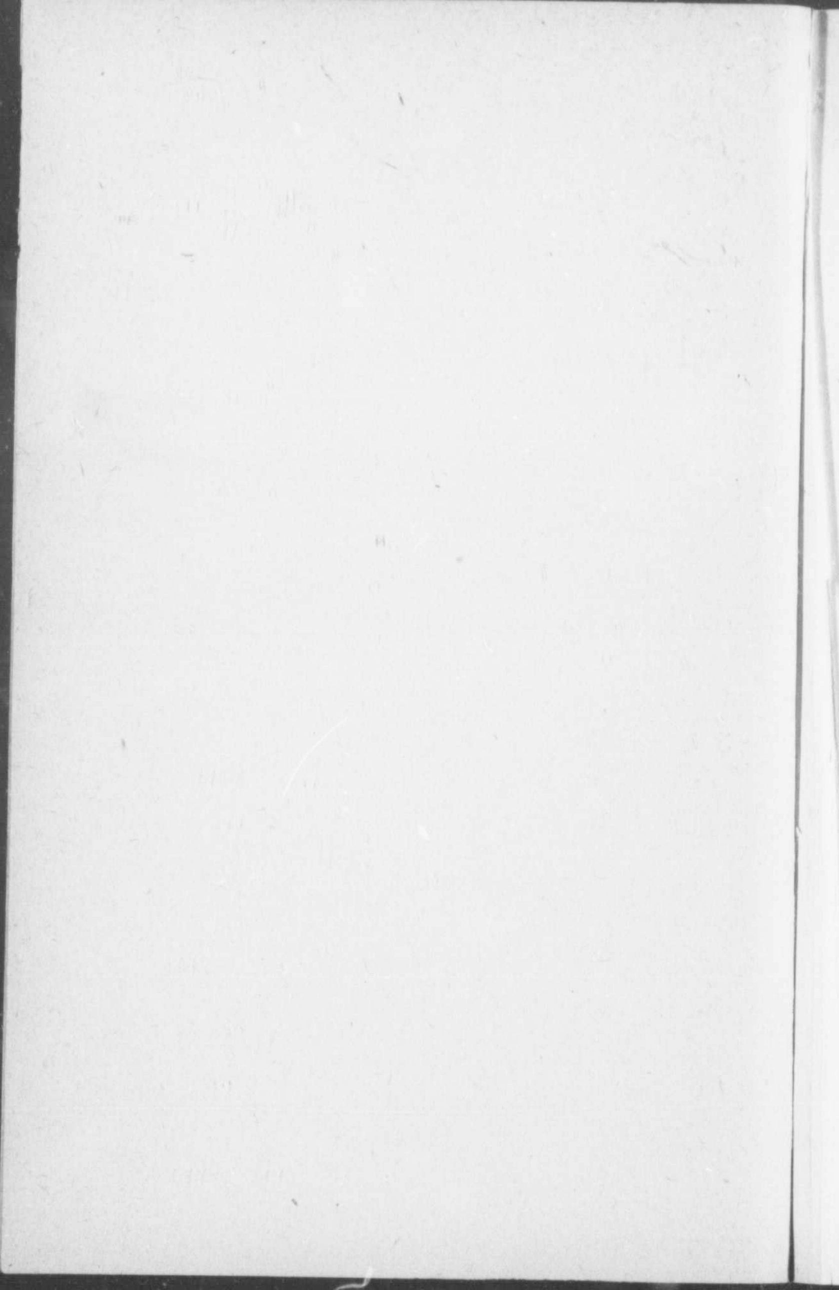

THE LAW RELATING TO

EXECUTORS AND ADMINISTRATORS

IN THE

PROVINCE OF ONTARIO

BY

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OF TORONTO, BARRISTER

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PREFACE

In the present edition, the arrangement by numbered sections has been abandoned. A great many changes have been necessary, and the old numbers would have been useless. The Statutory references to the Province of Ontario are taken from the Revision of 1914, with any amending legislation of the Session of 1914 subsequent to the issue of the revision. A Table of Statutes of the other Provinces of the Dominion (except Quebec) brought down to the end of 1913 will give a means of reference to these Statutes, so that they can be compared with the text of the Ontario Statutes quoted.

At the end of each chapter, cases selected from the Reports of all the Provinces will be found digested bearing on the subjects of the chapter. With the view of facilitating reference to these cases a list is furnished in the Table of Contents. This list, with a very carefully compiled index, ought to make the book easy of reference.

The serious changes introduced in 1914 in the Revised Statute of Ontario, 1914, chapter 24, The Succession Duty Act, have necessitated a consolidation which is Appendix V.

R. E. Kingsford.

August, 1914.
18 St. Joseph St.,
Toronto.

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N. S. R. S. 1900 c. 129, 171, 1902 c. 27, 1903-4 c. 25, 1905 c. 31, 1909 c. 40.

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B. C. R. S. 1911 c. 115, 1913 c. 33.
Alberta G. O. 1905 p. 382, 1913 c. 16.
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B. C. R. S. 1911 c. 145.
Alberta G. O. 1905 p. 621.
Sask. R. S. 1909 c. 50.
Man. R. S. 1902 c. 38.
N. B. C. S. 1903 cc. 138, 139.
N. S. R. S. 1900 c. 167, 1910 c. 29.

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N. S. R. S. 1900 c. 152.

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Alberta G. O. 1905, p. 374, 1907 c. 7, 1909 c. 4, 1911-12 c. 4, 1913 c. 9.
B. C. R. S. 1911 c. 148, 1912 c. 22.
Man. R. S. 1902 c. 103, 1907 c. 25, 1909 c. 32, 1912 c. 35, 1913, 29.
Sask. R. S. 1909 c. 138.
N. B. C. S. 1903 c. 112 (S. C. in Eq.)
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N. S. R. S. 1900 c. 113, 1902 c. 14, 1906 c. 52, 1908 c. 49, 1910 c. 17, 1913 c. 35.

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B. C. R. S. 1911 c. 152.
Alberta G. O. 1905, p. 740.
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Man. R. S. 1902 c. 107.

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N. B. C. S. 1903 c. 147.

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Alberta 1905, p. 883.
Man. R. S. 1902 c. 85.
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EXECUTORS AND ADMINISTRATORS

PART I.

CREATION OF OFFICE.

CHAPTER I.

EXECUTORS.

DEFINITION OF TERM "EXECUTOR."

As the term "executor" is at present accepted in the Province of Ontario, an executor may be defined to be "a person to whom the execution of a last will and testament of property is by the testator's appointment confided." In Ontario, under the Devolution of Estates Act, real and personal estate are both now confided to the management of an executor.

BARE NOMINATION OF EXECUTOR ENTITLES WILL TO PROBATE.

The bare nomination of an executor, without giving any legacy or appointing anything to be done by him, is sufficient to make it a will, and as a will it is to be proved.

In the Goods of Lancaster, 1 Sw. & Tr. 464.

WHO MAY BE APPOINTED EXECUTOR.

Generally speaking, all persons who are capable of making wills, and some others besides, are capable of being made executors. Any doubt as to whether a corporation could be an executor in Ontario has been removed by Statute, as we shall presently see. An infant may be appointed an executor how young so ever he may be; but if an infant is appointed sole executor by 38 Geo. III. c. 87, s. 6, he is altogether disqualified from exercising his office during his minority, and administration cum testamento annexo shall be granted to the guardian of such infant, or to such other person as the court shall think fit, until such infant shall have attained the age of twenty-one years.

Sections 50 and 51 of the Surrogate Courts Act, R. S. O. 1914, ch. 62, are as follows:—

50. Where an infant is sole executor, administration with the will annexed shall be granted to the guardian of such infant, or to such other person as the court shall think fit, until such infant shall have attained the full age of twenty-one years, at which period, and not before, probate of the will may be granted to him.

Imp. Act. 38 G. III., c. 87, s. 6.

51. The person to whom such administration is granted shall have the same powers as an administrator has by virtue of an administration granted to him durante minore aetate of the next of kin.

Imp. Act 38 G. III., c. 87, s. 7.

This Act only applies in case of an infant being sole executor, for if there are several executors and one of them is of full age no administration durante minore aetate ought to be granted, for he who is of full age may execute the will.

2 Black. Comm. 503; *In the Goods of Stewart*, L. R. 3 P. & D. 244.
Cumming v. *Landed Banking and Credit Co.*, 20 O. R. 382.

MARRIED WOMAN.

A married woman may be appointed an executrix, and may take upon herself the probate without the assent of her husband.

PERSONS ATTAINTED OR FELONS NOT DISQUALIFIED.

There are few, or none, who, by law, are disabled on account of their crimes from being executors, and, therefore, it has always been held that persons attainted or outlawed may sue as executors, because they sue in auter droit and for the benefit of the persons deceased.

Ancient Authorities, Wms. 161.

POVERTY OR INSOLVENCY.

The court cannot refuse, on account of his poverty or insolvency, to grant the probate of a will to a person appointed executor; but the High Court of Justice will restrain the insolvent or bankrupt executor and appoint a receiver, and if it is necessary to bring an action of law to recover part of the effects, where the action must be in the name of the executor, the court will compel him to allow his name to be used or appoint an administrator ad litem; but if a person known by a testator to be a bankrupt or insolvent be appointed executor by him, such person cannot on the ground of insolvency alone be controlled by the appointment of a receiver. (See Chapter V. Revocation of Probate).

Stainton v. *The Carron Co.*, 18 Beav. 146.
Johnson v. *McKenzie*, 20 O. R. 131; *Re Bush*, 19 O. R. 1.

IDIOTS AND LUNATICS.

Idiots and lunatics are incapable of being executors or administrators, and if an executor become non compos the court may, on account of his natural disability, commit the administration to another.

Old Cases, Wms. 164.

EXECUTOR ACCORDING TO THE TENOR.

The appointment of an executor may be either express or constructive, in which latter case he is sometimes called executor according to the tenor; for although no executor be expressly nominated in the will by the word executor, yet, if by any word or circumlocution the testator recommend or commit to one or more the charge and office or the rights which appertain to an executor, it amounts to as much as constituting him or them to be executors.

In the Goods of Fraser, L. R. 2 P. & D. 183.

Young v. *Purvis*, 11 O. R. 597; *In the Goods of Briesman* (1849), P. 260.

Unless the court can gather from the words of the will that a person named trustee therein is required to pay the debts of the deceased, and generally to administer his estate, it will not grant probate to him as executor according to the tenor thereof. A direction in a will to a person to pay the testator's debts or funeral expenses out of a particular fund, and not out of the general estate, does not constitute such person executor according to the tenor.

In the Goods of Baylis, L. R. 1 P. & D. 21.

EXECUTOR BY NECESSARY IMPLICATION.

An executor may be appointed by necessary implication, as where a testator says, "I will that A. B. be my executor if C. D. will not;" in this case C. D. may be appointed if he please.

COADJUTOR.

There is a great distinction between the office of coadjutor or overseer and that of executor. The coadjutor or overseer has no power to administer or intermeddle, otherwise than to counsel, persuade and advise and, if necessary, apply to the court. It is, therefore, material to enquire what words will appoint coadjutor or overseer. If A. is made executor and B. coadjutor, without more he is not by this made a joint executor with A. If A. be made executor and the testator afterwards in his will expresses that B. shall administer also with him and in aid of him, here B. is an executor as well as A., and may prove the will as executor if A. refuses.

Ancient References, Wms. 169.

AN EXECUTOR BY THE TENOR MAY BE ADMITTED TO PROBATE JOINTLY WITH AN EXECUTOR EXPRESSLY NOMINATED.

Although when there is an express appointment of an executor, it is less probable that there should be an indirect appointment to the same office, yet there is no objection either in principle or practice, to admit an executor according to the tenor to probate, jointly with an executor expressly nominated.

Where the testator named his wife as executrix, and A. B. to assist her, it was held that A. B. might be executor according to the tenor.

In the Goods of Brown, 2 P. D. 110.

EXECUTOR BY IMPLICATION.

Where a person had been expressly appointed executor for a limited purpose in a will, it was held that he was appointed general executor by a codicil by implication merely without express words.

In the Goods of Aird, 1 Hagg. 336.

EXECUTORS IN SEVERAL DEGREES.

An executor may be appointed solely or in conjunction with others, but in the latter case they are all considered in law in the light of an individual person. Likewise a testator may appoint several persons as executor in several degrees, as where he makes his wife executrix; but if she will not or cannot be executrix, then he makes his son executor; and if his son will not or cannot be executor, then he makes his brother, and so on; in which case the wife is said to be instituted executrix in the first degree; B. is said to be substituted in the second degree; C. to be substituted in the third degree, and so on.

In the Goods of Lane, 33 L. J. P. M. & A. 185.

SUBSTITUTES WHEN EXCLUDED.

If an instituted executor once accepts the office and afterwards dies intestate, the substitutes in what degree so ever are all excluded because the condition of law, if he will not or cannot be executor, was once accomplished by such acceptance of the instituted executor.

Ancient authority, Wms. 172.

Where a testator in his will appointed two persons as executors, and in a codicil named his wife "sole executrix of this my last will and testament," the court held that the appointment of executors in the will was revoked.

In the Goods of Lowe, 3 Sw. & Tr. 478.

APPOINTMENT BAD FOR UNCERTAINTY.

An appointment of "A., as my executor, with any two of my sons," was held bad as to the sons for uncertainty.

In the Goods of Baylis, 2 Sw. & Tr. 613.

TRUST COMPANIES.

The many difficulties caused through the appointment of individuals to act as executors, and the loss in many cases incurred through individual carelessness or misconduct, have always been a source of danger to the public. This danger of late years has been met by the incorporation of Trust Companies. The first of the Ontario Trust Companies commenced business in 1882, and others have since been incorporated. The object of these companies is to undertake and execute every kind of trust and financial agency. Among their other functions they undertake to act as trustee under the appointments of courts, corporations and private individuals.

For the regulation of Trusts Companies the following statutory provisions are made by R. S. O. 1914, chapter 184, The Loan and Trusts Corporation Act.

INTERPRETATION. "FIDUCIARY." "INSTRUMENT."

60.—(1) In this section "Fiduciary" shall include trustee, executor, administrator, assignee, guardian, committee, receiver, liquidator or agent; and "Instrument" shall include every will, codicil, or other testamentary document, settlement, instrument of creation, deed, mortgage, assignment, Act of the Legislature, and a judgment, decree, order, direction and appointment of any court, Judge, or other constituted authority.

SECTIONS 50 TO 59 RELATING TO AMALGAMATION TO APPLY TO TRUST CORPORATIONS.

(2) Sections 50 to 59 shall apply to the purchase and sale of the assets of a trust company by and to another and to the amalgamation of trust companies, such corporations being incorporated under the law of Ontario or having their head offices in Ontario, and registered under this Act.

Sub-sections (4) and (5) relate to passing of trusts to new corporations.

REFERENCES IN WILL OR CODICIL.

(5) Where the name of the selling corporation or of either of the amalgamated corporations appears as executor, trustee, guardian, or curator in a will or codicil such will or codicil shall be read, construed and enforced as if the new or continuing corporation was so named therein; and it shall, in respect of such will or codicil, have the status and rights as the selling or amalgamating corporation.

DUTIES OF OLD CORPORATION NOT COMPLETED.

(6) In all probates, administrations, guardianships, curatorships or appointments of administrator or guardian ad litem heretofore issued or made by any court of Ontario to the selling corporation or to either of the amalgamated corporations, from which at the date of such assent it had

not been finally discharged, the new or continuing corporation shall ipso facto be substituted therefor.

TRUSTS.

63.—(1) A corporation shall not be bound to see to the execution of any trust, whether express, implied or constructive, to which any share of its stock, or any deposit, debenture, or debenture stock may be subject.

Sub-sections (2) and (3) relate to receipt and non-liability to see to application of purchase money.

REPRESENTATIVES, GUARDIANS, OR TRUSTEES NOT TO BE PERSONALLY LIABLE.

(4) No person holding shares in the corporation as executor, administrator, guardian, committee of a lunatic, or trustee of or for any estate, trust or person named in the books of the corporation as being so represented by him, shall be personally subject to any liability as a shareholder, but the estate and funds in his hands shall be liable in like manner and to the same extent as the testator, intestate, ward or person interested in such trust fund would be if living and competent to hold the shares in his own name.

Sub-section (5) makes beneficiary shareholder if not under disability.

WHERE BENEFICIARY, ETC., NOT NAMED TRUSTEE, ETC., LIABLE.

(6) If such testator, intestate, ward, lunatic or person so represented is not named in the books of the corporation the executor, administrator, guardian, committee or trustee shall be personally liable in respect of such shares as if he held them in his own name as owner thereof.

DISPOSITION OF PROCEEDS OF SALE UNDER MORTGAGES.

64.—(1) Any surplus not exceeding $300 over and above the amount due to the corporation, including costs, derived from the sale under power of sale of any property mortgaged to the corporation, where the mortgagor or his assigns has or have died intestate, shall be personal property, whether the sale took place before or after the death of the mortgagor or person entitled to the equity of redemption.

RIGHTS OF EXECUTION CREDITORS.

(2) Where the surplus exceeds $300 nothing in this section shall prejudice any right or lien of an execution creditor in respect of such excess.

EXEMPTION.

65. To the extent of $300 the amount standing to the credit of any depositor in a registered corporation shall not, while in the hands of the corporation or while in course of transmission from the corporation, be liable to demand, seizure or detention under legal process as against the depositor or his nominee, assignee, or representative, or as against any person to whom the corporation is by the two next following sections authorized to pay said sum.

WHEN DEPOSITORS MAY NOMINATE A SUCCESSOR.

66.—(1) A depositor with a loan corporation having on deposit a sum not exceeding $300 may, from time to time, by a writing signed by him and deposited with the corporation, nominate any person to receive the money at his death.

SUBSTITUTION OF NOMINEE ON DEATH OF NOMINATOR.

(2) Upon receiving an affidavit of the death of the depositor the directors may substitute on the books of the corporation the name of the nominee

in the place of the depositor, or may immediately pay to the nominee the amount due to the deceased.

DISPOSITION OF FUNDS OF INTESTATE MEMBERS.

67. If a depositor with a loan corporation, having on deposit a sum not exceeding $300, dies intestate and without making such nomination, the amount due may, without letters of administration being taken out, be paid to the person who appears to the directors to be entitled under The Devolution of Estates Act to receive the same, upon receiving an affidavit of the death and intestacy, and that the person claiming is so entitled.

PAYMENTS BY MISTAKE BY THE CORPORATION, WHEN VALID.

68. Where the directors, after the death of a depositor, have paid such sum to the person who at the time appeared to be entitled to the same under the belief that the depositor died intestate without having appointed any nominee the payment shall be valid and effectual with respect to any demand from any other person as next of kin or as the lawful representative of the deceased against the corporation; but the next of kin or representative shall be entitled to recover the amount of such payment from the person who received the same.

The following further provisions of the Loan and Trusts Corporations Act must be noticed.

2. In this Act, (Interpretation Clause).

"TRUST COMPANY."

16. "Trust Company" shall mean a company constituted or operated for the purpose of acting as trustee, agent, executor, administrator, receiver, liquidator, assignee, guardian of a minor's estate, or committee of a lunatic's estate.

WHEN LETTERS PATENT OF INCORPORATION MAY ISSUE.

15.—(1) Letters patent of incorporation of a trust company may issue where it is shown to the satisfaction of the Lieutenant-Governor in Council that, in the locality in which the head office of the proposed company is to be situate, there exists a public necessity for a trust company or for an additional trust company.

PROPORTION OF STOCK TO BE HELD IN ONTARIO.

(2) At all times at least three-fourths of the shares of a company shall be held by persons who are residents of Ontario, or by companies incorporated under the law of Ontario.

FORFEITURE WHERE SMALLER PROPORTION SO HELD.

(3) If at any time it is shown to the satisfaction of the Lieutenant-Governor in Council that less than three-fourths of the shares of the company are so held the Letters Patent incorporating the company may be revoked under the provisions of section 21.

SATISFYING LIEUTENANT-GOVERNOR OF FITNESS OF APPLICANTS.

(4) Letters Patent shall not issue unless the Lieutenant-Governor in Council is satisfied that the fitness of the applicants to discharge the duties of a trust company is such as to command the confidence of the public, and that the public convenience and advantage will be promoted by granting to the company the powers applied for.

Section 16 relates to procedure for incorporation.

PROHIBITION AGAINST TAKING DEPOSITS OR ISSUING DEBENTURES.

17.—(1) A trust company incorporated under the law of Ontario shall not borrow money by taking deposits or by issuing debentures or

debenture stock, and Letters Patent incorporating any such company shall expressly prohibit it from so doing.

CERTAIN UNDERTAKINGS NOT TO BE DEEMED DEBENTURES.

(2) Where money is entrusted to the company for the bona fide purpose of its being invested by the company as trustee for, or as agent of the person by whom it is entrusted, the guarantee by the company of the repayment of the same or of the payment of the interest thereon at such rate as may be agreed on, on fixed days shall not be deemed to be a debenture nor shall the money be deemed to be money borrowed by the company by issuing debentures within the meaning of subsection 1.

POWERS WHICH MAY BE CONFERRED ON TRUST COMPANIES.

18.—(1) Subject to the provisions of the next preceding three sections, and to the law of Ontario, the Letters Patent may authorize the company to exercise any or all of the following powers:

ACCEPT PROPERTY ON TRUST.

(a) To take, receive and hold all estates and property, real and personal, which may be granted, committed, transferred or conveyed to the company with its consent, upon any trust or trusts whatsoever not contrary to law, at any time or times, by any person or persons, body or bodies corporate, or by any court in Ontario

ACCEPT DEPOSITS OF PROPERTY FOR SAFE KEEPING.

(b) To take and receive as trustee or as bailee, upon such terms and for such remuneration as may be agreed upon, deeds, wills, policies of insurance, bonds, debentures or other valuable papers or securities for money, jewelry, plate or other chattel property of any kind, and to guarantee the safe keeping of the same.

ACT AS ATTORNEY OR AGENT.

(c) To act generally as attorney or agent for the transaction of business, the management of estates, the collection of loans, rents, interest, dividends, debts, mortgages, debentures, bonds, bills, notes, coupons and other securities for money.

ISSUE AND COUNTERSIGN STOCK CERTIFICATES, BONDS, ETC. MANAGE SINKING FUNDS.

(d) To act as agent for the purpose of issuing or countersigning certificates of stock, bonds or other obligations of any association or municipal or other corporation, and to receive, invest and manage any sinking fund therefor on such terms as may be agreed upon.

ACT AS EXECUTOR, ETC.

(e) To accept and execute the offices of executor, administrator, trustee, receiver, liquidator, assignee, or of trustee for the benefit of creditors under any Act of this Legislature, and of guardian of any minor's estate, or committee of any lunatic's estate; to accept the duty of and act generally in the winding up of estates, partnerships, companies and corporations.

INVEST TRUST FUNDS.

(f) To invest any trust money in the hands of the company in any securities in which private trustees may by law invest trust money, and also in the debentures of any municipal corporation in the provinces of Manitoba, Saskatchewan, or Alberta, or in any other province which may be named by the Lieutenant-Governor in Council.

GUARANTEE INVESTMENTS.

(g) To guarantee any investment made by the company as agent or otherwise.

SELL OR MORTGAGE PROPERTY.

(h) To sell, pledge or mortgage any mortgage or other security, or any other real or personal property held by the company, and to make and execute all requisite conveyances and assurances in respect thereof.

MAKE DEEDS, TRANSFERS, ETC.

(j) To make, enter into, deliver, accept and receive all deeds, conveyances, assurances transfers, assignments, grants and contracts necessary to carry out the purposes of the company, and to promote its objects and business.

COLLECT COSTS, CHARGES AND EXPENSES FOR SERVICES.

(k) And for all such services, duties and trusts to charge, collect and receive all proper remuneration, legal, usual, and customary costs, charges and expenses.

INVESTMENT OF ITS OWN FUNDS.

(2) A trust company may invest any money held by it other than trust money, in any of the securities authorized in the case of a loan corporation or loaning land corporation, by section 27.

LIABILITY, EXTENT OF.

19. The liability of a trust company to persons interested in an estate held by the company as executor, administrator, trustee, receiver, liquidator, assignee, guardian, or committee, shall be the same as if the estate had been held by any private person in the like capacity, and the company's powers shall be the same.

APPROVAL OF COMPANY FOR THE ACCEPTANCE OF THE COURT IN CERTAIN FIDUCIARY OFFICES. PROVISO.

20.—(1) Where a trust company is authorized to execute the office of executor, administrator, trustee, receiver, liquidator, assignee, guardian or committee, and the Lieutenant-Governor in Council approves of such company being accepted as a trust company for the purposes of the Supreme Court, every court or Judge having authority to appoint such an officer may, with the consent of the company, appoint such company to exercise any of such offices in respect of any estate or person under the authority of such court or Judge, or may grant to such company probate of any will in which such company is named as an executor; but no company which has issued or has authority to issue debentures or debenture stock, or which has received or has authority to receive deposits, shall be approved.

APPOINTMENT OF COMPANY AS SOLE.

(2) A trust company so approved may be appointed to be a sole trustee, notwithstanding that but for this Act it would be necessary to appoint more than one trustee.

OR JOINT TRUSTEE.

(3) A trust company so approved may be appointed to any of the offices mentioned in subsection 1 jointly with another person.

WHEN APPOINTMENT MAY BE MADE BY COURT.

(4) Such appointment may be made whether the trustee is required under the provisions of any deed, will or document creating a trust or whether the appointment is under the provisions of the Trustee Act or otherwise.

SECURITY NOT REQUIRED.

(5) Notwithstanding any rule or practice or any provision of any Act requiring security it shall not be necessary for the company to give any security for the due performance of its duty as such executor, adminis-

trator, trustee, receiver, liquidator, assignee, guardian or committee unless otherwise ordered.

REVOCATION OF APPROVAL.

(6) The Lieutenant-Governor in Council may at any time revoke the approval given under this section.

ADVANTAGES.

It is claimed for such companies that persons making use of them will secure the following advantages:

Firstly.—Absolute safety of the trust property.

Secondly.—Efficiency and economy in its administration.

Thirdly.—An unchanging and undying trustee.

Fourthly.—The assurance that the trust will be administered on certain well considered principles, and the avoidance of the serious risks, delays and inconveniences incident to the death of a trustee.

HIGH COURT OF JUSTICE ADOPTS.

Under the authority of the Judicature Act the High Court of Justice has approved of Trust Companies as Surety Corporations for the purposes of the court. The Guarantee Companies Securities Act, R. S. O. 1914, c. 190, gives similar authority.

R. S. O. 1914, c. 56, s. 69.

SECURITY DISPENSED WITH.

It will be noticed that the fifth section of the latter Act dispenses with the necessity for giving security for the due performance of an executorship by a company.

SECURITY FOR DOUBLE VALUE MUST BE FURNISHED.

The present state of the law, by which real as well as personal property devolves upon the personal representatives of the deceased, requires that parties petitioning for administration of an intestate's estate shall give security for double the value of both the real and personal property. This requirement greatly increases the risk and responsibility of individuals. This risk and responsibility are now rendered unnecessary if a Trust Company is made use of.

See R. S. O. 1914, ch. 62, s. 63 (1).

SECURITIES OF GUARANTEE COMPANIES IN SURROGATE COURT.

Guarantee companies are accepted as security under the following clauses of the Guarantee Companies Act above referred to.

INTERPRETATION.

2. In this Act,

"Guarantee company" shall mean an incorporated company empowered to grant guarantees, bonds, policies, or contracts for the integrity and fidelity of employed persons, or in respect of any legal proceedings or for other like purposes approved by the Lieutenant-Governor in Council.

Bonds of Guarantee Company may be Taken by Officers and Others.

3. Where any judge, functionary, officer or person is entitled or required to take security by bond with sureties he may in lieu thereof take the bond, policy or guarantee contract of a guarantee company of the like nature and effect.

Persons Required to Give Security may Give Bond of Guarantee Company.

4. Where any person is required to give security by bond with sureties, he may in lieu thereof furnish the bond, policy or guarantee contract of a guarantee company of the like nature and effect.

Justification not Required.

5. The guarantee company shall not be bound or required to justify.

Bond of Company may be Substituted for other Bond.

6. The bond, policy or guarantee contract of a guarantee company may be taken instead of or in substitution for any existing security if the judge, functionary, officer or person, mentioned in section 3, so directs.

Interim Receipt in Lieu of Bond.

7. The interim receipt of a guarantee company may be accepted in lieu of a bond, policy or guarantee contract, but the latter shall be furnished within one month.

Publication of Order in Council and Laying before Assembly.

8. Every Order in Council approving of a guarantee company shall immediately after the making thereof be published in the Ontario Gazette, and shall be laid forthwith before the Assembly if in session and if not then in session then within the first fifteen days of the next session thereof.

Necessity for Public Inspection.

The affairs and management of these trusts corporations are subject to investigation and inspection by any person appointed for that purpose by the High Court of Justice or the Ontario Government. The necessity for such an examination is obvious. These Trust Companies are, like all other financial companies, liable to mismanagement, and, while they are on the one hand unquestionably of great benefit to the public, on the other hand unless their investments and deposits are carefully scrutinized great loss and damage might be occasioned by unfortunate or improper investment. The public have only the financial guarantee of the liability of the shareholders of the corporation.

Extensive Powers Given.

The exercise of these extensive powers should be carefully scrutinized by the Government. A periodical statement should be issued to the public by a government inspector, as in the case of banks and building societies.

Appointment may be Absolute or Qualified.

The appointment of an executor may be either absolute or qualified. It may be absolute when he is constituted certainly, immediately, and without any restriction in regard to the testator's effects or limitation in point of time. It may be qualified by limita-

tions as to the time or place wherein or the subject-matter whereon the office is to be exercised; or the creation of the office may be conditional.

LIMITATIONS IN POINT OF TIME.

It may be qualified by limitations in point of time, inasmuch as the time may be limited when the person appointed shall begin, or when he shall cease to be executor. Thus, if one appoint a man to be his executor at a certain time, as at the expiration of five years after his death; or, at an uncertain time, as upon the death or marriage of his son. Likewise a testator may appoint a person to be his executor for a particular period of time only, as during the five years next after his decease; or during the minority of his son; or the widowhood of his wife; or until the death or marriage of his son.

Ancient Authorities, Wms. p. 176.
See *Conron* v. *Clarkson*, 3 Ch. Chas. 308.

TEMPORARY ADMINISTRATION GRANTED.

In these cases if the testator does not appoint a person to act before the period limited for the commencement of the office on the one hand, or after the period limited for its expiration on the other; the court may commit administration to another person until there be an executor, or after the executorship is ended This administration will be one cum testamento annexo.

Wms. p. 176.

* See next chapter as to administration de bonis non, and administration with will annexed.

LIMITATIONS AS TO PLACE.

Further, an appointment may be limited in point of place, as thus: a testator may make A. his executor of his goods in one portion of Ontario; B. his executor for his goods in some other portion of Ontario, say the district of Muskoka, and so on. Or, what seems more rational and expedient, he may divide the duty when his property is in various countries.

See *In the Goods of Harris*, L. R. 2 P. & D. 83.

LIMITATION AS TO SUBJECT MATTER.

Again, the power of an executor may be limited as to the subject-matter upon which it is exercised. Thus a testator may make A. his executor for his plate and household stuff; B. for his sheep and cattle; C. for his leases and estates by extent, and D. for his debts due to him. So a person may be made executor for one particular thing only as touching such a statute or bond and no more, and the same will may contain the appointment of one executor for a general and another for limited purposes; but though a testator may thus appoint separate executors for distinct parts

of his property, and may divide their authority, yet quoad creditors they are all executors, and are considered as one executor, and may be sued as one executor.

Old Authorities, Wms. p. 177.

CONDITIONAL APPOINTMENT.

Lastly, the appointment may be conditional and the condition may be either precedent or subsequent. This it may be that an executor gives security to pay the legacies and in general to perform the will before he acts as executor.

Old Authorities, Wms. p. 178.

AN EXECUTOR CANNOT ASSIGN HIS EXECUTORSHIP.

An executor cannot assign the executorship. Formerly the interest vested in him by the will of the deceased might, generally speaking, be continued and kept alive by the will of the executor; so that if there was a sole executor of A., the executor of that executor is to all intents and purposes the executor and representative of the first testator.

Old Cases, Wms. p. 180.

EXECUTOR OF AN EXECUTOR.

By Statute of Ontario.

(6) The executor of a person appointed an executor under this section shall not by virtue of such executorship be an executor of the estate of which his testator was appointed executor under this section, whether such person acted alone or was the last survivor of several executors.

This provision appears in s.-s. 6 of s. 40 of ch. 121 of the Revised Statutes of Ontario, 1914, the Trustee Act which relates to removal of an executor by a Court.

The result is that if an executor is appointed by the High Court or by a Surrogate Court, the executorship is not transmitted beyond the person so appointed. Nor does that person become executor of an estate whereof his testator was executor. Except in these cases the old rule, as above stated, still exists.

Sections 59 and 60 of the Trustee Act, R. S. O. 1914, ch. 121, are as follows:—

59. Executors of executors shall have the same actions for the debts and property of the first testator as he would have had if in life; and shall be answerable for such of the debts and property of the first testator as they shall recover as the first executors would be if they had recovered the same.

25 Edw. III. Stat. V. c. 5.

60. The personal representative of any person who, as executor or as executor in his own wrong, or as administrator, wastes or converts to his own use any part of the estate of any deceased person, shall be liable and chargeable in the same manner as his testator or intestate would have been if he had been living.

30 Car. II., c. 7, s. 1; 4 W. & M., c. 24, s. 12.

CHAPTER II.

ADMINISTRATORS.

"INTESTACY."

In case a party makes no testamentary disposition of his real or personal property he is said to die intestate.

2 Black. Comm. 494.

1. *Origin and Extent of Jurisdiction of Courts.*

THE KING WAS ORIGINALLY ENTITLED TO ADMINISTRATION BY PREROGATIVE.

In ancient time when a man died without making any disposition of such of his goods as were testable, it is said that the king, who is parens patriae, and has the supreme care to provide for all his subjects, used to seize the goods of the intestate, to the intent that they should be preserved and disposed for the burial of the deceased, the payment of his debts, to advance his wife and children, if he had any, and if not, those of his blood. This prerogative the king continued to exercise for some time, by his own ministers of justice, and probably in the County Court, where matter of all kinds were determined. And it was granted as a franchise to many lords of manors and others, who had, until the passing of the Court of Probate Act, a prescriptive right to grant administration to their intesate tenants and suitors in their own courts Baron and other courts. Afterwards, the Crown, in favour of the Church, invested the prelates with this branch of the prerogative; for it was said, none could be found more fit to have such care and charge of the transitory goods of the deceased than the Ordinary who for all his life had the cure and charge of his soul. The goods of the intestate being thus vested in the Ordinary, as trustee to dispose of them in pios usus, it has been said that the clergy took to themselves (under the name of the church and poor) the whole residue of the deceased's estate, after the parties rationabiles of the wife and children had been deducted, without paying even his lawful debts and charges thereon, until by Stat. Westm. 2 (13 Edw. I. c. 19), it was enacted that the Ordinary* should be bound to pay the debts of the intestate as far as his goods extended, in the same manner that executors were bound in case the deceased had left a will. However, in Snelling's case, it was resolved that if the

* Ordinarius—an overseer. Greek—Episcopos. Bishop.

