'s duty was to secure the asset, and to realize it, and not leave it with his co-executor, whose duty and interest were in direct conflict, and not having done this he was liable. See also *Candler v. Tillet*, 22 Beav. 257; 111 R. R. 361, where the facts, and the result, were somewhat similar.

It is the duty of executors to keep a check on each other's conduct, and an executor is chargeable with neglect in allowing a part of the estate to remain outstanding in an improper state of investment, whether the party in whose hands it is outstanding is a co-executor or a stranger. In *Stykes v. Guy*, 1 Mac. & G.

422, 84 R. R. 111, two of three executors knew there were unsettled accounts between the testator and the third executor, and they had reason to believe that the latter was indebted in a considerable sum to the estate, but they took no effectual steps to compel him to account and pay or secure the balance. Several years after the death of the testator this executor became insolvent and the other executors were unable to prove that an earlier attempt to recover the money would have been fruitless, and were held liable for the loss to the estate.

A special indemnity clause will often protect an executor from liability for the acts of his co-executor, but it will not protect him from liability for a breach of his duty. *Knor v. McKinnon*, 13 A. C. 753; *Rae v. Meek*, 14 A. C. 558; *Burritt v. Burritt*, 27 Gr. 143, 29 Gr. 321. In the last case the testator expressed the fullest confidence in C. and directed the other executors to be guided entirely by the judgment of C. as to the sale, disposal and re-investment of certain securities and declared that his trustees should not be responsible for loss occasioned thereby. Held, this did not authorize the re-investment of moneys in foreign securities.

In *Wilkins v. Hogg*, 3 Giff. 116, the clause was "that any trustee who shall pay to his co-trustee, or shall do or concur in any act enabling his co-trustee to receive any moneys, shall not be obliged to see to the application thereof; nor shall such trustee be subsequently rendered responsible by an express notice or intimation of the actual misapplication of the same moneys." One trustee misapplied moneys which his co-trustee had enabled him to receive, but it was held he was saved from liability, though otherwise his negligence would have rendered him responsible. This case was followed in *Pass v. Dundas*, 43 L. T. 665.

In *Candler v. Tillet*, 22 Beav. 257, 111 R. R. 351, it was held that if an executor does an act which enables his co-trustee to obtain sole possession of money belonging to the estate, and the money is afterwards mis-

applied by the co-executor, both are liable for the loss. But this proposition must be read "who unnecessarily does an act," and such an act is not "unnecessary" if it is done in the regular course of business in administering the property. *In re Gasquoine* (1894), 1 Ch. 470.

In *Hanbury v. Kirkland*, 3 Sim. 265, 30 R. R. 165, two trustees gave to a third trustee a power of attorney to sell certain stock, and he sold the stock and misapplied the proceeds. They were held liable though there was a provision in the trust deed that the trustees should be chargeable only with moneys they respectively actually received, and that one or more of them should not be answerable or accountable for the other or others of them or for involuntary losses. See also *Bone v. Cook*, McClel. 168, 28 R. R. 697.

In *Terrell v. Matthews*, 1 Mac. & G. 433, 84 R. R. 120, it is said that if money be required for the payment of debts or legacies, one executor is safe in joining in the sale of stock or other property, and permitting another executor to receive the proceeds for that purpose, as in *Hovey v. Plakeman*, 4 Ves. 596; but if he joins in such sales when the money is not required, and he had not reasonable grounds for believing that it was not so required, he is liable for the money so received by his co-executor. *Chambers v. Minchen*, 7 Ves. 193; 6 R. R. 111; *Shipbrook v. Hinchinbrook*, 11 Ves. 252, 8 R. R. 133; *Price v. Stokes*, 11 Ves. 319, 8 R. R. 164.

An executor who sanctions or adopts improper accounts rendered to the beneficiaries by a defaulting co-executor becomes responsible for the statements therein contained. *Horton v. Brockhurst*, 29 Beav. 504, 131 R. R. 683. In this case the accounts were prepared by L., one of the executors, and they represented that one-third of the net income had been received by the executors and invested by them. The truth was the money had been allowed to remain in the hands of L. until he became bankrupt. The defendant (the other executor) had nothing to do with making up

the accounts, and the moneys never came to his possession, but he was present at meetings when the accounts were presented and discussed, and defended the accounts. It is to be noted that the defendant's liability is not placed on the ground of wilful default or anything of that description; but on the ground that the accounts was an admission by the executors to their *cestuis que trust* that they had sums of money in their hands which they ought to have had, and that these sums were retained by them for investment.

Mickleburgh v. Parker, 17 Gr. 503, is an important case because of the common practice, in Ontario, of one of several executors doing all the active work of administration without any supervision whatever by his co-executors. A. and B. were joint trustees, and had trust money to their joint credit. A., the "acting trustee," from time to time brought cheques to B. already signed by A. for the signature of B. B. made no inquiry as to how the funds were to be applied, and A. misapplied them. It was held that B. was liable—that the general rule applied, that trustees must account for the proper application of money in their hands. It was also held that it was no defence on behalf of B. that he only became trustee at the request of the *cestui que trust*, and on the representation that his name only was wanted, and that A. would do all the business. "It is not uncommon to hear one of several trustees spoken of as the acting trustee, but the Court knows no such distinction; all who accept the office are, in the eyes of the law, acting trustees": p. 506.

M. and L. were executors, M. having been the testator's solicitor, and continuing to act as solicitor for himself and his co-trustee. M. represented to L. that he had made a loan on satisfactory security, and L. joined in signing a cheque payable to the order of the alleged mortgagor. M. forged the signature of the payee and absconded. Rose, J., reversed the judgment of the Master-in-Ordinary, and held that L. was not liable. The testator had by appointing M. as an executor shewn that he trusted him as a proper person to

act in a fiduciary capacity, and, *semble*, L. had also a right to trust him. *Re McLatchie*, 30 O. R. 179. See also *Dover v. Denne* (1892), 3 O. L. R. 664, and other cases cited under "Honestly and Reasonably."

Where one of two executors resides abroad he is justified in delegating to his co-executor the right to receive money owing to the estate. *In re Huntley*, 7 C. L. Times, 251.

Notwithstanding the provision of section 35 as to depositing trust moneys in a bank, this does not protect an executor who deposits such moneys as an investment and not as a deposit. *Behden v. Wesley*, 29 Beav. 213, 131 R. R. 530.

36.—(1) Where a trustee commits a breach of trust, at the instigation or request or with the consent in writing of a beneficiary, the Supreme Court may make such order as to the Court seems just for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or person claiming through him.

(2) This section shall apply notwithstanding that the beneficiary is a married woman entitled to her separate use and restrained from anticipation.

This section corresponds with section 45 of The Trustee Act, 1893. It appears to embody what was formerly the rule in equity. In the earlier cases the Court held that the limit of the impounding was the advantage derived by the beneficiary who instigated the breach of trust. *Raby v. Ridehalgh*, 7 D. M. & G. 104, 109 R. R. 46. And in *In re Somerset* (1894), 1 Ch. 231, Davey, L.J., said he could not find any words in the section which have the effect of directing the Court to exercise the statutory jurisdiction on principles different from those on which it acted before the statute: p. 275.

In *Bolton v. Currie* (1895), 1 Ch. 544, Romer, J., said this section was intended to enlarge the power of the Court as to indemnifying trustees, so as to give greater relief to trustees, and was not intended and did not operate to curtail the previously existing rights and

remedies of trustees, or alter the law except by giving greater power to the Court.

The words "in writing" do not govern or apply to all the three antecedents. They apply only to "consent," and not to "instigation" or "request." Where a trustee for a married woman, a tenant for life restrained from anticipation, advanced part of the capital to her upon her verbal request and statement that the money was needed to prevent her home from being sold, it was held that the trustee, upon making good to the estate the money so advanced, ought to be indemnified out of the income payable to his *cestui que trust*. *Griffiths v. Hughes* (1892), 3 Ch. 105; *In re Somerset* (1894), 1 Ch. p. 265.

The discretion which the section confers upon the Court of ordering that the interest of the beneficiary be impounded by way of indemnity, ought to be exercised in cases where both the trustee and the instigating beneficiary were aware of the facts which constitute the breach of trust. *Griffiths v. Hughes, supra*.

In *In re Somerset, supra*, an investment of trust funds on mortgage of property of insufficient value was made by the trustees at the instigation and request and with the consent in writing of the tenant for life, but it did not appear that he intended to be a party to any breach of trust, or to an investment without proper inquiry, and in effect he left it to the trustees to determine whether the investment was a proper one for the amount to be advanced. It was held the trustees were not entitled to the benefit of this section. Lindley, L.J., said: "In order to bring a case within this section the *cestui que trust* must instigate, or request, or consent in writing to some act or omission which is in itself a breach of trust, and not to some act or omission which only becomes a breach of trust by reason of want of care on the part of the trustees. If a *cestui que trust* instigates, requests, or consents in writing to an investment not in terms authorized by the power of investment, he clearly falls within the section; and in such case his ignorance or forgetfulness of the terms

of the power would not, I think, protect him—at all event, not unless he could give some good reason why it should, e.g., that it was caused by the trustee. But if all that a *cestui que trust* does is to instigate, request, or consent in writing to an investment which is authorized by the terms of the power, the case is, I think, very different. He has a right to expect that the trustees will act with proper care in making the investment, and if they do not they cannot throw the consequences on him unless they can shew that he instigated, requested, or consented in writing to their non-performance of their duty in this respect": p. 265. To the same effect are the remarks of A. L. Smith, L.J., at p. 270.

The discretion now given to the Court is a judicial discretion, and a trustee ought not to be allowed to deliberately commit a breach of trust at the request or with the consent of a beneficiary in the hope and expectation that the Court will afterwards assist him. *Bolton v. Currie* (1895), 1 Ch. 544.

A trustee, who at the time a breach of trust is committed, merely declines an offer to take a mortgage of the beneficiary's interest by way of security for the breach of trust, does not *per se* waive or abandon his equity. *Ib.*

The Court is not bound to impound the interest of the *cestui que trust*, and will not do so if it would be unjust. *Mara v. Browne* (1895), 2 Ch. p. 94—reversed but on another ground (1896), 1 Ch. 199.

It is the duty of trustees to make balances in their hands productive; and a trustee allowing trust money to remain in a bank will be charged interest thereon: but a *cestui que trust* cannot make a trustee liable for losses occasioned by a breach of trust which he has authorized and consented to. *Chillingworth v. Chambers* (1896), 1 Ch. 685.

Where trustees settled their accounts and paid all the beneficiaries except H., whose share was withheld pending his accounting for moneys of the estate in his hands, and was kept for some years lying in a bank without interest, the trustees were ordered, on the

application of H., to bring the moneys into Court without interest. If the trustees were wrong in not placing the moneys where they would produce interest, they had acted honestly and ought fairly to be excused. *Re McNeill Estate* (1911), 19 W. L. R. 691 (B.C.).

CHAPTER XXXIII.

CAPITAL AND INCOME.

Where a will contains a trust for the benefit of several persons in succession, and the trust property is of a wasting nature, or is a future reversionary interest, the trustee must convert the property into property of a permanent and immediately profitable character, unless: (1) the will contains a direction or implication to the contrary; or, (2) the will confers a discretion on the trustee to postpone such conversion, which he *bona fide* and impartially exercises; or, (3) the property in question is specifically settled.

This is known as the rule in *Howe v. Earl of Dartmouth* (7 Ves. 137, 6 R. R. 96), and is only a corollary of the principle that a trustee must act impartially between the beneficiaries. For if wasting property, like leaseholds and terminable annuities, were to be retained, the tenant for life would profit at the expense of the remainderman; and if reversionary property were not converted, the remainderman would profit at the expense of the tenant for life.

A power to retain any portion of the testator's property in the same state in which it should be at his decease, or to sell and convert the same as the trustee shall think fit, takes the case out of the rule. *Gray v. Siggers*, 15 Ch. D. 74; so too a devise to trustees upon trust to sell "when in their discretion they should deem it advisable." *Miller v. Miller*, 13 Eq. 263. Nor does

the rule apply where wasting property is given specifically, in the strict sense of the term. *In re Beaufay's Estate*, 1 Sm. & G. 20, 96 R. R. 300.

In Funderhill on Trusts, the duty of a trustee in relation to the payment of outgoings out of corpus and income respectively, is thus summarized: "Subject to the directions of the settlement, and of particular statutes—(a) The corpus bears capital charges, and the income bears the interest on them:

(b) The income bears current expenses incident to the possessory ownership of property except the costs of repairs:

(c) Where repairs are necessary, or fines become payable for the renewal of leases, application should be made by the trustees to the Court, which will give directions for the raising of money to pay for them in such a way as to distribute the burden equitably between income and corpus.

(d) All costs incident to the protection of the trust property, including legal proceedings, are borne by the corpus, unless they relate exclusively to the tenant for life."

Capital charges which must be borne by the corpus includes an annuity charged on the land. In such a case the annuity must be valued, and the tenant for life pays an amount equal to the interest on the valuation at five per cent. per annum. *Jones v. Mason*, 39 Ch. D. 534.

Where the gift is of an annuity, and the disposition of the estate is subject thereto, the charge is upon the corpus. On the other hand, if the gift is of an annuity payable out of income only, the corpus is not charged. *Re Irwin*, 3 O. W. N. 937.

Arrears of interest on incumbrances, accrued in the lifetime of the testator, are a charge on the corpus, the life-tenant merely paying the interest on them. *Revel v. Watkinson*, 1 Ves. 93; *Playfair v. Cooper*, 17 Beav. 187, 99 R. R. 90.

Calls on shares, which form a part of the trust estate, are payable out of corpus. *Todd v. Moorehouse*, 19 Eq. 69.

Where settled residue comprised capital left in a business, the expenses of a yearly audit and stock-taking which had been stipulated for by the testator, were held to be payable out of capital. *Lindley, L.J.*, said that an expense of this kind is a part of the costs, charges and expenses properly incurred by the executor in the performance of his duty—that it is for the benefit of the whole estate and should not be thrown wholly on the tenant for life—it is not in the nature of an annual outgoing, i.e., some payment which must be made to secure the income of the property. *In re Bennett* (1896), 1 Ch. 778. The practical effect of throwing this expense on the whole estate was that the tenant for life lost the income of the sums so expended.

The costs of appointing new trustees come out of the capital. *Carter v. Schright*, 26 Beav. p. 377, 122 R. R. p. 147.

The costs of investing trust funds are payable out of capital. *Horlock v. Smith*, 17 Beav. 572, 99 R. R. 294.

Costs incurred by a tenant for life in proceedings taken for the protection of the settled estate have been allowed by the Court out of capital. *Re De la Warr*, 16 Ch. D. 587; but not costs of proceedings in respect of his life interest, or for his sole benefit. *Croggan v. Allen*, 22 Ch. D. 101.

Where a business is vested in trustees for successive tenants for life and remaindermen, the net losses in one year's trading, must under ordinary circumstances, be made good out of the profits of subsequent years, and not out of capital. *Tipton v. Brown*, 26 Ch. D. 588. But this rule does not apply where there is no direction to carry on the business, but it is merely carried on temporarily until it can be sold profitably. In such cases the annual loss or profit ought to be apportioned between capital and income, by calculating the sum which, put out at interest at five per cent. per annum on the day when the business ought to have been sold, if it could have been, and accumulated at compound interest, with rests, would together with such interest

and accumulations, be equivalent at the end of each year to the amount of the loss or profit sustained or made during that year, and then charging the sum so ascertained against, or crediting it to, capital, and charging the rest of the loss against, or crediting the rest of the profit to, income. *Re Heugler* (1893), 1 Ch. 586.

In *re Berkeley's Trusts*, 8 P. R. 193, the income on a \$72,000 estate was payable to the widow for life, and on her death to children. On an interim application to fix the executors' compensation it was contended, for the children, that for the present (at least) the income should bear all the burden of compensation. For the widow it was contended that the true principle was to pay the compensation, or the chief part, out of the corpus, and that in this way the burden would fall in the proper proportion on the tenant for life and remaindermen, as the income would be reduced in the same relative proportion as the corpus. Blake, V.C., allowed \$400 for taking over the trust estate, obtaining proper transfers, opening books, determining investments, etc.; and a further sum of \$50 per annum for general supervision of the estate, payment of taxes, insurance, etc. "These sums, amounting in all to \$1,000, must be borne by the corpus of the estate, as they represent charges for the preservation of the estate itself." On \$20,000 of income received the executors were allowed 4 per cent. payable out of income; and it was suggested that in the future it would not be unreasonable if the trustees charged against the income \$240, and against the corpus \$150, annually, for commission. The costs of the application were ordered to be borne half by the corpus and half by the income.

The rule appears to be that ordinary outgoings of a recurring nature must be borne by the tenant for life in the absence of any provision in the will shewing a contrary intention. In *Vallambrosa Rubber Co. v. Inland Revenue*, 1910, S. C. 519, the Lord President said: "I do not say that this consideration is absolutely

final and determinative, but in a rough way I think it is not a bad criterion of what is capital expenditure—as against what is income expenditure—to say that capital expenditure is anything that is going to be spent once and for all, and income expenditure is a thing that is going to recur every year.” In a very recent case the Judge, referring to this observation, said: “I take it, and indeed both sides agree, that no stress is there laid upon the words ‘every year:’ the real test is between expenditure which is made to meet a continuous demand, as opposed to an expenditure which is made once for all.” *Ounsworth v. Pickers* (1915), 3 K. B. 267, 273.

The costs of preparing and rendering a succession duty account in respect of the life-tenant's interest under a will, are payable out of income. *Cowley v. Wellesley*, 1 Eq. 656.

The charge of taxes is one of the things which should be paid by the tenant for life so as to protect the property for the remainderman. As between him and the remainderman the Court will not allow him to receive rents from part of the property while he allows taxes to accumulate in another part. *Re Denison*, 24 O. R. 197.

A testator directed his executors to invest \$50,000 and pay the income to his widow for life. The estate consisted of income-producing securities of \$30,000, and a large amount of unproductive lands. Street, J., held the executors were bound to reserve sufficient productive assets to secure sufficient income to pay the taxes and the other necessary expenses, and the widow was entitled to a first charge on these lands for the income taken to pay taxes, and to the balance of the income from the productive assets, and to have the principal producing such balance set aside towards the fund of \$50,000 ultimately to be made up as the lands were sold according to the following rules:—As lands were sold the proceeds to be apportioned between capital and income by ascertaining the sum which put out at interest at five per cent. per annum

at the expiration of one year from testator's death, and accumulated at compound interest with rests, would, with accumulations, have produced at the day of receipt, the amount actually received from the sale of the lands: the sum so ascertained to be treated as capital, and added to the sum therefore set apart towards the \$50,000; and the residue to be treated as income and paid over to the widow. *In re Cameron* (1901), 2 O. L. R. 756; *Re Clarke* (1903), 6 O. L. R. 551.