Ordinary took the goods into possession, he was chargeable with the debts of the intestate at common law, and that the Sta. Westm. 2, was made in affirmance of the common law. But, though the Ordinary was (either at common law, or by force of this statute), liable to the creditors for their just and lawful demands, yet the residuum, after payment of debts, remained still in his hands, to be applied to whatever purposes the conscience of the Ordinary should approve. The flagrant abuses of which power occasioned the Legislature to interpose in order to prevent the Ordinaries from keeping any longer the administration in their own hands or those of their immediate dependents. And therefore the Statute of 31 Edw. III. St. I. c. 2, provides "that in case where a man dieth intestate, the Ordinaries shall depute of the next and most lawful friends of the dead person intestate to administer his goods, which person so deputed shall have action to demand and recover as executors, the debts due to the said deceased intestate, in the King's Court, to administer and dispend for the soul of the dead; and shall answer also in the King's Court to others to whom the said deceased was holden and bound in the same manner that executors shall answer. And they shall be accountable to the Ordinaries as executors be in the case of testament, as well as of the time past as the time to come."

2 Black. Comm. 495.

TRANSFER OF BUSINESS TO SURROGATE COURTS.

In Ontario, the Probate and Surrogate Courts date from 1793. In that year, a Court of Probate was instituted to take cognizance of all matters relating to the granting of probate and committing letters of administration. The governor was to preside and could appoint assessors. He was also empowered to commission a Surrogate Court in each of the four districts into which the Province was then divided. On 24th July, 1788, Lord Dorchester had established the four districts of Lunenburgh, Mecklenburgh, Nassau and Hesse. These names had been changed, in 1792, to Eastern, Midland, Home and Western. In 1798 counties were formed, and the old districts were increased to Eastern, Johnstown, Midland, Home, Newcastle, Niagara, London, Western. In 1816 the Ottawa and Gore districts were created. In 1823 the District of Bathurst; 1837, the districts of Brock, Hastings, Simcoe and Talbot. In 1838 the districts of Colborne, Wellington and Huron were formed; District of Dalhousie in 1839. Finally, in 1849, as it was found that by the subdivision of districts their boundaries had become identical with the boundaries of counties, and it had become un-

necessary to continue that mode of division, districts were abolished. Counties were then retained as the name for a territorial division for judicial as well as all other purposes. The Act came into effect 1st January, 1850. As the number of districts was increased, the Courts were from time to time also increased. The present Surrogate Courts are established in every county substantially for purposes defined by statute as follows:

3. There shall be in and for every County a Court of Record to be styled "The Surrogate Court of the County (or united Counties or District) of " (inserting the name of the County or united Counties or District).

R. S. O. 1914. c. 62, s. 3.

TESTAMENTARY JURISDICTION TO BE EXERCISED BY THE SURROGATE COURTS.

The jurisdiction and powers of the Surrogate Courts are defined as follows:

19. Subject to the provisions of the Judicature Act, all jurisdiction and authority, voluntary and contentious, in relation to matters, and causes testamentary, and in relation to the granting or revoking probate of wills and letters of administration of the property of deceased persons and all matters arising out of or connected with the grant or revocation of grant of probate or administration, shall be exercised in the name of His Majesty, in the several Surrogate Courts.

20. Every Surrogate Court shall have full power, jurisdiction and authority:

(a) To issue process and hold cognizance of all matters relating to the granting probate of wills and letters of administration, and to grant probate of wills and letters of administration of the property of persons dying intestate, and to revoke the same; and

(b) To hear and determine all questions, causes and suits in relation to such matters, and to all matters and causes testamentary.

21.—(1) Subject to the provisions herein contained, every such Court shall also have the same powers and the grants and orders of such Court shall have the same effect throughout Ontario, as the former Court of Probate for Upper Canada and its grants and orders respectively had in relation to the personal estate of deceased persons and to causes testamentary within its jurisdiction; and all duties which by statute or otherwise were imposed on or exercised by such Court of Probate or the Judge thereof in respect of probates, administrations and matters and causes testamentary, and the appointment of guardians and otherwise, shall be performed by the Surrogate Courts and the Judges thereof, within their respective jurisdictions.

(2) An action for a legacy or for the distribution of a residue shall not be entertained by any Surrogate Court.

22. Letters of administration shall not be granted to a person not resident in Ontario, but this shall not apply to resealing letters under section 74.

Section 74 relates to Ancillary Probates.

23. Letters probate shall not be granted to a person not resident in Ontario or elsewhere in the British Dominions, unless such person shall have given the like security as is required from an administrator in case of intestacy unless, in the opinion of the Judge, such security should, under special circumstances, be dispensed with or be reduced in amount.

24.—(1) The granting of probate or letters of administration shall belong to the Surrogate Court of the county in which the testator or intestate had at the time of his death his fixed place of abode.

(2) If the testator or intestate had no fixed place of abode in, or resided out of, Ontario at the time of his death, the grant may be made by the Surrogate Court of any county in which the testator or intestate had property at the time of his death.

(3) In other cases the granting of probate or letters of administration shall belong to the Surrogate Court of any county.

25.—(1) Where the person or one of the persons entitled to apply for probate of a will or for letters of administration is Judge of the Court having jurisdiction in the matter, and he does not renounce, application by him for such probate or letters, and any subsequent application in the matter of the estate by him or by any other person may be made to the Judge of the Surrogate Court for an adjoining county, who shall have the same authority as to such application, and generally in all matters connected with the estate, as if he were the Judge of the Surrogate Court having jurisdiction, and he shall be entitled to the same fees, to be paid in stamps if his fees have been commuted, as he would have been entitled to if the application had been made or proceedings had been taken in the Court of which he is Judge.

(2) All proceedings shall be carried on in the Surrogate Court having jurisdiction.

26. Letters probate and letters of administration granted by a Surrogate Court not having jurisdiction to grant the same shall, nevertheless, until revoked have the same force and effect as if they had been granted by a Surrogate Court having jurisdiction.

27.—(1) Letters probate and letters of administration shall have effect over the property of the deceased in all parts of Ontario.

(2) This section shall be subject to the provisions of section 57 and to the provisions contained in the letters probate or letters of administration.

IN CASES OF CONTENTION, THE MATTER MAY, BY CONSENT, BE REFERRED FOR ADJUDICATION TO THE HIGH COURT.

The jurisdiction of the High Court of Justice as to probate and administration is laid down in the two following sections:

32. Where there is a contention as to the grant of probate or administration, and the parties agree, the contention shall be referred to and determined by the Supreme Court on a case to be stated, and the probate or administration shall not be granted until the contention is terminated and disposed of by judgment, or otherwise.

33.—(1) Where in any cause or proceeding any contention arises as to the grant of probate or administration, or any question is raised as to law or facts relating to matters and causes testamentary, the same may be removed into the Supreme Court by order of a Judge of such Court, made on motion supported by affidavit, and on notice to the other parties concerned.

(2) The Judge may impose such terms as to payment of or security for costs or otherwise as he may deem just.

(3) No cause or proceeding shall be removed unless it is of such a nature and of such importance as to render it proper that the same should be disposed of by the Supreme Court, nor unless the property of the deceased exceeds $2,000 in value.

(4) The final order or judgment of the Supreme Court in any cause or proceeding so removed shall, for the guidance of the Surrogate Court, be transmitted by the Surrogate Clerk to the Registrar of the Surrogate Court from which the cause or proceeding was removed.

JURISDICTION OF HIGH COURT.

The High Court has jurisdiction also to try the validity of last wills and testaments, and also to appoint administrators pen-

dente lite, and would have the power to revoke any appointment so made.

POWER OF HIGH COURT TO REVOKE GRANT.

No jurisdiction exists in the High Court of Justice nor has any been conferred upon it to revoke the grant by a Surrogate Court of letters of administration, except under authority referred to in chapter V., post.

McPherson v. *Irvine*, 26 O. R. 438
In re Ivory, Hawkin v. *Turner*, 10 Ch. D. 372.

ESTATES OF SMALL VALUE.

As to estates of small value, jurisdiction is conferred on the Surrogate Courts as follows:

73.—(1) Where letters probate, letters of administration or letters of guardianship are sought and the whole property of the deceased or of the ward does not exceed in value $400, the Registrar shall prepare the necessary papers to lead grant, including all papers and proofs required by The Succession Duty Act, and the bond, if any, and administer the necessary oaths; and the total amount to be charged to the applicant for all the proceedings and services shall be $2.

(2) Where letters probate, letters of administration or letters of guardianship are sought, and the whole property of the deceased or of the ward exceeds in value $400, but does not exceed $1,000, the fees payable to the Judge and the Registrar shall be one-half of the fees payable according to the tariff in the case of an estate not exceeding in value $1,000.

(3) If the Judge has reason to believe that the property exceeds in value $400 or $1,000 as the case may be, he shall refuse to proceed with the application until he is satisfied as to the real value.

(4) Subject to the provisions of sub-section 1, where the whole property of the deceased or of the ward consists of insurance money or of insurance money and wearing apparel, although general letters probate, general letters of administration or letters of guardianship are sought, the fees payable thereon shall be as follows:—

Where the insurance money does not exceed $1,000....$4.00
Where the insurance money exceeds $1,000, but does not exceed $2,000 .... 6.00
Where the insurance money exceeds $2,000, but does not exceed $3,000 .... 8.00

(5) The Lieutenant-Governor in Council may apportion the fees payable between the Judge and the Registrar.

(6) The fees prescribed by this section shall be exclusive of the fees payable to the Crown under Schedule "A" (2) and shall not include the fees payable in respect of contentious business.

APPEALS.

Appeals from the Surrogate Courts are limited as follows:

TO WHAT COURT.

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.

WHEN PERMITTED.

(2) No such appeal shall lie unless the value of the property to be affected by such order, determination or judgment exceeds $200.

PRACTICE.

(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.

(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 the 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.

2. *Administration Generally.*

COURSE OF ADMINISTRATION AS PRESCRIBED BY STATUTE.

The Stat. 31 Edw. III. Stat. 1, c. 11, provides that in cases of intestacy "the Ordinaries shall depute of the next and most lawful friends of the dead person intestate to administer his goods." The power of the Ecclesiastical Judge was a little more enlarged by the Statute 21 Hen. VIII. c. 5, s. 3, which provides that in case any person die intestate, or that the executors named in any testament refuse to prove it, the Ordinary shall grant administration "to the widow of the deceased, or to the next of his kin, or to both, as by the discretion of the same Ordinary shall be thought good." And the same section goes on to enact that "where divers persons claim the administration as next of kin which be equal in degree of kindred to the testator or person deceased, and where any person only desireth the administration as next of kin, where indeed divers persons be in equality of kindred as is aforesaid, that in every such case the Ordinary to be at his election and liberty to accept any one or more making request where divers do require the administration."

Sections 54 and 56 of the Surrogate Courts Act, R. S. O. 1914 ch. 62, are as follows:

TO WHAT PERSONS ADMINISTRATION SHALL BE GRANTED.

54.—(1) Subject to the provisions of sub-section 3, where a person dies intestate, or the executor named in his will refuses to prove the same, administration of the property of the deceased may be committed by the Surrogate Court having jurisdiction, to the husband, or to the wife, or to the next of kin, or to the wife and next of kin as in the discretion of the Court shall seem best; and where more persons than one claim the administration as next of kin who are equal in degree of kindred to the deceased, or where one only desires the administration as next of kin, where there are more persons than one of equal kindred the administration may be committed to such one or more of such next of kin as the court may think fit.

Imp. 31 Edw. III. St. 1, c. 11 & 21, Hy. VIII. c. 5, s. 2.

(2) Subject to sub-section 3 where a person dies wholly intestate as to his property, or leaving a will affecting property but without having appointed an executor thereof, or an executor willing and competent

to take probate and the persons entitled to administration, or a majority of such of them as are resident in Ontario, request that another person be appointed to be the administrator of the property of the deceased, or of any part of it, the right which such persons possessed to have administration granted to them in respect of it shall belong to such person.

(3) Where a person dies wholly intestate as to his property, or leaving a will affecting property, but without having appointed an executor thereof willing and competent to take probate, or where the executor was at the time of the death of such person resident out of Ontario, and it appears to the court to be necessary or convenient by reason of the insolvency of the estate of the deceased, or other special circumstances, to appoint some person to be the administrator of the property of the deceased, or of any part of such property, other than the person who if this sub-section had not been enacted would have been entitled to the grant of administration, it shall not be obligatory upon the court to grant administration to the person who if this sub-section had not been enacted would have been entitled to a grant thereof, but the court may appoint such person as the court thinks fit upon his giving such security as the court directs, and every such administration may be limited as the court thinks fit.

(4) A trust company may be appointed as administrator under sub-section 2 or sub-section 3, either alone or jointly with another person.

POWER OF ADMINISTRATORS TO SUE AND TO BE ACCOUNTABLE AS EXECUTORS.

56. An administrator appointed by the Surrogate Court to administer the estate of a deceased person shall be entitled to sue for, and recover, the debts and other property of the deceased, and shall be accountable for the due administration of the same in like manner as an executor.*

Imp. 31 Edw. III. St. 1, c. 11.

RIGHT OF HUSBAND.

The right of the husband to be administrator of his wife belongs to him exclusively of all other persons, and the Surrogate Judge has no power or election to grant it to any other. It is expressly confirmed by the Statute 29 Car. II. c. 3, which gives the husband the right notwithstanding the provisions of Statute of Distributions, 22 & 23 Car. II. c. 10.

Humphrey v. *Bullen*, 1 Atk. 459. (Section 25 of 29 Car. II. c. 3 was not repeated in Ontario, in 1902 Revision.)

On the death of a married woman without disposing of her separate personalty, the quality of separate property ceases, and the right of the husband to such undisposed of personalty accrues as if the separate use had never existed.

Re Lambert's Estate, 39 C. D. 626.

BY THE OLD PRACTICE IF THE HUSBAND DIES BEFORE HE OBTAINED ADMINISTRATION, IT WAS GRANTED TO THE WIFE'S NEXT OF KIN.

In case the wife died intestate, and afterwards the husband died without having taken out administration to her, the Ecclesias-

*AFTER GRANT OF ADMINISTRATION NO PERSON TO ACT AS EXECUTOR.

55. After a grant of administration no person shall have power to sue or prosecute any action, or otherwise act as executor of the deceased as to the property comprised in or affected by such grant or administration, until such administration has been recalled or revoked.

tical Court at one time considered itself bound by the statute to grant administration to the next of kin of the wife, and not to the representatives of the husband. But such administrator was considered in equity as a trustee for the representatives of the husband.

ADMINISTRATION TO WIFE DYING AFTER A JUDICIAL SEPARATION OR PROTECTION ORDER.

Where a wife has been judicially separated or has obtained a protection order, under Stat. 20 & 21, Vict. c. 85, s. 21, and afterwards dies in the lifetime of her husband, intestate, the court will decree administration, limited to such property as she acquired since the judicial separation or protection order (without specifying of what that property consisted), to the next of kin of the wife; as to the remainder, administration will be granted to the husband.

In the Goods of Hay, L. R. 1 P. & D. 51; 35 L. J. P. & M. 3.

And the course in the courts now is, in all cases where the wife has predeceased her husband, to grant to the representatives of the husband alone letters of administration to the wife. But if the next of kin are entitled to the beneficial interest (as by settlement), the administration is still to be decreed to them; because the principle is that the grant ought to follow the interest.

In the Goods of Pountney, 4 Hagg. 289.

LAW SINCE MARRIED WOMEN'S PROPERTY ACT.

Since the passing of the Married Women's Property Act, 1882, the prior authorities have become of little moment except as to cases excluded from or not falling within the operation of that Act. In cases coming within the operation of the Act a married woman can appoint anyone she pleases executor of her will, and exclude her husband's right to be her administrator; and a grant of probate of the will of a married woman is now unlimited, and there is, generally speaking, no caeterorum grant.

RIGHT OF WIDOW.

Next as to the right of the widow. The Statute 21 Hen. VIII. c. 5, s. 3, directs that the Ordinary shall, in case of intestacy or refusal to prove the will, grant administration to the widow or next of kin, or to both, at his discretion. In modern practice, the election of the Judge is in favour of the widow under ordinary circumstances. The court has always held that administration may be granted to the next of kin, and the widow be set aside upon good cause. For instance, if she has barred herself of all interest in her husband's estate by her marriage settlement; or where she is a

lunatic; or where she has eloped from her husband; or has lived separate from her husband. But the circumstance of the wife having married again is no valid objection. But if the deceased left children, one of whom supported by the rest applies for administration, the second marriage might induce the court to prefer the child, and I think in every case it should.

Webb v. *Needham*, 1 Add. 494.

As a wife divorced a vinculo matrimonii has forfeited all interest in the estate of the deceased former husband, there is no necessity for citing her before granting administration to the next of kin. See In the goods of Nares, 13 P. D. 35. But the Court will not, at any rate without notice, pass over the widow who has been legally separated from her husband by reason of his cruelty, in granting administration to his estate.

In the Goods of Ihler, L. R. 3 P. & D. 50.

NEXT OF KIN.

Who are the next and most lawful friends or next of kin is prescribed by the Statute of Distributions, 22 & 23 Car. II. c. 10, which is in force in Ontario.

See Black. Comm. Vol. II. 203.
See sections 29 and 30 of the Devolution of Estates Act, R. S. O. 1914, c. 119.
Right to. *Chard* v. *Rae*, 18 O. R. 232.

WHERE THERE ARE SEVERAL NEXT OF KIN IN EQUAL DEGREE.

Where there are several persons standing in the same degree of kindred to the intestate, the statute, we have seen, gives the Ordinary his election to accept any one or more of such persons. It remains to inquire by what principles and rules of practice his discretion, in making such election, was guided in the Ecclesiastical Court.

THE COURT GRANTS ADMINISTRATION TO HIM WHOM THE MAJORITY OF PARTIES INTERESTED DESIRE.

The court considered it its first duty to place the administration in the hands of that person who was likely best to convert it to the advantage of those who have claims, either in paying the creditors, or in making distribution: the primary object being the interest of the estate. But where there is no material objection on one hand, or reasons for preference on the other, the court, in its discretion, puts the administration into the hands of that person, amongst those of the same degree of kindred, to whom the majority of parties interested are desirous of entrusting the estate. On this principle, in a case as early as 1678, it was decided by the two Chief Justices, the Chief Baron et aliis, that, where the deceased

left four grandchildren, whereof one was of age and the other three minors, the administration should be granted to the mother as guardian to the three durante minore aetate, in preference to the grandchild who was of age: because, since the statute (22 & 23 Car. II. c. 10), which entitled them all to distribution, the interest of the three preponderated.

Whole Blood Preferred, unless Material Objections can be Proved.

But, although, when the contest for an administration is between two persons in equal degree of the whole blood, the general rule has been to grant it to that person in whom the majority of those entitled to distribution concur; yet that rule does not hold when the contest is between one of the whole blood and one of the half blood; for, in that case, the whole blood is preferable in the grant of administration to the half blood, though the majority of interests concur in the latter, unless material objections can be proved against him of the whole blood.

Son Preferred to Daughter.

Again, by the practice of the court, a son has the preference to a daughter, unless there are material objections to him; and it has been held not enough to divest him of that preference, to show that he has intermeddled with the effects of the deceased without competent authority.

Man used to Business Preferred: Next of Kin also Creditor.

Caeteris paribus, a man accustomed to business is preferred by the court to be administrator.

The fact of one of several next of kin being also a creditor is rather adverse to, than in favour of, his being preferred in a contest for the administration.

Sole Administration Preferred.

The court prefers caeteris paribus, a sole to joint-administration, because it is much better for the estate and more convenient for the claimants on it, since the administrators must join and be joined in every act, and the court never forces a joint administration upon unwilling parties.

In the Goods of Nayler, 2 Robert. 409.

When an Administrator is once Appointed Another of Same Degree of Kindred Cannot Come into the Administration till the Administrator is Dead.

When administration has been once committed to any of the next of kin, others, even in the same degree of kindred, have, during the life of the administrator, no title to a similar grant; unlike

the case of an executor, who has a right to probate, though it has been already taken out by his co-executor. The maxim, "qui prior est tempore potior est jure," applies in the former but not in the latter instance. But a next of kin—and even though he had formerly renounced administration—may, upon the death of the party appointed administrator, come in and take administration de bonis non.

PERSON ENTITLED, RESIDENT IN A FOREIGN COUNTRY.

When a person entitled to administration is resident in a foreign country, the court will expect that due diligence will be used to give him notice of the application, before it will grant administration to another person.

Goddard v. *Cressoiner*, 3 Phil. 637.

ADMINISTRATION TO ESTATE OF FOREIGNER.

In case of a foreigner dying intestate in Ontario, if no question is raised the court will grant administration to the person entitled to the effects of the deceased according to the law of his own country. If the legal title be disputed, the question will depend on the fact whether the deceased was domiciled within the British dominions or only had a temporary residence there.

In the Goods of Beggia, 1 Add. 340.

INTESTATE DOMICILED IN A FOREIGN COUNTRY.

If the intestate was domiciled in a foreign country or within the King's dominions out of Ontario, administration must be taken out here as well as in the country of domicile. But if he left no assets in this country, the Court of Probate has no jurisdiction to make any grant of administration in respect of his estate.

Attorney-General v. *Bouvens*, 4 M. & W. 193; *In the Goods of Tucker*, 3 Sw. & Tr. 585.

If the party applying for administration here has already obtained a grant in the proper court of the country where the domicil was, it seems that the court here, generally speaking, would follow that grant.

MANDAMUS TO COMPEL ADMINISTRATION.

In a case of complete intestacy if the Ordinary would not grant administration as the statutes appointed, a mandamus lay to compel him. It is a good return to such a mandamus that a controversy is depending in the court, whether there is a will or not.

Rex v. *Hay*, 1 W. Bl. 640.

RIGHTS AND LIABILITIES OF FOREIGN ADMINISTRATORS.

It may here be remarked, that although it is fully settled (as there will hereafter be occasion to show), that the right of succes-

sion to the movable personal estate of an intestate is to be regulated by the law of the country in which he was domiciled at the time of his death, yet the administration of the estate must be in the country in which possession of it is taken and held under lawful authority. Thus, by the law of England, the person to whom administration is granted by the Court of Probate is by statute bound to administer the estate, and to pay the debts of the deceased: The letters of administration, under which he acts, direct him to do so, and he takes an oath that he will well and truly administer all and every the goods of the deceased, and pay his debts so far as his goods will extend, and exhibit a full and true account of his administration: And these duties remain the same, notwithstanding the intestate may have died domiciled elsewhere.

Again, with respect to all the property of which the intestate died possessed in the King's dominions out of England, the administrator, under the letters granted there, has, it would seem, a right to hold it against an administrator under a grant obtained in this country.

Next of Kin Excluded from the Administration when they Have no Interest.

It has always been considered, both in the Common Law and Spiritual Courts, that the object of the statutes of administration (31 Edw. III. c. 11, and 21 Hen. VIII. c. 5), is to give the management of the property to the person who has the beneficial interest in it.

Young v. *Pierce,* 1 Freem. 496.

To whom Grant Made if the Next of Kin Die before Administration Granted.

Again, the statutes of administration (31 Edw. III. c. 11, and 21 Hen. VIII. c. 5), provide that the Ordinary shall grant administration to the next of kin, or the widow, or to both; and therefore these parties have a statutory right to the administration. But the obligation of the statutes has, in several adjudged cases, as well as in practice, been considered to extend only to such persons as are next of kin at the time of the intestate's death; and therefore the court is not bound to grant administration to one who is not entitled to a beneficial interest in the effects, although by the death of intermediate persons, he may have become next of kin at the time the grant is required. "It is clear, from the argument on this case how the matter stands. There are three propositions established. The first is, that the court is not bound by the statute to make the grant to the party entitled in distribution. The second is,

that the general practice that prevails would enable the party entitled in distribution to obtain the grant on application at the registry, the right of a party originally entitled being preferred to a party having a derivative interest. The third proposition is, that the whole matter is in the discretion of the court.

In the Goods of Carr, 1 P. & D. 291.

DISTINCTION BETWEEN EXECUTOR AND ADMINISTRATOR AS TO OBLIGATION TO ADMINISTER.

There is a distinction between a person appointed executor and one entitled to administration as next of kin, with respect to the obligatory consequences of administering the property of the deceased. An executor cannot after an act of administration refuse to accept he executorship and take probate; but although a next of kin may have intermeddled with the effects and made himself liable as executor de son tort, he cannot be compelled by the court to take upon himself the office of administrator.

Long v. *Symes*, 3 Hagg. 774; *In the Goods of Fell*, 2 Sw. & Tr. 126.

ATTORNEY OF NEXT OF KIN.

Administration may be granted to the attorney of all the next of kin, provided they reside out of the country.

In the Goods of Elderton, 4 Hagg. 210.

FORM OF POWER.

Where letters of administration are granted to persons under a power of attorney from the party entitled to the representation, the letters express that they are granted "for the use and benefit" of those entitled. But these words do not exclude the claim of other persons to share in the property.

Anstruther v. *Palmer*, 2 Sim. 5.

GRANT ISSUED TO ATTORNEY.

Where a person is authorized by a simple power of attorney to take out administration, the court ought to decree him such administration as it would have granted to the person who conferred the power, if he had applied for it himself.

In the Goods of Goldborough, 1 Sw. & Tr. 295.

CREDITOR MAY ADMINISTER WHEN.

If none of the next of kin will take out administration, a creditor may do it on the ground that he cannot be paid his debts until representation to the deceased is made. And therefore administration is only granted to him failing every other representative.

Elme v. *DaCosta*, 1 Phillim. 177.

EVEN THOUGH HIS RIGHT OF ACTION BE STATUTE BARRED.

It was decided that a creditor is entitled to a grant of administration, although his right of action is barred by the Statute of Limitations, but the court made it a condition that the administration bond should contain no obligation to distribute the estate rateably with other creditors, and without any preference of his own debt, as the administering creditor in the absence of any condition to the contrary is entitled to retain his own debt in preference to the debts of the other creditors.

BUT PRESENT FORM OF BOND PRECLUDES HIM PREFERRING HIS OWN DEBT.

The form of a creditors administration bond now is that the administering creditor will pay the debts of the deceased in due course of administration, rateably and proportionably, "and according to the priority required by law, not, however, preferring his own debt by reason of his being administrator as aforesaid."

PROCEDURE ON APPLICATION OF CREDITOR.

The necessary course when a creditor applies for administration is to issue a citation for the next of kin in particular, and all others in general, to accept or refuse letters of administration, or show cause why administration ought not to be granted to such creditor. The next of kin may appear to the citation and will then be preferred to the creditor. But if the next of kin has unduly delayed to take out administration (as where six months elapse from the death of the intestate), the creditor will be allowed his costs.

In the Goods of Barker, 1 Curt. 592.

The following statutory provisions relate to this part of the subject. (Surrogate Courts Act, R. S. O. 1914, c. 62:)

38. Where application is made for letters of administration by a person not entitled to the same as next of kin of the deceased, an order shall be made requiring the next of kin or others having or pretending interest in the property of the deceased, resident in Ontario, to shew cause why the administration should not be granted to the person applying therefor; and if neither the next of kin nor any person of the kindred of the deceased resides in Ontario, a copy of the order shall be served or published in the manner prescribed by the Surrogate Court Rules.

39.—(1) If the next of kin, usually residing in Ontario and regularly entitled to administer, is absent from Ontario, the court having jurisdiction may grant a temporary administration to the applicant, or to such other person as the court thinks fit, for a limited time, or subject to be revoked upon the return of such next of kin to Ontario.

(2) The administrator so appointed shall give such security as the court directs, and shall have all the rights and powers of a general administrator, and shall be subject to the immediate control of the court.

55. After a grant of administration no person shall have power to sue or prosecute any action, or otherwise act as executor of the deceased as to

the property comprised in or affected by such grant or administration, until such administration has been recalled or revoked.

57. A person entitled to letters of administration to the property of a deceased person shall be entitled to take out such letters limited to the personal estate of the deceased, exclusive of the real estate.

Before granting letters of administration to a creditor, the court always required an affdavit as to the amount of the property to be administered, unless where there has been a personal service of the usual citation on the parties entitled to the administration in the first instance.

Briggs v. *Roope*, 29 L. J. P. & M. 96.

NEXT OF KIN CANNOT OUST A CREDITOR ADMINISTRATOR DURING HIS LIFE.

When a creditor administrator has been duly appointed, the next of kin cannot, during his lifetime, take the administration from him: but upon his death they may come in, and claim administration de bonis non.

Although before administration granted a creditor cannot deny an interest or oppose a will, yet when he has obtained administration, he has the right to maintain it against the executor of the next of kin, and it is not to be revoked on mere suggestion.

Menzies v. *Pulbrook*, 2 Curt. 821.

IN DEFAULT OF NEXT OF KIN OR OF CREDITORS.

For want as well of creditors as of next of kin desirous to take out administration, the court may grant it to any person at its discretion; or it may ex officio grant to a stranger letters ad colligendum bona defuncti to gather up the goods of the deceased.

Davis v. *Chanter*, 14 Sim. 212.

CITATION OR CONSENT OF PARTY HAVING A PRIOR RIGHT REQUISITE BEFORE ADMINISTRATION GRANTED TO ANOTHER.

Wherever a party has a prior right to administer, the court requires that he should be cited or consent, before it will grant administration to any other person. And the rule will not be relaxed, notwithstanding the party who has the right has no interest in the property in respect of which the grant of administration is sought. But in cases where the court has a discretion, viz., in cases where the party entitled in priority is so entitled by the practice of the court, and not by statute, the court will sometimes dispense with the citation or consent of the party having the prior claim.

INCAPACITY TO TAKE GRANT.

A widow or next of kin who would otherwise be entitled, may be incapable of the office of administrator on account of some legal disqualification.

INCAPACITIES.

The incapacities of an administrator not only comprise those persons who have been already mentioned as disqualified for the office of executor, but extend to attainder or treason, or felony or other lawful disability, outlawry and bankruptcy, not alienage.

Old Authorities, Wms. p. 359.

MINOR.

If the next of kin be a minor, administration must be granted to another person during his minority.

MARRIED WOMAN.

Administration may be granted to a married woman.

Ibid. 360.

ADMINISTRATION, HOW GRANTED.

Administration is generally granted by writing under seal. It may also be committed by entry in the registry without letters of administration under the seal, but it cannot be granted by parol.

Ibid. 361.

RETRACTING RENUNCIATION.

Where the party entitled to grant of administration has renounced, such renunciation may be retracted before the administration has passed the seal.

West v. *Wilby*, 3 Phillim. 379.

ADMINISTRATION BY CROWN

Administration in favour of the Crown may be granted to the Attorney-General for Ontario under the Ontario Act respecting the Administration by the Crown of the Estates of Intestates.*

The mode of obtaining grant of administration or probate of will is a branch of practice which in an uncontested case is a simple matter. The requirements of the statute are as follows:

35. On every application for probate of a will or for letters of administration where the deceased was resident in Ontario at the time of his death, his place of abode at the time of his death shall be made to appear by affidavit of the person or one of the persons making the application; and thereupon and upon proof of the will, or in case of intestacy, upon proof that the deceased died intestate, probate of the will or letters of administration, as the case may be, may be granted.

36. On every application for probate of a will or for letters of administration where the deceased had no fixed place of abode in or resided out of Ontario at the time of his death, the same shall be made to appear by affidavit of the person or one of the persons making the application, and that the deceased died leaving property within the County to the Surrogate Court of which the application is made, or leaving no property in Ontario, as the case may be, and that notice of the application has been published at least three times successively in the *Ontario Gazette;* and

*This Act is printed as an Appendix.

thereupon and upon proof of the will, or, in case of intestacy, upon proof that the deceased died intestate, probate of the will or letters of administration, as the case may be, may be granted.

37. The affidavit as to the place of abode and property of the deceased under the next preceding two sections, for the purpose of giving a particular court jurisdiction, shall be conclusive for the purpose of authorizing the exercise of such jurisdiction; and no grant of probate or administration shall be liable to be recalled, revoked or otherwise impeached by reason that the deceased had no fixed place of abode within the particular county, or had not property therein at the time of his death; but in case it is made to appear to the Judge of a Surrogate Court before whom the application is pending, that the place of abode of the deceased, or the situation of his property, has not been correctly stated in the affidavit, the Judge may stay all further proceedings and make such order as to the costs of the proceedings before him as he may deem just.

3. *Administration on Failure of Appointment of Executor.*

DEATH QUASI INTESTATUS.

It often happens that a deceased, although he makes a will, appoints no executor or else the appointment fails. In either of which events he is said to die quasi intestatus.

Old Authority, Wms. p. 370.

FAILURE OF APPOINTMENT OF EXECUTOR.
ADMINISTRATION DE BONIS NON.

The appointment of executor fails: (1) Where the person appointed refuses to act. (2) Where the person appointed dies before the testator, or before he has proved the will, or where from any cause he cannot act. (3) Where the executor dies intestate after having proved the will, but before he had administered all the property of the deceased. In all these cases, as well as where no executor is appointed, the court must grant an administration, which is called administration with the will annexed, and in the last instance it is also called administration de bonis non.

Ibid.
Ingalls v. *Reid*, 17 U. C. C. P. 500.

ADMINISTRATION WITH THE WILL ANNEXED.

The office of administrator differs little from that of an executor, and it is plain that the will to which it is annexed must be similarly proved, as though probate of it were taken by an executor.

2 Black. Comm. 535.

SCOPE OF 21 HEN. VIII. c. 5.

Many of the cases above contemplated are not within the Statute of Administration, 21 Hen. VIII. c. 5, which provides only for intestacy and the refusal of an appointed executor. Consequently the court is left to the exercise of its discretion in the choice of an administrator according to its own practice, and no

person has such a legal right to preference as can be enforced by application to the common law courts.

In the Goods of Ewing, 6 P. D. 19.

ADMINISTRATION FOLLOWS THE PROPERTY.
RESIDUARY LEGATEE.

The rule of practice where the grant of administration is not within the statute is to consider which of the claimants has the greatest interest in the effects of the deceased, and decree the administration accordingly, if there are no peculiar circumstances. So, in all cases where no executor is appointed, or where the appointed executor fails to represent the testator, the residuary legatee, if there be one, is preferred to the next of kin, and is entitled to administration cum testamenta annexo.

In the Goods of Gill, 1 Hagg. 341.
See *Kearney* v. *McMinn*, 3 S. C. R. 332.

The residuary legatee, even where there is no present prospect of any residue, is entitled to administration in preference as well to the next of kin as also to legatees and annuitants. So he is entitled, though only residuary legatee in trust. But the next of kin has a prima facie right, subject to the rights of the heir under the Devolution of Estates Act, and therefore, where a party claims as or derivatively from the residuary legatee in cases within the Devolution of Estates Act, the burden of proof lies on such party.

Atkinson v. *Barnard*, 2 Phillim. 316.

REPRESENTATIVE OF RESIDUARY LEGATEE.

Where the residuary legatee survives the testator and has a beneficial interest, his representative has the same right to administration with the will annexed as the residuary legatee himself, and is therefore entitled to administration in preference to the next of kin or the legatees. Thus if an executor be also residuary legatee, and die before probate or intestate, before he has fully administered the estate, administration with the will annexed shall be granted to his personal representative, and not to the next of kin of the first testator.

Wetdrill v. *Wright*, 2 Phillim. 243.

COURT NOT BOUND TO GRANT TO RESIDUARY LEGATEE.

Although it was the practice of the spiritual court to grant administration to the residuary legatee, yet the court was not bound to grant it to him.

In the Goods of Ewing, 6 P. D. 19, 25.

IF RESIDUARY LEGATEE DECLINES.

If the residuary legatee declines it is usual to grant administration cum testamento annexo to the next of kin; but it is clear

that when he has no interest he may be excluded, and the administration granted to a person who has an interest in the effects, for instance, a creditor.

West v. *Wilby*, 3 Phillim. 381.

CREDITOR.

If an executor fails to take probate and there is no residuary legatee, subject to the right of the heir under the Devolution of Estates Act, the next of kin are entitled to administration with the will annexed. If the next of kin decline it such administration may be granted to a legatee or to a creditor; but notice must be given of the application of the legatee or creditor to the next of kin.

Kooystra v. *Buyskes*, 3 Phillim. 531.

CITATION OF PRIOR PARTY REQUIRED.

In all these cases where a party has a prior title to a grant, he must be cited before administration is committed to any other person.

In the Goods of Barker, 1 Curt. 592.

LETTER OF ATTORNEY TO TAKE ADMINISTRATION.

When the executor resides out of the jurisdiction administration with the will annexed may be granted to another person under a letter of attorney from the executor for his use and benefit. A will thus proved by the attorney of an executor is the same thing as if actually proved by himself. The letter of attorney is revocable, and when the executor revokes it and desires probate the court is bound to grant it to him.

In the Goods of Barker (1891), P. 251.

EFFECT OF DEATH OF EXECUTOR ON LETTER OF ATTORNEY.

On the death of the executor the letters of administration cease to be of any force, and therefore the administrator cannot make a good title if he sells leasehold property of the deceased, unless he can warrant to the purchaser that the executor is alive.

Suwerkrop v. *Day*, 8 A. & E. 624.

DEATH OF SOLE EXECUTOR.

If a sole executor happens to die without having proved the will, the executorship is not transmissible to his executor but is wholly determined, and administration with the will annexed must be committed to the person entitled according to the above rules.

Wankford v. *Wankford*, 1 Salk. 308.

EXECUTORSHIP IN SUCH CASE.

When the administration is granted under such circumstances, although the executor may have administered in part by disposing

of the testator's effects, yet the administration shall not be de bonis non administratis but an immediate administration: because, although the acts done by the executor are good, the administering is an act in pais, of which the Court of Probate cannot take notice.

Wankford v. *Wankford*, *ut sup.*

DEATH OF ONE OR TWO EXECUTORS.

If one of two executors dies before or after probate, no interest is transmissible to his own executor, but the whole representation survives to his companion.

In the Goods of Smith, 3 Curt. 31.

The following statutory rules regulate the granting of administration with will annexed:

62. Except where otherwise provided by law, every person to whom a grant of administration, including administration with the will annexed, is committed shall give a bond to the Judge of the Surrogate Court by which the grant is made, to enure for the benefit of the Judge of the Court for the time being, or in case of the separation of counties, to enure for the benefit of any Judge of a Surrogate Court to be named by the Supreme Court for that purpose, with a surety or sureties as may be required by the Judge, conditioned for the due collecting, getting in, administering and accounting for the property of the deceased, and the bond shall be in the form prescribed by the Surrogate Court Rules; and in cases not provided for by the Rules, the bond shall be in such form as the Judge may by special order direct.

63.—(1) The bond shall be in a penalty of double the amount under which the property of the deceased has been sworn, unless the Judge directs that the same shall be reduced, and the Judge may also direct that more bonds than one may be given, so as to limit the liability of any surety to such amount as the Judge deems proper.

(2) The amount of the security may from time to time be reduced by the Judge to double the amount of the property remaining in the hands of the administrator according to the last audit of his accounts by the Judge.

66.—(1) Where a surety for an administrator or guardian dies or becomes insolvent or where for any other reason the security furnished by an administrator or guardian becomes inadequate or insufficient the Judge may require other or additional security to be furnished and if the same is not furnished as directed by the Judge he may revoke the grant of administration or letters of guardianship.

(2) The order may be made by the Judge sua sponte or on the application of any person interested.

67.—(1) Where a surety for an administrator or guardian desires to be discharged from his obligation, or where an administrator or guardian desires to substitute other security for that furnished by him, the Judge may allow other security to be furnished in lieu of that of such surety or of the security so furnished on such terms as to the Judge may seem proper and may direct that on the substituted security being furnished and if the Judge so directs, the accounts of the administrator or guardian being passed, the surety or sureties be discharged.

(2) The application may be made ex parte or on such notice as the Judge directs.

68. Where an administrator has passed his final account and has paid into Court or distributed the whole of the property of the deceased which has come to his hands the Judge may direct the bond or other security furnished by the administrator to be delivered up to be cancelled.

ADMINISTRATION DE BONIS NON.

Where a surviving executor or sole executor dies after probate intestate, no interest is transmissible to his own administrator; but administration of another sort becomes necessary, which is called administration de bonis non, that is, of the goods of the original testator left unadministered by the former executor.

Tingrey v. *Brown*, 1 Bos. & Pull. 310.

EFFECT OF SUCH APPOINTMENT.

The administrator de bonis non will, when appointed, be the only representative of the party originally deceased.

REPRESENTATIVE OF NEXT OF KIN.

If a party who, as next of kin to the testator at the time of his death, was entitled to administration, dies before letters of administration are obtained, his representative is entitled to the grant in preference to one who has no beneficial interest in the effects, although he may have become next of kin at the time the grant was required.

Savage v. *Blythe*, 2 Hagg. Appendix, 150.

ADMINISTRATION GRANTED TO TWO, ONE DIES.

Where such administration has been granted to two, and one dies, the survivor will be sole administrator. Upon the death of such surviving administrator, or of a sole administrator, in order to effect a representation of the first intestate, the court, whether the administrator died testate or intestate, must appoint an administrator de bonis non.

It remains to be considered who, upon the death of the administrator, is entitled to be appointed administrator de bonis non to the original intestate.

RULE NOW ESTABLISHED.

Accordingly, upon the death of an original administrator, a person who was next of kin at the time of the death of the intestate, has been regarded as entitled under the statute of Hen. VIII., to the de bonis non grant, in preference to the representative of the original administrator, or to the representative of any other next of kin at the time of the death. Where a husband takes out administration to his wife and dies the administration will be granted to the representatives of the husband, unless it can be shown that the next of kin of the wife are entitled to the beneficial interest.

ADMINISTRATION DE BONIS NON GRANTED.

Again it has been held that the statutes only regard the next of kin at the time of the death of the intestate, and not the next

of kin at the time a second grant is wanted; and therefore when the next of kin, who were so at the time of the death, are dead, the court has power, independent of the statute, to grant administration de bonis non, at its discretion according to its own rules. In the guidance of which discretion, the established principle is (as in the case of administration cum testamento annexo), that if there are no peculiar circumstances, the administration shall be committed to him who has the greatest interest in the effects of the original intestate.

And though all the next of kin at the time of the death are dead, it should seem that no grant of administration de bonis non, however limited in its object, can be obtained after the termination of the creditor administration, without citing those who are next of kin at the time the grant is required.

POWER OF ADMINISTRATOR DE BONIS NON.

With regard to the power and authority of an administrator de bonis non, he becomes only a personal representative of the original deceased, and with respect to the estate left unadministered by the former executor or administrator, he has the same power and authority as the original representative, for he succeeds to all the legal rights which belonged to the former executor or administrator in his representative character.

2 Black. Comm. 506.

RIGHTS OF ADMINISTRATOR DE BONIS NON.

An administrator de bonis non is entitled to all the goods and personal estate, such as terms for years, household goods, etc., which remain in specie and were not administered by the first executor or administrator. If an executor receives money in right of his testator, and lays it up by itself and dies intestate, this money shall go to the administrator de bonis non, being as easily distinguished to be part of the testator's effects as goods in specie. And wherever assets are in the hands of a third person at the death of an administrator or executor, intestate, the administrator de bonis non may sue for their recovery.

Langford v. *Mahony*, 2 Dr. & Warr. 81, 107.

4. *Limited Administrations.*

LIMITED ADMINISTRATION.

Besides the administrations already discussed, which extend to the whole property of the deceased and terminate only with the life of the grantee, it is competent to the court to grant limited

administrations, which are confined to a particular extent of time or to a specified subject matter.

Wms. 385.

DURANTE MINORE ÆTATE.

If a person appointed sole executor, or he to whom in case of intestacy the right to administration has devolved under the statute, be under age, a peculiar sort of administration must be granted, which is called an administration durante minore aetate. In the former case it is obviously a species of administration cum testamento annexo.

Wms. 386.

SEVERAL EXECUTORS, ONE AN INFANT.

If there are several executors and one of them is of full age, no administration of this kind ought to be granted, because he who is of full age may execute the will. This sort of administration has been frequently held not to be within the statute of 21 Henry VIII. c. 5, and consequently it is discretionary in the court to grant it to such persons as it shall think fit.

Infant not liable on a devastavit: *Young* v. *Purvis*, 11 O. R. 587.

DISCRETION OF COURT.

In the exercise of this discretion it was the practice of the Spiritual Court to grant the administration to the guardian, whom that court had a right by law to appoint for a personal estate.

See *John* v. *Bradbury*, L. R. 1 P. & D. 245.

38 GEO. III. c. 87, INFANT EXECUTOR.

By Statute 38 Geo. III. c. 87, s. 6, it is enacted that where an infant is sole executor administration with the will annexed shall be granted to the guardian of such infant, or to such other person as the Spiritual Court may think fit, until such infant shall have obtained the full age of twenty-one years, at which period, and not before, probate of the will shall be granted to him.

See Page 2.

SALE BY ADMINISTRATOR DURANTE MINORE ÆTATE.

The limit of the administration of an administrator durante minore ætate is the minority of the person only. A power of sale given to executors or administrators may be executed by an administrator durante minore ætate. The limit to his administration is no doubt the minority of the person, but there is no other limit. He is an ordinary administrator: he is appointed for the very purpose of getting in the estate, paying the debts, and selling the estate in the usual way, and the property vests in him.

Monsell v. *Armstrong*, L. R. 14 Eq. 423. *See Re Cope*, 16 C. D. 49. *Re Thompson* v. *McWilliams*, 1 I. R. 356.

WASTE BY ADMINISTRATOR DURANTE MINORE ÆTATE.

An administrator durante minore ætate who has wasted the goods of the deceased, cannot be charged by a creditor as executor de son tort after the infant has obtained his majority, because the administrator at the time had lawful power to administer.

Brooking v. *Jennings*, 1 Mod. 174.

Although an administrator of an executor is not administrator to the first testator, yet the administrator durante minore ætate of the executor of an executor is in loco executoris, and the representative of the first testator. Therefore, in an action by a creditor of the original testator, such an administrator is properly charged as the administrator durante minore ætate of the second executor, and not as the administrator de bonis non of the original deceased.

ADMINISTRATION PENDENTE LITE.

In case of a controversy in the Spiritual Court concerning the right of administration to an intestate, it seems to have been always admitted that it was competent to the Ordinary to appoint an administrator pendente lite. The following is the provision of the Ontario Act on this point. R. S. O. 1914, c. 62, sec. 53:

53. Pending an action touching the validity of the will of any deceased person, or for obtaining, recalling or revoking any probate or grant of administration, the Surrogate Court having jurisdiction to grant administration in the case of intestacy may appoint an administrator of the property of the deceased person; and the administrator so appointed shall have all the rights and powers of a general administrator other than the right of distributing the residue of the property; and every such administrator shall be subject to the immediate control and direction of the court; and the court may direct that such administrator shall receive out of the property of the deceased such reasonable remuneration as the court may deem proper.

Before granting administration pendente lite the court must be satisfied as to the necessity of such an administrator, and also as to the fitness of the proposed administrator; or must be placed in a condition to determine between the two (its most usual office upon such occasions), an administrator, that is, being proposed by either party.

INDIFFERENT PARTY PREFERRED.

It is the practice to decline to put a litigant party in possession of the property by granting administration pendente lite to him. A nominee presumed to be indifferent is preferred.

Cases cited, Wms. 400.

APPOINTEE OF COURT.

Administrators pendente lite are the appointees of the court, and not merely nominees or agents of the several parties on whose recommendation they are selected.

Stanley v. *Bernes*, 1 Hagg. 221.

The duties of an administrator and receiver pendente lite commence from the order of appointment, and, if the decree in the action is appealed from, do not cease until the appeal has been disposed of. In the absence of any appeal the functions of an administrator pendente lite terminate with a decree pronounced in favour of a will, and do not continue until the executors obtain probate, and the case is not altered if there are no executors.

ADMINISTRATION DURANTE ABSENTIA.

If an executor named in the will or the next of kin be out of the Province, the Ecclesiastical Courts had and the Surrogate Court has power, before letters probate obtained or letters of administration issued, to grant to another limited administration durante absentia. Such an administrator is such a legal representative as to entitle him to assign the property of the deceased.

Webb v. *Kirby*, 3 Sm. & G. 333.

ABSENCE OF EXECUTOR.

But when probate was once granted and the executor had gone abroad, the Ecclesiastical Courts did not feel themselves authorized to grant new administration on the ground that the executor had left the kingdom; nor could a Court of Equity interfere by appointing a receiver. The consequence was that there was no person existing within the jurisdiction of the courts of law or equity duly authorized to appear and collect the debts. The statute 38 Geo. III. c. 87, remedied this defect by enacting that if at the expiration of twelve months from the testator's decease the executor to whom probate was granted did not reside within the jurisdiction of the courts, any creditor, next of kin or legatee could obtain special administration.

There are several other instances of temporary administrations, granted as well cum testamento annexo, as in cases of complete intestacy.

Wms. p. 408.

LIMITATIONS AS TO TIME.

An executor may be appointed with limitations as to the time when he shall begin his office, as where a man is appointed to be executor at the expiration of five years from the death of the testator. So the testator may appoint the executor of A. to be his executor; and then if he die before A. he has no executor till A. die. In these cases the court must commit administration limited until there be an executor.

UNTIL A PRODUCTION OF WILL.

So it may be necessary to decree a limited administration till the will of the deceased can be produced in order to be admitted

to probate. For instance, a will may be in some foreign country under circumstances on account of which it may not be obtainable for some time.

In the Goods of Metcalfe, 1 Add. 343.

TILL LOST WILL BE FOUND.

Where a will proved to have been in existence after the testator's death, is accidentally lost, and the contents unknown, the court will grant administration limited until the original will be found and brought into the registry.

In the Goods of Campbell, 2 Hagg. 555.

EXECUTOR BECOMING A LUNATIC.

If an executor be disabled from acting, as if he become a lunatic or incapable of legal acts, then on the principle of necessity there shall be a grant of temporary administration with the will annexed. Where a sole executor or administrator becomes a lunatic, it is the ordinary practice of the court to make a grant to his committee for his use and benefit during his lunacy.

In the Goods of Penny, 4 Notes of Cas. 659.

LIMITATION TO CERTAIN SPECIFIC EFFECTS.

There may also be a grant of administration limited to certain specific effects of the deceased; and the general administration may be committed to a different person, but such a grant is entirely exceptional, and should not be made unless very strong reason be given.

In the Goods of Prothero, L. R. 3 P. & D. 209.

Two administrations may well subsist together when there is no executor: But it should be observed that, regularly, no administration of any sort can be granted when there is an executor appointed; for he is universi juris haeres to his testator.

Coswall v. *Morgan*, 2 Cas. temp. Lee. 751.

REVIVAL OF ADMINISTRATION FOR A SINGLE ACT.

It frequently happens that the personal administration of a party deceased is broken, and its revival is necessary merely for the performance of a single act. In such case administration de bonis non will be granted limited to that particular object.

In the Goods of Fenton, 3 Add. 36 n. (*a*).

ADMINISTRATION AD LITEM.

So where a claim on property in dispute would vest in the personal representative of a deceased person, and there is no general personal representative of that person, an administration limited to the subject of the suit may be necessary to enable the

court to proceed to a decision on the claim. And when a right is clearly vested as a trust term which is required to be assigned, an administration of the effects of the deceased trustee limited to the trust term is necessary to warrant the decree of the court for assignment of the term.

Mitf. Plg. (4th) 177.

CAETERORUM ADMINISTRATION.

In cases of such limited administrations the parties entitled to the general grant may take out a caeterorum representation.

In the Goods of Currey, 5 Notes of Cases, 54.

CITATION OR CONSENT REQUIRED BEFORE GRANT.

Further, such limited administrations in strictness ought not to be granted without either the regular renunciation of the party entitled according to the practice of the court to the general grant; or a citation of such party to accept or refuse. But under peculiar circumstances, this seems to have been sometimes dispensed with.

Harris v. *Milburn*, 2 Hagg. 63.

LOCAL ADMINISTRATION.

Finally an administration limited to the effects of the deceased in one country or place may be committed to one administrator, and an administration limited to those in another country or place to another.

In the Goods of Mann (1891) P. 293.

AN ADMINISTRATOR CAN DO NOTHING AS SUCH BEFORE GRANT.

An executor may perform most of the acts appertaining to his office before probate. But with respect to an administrator, the general rule is that a party entitled to administration can do nothing as administrator before letters of administration are granted to him, inasmuch as he derives his authority not like an executor from the will, but entirely from the appointment of the court.

Wankford v. *Wankford*, 1 Salk. 301.

A RELEASE BY AN ADMINISTRATOR BEFORE LETTERS NOT BINDING.

So if an executor releases before probate, such act will bind him after he has proved the will; but if a man releases and afterwards takes out letters of administration, it will not bar him: for the right was not in him at the time of the release.

ASSIGNMENT OR SURRENDER BY ADMINISTRATOR BEFORE LETTERS NOT VALID.

So though an executor may assign a term for years of the testator, before probate, yet an assignment by an administrator before letters is, it seems, of no validity. Again, if the deceased

was a tenant from year to year, a surrender of this leasehold interest cannot be made by the next of kin before taking out letters of administration.

Rex v. *Great Glenn, Inhabitants of*, 5 B. & Adol. 188.

ONLY WHEN DONE FOR BENEFIT OF ESTATE.

The relation of the letters of administration to the death of the intestate exists only in those cases where the act done is for the benefit of the estate.

Morgan v. *Thomas*, 8 Exch. 302.

ADMINISTRATION BY RELATION.

Letters of administration have been held to have a relation to the death of the intestate so as to give a validity to acts done before the letters were obtained. Thus if a man takes the goods of the deceased as executor de son tort and sells them, and afterwards obtains letters of administration, it seems the sale is good.

Hill v. *Curtis*, L. R. 1 Eq. 99, 100.
Trice v. *Robinson*, 16 O. R. 433.

ACTS MUST BE FOR THE BENEFIT OF THE ESTATE.

The administration by relation exists only in those cases where the act is done for the benefit of the estate.

Morgan v. *Thomas*, 8 Exch. 302.

The Devolution of Estates Act, R. S. O. 1914, c. 119, contains the following provisions:

APPLICATION OF ENACTMENTS AS TO PROBATE, ETC., EXCEPTION.

4. The enactments and rules of law relating to the effect of probate or letters of administration as respects personal property and as respects the dealings with personal property before probate or administration and as respects the payment of costs of administration and other matters in relation to the administration of personal estate and the powers, rights, duties and liabilities of personal representatives in respect of personal estate shall apply to real property vesting in them, so far as the same are applicable as if that real property were personal property, save that it shall not be lawful for some or one only of several joint personal representatives without the authority of the Supreme Court or a Judge thereof to sell or transfer real property.

Imp. Act. 60-61 Vict. c. 65 (2).

REAL AND PERSONAL PROPERTY ASSIMILATED IN MATTERS OF ADMINISTRATION.

5. Subject to the other provisions of this Act, in the administration of the assets of a deceased person, his real property shall be administered in the same manner, subject to the same liability for debts, costs and expenses and with the same incidents as if it were personal property, but nothing in this section shall alter or affect as respects real or personal property of which the deceased has made a testamentary disposition the order in which real and personal assets are now applicable to the payment of funeral and testamentary expenses, the costs and expenses of administration, debts or legacies, or the liability of real property to be charged with the payment of legacies.

Imp. Act. 60-61 Vict. c. 65, s. 2 (3).

Executor de son Tort.—An action will not lie against one as executor de son tort, where there is a legally appointed administrator, even though the latter may have conveyed the estate to the former on condition of his paying the debts of the deceased. *Armstrong* v. *Armstrong*, 44 U. C. R. 615.

Payments made to an executor de son tort form no defence to an action by the rightful executor. *Hunter* v. *Wallace*, 13 U. C. R. 385.

An action commenced against an intestate may be revived under C. S. U. C. c. 22, s. 134, and continued against his executor de son tort. *Kenna* v. *O'Hara*, 16 U. C. C. P. 435.

This question cannot be raised under a plea of ne unques executor. *Kenna* v. *O'Hara*, 16 U. C. C. P. 435.

Real estate cannot be sold in this Province under an execution obtained against an executor de son tort. *McDade d. O'Connor* v. *Dafoe*, 15 U. C. R. 386; *Wrathwell* v. *Bates*, 15 U. C. R. 391; *Graham* v. *Nelson*, 6 U. C. C. P. 280.

Action brought by administratrix to recover $500 damages for alleged conversion of property comprised in the scope of her administration. Divisional Court held, that the acts of an executor de son tort are not entirely void, and a party can defend possession against the lawful administratrix when the transaction he relies upon was in the course of administration. *Pickering* v. *Thomson* (1911), 19 O. W. R. 697; 2 O. W. N. 1361.

Selling Goods of Deceased Person.—The party who sells or gives the goods of a deceased person to another, but not the purchaser or receiver, is subject to the liability of an executor de son tort. The rule that where an executor takes the testator's goods on a claim of property in them himself, although it afterwards appear he had no right, such claim being expressive of a different purpose from that of administration as executor, is also applicable to the case of a person taking the goods of a deceased person under a fair claim of title; such person, though he may not be able to establish his claim of title completely in every respect, is not liable to be charged as an executor de son tort. *Merchants Bank* v. *Monteith*, 10 P. R. 467.

Set-off.—In an action by a creditor against an executrix de son tort, she cannot set-off a debt due from the plaintiff to her testator:—Held, also, that she may be sued as executrix, and on her defending as such the plaintiff may reply that she is executrix de son tort. *Cameron* v. *Cameron*, 23 U. C. C. P. 289.

Statute of Limitations.—An executor de son tort cannot, by giving a confession of judgment, or making payments on account of a debt or by any other act of his, give a new starting point to the Statute of Limitations as against the rightful administrator, or the parties beneficially interested in the estate. *Grant* v. *McDonald*, 8 Chy. 468.

What Constitutes.—A party may make himself an executor de son tort by answering as executor to any action brought against himself, or by pleading any other plea than ne unques executor. *Haacke* v. *Gordon*, 6 U. C. R. 424.

The personalty of a person who died since the Devolution of Estates Act was less than $2,000, but her whole estate, including land, was more than that sum:—Held, that a contest as to the grant of probate of her will could not be removed from a Surrogate Court to the High Court; for the words "personal estate" in s. 31, s.-s. 2, of the Surrogate Courts Act, R. S. O. 1887, c. 50, mean personal estate proper, notwithstanding that by the Devolution of Estates Act, R. S. O. 1887, c. 108, the whole estate is now to be administered as personalty. *Re Nixon*, 13 P. R. 314.

Order for Sale of Land to Pay Deficiencies in Legacies—Laches—Statute of Limitations—Executor — Assignee for Creditors—Status—"Person Interested."—In December, 1902, J. H. R. made an assignment, under the provisions of the Assignments Act, to F., and in April, 1903, he applied to the Judge of Probate for a license to sell the real estate devised to himself, and covered by the assignment for the purpose of paying the legatees I. and E. the balances due them:—Held, that J. H. R. was "a person interested," within the meaning of the statute:

that the facts stated shewed the sale applied for to be unnecessary; that there are no words in section 43 restricting the inquiry as to the necessity for the sale to the circumstances mentioned in section 42; and that the terms in which the jurisdiction of the court is defined should not be narrowly construed. *In re Runciman*, 38 N. S. R. 89.

Legal Estate—Fire Insurance—Repairs.—As to whether the executors here take the legal estate or merely a power under the wording of the will, see *Doe d. Hampton* v. *Shotter*, 8 A. & E. 905, which is almost identical with this, and in which it was held they only took a power—as I hold the executors here do.—As regards fire insurance—if the mortgage contains a covenant for insurance, the premiums may properly be deducted from the proceeds of the crops. If not, the life tenant is not bound to insure for the benefit of the remainderman, and the executors have no funds out of which to pay premiums under the Trustee Act, sec. 31, and I do not think they would be justified, as donees of a power to sell, in making the outlay with a view to reimbursement after the life estate falls in. If the life estate has been refused, they, as present holders of the legal estate, as executors and also donees of the power, would be justified in insuring. If the life estate has not been refused, they would in the same capacity be justified in consenting to the payment of premiums out of the annual produce, provided the interests in remainder be properly guarded, so that the insurance money representing their interest in the buildings be not applicable to pay a mortgage which the tenant for life should pay, unless a charge therefor on the life estate be reserved; see *Heron* v. *Moffatt*, 22 Chy. 370.

As to repairs, the tenant for life is not bound to put the premises in better condition than he finds them, and is not liable for mere permissive waste: *Re Cartwright*, 41 Ch. D. 532; *Patterson* v. *Central Savings Co.*, 29 O. R. 134; *Holmes* v. *Wolfe*, 26 Chy. 228.

The particular class of repairs is not shewn, or whether they would be beneficial to the interest in remainder: see *Re Tucker* (1895), 2 Ch. 468; and *Re Willis* (1902), 1 Ch. 15. *Re Bell*, 7 O. W. R. 200.

Effect of Probate.*—Letters probate issued by the proper surrogate court are, notwithstanding the Devolution of Estates Act, only primâ facie evidence as far as real estate is concerned of the testamentary capacity of the testator; and in an action asserting title to real estate under a will, the defendant is entitled to give evidence to shew want of testamentary capacity. *Sproule* v. *Watson*, 23 A. R. 692.

Section 38 of the Judicature Act, R. S. O. 1897, c. 51, gives jurisdiction to the High Court to try the validity of wills even after probate has been granted; and the omission of the last clause of s. 17 of the Surrogate Courts Act R. S. O. 1897, c. 59, from s. 19 of the revised Act, 10 Edw. VII. c. 31, cannot take away the effect of the express words of s. 38. *Badenach* v. *Inglis* (1913), 29 O. L. R. 165; 4 O. W. N. 1495.

*Section 19 of the Surrogate Courts Act (R. S. O. 1914 ch. 62) makes the testamentary jurisdiction of the Surrogate Courts "subject to the provisions of the Judicature Act." Section 3 of the Judicature Act (R. S. O. 1914 ch. 56) continues in the Supreme Court all the jurisdiction which on the 31st of December, 1912, was vested in or might be exercised by the Court of Appeal or by the High Court of Justice or by a Divisional Court of the High Court of Justice. Section 38 of R. S. O. 1897, ch. 51, has disappeared. It gave jurisdiction as follows:—

The High Court shall have jurisdiction to try the validity of last wills and testaments, whether the same respects real or personal estate, and whether probate of the will has been granted or not, and to pronounce such wills and testaments to be void for fraud and undue influence or otherwise, in the same manner and to the same extent as the court has jurisdiction to try the validity of deeds and other instruments.

The Revised Statute of 1897, ch. 51, which contained section 38, was repealed by ch. 19 of the Ontario Statutes of 1913 (now continued as R. S. O. 1914 ch. 56) and no section similar to section 38 was enacted. The result is that there is no special power given by the Judicature Act to the Supreme Court as mentioned in section 38. Apparently the jurisdiction is transferred to the Surrogate Court.

See Page 16.

Document Partly Testamentary Admitted to Probate.—Where a document, duly executed as a will, is partly testamentary and partly not testamentary, the Court has jurisdiction to admit the testamentary part of the document to probate. *Wolfe* v. *Wolfe* (1902), 2 Ir. R. 246.

Testamentary Paper—Execution of Wrong Paper by Mistake—Intention.—Where intention to execute the identical testamentary document propounded was completely absent, the wrong paper having been executed by mistake, probate was refused of the whole document although it contained certain dispositions in fact intended by the testatrix. *Meyer, In the goods of*, 77 L. J. P. 150; (1908) P. 353; 99 L. T. 881.

Naturalised British Subject—Validity to Pass Leaseholds—"Personal Estate."—"Personal Estate" in the Wills Act, 1861, includes leasehold property. A will made out of the United Kingdom by a British subject, whatever his domicil at the time of making it or at his death, and made according to the law of the place where it was made, or where he was domiciled when it was made, or where in the King's dominions he had his domicil of origin, is effectual to pass his beneficial interest in leaseholds. *Grassi, In re; Stubberfield* v. *Grassi*, 74 L. J. 341; (1905), 1 Ch. 584; 92 L. T. 455; 53 W. R. 396; 21 T. L. R. 343.

Attesting Witnesses—Refusal to Make Affidavit—Order Requiring Attendance for Examination.—Where two attesting witnesses to a codicil had refused, after proper application, to make a necessary affidavit as to the execution of the testamentary document, the court ordered both to attend for examination unless they made the required affidavit within seven days, and also ordered them to pay the costs caused by their previous refusal. *Bays, In the goods of*, 54 S. J. 200.

Domiciled English Person Residing in France—Incorrect Date—Power of French Courts to Amend.—On its being proved that a document although incorrectly dated, being otherwise a valid testamentary document according to French law, and the date having been inserted under such circumstances that the French courts would grant relief, is entitled to be admitted to probate in England, although it has not been adjudicated upon in the French courts. *Lyne* v. *De la Ferte*. 102 L. T. 143.

Foreign Domicil, Will and Marriage—English Domicil Subsequently Acquired.—Section 3 of the Wills Act, 1861, the title of which is, "An Act to amend the law with respect to wills of personal estate made by British subjects," is not limited in its operation to the wills of British subjects, but extends to the will of a foreign testatrix, made before her marriage, and in strict conformity with the law of her foreign domicil at that time, according to which, marriage does not revoke a will. *Groos, In the goods of*, 73 L. J. P. 82; (1904) P. 269; 91 L. T. 322.

Executor According to Tenor—Legatees in Trust—Form of Grant.—A testatrix by her will left all she possessed to two persons, whom she named, in trust to pay the income to her husband during his lifetime, and directed that her estate should be divided equally between her four children at his death. There was no direction to pay debts and no appointment of executors. The testatrix expressed adherence to her will, which she retained in her own possession, but at her death it was found torn up. All parties interested consenting:—Held, that there was on these facts no presumption of revocation, that the persons named as trustees were not, in the absence of a direction to pay debts, executors according to the tenor, and that the proper form of grant was one, with the will annexed, to them as universal legatees in trust. *Mackenzie, In the goods of*, 79 L. J. P. 4; (1909) P. 305; 26 T. L. R. 39.

Impeaching Status of Administrator.—Held, that the fact of C. being administratrix could not be impeached, so long as the letters of administration granted to her remained in force; and that she could

legally give the confession she did, and purchase under the judgment obtained on it against herself, though it might furnish grounds for suspicion of fraud. *Eades* v. *Maxwell*, 17 U. C. R. 173.

Original Administrator not Forthcoming.—Where the original administrator of a deceased intestate could not be found, and further assets since come to hand necessitated further representation, the court revoked the existing grant at the suit of a creditor, and in making a fresh grant to the creditor followed as to the form of order the practice in *Saker, In the goods of*, 78 L. J. P. 85; *French, in the goods of*, 79 L. J. P. 56; (1910) P. 169; 54 S. J. 361; 26 T. L. R. 374.

Letters of Administration—Issue of Letters out to Improper Surrogate Court—Validity—Surrogate Courts Act.—Where letters probate or of administration have issued out of a court from which they could not properly issue under the Surrogate Courts Act, R. S. O. 1897, ch. 59, sec. 19, they are nevertheless valid unless and until revoked. *London and Western Trusts Co.* v. *Traders Bank of Canada*, 16 O. L. R. 382.

Payment under Invalid Grant.—The 57th and 58th ss. of the Surrogate Act (R. S. O. 1877 c. 46), protect parties bona fide making payments to an executor or administrator notwithstanding any invalidity in the probate or letters of administration, but they do not protect payments made to third parties by an infant assuming to act as administrator of the estate. *Merchants Bank* v. *Monteith*, 10 P. R. 334.

The practice of the Surrogate Courts in this province is to apply the provisions of s. 59 of the Act more liberally than do the English courts the corresponding provision of the English Probate Act. Held, also, affirming the finding of the Surrogate Court, that the defendant had not made false suggestions nor concealed material facts for the purpose of obtaining the grant. *Carr* v. *O'Rourke*, 22 Occ. N. 207, 3 O. L. R. 632, 1 O. W. R. 331.

Mandamus to Compel Grant of Administration.—Held, that this was not a case for an appeal from the refusal to grant administration under s. 31 of the Surrogate Courts Act, because an appeal under that section would appear to be granted only when some one contests the grant of administration which no one was doing here. Semble, that the High Court has jurisdiction to declare a will valid. *Dickson* v. *Monteith*, 14 P. R. 719.

Administrator of Administrator. — An administrator of an administratrix cannot represent the intestate, but an administrator de bonis non must be appointed to the original estate; and a sale by the sheriff of lands belonging to the intestate under a fi. fa. issued on a judgment against such administrator, is nugatory. *Ingalls* v. *Reid*, 15 U. C. C. P. 490.

Official Administrator—Heirs out of Jurisdiction.—The official administrator is not allowed to take out letters of administration in opposition to the heirs of the deceased, such heirs being resident out of the jurisdiction, but having an attorney-in-fact within the province to manage the estate, and there being no evidence that the deceased had any debts or any substantial personal property, although he died possessed of real estate within the province subject to a mortgage. *In re Lelaire*, 9 B. C. R. 429.

Advice of the Court.—An administrator, being desirous of converting saw logs into lumber, for the benefit of the estate, an application under 29 Vict. c. 28, s. 31, was entertained, and an opinion of a Judge given in favour of the course suggested. *Re Caldwell Estate*, 2 Ch. Ch. 150.

Application for Letters of Administration by Stranger.—In the absence of an application by a person entitled by reason of relationship to the deceased, it is necessary, in order to justify the grant of letters of administration to a creditor or a person without interest, to shew by special circumstances that such grant is in the interests of the estate; otherwise the grant should be made to the public administrator for the district. *Re Morton*, 5 Terr. L. R. 409.

Upon an application by certain of the next of kin of an intestate, under s. 31 of the Surrogate Courts Act, R. S. O. 1887 c. 50, to remove from a Surrogate Court into the High Court a cause in which a contention arose as to the grant of administration it appeared that the widow and a trust company had petitioned for joint administration of the estate, which was a large one, that the next of kin opposed the petition; that neither widow nor next of kin could, unaided, supply the necessary security; and that there were no creditors:—Held, that the jurisdiction to award grant, being of a discretionary kind, could be better exercised by the surrogate Judge, and the cause should not be removed. The personal disqualification of a surrogate Judge to pass upon an application, by reason of his interest as a shareholder in a company applicant, is not a ground for removal to the High Court; for he can call in the aid of a neighbouring county Judge. Where the assets are separable, administration may be granted quoad, i.e., to the widow as to one part, and to the next of kin as to another part, or there may be a joint grant to the widow and next of kin. *Re McLeod*, 16 P. R. 261.