A tenant for life is not obliged to pay any part of the principal of incumbrances on the life estate; but he is liable, as between himself and the remaindermen, to keep down the interest on all incumbrances out of the rents and profits of the estate. When an estate is settled subject to a charge of legacies, any interest payable on the legacies is payable out of income. *Milltown v. Trench*, 4 Cl. & F. 276.

Where trustees are directed to insure the trust property against loss or damage by fire, the premium must be borne by income. *Re Redding* (1897), 1 Ch. 876; unless the property is unproductive and incapable of beneficial enjoyment by the tenant for life. *Lonsdale v. Berchtoldt*, 3 K. & J. 185, 112 R. R. 97.

Where a settled estate is charged by the settlement with a life annuity, the tenant for life must keep down the instalments out of income, and is not entitled to have an annuity purchased out of capital to satisfy it: *Re Grant*, 52 L. J. Ch. 552; but if the income is insufficient, so that there are arrears at the annuitant's death, the life tenant is only bound to keep down the interest on arrears. *Prince v. Cooper*, 17 Beav. 187.

Where an annuity is charged on both the income and corpus of a residuary estate it is payable primarily out of the income; but if the income is insufficient in any one year to pay the annuity and the deficiency is paid out of the corpus, the tenant for life cannot be called upon to pay such deficiency out of the surplus income of any subsequent year. *In re Croxon, Ferrers v. Croxon*, 1915, 2 Ch. 290.

Where, however, an estate is settled by will charged with life annuities which the testator was personally liable to pay, the annuities must be capitalized, and the capitalized value treated as a charge on the inheritance. *Re Muffet*, 39 Ch. D. 534: the life-tenant being only bound to keep down the interest on the capitalized value. *Re Harrison*, 43 Ch. D. 55; *Re Bacon*, 62 L. J. Ch. 445: and if the life-tenant pays any instalments of the annuities he is entitled to a charge for the amount. *Re Harrison*, and *Re Bacon*, *supra*.

A tenant for life is not bound to repair unless he is under some obligation to do so by the terms of the will. In *Re Courtier*, 34 Ch. D. 136, a testator gave his wife certain leasehold properties for life. At his death the leaseholds were in a bad state of repair, and the widow declined to remedy their condition. The remainderman applied for an order to compel the widow to repair so as to satisfy the covenants in the leases and avoid a forfeiture. Fry, L.J., said: "I am unable to find any principle or rule of law which throws any obligations on her to do this: and as there is an entire want of authority in its favour it is clear there is no obligation." Cotton, L.J., said: "There is no rule of law that the tenant for life is bound to do repairs out of the rents and profits." The Court points out that in *In re Fowler*, 16 Ch. D. 723, no question was decided between tenant for life and remainderman. There leaseholds were vested in trustees on behalf of a tenant for life and remainderman, and the Court held it was the duty of the trustees to keep the property free from the risk of forfeiture by breach of the covenants in the lease, and they were entitled to have the rents applied for this purpose.

In *In re Baring* (1893), 1 Ch. D. p. 67, Kekewich, J., said: "We very nearly come to this, that the Court of Appeal did not think *In re Fowler* properly decided. They do not say so in terms, but they alleged that it did not intend to decide the question between tenant for life and remainderman." In the last case the facts were the same as in *In re Courtier*, and Kekewich, J.,

said: "I should have thought if I had not been instructed by the case to which I have been referred (*In re Courtier*), that she, being tenant for life, ought to keep down these periodical payments which were necessary to her occupation, not because of any liability imposed by express words, and not by any other rule of law than that expressed by the maxim: *Qui sentit commodum sentire debet et onus.*" And although he reluctantly followed *In re Courtier* he intimated that it was the duty of the trustees, having the money in their hands, to pay the costs of repairs, insurance, etc.

In *In re Redding* (1897), 1 Ch. 876, the testator directed his executors to manage his estate, and to retain certain leaseholds and let them on lease, and pay the income derived therefrom to his wife for life. It was held, on the construction of the will, that the "income derived" from the leaseholds meant the net income, i.e., the amount of the rents after deducting all proper outgoings, and that consequently the life-tenant must bear the expense of the proper outgoings in respect of ground-rent, rates, taxes, insurance and other outgoings on the property. In the judgment, Stirling, J., dissents from the view taken of *In re Courtier* by the Court in *In re Baring*. He points out that in the former case the only question for decision was whether the tenant for life was bound to discharge the liabilities in respect of repairs to property which had accrued at the death of the testator.

Somewhat similar is the recent case of *In re Tubbs* (1915), 1 Ch. 540. A testator devised his real estate upon trust to permit his wife to receive the rents, profits and income thereof during her life. The will empowered the trustees to "manage the said estate," and to pay the "costs of management" out of the rents and profits. In 1913 the trustees expended £1,100 in having the estate surveyed and in having repair notices served on tenants. The estate comprised 650 houses and the yearly rents were £2,100. It was held the liability of the trustees formed part of their expenses in managing the estate, and, having regard to

the terms of the will they must be paid by the tenant for life out of income. This was approved of by the Court of Appeal (1915), 2 Ch. 137.

S. devised lands to H. for life and, after her life, to her children. H. petitioned the Court claiming to be allowed for expenditures for needed repairs and lasting improvements on two houses, and for \$100 paid to a tenant for improvements made by him under a promise of the testator that he should be paid for them. Boyd, C., held that H. might be reimbursed the \$100, that being a debt due by the testator; but that neither this or the other expenditures could be a charge on the land. "The repairs of a tenant for life, however substantial and lasting, are his own voluntary act, and do not arise from any obligations, and he cannot charge the inheritance with them." *Re Smith's Trusts*, 4 O. R. 518.

Where real estate is given to a tenant for life and is sold by the trustees under a power of sale, the proceeds are capital which must be invested, the life-tenant being entitled to the income only. *Shrewsbury v. Shrewsbury*, 18 Jur. 397, 97 R. R. 868.

Where specific property is settled by will, without any trust for conversion, the life-tenant is entitled to the income actually produced during his lifetime, whether the property be permanent, as in the case of real estate, or of a wasting nature such as leaseholds. *Gibson v. Bott*, 7 Ves. 89, 6 R. R. 87.

A trust for sale of real estate and settlement of the proceeds entitles the life-tenant to the rents until sale. *Fitzgerald v. Jervoise*, 5 Madd. 25, 21 R. R. 268.

The life-tenant of a settled estate takes all casual profits which accrue during the time of his tenancy for life. *Brigstocke v. Brigstocke* (1878), 8 Ch. D. 357, 363. Thus he is entitled to all annual produce, such as fruit and hay: *Campbell v. Wardlaw*, 8 A. C. 645; rent, whether payable quarterly or at longer intervals: *Brigstocke v. Brigstocke*, *supra*; damages recovered from tenants for breach of covenants: *Noble v. Cass*, 2 Sim. 343, 29 R. R. 115; compensation for waiver of

restrictive covenants, if imposed on grants by the trustees, though not if imposed on grants by the settlor. *Cowley v. Wellesley*, 1 Eq. 656.

A tenant for life has no right to take the substance of the estate, by opening mines or clay pits: but he has a right to continue the working of mines and clay pits where the author of the gift has personally done it and such mines or pits had not been abandoned: and for this reason, that the author of the gift has made them part of the profits of the land. *Tiner v. Vaughan*, 2 Beav. 466, 50 R. R. 245. So in Ireland it was held that a tenant may have a right to cut and sell turf when bog, or where there is no other mode of enjoying the bog which it appears that the grantor intended should be enjoyed. *Coppinger v. Gabbins*, 3 J. & Lat. 397. The latter part of the proposition furnishes the tests to be applied. It must be shewn, in the first place, that the grantor intended this particular portion of the subject-matter to be enjoyed. Next, it must be proved that there is no other reasonable mode of enjoying it than by treating the produce of it as fruits and profits of the estate. It is not waste to consume a portion of the inheritance, when the portion in question is evidently intended to be enjoyed, and cannot reasonably be enjoyed otherwise than through such consumption. For instance, a devise of a stone quarry to a tenant for life would be valueless if the devisee could not quarry stone.

A tenant for life has a right to cut trees in the ordinary course of good forestry, and, apart from custom, this is not waste. And the proceeds of a sale arising from periodical cuttings, after deducting the expenses of replanting, are payable to the tenant for life. *Dashwood v. Magniac* (1891), 3 Ch. 306. *In re Trevor-Batye's Settlement* (1912), 2 Ch. 339. But apart from this a tenant for life cannot cut timber. *Honeywood v. Honeywood*, L. R. 18 Eq. 309.

Except as hereinbefore mentioned minerals stand in a similar position to timber, inasmuch as being imbedded in the soil, they form part of the inheritance. *Campbell v. Wardlaw*, 8 A. C. 645, 649.

A gift for life of things *qua ipso usa consumuntur*, as grain and wine, if specific, is an absolute gift of the property: but if residuary, the things must be sold and the interest of the proceeds paid to the legatee for life. *Randall v. Russell*, 3 Meriv. 194. Farming stock and implements of husbandry are not things *qua ipso usa consumuntur* within this rule, and the life-tenant is only entitled to their use. *Groves v. Wright*, 2 Kay & J. 347; *Cockayne v. Harrison*, L. R. 13 Eq. 432.

A wine merchant gave all his property to his wife for life and it was held she took absolutely the wine which the testator had for his private use, but a life interest only in that kept for the purpose of trade. *Phillips v. Beal*, 32 Beav. 25, 138 R. R. 616.

Where a will creates a life estate in chattels, the executor is discharged when he hands over such chattels to the tenant for life. The tenant for life, and not the executor, then becomes liable for them to the person entitled in remainder. *Re Munsie*, 10 P. R. 98. The old practice of the Court of Chancery was to require the tenant for life to give security for the protection of the remainderman, but such security is not now required, unless a case of danger is shewn. *Conduitt v. Soane*, 1 Coll. 285.

Where a trustee has invested in unauthorized investments, and the tenant for life has thereby received a larger income, but the capital is intact, the persons entitled in remainder cannot recover from the life tenant the excess of income which has been paid to him. And this rule applies where the same person is trustee and tenant for life and has himself retained the excess of income. *In re Hogles* (1912), 1 Ch. 67. So where a trustee uses a part of the capital in his own business and realizes profits in excess of the interest that would have been made on the money, these profits are income and not capital. *Slade v. Chaine* (1908), 1 Ch. 522.

Dividends on stock or shares are presumed to be paid out of current profits, and a life-tenant is entitled

to all such dividends. *Price v. Anderson*, 15 Sim. 473, 74 R. R. 124. But dividends declared before the death of the testator are capital. *Re Kernochan*, 104 N. Y. 618. The life-tenant is also entitled to any bonus declared out of current profits. *Preston v. Melville*, 16 Sim. 163, 80 R. R. 45.

But where the company has the power either of distributing the profits as dividends or of converting them into capital, and the company validly exercises its power, such exercise of its power is binding on all persons interested under the testator, and consequently what is paid by the company as dividends goes to the tenant for life, and what is paid by the company to the shareholders as capital, or appropriated as an increase of the capital stock, ensures to the benefit of those interested in the capital. *Bouch v. Sproule*, 12 A. C. 38.

Bonuses declared by a life insurance company on a policy are capital. *Macdonald v. Irvine*, 8 Ch. D. 101.

Where a loss occurs in trust funds, the income of which is payable to a life-tenant, the loss should be apportioned between the life-tenant and remainderman by adding the amount actually realized from the security to the amount of interest theretofore received by the tenant for life and dividing the whole sum between the latter and the remainderman in the proportion in which they would have been entitled to share if the security had been paid in full, the tenant for life giving credit for the amounts already received, less income tax. *In re Foster, Lloyd v. Carr*, 45 Ch. D. 629; followed in *In re Plumb*, 27 Ont. R. 601.

As to trustees charging against income costs which ought to be borne by capital, see *In re Weall*, 42 Ch. D. 674.

CHAPTER XXXIV.

COMPENSATION TO TRUSTEES.

- (1) Generally.
- (2) Legacies in lieu of Commission.
- (3) By whom Paid.
- (4) Amount Realized: How Calculated.
- (5) Amount of Compensation.
- (6) Miscellaneous.

In England the rule is that executors and administrators cannot charge anything for their services. This is upon the principle of equity, that a trustee cannot profit by his trust. In Ontario the rule was first relaxed in favour of executors and administrators by 22 Vic. ch. 93, sec. 47. This provision is now found in section 67 of The Trustee Act, and has been extended to guardians, and trustees other than personal representatives. The section does not apply where the allowance is fixed by the instrument creating the trust.

Although a next friend is, in some respects, in the same position as a trustee, this section does not cover his case, and he is not entitled to compensation or remuneration. *Tano v. Canadian Colored Mills Co.* (1910), 21 O. L. R. 144. The section applies only to express trustees; and, *semble*, a partner is not a trustee at all. *Livingstone v. Livingstone* (1912), 26 O. L. R. 246, 32 O. L. R. 440; *Mack v. Mack*, 33 C. L. J. 400.

The right to compensation is a statutory one, of which an executor or administrator should not be deprived unless there be serious misconduct or mismanagement. *Simpson v. Horne*, 28 Gr. p. 9. "I do not know that it has ever been determined that where the accounts are in fact accurate, that the form of them has ever subjected executors to liability, unless the confusion has been designed, or has been such as to

necessitate a suit." *McMillan v. McMillan*, 21 Gr. p. 379, per Prondfoot, V.C.

There is nothing in the statute rendering it necessary to hold that an executor who does not do his duty properly, has a right to the same compensation as an executor whose conduct is free from blame. But the fact that an executor has retained money in his hands unemployéd, while it makes him liable for interest thereon, is no ground for depriving him of his commission. *Gould v. Burrill*, 11 Gr. 523.

In *Kennedy v. Pingle*, 27 Gr. 305, one executor had used \$200 of estate money in his own business, and the other had taken a mortgage of \$900 in his own name without any declaration of trust. The Court, while refusing them their costs of an administration action, allowed them compensation. See also *Inglis v. Beatty*, 2 A. R. 453, and *Re Honsberger*, 10 Ont. R. 521.

In *Sierwright v. Leys*, 1 Ont. R. 375, on an appeal from a Master allowing compensation, Prondfoot, V.C., said: "The reason for objection to the commission is because the defendant has been found in debt to the estate, and that some items of overcharge have been proved against him. The statute does not compel the Court in every case, no matter how flagrant the misconduct, to allow the compensation. . . . I think the course of decision has been that an executor or trustee will be allowed his commission though he may have so managed the estate as to justify the appointment of a receiver, and to be deprived of and even made to pay costs. There may be cases of such exceptional misconduct as to induce the Court to deprive him of a commission. I do not mean to bind the hands of the Court in such a case. See also the remarks of Spragge, C., in *Simpson v. Horne*, 28 Gr. 1. 'I must, in this case, reiterate my opinion that the principle stated in *Tebbs v. Carpenter*, 1 Nad. 290, is the sound one: and certainly there is less hardship in applying it in this country, where an executor doing his duty to the estate he represents, is allowed a fair compensation for his pains and trouble: a compensation which

he is not deprived of unless there be serious misconduct or mismanagement on his part.' And *Simpson v. Horne* was a case where the dealing of the executor was not only careless but perverse."

The taking of administration proceedings does not deprive executors of their functions, or even suspend them, and a reasonable allowance should be made for moneys received *pendente lite*. *Re Housberger*, 10 Ont. R. 521. But where an administration action is pending it is improper for a Surrogate Judge to fix the compensation, and his allowance will be disregarded. *Biggar v. Dickson*, 15 Gr. 233; *Cameron v. Bethune*, 15 Gr. 486.

An executor who discharges his duty honestly, but owing to want of business training keeps his accounts loosely and inaccurately is entitled to compensation, but the amount in such a case should not be relatively large. If an executor takes no care or pains whatever, or so little that the trust estate receives no benefit, or if the care and pains have been employed not for the advantage of the trust but dishonestly and for the trustee's own benefit, then there may be a proper case for disallowance. *Hoover v. Wilson*, 24 A. R. 424. This was approved of in *McClenaghan v. Perkins* (1903), 5 O. L. R. 129, where it is said the effect of all the decisions on the statute is that an executor or trustee is not to be deprived of compensation for actual and beneficial services, though he may also have been guilty of neglects and defaults more or less grave: p. 139.

In *Graham v. Robson*, 17 Gr. 318, an executor was deprived of his compensation where he unnecessarily sold real estate to pay debts and legacies, there being more than enough money available for these purposes apart from the proceeds of the sale.

(2) *Legacies in Lien of Compensation.*

Where a legacy is given to an executor named in the will the presumption is that it was intended as compensation, and it is on him to shew something in

the nature of the legacy, or other circumstances arising on the will, to rebut that presumption. The fact that legacies are left to other executors of unequal amount is not sufficient to rebut the presumption. *Re Appleton*, 52 L. T. 906, 29 Ch. D. 893.

The presumption is rebutted if it appears, either from the language of the bequest, or from the fair construction of the whole will, that the bequest to the person who is named as executor, is given to him independently of that character. Where a testator appointed his "Friend" P. his executor, and gave him a legacy "as a remembrance," and P. did not act as executor, it was held he was entitled to the legacy without proving the will. *Bubb v. Felverton*, L. R. 13 Eq. 131. So in *Burgess v. Burgess*, 1 Coll. 367, 66 R. R. 98, a legacy given to executors "as a great mark of respect" for them, was held not to be revoked by a codicil appointing other executors in their room, and giving a legacy of equal amount to the newly appointed executors in similar language.

A legacy "to my friend J. S., banker's clerk and one of the executors of this my will," was held not to be conditional on the acceptance of the office of executor. *In re Denby*, 3 D. F. & J. 350, 130 R. R. 166.

In *McClenaghan v. Perkins* (1903), 5 O. L. R. 129, there was a devise of land "unto my brother George Washington Perkins . . . free from all incumbrances," with a direction that a mortgage on the land should be paid out of the personal estate. Maclellan, J.A., said: "Now taking this will as a whole, I think the presumption that the devise was intended as compensation to the executor is rebutted. In *Compton v. Bloxham*, 2 Coll. 201, it was held by Knight Bruce, then Vice-Chancellor, that the circumstances that the testator did not name Charles Bloxham in his will without calling him his brother, rebutted the presumption that the bequests made to him were made in his character of executor; and that case was referred to without disapproval in *Re Appleton*. *Barber v. Tebbit*, 29 Ch. D. 893. Here the gift is 'to

my brother George Washington Perkins,' and I think that is an indication of the testator's motive for the gift sufficient, having regard to the other parts of the will, to rebut the general presumption."