Revocation of Letters of Administration.—The High Court of Justice for Ontario has no jurisdiction to revoke the grant by a Surrogate Court of letters of administration. *McPherson* v. *Irvine*, 26 O. R. 438.

Heirs and Personal Representatives.—The words "personal representatives" must, of course, in the absence of other controlling words, be taken to mean persons claiming as executors or administrators. If, however, there is an indication of intention that the "representatives" are to take beneficially, and not in any fiduciary capacity, the words can hardly be referred to executors or administrators, and they generally mean statutory next of kin, including a widow: per curiam, in *Birkett* v. *Tozer*, 17 O. R. 587, at pp. 589, 590.

The word "heirs" means those who by the law of the land at the date of the will are technically heirs-at-law, unless a contrary intention appears, and such a contrary intention is not shewn by the fact that the gift in part or the whole of a fund derived from the sale of real and personal property. *Coatsworth* v. *Carson*, 24 O. R. 185.

The provision, then, is to be interpreted as though it read "my heirs and next of kin," and that expression has been interpreted in *Rees* v. *Fraser*, 25 Chy. 253. There are two modes of reading the words "heirs-at-law," and "next-of-kin" in one the next-of-kin are such as are heirs-at-law, and in the other, the heirs-at-law are such as are next-of-kin. If the construction is to be shut up to these two, then the devise would be void for uncertainty: *Lowndes* v. *Stone*, 9 Ha. Appx. 32. But there is another by which effect is given to every word used, viz., to give to both, and that, I think, is the true construction. The effect is, no doubt, the same as if the words "next-of-kin" were struck out, but that only shews that the testator has described the same person in two characters, which is wholly insufficient to exclude one of the heirs from a share of the personalty. *Re Read*, 12 O. W. R. 1009.

Executors or Next of Kin—Part Intestacy—Rights of Widow —Advertisement for Creditors.—Petition for payment of money out of court. Direction in will to the executors of Barak Daubeny was to divide the estate on the death of his widow amongst the persons named. Wm. Gough, one of these persons, survived testator but died in the widow's lifetime leaving a widow, now Alice Otter, but no children, and leaving the petitioners, his sister Jane Allingham and his half-brother Flinton John Medforth, his only next of kin. It was plain by the terms of the will that the share did not vest in Wm. Gough during the lifetime of testator's widow but passed under the substituted gift to his personal representatives upon the happening of his death in his lifetime of the testator's widow. The question was whether by the term "personal representatives" the testator intended that Wm. Gough's executors or administrators should take or his next of kin.—When there is a gift of income to one for life followed by a gift of the corpus at the termination of the life estate of another with a substitutional gift to the "personal representatives" of that other, then in the absence of a clearly controlling context these words are to be construed as meaning "executors or administrators" and not

"next of kin." *Re Crawford's Trusts*, 2 Drew 230, *Hinchcliffe* v. *Westwood*, 2 DeG. & Sm. 216, and *Re Thompson*, 55 L. T. 86, referred to. And therefore Wm. Gough became vested in his executors as part of his estate to be administered.—Wm. Gough bequeathed to his widow certain specific articles. Such bequest cannot be stretched to cover his share in the Daubeny estate and there being no residuary bequest there was an intestacy as to that share now represented by the moneys in court.—Wm. Gough having died before 1st July, 1895, and not wholly intestate, his widow is not entitled to the increased rights given by sec. 12 of R. S. O. c. 127, but merely to her share under the Statute of Distributions—There should be an advertisement for creditors and persons having claims on estate of Wm. Gough in the Gazette and a Sarnia newspaper, unless it can be shown that an advertisement has already appeared. Subject to any claims that may be filed the moneys in court after payment of the costs of all parties of this application should be paid out one-half to Alice Otter and the other half to the next of kin of Wm. Gough. *Re Daubeny*, 1 O. W. R. 773, 774.

Tenant for Life and Remainderman—Power to Retain Securities—Unauthorised but Non-wasting Securities — Income Pending Conversion.—Where there is an express trust for conversion and power to retain securities of every kind, authorized and unauthorized, and there is no gift either express or implied of the income pending conversion, the tenant for life is entitled to the income of authorized securities, but not to the income of unauthorized securities. As regards the latter he is only entitled to interest at 3 per cent. on the value at the testator's death. The rule applies to non-wasting as well as to wasting securities. *Chaytor, In re; Chaytor* v. *Horn*, 74 L. J. Ch. 106; (1905) 1 Ch. 233; 92 L. T. 290; 53 W. R. 251.

Administration with Will Annexed—Land—Power of Sale—Trustee.—Deceased directed his executor to sell his real estate. The executor obtained probate and died and his executors renounced as to this estate. The widow and another then took out letters of administration with will annexed. The widow entered into an agreement to sell the homestead farm mentioned in the will, she, and the next of kin, with the exception of an infant and a legatee, executing the conveyance. Specific performance refused:—*Held*, that the power of sale was confined to the original executor. There is no trustee of the trusts in the will to give a discharge. If debts and funeral expenses are paid, a trustee may be appointed under the Trusts Act. *Wymers* v. *Hilton*, 6 E. L. R. 326, 43 N. S. R. 161.

Execution—Addition of Signature of Sole Devisee Apparently as Witness—Admission to Probate.—Application by Fannie Lomas, widow of deceased, for letters probate of the will of Fred G. Lomas, who died on 15th February, 1907, having first made his will dated 4th February, 1907, whereby he devised all his estate to his wife, and thereby appointed her sole executrix. The will was signed by the testator in the attestation clause and the names of Fannie Lomas (the widow and executrix) and Mary Sarah Lomas and H. Lomas were signed at the foot of the will to the right of the attestation clause, apparently as witnesses. The will was printed, leaving blanks to be filled up; the blanks filled up in the attestation clause, in addition to the signature of the testator, were in italics.—Upon the papers being brought before the Judge, he drew the attention of the solicitor filing them to the position in which Fannie Lomas was apparently placed by reason of her signature as a witness, she being the sole devisee and executrix; see Wills Act R. S. O. 1897, ch. 128, s. 17.—Thereupon an application was made to have the letters probate issued without the name of Fannie Lomas as a witness. Granted. *Re Lomas* (1907), 9 O. W. R. 975.

In a contest for administration de bonis non between the next of kin of the deceased administrator, the husband of the intestate, and the next of kin of the intestate, whose status as a petitioner depended on the domicile of the intestate, the Judge of Probate disregarded the fact that letters of administration had been issued out of his court to the estate of the

intestate as domiciled in New Brunswick, the petition upon which the letters were granted not having been put in evidence or the statements therein relied upon, and he refused to consider as evidence a statement in the unsworn petition of a trust company applying for administration as the representative of the next of kin of the deceased administrator, that at the time of her death the intestate was domiciled in New Brunswick:—Held, on appeal, that the decision was right, and that administration was properly granted to the representative of the next of kin of the intestate. *In re Forester*, 37 N. B. R. 209.

Quære, whether an administrator de bonis non can call in question the administration of his predecessor in office. *Tiffany* v. *Thompson*, 9 Chy. 244.

Promise to Pay made before Administration.—An express promise to pay made to a third party may enure to the benefit of an administrator de bonis non with the will annexed, though at the time of such promise he had not obtained letters of administration. *Beard* v. *Ketchum*, 6 U. C. R. 470.

Concealment of Fact. — Where an applicant for administration makes an ex parte statement, subsequently contradicted by medical testimony, as to the incapacity of another next-of-kin, his application will on this ground alone be refused. There must be uberrima fides on an ex parte application. The court will not grant administration to one who is himself an accounting party. *Toole, In the goods of*, (1913) 2 Ir. R. 188.

Grant in Official Capacity.—A grant of administration is personal to the grantee, even if taken in an official capacity, and does not pass to his successor in office. *Heathcote, In the goods of*, 82 L. J. P. 40; (1913) P. 42; 108 L. T. 122; 57 S. J. 266; 29 T. L. R. 268.

Criminal Conviction of Executor — Refusal to Renounce— Grant—Passing over.—Where an executor, though "willing," is not "competent," to take probate, by reason of his being in prison, the Court under the provisions of section 73 of the Court of Probate Act, 1857, will pass over the executor on that ground and make a grant under the same section to such person as it may think fit. *Drawmer's Estate, In re*, 108 L. T. 732; 57 S. J. 534.

Defendant Convicted of Manslaughter of Testator.—Public policy demands that the rule of law, that neither a person nor his representative claiming under him can obtain or enforce any rights directly resulting from his own crime, should equally apply to manslaughter as it does to murder. *Cleaver* v. *Mutual Reserve Fund Life Association* (61 L. J. Q. B. 128; (1892) 1 Q. B. 147) and *Crippen, In the goods of* (80 L. J. P. 47; (1911) P. 108), applied. *Hall, In the goods of; Hall* v. *Knight*, 109 L. T. 587; 58 S. J. 30; 30 T. L. R. 1.

Bequest Forgiving Debts, Construction of.—*Mitchell, In re; Freelove* v. *Mitchell*, 82 L. J. Ch. 121; (1913) 1 Ch. 201; 108 L. T. 34; 57 S. J. 213.

Devise by Wrong Description. — A testator directed "my two freehold cottages or tenements known as numbers 19 and 20 Castle Street" in T. to be sold for the benefit of his daughters. He disposed specifically of two other houses in T., one of them being No. 39 Castle Street. He did not dispose of two cottages known as Nos. 19 and 20 Thomas Street in T., which constituted the remainder of his real estate, and there was no residuary devise. There were houses in T. known as Nos. 19 and 20 Castle street, but they did not belong to the testator:—Held, that evidence as to the real estate possessed by the testator was admissible; that the words "Castle Street" might be rejected as falsa demonstratio; and that Nos. 19 and 20 Thomas Street passed by the devise. *Mayell, In re; Foley* v. *Ward*, 83 L. J. Ch. 40; (1913) 2 Ch. 488; 109 L. T. 40.

CHAPTER III.

RENUNCIATION AND RETRACTATION.

REFUSAL BY EXECUTOR.

The office of executor being a private one of trust named by the testator and not by the law, the person nominated may refuse though he cannot assign the office, and even if in the lifetime of the testator he has agreed to accept the office, it is still in his power to recede.

MAY BE COMPELLED TO APPEAR WITH WILL.

But though the executor cannot be compelled to accept the executorship, yet by statute 21 Hen. VIII. c. 5, s. 8, the ordinary might convene before him any person made and named executor of any testament "to the intent to prove or refuse the testament," and if he neglected to appear he was punishable by excommunication.

Wms. p. 197.

Section 48 of the Surrogate Courts Act, R. S. O. 1914, ch. 62, is as follows:

48. The court having jurisdiction may summon any person named executor of any will to prove or refuse to prove such will, and to bring in inventories and to do every other thing necessary or expedient concerning the same.

Imp. 21 H. VIII c. 5, s. 6.

TIME ALLOWED FOR DELIBERATION.

The time allowed to the person named executor to deliberate whether he will accept or refuse the executorship is uncertain, and left to the discretion of the Judge, who has been used at his pleasure not only within the year, but within a month or two to issue his citation.

TEMPORARY ADMINISTRATION MAY BE GRANTED.

If he appear either on citation or voluntarily and ask for time to consider whether he will act or not the ordinary might grant a temporary administration in the meantime, but if he appears and refuses to act or fails to appear, administration cum testamento annexo will be granted to another.

WHICH RIGHT CEASES AFTER CITATION.

By statute 21 & 22 Vict. c. 95, s. 16, whenever an executor appointed in a will survive a testator, but dies without having taken

probate, and whenever named in a will, is cited to take probate, and does not appear to such citation, the right of such person in respect to the executorship shall wholly cease, and the representation to the testator and the administration of his effects shall go without any further renunciation, as if such person had not been appointed executor.

Section 49 of the Surrogate Courts Act, R. S. O. 1914, ch. 62, provides as follows:

49. When an executor survives the testator, but dies without having taken probate, and when an executor is summoned to take probate, and does not appear, his right in respect of the executorship shall wholly cease, and the representation to the testator, and the administration of his property, shall and may, without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor.

Imp. Act. 21-22 Vict. c. 95, s. 16.

How Election Determined.
Refusal May Be Accepted.

Although an executor has his election whether he will accept or refuse the executorship, yet he may determine his election by acts which amount to an administration. For if he once administer it is considered that he has already accepted the executorship, and the court may compel him to prove the will, or may accept a refusal notwithstanding he has administered, but only on terms of his passing his accounts, and perhaps of paying the costs out of his own pocket.

Mordaunt v. *Clarke*, L. R. 1 P. & D. 592.
McDonald v. *McDonald*, 17 A. R. 192, affirmed, 21 S. C. R. 201.

One of Several Renouncing.

If one of several executors, after intermeddling with the effects, renounces, his renunciation is invalid.

In the Goods of Badenach, 3 Sw. & Tr. 465.

What Acts Constitute Acceptance.

As to what acts will amount to an administering, such as to render an executor compellable to take probate, two general rules may be laid down: first, That whatever the executor does with relation to the goods and effects of the testator which shows an intention in him to take upon him the executorship, will regularly amount to an administration; second, That whatever acts will make a man liable as executor de son tort will be deemed an election of the executorship. What constitutes "intermeddling" will be discussed later on.

Wms. p. 200.

MODE OF REFUSAL.

With respect to the mode of refusal by the executor, it is laid down that refusal cannot be verbally or by word, but it must be by some act entered or recorded in the Surrogate Court. But if an executor send a letter to the Ordinary, by which he renounces, and the refusal be recorded, it is sufficient. Accordingly, it has been held that a renunciation need not be under seal.

Long v. *Symes*, 3 Hagg. 776.

REFUSAL MUST BE RECORDED.

Until the refusal is recorded no person can take administration.

Garrard v. *Garrard*, L. R. 2 P. & D. 238.

REFUSAL MUST BE ENTIRE.

An executor cannot in part refuse. He must refuse entirely or not at all.

Brooke v. *Haymes*, L. R. 6 Eq. 25.

RETRACTATION OF RENUNCIATION.

An executor who renounced might formerly at any time before the granting of administration cum testamento annexo retract his renunciation, but the Ontario Act, s. 59 (taken from Imp. Act 20 & 21 Vict. c. 77, s. 79), provides as follows:—

59. Where a person renounces probate of the will of which he is appointed an executor his rights in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his property shall and may, without any further renunciation, go, devolve and be committed in like manner as if such person had not been appointed executor.

DEBTOR AND CREDITOR.

If a debtor makes his creditor and another his executors, and the creditor neither intermeddles nor proves the will, he may bring an action against the other.

Rawlinson v. *Shaw*, 3 Term Rep. 557.

Renunciation.—Testator directed "that no real estate be sold without the unanimous consent and direction of all my executors," and also gave them power to buy and sell, give and take titles in fee simple in as full manner as if he were living, and appointed his widow executrix, and F. and H. executors. F. and H. renounced probate, and the widow alone proved the will:—Held, that the powers conferred by the will were personal, and could not be exercised by the widow alone; that being personal, they had become extinct; and the division of the estate having been postponed only for the sake of the powers, its distribution was accelerated by their extinction. *Kerr* v. *Leishman*, 8 Chy. 435.

Disclaimer.—A disclaimer as executor by one of two executors and devisees in trust, does not prevent the trust estate from vesting. *Doe d. Boyer* v. *Claus*, 3 O. S. 146.

Executor Sued after Renunciation.—Where an executor, who has renounced probate of the will, is made defendant to a suit, the bill will be dismissed, as against him, with costs. *Stinson* v. *Stinson*, 2 Chy. 508.

Forfeiture of Bequest.—Renunciation by executor held a forfeiture of bequest in his favour. *Paton* v. *Hickson*, 25 Chy. 102.

Form of Renunciation.—A written renunciation, though not sealed, made before the Surrogate, and produced from his office, is sufficient to entitle the remaining executors to act under 21 Hen. VIII., c. 4. *Doe d. Ellis* v. *McGill*, 8 U. C. R. 224.

Three persons were named as executors. They declined to prove the will, and renounced probate, but expressed their willingness to assist the family with their advice, and accordingly assisted in preparing a list of debts due by the estate and of the assets and value thereof. On being spoken to by a creditor, one of them stated that they had been named as executors; assured the creditor that he was all right; and that there was enough to pay the debts; another of them subsequently wrote to the widow stating that he and the other parties named "were in Port Hope yesterday, and after legal advice on the subject, have relinquished all further action on the will":—Held, that these facts did not shew such a dealing with the estate as would render the parties liable as executors, in opposition to their renunciation. *Vannatto* v. *Mitchell*, 13 Chy. 665.

Release by Executor.—A release by an executor who is also a trustee does not amount to a relinquishment of the trust. *Doe d. Boyer* v. *Claus*, 3 O. S. 146, approved. *Doe d. Berringer* v. *Hiscott*, 6 O. S. 23.

Withdrawing Renunciation.—Under C. S. U. C. c. 16, s. 1, the renunciation of probate by one of two or more executors is final, and cannot be recalled on the death of the acting executor or executors. *Allen* v. *Parke*, 17 U. C. C. P. 105.

Disclaimer—Partial.—A trustee of a will comprising property in England and abroad cannot disclaim the trusts relating to the property in England only, and unless he disclaims the trusts in toto he remains a trustee for all purposes. *In re Lord and Fullerton*, 65 L. J. Ch. 184; (1896), 1 Ch. 228.

Renunciation of Retractation.—Notwithstanding the provisions of section 79 of the Court of Probate Act, 1857, the Court has power to allow one of several executors who has renounced to retract such renunciation for the purpose of carrying on the executorship; but such power ought only to be exercised in a proper case—that is, where it can be clearly shewn that such retractation is for the benefit of the estate. *In the Goods of Stiles*, 67 L. J. P. 23; (1898), P. 12; 78 L. T. 82; 46 W. R. 444.

Jurisdiction of High Court.—Held, that all jurisdiction and authority in testamentary matters is by the Surrogate Court Act, R. S. O. (1897) c. 59, ss. 17 and 18, now 10 Edw. VII., c. 31, ss. 19 and 20, vested in the Surrogate Courts, subject to provisions of the Judicature Act.—That neither the Judicature Act nor the Surrogate Courts Act, gave the High Court jurisdiction to adjudicate upon a claim to set aside a renunciation of probate or to allow a retraction by a plaintiff, who was named in the will as executor and who had filed a renunciation, therefore plaintiff must seek redress in the Surrogate Court in which the renunciation was filed and out of which probate issued. *Foxwell* v. *Kennedy* (1911), 18 O. W. R. 782; 2 O. W. N. 821.

CHAPTER IV.

ADMINISTRATION BOND.

Former Statutory Provisions.

The statute 21 Hen. VIII. c. 5, s. 3, directs the Ordinary to grant administration, taking surety of him or them to whom shall be made such commission. And the statute 22 & 23 Car. II. c. 10, s. 1, further provides that the Ordinary shall take sufficient bonds, with two or more able sureties in the form given by the statute providing for (1) the making of an inventory; (2) to administer well and truly; (3) to make a true and just account of his administration; (4) to deliver and pay the residue as the Judge shall appoint, and (5) to deliver up the letters if the will shall appear.

The Ontario Statute on this point now provides as follows. R. S. O. 1914, c. 62, the Surrogate Courts Act:

64. The Judge on application made in a summary way, and on being satisfied that the condition of the bond has been broken, may order the Registrar to assign the bond to some person to be named in the order, and such person shall thereupon be entitled to sue on the bond in his own name, as if the same had been originally given to him, and shall recover thereon, as trustee for all persons interested, the full amount recoverable in respect of any breach of the condition of the bond.

65. The oaths to be taken by executors, administrators and guardians, and the bonds or other security to be given by administrators and guardians and probates, letters of administration and letters of guardianship shall require the executor, administrator or guardian to render a just and full account of his executorship, administration or guardianship only when thereunto lawfully required.

71.—(1) 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 any such person.

(2) A guardian appointed by the Surrogate Court may pass the accounts of his dealings with the estate before the Judge of the Court by which letters of guardianship were issued.

(3) The Judge, on passing the accounts of an executor, administrator or such a trustee, shall have jurisdiction to enter into and make full enquiry 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 under an administration order and, for such purpose, may take evidence and decide all disputed matters arising in such accounting subject to an appeal under section 34.

(4) The persons interested in the taking of such accounts or the making of such enquiries shall, if resident within Ontario, be entitled to not less than seven days' notice thereof, and, if resident out of Ontario, shall be entitled to such notice as the Judge shall direct.

(5) Where an infant or a person of unsound mind is interested, such notice shall 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.

72.—(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, unless 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.

Imp. 1 Jac. 11, c. 17, s. 6.

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

With regard to security by companies the Judicature Act, R. S. O. 1914, c. 56, provides as follows:

"SURETY COMPANY."

69.—(1) In this section "Surety Company" shall mean an incorporated company empowered to give bonds by way of indemnity.

BONDS OF COMPANY MAY BE TAKEN AS SECURITY.

(2) The Lieutenant-Governor in Council may direct that the bond of any surety company named in the order in council may be given as security in all cases where security is ordered to be given by any court or by any Judge or officer of any court, and in all cases where security for the costs of an appeal, or for the prosecution of the appeal, is required by any law, rule or practice.

ORDER IN COUNCIL APPROVING OF COMPANY TO BE PUBLISHED IN GAZETTE.

(3) Every order in council made under subsection 2 shall forthwith be published in the Ontario Gazette and shall be laid before the Assembly within 15 days after the making thereof if the Assembly is then in session, and if it is not in session within 15 days after the opening of the next session.

OTHER SURETY OR AFFIDAVIT OF JUSTIFICATION NOT REQUIRED.

(4) The bond of any surety company named in the order in council shall be sufficient without any other surety joining in the bond, and an affidavit of justification shall not be necessary.

DISALLOWANCE OF BOND ON MOTION.

(5) Notwithstanding anything in this section, any judge or any officer having jurisdiction in the matter, may in his discretion disallow any such bond on a motion to disallow it, and upon any evidence which may be deemed sufficient.

CHAPTER V.

REVOCATION OF PROBATE OR LETTERS OF ADMINISTRATION.

TWO MODES OF REVOCATION.

A probate or grant of administration may be revoked in two ways: 1. On a suit by citation. 2. On an appeal to a higher tribunal to reverse the sentence by which they are granted.

Wms. p. 449.

REVOCATION BY CITATION.

A revocation by citation usually is when the executor or administrator is cited before the Judge by whom the probate or letters of administration were originally granted, to bring in the same, and to show cause why they should not be revoked.

EXECUTOR MAY BE CITED BY NEXT OF KIN.

Where an executor obtains probate of a will in common form he may afterwards be cited by next of kin to prove it per testes or in solemn form. And upon this citation, if the executor does not sufficiently prove the will, the probate will be revoked.

Blake v. *Knight*, 3 Curt. 553.

NO SECOND CITATION TO SEE PROCEEDINGS.

If the will has been proved in solemn form either by the executor himself, in the first instance, or upon citation, as above stated, and the next of kin have been cited to see proceedings, they cannot afterwards by a fresh citation again put the executor on proof of the will, but if fraud be shown, or a later distinct will be set up, then the party having an interest under such later will may again cite the executor who has succeeded in proving in solemn form, and obtain a revocation of the probate.

Ratcliffe v. *Barnes*, 2 S. & Tr. 486.

Since the statute 21 Hen. VIII, c. 5, when administration is granted it cannot be repealed unless for a just cause. So where administration is granted without the obligation of the statute, as administration durante minore aetate, it was held that when the Ordinary had once exercised his power by granting the administration, he should not repeal it without due cause. Again, though the court has power to revoke a limited administration, it is very unwilling to do so, unless there was some misrepresentation in the first instance, in obtaining the grant.

REVOCATION OF ADMINISTRATION.

An administration may be revoked where it was granted in an irregular manner, as where the next of kin comes too hastily to take out the administration within the fourteen days, or where it has been granted without citing the necessary parties, in which case the administration though not void is voidable.

NEXT OF KIN NON COMPOS, ETC.

Again, an administration may be revoked if a next of kin to whom it has been committed becomes non compos or otherwise incapable, or it has been said if he goes beyond seas.

GRANT OF ADMINISTRATION VOIDABLE.

The court may repeal its grant of administration when made to other than the next of kin, or to one of kin but not next of kin, or to a creditor before the renunciation of the next of kin. In this case the administration is not void but voidable only.

Old authorities, Wms. p. 453.

RE-GRANT AD EUNDEM.

An administration repealed quia improvide shall be re-granted to the same person (ad eundem).

POWER TO REMOVE EXECUTORS OR ADMINISTRATORS IN CERTAIN CASES.

The jurisdiction to remove an executor was formerly doubtful even in the High Court, but by Ontario statute it is now provided as follows, R. S. O. 1914, c. 62, the Surrogate Courts Act:

60.—(1) The Surrogate Court by which the grant of probate or letters of administration was made shall, where the entire estate left by the deceased does not exceed $1,000, have the like authority for the removal of an executor or administrator and to appoint some other proper person to act in his place as is possessed by the Supreme Court, but nothing in this section shall affect the jurisdiction of a Surrogate Court to revoke a grant of probate or of letters of administration.

(2) Where the executor or administrator removed is not a sole executor or administrator the Court need not, unless it sees fit, appoint any person to act in the room of the person removed, and, if no such appointment is made, the rights and estate of the executor or administrator removed shall pass to the remaining executor or administrator as if the person so removed had died.

61. A certified copy of the order of removal shall be filed with the Surrogate Clerk and another copy with the Registrar of the Court by which probate or administration was granted, and such officers shall, at or upon the entry of the grant in the registers in their respective offices, make in red ink a short note giving the date and effect of the order, and shall also make a reference thereto in the index of the register at the place where such grant is indexed.

The Trustee Act, R. S. O. 1914, c. 121, further provides:

40.—(1) The Supreme Court may remove a personal representative upon any ground upon which such court may remove any other trustee, and

may appoint some other proper person or persons to act in the place of the executor or administrator so removed.

(2) Any person so appointed shall unless the court otherwise orders give such security as he would be required to give if letters of administration were granted to him under The Surrogate Courts Act.

(3) The order may be made upon the application of any executor or administrator desiring to be relieved from the duties of the office, or of any executor or administrator complaining of the conduct of a co-executor or co-administrator, or of any person interested in the estate of the deceased.

(4) Subject to any rules to be made under The Judicature Act, the practice in force for the removal of any other trustee shall be applicable to proceedings to be taken in the Supreme Court under this section.

(5) Where the executor or administrator removed is not a sole executor or administrator the court need not, unless it sees fit, appoint any person to act in the room of the person removed, and if no such appointment is made the rights and estate of the executor or administrator removed shall pass to the remaining executor or administrator as if the person so removed had died.

(6) The executor of any person appointed an executor under this section shall not by virtue of such executorship be an executor of the estate of which his testator was appointed executor under this section, whether such person acted alone or was the last survivor of several executors.

(7) A certified copy of the order of removal shall be filed with the Surrogate Clerk, and another copy with the Registrar of the Surrogate Court by which probate or administration was granted, and such officers shall, at or upon the entry of the grant in the registers of their respective offices, make in red ink a short note giving the date and effect of the order, and shall also make a reference thereto in the index of the register at the place where such grant is indexed.

(8) The date of the grant shall be endorsed on the copy of the order filed with the Surrogate Clerk.

Caveat.

It is usual where there is a question about a will, or when the right of administration comes in dispute, to enter what is called a caveat, which is a caution entered in the Court of Probate to stop probates, administrations, faculties and such like from being granted without the knowledge of the person that enters. A caveat is a mere cautionary act done by a stranger to prevent the court from doing any wrong, and, therefore, administration or probate, granted contrary to a caveat entered shall not stand good.

Practice Respecting Caveats.

The provision of the Surrogate Courts Act as to the practice on caveats is as follows. R. S. O. 1914, c. 62, sec. 45:

45. Caveats against the grant of probate or administration may be lodged with the Surrogate Clerk or with the Registrar of any Surrogate Court.

No Revocation of a Proper Grant.

If an administration has been properly granted it cannot be revoked, even on the application of the administrator himself, and although he has not intermeddled with the effects; at all events unless some strong ground for the revocation be shown.

In the Goods of Reid, 11 P. D. 70.

EFFECT OF REVOCATION.

It remains to consider what effect the revocation of probate or letters of administration has on the intermediate acts of the former executor or administrator.

DISTINCTION BETWEEN VOID AND VOIDABLE GRANTS.

The first important distinction on this subject is between grants which are void and such as are merely voidable. If the grant be of the former description, the mesne acts of the executor or administrator done between the grant and its revocation shall be of no validity. As, if administration be granted on the concealment of a will and afterwards the will appear, inasmuch as the grant was void from its commencement, all acts performed by the administrator in that capacity shall be equally void, nor can they, although the executor should refuse to act, be made good by relation.

Distinguish *Boxall* v. *Boxall*, 27 C. D. 220; in which case in the suppressed will no executors were appointed.

ACT OF ALIENATION.

As between the rightful representative and the person to whom the executor or administrator under a void probate or grant of letters has aliened the effects of the deceased, the act of alienation, if done in the due course of administration, shall not be void.

BONA FIDE PAYMENTS MADE AND UPHELD.

The following sections of the Trustee Act seem to provide fully for the validity of payments under revoked grants. R. S. O. 1914, c. 121:

50.—(1) Where a court of competent jurisdiction has admitted a will to probate, or has appointed an administrator, notwithstanding that the grant of probate or the appointment may be subsequently revoked as having been erroneously made, all acts done under the authority of such probate or appointment, including all payments made in good faith to or by the personal representative, shall be as valid and effectual as if the same had been rightly granted or made; but upon revocation of the probate or appointment in cases of an erroneous presumption of death, the supposed decedent, and in other cases, the new personal representative may, subject to the provisions of sub-sections 2 and 3, recover from the person who acted under the revoked grant or appointment any part of the estate remaining in his hands undistributed, and, subject to The Limitations Act, from any person who erroneously received any part of the estate as a devisee, legatee or one of the next of kin, or as a husband or wife of the decedent, or supposed decedent, the part so received or the value thereof.

(2) The person acting under the revoked probate or appointment may retain out of any part of the estate remaining in his hands undistributed his proper costs and expenses incurred in the administration.

(3) Nothing in this section shall protect any person acting as personal representative where he has been party or privy to any fraud whereby the grant or appointment has been obtained, or after he has become aware of any fact by reason of which revocation thereof is ordered, unless in the latter case he acts in pursuance of a contract for valuable consideration and otherwise binding made before he became aware of such fact.

51. All persons making or permitting to be made any payment or transfer in good faith upon any probate or letters of administration granted

by any Surrogate Court in Ontario, in respect of the estate of the deceased, shall be indemnified and protected in so doing, notwithstanding any defect or circumstance affecting the validity of the probate or letters of administration.

The above sections are taken from sections 77 and 78 of Imp. Act, 20 & 21 Vict. c. 77.

DISTINCTION BETWEEN SUIT BY CITATION AND AN APPEAL.

If the grant were only voidable, a distinction arises between the case of a suit by citation, which is to countermand or revoke a former probate or former letters of administration, and an appeal, which is always to reverse a former sentence. In case of an appeal all intermediate acts of the executor or administrator are ineffectual; because the appeal suspends the former sentence; and on its reversal it is as if it had never existed.

But if the suit be by citation, and the grant of administration be voidable only, as where it has been granted to a party not next of kin, or where the executor having acted, and the court, not knowing it, committed administration to another, or non vocatis jure vocandis, without citing the necessary parties, all lawful acts done by the first administrator shall be valid: as a bona fide sale by him of the goods of the intestate, and such sale shall be available, even if it were with intent to defeat the second administrator, or were made pendente lite, on the citation; although by statute 13 Eliz. c. 5, it be void as to a creditor. Again, if the administration be granted on condition, all the acts which the administrator does before the breach of the condition are good; so that the subsequent administrator cannot avoid any gifts or sales before such breach made by such conditional administrator.

NO ABATEMENT OF SUIT SINCE JUDICATURE ACT.
MODERN PROCEDURE.

And since the Judicature Acts proceedings commenced by, or against, any administrator, before revocation of the administration, do not become abated, but upon such revocation they may be continued by, or against, the person to whom the new grant of administration is made. An order that the proceedings shall be carried on by or against such new administrator (as the case may be) may be obtained ex parte on application to the court or a Judge upon an allegation of the transmission of interest to the new administrator by such grant of administration to him.

Removing from Office or Restraining from Acting—Duty not wholly Performed.—An executor cannot be removed from his position, where anything remains to be done appertaining to his office, even although the will provides for his continuance as a trustee thereunder after his

duties as executor have ceased, and he has acted as trustee by investing part of the trust moneys. *In re Moore, McAlpine* v. *Moore*, 21 Ch. D. 778, distinguished. *Re Bush*, 19 O. R. 1.

Forum.—Where a bill was filed by devisees against the executors of their testator's will, alleging the inability of the executors to attend to the trusts of the will on account of bodily infirmities, and praying for the appointment of a trustee or trustees in their stead, the court dismissed the bill, on the ground that the jurisdiction to interfere in such a case belongs to the Probate and Surrogate Courts, and not to the Court of Chancery; and inasmuch as the executors had been brought before the courts without any fault on their part, the bill was dismissed with costs. *Corrigal* v. *Henry*, 2 Chy. 310.

Improper Conduct—Delay.—A bill was filed in 1846, by devisees against executors charging them with improper conduct in the management of the estate and the answers were all filed within a year afterwards. No further proceeding was had thereon until the beginning of 1851, when the plaintiffs moved on affidavit for the appointment of a receiver of the real and personal estate. The court under the circumstances, refused the application with respect to the personal estate, as no new grounds for the proceeding were stated in the affidavit filed, but granted the motion in respect of the real estate. *Meacham* v. *Draper*, 2 Chy. 316.

Injunction.—A., and B., and G. were appointed executors. B. as acting executor, received a large sum belonging to his testator's estate which he failed to account for, and a suit was commenced to administer the estate. This suit was compromised by the plaintiff therein, who was a beneficiary under the testator's will, and the co-executors, who took security for the sum found due from B., who agreed to cease all further interferences with the estate, which was thenceforth to be managed by A. B. continued to meddle with the estate, whereupon A. and G. filed a bill praying for an account, and for an injunction to restrain B. from all further interference with the estate:—Held, on demurrer, that the proceedings in the former suit and its pendency were no bar to the relief sought. *Aikins* v. *Blain*, 11 Chy. 212.

Insolvency—Intemperance.—Where a person named as an executor was at the time of the making of the will in excellent credit and circumstances, but before the death of the testator became insolvent and made an assignment for the benefit of his creditors, and also apparently became intemperate, an injunction was granted restraining him from interfering with the estate; and the appointment of a receiver was directed. *Johnson* v. *McKenzie*, 20 O. R. 131.

Relieving from Office.—Parties named executors, whose duties in respect to the management of the estate did not commence until after the death of B. and M., proved the will, and shortly afterwards, and before the death of either of these parties, filed a bill to be relieved from the executorship. The court, under the circumstances, refused to make any order to relieve them, they having deliberately accepted the office. *Hellem* v. *Severs*, 24 Chy. 230.

Summary Application.—The court will not upon a summary petition, or otherwise than in an action, remove a trustee or an executor in invitum. *Re Davis's Trust*, 17 P. R. 187.

CHAPTER VI.

ANCILLARY PROBATE AND ADMINISTRATION.

IF THE DECEASED LEFT NO PROPERTY IN THIS COUNTRY HIS WILL NEED NOT BE PROVED HERE.

If a testator domiciled abroad dies without leaving any personal property in this country, or since the Devolution of Estates Act, without leaving any real or personal property in this country, generally speaking, his will need not be proved in any Court of Probate here.

FOREIGN EXECUTOR MUST PROVE IN ONTARIO.

If a foreign executor should find it necessary to institute a suit in Ontario to recover a debt due to his testator, he must prove the will here also, or a personal representative must be constituted.

Attorney-General v. *Bouvens*, 4 M. & W. 193.

ANCILLARY PROBATE OR ADMINISTRATION.

In order to sue in any court in Ontario in respect of the property of a deceased person, the plaintiff must appear to have obtained probate or letters of administration in a Surrogate Court of this province. On the ground of letters testamentary or administration granted to the plaintiff in the country where the deceased died ancillary* probate or administration will be granted.

Vanquelin v. *Bouard*, 15 C. B. N. S. 341; *Enohin* v. *Wylie*, 10 H. L. 19.

See *Pritchard* v. *Standard Life*, 7 O. R. 188; *Re O'Brien*, 3 O. R. 326.

FOREIGN WILL.

Likewise if a will be made in a foreign country and proved there, disposing of property in Ontario, the executor must prove the will here also. Generally speaking, the Surrogate Court in this country will adopt the decision of the Court of Probate in the foreign country in which the testator died domiciled.

In the Goods of Deshais, 34 L. J. P. & M. 58.

Before granting probate of a foreign will of personal property the court should be satisfied of one of two things, viz., either that the will is valid by the law of the country where the testator was domiciled, or that a court of the foreign country has acted upon it and given it efficiency.

* Ancilla, a "handmaid."

RIGHTS OF ONTARIO ADMINISTRATOR OR EXECUTOR EXTEND ABROAD.

All personal property follows the person, and the rights of a person constituted in Ontario representative of a party deceased, domiciled in Ontario, are not limited to the personal property in Ontario, but extend to such property wherever locally situated.

Spratt v. *Harris*, 4 Hagg. 405.

DEVOLUTION OF ESTATES ACT A LOCAL LAW.

The declaration in the Ontario Devolution of Estates Act that land shall descend as personalty is a local law, which will not give persons obtaining probate or administration in Ontario similar rights in countries where real and personal property are governed by different rules.

FOREIGN COURTS WOULD PROBABLY FOLLOW DECISION OF LOCAL COURTS.

If it should become necessary that the courts of the foreign country where the assets were situate should grant probate or administration for the purpose of giving a legal right to recover and deal with them, such courts, by the comity of nations, would probably follow the decision of the Surrogate Court in this province as being the country of domicile.

Enohin v. *Wylie*, 10 H. L. Cas. 1.

LOCAL PROBATE EXTENDS TO FOREIGN PERSONAL ESTATE.

Though the executor of a man who has died domiciled in Ontario be not able to sue in a foreign court by virtue of the Ontario probate any more than he can sue in an Ontario Court by virtue of a foreign probate, yet for the purpose of suing in an Ontario Court, a probate obtained in the proper court here extends to all the personal property of the deceased wherever it is situate at the time of his death, whether in Ontario or in Great Britain, or in any country abroad.

White v. *Rose*, 3 Q. B. 493, 507.

RULE AS TO GRANT OF PROBATE WHERE TESTATOR HAS MADE TWO WILLS—ONE RELATING TO FOREIGN ASSETS, THE OTHER OF ENGLISH ASSETS.

If a testator has made two independent wills, one disposing of his property in this country and the other disposing of his property abroad, the former alone should be admitted to probate here. If, however, the two wills are not independent the case is different, as where an English will ratifies and confirms a foreign will, it is right that the latter should be incorporated in the probate.

In the Goods of Murray (1896), P. 65.

LAW OF DOMICILE GOVERNS SUCCESSION OF PERSONALTY, AND ALSO WHAT IS THE LAST WILL.

The law of the country in which the deceased was domiciled at the time of the death, not only decides the course of distribution

or succession as to the personalty, but regulates the decision as to what constitutes the last will without regard either to the place of birth or death, or the situation of the property at the time.

Miller v. *James*, L. R. 3 P. & D. 4.

LAW OF PARTICULAR DOMICILE MAY GOVERN.

When it is said that the law of the country of domicile must regulate the succession, it is not always meant to speak of the general law, but in some instances of the particular law which the country of domicile applies to the case of foreigners dying domiciled there, and which would not be applied to a natural-born subject of that country.

See *Collier* v. *Rivaz*, 2 Curt. 855; *Maltass* v. *Maltass*, 3 Curt. 231.

FOREIGN GRANT WILL BE FOLLOWED HERE.

It has been the practice upon producing an exemplified copy of the probate granted by the proper court in a country where the deceased died domiciled for the court here to follow the grant upon the application of the executor in decreeing its own probate.

In the Goods of Earl, L. R. 1 P. & D. 450.

ADMINISTRATION TO BE EFFECTED BY LOCAL COURT.

When the court is satisfied that the testator died domiciled in a foreign country, and that his will contained a general appointment of executors, and has been duly authenticated by those executors in the proper court in the foreign country, it is the duty of the Surrogate Court in this province to clothe the foreign executors with ancillary letters of probate to enable them to get possession of that part of the personal estate which was locally situate in Ontario.

Enohin v. *Wylie*, 10 H. L. 14.

WILLS MADE BY BRITISH SUBJECTS DYING AFTER 6TH AUGUST, 1861.

By Imperial Statute known as the Colonial Probates Act, 1892 (55 & 56 Vict. c. 6), provision is made for the recognition of colonial probates in the United Kingdom. This Act is printed as an Appendix. The following sections of the Ontario Statute contain the recognition desired by the Imperial authorities. R. S. O. 1914, c. 62, the Surrogate Courts Act:

74.—(1) Where probate or letters of administration, or other legal document purporting to be of the same nature, granted a court of competent jurisdiction in the United Kingdom, or in any Province or territory of the Dominion, or in any other British possession, is produced to, and a copy thereof deposited with the Registrar of any Surrogate Court, and the prescribed fees are paid as on a grant of probate or administration, the probate or letters of administration, or other document shall, under the direction of the Judge, be sealed with the seal of the Surrogate Court, and shall thereupon be of the like force and effect in Ontario, as if the same had been originally granted by such Surrogate Court, and shall, so far as regards

Ontario, be subject to any order made by such court, or on appeal therefrom, as if the probate or letters of administration had been granted thereby.

(2) The letters of administration shall not be sealed with the seal of the said Surrogate Court until a certificate has been filed under the hand of the Registrar of the court which issued the letters, that security has been given in such court in a sum of sufficient amount to cover as well the assets within the jurisdiction of such court as the assets within Ontario, or in the absence of such certificate, until like security is given to the Judge of the Surrogate Court covering the assets in Ontario as in the case of granting original letters of administration.

DISTRIBUTION BY ONTARIO COURT.

Where the deceased has left a will valid by the law of his domicile, and probate either original or ancillary has been obtained here, the duty of the court in administering the property is to ascertain who by the law of domicile are entitled under the will, and that being ascertained, to distribute the property accordingly. The duty of administration has to be discharged by the courts of this province, though in the performance of that duty they will be guided by the law of the domicile.

IMP. ACT, 24 & 25 V. c. 114.

Under Imperial Statute, 24 & 25 Vict. c. 114, every will made by a British subject out of the United Kingdom is to be admitted to probate, if made according to the law of the place where it was made, or where the testator was domiciled or had his domicile of origin. 2. A will made by a British subject within the United Kingdom is to be admitted if made according to the local law; and, 3. No will is to be revoked or the construction altered by reason of any subsequent change of domicile.

Distribution of Estate—Domicil.—J. S. C. died in the State of New York, leaving a will, which the courts there declared void as having been improperly attested, and thereupon letters of administration of his effects in Ontario were granted to his widow by the proper court; and she and the next of kin—all of whom were of age—made an agreement for a distribution of all the assets, whereupon she filed a bill in this court to have such agreement established and the intended will declared invalid, with a view of estopping the intended legatees thereunder from afterwards attempting to set up the same. The court under the circumstances, and in view of the fact that the intended legatees were not parties and that no controversy was shewn to exist, refused to make any declaration, and dismissed the bill; but—as the defendants were all assenting parties to the course pursued by the plaintiff—without costs. *Clarke* v. *Cook*, 23 Chy. 110.

CHAPTER VII.

INTERMEDDLING WITHOUT AUTHORITY.

Result of Intermeddling.

If one who is neither an executor nor administrator intermeddles with the goods of the deceased, or does any other act characteristic of the office of executor, he thereby makes himself what is called in the law an executor of his own wrong, or more usually an executor de son tort.

See *Hursell* v. *Bird*, 65 L. T. 709.

What Acts will Constitute Intermeddling.

A very slight circumstance of intermeddling with the goods of the deceased will make a person executor de son tort. Thus, it is said that milking the cows, even by the widow of the deceased, or taking a dog, will constitute an executorship de son tort. So, in one case, the taking a Bible, and in another a bedstead were held sufficient, inasmuch as they were the indicia of the person so interfering being the representative of the deceased. So, if a man kills the cattle or uses or gives away or sells any of the goods, or if he takes any of the goods to satisfy his own debt or legacy, or if the wife of the deceased takes more apparel than she is entitled to, she will become an executrix de son tort. So there may be a tort executor of a term for years, as where a man enters upon the land leased to the deceased, and takes possession claiming a particular estate. Though with respect to a term of years in reversion there can be no executorship of this nature, because it is incapable of entry.

See *Serle* v. *Waterworth*, 4 M. & W. 9.

Collecting Debts.

Again, if a man demands the debts of a deceased, or makes acquittances for them, or receives them, he will become executor de son tort. So, if a man pays the debts of the deceased or the fees about proving his will, this will constitute him executor de son tort, but it is otherwise if he pays the debts or fees with his own money.

Bringing Suit.

Likewise, if a man sue as executor, or if an action be brought against him as executor, and he pleads in that character, this will make him an executor de son tort.

FRAUDULENT INTERMEDDLING.

By 43 Eliz. c. 8, it is enacted "That every person who shall obtain, receive and have any goods or debts of any person dying intestate, or a release or other discharge of any debt or duty belonging to the intestate upon any fraud, as described in that Act, or without such valuable consideration as shall amount to the value of these goods, unless in satisfaction of some debt, such person shall be chargeable as executor of his own wrong. And so far only as such goods and debts coming to his hands, or whereof he is released or discharged by such administrator will satisfy, deducting nevertheless to and for himself allowance of all just, due, and principal debts upon good consideration, without fraud, owing to him by the intestate at the time of his decease, and of all other payments made by him which lawful executors or administrators may and ought to have and pay by the laws and statutes of this realm."

This statute appeared in the Ontario Statutes as section 8 of R. S. O. 1897, c. 337, the Act respecting executors and administrators. This clause of 337 was repealed (among others) in 1910 by section 81 of chapter 31. In further consolidations this section seems to have been dropped.

IF WILL PROVED A STRANGER CANNOT BE EXECUTOR DE SON TORT.

When a will is proved or administration granted, and another person then intermeddles with the goods, this does not make him an executor de son tort by construction of law, because there is another personal representative of right against whom the creditors can bring their actions, and such wrongful intermeddler is liable to be sued as trespasser.

Armstrong v. *Armstrong*, 44 U. C. R. 615.

ACTS WHICH ARE NOT INTERMEDDLING.

There are many acts which a stranger may perform without incurring the hazard of being involved in such an executorship; such as locking up the goods for preservation, directing the funeral and defraying expenses of funeral himself or out of the testator's effects; making an inventory of his property, feeding his cattle, repairing his house, or providing necessaries for his children, for these are offices merely of kindness and charity.

See *Camden* v. *Fletcher*, 4 M. & W. 378; *Serle* v. *Waterworth*, 4 M. & W. 9.

COLLUSIVE SALE.

If another man takes the goods of the deceased and sells and gives them to me, this shall charge him as executor of his own wrong, but not me, unless there be collusion.

Hill v. *Curtis*, L. R. 1 Eq. 90.

COLOURABLE TITLE.

Again, if a person sets up in himself a colourable title to the goods of the deceased, as where he claims a lien on them, though he may not be able to make out his title completely, he shall not be deemed an executor de son tort. So, if a man lodge in my house, and die there, leaving goods therein behind him, I may keep them until I can be lawfully discharged of them without making myself chargeable as executor in my own wrong, or if I take the goods of the deceased by mistake supposing them to be my own, this will not make me an executor of my own wrong.

Flemings v. *Jarratt*, 1 Esp. N. P. C. 336.

AGENT.

Likewise a man who possesses himself of the effects of the deceased under the authority of and as agent for the lawful executor, cannot be charged as executor de son tort.

Sykes v. *Sykes*, L. R. 5 C. P. 113.

QUESTION IS ONE OF LAW.

The question whether executor de son tort or not is a conclusion of law, and not to be left to a jury, whether the party did certain acts, is a question for the jury, but when these facts are established the result from them is a question of law.

Padget v. *Priest*, 2 T. R. 99.

CONSEQUENCES OF INTERMEDDLING.

When a man has so acted as to become in law executor de son tort, he thereby renders himself liable not only to an action by the rightful executor or administrator, but also to be sued as executor by a creditor of the deceased or by a legatee. An executor de son tort has all the liability though none of the privileges that belong to the character of executor.

See *Webster* v. *Webster*, 10 Ves. 93; *Coote* v. *Whittington*, L. R. 16 Eq. 534.

FORM OF JUDGMENT.

A judgment against a man found executor de son tort after a defence that he was not executor, would be that the plaintiff do recover the debt and costs to be levied out of the assets of the testator, if the defendant have so much, or if not, then out of the defendant's own goods.

HOW FAR EXECUTOR DE SON TORT PROTECTED.

Though an executor de son tort cannot by his own wrongful acts acquire any benefit, yet he is protected in all acts not for his own benefit which a rightful executor may do. Accordingly, if he pleads properly he is not liable beyond the extent of the goods

which he has administered. Therefore, in an action by a creditor of the deceased under a defence that the property has been lawfully and completely administered, he shall not be charged beyond the assets which came into his hands.

Yardley v. *Arnold*, Carr. & M. 434.

At law an executor de son tort cannot discharge himself unless he hands over the property to the rightful representative, before action brought. The rule in equity follows the rule at law; so that an executor de son tort can prove a settled account with the rightful representative before suit, it is a sufficient answer to an action against him for an account.

Hill v. *Curtis*, L. R. 1 Eq. 90.

No Right of Retainer.

An executor de son tort cannot give in evidence or successfully claim a retainer for his own debt; for otherwise the creditors of the deceased would be running a race to take possession of his goods without taking administration to him.

Executor de son tort Obtaining Administration.

Yet, if an executor de son tort afterwards, even pendente lite, obtained administration, he might retain, for it legalized those acts which were tortious at the time.

Old Cases cited, Wms. p. 193.

Liability at Suit of Lawful Representative.

With respect to the liability of an executor de son tort at the suit of the lawful representative of the deceased, there are several authorities to show that if the rightful executor or administrator bring an action the executor de son tort may give in evidence and in mitigation of damages payments made by him in the rightful course of administration upon this ground that the payments, which are thus, as it were, recouped in damages, were such as the lawful executor or administrator would have been bound to make.

Mountford v. *Gibson*, 4 East. 451.

Requisites.

This recouping in damages can only be allowed to the executor de son tort in cases where there are sufficient assets to satisfy all the debts of the deceased.

Elworthy v. *Sandford*, 3 Hurl. & C. 330.

What Acts are Good.

All the lawful acts which an executor de son tort doth are good. This must be understood in a case where payments are made by one who is proved to have been acting at the time in the char-

acter of executor, and not of a mere solitary act of wrong in the very instance complained of by one taking upon himself to hand over the goods of a deceased to a creditor.

Mountford v. *Gibson*, ut sup.

ACT OF EXECUTOR DE SON TORT.

The act of an executor de son tort is good against the true representative of a deceased only where it is lawful, and such an act as the true representative was bound to perform in the due course of administration.

Buckley v. *Barber*, 6 Exch. 164.

See *McDade* v. *Dafoe*, 15 U. C. R. 386; *Bain* v. *McIntyre*, 17 U. C. C. P. 500.

THE EXECUTOR CANNOT RELY ON HIS TITLE IN ANY COURT WITHOUT THE PRODUCTION OF THE PROBATE.

THE PROBATE.

An executor cannot assert or rely on his right in any court without showing that he has previously established it in the Probate Division: the usual proof of which is, the production of a copy of the will by which he is appointed, certified under the seal of the court. This is usually called the probate, or the letters testamentary. In other words, nothing but the probate (or letters of administration with the will annexed, when no executor is therein appointed, or the appointment of executor fails), or other proof tantamount thereto of the admission of the will in the Probate Division is legal evidence of the will in any question respecting personalty.

As regards real estate in the case of the will of a person dying after the Devolution of Estates Act, Probate and Letters of Administration may be granted in respect of real estate only, although there is no personal estate.

CHAPTER VIII.

PROBATE.

EFFECT OF DECLARATION OF PROBATE OR ADMINISTRATION.

A probate is merely operative as an authenticated evidence, and not at all as the foundation of the executor's title, for he derives all his interest from the will itself, and the property of the deceased vests in him from the moment of the testator's death. Therefore the probate is said to have relation to the time of the testator's death.

Ingle v. *Richards*, 28 Beav. 366.

EXTENT OF OPERATION OF PROBATE.
EXECUTOR CONSIDERED A TRUSTEE.

Equity considers an executor as trustee for the legatees in respect to their legacies, and in certain cases as trustee for the next of kin of the undisposed of surplus, and since the Devolution of Estates Act as regards also devisees or the heir at law in respect of the real estate, and as all trusts are the peculiar objects of equitable cognizance, the High Court of Justice will compel the executor to perform these his testamentary trusts with propriety. Therefore, while the seal of the Court of Probate is conclusive evidence of the factum of a will, the High Court of Justice has an equitable jurisdiction of construing the will in order to enforce a proper performance of the trusts of the executor.

MATTERS HELD TO BE CONCLUSIVELY PROVED.

It is a legal consequence of the exclusive jurisdiction of the Court of Probate in deciding on the validity of wills of personalty and granting administration, that its sentences pronounced in the exercise of such exclusive jurisdiction should be conclusive evidence of the right directly determined. Hence, a probate even in common form unrevoked is conclusive both in the Courts of Law and Equity as to the appointment of executor and the validity and contents of a will, and it cannot be impeached by evidence even of fraud.

Griffiths v. *Hamilton*, 12 Ves. 307.

Therefore, it is not allowable to prove that another person was appointed executor, or that the testator was insane, or that the will of which the probate was granted was forged, for that would be directly contrary to the seal of the court in a matter within

its exclusive jurisdiction. So the probate of a will conclusively establishes in all courts that the will was executed according to the law of the country where the testator was domiciled.

Whicker v. *Hume*, 7 H. L. 124.

PAYMENT OF MONEY TO AN EXECUTOR UNDER FORGED WILL.

Upon this principle it was decided that payment of money to an executor who has obtained probate of a forged will is a discharge to the debtor of the deceased.

Prosser v. *Wagner*, 1 C. B. N. S. 289.

PROBATE OF INSTRUMENTS AS DISTINCT.

When there is a question, whether particular legacies given by a will are cumulative or substituted, it is often determined by the circumstance of the bequest having been given by distinct instruments. In such a case if the probate has been granted as of a will and codicil, that is conclusive of the fact of their being distinct instruments though written on the same paper.

Baillie v. *Butterfield*, 1 Cox. 392.

A BEQUEST OBTAINED BY FRAUD MAY BE DECLARED A TRUST.

The probate is also conclusive as to every part of the will in respect to which it has been granted. Though the courts are bound to receive as testamentary a will in all its parts, which has been proved in the proper Surrogate Court, yet they may in certain cases affect with a trust or particular legacy or a residuary bequest which has been obtained by fraud. For instance, if the drawer of a will should fraudulently insert his own name instead of that of a legatee, he would be considered in equity as a trustee for the real legatee.

Marriott v. *Marriott*, 1 Stra. 666; *Allen* v. *McPherson*, 5 Beav. 469.

WHAT ACTS AN EXECUTOR MAY DO BEFORE PROBATE.

An executor before he proves the will in the Probate Court may do almost all the acts which are incident to his office, except only some of those which relate to suits. Thus, he may seize and take into his hands any of the testator's effects, and he may enter peaceably into the house of the heir for that purpose, and take specialties and other securities for the debts due to the deceased. He may pay or take releases of debts due by the estate, and he may receive or release debts which are owing to it, and distrain for rent due to the testator, and if before probate the day occur for payment upon bond made by or to the testator, payment must be made by or to the executor though the will be not proved upon like penalty as if it were. So he may sell, give away or otherwise

dispose at his discretion of the goods and chattels of the testator before probate; he may assent to or pay legacies, and he may enter on the testator's term of years. Although an executor dies after any of these acts done, without proving the will, yet these acts so done stand firm and good.

See Wms. p. 220.

PROBATE NECESSARY TO PROVE APPOINTMENT.

Although an executor may, before probate, by assignment of a term for years or other chattel if a testator or by an assent to a specific legacy give a valid title to an assignee or legatee, yet if it is necessary to support that title by adducing it from the assignment or assent, it also becomes requisite to show the right to make assignment or give the assent, which can only be effected by producing the probate or other evidence of the admission of the will in the Surrogate Court. For the fact of a particular person having been appointed executor to another can be proved by no other means. If the executor died after the assignment or assent, without having obtained probate, letters of administration cum testamento annexo must be produced instead.

PAYMENT OF PURCHASE MONEY TO EXECUTOR.

Although an executor can before probate make an assignment and give a receipt for purchase-money, which are binding, yet a purchaser is not bound to pay the purchase money until probate, because till the evidence of title exists the executor cannot give a complete indemnity.

Newton v. *Met. Ry. Co.*, 1 Dr. & Sm. 583.

ACTIONS MAY BE MAINTAINED BEFORE PROBATE IF ACTUAL POSSESSION.

An executor cannot maintain actions before probate, unless such as are founded on his actual possession, for in actions where he sues in his representative character he may be compelled by the course of pleading to produce the letters testamentary at the trial or in some cases by an application to the court at an earlier stage of the cause. In those actions where he sues in his individual capacity, relying on his constructive possession as executor, although he does not describe himself as executor in his pleading, yet, generally speaking, it will be necessary for him to prove himself executor at the trial, which he can only do by showing the probate.

Tarn v. *Com. Bank of Sydney*, 12 Q. B. D. 294.

POSSESSION A PRIMA FACIE TITLE.

In cases where the executor has actually been possessed of the property before it came to the hands of the defendant, such posses-

sion is of itself sufficient without showing any title, to establish a prima facie case, when the property has come to the defendant's hands or been converted by tort, or when the defendant has acquired it by a contract with the executor.

White v. *Mullett*, 6 Exch. 713, 715.

PROBATE OBTAINED IN COURSE OF PROCEEDINGS MAY BE SUFFICIENT.

Although an executor cannot maintain actions before probate, except upon his actual possession, yet he may advance in them as far as that step where the production of the probate becomes necessary, and it will be sufficient if he obtains the probate in time for that exigency.

Webb v. *Adkins*, 14 C. B. 401.

MAY BE SUED ALTHOUGH PROBATE NOT ISSUED.

On the other hand, if he have elected to administer he may also, before probate, be sued at law or in equity by the deceased's creditors, whose rights shall not be impeded by his delay, and to whom, as executor de jure or de facto, he has made himself responsible.

IF HE DIE BEFORE PROBATE, HIS EXECUTOR SHALL NOT BE EXECUTOR TO THE FIRST TESTATOR.

If an executor die before probate, although, as already mentioned, the acts which he may legally do before probate stand firm and good, yet his executor may not prove both wills, and so become executor to both the testators. But administration of the goods of the first testator, with the will annexed to it, is to be committed to the executor of the executor, if the first executor is residuary legatee of the first testator; or if he is not then to such other person as may be the residuary legatee; otherwise to the next of kin of the first testator.

EXECUTOR ONLY PERSON ENTITLED TO PROVE WILL.

The only person by whom the testament can be proved is the executor named in it, whom the Court of Probate may cite to the intent to prove the testament, and take upon him the execution thereof, or else refuse the same. This the court may do not only ex officio, but at the instance of any party having an interest, which interest is proved by the oath of the party.

CITATION, PURPOSE OF.

A citation answers two purposes: it either compels a representation to be taken by those who are primarily entitled to it, or where they do not take it, the process provides a substitute for a voluntary renunciation on their part. Availing himself, therefore, of the rule, a person having an inferior interest, but unable

to procure the renunciation of the persons who have the superior interest, cites all those persons who have such superiority to take the required grant, or show cause why it should not be made to himself.

Thus in the case of a will, the residuary legatee, or residuary devisee if there is real estate, cites the executor to accept or refuse probate of the will, or to show cause why letters of administration with the will annexed, of all the estate which by law devolves to and vests in the personal representative of the deceased, should not be granted to him (the residuary legatee or residuary devisee).

A legatee or a creditor similarly cites both the executor and the residuary legatees and residuary devisees, if there is real estate, or the testator's next of kin and heir-at-law if the residue has been disposed of.

Before any citation can issue in respect of a will, that will must have been filed.

WILL DESTROYED OR SUPPRESSED.

Where the will is destroyed or concealed by the executor, if it be proved plainly, the legatee can go to the High Court of Justice for a decree upon the ground of spoliation or suppression, although the general rule is to cite the executor in the Surrogate Court.

PERSON OTHER THAN EXECUTOR WITH WILL IN POSSESSION MAY BE CITED.

If the executor has not the will in his possession, but some other person, then such other person may be compelled to exhibit the same, and it is sufficient to prove that he once had it, for he is still presumed to have it, unless he affirms upon oath that it is not in his possession.

NO SOLICITOR'S LIEN ON WILL.

The lien of an attorney or solicitor does not extend to the original will executed by his client, and he cannot refuse the production of it.

Georges v. *Georges*, 18 Ves. 294.

DISPUTED WILLS SHOULD BE LODGED IN COURT.

Disputed wills ought to be lodged with the Registrar of the Surrogate Court for custody. Practitioners have no right to keep wills in their possession. The expense necessary to get a will out of the hands of a party must fall upon the person who withholds it.

Cunningham v. *Seymour*, 2 Phillim. 250.

IF TESTATOR ALIVE WILL MAY NOT BE PROVED, ONLY RECORDED.

If a testator be yet living, the Judge may not proceed to the proving of his testament at the petition either of the executor or any

other, except at the request of the testator himself, and at his petition the testament may be recorded and registered among other wills, but it is not to be delivered forth under the seal of the Court with the probate, because it is of no force so long as the testator lives, who also may revoke or alter the same at any time before his death.

TIME FOR PROBATE.

STATUTORY PROVISION AS TO ADMINISTERING WITHOUT OBTAINING PROBATE.

The time after the testator's death when the will is to be proved is somewhat uncertain, and left in the discretion of the Judge, according to the distance of the place, the weight of the will, the quality of the executors and legatees, and other circumstances incident thereto.

The production of a testamentary paper may be compelled as follows. R. S. O. 1914, c. 62, the Surrogate Courts Act:

31.—(1) Whether any suit or other proceeding is or is not pending in the court with respect to any probate or administration, every Surrogate court may, on motion or otherwise in a summary way, order any person to produce and bring before the Registrar, or otherwise as the court may direct, any paper or writing being or purporting to be testamentary which is shewn to be in the possession or under the control of such person.

(2) If it is not shewn that such paper or writing is in the possession or under the control of such person, but it appears that there are reasonable grounds for believing that he has knowledge of any such paper or writing, the court may direct such person to attend for the purpose of being examined in open court or before the Registrar or such person as the court may direct, or upon interrogatories respecting the same, and to produce and bring in such paper or writing, and such person shall be subject to the like process in case of default in not attending or in not answering questions or interrogatories or not bringing in such paper or writing, as he would have been subject to if he had been a party to a suit in the court and had made such default; and the costs of such motion of other proceeding shall be in the discretion of the court.

PRESUMPTION OF DEATH.

If a death cannot be proved, recourse must be had to the presumption of law. At common law a jury may presume that a man is dead at the expiration of seven years from the time he was last known to be living. There is, however, no legal presumption as to the date of the death.

Doe v. *Nepean*, 2 M. & W. 894.

TWO WAYS OF PROVING WILLS.

A testament may be proved in two ways, either in common form or by form of law, which latter mode is also called the solemn form, and sometimes proving per testes.

PROVING WILL "IN COMMON FORM."*

A will is proved in common form when the executor presents it before the Judge, and in the absence of and without citing the parties interested, produces witnesses to prove the same, who, testifying by their oaths that the testament exhibited is the true, whole and last will and testament of the deceased, the Judge thereupon, and sometimes upon less proof, annexes his probate and seal thereto.

WILLS MADE AFTER 1ST JANUARY, 1874, IF ATTESTATION CLAUSE.

With respect to wills made on and after the 1st January, 1874, if a will be perfect on the face of it, and there is an attestation clause reciting that the solemnities required by the Wills Act have been complied with, probate in common form may be obtained upon the oath of the executor alone.

IF NO ATTESTATION CLAUSE.

But if there is no attestation clause, or if there is a clause which does not state the performance of all the prescribed solemnities, an affidavit is required from one of the subscribing witnesses by which it must appear that the will was executed in compliance with the statute. But this requisite may be dispensed with if the witnesses, after diligent enquiry, are not forthcoming.

In the Goods of Dickson, 6 Notes of Cas. 278.

PROBATE OF IMPERFECT INSTRUMENT.

Where probate in common form is sought of an instrument which on the face of it is imperfect, whether the imperfection consist of it being incomplete in the body of it or merely in the execution, as in the want of signature or by subscribing witnesses, as where there is an attestation clause, two things are required by the court before probate will be allowed, first, there must be affidavits stating facts which, if established in solemn form of law, that is by statements of claim and defence, would sustain the instrument as a will in case it were disputed, and, second, there must be consent implied or expressed from all parties interested.

*Section 2 of the Surrogate Courts Act, R. S. O. 1914, ch. 62, is as follows:

2. In this Act: (b) "Common form business" shall mean the business of obtaining probate or administration where there is no contention as to the right thereto, including the passing of probate and administration through a Surrogate Court when the contest is terminated, and all business of a non-contentious nature to be taken in a Surrogate Court in matters of testacy and intestacy not being proceedings in any suit, and also the business of lodging caveats against the grant of probate or administration.

PROOF OF WILL IN SOLEMN FORM.

When a will is to be proved in solemn form it is requisite that such persons as have interest, that is to say, the widow and next of kin of the deceased, to whom the administration of his goods ought to be committed if he dies intestate, and now the heir at law if there is real estate, should be cited to be present at the probation and approbation of the testament.

Wms. p. 241.

DIFFERENCE BETWEEN COMMON FORM AND SOLEMN FORM.

The difference between the common form and the solemn form with respect to citing the parties interested, works this diversity of effect, namely, that the executor of a will proved in common form may at any time within thirty years be compelled by a person having an interest to prove it per testes in solemn form. So that if the witness be dead in the meantime, it may endanger the whole testament. Whereas a testament being proved in solemn form of law the executor is not to be compelled to prove the same any more, and although all the witnesses afterwards be dead, the testament still retains its full force.

EXECUTOR MAY PROVE WILL IN SOLEMN FORM.

Therefore, not only are wills proved in solemn form at the instance of persons who desire to invalidate them, but the executor himself may, and sometimes does, for greater security propound and prove the will in the first instance per testes of himself, citing the next of kin, and all others pretending interest in general, to see proceedings which, being done, the will shall not afterwards be set aside (provided there be no irregularity in the process) when the witnesses are dead.

Lister v. *Smith*, 3 Sw. & Tr. 53.

WHERE IT APPEARS THAT WILL WAS NOT PROPERLY ATTESTED.

Where it appears from the affidavits the attestation clause being imperfect, that the will was not properly attested by the witnesses under the statute, the court cannot decree administration to pass to the effects of the deceased as dead intestate; all that the court will do in such cases is to reject the prayer for probate, leaving the parties to take out administration, if they think proper, as though the court declines to grant probate, the will may be propounded and established.

In the Goods of Ayling, 1 Curt. 913.

UNATTESTED OBLITERATION, ETC.

If a will dated after the 1st January, 1874, has upon the face of it any unattested obliteration, interlineation or alteration, an

affidavit is required showing whether they were made before or after the execution of the will.

PROBATE OF WILL ISSUED AS ALTERED BY TESTATOR.

Where alterations are satisfactorily shown to have been made before the execution, it is usual to engross the probate copy of the will fair, inserting the words interlined in their proper places, and omitting words struck through or obliterated. But in cases where the construction of the will may be affected by the appearance of the original paper, the court will order the probate to pass in fac-simile. A fac-simile probate of a will is conclusive in the High Court, that the will was in that state, that is, that the testator duly executed it with the alterations or cancellations upon it.

Gann v. *Gregory*, 3 DeG. M. & G. 777.

COSTS OUT OF ESTATE.

It is only under special circumstances that costs are to be directed to be paid out of a testator's estate. The rules are laid down as follows:

If the cause of litigation takes its origin in the fault of the testator or those interested in the residue, costs may be properly paid out of the estate. 2nd. If there be sufficient and probable ground looking to the knowledge and means of knowledge of the opposing party to question either the execution of the will or the capacity of the testator, or to put forward a charge of undue influence or fraud, the losing party may properly be relieved from the costs of his successful opponent.

Mitchell v. *Gard*, 3 Sw. & Tr. 275.

In cases where neither the testator by his own conduct, nor the executors or persons interested under the will by their conduct, have brought about the litigation as to its validity, but the opponents of the will, after due enquiry into the facts, entertained a bona fide belief in the existence of the state of things which, if it did exist, would justify litigation, and the opposition is unsuccessful, each party must pay his own costs.

Davies v. *Gregory*, L. R. 3 P. & D. 28.

PARTIAL PROBATE.

A will may be in part admitted to probate and in part refused. Thus, if the court is satisfied that a particular clause has been inserted in a will by fraud, without the knowledge of the testator in his lifetime, or by forgery after his death, or if he has been induced by fraud to make it a part of his will, probate will be granted of the instrument with the reservation of that clause.

Allen v. *McPherson*, 1 H. L. 191.

PROBATE CANNOT BE ALTERED.

The court has under no circumstances power to make any alterations in papers of which probate has been granted.

LOST WILL.

If a testament is made in writing and is afterwards lost by some casualty, and there be two unexceptionable witnesses who did see and read the testament written, and who remember its contents, these two witnesses so deposing to the tenor of the will are sufficient for the proving thereof in form of law. In such cases the court will grant probate of the will as contained in the depositions of the witnesses.

Trevelyan v. *Trevelyan*, 1 Phillim. 154.

LIMITED PROBATE.

The court may grant a limited probate where the testator has limited the executor. However, where there is an executor appointed without any limitation, the court can only pronounce for the will, or for an absolute intestacy: It cannot pronounce the deceased to be dead intestate as to the residue, though the executor may eventually be considered only to hold for the next of kin.

IF CODICIL IN LITIGATION NO PROBATE ALLOWED.