That the legatee is described in the will as the testator's "wife and executrix" does not of itself indicate that the legacy was given by way of compensation and is to be taken in lieu of commission. *Linnott v. Kenaday*, 14 App. D. C. 27, 27 Wash. L. R. 82.

In *Denison v. Denison*, 17 Gr. 306, it was held that where a legacy is given to executors as compensation for their trouble, they are at liberty to claim a further sum under the statute if the legacy is not sufficient compensation. In this case the words of the will were "that each of my executors shall be paid the full sum of one hundred pounds out of my estate to see my will fully carried out."

In *Kennedy v. Pingle*, 27 Gr. 305, where executors were given \$40 "in remuneration for their trouble," the Master allowed \$440 by way of compensation in addition to the legacy. Spragge, C., who decided *Denison v. Denison*, held they were not entitled to both, and disallowed the amount of the legacy.

In *Roy v. Williams*, 9 Ont. R. 534, the words of the will were: "I hereby authorize and direct my executors to retain for their own use and benefit the sum of \$200 each in lieu of all charges for their services." The executors claimed an additional sum. Boyd, C., said: "Out of deference to *Denison v. Denison*, I have had doubts as to the proper manner of disposing of this case; but my conclusion is adverse to the executor's claim. *Denison's* case may have been properly decided as it was when it was, in 1870, but I should hesitate now to follow it, even in a case where the language of the will was identical with the will there under consideration. Here the testator's language is very precise. It was thought that as the language used in the *Denison* will did not import that "compensation" was thereby intended no such doubtful meaning can be attached to the clause I have quoted. In 1874 the

Legislature passed an Act relating to the compensation of trustees and executors [now sec. 67 (5) of The Trustee Act] in which the principle is laid down that the Court is not to fix the allowance where the testator has himself provided what it shall be. That is a most reasonable rule, and one of general application, one indeed to which the Court should give effect without requiring a parliamentary declaration as to its propriety."

This is the rule followed in the American Courts. *Re Hay's Estate*, 183 Pa. 296; *Fletcher v. Hurd*, 14 N. Y. Supp. 388; *Rote v. Warren*, 17 Ohio Cir. Ct. 342.

But the limitation of compensation fixed by the will does not apply to a trustee afterwards appointed by the Court, at the instance of the beneficiaries, in place of an original trustee appointed by the testator; and the principle laid down in *Roy v. Williams* is not to be extended to such a state of facts. *Freeborn v. Vandusen*, 15 P. R. 264.

Where a legacy is given to one of two executors as compensation, the other executor is entitled to only his proper proportion of the regular commission. *Edward's Succession*, 34 La. Ann. 216; *Lee v. Lee*, 6 Gill & J. (Ind.) 316.

A legacy by way of compensation precludes any presumption that the executor is entitled beneficially to the undisposed of residue. *Loreless v. Clarke*, 24 Gr. 14. Section 58 of The Trustee Act now provides that the executor shall be considered a trustee of the residue not expressly disposed of for the next of kin "unless it appears by the will that the executor was intended to take such residue beneficially." The section does not prejudice any right in respect of such residue where there is no next of kin. See sub-sec. (2).

Before this enactment, it was the rule at law, from the earliest period, that the whole personal estate devolved on the executor; and if, after payment of the funeral expenses, testamentary charges, debts and legacies, there should be any surplus, it would vest in him beneficially. *Attorney-General v. Hooker*, 2 P. Wms. 340; *Urchhart v. King*, 7 Ves. 225.

If the residue is given by the will to the executor, the Court must decide the effect of the gift upon the construction of the will, and upon general principles applicable to that construction, just as before the statute it would have construed a similar gift of real estate. The statute therefore has, of necessity, no application where there is an express gift of residue. The statute was intended to apply only in those cases where the rule or presumption of law could be held to operate, and where an express gift of residue is found, the meaning of that residuary bequest must be ascertained by the ordinary rule of construction. *Williams v. Arkle*, L. R. 7 IL L. 606, 616.

This was followed in *Boys' Home v. Lewis*, 4 Ont. R. 18, where it was held that a bequest of a share of the residuary estate to executors was a gift to them personally and not as trustees. It was further held that it was not to be inferred that the bequest was given in lieu of compensation, as in the case of a legacy of a definite sum, but it was one of the elements to be taken into consideration in dealing with the question of the amount of compensation.

Where a bequest is given to an executor for compensation, and is followed by a bequest of residue to him *qua* executor "to be at his discretion," he is a trustee of the residue for the next of kin. *Re Howell* (1914), 2 Ch. 173.

In case of a deficiency of assets a legacy by way of compensation does not abate with other legacies, even though it exceeds the amount the executor would be entitled to under the Statute. *Anderson v. Dongall*, 15 Gr. 405; and it bears interest at the expiration of a year from the testator's death. *Ib.* per Spragge, V.C., on appeal, 14 Dec. 1870.

In *re Leblond*, 7 O. W. N. 398, the testatrix had used a printed form of will, whereby she gave her property to her mother as trustee and appointed her executrix. The space following, in which it was intended the whole operative part of the will should be written, was left blank, and no beneficiary was named.

The mother claimed that the will indicated she should take the property not only as trustee but as beneficiary. Middleton, J., held that it could not be inferred from the fact that the mother was named as trustee and executrix that she should take beneficially.

Where the executor's compensation is fixed by the will the Surrogate Judge cannot reduce the amount. *Heron v. Moffatt*, 7 P. R. 438.

A provision in a will that the executrix shall maintain herself out of the income of the fund while she is managing the same for the support and education of the testator's children during minority, for whom she is also to act as guardian, does not deprive her of the usual compensation allowed executors. *Thorne v. Allen*, 49 S. W. 1068, 20 Ky. L. R. 1728.

In *Fidelity Trust Co. v. Watkins*, 19 Ky. L. R. 957, it was held that a provision of a will requiring that the executors make no charge for distributing the legacies does not disentitle them to a reasonable compensation for services necessarily rendered.

(3) *By Whom Paid.*

It is well settled that the expenses and compensation of executors in clearing, dealing with and generally administering the assets of an estate, are to be borne by the aggregate of the estate, and this necessarily so in order that the residue may be ascertained from time to time according to the nature of the assets, some of which may call for considerable time and trouble in order to handle them or realize them satisfactorily. But where the estate has been cleared, and the residue ascertained, any subsequent compensation payable for the investment of the ascertained share of a beneficiary not presently payable, must be borne by that share. Such share is no longer property of the executors to be administered, but has reached its destination, though it may not, owing to the terms of the will, or for other reasons, have been actually paid into the hands of the beneficiary. *Re Church* (1906), 12 O. L. R. 18.

In re Berkeley's Trusts, 8 P. R. 193, the income on a \$72,000 estate was payable to the widow for life, and on her death to her children. On an interim application to fix the compensation, for the children it was contended that for the present, at least, the income should bear all the burden of the compensation. For the widow it was contended that the true principle was to pay the compensation, or the chief part thereof, out of the *corpus*, and that in this way the burden would fall in the proper proportion on the tenant for life and remainderman, as the income would be reduced in the same relative proportion as the *corpus*. Blake, V.C., allowed \$400, for taking over the trust estate, obtaining proper transfers, opening books, determining investments, etc.; and a further sum of \$50 per year for general supervision of the estate, payment of taxes, insurance, etc. "These sums, amounting in all to \$1,000, must be borne by the *corpus* of the estate, as they represent charges for the preservation of the estate itself."

On \$20,000 of income received the executors were allowed 4 per cent. payable out of the income. "I think in the future it would not be considered unreasonable if the trustees charged against the income \$240, and against the *corpus* \$150 annually, for commission." The costs of the application were ordered to be borne one-half by the *corpus* and one-half by the income.

As between residuaries and specific or pecuniary legatees, and residuary legatees, the compensation to executors falls upon the residuary legatees. *Re McIntyre* (1904), 7 O. L. R. p. 556.

For services rendered by way of collecting and paying over the income, the compensation is a first charge upon the income, and is properly deducted from it. In fact, for a trustee under such circumstances to charge his commissions upon the *corpus* of the trust fund, thereby necessarily decreasing the fund, would be inconsistent with his duty of preserving undiminished the trust capital. *Guarantee Trust Co.'s Appeal* (Pa.), 9 Atl. Rep. 66.

A trustee is not allowed, where there is a remainder after a life estate, to receive out of the *corpus* of the fund, charges for his services which should have been deducted from the income, unless both estates are owned by the same parties. *Brown v. Grandin* (N.J.), 13 Atl. Rep. 266.

Where a testatrix separated her estate into two parts, bequeathing her personalty to one class of persons and disposing of her realty to another, and one executor solely administered the former and another the latter, and rendered separate accounts, it was held that each class of beneficiaries should bear the expenses of the accounting in regard to the funds in which they were interested, and the executors should have commissions on the fund each represented. *Re Mansfield*, 10 Misc. (N.Y.) 296.

In *Mason Co. Justices v. Lee*, 1 Mon. (Ky.) 247, it was held that the expenses and compensation of an executor for managing and selling real estate devised to be sold for the education and advancement of children ought to be paid out of the proceeds of the lands.

(4) Amount Realized: How Calculated.

Where the real estate of the deceased is subject to an incumbrance by way of mortgage, and it is sold subject to the mortgage, it is a common practice to shew the whole purchase money as a receipt, and the amount of the mortgage indebtedness as a disbursement. But the receipts and disbursements cannot be so swollen to increase the amount of compensation. In *In re Sanderson*, 7 Ch. D. 176, Jessel, M.R., said: "When the Court administers the estate of a testator which is subject to a mortgage, that is, an estate in which he has only the equity of redemption, what is administered is not the whole of the estate, but only that which the testator had, namely, the equity of redemption, though in case of a sale being directed the mortgagee may come in and concur, and so get paid. Supposing a man has a property worth £2,000, and he

mortgages it for £1,500, all he can get on a sale is £500, for the remainder belongs to the mortgagee. If, then, the action were brought for the administration of his estate, how could it be said that his interest in the mortgaged property was more than he could get, namely, the £500?" This is the rule in the American Courts: *Baucus v. Storer*, 24 Hun (N.Y.) 109; *Buerhaus v. Saussure*, 41 S. C. 457.

Con. Rule 653 provides that in administration cases "a commission on the amount realized" shall be allowed solicitors in lieu of taxed costs. *In re McColl*, *McColl v. McColl*, 8 P. R. 480, land was subject to a mortgage, and the mortgagee refused to consent to a sale free from the mortgage. Blake, V.C., held that the Master was right in allowing commission only on the actual value of the intestate in the land, that being the amount realized. He said that had the mortgagee consented to a sale free from the mortgage, then the commission would have been estimated on the full amount.

Where the executor carries on the business of the deceased under the direction of the will, he is not entitled to a commission on the gross receipts realized or the necessary disbursements made by him while conducting the business, but the proper compensation is a reasonable allowance for the time and labour bestowed in carrying on the business. *Lamar v. Lamar*, 118 Ga. 684; *In re Brewster*, 113 Mich. 561; *Thompson v. Freeman*, 15 Gr. 384.

As a general rule the executor or administrator is entitled to a commission for paying over legacies and distributive shares as well as debts. *West v. Smith*, 8 How. (U.S.) 402.

(5) *Amount of Compensation.*

The allowance to be made in all cases is, what is fair and reasonable for the executor's care, pains and trouble, and his time expended in or about the estate.

In Re Toronto General Trusts and Central Ontario Ry., 6 O. W. R. 350, Teetzel, J., said the proper things

to be considered in fixing the remuneration of trustees are:

- (1) The magnitude of the trust;
- (2) The care and responsibility springing therefrom;
- (3) The time occupied in performing its duties;
- (4) The skill and ability displayed;
- (5) The success which has attended its administration.

This was cited with approval by Britton, J., in *Re Prittie's Trusts*, 12 O. W. R. 264, and approved of in Manitoba in *Re Sanford Estate*, 18 Man. R. 413.

"The statute has fixed no standard by which the rate of compensation is to be measured, and this imports that each case is to be dealt with on its merits, according to the sound discretion of the Judge, who is to regard the care, pains and trouble, and time bestowed and expended by the claimant. Nor have the courts laid down any inflexible rule in this regard. While a percentage has been usually awarded as a convenient means of compensating a class of services which do not admit of accurate valuation, yet the adoption of any hard and fast commission (such as five per cent.), would defeat the intention of the statute. . . . Five per cent. may be a reasonable allowance in many cases, but where the estate is large and the services rendered are of short duration and involving no very serious responsibility such a rate may be excessive." Boyd, C., *Re Fleming*, 11 P. R. 426.

In the absence of such standard we can only examine the decisions. I have placed them in chronological order.

McLennan v. Heward (1862), 9 Gr. 178. 5 per cent. allowed on all moneys received and paid over and 2½ per cent. on moneys received and not paid over. The report is not clear as to the amount of the estate, time occupied or labour involved.

Torrance v. Chewett (1866), 12 Gr. 407. 4 per cent. allowed on all transfers of stocks and all moneys paid

in and collected. The report does not give sufficient facts to be of much assistance.

Thompson v. Freeman (1868), 15 Gr. 384. The receipts were \$298,930 and disbursements \$286,798. The Master allowed the same as in *McLennan v. Heward*. A large portion of the receipts and disbursements appear to have been from mortgage investments and reinvestments extending over a period of years. It was held the commission was too large and it was referred back to the Master. It was pointed out that although 5 per cent. may not be too large a commission where the sums collected are small, it is too large when the amounts are large. It was also held that where executors convey lands to the beneficiaries they should not be compensated by way of commission but by a lump sum. As to compensation for investment, see *Re Berkeley's Trusts*, *infra*.

Denison v. Denison (1870), 17 Gr. 306. \$1,500 allowed one executor and \$1,500 to the other two jointly. All the report says is, "there was not only a large estate, but one requiring care, judgment and circumspection in its management."

Re Berkeley's Trusts (1879), 8 P. R. 193. The capital amounted to \$72,000, and the administration of the estate covered 14 years. The income was payable to the widow for life and on her death to the children. On an interim application by trustees to fix their remuneration, Blinke, V.C., held: (1) that on trustees assuming the trust estate, a commission is not to be allowed to them for merely taking the same over, as they may hold it but for a day, or they may, holding it longer, so deal with it as to disentitle them to any commission whatever; but that trustees properly dealing with the estate, and handing it over on the determination of the trust, are entitled to one commission for the receipt and proper application of the estate; (2) that trustees are not entitled to commission for the investment or reinvestment of the funds of the estate, as such a mode of remuneration encourages a continued changing of the investments, which may be most

injurious to the estate; (3) that the trustees are entitled to a commission on the receipt and payment of the income of the estate, and to the reasonable compensation for looking after the estate; (4) that it is not unreasonable to make some allowance for services not covered by the commission awarded.

The trustees were allowed \$400 for four times taking over the estate as they became entitled to it, examining securities, opening books, determining investments, etc.; and \$50 a year for the general supervision of the estate, paying taxes, insurance, etc. They were also allowed 4 per cent. commission on receipts of income.

Stinson v. Stinson (1881), 8 P. R. 560. An executor may be allowed a lump sum as his remuneration for the care and management of real estate, if there is evidence to enable the Court reasonably to see the services rendered and to make a proper allowance therefor. He is not limited to a commission on that part of the estate which has become personal property. The responsibility and difficulty of managing a trust estate consisting of stocks and mortgages, are far less than that consisting of unproductive real estate where the receipts may be very small.

Re Batt, Wright v. White (1883), 9 P. R. 447. The receipts were \$9,404 and disbursements \$8,228. These amounts included, on both sides, a sum of \$3,238, representing securities in the hands of the residuary devisee and charged to her, and with which the executors never intermeddled. The Master allowed \$400, being about 5 per cent. on total receipts, including the \$3,238. On appeal, Proudfoot, J., considered the retention of this sum involved a personal risk to the executors, and necessitated a calculation as to assets and liabilities, for which it was not unreasonable to compensate them; and \$400, being about 2½ per cent. upon the receipts, and 2½ per cent. upon the disbursements, was not excessive. The report does not shew the labour involved or the time spent in the

administration of the estate. See *Thompson v. Fairbairn, supra*.

In re Housberger (1885), 10 O. R. 521. The Master allowed the executors commission on moneys paid in pending administration proceedings, and on sums charged them for interest upon balances in their hands. The Court refused to interfere.

Thompson v. Fairbairn (1886), 11 P. R. 333. In this case all the work of collecting and paying over was done after the administration order was made, and was done under the advice of solicitors, and in the more important matters, under the direction of the Master. The receipts were \$29,000 and disbursements \$5,000. An item of \$4,684 on each side of the account, consisted of a mortgage, transferred to the plaintiff. The plaintiff's solicitor collected \$2,400 and made a payment of \$10,000 for which he was personally liable. The Master allowed \$1,193. On appeal, Boyd, C., reduced this to \$400, because the administration proceedings reduced the executor's responsibility to a vanishing point. Nothing was allowed in respect of the \$4,684. 1 per cent. was allowed on the \$2,400 and \$10,000, 2½ per cent. on balance of collections, and 5 per cent. on actual disbursements.

Re Fleming (1886), 11 P. R. 272. The Master allowed 5 per cent. on \$32,000, receipts from mortgage investments, and 1 per cent. on \$79,000, on debentures and specific securities. Ferguson, J., increased this by allowing 3½ per cent. on the whole estate. On appeal, the Divisional Court restored the judgment of the Master, holding that if he was wrong he erred on the side of liberality. Little actual work appears to have been done by the executors, that being left to the solicitors.

Archer v. Severn (1886), 13 O. R. 316. The personal estate not specifically bequeathed amounted to \$41,818, and the rents and profits come to the hands of the executors, \$4,052. They expended \$25,100 and \$3,816. The accounts showed 300 items on one side and

400 on the other, and there had been considerable labour, care and trouble in the management of the estate. Held, that 5 per cent. on the total receipts was not an excessive compensation, although about \$17,000 remained in the hands of the executors with which they were chargeable.

Re Prittie Trusts (1889), 13 P. R. 15. Trustees exchanged an investment for stock in a land company. Held, that a commission on the value of the stock was not a proper method of remuneration, but they should be allowed a sum for their trouble in making the exchange. The trustees paid an agent for collecting rents. The collections were in large and small sums extending over several years, and involved care and attention on the part of the trustees. It was held they were justified in employing agents to make these collections, and were entitled to $2\frac{1}{2}$ per cent. upon the rents collected.