Probate of a will cannot be granted to an executor while a contest subsists about the validity of a codicil, for that being undetermined it does not appear what is the will, and the executor cannot take the common oath.

See *In the Goods of Robarts*, L. R. 3 P. & D. 110.

PROBATE, HOW ISSUED.

When a will is proved the original is deposited in the registry, and a copy is made out under the seal of the court and delivered to the executor, together with a certificate of its having been proved, and such copy and certificate are usually styled the probate.

See *Sproule* v. *Watson*, 23 A. R. 692. *Book* v. *Book*, 15 O. R. 119.

FOREIGN LANGUAGE.

If a will be in a foreign language the probate is granted of a translation of the same by a notary public. But other courts are not bound by it, and may themselves correct any inaccuracy in it.

Wms. p. 299.

LOST PROBATE.

Where the probate is lost the court merely grants an exemplification of the probate from its own record, and the exemplification is evidence of the will having been proved.

REVOCATION OF PROBATE.

The probate may be revoked either on suit by citation; for instance, where the executor after proof in common form is cited to prove the will in solemn form, or even after proof in solemn form where the probate is shown to have been obtained by fraud, or the will of which it has been granted is proved to have been revoked or a later will made, or on appeal to a higher tribunal.

The following statutory provision should here be noted:

47. Where proceedings are taken for proving a will in solemn form, or for revoking the probate of a will on the ground of the invalidity thereof, or where in any other contentious cause or matter the validity of a will is disputed, all persons having or pretending to have any interest in the property affected by the will, may, subject to the provisions of this Act and to the Surrogate Court Rules, be summoned to see the proceedings, and may be permitted to become parties, subject to such Rules and to the discretion of the court.

Action by Crown where No Known Relatives. — Where a person possessed of real and personal estate dies leaving no known relatives within the province, the attorney-general on behalf of Her Majesty may maintain an action to set aside letters probate of that person's will, executed without mental capacity, and in that action may obtain an order for possession of the real estate; but a grant of administration should be obtained by a separate proceeding. Such an action under the statute R. S. O. 1887 c. 59 is not for the purpose of escheating, but to protect the property for the benefit of those who may be entitled. *Regina* v. *Bonnar*, 24 A. R. 220.

Limited Appointment. — Where an executor is appointed for a limited period or until the happening of some event, his power ceases with the occurrence of such event. *Conron* v. *Clarkson*, 3 Ch. Ch. 368.

Infant Executor.—A grant of probate to an infant executor along with an adult is not a nullity. *Cumming* v. *Landed Banking and Loan Co.*, 20 O. R. 382.

An infant cannot lawfully be appointed administrator of an estate, and therefore a grant of probate or of letters of administration to an infant is void, and confers no office on, and vests no estate in, such infant. *Merchants Bank* v. *Monteith*, 10 P. R. 334.

Appointment of new executor.—The courts ought only to intervene in the appointment of executors and administrators under a will, and in that of trustee when it is impossible to make new appointments in accordance with the conditions of the will or with the document creating the trust; the will of the devisor is the supreme law. *Re Williams & McCallum* (1908), 10 Que. P. R. 356.

Executor of Executor. — L. appointed M. and K. executors and trustees of his will for the management of his property thereby bequeathed (which was personalty) and the payment of the legacies; and he afterwards added and signed a memorandum as follows: "If anything should happen to the trustees, I appoint R. to be one of the trustees." M. proved the will; after his death K. renounced:—Held, that M.'s executor did not represent the testator L.: and that R. was entitled to probate. *In re De Laronde*, 19 Chy. 119.

Several Executors—Probate to one. — An action can be maintained by two or more executors for the goods of a testator where probate is only issued to one, or goods taken out of the possession of one of them, possession of one being possession of all. *Bryce* v. *Beattie*, 12 U. C. C. P. 409.

Revocation of Probate—Evidence—Appeal on Facts—Parties to Proceedings.—Held, reversing the decision of the Judge of Probate, that, after the long lapse of time, it was impossible to accept the evidence of M. H. and his brother—both being interested parties—to establish the invalidity of the will, as against the oath of the deceased witness upon whose testimony it was proved. *In re Hill Estate*, 34 N. S. R. 494.

Contention as to Grant—Removal to High Court.—The legislature has intended that only those causes in which disputed questions of law or fact arise should be removed to the court of chancery, and not contentions as to whom administration should be granted. *In re Beckwith*, 5 L. J. 256.

Collateral Attack on Probate.—The plaintiffs sued as executors under the last will and testament of B., deceased, alleging that the will was duly proved in the proper Surrogate Court. The defendant denied the validity of the probate by reason of the mode of proof and invalidity of the will:—Held, on demurrer, that the defence was bad; that when it is desired to attack the validity of letters probate, issued by a Surrogate Court having jurisdiction, and when the person on whose death the letters probate were issued is really dead, it must be done in an independent proceeding with the proper parties before the court. *Irwin* v. *Bank of Montreal*, 38 U. C. R. 375, followed. Quære, whether the application must be to the Surrogate Court or not. *Book* v. *Book*, 15 O. R. 119. See *Eades Maxwell*, 17 U. C. R. 173.

Where the validity of a will relating to both real and personal estate was in dispute, the personal property being worth at least £2,000, and it was sworn and not denied that the questions to be determined were of such importance that they could be more effectually tried and disposed of in the court of chancery than in the Surrogate Court, an order for removal was made. *Re Eccles*, 1 Ch. Ch. 376.

— **Removal of Cause into High Court—Will—Undue Influence—Value of Estate—Importance of Issues.**—Upon an application under sec. 34 of the Surrogate Courts Act to remove a cause from a Surrogate Court into the High Court, the importance of the case and its nature are not to be tried on counter-affidavits: it is enough if it appears from the nature of the contest and the magnitude of the estate that the higher court should be the forum of trial. Much is left to the discretion of the High Court Judge as to the disposal of each application. *In re Reith et al* v. *Reith et al.*, 16 O. L. R. 168.

Appointment to Executor—Bishop—Corporation sole. — Testator by his will gave his real and personal estate to the Roman Catholic Bishop of St. John, and appointed the Roman Catholic Bishop of St. John one of the executors. The Roman Catholic Bishop of St. John is a corporation by Act of Parliament: — Held, that the Bishop took as executor in his personal capacity, and that it was not sought by the will to appoint him in his corporate capacity. *In re Sweeney*, 21 Occ. N. 511.

CHAPTER IX.

CO-EXECUTORS.

CO-EXECUTORS HOW REGARDED.

Co-executors, however numerous, are regarded in law as an individual person, and therefore the acts of any one of them in respect of the administration of the effects are deemed to be the acts of all; for they all have a joint and entire authority over the whole property. Hence a release of a debt by one of several executors is valid, and shall bind the rest. So, one of several executors may settle an account with a person accountable to the estate, and in the absence of fraud the settlement will be binding on the others though dissenting. So a grant or surrender of the term by one executor shall be equally available; the attornment of one shall be the attornment of the other. And the sale or gift by one of several executors of the goods and chattels of the deceased is the sale and gift of them all.

Wms. p. 715.

AN ACKNOWLEDGMENT OF A DEBT BY ONE OF TWO EXECUTORS IS VALID: BUT NOT AS AGAINST A DEVISEE.

An acknowledgment of a debt within Lord Tenterden's Act (9 Geo. IV. c. 14), s. 1, made by one of several executors as executor binds the testator's estate, and on the death of the executor who makes the acknowledgment, an order may be made in an administration action for payment of the debt out of assets remaining unadministered in the hands or under the control of the surviving executors. But an acknowledgment made by an executor is not effectual to keep alive a debt against the devisee of real estate, supposing him to be a different person.

Astbury v. *Astbury* (1898), 2 Ch. 111.
See the Limitations Act, R. S. O. 1914, c. 75, s. 54 et seq.

ASSENT TO A LEGACY BY ONE EXECUTOR SUFFICIENT.

An assent to a legacy by one of several executors is sufficient. So if one of several executors be a legatee, his single assent to his own legacy will vest the complete title in himself.

Wms. old authorities, p. 718.

ONE EXECUTOR TAKING POSSESSION OF A CHATTEL.

But the act of one in taking possession of the testator's effects, real or personal, cannot create a new liability and impose a charge on the other personally and in his own individual character which,

without such an Act, would never have existed. Therefore, if one executor takes possession of and uses a personal chattel, the other is not liable to the creditors for such an act of his co-executor.

It is said by Lord Coke, that although one executor refuses to act, the others cannot sell to him, because he is a party and privy to the will, and remains executor still. Whether such a sale can be supported in equity will depend upon the circumstances.

Mackintosh v. *Barber*, 1 Bingh, 50.

And now by section 22 of the Trustee Act, 1893, which replaced section 38 of the Conveyancing and Law of Property Act, 1881, where a power or trust is given to, or vested in, two or more trustees (which expression by section 50 of the Trustee Act, 1893, is defined as including executors and administrators) jointly, then, unless the contrary is expressed in the instrument (if any) creating the power or trust, the same may be exercised or performed by the survivor or survivors of them for the time being. This provision, however, applies only to trusts constituted after, or created by instruments coming into operation after 31st December, 1881.

Where, however, one executor of several has alone proved the will, he may sue without making the other executors parties, although they have not renounced. If one of several executors who have all proved the will sue alone, the defendant may apply to the court for an order that the other executors or executor may be joined as co-plaintiffs.

WHEN ONE EXECUTOR MAY SUE THE OTHER.

Generally speaking, it is clear that at law one executor cannot sue or be sued by his co-executor: neither, after the death of one of several executors, can his executor be sued by the surviving co-executor for a debt due to their testator. Nevertheless, if a debtor makes his creditor and another his executors, and the creditor neither proves the will nor acts as executor, he may bring an action against the other executor: nor is it necessary to enable him so to do, that he should renounce in the Court of Probate.

INTEREST OF CO-EXECUTORS.

If there be several executors or administrators, they are regarded in the light of an individual person. They have a joint and entire interest in the effects of the testator or intestate, including chattels real, which is incapable of being divided, and in case of death such interest shall vest to the survivor, without any new grant by the Surrogate Court. Consequently, if one of two ex-

ecutors or administrators grant or release his interest in the testator's or intestate's estate to the other nothing shall pass, because each was possessed of the whole before. So, if one of several executors release but his part of the debt, it has been held that the whole is discharged.

Heath v. *Chilton*, 12 M. & W. 632.

Again, if two men have a lease or term of years, as executors, and the one of them grant all his right and interest, and all that appertains to him by virtue of the lease, to A., the whole term of years passes; because every executor has an entire authority and interest.

EFFECT OF POSSESSION BY ONE.

Since several executors have a joint and entire interest in all the goods of their testator, including chattels real, it follows that the act of one in possessing himself of the effects, is the act of the others, so as to entitle them to a joint interest in possession and a joint right of action if they are afterwards taken away.

Nation v. *Tozer*, 1 Cr. Mees. & R. 174.

DEATH OF ONE OF SEVERAL EXECUTORS.

If one of several executors dies before the joint interest in the residue is severed, where the executors are entitled to such residue the share of the executor dying will survive to his common executors, and the executors of his own executors or administrators.

OF ONE OF SEVERAL ADMINISTRATORS.

One of several administrators stand on the same ground and foundation with one of several executors.

Stanley v. *Bernes*, 1 Hagg. 222.

SURVIVAL OF POWERS.

The power of an executor is not determined by the death of his co-executor, but survives to him. And so, likewise, if administration has been granted to two and one dies, the other will be sole administrator and all the power of the office will survive to him.

Hudson v. *Hudson*, Cas. temp. Talb. 127.

ONE OF SEVERAL MAY ACT.

The ordinary functions incident to the office of executor may be exercised by one of several appointed executors, although the others renounce; but at common law where a power was given to executors to sell land, and one of them refused the trust, it was clear that the others could not sell, but the statute 21 Hen. VIII. c. 4, provides that where lands are willed to be sold by executors and

part of them refuse to be executors and to accept the administration of the will, all sales by the executors that accept the administration shall be as valid as if all the executors had joined.

NAKED AUTHORITY DOES NOT SURVIVE.

If one of two executors dies the office survives to his co-executor. A naked authority given to several cannot survive. Therefore, if a man devises his lands to A. for life, and that after his decease the estate shall be sold by the executors, naming them as B. and C., his executors, or by B. and C., who are not named executors; in that case if one of them die during the life of A. the other cannot sell, because the words of the testator would not be satisfied.

Co. Lit. 113*a*.

Section 27 of the Trustee Act, R. S. O. 1914, ch. 121, is as follows:

27. Where a power or trust is hereafter given to or vested in two or more trustees jointly, it may be exercised or performed by the survivor or survivors of them for the time being.

Imp. Act, 56-57 Vict., c. 53, s. 22.

MUST JOIN IN ACTIONS.

If there are several executors appointed by the will they must all join in bringing actions, even though some of them be infants, or have not proved the will.

LEASE TO ONE EXECUTOR.

Where there are several executors they may agree that one of them shall hold the land devised to them in trust at a fixed rent, and if the rent falls into arrears he may be distrained upon in respect of it.

Cowper v. *Fletcher*, 34 L. J. (N. S.) Q. B. 187.

In this connection, it may be well to call attention here to the following s. 35 of the Trustee Act, R. S. O., 1914, c. 121. The section will come again under consideration in dealing with the liabilities of executors.

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 moneys, 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.

Imp. Act, 56-57 Vict., c. 53, s. 24.

CHAPTER X.

APPLICATION IN CASES WHERE SUCCESSION DUTIES ARE PAYABLE.

Security Required when Succession Duties are Payable.

In certain cases, which will be stated in a subsequent part of this book, succession duties are required by the Crown to be paid for the purposes of the Province. In such cases, information is required and security taken from executors and administrators as directed by the Ontario Succession Duties Act which is fully set out in Part III. relating to the Duties of Executors.

The original Succession Duties Act in Ontario was passed in 1892 and came into operation on the first of July of that year. This Statute with its amendments was consolidated as chapter 24 of Revised Statutes, 1897. Amendments were made to this Revised Statute in successive sessions until it was re-consolidated in 1907 as chapter 10.

After being amended in 1908 there was a further consolidation as chapter 12, 1909. This latter consolidation was again amended and appeared as amended as chapter 24 R. S. O. 1914, which came into effect by proclamation on the first day of March, 1914.

In the session of 1914 immediately following the promulgation of the Revised Statutes, chapter 24 was again amended by chapter 10 of the Statutes passed in that session. This extensive list of amendments and re-amendments, of consolidations and re-consolidations, will show the necessity of section 9 of Chapter 10 of the Statutes of 1914 which is as follows.

Declaration as to Application of Act.

Except as to the rate of duty and as to the liability for duty of any property transferred inter vivos the Succession Duty Act as amended by this Act shall be deemed to be and to declare the law relating to succession duty since the first day of July, 1892, save as to any action or reference heretofore determined in any court, or as to any estate upon which the duty has been fully paid and satisfied.

This legislative method of cutting a Gordian Knot is a rough and ready way of getting over any necessity for studying the various enactments. There is no saving clause as to litigation pending at the passing of the Act (1st day of May, 1914).

CHAPTER XI.

ERRONEOUS PRESUMPTION OF DEATH.

CASES WHERE DEATH HAS BEEN ERRONEOUSLY PRESUMED.

In cases where death has been presumed, and it afterwards appears that the presumption was erroneous, persons who have acted as executors or administrators are protected by the following section. R. S. O. 1914, c. 121, sec. 50:

VALIDITY OF ACTS DONE PRIOR TO REVOCATION OF ERRONEOUS GRANT. RECOVERY OF PROPERTY.

50.—(1) Where a court of competent jurisdiction has admitted a will to probate, or has appointed an administrator, notwithstanding that the grant of probate or the appointment may be subsequently revoked as having been erroneously made, all acts done under the authority of such probate or appointment, including all payments made in good faith to or by the personal representative, shall be as valid and effectual as if the same had been rightly granted or made; but upon revocation of the probate or appointment, in cases of an erroneous presumption of death, the supposed decedent, and in other cases the new personal representative may, subject to the provisions of subsections 2 and 3, recover from the person who acted under the revoked grant or appointment any part of the estate remaining in his hands undistributed, and, subject to The Limitations Act, from any person who erroneously received any part of the estate as a devisee, legatee or one of the next of kin or as a husband or wife of the decedent or supposed decedent, the part so received or the value thereof.

EXPENSES.

(2) The person acting under the revoked probate or appointment may retain out of any part of the estate remaining in his hands, undistributed his proper costs and expenses incurred in the administration.

FRAUD.

(3) Nothing in this section shall protect any person acting as personal representative where he has been party or privy to any fraud whereby the grant or appointment has been obtained, or after he has become aware of any fact by reason of which revocation thereof is ordered unless, in the latter case, he acts in pursuance of a contract for valuable consideration and otherwise binding made before he became aware of such fact.*

ERRONEOUSLY SUPPOSED INTESTACY OR DISCOVERY OF LATER WILL.

In cases where an administration has been granted on some erroneous supposition of intestacy of the deceased, or on the discovery of a later will than that of which probate was granted, or of some other cause for issuing a substituted probate, the above provisions are made for the confirmation of acts done under the superseded probate or administration, and for the better protection of all parties concerned.

*1 Geo. V. (1911) c. 26, sec. 49. Section 49 was a consolidation of sections 1 and 2 of R. S. O. 1897 c. 131.

CHAPTER XII.

APPOINTMENT OF NEW TRUSTEE.

Continuance of Office of Executor.

This part of the subject will not be complete without setting forth the following sections of The Trustee Act. It will be seen that they provide for the continuance of the office.

2. In this Act,—

(a) "Assign" shall mean and include the execution and performance by a person of every necessary or suitable deed or act for assigning, surrendering or otherwise transferring land of which such person is possessed, either for the whole estate of the person so possessed, or for any less estate; and "assignment" shall have a corresponding meaning.

(b) "Contingent right" as applied to land, shall mean and include a contingent and executory interest, and a possibility coupled with an interest whether the object of the gift or limitation of such interest or possibility is, or, is not, ascertained; also a right of entry, whether immediate or future, vested or contingent.

(c) "Convey" applied to any person, shall mean and include the execution and delivery by such person of every necessary or suitable assurance for conveying or disposing to another land whereof such person is seized, or wherein he is entitled to a contingent right, either for his whole estate, or for any less estate, together with the performance of all formalities required by law to the validity of such conveyance; and "conveyance" shall have a corresponding meaning.

(d) "Devisee" shall include the heir of a devisee, and the devisee of an heir, and any person who may claim right by devolution of title of a similar description.

Imp. Act 56-57 Vict. c. 53, s. 50, part.

(e) "Instrument" shall include a deed, a will and a written document and an Act of this Legislature, but not a judgment or order of a court.

(f) "Land" shall include messuages, and all other hereditaments, whether corporeal or incorporeal, chattels and other personal property transmissible to heirs, money to be laid out in the purchase of land, and any share of the same hereditaments and properties, or any of them, and any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, and any possibility, right or title of entry or action, and any other interest capable of being inherited, whether the same estates, possibilities, rights, titles and interests, or any of them, are in possession, reversion, remainder or contingency.

(g) "Lunatic" shall mean any person who has been declared a lunatic.

(h) "Mortgage" shall be applicable to every estate, interest or property in land or personal estate, which is merely a security for money; and "mortgagee" shall have a corresponding meaning and shall include every person deriving title under the original mortgagee.

Imp. Act. s. 13, 14 Vict. c. 60, s. 2 and 56 and 57 Vict. c. 53 s. 50.

(i) "Person of unsound mind" shall mean any person, not an infant, who, not having been declared a lunatic, is incapable, from infirmity of mind, to manage his own affairs.

(j) "Personal estate" shall include leasehold estates and other chattels real, and also money, shares of Government and other funds, securities for money (not being real estate), debts, choses in action, rights, credits, goods, and all other property, except real estate, which by law devolves upon the executor or administrator, and any share or interest therein.

(k) "Personal Representative" shall mean and include an executor, an administrator, and an administrator with the will annexed.

(l) "Possessed" shall be applicable to any vested estate less than a life estate, legal or equitable, in possession or in expectancy, in any land.

(m) "Securities" shall include stocks, funds and shares.

(n) "Seized" shall be applicable to any vested interest for life, or of a greater description, and shall extend to estates, legal and equitable, in possession, or in futurity, in any land.

(o) "Stock" shall include fully paid up shares, and any fund, annuity, or security transferable in books kept by any incorporated bank, company or society, or by instrument of transfer, either alone or accompanied by other formalities, and any share or interest therein.

(p) "Transfer," in relation to stock, shall include the performance and execution of every deed, power of attorney, act or thing, on the part of the transferor, to effect and complete the title in the transferee.

(q) "Trust" shall not mean the duties incident to an estate conveyed by way of mortgage; but, with this exception, shall include implied and constructive trusts and cases where the trustee has some beneficial estate or interest in the subject of the trust, and shall extend to, and include the duties incident to the office of personal representative of a deceased person; and "trustee" shall have a corresponding meaning and shall include a trustee however appointed and several joint trustees.

(r) "Will" shall include a testament, and a codicil and an appointment by will, or by writing in the nature of a will in exercise of a power, and also a disposition by will and testament, or devise of the custody and tuition of any child, by virtue of the Infants' Act, and any other testamentary disposition.

3 (1) Where there are more than two trustees, if one of them by deed declares that he is desirous of being discharged from the trust, and if his co-trustees and such other person, if any, as is empowered to appoint trustees, consent by deed to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust property, then the trustee desirous of being discharged shall be deemed to have retired from the trust and shall, by the deed, be discharged therefrom under this Act, without any new trustee being appointed in his place.

Imp. Act, 56-57 Vict., c. 53, s. 11.

(2) Any assurance or thing requisite for vesting the trust property in the continuing trustees alone shall be executed or done.

(3) This section shall not apply to executors or administrators.

4 (1) Where a trustee either original or substituted dies or remains out of Ontario for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, the person nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust, or if there is no such person or no such person able and willing to act, the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee may by writing appoint another person or other persons to be a trustee or trustees in the place of the trustee dying, remaining out of Ontario, desiring to be discharged, refusing or being unfit or incapable.

Imp. Act, 56-57 Vict., c. 53, s. 10.

(2) Whenever it is expedient to appoint a new trustee, or new trustees and it is found inexpedient, difficult, or impracticable so to do without

the assistance of the Court, the Supreme Court may make an order for the appointment of a new trustee, or new trustees, either in substitution for or in addition to any existing trustee or trustees or although there is no existing trustee; and in particular, and without prejudice to the generality of the foregoing provision, the court may make an order for the appointment of a new trustee in substitution for a trustee who is convicted of an indictable offence, or is bankrupt or insolvent.

Imp. Act. 56-57 Vict., c. 53, s. 25.

(3) An order under sub-section 2 and any consequential vesting order or conveyance shall not operate further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under a power for that purpose contained in an instrument would have operated.

(4) Nothing in this section shall give power to appoint a personal representative.

(5) On the appointment of a new trustee for the whole or any part of trust property:

Imp. Act, 56-57 Vict. c. 53, s. 10.

(a) The number of trustees may be increased; and

(b) A separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property, notwithstanding that no new trustees or trustee are or is to be appointed for other parts of the trust property, and any existing trustee may be appointed or remain one of such separate set of trustees; or, if any one trustee was originally appointed, then one separate trustee may be so appointed for the first mentioned part; and

(c) It shall not be obligatory to appoint more than one new trustee where only one trustee was originally appointed or to fill up the original number of trustees where more than two trustees were originally appointed; but, except where only one trustee was originally appointed, a trustee shall not be discharged under this section from his trust unless there will be at least two trustees to perform the trust; and

(d) Any assurance or thing requisite for vesting the trust property, or any part thereof, in the person who is the trustee, or jointly in the persons who are the trustees, shall be executed or done.

(6) Every new trustee so appointed, as well before as after all the trust property becomes by law, or by assurance, or otherwise, vested in him, shall have the same powers, authorities and discretions, and may in all respects act as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

(7) The provisions of this section relative to a trustee who is dead shall include the case of a person nominated trustee in a will but dying before the testator, and those relative to a continuing trustee shall include a refusing or retiring trustee, if willing to act in the execution of the provisions of this section.

(8) This section is subject to the provisions of section 20 of The Loan and Trust Corporations Act.

Section 20 relates to approval of company for acceptance by Court in certain fiduciary offices.

5 (1) Where an instrument executed after the first day of July, 1886, by which a new trustee is appointed to perform any trust, contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust, or in any personal estate so subject, shall vest in the person or persons who by virtue of such instrument shall become and be the trustee or trustees for performing the trust, that declaration shall, without any conveyance or assignment, operate to vest in him, or in them as joint tenants, and for the purposes of the trust, that estate, interest or right.

Imp. Act. 56-57 Vict. c. 53, s. 12.

(2) Where such an instrument by which a retiring trustee is discharged under this Act contains such a declaration as is in this section mentioned by the retiring and continuing trustees, and by the other person if any, empowered to appoint trustees, that declaration shall, without any conveyance or assignment, operate to vest in the continuing trustees alone as joint tenants, and for the purposes of the trust, the estate, interest or right to which the declaration relates.

(3) This section shall not extend to land conveyed by way of mortgage for securing money subject to the trust, or to any share, stock, annuity, or property transferable only in books kept by a company or other body, or in manner prescribed by or under an Act of Parliament or of this Legislature.

See 56-57 Vict. Imp. c. 53, s. 12 (3).

(4) For the purpose of registration, the person or persons making the declaration shall be deemed the conveying party or parties, and the conveyance shall be deemed to be made by him or them under a power conferred by this Act.

44. Where there is in a will a direction, express or implied, to sell, dispose of, appoint, mortgage, incumber or lease any land, and no person is by the will or otherwise by the testator appointed to execute and carry the same into effect, the executor, if any, named in such will may execute and carry into effect every such direction in respect of such land, and any estate or interest therein, in the same manner, and with the same effect, as if he had been appointed by the testator for that purpose.

45. Where from any cause a court of competent jurisdiction has committed to a person, who has given security to the satisfaction of such Court for his dealing with such land and its proceeds, letters of administration with a will annexed which contains an express or implied power to sell, dispose of, appoint, mortgage, incumber or lease any land, whether such power is conferred on an executor named in the will or the testator has not by the will or otherwise appointed a person to execute it, the administrator may exercise the power in respect of such land in the same manner and with the same effect as if he had been appointed by the testator for that purpose.

Power to Appoint New Trustees.—The power of appointing new trustees given by s. 10, s.-s. 1 of the Trustee Act, 1893, does not enable a donee of the power to appoint himself a trustee, as the words "another person or other persons" means some person or persons other than the person appointing. *Montefiore* v. *Guedalla* (No. 2), 73 L. J. Ch. 13; (1903), 2 Ch. 723, explained and applied. *Sampson, In re; Sampson* v. *Sampson*, 75 L. J. Ch. 302; (1906), 1 Ch. 435; 94 L. T. 241; 54 W. R. 342.

Appointment of New Trustee.—Upon an application to appoint a new trustee, the court refused to appoint a foreigner resident out of the jurisdiction; and quære, whether the court has power to make such an appointment. *In re Dudley's Trusts*, 40 N. S. R. 36n.

A testator appointed two of his brothers executors and trustees of his will, and provided that in the event of either dying "then my surviving brothers and sisters or a majority of them shall appoint a new trustee." He died in 1899, and afterwards in the same year, one of the executors died, and also another brother. In 1900 a majority of the brothers and sisters still living appointed the plaintiff trustee in place of the deceased trustee:—Semble, that the appointment was valid, for that it was the survivors of the brothers and sisters at the time of exercising the power to appoint who were entitled to exercise the power. *Saunders* v. *Bradley*, 6 O. L. R. 250.

New Trustee.—Under the Trustee Act, R. S. O. 1897, c. 129, a married woman was appointed a trustee to fill a vacancy, in view of the circumstances detailed in the report. *In re Gough*, 22 C. L. T. 112; 3 O. L. R. 206.

VESTING ORDERS, AND ORDERS RELEASING CONTINGENT RIGHTS, AS TO LAND.

6. (1) In any of the following cases:—

(a) Where the Supreme Court appoints or has appointed a new trustee; or

(b) Where a trustee entitled to, or possessed of, any land, or entitled to a contingent right therein, either solely or jointly with any other person is an infant, or is out of Ontario, or cannot be found; or

(c) Where it is uncertain who was the survivor of two or more trustees jointly entitled to, or possessed of any land; or

(d) Where it is uncertain whether the last trustee known to have been entitled to, or possessed of any land, is living, or dead; or

(e) Where there is no heir, or personal representative of a trustee who was entitled to, or possessed of land and has died intestate as to that land, or where it is uncertain who is the heir, or personal representative, or devisee of a trustee who was entitled to, or possessed of land and is dead; or

(f) Where a trustee jointly, or solely, entitled to, or possessed of any land, or entitled to a contingent right therein, has been required by, or on behalf of a person entitled to require a conveyance of the land, or a release of the right, to convey the land, or to release the right, and has wilfully refused or neglected to convey the land, or release the right for fourteen days after the date of the requirement; the Supreme Court may make an order (in this Act called a vesting order) vesting the land in any such person in any such manner, and for any such estate, as the court may direct, or releasing, or disposing of the contingent right to such person as the court may direct.

(2) Where the order is consequential on the appointment of a new trustee, the land shall be vested, for such estate as the court may direct, in the persons who, on the appointment, are the trustees.

(3) Where the order relates to a trustee entitled jointly with another person, and such trustee is out of Ontario, or cannot be found, the land or right shall be vested in such other person, either alone, or with some other person.

Imp. Act 56-57 Vict. c. 53, s. 26.

7. Where any land is subject to a contingent right in an unborn person, or a class of unborn persons, who, on coming into existence would, in respect thereof, become entitled to, or possessed of the land on any trust, the Supreme Court may make an order releasing the land from the contingent right or may make an order vesting in any person the estate to or of which, the unborn person, or class of unborn persons, would, on coming into existence, be entitled, or possessed in the land.

Imp. Act, 56-57 Vict., c. 53, s. 27.

8. Where any person entitled to, or possessed of, land, or entitled to any contingent right in land, by way of security for money, is an infant, the Supreme Court may make an order vesting, or releasing, or disposing of the land or right in like manner as in the case of an infant trustee.

Imp. Act, 56-57 Vict., c. 53, s. 28.

9. Where a mortgagee of land has died without having entered into the possession or into the receipt of the rents and profits thereof, and the money due in respect of the mortgage has been paid to a person entitled to receive the same, or that last mentioned person consents to an order for the re-conveyance of the land the Supreme Court may make an order

vesting the land in such person or persons, in such manner, and for such estate as the court may direct in any of the following cases:—

Imp. Act, 56-57 Vict., c. 53, s. 29.

(a) Where an heir, or personal representative, or devisee, of the mortgagee is out of Ontario, or cannot be found; or

(b) Where an heir, or personal representative, or devisee of the mortgagee, on demand made by, or on behalf of a person entitled to require a conveyance of the land, has stated in writing that he will not convey the same, or does not convey the same for the space of fourteen days next after a proper deed for conveying the land has been tendered to him by or on behalf of the person so entitled; or

(c) Where it is uncertain which of several devisees of the mortgagee was the survivor; or

(d) Where it is uncertain, as to the survivor of several devisees of the mortgagee, or as to the heir, or personal representative, of the mortgagee, whether he is living or dead; or

(e) Where there is no heir, or personal representative of a mortgagee who has died intestate as to the land, or where the mortgagee has died and it is uncertain who is his heir, or personal representative, or devisee.

10. Where any Court gives a judgment, or makes an order directing the sale, or mortgage of any land, every person who is entitled to or possessed of the land, or entitled to a contingent right therein as heir, or under the will of a deceased person, for payment of whose debts the judgment was given, or order made, and is a party to the action or proceeding in which the judgment, or order, was given, or made, or is otherwise bound by the judgment, or order, shall be deemed to be so entitled, or possessed, as the case may be, as a trustee within the meaning of this Act; and the Supreme Court may make an order vesting the land, or any part thereof, for such estate as that Court thinks fit, in the purchaser, or mortgagee, or in any other person.

Imp. Act, 56-57 Vict., c. 53, s. 30.

11. Where a judgment is given for the specific performance of a contract concerning any land, or for the partition, or sale in lieu of partition or exchange of any land, or generally, where any judgment is given for the conveyance of any land, either in cases arising out of the doctrine of election, or otherwise, the Supreme Court may declare that any of the parties to the action are trustees of the land, or any part thereof within the meaning of this Act, or may declare that the interests of unborn persons who might claim under any party to the action, or under the will, or voluntary settlement, of any person deceased, who was, during his lifetime a party to the contract or transactions concerning which the judgment was given, are the interests of persons who, on coming into existence, would be trustees within the meaning of this Act, and thereupon the Supreme Court may make a vesting order relating to the rights of those persons, born and unborn, as if they had been trustees.

Imp. Act, 56-57 Vict., c. 53, s. 31.

EFFECT OF VESTING ORDERS OF LAND.

12. A vesting order under any of the foregoing provisions shall, in the case of a vesting order consequential on the appointment of a new trustee, have the same effect as if the persons who before the appointment were the trustees, if any, had duly executed all proper conveyances of the land for such estate as the Supreme Court directs, or if there is no such person, or no such person of full capacity, then as if such person had existed and been of full capacity and had duly executed all proper conveyances of the land for such estate as the court directs, and shall in every other case have the same effect as if the trustee, or other person, or description or class of persons, to whose rights or supposed rights such

provisions relate, had been an ascertained and existing person of full capacity, and had executed a conveyance or release to the effect intended by the order.

Imp. Act, 56-57 Vict., c. 53, s. 32.

13. Where a vesting order is made as to any land under this Act, founded on an allegation of the personal incapacity of a trustee, or mortgagee, or on an allegation that a trustee, or the heir, or personal representative, or devisee, of a mortgagee is out of Ontario, or cannot be found, or that it is uncertain which of the several trustees, or which of several devisees of a mortgagee was the survivor, or whether the last trustee, or the heir or personal representative, or last surviving devisee of a mortgagee is living or dead, or on an allegation that any trustee or mortgagee has died intestate without an heir, or has died and it is not known who is his heir, or personal representative, or devisee, the fact that the order has been so made shall be conclusive evidence of the matter so alleged in any court upon any question as to the validity of the order; but this section shall not prevent the Supreme Court from directing a re-conveyance, or the payment of costs occasioned by any such order if improperly obtained.

Imp. Act, 56-57 Vict., c. 53, s. 40.

APPOINTMENT OF PERSONS TO CONVEY.

14. Where a vesting order may be made under any of the foregoing provisions, the Supreme Court may, if it is more convenient, by order appoint a person to convey the land, or release the contingent right, and the conveyance, or release by that person in conformity with the order shall have the same effect as an order under the appropriate provision.

Imp. Act, 56-57 Vict., c. 53, s. 33.

VESTING ORDERS, AND ORDERS RELEASING CONTINGENT RIGHTS AS TO STOCKS, AND CHOSES IN ACTION.

15. (1) In any of the following cases:—

(a) Where the Supreme Court appoints, or has appointed, a new trustee; or

(b) Where a trustee entitled alone, or jointly with another person, to stock, or to a chose in action—

Imp. Act 56-57 Vict. c. 53, s. 35.