In *Re Central Bank* (1892), 22 O. R. 247. This was the case of a claim of a liquidator of a bank. He was allowed $2\frac{1}{4}$ per cent. on moneys actually collected. On appeal, he was allowed $1\frac{1}{4}$ per cent. on a sum of \$231,000 consisting of amounts adjusted or set off, owing to the trouble in preparation of accounts, etc.

Re Cursiter (1894), 9 M. L. R. 433. 4 per cent. was allowed on the amount received and disbursed, and 2 per cent. on the amount received and still remaining on hand, subject to a further allowance to be made when the estate should be wound up.

In *re Williams* (1902), 4 O. L. R. 501. Trustees had from 1891 to 1902 taken care of an estate of \$60,000, received payments of principal and re-invested them, and collected \$39,700 of interest, being an average rate of about 6 per cent. per annum. Held, following *Re Berkeley's Trusts*, *supra*, that an allowance of \$100 a year should be allowed them for taking care of the estate and making re-investments in addition to 5 per cent. for collection and payment over of the interest.

Re McIntyre (1904), 7 O. L. R. 548. The administrators took over about \$60,000 of property, consisting

of mortgages, notes, farm property and furniture. They distributed \$29,000 and set apart \$31,000 for payment of annuities, legacies not matured, etc. They collected about \$6,500 of interest. The administration to date had extended over a period of a little more than four years. The estate was not an easy one to deal with owing to conflicting interpretations of the rights of beneficiaries under the will, the nature of the trusts, their number and complications, etc. Street, J., allowed the administrators $2\frac{1}{2}$ per cent. upon such portion of the corpus of the estate as they had taken over and distributed, the same amount to be allowed on the balance of the *corpus* as it was distributed from time to time. He allowed 5 per cent. on interest collected, and \$100 a year, in addition, for the first two years, and \$75 a year for the last two years for management of the estate and services not covered by the other charges, including the care and preservation of the estate. "All these charges are to be made against the residue of the estate, as the legatees and annuitants for whom the investments are made are entitled to receive the provisions made for them in the will without deduction."

Re Farmers Loan and Savings Co. (1904), 3 O. W. R. 837. Fulconbridge, C.J.: "The practice in respect of trustees' remuneration is, I think, well settled. It appears to be clear upon the authorities that a trustee (or a person in the position of a trustee), is entitled to a commission upon the *corpus* which comes into his hands and upon the *corpus* which is finally distributed by him, but that such commission should be paid when the distribution of the *corpus* takes place from time to time, and that the trustee is further entitled to a reasonable annual allowance for care and management, and that the Court may, instead of fixing the remuneration by way of percentage, allow one lump sum to include and cover the percentages upon the receipts and disbursements of the *corpus*, and the allowance for the care and management of the estate. The usual commission allowed is 5 per cent.,

exclusive of the annual allowance for care and management, but each case . . . must depend upon its own circumstances."

Re Patrick Hughes (1909), 14 O. W. R. 630. In this case the accounting covered a period of eight years. The estate consisted of store premises in Toronto, and an undivided half-interest in two leasehold properties. The trustees had realized on a sale of the freehold \$31,816, and on one-half of the leasehold properties \$2,500. \$28,000 had been received from revenue, about \$10,000 of which had been collected by a trust company, being paid therefor a commission of 5 per cent. The receipts from revenue were distributed as received, but the *corpus* could not be divided until the death of the testator's widow, which had not yet happened. On these facts it was held that the trustees were entitled to 2½ per cent. on the revenue receipts except the \$10,000, on which the commission should be 1 per cent; and 2½ per cent. on all disbursements of revenue. It was further held that no commission should be allowed on the conversion into cash of the real estate, but an allowance of \$200 to cover their trouble in making the sales. They were allowed, in addition, a yearly sum of \$75 for taking care of the estate and making investments. It was pointed out that on the distribution of the *corpus* the trustees would be entitled to a further allowance.

Re Griffen (1912), 3 O. W. N. 759, 1049. The estate was \$100,000, consisting of cash on hand, life insurance, stocks, and household furniture. There were pecuniary legacies to fifty-three persons, and six charities. The assets were in Ontario, Quebec and Manitoba, and the executors had to adjust succession duties with each Province. The Surrogate Judge allowed \$3,000 for care, pains and trouble. On appeal, Middleton, J., thought 1 per cent. a liberal commission and reduced the commission to \$1,000. On appeal to the Divisional Court the judgment of the Surrogate Judge was restored. Mulock, C.J., delivering the judgment of the Court said: "I am unable to reach the conclusion that

the learned Surrogate Court Judge allowed an excessive amount. On the contrary, I am of opinion that, if he erred at all, it was not in allowing a larger sum. I have not overlooked the circumstance that the estate consisted largely of shares in companies which, it was argued, were readily convertible; but shares in companies are liable to fluctuate in value, and a loss concerning to the estate because of their falling in value might, under some circumstances, render executors liable therefor, although exercising what they considered good judgment. Such a risk on their part should not be overlooked when compensation for their services is being fixed."

The case is a good illustration of opposing conclusions drawn by different judges from the same set of facts.

Re Godchere Estate (1913), 5 O. W. N. 625. The real and personal estate realized \$21,234, and there was paid out thereof \$3,560. The Surrogate Judge allowed the administrators \$625, and, on appeal, Latchford, J., said he could not see that he had erred. The report does not shew the time or labour involved.

In re Sanford Estate, 18 Man. R. 413, the duties of the executors were to realize on real estate in Manitoba and transmit the proceeds to Ontario Executors. It took nine years to complete the work, which had been done with faithfulness and success. The amount realized was over \$300,000. R., who had the chief management of the work, had been paid \$19,500 on account. The Court gave R., in addition, 2 per cent. of the gross amount realized, and the other two executors together, 2 per cent. It was also held that R. was not entitled to commission as a real estate agent on sales made by him personally, although he might have employed another agent at the expense of the estate to perform such services.

(6) *Miscellaneous*: In no case will an executor be entitled to allowance for services performed by an agent, and which were so performed by him gratuitously. *Chisholm v. Bernard*, 10 Gr. 479.

As a general rule an executor should not be allowed a commission on sums which he has not realized, and which he is chargeable with in consequence of his neglect or other misconduct. *Bald v. Thompson*, 17 Gr. 154. But see *Dagg v. Dagg*, 25 Gr. 542, where commission was allowed on such sums.

Where an executor is a residuary legatee no commission should be allowed on the share of the residue which he takes under the residuary clause in the will. *Boys' Home v. Lewis*, 4 Ont. R. 18.

The commission may be apportioned among the executors according to the work done and time expended by them. *In re Williams* (1902), 4 O. L. R. 504; *Re Fleming*, 11 P. R. 272.

Where there are two or more executors or administrators of an estate, they are usually entitled only to the recompense or commission payable to a single representative. *Phillips v. Richardson*, 4 Marsh (Ky.) 212; *In re Aston*, 5 Whart. (Pa.) 228. And it has been held that where one of two executors is not entitled to a commission because he is a legatee, the other executor is entitled to only one-half of the regular commission. *Edward's Succession*, 34 La. Ann. 216; *Lee v. Lee*, 6 Gill & J. (Md.) 316.

Where an estate is administered by successive personal representatives, the compensation allowed should be apportioned among them according to the services rendered, and the compensation of one will not be increased because his predecessors received no compensation for their services. *Re Depew*, 19 N. Y. St. 902; *Linton's Succession*, 31 La. Ann. 130.

Personal representatives who resign or are removed may be allowed a sum commensurate with the services they have performed, if beneficial to the estate. *Re Douglass*, 60 N. Y. App. Div. 64; but where they resign for their own convenience after having rendered very little service to the estate, it was held they were not entitled to any compensation. *In re Hayden*, 1 Connolly, Snr. (N.Y.) 454.

In fixing the amount of compensation to be allowed an executor or administrator the reasonable efforts made by him to collect worthless debts should be taken into consideration. *John's Estate*, 1 Chest. (Pa.) 281; *Kester v. Lyon*, 40 W. Va. 161.

Where a testator directed that his executor should "be handsomely paid for his services," it was held that only the usual commission would be allowed him unless there had been extraordinary trouble. *Waddy v. Hawkins*, 4 Leigh (Va.) 458. So an agreement to pay an executor a "fair compensation" is a mere promise to pay what may be allowed by the Court. *Ratliff v. Davis*, 38 Miss 107.

What is a proper compensation is a matter of opinion, and even if, in granting the allowance, the Court below may have erred on the side of liberality, that alone is not a sufficient reason for reversing his judgment. *McDonald v. Davidson*, 6 A. R. 320.

Part of a testator's estate consisted of a dry goods business, which was carried on by his executors for nearly a year before it was sold *en bloc*, one executor doing practically all the work. Upon passing the accounts the Probate Judge allowed a commission of 4½ per cent. upon the whole estate to the executor who carried on the business, and a commission of one-sixth per cent. to the other. No commission was allowed upon sales made in carrying on the business. Upon appeal the Court refused to interfere with the Judge's discretion in apportioning the commission. *Re Manzer*, 42 N. B. R. 257.

An executor was held entitled to the ordinary commission on an estate where he exercised an effective supervision over the business, although he left the details to a clerk. *Hall's Estate*, 8 Pa. Dist. R. 8.

A Surrogate Court on the passing of an executor's accounts should not, under ordinary circumstances, fix in advance the compensation of an executor-trustee for the future work to be performed in getting in and distributing the unrealized part of the estate. *Re Patterson Estate*, 24 Man. R. 217, 28 W. L. R. 177.

An administrator is not entitled to commission on a fund held by his intestate as a trust fund. *Haines v. Hay*, 169 Ill. 93.

An administrator with the will annexed, who undertakes the administration of the estate of the original testator and that of his residuary legatee as one under an agreement that he shall be allowed a certain commission upon the original estate in full for his services in both estates, is not entitled to an additional commission because a formal accounting in the estate of the residuary legatee is subsequently had. *Re Hamilton's Estate*, 29 N. S. R. 249.

Executors were held entitled to compensation on the income of the estate received and paid out by them for a reasonable time after the death of the testator's widow, at which time they were directed to distribute the estate, where an immediate distribution would have resulted in a serious loss, and the retention of large sums of money by the executors during the time the property remained in their hands was required for the payment of taxes and other expenses. *Re Prentise*, 25 App. Div. 209, 49 N. Y. Supp. 353.

It has been held that the validity of an administrator's appointment cannot be questioned on the accounting, and where he has rendered services as administrator he is entitled to his expenses and compensation. *Carroll v. Hughes*, 5 Redf. Sur. (N.Y.) 337. Nor will the fact that the will under which an executor is appointed and acts is afterwards found invalid, deprive him of his right to compensation for services rendered in good faith. *Comstock v. Hadlyme, Ecc. Soc. & Comm.* 254.

Personal representatives have no right to appropriate assets of the estate for payment of their right to commissions until an allowance is made by the Court; but they are entitled to retain in their hands a sufficient fund to cover a reasonable commission to be awarded on a settlement of their accounts. *Re Furniss*, 86 N. Y. App. Div. 96; *Wheelerwright v. Wheelerwright*, 2 Redf. Sur. (N.Y.) 501.

An executor was instructed in the will to rent a farm belonging to the estate, and it was held he was not entitled to compensation for services performed in managing the farm himself. *Bartolet's Appeal*, 1 Walk. (Pa.) 77.

The indebtedness of an insolvent executor or administrator to the estate constitutes assets of the estate and will be applied in discharge of any compensation allowed him. *Freeman v. Freeman*, 4 Redf. (N.Y.) 211. *In re Dacre*, *Whitaker v. Dacre* (1915), 2 Ch. 480.

The compensation to which an executor or administrator is entitled is treated by the Court as a lien or charge upon the estate, and the *cestui que trust*, or his assign, cannot compel a conveyance or transfer of the trust property without first satisfying the trustee's just demands. The compensation is in the same category as any other expenses incurred by him. *Life Assurance of Scotland v. Walker*, 24 Gr. 293.

Where an estate was insolvent the Court held that the executor was entitled to his allowance for compensation in preference to all the creditors. It is allowed for his services, and is therefore part of the expenses incurred in administering the estate, and, as such, is one of the primary charges before payment of debts. *Harrison v. Patterson*, 11 Gr. 105.

And an executor is entitled to retain his compensation from time to time out of moneys received, without waiting for the completion of his trust duties. *Herron v. Moffat*, 7 P. R. 439. But where he does not retain his compensation from time to time he is not entitled to interest on sums which he might have deducted. *Re Moran Estate*, 38 C. L. J. 215.

A solicitor executor is not entitled to profit costs if the estate proves insolvent, even though the will contains the usual clause empowering him to charge for work done. *In re White* (1898), 1 Ch. 297, 2 Ch. 217. See further under "Solicitor-Trustee."

CHAPTER XXXV.

PRACTICE ON AUDIT.

The accounts of a trustee may be passed before the Judge of a Surrogate Court of a county in which a trustee or a co-trustee is resident, or in which any part of the trust estate is situated; but in the case of a trustee under a will the accounts must be passed in the Surrogate Court from which probate was granted. Sec. 25, The Trustee Act.

One of two executors may be called upon to pass his accounts at the instance of a co-executor who is also a residuary legatee. *Paul v. Nettleford*, 2 Add. Eec. 237. And there seems to be no reason why one of two or more executors might not submit his own dealings with the estate for approval, independently of the other or others. *Cunnington v. Cunningham* (1901), 2 O. L. R. p. 516.

Con. Rule 417 provides as follows: "Where an account is to be taken, the accounting party, unless the Master otherwise directs, shall bring in the same in debit and credit form, verified by affidavit. The items on each side of the account shall be numbered consecutively, and the account shall be referred to by the affidavit as an exhibit, and shall not be annexed thereto."

By Surrogate Rule 19 (a), Con. Rule 417 is applicable to the auditing of an executor's and administrator's account in the Surrogate Court. The vouchers for disbursements should be numbered to correspond with the items of disbursements. In some counties the practice is to deposit the vouchers with the Registrar when filing the petition and accounts, to enable the parties interested in the estate to examine them. This appears to be the practice in the Master's Office in England in administration actions, but is not generally followed in Ontario. No doubt the Surrogate

Judge has authority to order them to be so deposited in any case where required.

The account of receipts should shew the names of the parties from whom received; on what account received with sufficient detail to make each item explanatory; and the amount received. The disbursement account should shew to whom the money was paid; on what account paid, with sufficient detail to make the item explanatory; and the amount paid. The accounts should shew the actual date of receipt and payment.

Where during the administration of the estate there have been investments made by the trustees on mortgages or other securities, such investments should not appear as disbursements, but the income from these investments should appear as receipts. It is always advisable to have such investments appear in a separate account. This enables the Court to trace the administration of the assets, and to fix the allowance to the trustees for their care, pains and trouble in administering the estate.

Where, by the terms of the will, or trust deed, the income of the estate is payable specifically, the receipts on income account should be shewn apart from the receipts on capital account. The better practice is to prepare a separate account shewing the receipts and disbursements on income account.

With the accounts must be filed the petition of the trustee. This should shew all the facts entitling the petitioner to an audit of the accounts. It should shew, by schedule, or otherwise, all the estate undisposed of or unadministered, and the reasons why it has not been administered. It should give the names and residences of all the persons interested in the estate, distinguishing between adults and infants. If there are infants their respective ages should be shewn, if possible. *Re Lopwell*, 6 Terr. L. R. 467. If there are more petitioners than one it does not seem essential that all should join in the affidavit verifying the petition, but it is a prudent practice to have them all verify the petition where possible. A form of petition and affidavit

adopted by the writer will be found in the appendix. The affidavit is indorsed on the petition.

The petition, accounts and appointment should be properly indorsed and entitled. They should shew the name and address of the solicitor prosecuting the audit. The carelessness of many solicitors in this respect invites a disallowance of their costs.

The appointment to pass the accounts should be served on all parties interested in the estate. The audit is binding only on parties who are notified of the proceedings. See, 71, Surrogate Courts Act. Where an infant or person of unsound mind is interested a copy of the appointment may be served on the official guardian, except in the case of a person confined in a Provincial hospital for the insane, when such notice shall be served on the Inspector of Prisons and Public Charities. *Ib.*

Legatees, whose legacies have been paid in full, are not necessary parties. *Re Griffen*, 3 O. W. N. 759. Where property is bequeathed to one in trust for others, the trustee is regarded at law as the legatee, and his *cestuis que trust* are not necessary parties to be served. *Gaunt v. Tucker*, 18 Ma. 27.

Rule 16 of the Rules and Regulations of 27th May, 1914, for carrying into effect The Succession Duty Act, requires that in cases where security has been given for the payment of succession duty, notice of any appointment for the passing of the accounts of the executor or administrator, shall be served on the solicitor to the Treasury, together with a copy of the accounts, and the affidavit verifying, seven clear days before the audit of such accounts.

The Official Guardian and Inspector of Prisons and Public Charities, always require a copy of the accounts, and it is usual for the appointment to contain a direction that a copy be served.

Persons interested in the estate residing within Ontario are entitled to not less than seven days' notice of the audit, and if resident out of Ontario shall be entitled to such notice as the Judge shall direct.

See, 71 (4) Sur. Cts. Act. "Not less than seven days' notice," means seven clear days. *National Inse. Co. v. Egleson*, 29 Gr. 406.

Where interested parties reside out of Ontario the usual direction for service is by registered letter. The time allowed for service should be sufficient to enable the parties so served ample time to be represented on the audit, and will depend on the locality. A person residing in British Columbia should have not less than twenty days, while ten days might be ample for a person residing in Montreal. Where there are several parties to be served in different parts of Ontario, the appointment may provide for service by registered letter unless some good reason is shewn. For instance, a residuary legatee should, if at all possible, be served personally. So if the estate is large, and the accounts voluminous or intricate, the interested parties should be served personally.

As to surecharging and falsifying accounts, see *ante*, Chapter II.

Evidence on Audit.

A subpoena may properly be issued to compel the attendance of a witness on an audit. *Hannon v. McRae*, 17 P. R. 567.

Where a particular part of the estate cannot be traced, an application to charge the personal representative with it cannot be entertained unless it can be proved that it was received by him. *Shuttleworth v. Bristo*, 12 W. R. 40.

An executor or administrator must account for all the property of the deceased which has come into his hands wherever found or by whatever means collected; and the inventory of the estate constitutes the basis or starting point for such accounting. *Jamison v. Hapgood* 10 Pick (Mass.) 77; *Daves v. Boyston*, 9 Mass. 337; *Ella's Appeal*, 68 N. H. 35. An inventory is not, however, conclusive as to the assets for which an executor or administrator is accountable.

but he may be compelled to account for assets not inventoried or credited by him. *Field v. Hitchcock*, 14 Pick. 405. It is only as to property which an executor or administrator is entitled to receive in his representative capacity that an account should be taken, and if he receives money or property to which he is not entitled in his representative capacity he cannot be required to account therefor. *In re Soutter*, 105 N. Y. 514; *Gatson's Appeal*, 6 Pa. St. 505.