(i) is an infant, or
(ii) is out of Ontario, or
(iii) cannot be found, or
(iv) neglects or refuses to transfer stock, or receive the dividends or income thereof, or to sue for, or recover, a chose in action, according to the direction of the person absolutely entitled thereto, for fourteen days next, after a request in writing has been made to him by the person so entitled, or
(v) neglects or refuses to transfer stock, or receive the dividends or income thereof, or to sue for, or recover a chose in action for fourteen days next after an order of the Supreme Court for that purpose has been served on him; or

(c) Where it is uncertain whether a trustee entitled alone, or jointly with another person to stock, or to a chose in action is alive or dead,

the Supreme Court may make an order vesting the right to transfer, or call for a transfer of stock, or to receive the dividends or income thereof, or to

sue for, or recover a chose in action, in any such person as the court may appoint.

(2) Where the order is consequential on the appointment by the Court of a new trustee, the right shall be vested in the persons who, on the appointment, are the trustees; and

(3) Where the person whose right is dealt with by the order was entitled jointly with another person, the right shall be vested in that last mentioned person either alone, or jointly with any other person whom the Court may appoint.

(4) Where a vesting order may be made under this section, the court may, if it is more convenient, appoint some proper person to make, or join in making, the transfer.

(5) The person in whom the right to transfer or call for the transfer of any stock is vested by an order of the court under this Act may transfer the stock to himself, or any other person, according to the order, and all incorporated banks and all companies shall obey every order made under this section.

(6) After notice in writing of an order under this section it shall not be lawful for any incorporated bank or any company to transfer any stock to which the order relates, or to pay any dividends thereon except in accordance with the order.

(7) The Supreme Court may make declarations and give directions concerning the manner in which the right to any stock, or chose in action, vested under the provisions of this Act, is to be exercised.

(8) The provisions of this Act as to vesting orders shall apply to shares in ships registered under the Acts relating to merchant shipping, as if they were stock.

Imp. Act, 56-57 Vict., c. 53, s. 35.

EFFECT OF VESTING ORDERS OF CHOSES IN ACTION.

16. Where any order has been made under the provisions of this Act by the Supreme Court vesting the legal right to sue for, or recover any chose in action, or any interest in respect thereof, in any person, he may carry on, commence and prosecute in his own name any action, or proceeding, for the recovery of such chose in action, in the same manner and with the same rights as the person in whose place he has been appointed.

Imp. Act, 56-57 Vict., c. 53, s. 32.

TRUSTEES FOR CHARITIES.

17. The Supreme Court may exercise the powers herein conferred for the purpose of vesting any land or personal estate in the trustee of any charity, or society, over which the court would have jurisdiction upon action duly instituted.

Imp. Act, 56-57 Vict., c. 53, s. 39.

18.—(1) Where land is held by trustees for a charitable purpose and it is made to appear that the land can be no longer advantageously used for such charitable purpose or that for any other reason the land ought to be sold, a Judge of the Supreme Court may make an order authorizing the sale thereof and may give such directions in relation thereto and for securing the due investment and application of the money arising from the sale as may be deemed proper.

(2) No such order shall be made unless and until notice of the application has been given to the Attorney-General of Ontario.

WHO MAY APPLY.

19.—(1) An order under this Act for the appointment of a new trustee, or concerning any land or personal estate, subject to a trust, may be made upon the application of any person beneficially interested therein, whether under disability or not, or upon the application of any person duly appointed as a trustee thereof.

Imp. Act, 13-14 Vict., c. 60, ss. 37, 40 and 41.

(2) An order concerning any land or personal estate, subject to a mortgage, may be made on the application of any person beneficially interested in the equity of redemption, whether under disability or not, or of any person interested in the moneys secured by the mortgage.

(3) Any person entitled may apply, upon notice to such persons as he may think proper, for such an order as he may deem himself entitled to.

(4) Upon the hearing of the application the court may direct a reference to enquire into any facts which require investigation, or may direct the application to stand over to enable further evidence to be adduced, or further notice to be served.

PART II.

OF THE ESTATE OF A PERSONAL REPRESENTATIVE.

CHAPTER I.

PROPERTY DEVOLVING UPON EXECUTORS AND ADMINISTRATORS UNDER THE DEVOLUTION OF ESTATES ACT.

DEVOLUTION BEFORE 1ST JULY, 1886.

In Ontario, before the first day of July, 1886, on which date the Devolution of Estates Act came into effect, the law with respect to the estate which an executor or administrator had in the property of the deceased, was as follows:

In the goods of the deceased the executor or administrator had an estate, as such, in auter droit as the minister or dispenser of the goods of the dead. All goods and chattels, real and personal, went to the executor or administrator. "By the laws of this realm," says Swinburne, "as the heir hath not to deal with the goods and chattels of the deceased, no more hath the executor to deal with the lands, tenements and hereditaments." In other words, both at law and in equity, the whole personal estate of the deceased vested in the executor or administrator.

DEVOLUTION SINCE 1ST JULY, 1886.

These distinctions, as far as they relate to the devolution of the estate of a testator or intestate upon his executor or administrator, apart from any directions given by a testator have been obsolete since 1st July, 1885. They may and do still exist in ascertaining the rights of the parties interested in the estate between themselves; but the law as to devolution of an estate upon an executor or administrator is now contained in the Devolution of Estates Act (R. S. O. 1914, c. 119).

EFFECT OF DEV. OF ESTATES ACT.

In re Reddan, 12 O. R. 781, it was held that the effect of the Devolution of Estates Act was to abolish the distinction between

real and personal property for the purposes of administration, and to cast the whole upon the personal representative for distribution as personalty.

In re Malladine, 10 C. L. T. 226, the right of an administrator to sell realty, except where needed to pay debts, was denied.

In Martin v. Magee, 18 A. R. 384, it was decided that a devisee or heir could not make a title without a conveyance from the executor or administrator, whether there were debts or not. This construction of the law had been declared by Ontario Statutes, 1891, c. 18, which enacted that executors and administrators should have power to sell and convey real estate for the purpose not only of paying the debts, but also of distributing the estate among the parties beneficially entitled as directed by the Act.

By the Act of 1891, c. 18, it was enacted that the real estate of a deceased person should shift on to the beneficiaries at the expiration of a year from the death, but power was given to the personal representative to prevent this by registering a caution. If he omitted to caution, however, the land was irretrievably gone from him. In 1893, by the Act 56 Vict. c. 20, power was given to caution after the land had shifted, and the Act, by section 4, was declared to be applicable to the estates of persons dying "before or after the passing of the said Act or this Act." The Act of 1891 was held not to be retrospective.* But the effect of section 4 of the Act of 1893 was apparently to make it retrospective, and to enable the personal representative to caution after the time in cases to which the original Act had not applied at all. The Chancellor at first held (Re Baird, 13 C. L. T. 277), that the effect of section 4 of the Act of 1893 was to make the Act of 1891 retrospective. Thus, though originally not retrospective, it became retrospective after being in force two years. But again, in Re Martin, 26 O. R. 465, the Chancellor, after further consideration, held that Re Baird was not correctly decided, and that the effect of the Act of 1893 was not to make the Act of 1891 retrospective. Thus, the estate of a person dying before the 4th of May, 1891, was not subject to shifting or cautioning And the Act of 1893 was, therefore (contrary to its express terms), restricted in its retrospective operation to the estate of persons dying before the Act was passed, but after the Act of 1891. The Legislature (Ont. Acts 1897, c. 14, s. 29) amended section 4 of the Act of 1893 by striking out the words

*_In re Ferguson_, 11 C. L. T. 201.

"before or," thus making it operative only from the date of the passing of the Act of 1891—namely, 4th May, 1891. Two periods were thus fixed:—one, from the Devolution of Estates Act, 1st July, 1886, to 4th May, 1891, and the estates of persons dying during this period were not subjected to shifting or cautioning; the other from 4th May, 1891, during which the estates of persons dying were liable to shifting and cautioning.

By section 12 of chapter 17 Ontario Acts, 1902, the possible results of this anomaly were rectified as follows:

REAL ESTATE OF PERSONS DYING BETWEEN 1ST JULY, 1886, AND 4TH MAY, 1891.

12. (1) Real estate of persons who have died on or after the first day of July, 1886, and before the fourth day of May, 1891, which has not already been disposed of or conveyed by the executors or administrators of such persons shall at the expiration of one year from the passing of this Act (17th March, 1902) be deemed thenceforward to be vested in the devisees or heirs beneficially entitled thereto (or their assigns, as the case may be), without any conveyance by the executors or administrators, unless within the said year such executors or administrators shall have caused to be registered a caution as authorized in respect of the real estate of persons dying after the said fourth day of May, 1891, by the Act passed in the fifty-fourth year of her late Majesty's reign, intituled an Act respecting the sale of Real Estate by Executors and Administrators.

(2) In case of such caution being so registered, this section shall not apply to the real estate referred to therein for twelve months from the time of such registration, or from the time of the registration of the last of such cautions, if more than one are registered.

(3) This section shall be applicable, notwithstanding a grant of probate of the will of the deceased or administration to his estate may not have been made prior to the expiration of the said period.

The next amendment was in 1906, when chapter 23 was passed repealing sec. 16 of the original Act and substituting the following:—

POWERS OF EXECUTORS AND ADMINISTRATORS AS TO SELLING AND CONVEYING REAL ESTATE.

16.—(1) Subject to the provisions of sections 8 and 9 of this Act, executors and administrators in whom the real and personal estate of a deceased person is vested under this Act shall have as full power to sell and convey such real estate for the purpose not only of paying debts, but also of distributing or dividing the estate among the parties beneficially entitled thereto whether there are debts or not as they have in regard to personal estate, and in no case shall it be necessary that the persons entitled to such real estate as heirs or devisees shall concur in any such sale except where the sale is made for the purpose of distribution only.

This section was continued in 1910 and is found in the present consolidation.

In Ontario the first Devolution of Estates Act, which came into effect 1st July, 1886, appeared in the consolidation of 1887 as chapter 108. With its various amendments referred to above

it was continued until 1910. In that year it was re-consolidated as chapter 56 of the Statutes of that year. Amendments were passed in 1911 and 1912. There were no amendments in 1913 or 1914. In 1914 the Act was re-consolidated and appears as chapter 119 of Revised Statutes of Ontario 1914 and is the present law.

The original Act in the main seems to have been taken from an Act of the Province of New South Wales, No. 20 of 26 Vict. See Plomley v. Shepherd, 64 L. T. N. S. 94; (1891), A. C. 244; Martin v. Magee, 18 A. R. 388, and all amendments up to 1910 were based on the clauses of the original consolidation of 1887 and the distinctions above referred to were of importance until that date.

In 1910 the clauses relating to devolution were taken from the Imperial Land Transfer Act, 60-61 Vict. c. 65, which had come into effect in England 1st January, 1898, and doubts raised by decisions on the wording or effect of previous statutes were removed.

The clauses of the Imperial Land Transfer Act thus adopted are:—

Land Transfer Act, 1897 (60 & 61 Vict. c. 65).

1.—(1) Where real estate is vested in any person without a right in any other person to take by survivorship it shall, on his death, notwithstanding any testamentary disposition, devolve to, and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him.

(2) This section shall apply to any real estate over which a person executes by will a general power of appointment, as if it were real estate vested in him.

(3) Probate and letters of administration may be granted in respect of real estate only, although there is no personal estate.

2.—(1) Subject to the powers, rights, duties, and liabilities hereinafter mentioned, the personal representatives of a deceased person shall hold the real estate as trustees for the persons by law beneficially entitled thereto, and those persons shall have the same power of requiring a transfer of real estate as persons beneficially entitled to personal estate have of requiring a transfer of such personal estate.

(2) All enactments and rules of law relating to the effect of probate or letters of administration as respects chattels real, and as respects the dealing with chattels real before probate or administration, and as respects the payment of costs of administration and other matters in relation to the administration of personal estate, and the powers, rights, duties, and liabilities of personal representatives in respect of personal estate, shall apply to real estate so far as the same are applicable, as if that real estate were a chattel real vesting in him or them, save that it shall not be lawful for some or one only of several joint personal representatives, without the authority of the court, to sell or transfer real estate.

(3) In the administration of the assets of a person dying after the commencement of this Act, his real estate shall be administered in the same manner, subject to the same liabilities for debt, costs, and expenses, and with the same incidents, as if it were personal estate; provided that nothing herein contained shall alter or affect the order in which real and personal assets respectively are now applicable in or towards the payment

of funeral and testamentary expenses, debts or legacies, or the liability of real estate to be charged with the payment of legacies.

(4) Where a person dies possessed of real estate the court shall, in granting letters of administration, have regard to the rights and interests of persons interested in his real estate, and his heir-at-law, if not one of the next-of-kin, shall be equally entitled to the grant with the next-of-kin, and provision shall be made by rules of court for adapting the procedure and practice in the grant of letters of administration to the case of real estate.

The Ontario corresponding sections are as follows:—3, 4 and 5 of R. S. O. 1914 c. 119, The Devolution of Estates Act.

3.—(1) All real and personal property which is vested in any person without a right in any other person to take by survivorship, shall on his death, whether testate or intestate, and notwithstanding any testamentary disposition, devolve to and become vested in his personal representative from time to time, as trustee for the persons by law beneficially entitled thereto and, subject to the payment of his debts, and so far as such property is not disposed of by deed, will, contract or other effectual disposition, the same shall be administered, dealt with and distributed as if it were personal property not so disposed of.

(2) This section shall apply to property over which a person executes by will a general power of appointment as if it were property vested in him.

(3) This section shall not apply to estates tail or to the personal property, except chattels real, of any person who at the time of his death is domiciled out of Ontario.

4. The enactments and rules of law relating to the effect of probate or letters of administration as respects personal property, and as respects the dealings with personal property before probate or administration and as respects the payment of costs of administration and other matters in relation to the administration of personal estate and the powers, rights, duties and liabilities of personal representatives in respect of personal estate shall apply to real property vesting in them, so far as the same are applicable as if that real property were personal property, save that it shall not be lawful for some or one only of several joint personal representatives without the authority of the Supreme Court or a Judge thereof to sell or transfer real property.

5. Subject to the other provisions of this Act, in the administration of the assets of a deceased person, his real property shall be administered in the same manner, subject to the same liability for debts, costs and expenses and with the same incidents as if it were personal property, but nothing in this section shall alter or affect as respects real or personal property of which the deceased has made a testamentary disposition the order in which real and personal assets are now applicable to the payment of funeral and testamentary expenses, the costs and expenses of administration, debts or legacies, or the liability of real property to be charged with the payment of legacies.

On comparing the two enactments it will be seen that the Imperial Act vests in personal representatives "real estate" as if it were a chattel real. In Ontario it is to be administered as if it were personal property.

(2) There is no exception in the Imperial Act as there is in the Ontario Act of Estates Tail.*

*The reason for the exception is that a tenant in tail cannot give a complete consent. He can bind only his own interest and cannot bind the protector of the settlement.

(3) There is no exception in the Imperial Act as there is in the Ontario Act of personal property (except chattels real) of any person who at the time of his death was domiciled out of the jurisdiction.

In Ontario, estates tail are thus not within the Devolution of Estates Act. In England by section 24 (1) of the Land Transfer Act 1897 (the Act in question) "all hereditaments corporeal and incorporeal" are deemed "land." The words in the Ontario Act in section 3 (1) "all real and personal property" cover hereditaments.

Trust estates and mortgage interests coming to a personal representative are provided for as follows (section 8 of the Devolution of Estates Act):

8. Where an estate or interest of inheritance in real property is vested on any trust or by way of mortgage in any person solely the same shall on his death, notwithstanding any testamentary disposition, devolve to and become vested in his executor or administrator in like manner as if the same were personal estate vesting in him and, accordingly, all the like powers for one only of several joint executors or administrators as well as for a single executor or administrator and for all the executors and administrators together to dispose of and otherwise deal with the same shall belong to the deceased's executor or administrator with all the like incidents but subject to all the like rights, equities and obligations as if the same were personal estate vesting in him, and for the purposes of this section the executor or administrator of the deceased shall be deemed in law his heirs and assigns within the meaning of all trusts and powers.

Imp. Act. 44-45 Vict. c. 41, s. 30.

The property thus cast upon the personal representative must be administered by him for the purposes of the estate and in trust for the persons beneficially entitled. As funeral and testamentary expenses and the costs and expenses of administration and debts and legacies must be paid it is necessary that the personal representative should have the power to sell the estate or realize upon it so that lawful claims may be met.

The power of selling is a different matter from the duty to distribute. The persons who are to receive the property are defined by sections of the Devolution of Estates Act which will be stated later on when we come to deal with the subject of Distribution of Estates.

Before dealing with the powers given under the Devolution of Estates Act to personal representatives it is necessary to notice section 14 of that Act which is as follows:

14. Nothing in section 13 shall derogate from any right possessed by an executor or administrator with the will annexed under a will or under the Trustee Act or from any right possessed by a trustee under a will.

On the question of the power to sell under the original Devolution of Estates Act, it was at one time doubted whether the powers given by statute would supersede those set out in a will where the testator had conferred upon his executor a power of sale. The doubt was removed by the decisions in the cases Re Booth's Trusts, 16 O. R. 429; Re Koch v. Wideman, 25 O. R. 266. Provisions which testators may make as to the time and manner in which their estates are to be dealt with were there held not destroyed by the Act. By amendment made in 1902 (c. 17) the specific declaration was made which is continued in section 14 just quoted.

Section 20 of the Act enacts:

20. Except as herein otherwise provided, the personal representative of a deceased person shall have power to dispose of and otherwise deal with the real property vested in him by virtue of this Act, with the like incidents, but subject to the like rights, equities, and obligations, as if the same were personal property vested in him.

As the changes introduced by the Devolution of Estates Act chiefly operated upon real estate and as these changes did not deprive the persons beneficially entitled of the estate which the law gave them while it might be withheld from them for the purpose of enabling the personal representative to realize the estate it was necessary to provide means whereby the personal representative could clothe himself with a statutory title which would give him the right to deal with the property as the case might require and sections 21 and 19 provide the machinery required.

In this connection sub-section 7 of section 21 of the Devolution of Estates Act must be borne in mind. Executors cannot exercise the powers conferred under the Act until probate is issued and administrators must have obtained administration of the realty.

(7) Section 20 and this section (21) shall not apply to an adminwhere the letters of administration are limited to the personal property, exclusive of the real property, and shall not derogate from any right possessed by a personal representative independently of this Act, but an executor shall not exercise the powers conferred by this section until he has obtained probate of the will unless with the approval of the Supreme Court or a Judge thereof.

Section 20 will be found as above and section 21 on page 104.

The subsection in question originally appeared in Ont. Act 1891 c. 18.

There are two cases to be provided, for which the personal representative could be expected to meet: the first, payment of debts; the second, the distribution of the property. For the

first object a sale might be necessary, for the second a sale might not be required as the persons beneficially entitled might wish to devide the estate in specie.

Section 21 provides as follows covering the two cases:

21.—(1) The powers of sale conferred by this Act on a personal representative may be exercised for the purpose not only of paying debts, but also of distributing or dividing the estate among the persons beneficially entitled thereto, whether they are or are not debts, and in no case shall it be necessary that the persons beneficially entitled shall concur in any such sale except where it is made for the purpose of distribution only.

(2) No sale of any such real property made for the purpose of distribution only shall be valid as respects any person beneficially entitled thereto unless he concurs therein; but where a lunatic is beneficially entitled or where there are other persons beneficially entitled whose consent to the sale is not obtained by reason of their place of residence being unknown or where, in the opinion of the Official Guardian it would be inconvenient to require the concurrence of such persons, he may, upon proof satisfactory to him that such sale is in the interest and to the advantage of the estate of such deceased person and the persons beneficially interested therein, approve such sale, on behalf of such lunatic and non-concurring persons, and any such sale made with the written approval of the Official Guardian shall be valid and binding upon such lunatic and non-concurring persons; and for this purpose the Official Guardian shall have the same powers and duties as he has in the case of infants; and provided also, that in any case the Supreme Court, or a Judge thereof, may dispense with the concurrence of the persons beneficially entitled, or any or either of them.

(3) The personal representative shall also have power, with the concurrence of the adult persons beneficially entitled thereto, and with the written approval of the Official Guardian on behalf of infants or lunatics, if any, so entitled, to convey, divide or distribute the estate of the deceased person or any part thereof among the persons beneficially entitled thereto, according to their respective shares and interests therein.

Sub-sec. 5 of sec. 21 adds the following provision:

(5) The power of division conferred by sub-section 3 may also be exercised, although all the persons beneficially interested do not concur, with the written approval of the Official Guardian, which may be given under the same conditions and with the like effect as in the case of a sale under sub-section 2.

On a division of the estate before a party entitled to a share accepts the amount offered by the personal representative it will be well for him to look into the regularity of the proceedings. If a sale has been made without the written consent of the official guardian, which should have been obtained, there may be an estoppel under section 22 of the Act, as follows:

22. The acceptance by an adult of his share of the purchase money in the case of a sale by a personal representative which has been made without the written approval of the Official Guardian, where such approval is required, shall be a confirmation of the sale as to him.

Where for any reason a personal representative desires not to distribute but to hold the estate in hand section 13 provides as follows:

13.—(1) Real property not disposed of, conveyed to, divided or distributed among the persons beneficially entitled thereto under the provisions of section 21 by the personal representative within three years after the death of the deceased shall, subject to the Land Titles Act, in the case of land registered under that Act, at the expiration of that period, whether probate or letters of administration have or have not been taken, be thenceforward vested in the persons beneficially entitled thereto under the will or upon the intestacy or their assigns without any conveyance by the personal representative unless such personal representative, if any, has registered, in the proper registry or land titles office, a caution, Form 1, under his hand, and if such caution is so registered such real property, or the part thereof mentioned therein, shall not be so vested for twelve months from the time of registration of such caution or of the last caution if more than one are registered.*

(2) The execution of every caution shall be verified by the affidavit of a subscribing witness in the manner prescribed by the Registry Act, or the Land Titles Act, as the case may be.

(3) Where the caution specifies certain parcels of land it shall be effectual as to those parcels only.

(4) The personal representative before the expiration of the twelve months may register a certificate, Form 2, withdrawing the caution; or withdrawing the same as to any parcel of land specified in such certificate, and upon registration of the certificate the property or the parcel specified shall be treated as if the caution had expired.

(5) The certificate of withdrawal shall be verified by an affidavit of a subscribing witness, Form 3.

(6) Before a caution expires it may be re-registered, and so on from time to time as long as the personal representative deems it necessary, and every caution shall continue in force for twelve months from the time of its registration or re-registration.

In the opinion of the persons beneficially interested a personal representative who is given as above stated three years within which to act, may be taking an unnecessarily long time in dividing the estate, or the personal representative himself may desire a speedier conclusion of his responsibility. In such a case the parties may act as directed by sub-sec. 4 of sec. 21, which is as follows:

(4) Upon the application of the personal representative or of any person beneficially entitled, the Supreme Court or a Judge thereof may, before the expiration of three years from the death of the deceased, direct the personal representative to divide or distribute the estate or any part thereof to or among the persons beneficially entitled, according to their respective rights and interests therein.

To meet the special cases of infants and lunatics the following directions are given: as to infants, by sec. 19; as to lunatics, sub-sec. 6, sec. 21 of the Statute:

19.—(1) Where an infant is interested in real property which but for this Act would not devolve on the personal representative, no sale or conveyance shall be valid under this Act without the written approval of the Official Guardian appointed under the Judicature Act, or, in the absence of such consent or approval, without an order of a Judge of the Supreme Court.

(2) The Supreme Court may appoint the Local Judge of any county or district, or the Local Master therein, as Local Guardian of Infants, in such county or district during the pleasure of the court, with authority to give

*See forms in appendix.

such written approval instead of the Official Guardian; and the Official Guardian and Local Guardian shall be subject to such rules as the Supreme Court may make in regard to their authority and duties under this Act.

21.—(6) Where the Inspector of Prisons and Public Charities is the Statutory Committee, under the provisions of the Hospitals for the Insane Act, of a lunatic beneficially entitled, it shall be the duty of the Official Guardian to notify the Inspector of any sale to which he has consented, and he may by leave of the Supreme Court or a Judge thereof pay to the Inspector the share of such lunatic or such part thereof as the court or Judge may direct.

Section 13 above quoted gives the personal representative—subject to application to the contrary under sub-sec. 4—three years to divide the estate, but if the caution referred to in sec. 4 is not filed or re-registered his power to distribute is gone and the beneficiaries take without him. To provide for such a lapse the following clause has been passed: sec. 15 of the Devolution of Estates Act.

15.—(1) Where a personal representative has not registered a caution within the proper time after the death of the deceased, or has not re-registered a caution within the proper time, he may register or re-register the caution, as the case may be, provided he registers therewith:—

(a) The affidavit of execution;

(b) A further affidavit stating that he finds or believes that it is or may be necessary for him to sell the real property of the deceased or the part thereof mentioned in the caution, under his powers and in fulfilment of his duties; and as far as they are known to him, the names of all persons beneficially interested in the real property, and whether any, and if so which of them, are infants or lunatics;

(c) The consent in writing of every adult and of the Official Guardian on behalf of every infant and lunatic whose property or interest would be affected; and an affidavit verifying such consent; or

(d) In the absence and in lieu of such consent, an order of a Judge of the Supreme Court or of the County or District Court of the county or district wherein the property or some part thereof is situate, or the certificate of the Official Guardian authorizing the caution to be registered, or re-registered, which order or certificate the Judge or Official Guardian may make with or without notice on such evidence as satisfies him of the propriety of permitting the caution to be registered or re-registered; and the order or certificate to be registered shall not require verification and shall not be rendered null by any defect of form or otherwise.

(2) This section shall extend to cases where a grant of probate of the will or of administration to the estate of the deceased may not have been made within the period after the death of the testator or intestate within which a caution is required to be registered.

(3) Where a caution is registered or re-registered under the authority of this section, it shall have the same effect as a caution registered within the proper time after the death of the deceased and of vesting or re-vesting as the case may be, the real property of the deceased in his personal representative, save as to persons who in the meantime have acquired rights for valuable consideration from or through any person beneficially entitled; and save also and subject to any equities of any non-consenting person beneficially entitled or person claiming under him, for improvements made after the time within which the personal representative might, without any consent, order or certificate have registered or re-registered a caution, if his real property is afterwards sold by the personal representative.

To cover the case of action by one representative the following sub-section, (4) of sec. 15 of the Devolution of Estates Act, has been enacted:

(4) Where there are two or more personal representatives, it shall be sufficient if any caution or the affidavit mentioned in clause (b) of subsection 1 is signed or made by one of such personal representatives.

A clause of temporary application provides as follows for pending cautions: sec. 16 of the Devolution of Estates Act.

16. Where a caution has been registered or re-registered under the authority of any enactment repealed and not re-enacted by this Act and is still in force, such caution shall have the same effect as if such enactment had not been repealed and may be registered in the manner provided by section 13.

To prevent improper or unnecessary cautioning of real property, thereby placing a cloud on the title to such property, the following clause is enacted: sec. 17 of the Devolution of Estates Act:

17. Any person beneficially entitled to any real property affected by the registration or re-registration of a caution, may apply to a Judge of the Supreme Court to vacate such registration or re-registration, and the Judge, if satisfied that the vesting of any such real property in such person or of any property of the deceased in any other of the persons beneficially entitled ought not to be delayed, may order that such registration or re-registration be vacated as to such property; and every caution, the registration or re-registration of which is so vacated, shall thereafter cease to operate.

Besides the power of selling and the duty to distribute the following powers of management are conferred by sec. 25 of the Devolution of Estates Act. It is sufficient to mention them here. They will appear again in discussing the powers of executors and administrators.

25.—(1) The powers of a personal representative under this Act shall include:—

(a) Power to lease from year to year while the real property remains vested in him.

(b) Power with the approval of the Supreme Court or a Judge thereof to lease for a longer term.

(c) Power to mortgage for the payment of debts.

(2) The written approval of the Official Guardian to mortgaging shall be required where it would be required if the real property were being sold.

Special provisions are made for the protection of purchasers under the procedure of the Devolution of Estates Act (secs. 23, 24 and 26). These sections will be considered in the next chapter.

ADMINISTRATORS AND EXECUTORS NOT IN ALL RESPECTS LIKE A TRUSTEE FOR SALE.

Where administrators in contracting to sell lands under circumstances not requiring the consent of the Official Guardian,

nevertheless made the contract of sale subject to his approval, and, as was alleged, lost the sale by having through negligence and delay failed to obtain such approval within the time required by the contract, but had acted throughout with good faith and to the best of their judgment:—

Held, that they were not liable to make good to the estate the deficiency resulting from a resale.

Under the above Act, executors and administrators are not, in all respects, in the same position as a trustee for sale of lands.

Upon the latter is cast a duty to sell, upon the former a mere discretion to be exercised only for certain purposes and in certain events.

In re Fletcher's Estate, 26 O. R. 499.

EXECUTORS BOUND TO SELL LAND TO PAY LEGACY.

A testator devised to his daughter a lot of land charged with a legacy. The daughter pre-deceased the testator, leaving two children to whom the lot descended.

On application by the executors at the instance of the Official Guardian, it was

Held, that it was the duty of executors to sell the land and pay the legacy.

Re Eddie, 22 O. R. 556.

HUSBAND AS ADMINISTRATOR CAN MAKE TITLE.

Land was conveyed in 1874 to a husband and wife who were married in 1864:—

Held, that they took like strangers, not by entireties, but as tenants in common:—

Held, also, that the husband could by the Devolution of Estates Act, as administrator of the wife, and in his own right, make a valid conveyance of the whole land, although there were no debts of the wife to pay. Martin v. Magee, 19 O. R. 705, distinguished.

Re Wilson and Toronto Incandescent Electric Light Co., 20 O. R. 397.

The administrators of an insolvent deceased person contracted to sell some of his lands. Subsequently to the contract a creditor who had obtained a judgment against the deceased in his life time issued execution thereon under an ex parte order therefor against the estate in the hands of the administrators:—

Held, that the execution formed no charge of encumbrance on the lands contracted to be sold.

Orders should not be made ex parte allowing issue of execution against goods of a testator or intestate in the hands of an executor or administrator.

In re Trusts Corporation of Ontario and Boehmer, 26 O. R. 191.

An executor or administrator cannot make the lands of the testator or intestate the subject of speculation or exchange by him in the same manner as if the lands were his own.

The Court refused to decree specific performance of a contract by an executor to exchange lands of his testatrix for other lands, as the purpose of the exchange could not have been the payment of debts or the distribution of the estate, and it was shown that the beneficiaries objected to the exchange, and it did not appear that the official guardian had been consulted.

Tenute v. *Walsh*, 24 O. R. 309.

Under the Devolution of Estates Act, the executor of a deceased lessor can make a valid renewal of a lease pursuant to the covenant of the testator to renew.

Re Canadian Pacific R. W. Co. and National Club, 24 O. R. 205.

RULE OF PRACTICE WHERE GUARDIAN'S CONSENT REQUIRED.

When the Official Guardian's consent is necessary to a sale of land as mentioned in the Act, the following rules must be observed:—

Before an executor or administrator takes proceedings under the Devolution of Estates Act, for the sale of real estate in which an infant is concerned, he shall give to the Official Guardian or Local Guardian appointed under that Act notice of the intention to sell, and shall not be entitled to any expenses incurred before giving such notice. (Rule 690.)

2. Produce the probate or letters of administration to, and leave a copy with, the Official Guardian.

3. Produce evidence by affidavits of the next of kin and their respective ages.

4. Produce evidence of the value of the land for the purpose of sale. The testimony of independent, experienced and reliable persons is essential.

5. If the land is under mortgage produce a statement from the mortgagee of the amount due on his mortgage, if it can be got; if not, some reliable evidence of the amount due.

If negotiations for sale are pending the Official Guardian will, upon the above material, assent to sale if a proper one. If no negotiations are pending a personal representative is at liberty to apply to the Official Guardian before any offer for the property is received, and a sale is desired by public auction or otherwise. In such a case the Official Guardian may assent that a sale be made.

In the meantime it is necessary for the administrators to:—

6. Advertise for creditors in the usual way, and prove the advertisement to the Official Guardian. Produce the sheriff's certificate as to executions against the deceased. All claims, both paid and unpaid, and all known to the executor or administrator, whether sent in or not, must be exhibited to the Official Guardian.

7. Prove the amount of the personal estate, and show what disposition, if any, has been made of it.

8. The widow must elect between her dower and her share under the Act, and the deed of election must be produced. If the land was under mortgage, show when it was made, and whether it was for purchase money or for a loan, as dower is to be computed according to circumstances.

9. The purchase money must be paid into the Canadian Bank of Commerce, to the joint credit of the executor or administrator and the Official Guardian.*

10. The draft conveyance must be approved by the Official Guardian, and he will, before delivery, mark his assent on the conveyance.

Rule 691 is as follows:

APPLICATION TO JUDGE.

The Official Guardian or other officer aforesaid, or any person interested in the land or in the proceeds of the sale thereof, may apply to a Judge, upon notice to all parties concerned, or to such parties as the Judge may direct, for such direction or order touching the real estate and the proceeds thereof, or the costs of the proceeding, as to the Judge may seem meet.

The devisee of real estate under the will of a testator, subject to the Devolution of Estates Act and amendments, has a transmissible interest in the lands during the twelve months† after the death of the testator, pending which time they are vested by the Act in the legal personal representatives.

And where real estate devised by a will so subject, of which letters of administration with the will annexed had been granted during the twelve months succeeding the testator's death, but as to which no caution had ever been registered, was, during such period, mortgaged by the devisee in good faith:—

Held, that the mortgage was operative between the devisee and the mortgagee when made, and became fully so as to land and against the personal representatives when the year expired,

*If there is no branch in the town in which the personal representatives reside the Bank of Commerce has made arrangements whereby the money may be paid into some bank in that town and transferred to the Bank of Commerce.

†Now three years.

in the absence of any warning that it was needed for their purposes.

Re McMillan, McMillan v. *McMillan*, 24 O. R. 181.

Letters of administration to the real estate of an intestate who died on October 18th, 1900, were issued to the defendants on October 14th, 1901. Prior to the latter date the defendant had advertised the lands for sale on October 22nd, 1901, on the day preceding which date, the plaintiff, one of the heirs, applied for an injunction to restrain the sale. No caution had been filed within the year, nor did it appear that there were any debts of the deceased;—

Held, that the plaintiff was entitled to an injunction, for when the defendant advertised the lands for sale he had no right to do so, and at the proposed time for sale he had no right to resell, since by the operation of the Devolution of Estates Act the property had vested in the heirs.

Dyer v. *Grove*, 2 O. L. R. 754.

POWERS OF EXECUTORS OVER REAL ESTATE.

In order that executors may be placed in a position to deal with the real estate of the testator the following statutory provisions have been enacted: R. S. O. 1914, ch. 121, the Trustee Act.

46. Where any person has entered into a contract in writing for the sale and conveyance of land, and such person has died intestate, or without providing by will for the conveyance of such land to the person entitled or to become entitled to such conveyance, if the deceased would be bound, were he alive, to execute a conveyance, his personal representative shall make and give to the person entitled to the same a good and sufficient conveyance of such land, of such nature as the deceased, if living, would be liable to give, but without covenants, except as against the acts of the grantor; and the conveyance shall be as valid and effectual as if the deceased were alive at the time of the making thereof, and had executed the same, but shall not have any further validity or effect.

DEVISES IN TRUST.