The affidavits of the executors or administrators verifying the accounts, and the production of the vouchers, is *prima facie* evidence to warrant the Judge in passing the accounts, and where voluminous accounts have been passed the pointing out of one or two objectionable items was held insufficient to re-open the account. *In re Curry*, 17 P. R. 379, 25 A. R. 267.

Should any item occur which cannot, at the moment, be satisfactorily explained, or the voucher for it produced, it is marked as a queried item for further inquiry; and if the accounting party does not afterwards attend and support the queried items, or obtain further time to do so, such items will be disallowed. *Dau. Chy. Pr.* 6th. ed. 1051.

In taking the accounts the Judge may direct that the books of account in which the accounts required to be taken have been kept, or any of them, be taken as *prima facie* evidence of the truth of the matters therein contained. *Con. Rule* 418. Where the evidence produced to charge an accounting party consists of entries in books kept by the party himself, the party has a right to make use of entries in the same books in support of his payments. *Darston v. Earl of Oxford*, 1 Eq. Ca. Ab. 10. The books must be adopted altogether or rejected *in toto*. *Kilbee v. Sneyd*, 2 Moll. 193. So when an account furnished by a party before action instituted, is produced to charge him with the items on the debit side, he is entitled to resort to the credit side in support of his items of disbursements. *Boardman v. Jackson*, 2 B. & B. 386.

Every sum of \$8.00 and under is allowed without a voucher upon the oath of the executor. *Everard v.*

Warren, 2 Ch. Ca. 249; but his oath must be positive and not on belief only. *Robinson v. Cumming*, 2 Atk. 410; and it would seem that the aggregate of such items should not exceed \$400 in amount. *Bennett's*, M. O. 86. If receipts or vouchers have been lost, or accidentally destroyed, secondary evidence will be let in. *Ib.*

On a bill to surcharge and falsify an administrator's former settlement, vouchers that could not be produced, were presumed to have existed, after a long lapse of time. *Campbell v. White*, 14 W. Va. 122.

Where an executor who had paid out money on account of expenses of administration produces a voucher shewing the nature of the disbursement, and stating facts which, if true, shew the same to have been reasonable and necessary for the good of the estate, a presumption is raised in favour of the correctness of the charge which must be opposed by affirmative evidence on the part of one contesting the claim for credit. *Re White*, 15 N. Y. St. 729.

But nothing will be allowed in the account under the name of general expenses; the particulars must be mentioned. So also, where a party discharges himself, upon his oath, of sums under \$8, he must give particulars of the payment, to whom paid, for what purpose, and when paid. *Dan. Ch. Pr.* 1053.

Where the account is of long standing it seems that the Court will sometimes permit the accounting party to discharge himself, upon oath, by reason of the loss of vouchers. Thus where the account in question was of twenty years' standing, it was ordered that the defendant should prove his account by his own oath, so far as he could not prove it by books or cancelled bonds. *Peyton v. Green*, 1 Ch. Rep. 146; and a similar direction was given where the account was of fourteen years' standing. *Holstern v. Rivers*, 1 Ch. Ca. 127; *Turner v. Carney*, 5 Beav. 515.

In a suit to administer the estate of a testator who had died in Jamaica in 1825, an account was directed against the surviving executor and the representatives

of a deceased executor. In taking the account (in 1857) the books of account, which were proved to have been recorded in the Jamaica Court, were allowed to be taken as *prima facie* evidence of the matters therein contained, under 15 & 16 Vic. ch. 86, which was similar to our Rule 418. *Sleight v. Lawson*, 3 K. & J. 292, 112 R. R. 155.

A testator died in 1834 and his trustee kept the trust accounts open to be inspected by the *cestuis que trust*, who all lived together and in communication. In 1855 an examination of the books was made on behalf of two of them. The Court allowed the books to be taken as *prima facie* evidence of the accounts up to the time of that examination. *Bauks v. Cartwright*, 17 W. R. 417.

Books of account, kept by a trustee and her agent, were tendered as evidence of disbursements made on behalf of the trust estate. As the trustee could not produce strict vouchers the chief clerk admitted the books as evidence, and a motion to vary the certificate was refused. *Cookes v. Cookes*, 3 N. R. 97.

The power given to the Master under Con. Rule 418 is not to be exercised until he is satisfied that the means of obtaining the ordinary legal evidence has been substantially exhausted. *Ewart v. Williams*, 3 Eq. R. 476, 7 DeG. & M. 68.

There are many cases in which the Court directs the account to be taken with the admission of certain documents, or testimonies, not having the character of legal evidence. Thus where the parties have been permitted, for a long course of years, to deal with property as their own, considering themselves under no obligation to keep accounts as if there was any adverse interest, having no reason to believe the property belonged to another, though it would not follow that, being unable to give an accurate account, they should keep the property, yet the account would be directed, not according to the strict course, but in such a manner as, under all the circumstances, would

be fit. Dan. Ch. Pr. 1052, citing *Lupton v. White*, 15 Ves. 432, 443.

Appeals.

Section 37 (*d*) of The Supreme Court Act provides for an appeal "from any judgment on appeal in a case or proceeding instituted in any Court of Probate in any Province of Canada other than the Province of Quebec, unless the matter in controversy does not exceed five hundred dollars."

This sub-section was enacted in consequence of the judgment in *Beamish v. Kaulbach*, 3 S. C. R. 407, which held that the Court of Probate in Nova Scotia was not a Superior Court and, therefore, an appeal did not lie in the Supreme Court of Canada from a judgment of the Supreme Court of Nova Scotia in a matter or controversy originating in the Probate Court.

In *In re Rundle*, 52 S. C. R. 114, it was held that the term "Court of Probate" denotes any Court exercising a general probate jurisdiction, and that under the terms of said section 37 (*d*) an appeal lies to the Supreme Court of Canada from a judgment of the Supreme Court of Ontario in a case originating on the audit of accounts in a Surrogate Court. (See *Re Rundle*, 32 O. L. R. 312).

Section 34 of The Surrogate Courts Act provides as follows:

34.—(1) Any person who deems himself aggrieved by an order, determination or judgment of a Surrogate Court, in any matter or cause, may appeal therefrom to a Divisional Court.

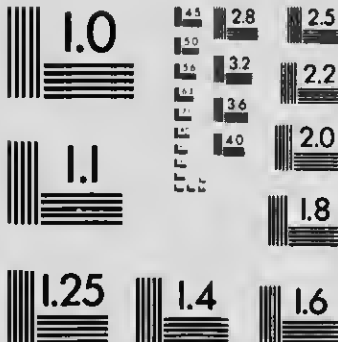
(2) No such appeal shall lie unless the value of the property to be affected by such order, determination or judgment exceeds \$200.

(3) The practice and procedure upon and in relation to an appeal shall be the same as is provided by The County Courts Act as to appeals from the County Court.



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(4) A motion for a new trial after a trial by jury under section 28 shall be deemed an appeal and shall be made to a Divisional Court.

(5) An appeal shall also lie from any order, decision or determination of a Judge of a Surrogate Court, on the taking of accounts in like manner as from the report of a Master under a reference directed by the Supreme Court, and the practice and procedure, upon and in relation to the appeal, shall be the same as upon an appeal from such a report.

(6) Sub-sections 2 and 3 shall not apply to the appeal provided for by sub-section 5.

Immediately an order is made removing a matter from a Surrogate Court to the Supreme Court it ceases to be a matter in the Surrogate Court, and an appeal from the order under this section cannot be entertained. Thereafter the practice of the Supreme Court of Ontario is to be followed. *Justin v. Goodwin*, 18 P. R. 174; *Forbes v. Forbes*, 23 O. L. R. p. 522.

Where the Surrogate Judge has no jurisdiction to adjudicate upon a claim, but by consent of the claimant and the executor he does adjudicate thereon, there is no appeal under this section, but there may be under The Arbitration Act. *Re Graham* (1912), 25 O. L. R. 5.

An order was made by the Judge of a Surrogate Court, requiring the plaintiffs in an issue directed to be tried in the Surrogate Court to give security in the sum of \$120. On appeal from this order it was urged that as the amount involved in the order was less than \$200, there was no appeal. The Court held the objection was untenable—that sub-section 2 was not intended to refer to a sum of money mentioned in an order as security for costs, but to property belonging to or in question in connection with the estate itself. *Forbes v. Forbes* (1911), 23 O. L. R. 518.

In *Re Nichol* (1901), 1 O. L. R. 213, it was held that an appeal to a Divisional Court from an order of a Surrogate Court was not properly lodged if security had not been given and an affidavit of the value of the property affected filed as required by rule 57 of the

Surrogate Court rules of 1892. Now no security for costs is required on appeals from County Courts, and no security would appear to be necessary on an appeal from a Surrogate Court. On p. 136 of Holmsted's Judicature Act, there is a foot-note by the learned author as follows:—"I am informed by Mr. Justice Middleton that it has been ruled in the Appellate Division that the effect of the provision of The Surrogate Courts Act as to appeals is to abrogate the Surrogate Court Rules on that subject, but I have been unable to find the case in which that ruling was made."

All appeals from a Surrogate Court, except as to a decision, order or determination under sub-section 5, are to the Appellate Division of the Supreme Court. Notwithstanding the judgment in *Re Alexander*, 31 O. R. 167, where it was held that an appeal lay to a Divisional Court from an order of a Surrogate Court Judge allowing compensation to an executor, it would appear that such appeals are more properly made to a single Judge. An appeal from a Master's report is to a single Judge, and the Appellate Division has no power to hear such an appeal. *Clarke v. Jamieson*, 9 C. L. T. 97; not even by consent. *In re Wilson*, 16 P. R. 150.

Appeals from orders on passing accounts have been heard without objection by the Divisional Courts, also by a single Judge. In a recent case there was an appeal as to the amount allowed executors as compensation, and the appeal came on before Middleton, J., in Single Court. It was objected that the appeal should have been to an Appellate Division, but Mr. Justice Middleton held that it was competent for a single Judge to hear the appeal. *Re Henderson*, 8 O. W. N. 31.

Mr. Holmsted, speaking of appeals under sub-sec 5, says: "Presumably, in order to comply with these Rules, the certificate or order of the Judge appealed from should be filed in the Surrogate Court, and notice of filing served on the opposite party, and seven clear days' notice of the appeal must then be served on the respondent within one month from the date of service

of the notice of filing. The appeal in this case is to a Judge of the High Court Division in the Weekly Court, and it would seem that an appeal would lie from his decision to the Appellate Division under the Judicature Act, sec. 26, unless precluded by Jud. Act, sec. 25": p. 135.

Cost of Audit. It is by no means a matter of course that the costs of taking and auditing the accounts are paid out of the estate. As a general rule the costs are so paid, but they are discretionary with the Judge, and it is impossible to lay down any rule when the usual course will be departed from. In *Heugh v. Scard*, 33 L. T. 659, Jessel, M.R., said: "In certain cases of mere neglect or refusal to furnish accounts, when the neglect is very gross or the refusal wholly indefensible, I reserve to myself the right of making the executor or trustee pay the costs of litigation caused by his neglect or refusal." This was approved of in the recent case of *In re Skinner, Cooper v. Skinner* (1904), 1 Ch. 289.

Where trustees had refused information and an account of the property to the parties who were interested in the estate, the trustees were ordered to pay the costs of an administration action up to the hearing, and each party his own costs of the subsequent proceedings. *Talbot v. Marshfield* (1868), L. R. Chy. App. 622; *Kemp v. Burn*, 4 Giff. 348.

But the mere fact that an executor neglected to render accounts when asked, is not of itself sufficient to make him liable to costs. *White v. Jackson*, 15 Beav. 191, 92 R. R. 379.

If the costs have been increased by the failure of the executor to keep reasonably accurate entries or accounts of his dealings with the estate, or by inquiries into his improper dealings with and application of the trust estate and funds, these should be deducted from his costs. *In re Honsberger*, 10 O. R. 521; *Zimmerman v. Wilcox*, 35 C. L. J. 688.

The Surrogate Judge is sometimes embarrassed by a number of interested parties, in the same interest, appearing on the audit and asking for costs out of the

estate. The practice was laid down very clearly by Jessell, M.R., in *Sharp v. Lush*, 10 Ch. D. 468, in a clear cut judgment which deserves to be copied *verbatim*:

"As to the costs of attending the proceedings in Chambers, there ought to be no mistake about the practice, as it is a matter of the greatest importance. If I were to accede to this application I should waste half of the estates which are administered before me in this Court.

"The law stands in this way, that any persons interested who ought to be served can, under the general practice, attend, as of course, the proceedings; but that does not entitle them to the costs of attending. That is determined by the Judge in Chambers, who, under a general order (see Con. Rule 406), decides what parties interested in the estate shall attend the taking of the accounts at the costs of the estate; that is the subject of a special application. I cannot prevent any body attending the proceedings; if there were fifty people I could not prevent them instructing fifty solicitors to attend all the proceedings; but if they did, they would not only pay their own costs where I found forty-eight of them unnecessary, but I should make them pay the extra costs occasioned by attending unnecessarily. That has always been the practice in my Chambers since I have had the honour of sitting here.

"I do not believe these numerous attendances in Chambers on taking the accounts, and so on, are of the slightest use. According to my experience, when you have one respectable solicitor taking the accounts adversely on one side, and you have an equally respectable solicitor attending on the other side, the attendance of all other solicitors and clerks is so much money wasted.

"As a rule, I give leave to one solicitor to attend on one side and one solicitor on the other. When the residuary legatee comes in, what I do is this: I let one solicitor take the accounts for the residuary legatee on the one side, and one solicitor take the accounts for

the executors on the other. In the present case as neither Mr. Ince's clients nor Mr. Davey's clients obtained special leave to attend the proceedings in Chambers, and as I am not satisfied their attendances were necessary, I shall not give them the costs of these attendances."

Sec. 79 of the Surrogate Court Act provides that the Board of County Judges may prescribe a tariff of fees and costs to be taken by the registrars and the officers of the Surrogate Courts, and to be allowed to solicitors and counsel practising therein for duties and services in respect of proceedings in such Courts, and to witnesses therein, and no other fees or costs than those so authorized shall be taken or allowed to such registrars, officers, solicitors, counsel and witnesses. The tariff of fees so prescribed will be found in the appendix.

In *Re Morrison*, 13 O. W. R. 767, the Surrogate Judge himself taxed the costs of the solicitors according to the tariff, "except that I allowed certain items not covered by the tariff, and which under the circumstances of this case, could not have been contemplated by the tariff, but in respect to which certain allowances were properly made to the solicitor." On appeal, Riddell, J., said: "I do not quarrel with the statement of the learned Judge that the amounts allowed are reasonable; but I think that the costs in the Surrogate Court must be those found in the tariffs. . . . Not only is there the negative prohibition against the allowance of anything which is not in the tariffs, but there is the positive prohibition in the statute. A taxation which admittedly contains "items not covered by the tariff" cannot stand. The appeal upon this ground must be allowed, and the bill complained of referred back to be taxed by the registrar in strict accordance with the tariff."

A Surrogate Court Judge allowed, by fiat, a counsel fee to the executors of \$100, and \$50 to counsel for the residuary legatee. On appeal, Middleton, J., said the maximum counsel fee was limited by the Rules and could not be exceeded, following *Re Morrison*, *Re Griffen*, 3 O. W. N. 759.

The late Master in Ordinary, Thomas Hodgins, K.C., refused to tax to a liquidator the premiums paid to a guaranty company, where such liquidator was required to give security under the provisions of the Winding-up Act. This practice has not been followed in the Surrogate Courts of Ontario on the passing of administrators' accounts; and, where an administrator has furnished security in the shape of a bond of a guarantee company, it is usual to allow him the premium paid the company. If the administrator neglects, for an unreasonable time, to pass his accounts so as to relieve the guaranty company, he should not be allowed for premiums paid after the date when he should have had an audit. Such an expense was disallowed by an Arkansas Court. See *Adamson v. Parker*, 85 S. W. 239.

It will be noticed that the new tariff provides that the fees, in cases of an important nature, may be increased by the Judge, but such increase shall be subject to approval by a Judge of the Supreme Court of Ontario upon a report from the Judge. Where the receipts exceed \$100,000, the fees shall be such as the Judge deems fair and proper subject to the approval of a Judge of the Supreme Court. To secure uniformity, until further direction is given, such applications are to be heard by Mr. Justice Middleton. To secure approval the certificate of the Surrogate Court Judge and all papers necessary to enable the matter to be dealt with, should be forwarded to him at Osgoode Hall, with return postage.

Payment into Court.

Where on the passing of the final accounts by the Judge of a Surrogate Court, there is in the hands of the accounting party any money belonging to an infant, or to a lunatic or person of unsound mind, or to a person whose address is unknown, the accounting party is required to pay the money into the Supreme Court to the credit of the person who is entitled to it. The accountant is to be furnished with a certified copy of

the order, and the person paying the money in is entitled to deduct \$5.00 for his cost.

For the purpose of payment in and out of Court, the order should state when the infants interested in the estate will attain their majorities. See, 38, The Trustee Act. See Form of Order in Appendix.

A Surrogate Court has no right to the custody of the property of an infant or lunatic; and the Judge of a Surrogate Court has no jurisdiction to order payment of an infant's money into that Court. *Re Mercer* (1912), 26 O. L. R. 427.

L., a resident of Chicago, died there, and his widow was appointed general administratrix of his estate. A small portion of his estate consisted of personalty in Ontario, of which a trust company was appointed administrator. This company administered the Ontario assets, and had a balance of \$774, on hand, which was claimed by the widow as general administratrix. The Official Guardian, on behalf of the infant heir, contended that the moneys realized in Ontario, or a portion of them, should be paid into Court. Britton, J., held that the passing of the accounts by the Ontario administrator was not the "passing of the final accounts" referred to in section 38 (2) of The Trustee Act. It is in fact only a collection by the Ontario administrator for the home administratrix, to enable the latter to pass the accounts and make final distribution, and the order went for payment to the administratrix. *Re Law* (1915), 34 O. L. R. 222.

CHAPTER XXXVI.

EFFECT OF AUDIT—MISTAKE OR FRAUD.

Most of the learning in the English cases deal with the law and practice in re-opening stated or settled accounts. A *stated account* is an agreement between parties who have had previous transactions of a monetary character, that all items of the accounts representing such transactions are true and that the balance struck is correct, together with a promise, express or implied, for the payment of such balance. Abbott's Trial Ev. 458. Lord Mansfield, C.J., in *Trueman v. Hurst*, 1 T. R. 42, said: "What is an account stated? It is an agreement by both parties that all the articles are true." See also *Union Bank v. Knapp*, 3 Pick. 96.

When the balance admitted upon a stated account is paid, the account is deemed a settled account. Storey Eq. Pl. 798. In dealing with executors' accounts, settled accounts are accounts rendered by an executor to his *cestuis que trust*, or to residuary legatees, upon their releasing him of his accountability to them, and approved and accepted by the *cestuis que trust* or legatees.

The rule in equity has always been that stated or settled accounts cannot be opened or corrected except on the ground of fraud, mistake, omission, accident or undue advantage, and the burden is on the party seeking to impeach the account to prove the existence of such fraud, mistake or the like. Even where these elements are shewn to exist, the courts will not readily set aside a settlement or statement presumably made by the parties after an examination of the state of their mutual dealings; and where the error or other taint does not affect the whole transaction, they will only allow the account to be surcharged or falsified. 1 A. & E. Ency. 461.

Where accounts were impeached the rule was that an establishment of one mistake was sufficient to induce the Court to give a decree entitling the party to surcharge or falsify an account. *Lawless v. Mansfield*, 1 D. & War. 557; *Davies v. Spurling*, Tam. 199; *Gething v. Keighley* (1878), 9 Ch. D. 547. This proceeded on the principle that if an account stated or settled be proved to be fraudulent there is nothing on which it can stand; the transaction itself is void; then, if the transaction is void, there is no question that can remain about an account partially settled, or settled so far as error may not be proved. *Alfrey v. Alfrey*, 1 Mac. & G. p. 93, 84 R. R. 20.

In *Vernon v. Vandry*, 2 Atk. 119, it is said that "if there are only mistakes and omissions in a stated account, the party objecting shall be allowed no more than to surcharge and falsify. But if it is apparent to the Court that there has been fraud and imposition, the decree must be that the whole shall be opened, notwithstanding it was a stated account of twenty-three years' standing, and he who was guilty of the fraud was dead."

In *Chappedelaine v. Dechenaux*, 4 Crauch. (U.S.) 306, Marshall, C.J., said: "No practice could be more dangerous than that of opening accounts which the parties themselves have adjusted, on suggestion supported by doubtful or by only probable testimony. But if palpable errors be shewn, errors which cannot be misunderstood, the settlement must so far be considered as made upon an absolute mistake or imposition, and ought not to be obligatory on the injured party or his representatives, because such items cannot be supposed to have received his assent." The same principle is stated by Lord Redesdale in *Drew v. Power*, 1 Sch. & Lef. 182: "One rule material to observe in all cases of account is, that where there has been a settlement of accounts, either the account has been signed or a security taken upon the footing of the account, a Court of equity does not open that transaction and throw it again between the parties as if no

such transaction had happened, unless the evidence which is produced (and that evidence founded on charges in the bill) shews the whole transaction to be so iniquitous that it ought not to be brought forward at all to effect the parties so to be bound. If the account impeached be a settled account, or if an instrument has been executed upon the foot of it, the Court expects that the errors should be specified in a bill and proved as specified; otherwise it would be easy to overthrow the fairest account and those settled in the most solemn manner, when there happens to be any complication in their nature."

In *Williamson v. Barbour*, 9 Ch. D. 529, the Master of the Rolls said that if the accounts shew errors of sufficient number and sufficient magnitude they may be re-opened although fraud is not shewn, and whether they are errors caused by mistake, or errors caused by fraud, the Court has a right to re-open the accounts. He also points out that a less amount of error will justify the Court in opening the accounts where the accounting party occupies a fiduciary position than in cases where persons do not occupy that position.

An elaborate investigation of the powers of the prerogative Court and the diocesan courts in England was made by Mr. Justice Daly in *Re Bicks Estate*, 15 Abbott's Prac. 12. He there cites a large number of cases in support of his statement that though these courts "were not courts of record and never had the broad general powers to review and correct their proceedings possessed by courts of that high character, still, as indispensable to the administration of justice, they had and exercised, . . . to a certain limited extent, the right of revoking acts done by them, as where a decree is obtained by collusion or fraud. . . . The whole may be summed up briefly in the statement that they may undo what has been done through fraud or upon the supposition that they had jurisdiction. . . . or correct mistakes, the result of oversight or accident." In *In re Wilson and Toronto General Trusts Corporation*, 13 O. L. R. 82, Meredith, C.J., said

that these conclusions of the learned Judge are fully supported by the adjudged cases to which he refers.

It is further to be observed that the Surrogate Courts of this Province are now courts of record; R. S. O. 1914, ch. 62, sec. 3, and therefore possess the broad powers to review and correct their own proceedings spoken of by Mr. Justice Daly as being possessed by courts of record.

A surrogate Judge acting as the Surrogate Court has inherent jurisdiction to set aside an order which he has been induced to make by fraud of the applicant, and also to set aside or vary an order which he has made by mistake, though not to correct errors made in the judicial determination by him of any question; thus it was held he had jurisdiction to vacate an order made by himself upon the taking of executors' accounts and re-open the accounts and further investigate them without reference to the order made. *In re Wilson and Toronto G. T. Co., supra.* The acts of the Surrogate Judge in passing the accounts of executors are those of the Court and not of the Judge as *persona designata*. *Ib.*

In the last mentioned case the Surrogate Court Judge had passed the executors' accounts in January, 1905, and in February, 1906, the wife of the testator presented to the Judge of the Surrogate Court a petition alleging that she had since discovered that the executors had bought mining stock with trust funds, that they had charged interest on overdrawing balances, that they had sold estate property without consulting her, had spent large sums in unnecessary and expensive litigation, etc., and asked to have the order vacated and the accounts re-opened. It will be noticed that neither fraud or mistake was charged, and counsel for the petitioner argued that the Surrogate Judge had power to open the accounts on such allegations "otherwise the petitioner would have had to bring an action in the High Court with the onus on her to prove mistake or fraud." The Surrogate Judge did re-open up the accounts to a limited extent and a Divisional Court held he had jurisdiction to do so.

Section 71 (1) of The Surrogate Courts Act is as follows:—“Where an executor, administrator, trustee, under a will of which he is an executor, or a guardian, has filed in the proper Surrogate Court an account of his dealings with the estate, and the Judge has approved thereof, in whole or in part, if he is subsequently required to pass his accounts in the Supreme Court, such approval, except so far as mistake or fraud is shewn, shall be binding upon any person who was notified of the proceedings taken before the Surrogate Judge, or who was present or represented thereat, and upon every one claiming under such person.”

It is only *so far as* mistake or fraud is shewn, and not *where* mistake or fraud is shewn, that the binding effect of the approval is taken away; and the language of the section plainly indicates that it was not intended that the whole account should be opened up, but that the account should be opened up so as to remove from it anything which, owing to fraud or mistake, had not been charged or had been allowed to the executor, administrator or guardian. *In re Wilson and Toronto G. T. Co.*, 15 O. L. R. p. 616.

The judgment in the last mentioned case was the aftermath of the same case reported in 13 O. L. R. *supra*, and Meredith, C.J., said: “It is unnecessary to determine whether, if this exception to the binding nature of the accounts had not been contained in the section, and the order approving the accounts were to be treated as a judgment or decision of the Surrogate Court, upon the case made by the appellant, as to the two matters as to which she has succeeded in shewing that the accounts were incorrect she would be entitled to have the accounts taken *de novo*, but, as at present advised, I do not think she would be entitled to that relief, but only to have the accounts corrected in those respects in which it is shewn that they are incorrect. The principle applicable to the opening of an ordinary stated account, and the consequences of such an account being opened, do not, I think, apply to an account taken by the Court in the presence of the

parties where the persons to whom the accounting is being made are brought before the Court for the purpose of enabling them to challenge, if they will, the correctness of the account."

The effect of this section is not to abridge the inherent jurisdiction or power of a Surrogate Judge to re-open accounts upon which he has already passed. It would seem, however, to limit the jurisdiction of the Supreme Court to re-open such accounts "except so far as mistake or fraud is shewn." What is meant by the words "if he is subsequently required to pass his accounts in the Supreme Court?" Does this limit the right to re-open the accounts where, an audit being had, an administration order is subsequently made and a reference ordered? In *Shaw v. Tackaberry* (1913), 29 O. L. R. 490, the sole beneficiary, alleging that one of the executors had himself become the real purchaser of a part of the trust estate at an undervalue, brought an independent action in the Supreme Court and succeeded, and a reference was directed as to profits and rents. It is not easy to see how, in that case, the action could have been framed so as to open up matters decided on the audit without asking for a new account, either in form or substance. But is this what is meant by "pass his accounts," in section 71 (1)? On p. 498 Riddell, J., speaking of the defence afforded by this section, says: "The defence under the statute may stand or fall with the main defence—if there was no mistake or fraud in the defendant asserting that the land had been properly sold, realizing \$2,200 only, it may be that the statute applies."

In refusing to open up items of an account which have been adjudicated upon the statute gives effect to the old maxim of law: *Nemo debet bis vexari pro una et eadem causa.* If an action be brought and the merits of the question be discussed between the parties and a final judgment obtained by either, the parties are concluded and cannot canvass the same in another action.

A judgment obtained by fraud could always be set aside by means of an action analogous to the former

Chancery suit to set aside a decree obtained by fraud. *Wyatt v. Palmer* (1899), 2 Q. B. 106; *Flower v. Lloyd* (1877), 6 Ch. D. 297. And the Court could set aside a judgment on the ground of mistake as well as fraud, but the application must be made within a reasonable time. *Cannan v. Reynolds*, 5 El. & Bl. 301, 103 R. R. 491.

A mistake is some unintentional act, omission or error arising from ignorance, surprise, imposition or misplaced confidence. 1 Story Eq. Jur. 110. That result of ignorance of law or fact which has misled a person to commit that which, if he had not been in error, he would not have done. Jeremy Eq. Jur. 358. A mistake exists where a person, under some erroneous conviction of law or fact, does or omits to do some act which, but for the erroneous conviction, he would not have done or omitted. It may arise either from unconsciousness, ignorance, forgetfulness, imposition, or misplaced confidence. Bispham's Eq. 185.

A mistake may be a mistake consisting of ignorance or forgetfulness of a material fact, or arising out of the belief in the existence of the subject matter of a transaction where it has ceased to exist, or of some fact which forms the basis of the transaction which is not true. Beyond this, however, it is impossible to give a complete definition of mistake as the courts have always refrained from attempting to do so. 21 Halsbury 2.

In *Barrow v. Isaacs & Son* (1891), 1 Q. B. D. 420, Lord Esher, M.R., said: "I can find no definition of what 'mistake' is; but if you treat mistake in its ordinary sense in the English language, is mere forgetfulness a mistake? Can you, in English, say, 'I forgot,' and is that the same thing as saying 'I was mistaken?' I think not. Both these questions depend on something happening in the mind of the person, and you have to see what it is that happens in his mind. If he merely forgets, he does not assume that one state of things exists whereas some other state of things exists; it is a mere passive state of mind; he has forgotten—he

has not thought that one thing was in existence, whereas something else was in existence. I should say that mere forgetfulness is not mistake at all in ordinary language. I cannot find any decision in Courts of Equity which has ever stated that mere forgetfulness is mistake against which equity will relieve."

It would appear that these remarks were not concurred in by Lopes and Kay, L.JJ., the other members of the Court, and in *Hood of Avalon v. Mackinnon* (1909), 1 Ch. D. 476, Eve, J., after quoting the above citation, said: "With the greatest possible respect to Lord Esher, I do not quite follow that. It seems to me that when a person has forgotten the existence of a pre-existing fact, and assumes that such fact did not exist, he is labouring under a mistake, and he acts on the footing that the fact did not pre-exist; and, venturing to criticize the language of Lord Esher, I should have thought that a man makes a mistake in forgetting an existing fact quite as much as he does in assuming a state of things to exist which does not in fact exist." See also *Kelly v. Solari*, 9 M. & W. 54, 60 R. R. 666; *Baker v. Courage* (1910), 1 K. B. p. 65.

Relief will not be granted on the ground of mistake if the mistake is one of law as distinguished from one of fact. The distinction between mistakes of law and mistakes of fact has never been clearly defined by the courts, but it may be taken that to exclude the right to relief the mistake must be one of general law, such, for example, as the legal interpretation of a contract. *Wilding v. Sanderson* (1897), 2 Ch. 534.

Thus the above rule does not apply to ignorance of a private right, although the private right is the result of a matter of law, or depends upon rules of law applied to the construction of legal instruments; nor does it apply to ignorance of a right which depends upon questions of mixed law and fact, and a statement of fact which involves a conclusion of law is still a statement of fact and not a statement of law, while mistake as to the law of a foreign country which is clearly, in one sense, a mistake of law, is held in this country to be a mistake of fact. 21 Halsbury, 4.

Fraud, in the sense of a Court of Equity, properly includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another. 1 Story Eq. Jar. 187.

Fraud, in the contemplation of a civil Court of Justice, may be said to include properly all acts, omissions and concealments which involve a breach of legal or equitable duty, trust or confidence, justly reposed, and are injurious to another, or by which an undue advantage is taken of another. All surprise, trick, cunning, dissembling and other unfair way that is used to cheat anyone is considered as fraud. Fraud in all cases implies a wilful act on the part of any one, whereby another is sought to be deprived, by illegal or inequitable means, of what he is entitled to. Kerr on Fraud, 1.

Fraud is not mistake or error in interpreting a contract; fraud is something dishonest and morally wrong, and much mischief is done as well as pain inflicted by its use where "illegality" and "illegal" are the really appropriate expressions. *Washburn v. Wright*, 31 O. L. R. 138, where it was held that the word "fraud" in sec. 3 of The Master and Servant Act means something more than mere mistake or an erroneous mode of interpreting the contract.

In *Duchess of Kingston's Case*, 2 Sm. L. C., it is said that "fraud is an extrinsic, collateral act, which vitiates the most solemn proceedings of Courts of Justice. Lord Coke says it avoids all judicial acts." DeGrey, C.J., in that case said: "Like all other acts of the highest judicial authority, it is impeachable from without; although it is not permitted to shew that the Court was mistaken, it may be shewn that they were misled." Lord Coleridge, C.J., in *Abouloff v. Oppenheimer*, 10 Q. B. D. 295, said he believed that the principle has never been either better or more tersely and neatly stated than it was in the foregoing passages.

To set aside a judgment of fraud it is not sufficient for the plaintiff to allege fraud. It is the duty of the Court to receive such evidence, pro and con, as is material to the question whether there really has been, since the former judgment, a new discovery of something material to disturb the former judgment, and the plaintiff must shew a reasonable possibility of the alleged fraud being established, a mere general allegation of fraud, without particulars, cannot avail. *Boswell v. Coaks*, 6 R. 167; *Birch v. Birch* (1902), P. 130, 138.

"It is not too much to require any one who intends to charge another with fraud . . . to take the responsibility of making that charge in plain terms." *Caldicell v. Cockshutt Plow Co.* (1913), 30 O. L. R. p. 262, citing *Low v. Guthrie* (1909), A. C. 278, and *Badenach v. Inglis* (1913), 29 O. L. R. 165; and the person making the charge is confined to the particular fraud charged. *Medcalf v. Oshawa Lands and Investments* (1914), 5 O. W. N. 797; *Washburn v. Wright*, *supra*. There must be a distinct and positive issue presented by the party seeking to set aside a judgment for fraud. It is not sufficient for the plaintiff to say to the defendant "You obtained that judgment by fraud." He must state in what the fraud consisted. "You bribed the witnesses, you bribed my solicitor, you bribed my counsel, you committed some fraud or other of that kind, and I ask to have the judgment set aside on the ground of fraud." Per James, J.J., *Flower v. Lloyd* (1877), 6 Ch. D. p. 302. And see *Wallingford v. Mutual Society*, 5 A. C. 685, 701.

In *Brooke v. Lord Moyston*, 2 D. J. & S. 373, 139 R. R. 134, a compromise was grounded on the supposed insufficiency of real estate to pay certain legacies. It appeared that at the time of the inquiry as to the compromise being for the benefit of one of the legatees, an infant, a document relative to the valuation of the estate rendering it doubtful whether the valuation, which throughout the inquiry was treated as correct, was not based on erroneous principles, so as to give an

undervalue, was in the possession of the owners of the estate, but was not laid before the Master. The compromise was set aside. *Turner, L.J.*, treated this as fraud, "meaning by fraud not moral fraud, but what in the eye of the Court is considered as amounting to fraud." This decision was subsequently reversed, *L. R. 11, L. 304*, but the reversal did not affect the law as laid down here.

One of two executors induced his agent to purchase a part of the trust estate at an auction sale for \$2,200, and then re-sold the land at a profit, accounting on the audit only for the sum at which the land was bid in. The representing to the Surrogate Court that \$2,200 had been received as the sale price of the land was either a mistake or fraud on the part of the defendant; and, assuming that the Surrogate Court Judge had jurisdiction to pass upon the items, such a decision was not binding." *Shaw v. Tackaberry* (1913), 29 O. L. R. 490. See also *Re Daly, Daly v. Brown*, 39 S. C. R. 122.

Where a solicitor puts in a fraudulent defence for his client, without the client's knowledge, making admissions on which judgment was obtained against the client, it was held this was fraud for which the Court would relieve. *Williamson v. Preston*, 20 Ch. D. 672.

A final settlement will not be interfered with on account of mere irregularities unless they are sufficiently gross to raise the presumption of fraud; nor are mere illegal allowances unless obtained by fraud, ground for impeaching or setting aside a final settlement. 18 C. Y. C. 1198.

It is fraud for an administrator to obtain an allowance to himself for the whole amount of a claim assigned to him by a former administrator of the deceased without deducting the amount for which his assignor is indebted to the estate. He should set off one debt against the other and take credit only for the difference. *Sorrels v. Frantham*, 48 Ark. 386.

The wilful omission or concealment of assets constitutes fraud for which a settlement may be set aside.

Ridenbaugh v. Burnes, 14 Fed. Rep. 33; *Smiley v. Smiley*, 80 Mo. 44; *In re McNeil*, 68 Pa. St. 412.

If a guardian buys up the incumbrances upon an infant's lands for less than the amount due, it is fraud if he charge the estate more than he actually paid. *Henley v. —* 2 Ch. Ca. 245. So a guardian settling accounts as soon as infants come of age, and retaining a gratuity, was set aside. *Oldham v. Hand*, 2 Ves. 259. See also *Wyeh v. Packington*, 3 Bro. P. C. 46. And a solicitor dealing with an infant is governed by the same principles which apply to a guardian and his ward. *Revett v. Harrey*, 1 S. & S. 502, 24 R. R. 219.

In some of the cases it seems to have been assumed that mere perjury or falsification of evidence does not amount to that fraud which is sufficient to set aside a judgment. *Flower v. Lloyd*, 10 Ch. D. 327; *Baxter v. Wadsworth*, 67 L. J. Q. B. 301; *Woodruff v. McLennan*, 14 A. R. 242. In Kerr on Fraud it is said: "To set aside a judgment on the ground of fraud, actual positive fraud must be shewn. There must be on the part of the person chargeable with it the *malus animus*, the *mala mens* putting itself in motion, and acting, in order to take an undue advantage for the purpose of actually and knowingly committing a fraud. The fraud must be a fraud which can be explained and defined upon the face of the judgment. Mere irregularity, or even perjury, is not the kind of fraud which will authorize the Court to set aside a judgment": p. 365.

But the better opinion would seem to be that if the perjury was that of the party to the action who obtained the judgment, or of a witness on behalf of such party, made with the knowledge of the party, such perjury amounts to fraud.

In *Abouloff v. Oppenheimer*, 10 Q. B. D. 295, in an action in a foreign Court, a claim was made for the value of certain goods. The plaintiff in that action knowingly misrepresented to the Court that the goods were not then in his possession. This was held to be fraud.

In *Vadala v. Lawes*, 25 Q. B. D. 310, in an action on a foreign judgment, the alleged fraud consisted of the plaintiff placing before the Italian Court bills of exchange which he alleged to be commercial bills, when in truth and in fact he knew them to be nothing of the sort, but bills for gambling transactions. Held to be fraud.

These cases were followed by a Divisional Court in *Johnston v. Barkley* (1905), 10 O. L. R. 724, in preference to *Woodruff v. McLennan*. Street, J., delivering the principal judgment of the Court, said: "In coming to my conclusions I follow *Abouloff v. Oppenheimer* and *Vadala v. Lawes*, which draw no distinction between the fraud which consists in presenting perjured evidence to the Court, and that which is collateral to the merits of the case. This distinction is recognized by the Supreme Court of the United States in the case of *Hilton v. Guyot*, 159 U. S. 113, and by our own Court of Appeal in *Woodruff v. McLennan*, but the House of Lords does not seem to have had the question presented to it as yet. Meantime there is no doubt that the wide doctrine which appears to be the result of the English and American cases at present, impairs to a very considerable extent the finality of all judgments."

But a party to an action cannot try over again the very question which was in issue in the original action. Where it is merely a question whether the plaintiff's witnesses or the defendant's witnesses were telling the truth at the trial or inquiry the Court will not re-open the judgment. See per Garrow, J.A., *Jacobs v. Beaver*, 17 O. L. R. 502.

It is clear that the fact that since the adjudication a party has discovered the existence of evidence which might have established his contention will not amount to fraud. *Taylor v. Sheppard*, 1 Y. & C. 271.

Where a plaintiff brings an action against an executor or other trustee to which section 71 of the Surrogate Courts Act applies, and seeks to re-open items in the accounts approved of by the Surrogate Court

Judge without alleging fraud or mistake, the action will be stayed as frivolous and vexatious, and an abuse of the process of the Court. In the exercise of its discretion the Court may allow the action to proceed upon security for costs being given. *Smith v. Clarkson* (1904), 7 O. L. R. 460.

An executor duly passed his accounts before the proper Surrogate Court Judge in the presence of the solicitor for the plaintiff, a beneficiary. Subsequently the plaintiff brought an action in the High Court, and without any pleadings being delivered, an order was made, by consent, for the removal of the executor and the appointment of a trust company in his place, and for the passing of the accounts, adopting the common form of the order for such purposes. It was held that, on the taking of the accounts in the Master's office the accounts taken and passed by the Surrogate Court Judge were under section 74, no mistake or fraud being shewn, binding on the plaintiff, for notwithstanding such consent the judgment must be construed as if made *in invitum*, and the usual rules of law and procedure, statutory and otherwise, applied thereto. *Gibson v. Gardner* (1907), 13 O. L. R. 521.

CHAPTER XXXVII.

THE RESIDUE.

Section 58 of The Trustee Act provides as follows:

(1) Where a person dies having by will appointed an executor, such executor, in respect of any residue not expressly disposed of, shall be deemed to be a trustee for the person, if any, who would be entitled to the estate under The Devolution of Estates Act in case of an intestacy, unless

it appears by the will that the executor was intended to take such residue beneficially.

(2) Nothing in this section shall prejudice any right in respect of any residue not expressly disposed of to which, if this Act had not been passed, an executor would have been entitled where there is not any person who would be entitled to the testator's estate under The Devolution of Estates Act.

On the passing of accounts, all debts and charges having been paid and the residue ascertained, the executors become trustees of the testator's estate, and their liability must be determined on that footing. *Dover v. Denne* (1902), 3 O. L. R. p. 689. And as soon as debts have been paid an administrator holds the estate in trust to convert and divide among those entitled under the statute to distribution, in precisely the same way that an executor holds an estate in trust under a will when he is directed to convert and distribute among several residuary legatees. *Re Harris*, 7 O. W. N. p. 598 (1915), 33 O. L. R. 83.

The "residue" of the estate means the estate which remains after payment of the debts, funeral and testamentary expenses, and the costs of an administration suit, but not succession duty. *Kennedy v. Protestant Orphans Home*, 25 O. R. 235. A gift of residue "to the amount of \$800" was held to be a gift of \$800 only. *Re Browne*, 5 O. W. N. 466; *In re Nelson*, 14 Gr. 199.

The term "residuary legatee" *prima facie* means the person taking what the law calls the residue of the personal estate; but it is a term which must be fashioned and moulded by the context. But the use of the word "legatee" instead of the more appropriate word "devisee" will not prevent real estate passing under a residuary clause where the intention of the testator, to be gathered from the whole will, was that real estate should pass. *Re Booth and Merriam*, 1 O. W. N. 646; *Patterson v. Hueston*, 40 N. S. R. 4.

When the executor has paid all the debts, the funeral and testamentary expenses, and all the legacies, he

must in the last place pay over the surplus or residue of the personal estate to the residuary legatee, if any such be nominated. The residuary legatee has a right to insist that the executor, before the end of the first year after the testator's death, shall, if possible, convert all the assets into money and pay the funeral and testamentary expenses, debts and legacies, and hand over the clear residue to the residuary legatee. *Wightwick v. Lord*, 6 H. L. C. 217, 108 R. R. 76. A residuary legatee is entitled to whatever may fall into the residue after the making of the will by lapse, invalid disposition, or other accident, or by acquirement subsequent to the date of the will.

The distribution of the residue of intestate estates is governed by sections 29, 30 and 31 of The Devolution of Estates Act, which are as follows:—

29.—(1) The real and personal property whether separate or otherwise, of a married woman in respect of which she dies intestate, shall be distributed as follows: One-third to her husband if she leaves issue, and one-half if she leaves no issue, and subject thereto shall devolve as if her husband had predeceased her.

(2) A husband, who, if this Act had not been passed, would be entitled to an interest as tenant by the curtesy in real property of his wife, may by deed or instrument in writing executed, and attested by at least one witness, and delivered to the personal representative, if any, or if there be none, deposited in the office of the Surrogate Clerk at Toronto, within six months after his wife's death, elect to take such interest in the real and personal property of his wife as he would have taken if this Act had not been passed, in which case the husband's interest therein shall be ascertained in all respects as if this Act had not been passed, and he shall be entitled to no further interest thereunder.

30. Except as in this Act is otherwise provided the personal property of a person dying intestate

shall be distributed as follows, that is to say: one-third to the wife of the intestate and all the residue by equal portions among the children of the intestate and such persons as legally represent such children in case any one of them have died in his lifetime, and if there are no children or any legal representatives of them then one-half of the personal property shall be allotted to the wife, and the residue thereof shall be distributed equally to every of the next of kindred of the intestate who are of equal degree and those who legally represent them, and for the purpose of this section the father and the mother and the brothers and sisters of the intestate shall be deemed of equal degree; but there shall be no representation admitted among collaterals after brother's and sister's children, and if there is no wife then all such personal property shall be distributed equally among the children, and if there is no child then to the next of kindred in equal degree of or unto the intestate and their legal representatives and in no other manner.

31. If, after the death of a father, any of his children die intestate, without wife or children in the lifetime of the mother, every brother and sister and the representatives of them shall have an equal share with her, anything in section 30 to the contrary notwithstanding.

Section 27 provides that an illegitimate child or relative shall not share under any of the provisions of the Act, and that a person born out of matrimony shall not become legitimate by the subsequent marriage of his parents.

The Devolution of Estates Act, passed in Ontario in 1886, makes a change amounting to a new rule in the law as to succession to real estate of persons dying intestate, and declares generally that land shall be distributed as personal property among the next of kin of a person dying intestate. It is sufficiently plain that the provisions of the Statute of Distributions, as

to personal estate, are to regulate the distribution of land. The same comprehensive change had been made in many of the Australasian Colonies before this, and the result of such legislation had been construed to the effect above indicated by the Privy Council in *Wentworth v. Humphrey*, 1886, 11 A. C. 619.

In the distribution under this Act of the real and personal property of an intestate, brothers and sisters of the half-blood share equally with those of the whole blood. *In re Wagner* (1903), 6 O. L. R. 680. And where the next of kin were consins, some of whom were the children of the intestate's father's half brother, and one of whom was the niece both of his father and mother, it was held that all the consins took equally—that those of the double blood took no more than the others. *Re Adams* (1903), 6 O. L. R. 697.

J. M. died intestate. Her father and mother were both dead and her nearest relatives were children of the father's sister, and grandchildren of the mother's brothers and sisters. Falconbridge, C.J.: "I am of the opinion that there is no representation of collaterals of this class, and that the two daughters of the deceased sister of the intestate's father take all to the exclusion of the grandchildren of the deceased brothers and sisters of the intestate's mother." *Re McEachern* (1905), 10 O. L. R. 499.

An intestate left nephews and nieces, and children of a nephew who predeceased the intestate. It was held that the provision in The Statute of Distributions (now in section 30 of The Devolution of Estates Act) that "there shall be no representation admitted among collaterals after brother's and sister's children," excluded the children of the deceased nephew. *Crowther v. Cawthra*, 1 O. R. 128.

Where brothers and sisters are entitled to share on an intestacy, the children of a deceased brother or sister are entitled to share *per stirpes*. *Walker v. Allen*, 24 A. R. 336, overruling *Re Colquhoun*, 26 O. R. 104.

Under The Statute of Distributions the division of personal estate of an intestate is always to be *per stirpes*. The intestate had a son and daughter both of whom predeceased her. The son left three children and the daughter one child. Held, the four grandchildren took *per stirpes*, and not *per capita*. *In re Natt*, 37 Ch. D. 517. This rule seems to be doubted in Williams on Executors, but for the present, the point may be said to be settled in favour of a division *per stirpes* when all the children are dead leaving descendants. Armour on Devolution, 253.

Where some of the children of the intestate are living and some are dead leaving issue, no question arises: The estate is divided into as many portions as there are living children and the deceased children who have left issue—each living child takes one share, and the descendants of each deceased child take the share which their ancestor, the child, would have taken if he had survived. Armour, 258.

Lineal descendants to the remotest degree are entitled to take as representing children. But it is strictly confined to descendants. Where an intestate's son died leaving a widow and child, and then the intestate died, the widow took nothing, the child taking the whole of his father's share. *Price v. Strange*, 6 Madd. 159, 22 R. R. 266, 268.

Section 12 of The Devolution of Estates Act provides that the real and personal property of every unmarried dying intestate and leaving a widow but no issue shall, where the net value of the property does not exceed \$1,000, belong to the widow absolutely and exclusively. Where the net value exceeds \$1,000, the widow is entitled to a preferential share of \$1,000 with interest at four per cent. per annum until payment. The provision of \$1,000 for the widow is in addition to her share in the residue of the estate.

This section does not apply where there is a partial intestacy: *In re Harrison* (1901), 2 O. L. R. 217, where a testator failed to dispose of his residuary estate. See also *Re Twigg's Estate* (1892), 1 Ch. 579. But, in

a case within the section, the widow is entitled to the \$1,000 out of the estate in Ontario, notwithstanding that she receives other benefits under the laws of another country out of her husband's estate in that country. *Sinclair v. Brown*, 29 O. R. 370.

The following table shews how the estate of an intestate, dying since 1st July, 1886, is distributable:—

If the intestate die leaving:	His personal representatives take as follows:
Wife only.	\$1,000 under sec. 12 as above. Of the residue one-half to wife and one-half to next of kin in equal degree to the intestate, or their legal representatives; or if no next of kin to the Crown.
Wife and child or children.	One-third to wife, residue to child or children; if children dead then to their legal representatives, i.e., their lineal descendants <i>per stirpes</i> . <i>Re Natt</i> , supra.
No wife or child.	All to next of kin and their legal representatives <i>per stirpes</i> .
Child, children or their representatives.	All to such child or children, or to their representatives <i>per stirpes</i> .
Children by two wives.	Equally to all.
No child, children or their representatives.	All to next of kin in equal degree to intestate
Child and grandchildren of deceased child.	Half to child, and half to grandchildren who take <i>per stirpes</i> .
Husband only.	Half to him and half as if he had predeceased his wife.
Husband and child or children.	One-third to husband and two-thirds to child or children.
Father and mother.	Equally to both.
Father, mother, brother and sister.	Equally to all.
Mother and brother and sister.	Equally to all.
Wife, mother, brothers, sisters and nephews or nieces.	\$1,000 to wife, one-half of balance to wife, and residue to mother, brothers, sisters, nephews and nieces—the nephews and nieces taking <i>per stirpes</i> .
Wife and father.	\$1,000 to wife and residue to wife and father equally.

Wife, mother, nephews and nieces.	\$1,000 to wife. One-half of residue to wife, one-fourth to mother, and one-fourth to nephews and nieces.
Wife, brothers, sisters and mother.	\$1,000 to wife. Half of residue to wife (sec. 30), and one-half to brothers, sisters and mother equally.
Mother only.	The whole.
Wife and mother.	\$1,000 to wife and the residue equally to both.
Brother or sister of whole blood and brother or sister of half blood.	Equally.
Posthumous child and mother.	Equally.
Posthumous child and child born in lifetime of intestate.	Equally.
Father's father and mother's mother.	Equally.
Uncle's or aunt's children, and brother's or sister's grandchildren.	Equally.
Grandmother, uncle or aunt.	All to grandmother.
Two aunts, nephews and niece.	Equally.
Uncle and deceased's uncle's child.	All to uncle.
Uncle by mother's side and deceased uncle's or aunt's child.	All to uncle.
Nephew by brother and nephew by half sister.	Equally <i>per capita</i> .
Brothers or sisters and nephews or nieces.	Equally. The nephews or nieces take <i>per stirpes</i> . Walker v. Allan, <i>supra</i> .
Nephews by deceased brother and nephews by deceased's sister.	Equally <i>per capita</i> .
Nephews and nieces, and children of deceased nephew.	All to nephews and nieces. Crowther v. Cathra, <i>supra</i> .
Brother and grandfather.	All to brother.
Brother's grandson and sister's son.	All to sister's son.
Brother and wife.	\$1,000 to wife—residue equally.
Wife, mother and brother.	\$1,000 to wife—residue equally.

Wife, mother and children of deceased brothers.	\$1,000 to wife and one-half of residue; one-fourth of residue to mother and one-fourth to children <i>per stirpes</i> .
Wife, brother and children of deceased brother.	\$1,000 to wife and residue divided one-half to wife, one-fourth to brother and one-fourth to children <i>per stirpes</i> .
Brother and children of a deceased brother.	One-half to brother and one-half to children <i>per stirpes</i> .
Grandfather and brother.	All to brother.
Grandchildren of deceased brothers of intestate's mother, and children of deceased sister of intestate's father.	All to children. <i>Re McEachren, supra.</i>

If one of the residuary legatees has received only his share, the subsequent wasting of the assets by the executors will not entitle the other residuary legatees to call upon him to refund. The case, however, is materially altered if the executor has dissipated a portion of the assets before any residuary legatees call upon him to account; and it would seem that the rule ought to be that what is available at that time should be equally divisible among the whole of the residuary legatees, i.e., an equal distribution should be made of the estate as it stood at the time of the payment to the residuary legatees. *Peterson v. Peterson*, 1 L. R. 3 Eq. 111; *McMillan v. McMillan*, 21 Gr. 369. *Fenwick v. Clarke*, 6 L. T. N. S. 593, is not adverse to this view. In that case there were several pecuniary legacies, some absolutely, others to tenants for life with remainders over—the assets were sufficient for all. The executors paid the absolute legacies and deposited a sum of money in a bank, awaiting an investment. The bank failed, and the executors were not held responsible, nor the paid legatees bound to refund. The payment to them, when made, was rightful.

In *Uffner v. Lewis*, 27 A. R. 242, the executors made efforts to discover the whereabouts of certain persons entitled to share in the residue, and failing to discover these persons, they distributed the residue among the others. The Court held that the executors had not made reasonable efforts to discover the legatees, and

in the absence of such efforts the persons who had shared in the residue must refund for the benefit of the persons whose claims were ignored. See however, *Re Ashman* (1908), 15 O. L. R. 42, where Riddell, J., held that executors were entitled to distribute the estate where a proper advertisement for creditors "and others" had been duly published.

Annuities given by the will are payable out of the income of residue if no other source is specified. *Re Grant*, 52 L. J. Ch. 552.

A fund directed to be set apart to answer ordinary life annuities is residue so far as not required; so that the life-tenant of residue is entitled to surplus income set free by the death of an annuitant. *Gibbs v. Gibbs*, 26 L. T. 865.

Any fund merely required to answer contingent liabilities is in the meantime treated as residue. Hence the life-tenant of residue is entitled to the immediate income of a fund set apart to answer reversionary life annuities. *Cranley v. Dixon*, 23 Beav. 512; or contingent legacies. *Allhusen v. Whittel*, 4 Eq. 295.

Where the interest of a legacy is directed to be accumulated beyond the period allowed by law, the interest accruing after that period on both legacy and accumulations forms part of the capital of residue. *Crawley v. Crawley*, 7 Sim. 427, 40 R. R. 170; *O'Neill v. Lucas*, 2 Keen 313, 53 R. R. 72.

In *Willie v. Headland*, 4 Giff. 505, 141 R. R. 302, in an administration suit, the executors claimed to retain part of the residue as an indemnity against possible liability in respect of unregistered mining shares. The Court refused the claim, but required the residuary legatees to undertake to answer such liability.

A gift of residue to an executor to enable him to carry into effect the purposes of the will does not give him any beneficial interest in the residue, and intrinsic evidence of intention to benefit the executor is not admissible. *Barrs v. Fewkes*, 2 H. & M. 232, 144 R. R. 33. In *Harrison v. Harrison*, 2 H. & M. 237, 144 R. R. 137, it was held the executors took beneficially.

Where the residue has been once ascertained it should be distributed, or, if the provisions of the will so require, invested. If this is not done and one executor allows the other to retain the ascertained residue in his hands and he becomes insolvent, both are liable as for a breach of trust. *Lincoln v. Wright*, 4 Beav. 427, 55 R. R. 132.

A residuary disposition of all the residue of an estate consisting of money, promissory notes, vehicles and implements, was held to carry land, a devise of which had lapsed, notwithstanding a gift to another of all real and personal estate. *Re Farrell* (1906), 12 O. L. R. 580.

Where land is devised for life, a residuary devise of all the real estate passes the reversion in the land *Swart v. Gregory*, 15 U. C. R. 335. And where an annuity is given for life a residuary bequest carries the capital. *Re Watt*, 29 N. S. R. 100.

Where a residuary bequest directs the residue to be "divided *pro rata* amongst the legatees," previously named in the will, they share the residue in proportion to the respective amounts of their prior legacies. *Kennedy v. Protestant Orphans' Home*, 25 O. R. 235. An annuitant is a legatee and entitled to share in such a distribution. *Woodside v. Logan*, 15 Gr. 145. But "legatee" may be given a more restricted meaning according to the context. *Edwards v. Smith*, 25 Gr. 159.

An executor or administrator may require a receipt or a release as a condition precedent to the payment of the amount due on a legacy or distributive share. *Sterett v. National Co.*, 10 App. Cas. (D.C.) 131; *In re Fortune*, Ir. R. 4 Eq. 351. But he cannot require the legatee or heir to pay the costs of such release. *In re Fortune, supra*.

So a legatee for life may be required as a condition precedent to the executor's assenting to or delivering the legacy to him, to sign an inventory of the chattels admitting their receipt, and that he is entitled to them only for life, after which they belong to the remainderman. *Howell v. Howell*, 38 N. C. 522.

APPENDIX

FORMS.

Petition to Pass Accounts.
Affidavit Verifying Accounts.
Appointment to Pass Accounts.
Order on Passing Accounts.
Notice to Creditors.

Surrogate Court Tariff—Solicitors.
Tariff of Fees to Registrars.
Tariff of Fees to Judges.

FORMS.

Note.—The following forms of Petition, Appointment and Order were framed by the writer for use in the County of Grey. They will be found much more convenient than the old forms commonly used. It will be noticed that the distinction between the proceeds of real and personal estate is done away with.

PETITION TO PASS ACCOUNTS.

In the Surrogate Court of the County of
In the Estate of
late of the of in the
County of . Deceased.
To the Judge of the Surrogate Court of the County of

Sheweth:—

1. That the said _____ died on or about the _____ day of _____ A.D. 19____, and on the _____ day of _____ A.D. 19____, your Petitioner _____ duly appointed the _____ of the said deceased by the Surrogate Court.
2. That your Petitioner _____ ha _____ brought in and filed with the Registrar of this Court a full and true account of _____ administration of the said estate, shewing all the personal property, money _____, estate and effects, and the real estate and the proceeds thereof, which have come into _____ hands or possession, or into the hands or possession of any other person or person for _____, with a full and correct account of all disbursements made in the course of the administration of the said estate.
3. That your Petitioner _____ ha _____ administered the estate of the said deceased to the best of _____ ability so far as the same can be administered at the present time.
4. That your Petitioner _____ ha _____ not heretofore been ordered or allowed, by this Court, or any other Court of competent jurisdiction, any compensation for care, pains and trouble and time expended in and about the estate of the deceased, and in administering, disposing of and settling the affairs of the said estate.
5. That your Petitioner _____ know _____ of no creditors of the estate of the said deceased having unsettled claims against the said estate which your Petitioner _____ consider _____ valid, except _____
6. That the only portion of the estate of the said deceased which remains unadministered at the present time is set forth in detail in the Schedule "A" hereto, and the reasons for the non-administration thereof are also set forth in the said Schedule.

7. That the only persons interested in the estate of the said deceased, or in the administration thereof, together with their proper Post Office addresses respectively, so far as known to your Petitioner, are set forth in the first and second parts of Schedule "B" hereto, and they are all of the full age of twenty-one years except those whose names are set forth in the second part of the said Schedule "B."

8. Your Petitioner therefore pray that the said accounts may be audited, taken and passed by and before this Honourable Court, and that he may be allowed a fair and reasonable compensation for care, pains and trouble and time expended in and about the said estate, and in administering, disposing of and settling the affairs of the said estate.

Dated the day of 19 .

SCHEDULE "A."

Shewing the Estate of the Deceased remaining undisposed of, and the reasons why it is undisposed of.

SCHEDULE "B."

Part I.—Shewing the adult parties interested in the estate.

Names.	Post Office Addresses.

Part 2.—Shewing the infants interested in the estate.

Names.	Post Office Addresses.

In the Surrogate Court of the County of
In the Estate of

I of the of in the County
of make oath and say:—

1. That I am the Petitioner within named,
and have read or heard read the within Petition, and
the statements therein made are true.

2. That the account now shewn to me and marked "A" sets forth a true and correct account of all the personal estate, and the proceeds of the real estate, which have come into the hands of the Petitioner , or into the hands of any other person or persons on behalf, and also the names of the parties from whom the same have been received, and the dates at which the same were received, to the best of my knowledge and belief.

3. That the account now produced and shewn to me and marked "B" sets forth a true and correct account of all the disbursements and payments made by the Petitioner , or on account of the said estate, and the purpose for which such payments were made, to the best of my knowledge and belief.

Sworn, etc.

APPOINTMENT TO PASS ACCOUNTS.

In the Surrogate Court of the County of .
In the Estate of late of the
of in the County of ,
Deceased.

UPON READING THE PETITION of

of the said deceased, and the Petitioner having
brought in and deposited with the Registrar of this

Court the accounts of receipts and expenditures in respect of the said estate, I hereby appoint day, the day of A.D. 19 , at o'clock in the noon, at my Chambers in the Court House in the Town of , Ontario, as the time and place for the purpose of examining, auditing and passing the said accounts, and to fix the compensation (if any) to be allowed to the Petitioner for care, pains and trouble and time expended in and about the said estate, and in administering and settling the same.

AND I DO ORDER that all persons who are or may be interested in the said estate attend at the said time and place; and, except so far as mistake or fraud is shown, my approval of the Petitioner's dealings with the said estate will be binding upon any person who is notified of these proceedings, or who is present or represented thereat, and upon any one claiming under such person.

AND I DO ORDER that a copy of this order and appointment at least days before the day so appointed be served on the following persons, namely:

Where a copy of this appointment is to be served on the Official Guardian, the Inspector of Prisons and Public Charities, or the Solicitor to the Treasury, a copy of the accounts must be served therewith.

Dated the day of A.D. 19 .

Surrogate Judge.

Note.—The accounts of the said Petitioner may be examined by the parties interested therein, or their solicitors, at the office of the Registrar of the Court in the said Court House.

ORDER ON PASSING ACCOUNTS.

In the Surrogate Court of the County of _____
 In the Estate of _____
 late of the _____ of _____ in the
 County of _____, Deceased.

UPON READING THE PETITION of

of the said deceased, and the affidavits and accounts brought in and filed with the Registrar of this Court, I did by my appointment of the _____ day of _____ 19____, require that all persons interested in the estate of the said deceased should attend at my Chambers in the Court House in the Town of _____ on the _____ day _____ 19____, at which time and place I would proceed to audit and pass the said accounts and fix the compensation to be allowed to the Petitioner for _____ care, pains, trouble and time expended in and about the said estate:

AND having on the _____ day of _____ 19____, proceeded to examine, audit and pass the said accounts pursuant to the said appointment in the presence of _____ (no one appearing for the other parties interested in the said estate although duly served with a copy of the said appointment as by affidavit filed duly appears)

I FIND AND DECLARE that the total amount of the estate and effects of the said deceased which came into the hands of the Petitioner amounts to the sum of \$ _____; and that the Petitioner has properly paid out and disbursed in the due course of administration of the said estate the sum of \$ _____.

AND I do hereby in pursuance of the prayer of the said Petitioner order and allow the Petitioner the sum of \$ _____ as a fair and reasonable allow-

ance for the care, pains and trouble and time expended in and about the administration of the said estate.

AND I do order that the costs of taking, auditing and passing the said accounts amounting to the sum of \$ as taxed by the Registrar of this Court, be allowed to the Petitioner ; and having deducted the amounts so disbursed and expended, and the compensation allowed and costs taxed, from the amount come to the hands of the Petitioner as aforesaid, I find there remains in the hands of the Petitioner the sum of \$.

(If the estate has not been fully administered the unadministered estate may be set out here, or by reference to the Petition or by schedule.)

If infants are interested in the estate, add:

AND I FIND AND DECLARE that A.B. and C.D. are infants under the age of 21 years and are entitled to share in the said residue, and that they will respectively attain the age of twenty-one years as follows:—The said A.B. on the day of A.D. 19 , and the said C.D. on the day of A.D. 19 .

AND I FIND that the said A.B. is entitled to \$ of the said residue, and the said C.D. is entitled to \$ thereof; and I order that the Petitioner do pay the said sums into the Supreme Court of Ontario to the credit of the said infants respectively pursuant to section 32 of The Trustee Act.

Dated at * the day of 19 .

Surrogate Judge of said County.

(The Petition, Appointment and Order should be endorsed, and should shew the name of the solicitor by whom filed or taken out.)

NOTICE TO CREDITORS.

In the Matter of the Estate of A.B. late of the
of in the County of
(occupation), Deceased.

NOTICE is hereby given pursuant to section 56 of The Trustee Act (R. S. O. 1914, Chapter 121) that all creditors and others having claims or demands against the estate of the said A.B., who died on or about the day of 19 , are required on or before the day of , 19 , to send by post prepaid, or deliver, to C.D. (name and address) the executor of the last will and testament of the said deceased (or the administrator of the estate of the said deceased) their Christian names and surnames, addresses and descriptions, the full particulars of their claims, a statement of their accounts, and the nature of the securities (if any) held by them.

AND take notice that after such last mentioned date the said executor (or administrator) will proceed to distribute the assets of the said deceased among the parties entitled thereto, having regard only to the claims of which he shall then have notice, and that the said executor will not be liable for the said assets or any part thereof to any person or persons of whose claims notice shall not have been received by him at the time of such distribution.

X. Y.

Solicitor for the said executor.

Dated the day of 19 .

SURROGATE COURT TARIFF.

FEES AND COSTS TO SOLICITORS AND COUNSEL.

The following shall be the tariff of fees and costs to be allowed in respect of proceedings in the Surrogate Courts in non-contentious cases to Solicitors and Counsel, viz.:

1. Drawing all necessary papers and proofs to lead grant and obtaining order for probate or letters of administration, in ordinary cases, and taking out same.

(a) When the value of the property devolving is \$1,000 or under	\$10 00
(b) Over \$1,000 and not exceeding \$5,000. .	15 00
(c) Over \$5,000 and not exceeding \$10,000. .	20 00
(d) Over \$10,000 and not exceeding \$20,000	30 00
(e) Over \$20,000 and not exceeding \$50,000	50 00
(f) Over \$50,000 and not exceeding \$100,000	75 00
(g) Over \$100,000	100 00
2. In cases of temporary administration..	10 00
(a) On application to revoke any grant ...	10 00

(To be increased in the discretion of the Judge in cases of a special or important nature, subject to approval by a Judge of the Supreme Court upon a report from the Judge.)

3. For obtaining Letters of Guardianship 10 00

(To be increased in the discretion of the Judge in cases of a special or important nature, subject to approval by a Judge of the Supreme Court upon a report from the Judge.)

4. Drawing the necessary affidavits, inventories and schedules under the Succession Duty Act:—

(a) Short form, where the aggregate value of the property does not exceed \$5,000	5 00
---	------

(b) Above \$5,000, where no duty is payable \$10 00

(To be increased in the discretion of the Judge in cases of a special nature, subject to approval by a Judge of the Supreme Court upon a report from the Judge.)

(c) Where duty is payable, in addition to the foregoing fees for preparing proofs for succession duty, for all services settling with the Solicitor to the Treasury the amount of duty payable and attending to payment or to securing payment (by bond or otherwise) of same 20 00

(To be increased in the discretion of the Judge in cases of a special nature, subject to approval by a Judge of the Supreme Court upon a report from the Judge.)

5. On preparing petition, affidavits, accounts and all other necessary papers and services in auditing and passing of accounts of an executor, administrator, guardian or trustee, and including the fixing of the remuneration of such executor, administrator, guardian or trustee.

(a) Where the receipts do not exceed \$2,000 25 00

(b) Where the receipts exceed \$2,000, but do not exceed \$5,000 30 00

(c) Where the receipts exceed \$5,000, but do not exceed \$10,000 40 00

(d) Where the receipts exceed \$10,000, but do not exceed \$20,000 50 00

(e) Where the receipts exceed \$20,000, but do not exceed \$50,000 75 00

(f) Where the receipts exceed \$50,000, but do not exceed \$100,000 100 00

(Any of the preceding fees, in cases of an important nature, may be increased by the Judge, but such increase shall be subject to approval by a Judge of the Supreme Court upon a report from the Judge.)

(When the receipts exceed \$100,000, the fees shall be such as the Judge deems fair and proper. This order allowing the same shall be subject to approval by a Judge of the Supreme Court upon a report from the Judge.)

6. To solicitors for other parties (including the official guardian) properly attending on audit of accounts a fee may be allowed in the discretion of the Judge not exceeding in the whole one-half of the above amounts and subject to increase with approval of a Judge of the Supreme Court upon report from the Judge.

7. In all contentious cases and proceedings not hereinbefore provided for, the same fees and disbursements as are provided for proceedings in the County Court, so far as the same may be applicable, may be charged and allowed on taxation.

8. In addition to the foregoing fees and costs, there shall be allowed all proper disbursements made by the solicitor in connection with the foregoing matters.

9. Where it has been proved to the satisfaction of the Judge that proceedings have been taken by solicitors out of Court to expedite proceedings, save costs, or compromise actions or disputes, a fee may be allowed therefor in the discretion of the Judge.

FEES TO REGISTRARS.

—ITEM

Number:

1. For services rendered under Section 73, ss. 1 and 3 of The Surrogate Courts Act, 1910, where the value of the property does not exceed \$400 (See that section)

2. Receiving and examining papers and entering application	\$1 00
3. Every necessary notice to Surrogate Clerk	25
4. Return of each grant to Surrogate Clerk	25
5. Receiving and entering certificate of Surrogate Clerk	25
6. Recording every bond with affidavits of justification and execution	1 00
7. Recording each additional separate affidavit of justification or execution if more than one of each, per folio.	10
8. (a) On every grant of letters probate or letters of administration or guardianship where the personal property devolving is under \$1,000	1 00
(b) \$1,000 and under \$2,000	2 00
(c) And for every additional \$1,000 or fraction thereof (not exceeding in the whole \$20.00)	50
9. Submitting papers with Registrar's report thereon to Judge to lead grant	50
10. Recording grants or other instruments or letters of guardianship, per folio	10
11. For preparing probate or letters of administration, issued under seal of the Court, each instrument	75
12. Ditto, if grant is special	1 00
13. For preparing letters of guardianship	1 00
14. Transcript of will, per folio	10
15. Certified copy will (including certificate), per folio	10
16. Drawing special orders or other papers when directed by the Judge	50
If exceeding 3 folios, per folio on the excess	10
17. Taking every affidavit or administering oath to a witness	20

18. Attending and entering every order or minute	\$0 50
19. Every summons or order and every instrument or other process under seal, not otherwise provided for, if prepared by the Registrar, per folio, including fee for sealing.	20
20. Search for original will or instrument and inspection, or for general search into proceedings	30
21. Every other search	20
22. Every necessary certificate granted by Registrar	50
23. Exemplification under seal	1 00
If exceeding 5 folios, per folio in excess	10
24. For every office or other copy or extract of a minute, order, decree or other document filed or deposited in the office of the Registrar or of any evidence or depositions whether such copy or extract be made by the Registrar or by any other person searching the original, per folio	10
25. For receiving for deposit the will of a living person for safe-keeping, including giving a deposit receipt and keeping a record of the deposit	1 00
26. Issuing every subpoena	50
27. Every necessary letter	25
28. Every necessary filing	10
29. Receiving, examining and entering every petition or application for audit or passing of accounts or contestation of claim	50
30. Attending audit, or contestation of claim, or at the trial of any issue or matter, when Registrar attends	1 00
31. Filing vouchers, if directed by the Judge or required by any party to be filed, each	10
Not exceeding in all	1 00

32. Entering order if required to be entered	\$0 50
33. Taxing costs and granting certificate. .	1 00
34. Receiving, entering and filing caveat or contestation of grant	50
35. Notice to Surrogate Clerk of caveat or of contestation of grant and entering same. .	50
36. Posting and other necessary disbursements to be added in all cases.	

FEES PAYABLE TO THE JUDGE (R. S. O. p. 774.)

On every grant of probate or administration:	
Where the property devolving does not exceed \$1,200	\$2 00
Where the property devolving exceeds \$1,200 but does not exceed \$3,000	3 00
Where the property devolving exceeds \$3,000 but does not exceed \$4,000	4 00
And for every additional \$1,000, or fraction thereof, the additional sum of	1 00
On every appointment of a guardian	2 00
On every order of appointment	50
On every special attendance or attendance to grant probate or administration or upon an appointment when an audit is adjourned. .	1 00
On every audit where the total amount of the accounts to be audited does not exceed \$1,000 per hour, but not to exceed \$2.00 on any day.	1 00
On every audit where such total exceeds \$1,000, but is under \$10,000	1 00
per hour, but not to exceed \$5.00 on any day.	
On every audit where such total is or exceeds \$10,000, but is under \$50,000	1 50
per hour, but not to exceed \$6.00 on any day.	

On every audit where such total is or exceeds
\$50,000 \$2 00
per hour, but not to exceed \$10.00 on any day.
For every day's sittings in contentions or dis-
puted cases, similar fees to those allowed in
cases of audit.

In cases of estates of small value, or where the
estate consists wholly of insurance moneys and cloth-
ing, for the fees of the Registrar and Judge, see sec-
tion 73 of The Surrogate Courts Act.

The Judges and Registrars of the several Surro-
gate Courts and solicitors practising therein shall be
entitled to take for the performance of duties and
services under The Succession Duty Act, similar fees
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