47.—(1) Subject to the provisions of The Devolutions of Estates Act, where by any will coming into operation after the eighteenth day of September, 1865, a testator charges his land or any specific part thereof with the payment of his debts or with the payment of any legacy or other specific sum of money, and devises the land so charged to a trustee for the whole of his estate or interest therein, and does not make any express provision for the raising of such debt, legacy or sum of money out of such land, the devisee in trust, notwithstanding any trusts actually declared by the testator, may raise such debt, legacy or money by a sale and absolute disposition, by public auction or private contract, of such land or any part thereof, or by a mortgage of the same, or partly by one mode and partly by the other, and in any mortgage so executed may agree to such rate of interest and such period of repayment as he may think proper.

Imp. Act, 22-23 Vict. c. 35, s. 14.

(2) The powers conferred by this section shall extend to every person in whom the land devised is for the time being vested by survivorship,

descent or devise, and to any person appointed under any power in the will or by the Supreme Court to succeed to the trusteeship vested in such devisee in trust.

Imp. Act. 22-23 Vict. c. 35, s. 15.

(3) If a testator who creates such a charge does not devise the land so charged in such terms that his whole estate and interest therein become vested in a trustee, the executor for the time being named in the will, if any, shall have the like power of raising money as is hereinbefore conferred upon the devisee in trust; and such power shall from time to time devolve upon and become vested in the person in whom the executorship is for the time being vested.

Imp. Act, 22-23 Vict., c. 35, s. 16.

(4) Any sale or mortgage under this section shall operate only on the estate and interest of the testator.

(5) Purchasers or mortgagees shall not be found to inquire whether the powers conferred by this section, or any of them, have been duly and correctly exercised by the person acting in virtue thereof.

Imp. Act, 22-23 Vict., c. 35, s. 17.

(6) This section shall not extend to a devise to any person in fee or in tail, or for the testator's whole estate and interest charged with debts or legacies, or affect the power of any such devisee to sell or mortgage.

Imp. Act, 22-23 Vict., c. 35, s. 18.

48. Every personal representative, as respects the additional powers vested in him by this Act, and any money or assets by him received in consequence of the exercise of such powers, shall be subject to all the liabilities and compellable to discharge all the duties which, as respects the acts to be done by him under such powers, would have been imposed upon a person appointed by the testator, or would have been imposed by law upon any person appointed by law, or by any court of competent jurisdiction to execute such power.

49. Where there are several personal representatives, and one or more of them die, the powers conferred upon them by this Act shall vest in the survivor or survivors.

LIABILITY OF AN EXECUTOR EXECUTING CONVEYANCES.

In order that the liability of an executor may be defined when he executes conveyances in his fiduciary capacity, the following provisions have been enacted: R. S. O. 1914, ch. 109, the Conveyancing and Law of Property Act.

COVENANTS TO BE APPLIED.

22. (1) In a conveyance made on or after the first day of July, 1886, there shall, in the cases in this section mentioned, be deemed to be included, and there shall in those cases be implied, covenants, to the effect in this section stated, by the person or by each person who conveys, as far as regards the subject-matter or share thereof expressed to be conveyed by him, with the person, if one, to whom the conveyance is made, or with the persons jointly, if more than one to whom the conveyance is made as joint tenants, or with each of the persons, if more than one, to whom the conveyance is made as tenants in common, that is to say:

Imp. Act, 44-45 V. c. 41, s. 7.

ON COVENANTS BY TRUSTEES, ETC.

In a conveyance, the following covenant by every person who conveys, and is expressed to convey, as trustee or mortgagee, or as personal

representative of a deceased person, or as committee of a lunatic, or under an order of the Court, which covenant shall be deemed to extend to every such person's own acts only, namely:

Imp. Act, s. 7.

AGAINST ENCUMBRANCES.

That the person so conveying has not executed, or done, or knowingly suffered, or been party to privy to, any deed, act, matter, or thing, whereby, or by means whereof the subject-matter of the conveyance, or any part thereof, is or may be impeached, charged, affected, or incumbered in title, estate or otherwise, or whereby or by means whereof the person who so conveys is in anywise hindered from conveying such subject-matter or any part thereof, in the manner in which it is expressed to be conveyed.

ON CONVEYANCE BY DIRECTION OF BENEFICIAL OWNER.

22—(2) Where in a conveyance it is expressed that by direction of a person expressed to direct as beneficial owner another person conveys, the person giving the direction, whether or not he conveys and is expressed to convey, as beneficial owner, shall be deemed to convey, and to be expressed to convey as beneficial owner the subject-matter so conveyed by his direction; and the covenants on his part mentioned in clause (a) of subsection 1 shall be implied accordingly.

The covenants mentioned in clause (a) are:

(I) Right to convey.
(II) Quiet enjoyment.
(III) Freedom from incumbrances; and
(IV) Further assurance.

PROTECTION OF SALES OF LAND BY EXECUTORS.

Sales of land by executors, if made in a reasonable manner, otherwise are protected in certain particulars, by statute, as follows (Trustee Act, R. S. O. 1914, ch. 121, sec. 21).

SALES BY TRUSTEES NOT IMPEACHABLE ON CERTAIN GROUNDS.

21.—(1) No sale made by a trustee after the 4th day of May, 1891, shall be impeached by any beneficiary upon the ground that any of the conditions subject to which the sale was made, were unnecessarily depreciatory, unless it also appears that the consideration for the sale was thereby rendered inadequate.

(2) No such sale shall after the execution of the conveyance be impeached as against the purchaser, upon the ground that any of the conditions subject to which the sale was made were unnecessarily depreciatory, unless it appears that the purchaser was acting in collusion with the trustee at the time when the contract for the sale was made.

(3) No purchaser, upon any such sale shall make any objection against the title upon this ground.

Imp. Act 56-57 Vict. c. 53 s. 14.

The Trustee Act contains the following interpretation provisions:

2. In this Act.

"Land" shall include messuages, and all other hereditaments, whether corporeal or incorporeal, chattels and other personal property transmissible to heirs, money to be laid out in the purchase of land, and any share of the same hereditaments and properties, or any of them, and any estate of inheritance, or estate for any life or lives, or other estate

transmissible to heirs, and any possibility, right or title of entry or action, and any other interest capable of being inherited, whether the same estates, possibilities, rights, titles and interests, or any of them, are in possession, reversion, remainder or contingency.

"Personal Estate" shall include leasehold estates and other chattels real, and also money, shares of Government and other funds, securities for money (not being real estate), debts, choses in action, rights, credits, goods, and all other property, except real estate, which by law devolves upon the executor or administrator, and any share or interest therein.

"Personal Representative" shall mean and include an executor, an administrator, and an administrator with the will annexed.

"Will" shall include a testament, and a codicil, and an appointment by will, or by writing in the nature of a will in exercise of a power, and also a disposition by will and testament, or devise of the custody and tuition of any child, by virtue of The Infants' Act, and any other testamentary disposition.

Where the deceased was married and left him surviving a widow, or where there is an estate by the curtesy, the following provisions enable the personal representative to make a sale of land free from the claims of curtesy or dower (sec. 11 and 12 (part) Devolution of Estates Act.)

11.—(1) Where the personal representative desires to sell any real property devolving upon him free from curtesy or dower he may apply to a Judge of the Supreme Court, who may, in a summary way, and upon notice, to be served personally unless the Judge otherwise directs, order that the same shall be sold free from the right of the tenant by the curtesy or dowress; and in making such order regard shall be had to the interests of all parties.

(2) If a sale free from such curtesy or dower is ordered all the right and interest of such tenant by the curtesy or dowress shall pass thereby; and no conveyance or release thereof to the purchaser shall be required; and the purchaser, his heirs and assigns, shall hold the real property freed and discharged from the estate or interest of such tenant by the curtesy or dowress.

(3) The Judge may direct the payment of such sum in gross out of the purchase money to the person entitled to curtesy or dower as he may deem, upon the principles applicable to life annuities, a reasonable satisfaction for such estate or interest; or may direct the payment to the person entitled of an annual sum, or of the income or interest to be derived from the purchase money or any part thereof, as he may deem just, and for that purpose may make such order for the investment or other disposition of the purchase money or any part thereof as he may deem necessary.

12.—(4) Where the estate consists in whole or in part of real property this section shall apply only if the widow elects under section 9 to take an interest in her husband's undisposed of real property in lieu of dower.

(5) In this section "net value" shall mean the value of the real and personal property after payment of the charges thereon, and the debts, funeral expenses and expenses of administration, including succession duty.

LAND OF INFANTS SUBJECT TO DOWER.

In connection with this subject, the following section should be noticed, taken from R. S. O. 1914, ch. 153, An Act respecting Infants.

19. If any real estate of an infant is subject to dower, and the person entitled to dower consents in writing to accept in lieu of dower a gross sum which the Court thinks reasonable, or the permanent investment of a reasonable sum in such manner that the interest thereof be

made payable to the person entitled to dower during her life, the Court may direct the payment of such sum in gross, out of the purchase money to the person entitled to dower, as upon the principles applicable to life annuities may be deemed a reasonable satisfaction for such dower; or may direct the payment to the person entitled to dower of an annual sum, or of the income or interest to be derived from the purchase money, or any part thereof, as may seem just, and for that purpose may make such order for the investment or other disposition of the purchase money, or any part thereof, as may be necessary.

Intestacy—P. E. I. Statute of Distributions, s. 10—Personal property—Next of Kin of Intestate and their Representatives.—W. died intestate leaving one brother and two sisters surviving him. One sister predeceased him, leaving a son and three grandchildren, children of her deceased daughter:—Held, that the grandchildren are entitled under s. 10 above, as representatives of their mother, to her distributive share in W.'s estate. *Re William Dodd Estate*, 6 E. L. R. 578.

Real Property—P. E. I. Statute of Distributions, s. 2—No Collaterals after Brother's and Sister's Children.—W. died intestate without issue. His father died also intestate leaving six sons, including W., and three daughters. Four of W.'s brothers predeceased him without issue and intestate, and one brother and two sisters are still living. His other sister died intestate, leaving a son and three grandchildren, children of her deceased daughter, of whom plaintiff is one:—Held, that plaintiff is not entitled to a share in W.'s real estate, being a collateral "after brother's and sister's children," under s. 2 above. *Phillips* v. *Gillis*, 6 E. L. R. 575.

"Next of Kin"—Period of Distribution.—Held, that the "next of kin" must be ascertained at the death of the testator J. C., and not at the death of his daughter, E. C., and as E. C. was sole next of kin, and being tenant for life, she had also a remainder in fee expectant on her own death, and contingent upon her dying without issue, and that this was such an interest as would pass by her will, and the plaintiff, as her executor, was entitled to the property. *Mays* v. *Carroll*, 14 O. R. 699.

"My Next of Kin Whoever They May Be Living at the Time of."—A testator gave on the failure of prior trusts six sums to "my next of kin whoever they may be living at the time of the trusts failing as aforesaid except the children or other descendants of" a deceased nephew:—Held, that the class of next-of-kin must be ascertained at the testator's death, but that only those members of it were entitled who were living when the prior trusts determined. *Nash, In re; Prall* v. *Bevan* (71 L. T. 5), followed. *Winn, In re; Brook* v. *Whitton*, 79 L. J. Ch. 165; (1910) 1 Ch. 278; 101 L. T. 737.

"My Then Next of Kin According to the Statutes" of Distribution.—Where a testator bequeaths an annuity and gives the accumulations of the surplus income of his estate, on the death of the annuitant, to his then next of kin according to the Statute of Distribution, the class to take the accumulations is an artificial class, to be ascertained on the hypothesis that the testator lives up to and dies at a period of time subsequent to the death of the annuitant. *Sturge* v. *Great Western Railway, In re* (51 L. J. Ch. 185; 19 Ch. D. 444), followed. *McFee, In re; McFee* v. *Toner*, 79 L. J. Ch. 676; 103 L. T. 210.

"Own Brothers and Sisters." — The testator by his will dated April 23, 1873, bequeathed certain property to his wife for life, and declared that at her death the property should be equally divided among all his "own brothers and sisters at her death:" Held, that the expression "my own brothers and sisters" meant brothers and sisters of the whole blood, and did not, therefore, include those of the half blood. *Dowson, In re; Dowson* v. *Beadle*, 101 L. T. 671.

Life Gifts to A, B, and C—Remainders to Respective Children—Referential Gifts to Survivors and Respective Issue—Intestacy.—*Harrison* v. *Harrison*, 70 L. J. Ch. 79; (1901) 2 Ch. 136; 85 L. T. 39; 49 W. R. 613.

The third rule of construction laid down by Kay, J., in *Bowman, In re; Lay, In re; Whytehead* v. *Boulton* (41 Ch. D. 525), examined and dissented from. *Hodge* v. *Foot* (34 Beav. 349); *Arnold's Estate, In re* (39 L. J. Ch. 875; L. R. 10 Eq. 252), and *Walker's Estate, In re; Church* v. *Tyacke* (48 L. J. Ch. 598; 12 Ch. D. 205), not followed. Ib.

Right of Action for Damages, Survival of.—1. The administrator of the estate of a deceased person cannot recover damages, in respect of a chattel belonging to the deceased, for its detention or seizure during his lifetime, or prior to the issue of the letters of administration, unless there is evidence to shew that the chattel was damaged, or that the estate of the deceased was depreciated by the seizure or detention in that period.—2. The administrator, however, is entitled to recover for the estate damages for being deprived of the use and possession of the chattel after the issue of the letters of administration. *Day* v. *Horton* (1913), 26 W. L. R. 72.

Gift of Estate to Wife.—The earlier cases on precatory trusts have been departed from, and a stricter rule now prevails. Words must not be construed as mandatory which are a mere indication of a wish or a request. The whole will must be looked at, and the court must come to a conclusion as best it can in construing, not one particular word, but the will as a whole, as to whether the alleged beneficiary is or is not a mere trustee or whether he takes beneficially with a mere superadded expression of a desire or a wish that he will do something in favour of a particular object, but without imposing any legal obligation. *In re Atkinson* (1911), 80 L. J. Ch. 370, followed. *Johnson* v. *Farney* (1913), 29 O. L. R. 223; 4 O. W. N. 1517.

Injury to and Death of Servant.—Under the Workmen's Compensation Act, where notice of injury is given and a claim for compensation made, within the proper time, by a workman who has been injured, the proceedings may, upon the death of the workman, be continued on behalf of his dependants, without a fresh notice and claim.—Section 7 of the Act considered. *Re Moffatt & Crow's Nest Pass Coal Co.* (1913), 25 W. L. R. 126.

Restraint on Anticipation—Married Woman—Rule against Perpetuities—Severance of Class.—*Ferneley's Trusts, In re*, 71 L. J. Ch. 422; (1902) 1 Ch. 543; 86 L. T. 413; 50 W. R. 346.

"Money"—"My Tin Despatch Box"—Box Containing Securities.—Held, that "money" applied only to cash in the house, money at the bank, or in the hands of agents, and to any other ready money at call at the testator's death, and did not extend to money invested in consols or other securities. *Hunter, In re; Northey* v. *Northey*, 25 T. L. R. 19.

Gift of Shares in Business.—Rule in *Howe* v. *Dartmouth* (Earl). —For the purpose of the application of the rule in *Howe* v. *Dartmouth* (Earl) (7 Ves. 137; 1 Wh. & Tu. L. C. (7th ed.), p. 68) there is no difference in principle between a trade involving risk and a leasehold burdened with onerous covenants. *Stainer* v. *Hodgkinson*, 73 L. J. Ch. 179; 52 W. R. 260.

Assignment of Chose in Action.—The Ontario statute dealing with the assignment of choses in action is substantially in the same terms as section 25 of the Judicature Act, 1873, and only enables such assignment to be made subject to existing equities. *Parsons* v. *Sovereign Bank of Canada*, 82 L. J. P. C. 60; (1913) A. C. 160; 107 L. T. 572; 20 Manson, 94; 29 T. L. R. 38.

CHAPTER II.

LAND AS ASSETS.

HEIR LIABLE AT COMMON LAW FOR DEBTS.

Besides the liability of the executor or administrator in respect of the personal assets in his hands, the heir of the deceased is liable at the common law to the extent of the real assets descended for the payment of his ancestors' debts of a certain quality, namely, those due on bonds, covenants or other specialties in cases where the deceased bound himself and his heirs. But such real assets were not liable for simple contract debts nor for specialty debts where the heirs were not expressed to be bound.

Jefferson v. *Morton*, 2 Saund. 7.

REMEDY GIVEN TO CREDITORS AGAINST DEVISEE, 3 WM. AND M., C. 14.

Creditors by specialties which affected the heir, provided he had assets by descent, had not at the common law the same remedy against the devisee of their debtor. To obviate this mischief, the Stat. 3 Wm. & Mary, c. 14, was passed. This statute gave the specialty creditor a remedy against the devisee; but did not extend to damages for breach of covenant or contracts under seal made by the testator.

HOW LIMITED.

It was further held that the statute applied only where a debt in the ordinary sense of the word existed between the parties in the lifetime of both; and, therefore, than an action of debt did not lie against the devisee of a surety in respect of breaches of covenant which did not occur in the lifetime of the testator, even though the damages were liquidated so that in form they might be sued for in an action of debt.

STATUTE 5 GEO. II., C. 7, S. 4, LAND IN COLONIES LIABLE FOR DEBTS.

By Stat. 5 Geo. II., c. 7, s. 4, it is enacted that, "The houses, lands, negroes and other hereditaments and real estates situate or being within any of the said plantations, i.e., British plantations in America, belonging to any person indebted, shall be liable to and chargeable with all just debts, duties and demands of what nature or kind soever, owned by any such person to his Majesty, or any of his subjects, and shall and may be assets for the satisfaction thereof, in like manner as real estates are by the law of England liable to the satisfaction of debts due by bond or other specialty,

and shall be subject to the like remedies, proceedings and process in any court of law or equity in any of the said plantations respectively, for seizing, extending, selling or disposing of any such houses, lands, negroes and other hereditaments and real estate, towards the satisfaction of such debts, duties and demands, and in like manner as personal estates in any of the said plantations respectively, ar seized extended, sold or disposed of for the satisfaction of debts."

INTEREST IN REAL ESTATE TO BE SEIZABLE ON A JUDGMENT AGAINST AN EXECUTOR.

Section 36 of the Execution Act, R. S. O. 1914, ch. 80, is as follows:—

HOW EXECUTION ENFORCEABLE AGAINST EXECUTOR, ETC.

36. The title and interest of a testator or intestate in land may be seized and sold under an execution upon a judgment recovered by a creditor of the testator or intestate against his executor or administrator in the same manner and under the same process as upon a judgment against the deceased if he were living.

Sections 57, 61 and 62 of the Trustee Act, R. S. O. 1914, ch. 121, are as follows:

57. Property over which a deceased person had a general 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.

3 Wm. & Mary c. 14.

61.—(1) Where an action or proceeding is instituted in any court for the payment of any debts of any person deceased, to which the estate may be subject or liable, and such court orders the estate liable to such debts, or any of them, to be sold or mortgaged, for satisfaction of such debts, and by reason of the infancy of any heir, or devisee, an immediate conveyance thereof cannot be compelled, such court shall direct, and if necessary, compel, such infant to convey such estate so to be sold, or mortgaged, by all proper assurances to the purchaser, or mortgagee thereof, and in such manner as the court shall deem proper and direct, and every such infant shall make such conveyance, or mortgage, accordingly.

11 Geo. IV. and 1 Wm. IV. c. 47, s. 11, 2-3 Vict. c. 60, s. 1.

(2) Every such conveyance, or mortgage, shall be as valid and effectual as if such infant was, at the time of executing the same, of the full age of twenty-one years.

(3) The surplus money from such sale, or mortgage, shall descend in the same manner as the estate so sold, or mortgaged, would have done.

Imp. Act, 2-3 Vict., c. 60, s. 2.

62. Where land is devised in settlement by any person whose estate is by law liable to the payment of any of his debts, and by such devise is vested in any person for life, or other limited interest, with any remainder, limitation, or gift over, which may not be vested, or may be vested in some person from whom a conveyance or other assurance of the same cannot be obtained, or by way of executory devise, and an order is made for the sale

thereof for the payment of such debts, or any of them, the court may direct the tenant for life, or other person having a limited interest, or the first executory devisee thereof, to convey, release, assign, surrender, or otherwise assure the fee simple, or other the whole interest so to be sold, to the purchaser, or in such manner as the court may deem proper; and every such conveyance, release, surrender, assignment, or other assurance, shall be as effectual as if the person who makes and executes the same was seized, or possessed of the fee simple, or other whole estate, so to be sold.

Imp. Act, 11 Geo. IV., and 1 Wm. IV., c. 47, s. 12.

EXECUTION CREDITORS NOT CREDITORS OF DECEASED.

The land of a testator or intestate is liable to be sold only for his debt, and where it is shewn that the judgment was not in fact recovered in respect of such a debt, but that the execution creditors never were creditors of the deceased, a sale of the land under it cannot be supported.

Freed v. *Orr*, 6 A. R. 690.

MONEY PAID ON UNCOMPLETED AGREEMENT TO PURCHASE.

Where money has been paid by a testator on an agreement for the purchase of lands, which the vendor has failed to complete, it may be recovered back by the executors, as money had and received to the use of the testator.

Innes v. *Brown*, 5 O. S. 665.

THE HEIRS MAY SHOW THAT THEY ARE NOT LIABLE UNDER JUDGMENT.

Since 27 Vict. c. 15, for the purpose of an execution against lands, heirs are prima facie bound by a judgment against the executor or administrator of their ancestor, in the same way as next of kin are bound; and although they are not entitled as of course to have the issue tried over again, it is open to them to show, not only fraud and collusion, but that the judgment or decree, though proper against the executor or administrator, was in respect of a matter for which the heirs were not liable.

Lovell v. *Gibson*, 19 Chy. 280.
Willis v. *Willis*, 19 Chy. 573.

POWERS OF EXECUTOR AS TO REAL ESTATE APART FROM DEVOLUTION OF ESTATES ACT.

Besides the interest which the executor or administrator in all cases took in the whole personal estate of the testator or intestate, he might in some instances be seized of real property of the deceased as trustee, or be ex officio invested with the power of disposing of it. The rule as stated by Williams (page 489), was, "You must find out the intention of the testator from the whole will taken together, and if it appears on the whole construction that you cannot give effect to the will unless you give to the executors a legal estate, then you must hold that they have the legal estate."

A testator could not alter the legal character of real property by directing, either impliedly or expressly, that it should be considered part of his personal estate; therefore, where lands were devised to executors to be sold for the payment of debts and legacies, the money arising from the sale was considered equitable not legal assets. Important consequences arose from this distinction. Equity, acting on the maxim that things shall be considered as actually done which ought to have been done, considered in some instances, land as money and money as land. Therefore, every person claiming property under an instrument directing this conversion, had to take it in the character which that instrument impressed upon it, and its subsequent devolution and disposition were governed by the rules applicable to that species of property.

REAL ESTATE CONTRACTED TO BE SOLD.

Where real estate is contracted to be sold, the vendor is regarded as a trustee for the purchaser of the estate sold, and the purchaser as a trustee of the purchase money for the vendor; therefore the death of the vendor or vendee before the conveyance or surrender, or even before the time agreed upon for completing the contract, is immaterial.

MONEY COVENANTED TO BE LAID OUT IN LAND.

On the same principle, money covenanted to be laid out in land and descended to the heir, nor did it make any difference that the covenant was a voluntary one.

TESTATOR MAY PRECLUDE QUESTIONS AS TO NATURE OF REAL ESTATE.

Again, a testator can, by his will, change the nature of his real estate to all intents and purposes, so as to preclude all questions between his real and personal representatives after his death.

FAILURE OF CONVERSION AS DIRECTED.

Again, where the conversion of land into money is directed by a testator for a particular purpose, which fails, so much of the estate as remains undisposed of results to the heir. If, on the other hand, there is a conversion of personal estate into real estate, and there is an ultimate limitation which fails to take effect, the interest which fails results for the benefit of the persons entitled to the personal estate.

LAND DEVISED FOR PAYMENT OF DEBTS.

It frequently occurs that the deceased has devised his real estate for the payment of his debts, or of his debts and legacies, or has charged his real estate with their payment.

Exoneration of Real Estate from Legacies.

With respect to the exoneration of the real estate from legacies, the general rule is equally clear as it is with respect to debts that the personal estate is the first and natural fund for the payment of them, and the real estate is only to be resorted to in aid of the personal. Therefore, even in cases where there is no doubt as to debts and legacies being effectually charged by the testator on the real estate; yet the personal estate remains undischarged from its primary liability to those claims. Accordingly, the direction of the testator to sell or mortgage his real estate for the payment of his debts and legacies, is not alone evidence of the intention of the testator that the personal estate should be exempted from those charges, and amounts only to a declaration that the real estate shall be so applied to the extent in which the personal estate, which by law is the primary fund, shall be insufficient for those purposes.

Personal Estate may be Given Discharged from Debts and Liabilities.

Nevertheless, it is clear that a testator may, if he pleases, give the personal estate as against his heir or any other real representative discharged from the payment of his debts and legacies, and in such cases the rules of exoneration in favour of the heir or devisee fail of application. A most important question, therefore, arises, viz., what is the mode of expression, on the part of the testator, which will give the personal estate exempt from such payment, in contravention of the ordinary rule that such estate is first liable. The personal fund will be exempted if the intention of the testator in its favour can be exempted if the intention of the testator in its favour can be collected from a sound interpretation put on the whole will. If there appears from the whole testamentary disposition an intention on the part of the testator so expressed as to convince a judicial mind that it was meant not merely to charge the real estate, but so to charge it as to exempt the personal. The rule of construction is such as aims at finding not that the real estate is charged, but that the personal estate is discharged.

Bootle v. *Blundell*, 1 Meriv. 230.

Where the Gift to the Person Intended to be Benefited by the Exoneration Fails, the Exoneration Itself Fails.

It is a general rule, in the absence of any expression of intention to the contrary, that if a testator charges real estate with payment of debts in exoneration of his personal estate, and bequeaths the personal estate to particular individuals, he is held to have in-

tended to exonerate his personal estate for the benefit only of those legatees, and therefore, if the bequest of the personal estate fails, whether by the death of the legatees in the lifetime of the testator or by reason of the Statute of Mortmain, so that the personal estate goes to other persons than those intended by the testator, those persons are not entitled to the benefit of the exoneration. In other words, where the gift to the person intended to be benefited by the exoneration fails, the exoneration itself fails. And this principle applies whether the property dealt with be realty or personalty.

Kilford v. *Blaney*, 31 C. D. 55, 56. See also *Fisher* v. *Fisher*, 2 Keen, 610.

PECUNIARY LEGACY GIVEN GENERALLY.

It is necessary to advert to a distinction which exists with respect to exoneration between debts and legacies. A pecuniary legacy given generally without specification of a particular fund for its payment is primarily chargeable upon the personal estate, although in other parts of the will the real estate is made expressly liable to it, but if the pecuniary legacy be not given generally but given only out of a particular fund, there the legatee can have recourse only to the particular fund.

Colville v. *Middleton*, 3 Beav. 57; *Ion* v. *Ashton*, 28 Beav. 379.

CERTAIN PORTION EXPRESSLY LIABLE.

Where a testator gives a certain portion of his personal estate, and expressly directs that it shall be liable and applicable to the payment of his debts, it is an exoneration of the general personal estate.

Coventry v. *Coventry*, 2 Dr. & Sm. 470.

UNION OF FUNDS.

Where a testator directs a sale of his real estate and the proceeds and the personal estate are thrown into one mass, which he subjects to the payment of debts and legacies, the real and the personal estate must contribute in proportion to their relative amounts to the payment of the debts and legacies.

Allen v. *Gott*, L. R. 7 Ch. 439.

But this rule is not applicable where the real and personal estate are not thrown into one mass, notwithstanding they are both given to the same persons, in trust therewith to pay the debts and legacies; for in such case each fund retains its original character and its original liabilities. In order that the rule should apply, it is not necessary that the testator should have directed an absolute conversion of the real estate; it is sufficient that he has shown an

intention of creating a mixed fund of realty and personalty out of which the legacies are to be paid.

APPLICATION OF PROPERTY IN PAYMENT OF DEBTS.

Under the Devolution of Estates Act lands are made expressly liable for the debts of the deceased, as follows:—

6. Subject to provisions of section 38 of the Wills Act, the real and personal property of a deceased person comprised in any residuary devise or bequest shall, except so far as a contrary intention appears from his will or any codicil thereto, be applicable rateably, according to their respective values, to the payment of his debts, funeral and testamentary expenses and the costs and expenses of administration.

The protection alluded to on page 107 ante of persons purchasing in good faith and for value from the personal representative is provided for by the following sections 23, 24 and 26 of the Devolution of Estates Act, R. S. O. 1914, c. 119.

23. A person purchasing in good faith and for value real property from the personal representative in manner authorized by this Act shall be entitled to hold the same freed and discharged from any debts or liabilities of the deceased owner, except such as are specifically charged thereon otherwise than by his will, and from all claims of the persons beneficially entitled thereto, and shall not be bound to see to the application of the purchase money.

24.—(1) A person purchasing real property in good faith and for value from a person beneficially entitled, to whom it has been conveyed by the personal representative by leave of the Supreme Court or a Judge thereof, shall be entitled to hold the same freed and discharged from any debts and liabilities of the deceased owner, except such as are specifically charged thereof otherwise than by his will; but nothing in this section shall affect the rights of creditors as against the personal representative personally, or as against any person beneficially entitled to whom real property of a deceased owner has been conveyed by the personal representatives.

(2) Real property which becomes vested in the person beneficially entitled thereto under section 13, shall continue to be liable to answer the debts of the deceased owner so long as it remains vested in such person or in any person claiming under him not being a purchaser in good faith and for valuable consideration, as it would have been if it had remained vested in the personal representative, and in the event of a sale thereof in good faith and for value by such person beneficially entitled he shall be personally liable for such debts to the extent of the proceeds of such real property.

26.—(1) A purchaser in good faith and for value of real property of a deceased owner which has become vested under the provisions of section 13 in a person beneficially entitled thereto, shall be entitled to hold it freed and discharged from the claims of creditors of the deceased owner, except such of them of which he had notice at the time of his purchase.

(2) Nothing in sub-section 1 shall affect the right of the creditor against the personal representative personally where he has permitted the real property to become vested in the person beneficially entitled to the prejudice of the creditor or against the person beneficially entitled.

DISCRETION GIVEN TO TRANSFER NO CONVERSION.

Where there is no absolute direction to sell, but a discretion is given to a trustee to sell or not, there is no conversion; but the property remains of the character it possessed at the death of the

testator until the trustee has seen fit in his discretion to change it by an execution of the power.

In re Trustees of Will of Ann Parker, 20 Chy. 389.

CHARGE OF DEBTS.

The operation of Part 1 of the Land Transfer Act, 1897, by putting the real estate on an equality with the personal estate as regards administration, has rendered it unnecessary for a testator to direct that his real estate shall be charged with the payment of his debts; but where such a direction has been in fact given, and therefore personalty has been exhausted in paying the debts, the court will give effect to it at the instance of pecuniary legatees, and direct that the testator's debts &c., shall be paid out of the realty, so far as is necessary in order to leave a sufficient part of the personalty not specifically bequeathed to satisfy the pecuniary legacies *Roberts, In re; Roberts* v. *Roberts*, 72 L. J. Ch. 38; (1902) 2 Ch. 834, followed. *Kempster, In re; Kempster* v. *Kempster*, 75 L. J. Ch. 286; (1906) 1 Ch. 446; 94 L. T. 248; 54 W. R. 385.

The testator had charged his real estate with the payment of his debts and legacies, both with those payable immediately on his own death (*Greville* v. *Browne*, 7 H. L. C. 689, followed), and also with the reversionary legacies payable on the death of the tenant for life; but inasmuch as the first tenant for life, being entitled to the rents and profits of the real estate, not for her separate use, took, according to *Doe d Leicester* v. *Biggs*, 2 Taunt. 109, the legal estate during her life, the testator had not devised the same so charged to the trustees for the whole of his estate and interest therein, and, consequently, the trustees had not power to sell the real estate under section 14 of the Law of Property Amendment Act, 1859 (Lord St. Leonard's Act). *Harton* v. *Harton*, 7 Term. Rep. 652, recognized in *Van Grutten* v. *Foxwell*, 66 L. J. Q. B. 745; (1897) A. C. 658, distinguished, on the ground that, in the present case, the trustees having no active duties to perform during the life of the first tenant for life, there is no reason why they should be held to take the legal estate during that period. *Doe d. Noble* v. *Bolton*, 11 Ad. & E. 188; 3 P. & D. 35, followed. *Adams and Perry's Contract, In re*, 68 L. J. Ch. 259; (1899), 1 Ch. 554; 80 L. T. 149; 47 W. R. 326.

A testator directed his executors to pay all his "funeral charges and just debts." The residue of his estate and property not required for that purpose he disposed of as follows: To his wife all his household furniture, his pew in a named church, and all cash in hand at his decease, also to his wife the entire exclusive and undivided use of his house, situate, &c., to hold the same during her natural life, then the proceeds to be equally, &c., he also gave and bequeathed the proceeds of the homestead to be equally divided, &c. There were other lands not mentioned in the will:—Held, that nevertheless the executors could give a good title to them to the purchaser, for the above words clearly imported an intention that the debts should be paid first out of the estate and property of the testator; this created a charge of debts upon his lands; and the mere failure of the testator to enumerate all his lands in the subsequent part of the will, by which there was an intestacy as to the part in question in this action, did not detract from the conclusion that the lands were so charged. The direction that his debts should be paid by his executors conferred an implied power of sale upon them for the purpose of paying the debts out of the proceeds. Held, also, that apart from the above R. S. O. 1877, c. 107, s. 19, covered the case. The testator had not indeed within the meaning of that section devised the real estate charged in such terms as that his whole estate and interest therein had become expressly vested in any trustee, but he had devised it to such an extent as to create a charge thereon which the Act in effect transmutes into a trust and thereupon clothes the executor with power to fully execute that trust by conveying the whole estate of the testator. *Yost* v. *Adams*, 8 O. R. 411, 13 A. R. 129.

PURCHASE BY TRUSTEE.

Right to Purchase.—But, after a sale by auction has been tried in vain, the trustee is at liberty to make proposals on his own behalf, and the court may, in its discretion, accept him as a purchaser of the estate. *Tennant* v. *Trenchard*, L. R. 4 Ch. 537, 546, 38 L. J. Ch. 661, followed. *Hutton* v. *Justin*, 22 Occ. N. 23, 2 O. L. R. 713.

Trustee Buying for Himself.—It is well-settled law that a trustee for sale cannot purchase the trust property, and a title based on such a conveyance cannot be forced on a subsequent purchaser. The burden of proof lies on the purchasing trustee that the parties to the conveyance to him were at arm's length, had the fullest information on all material facts and adopted the transaction. *Williams* v. *Scott*, 69 L. J. P. C. 77; (1900) A. C. 499; 82 L. T. 727; 49 W. R. 33.

Purchase of Trust Property by Discharged Trustee. — Apart from any circumstances of doubt or suspicion, there is no rule of the court that a person who has ceased to be a trustee of an instrument which contains a trust for sale cannot become a purchaser of the property subject to the trust. *Boles and British Land Co.'s Contract, In re* 71 L. J. Ch. 130; (1902) 1 Ch. 244; 85 L. T. 607; 50 W. R. 185.

Sale of Land of Intestate to one Administrator.—The practice in the land titles offices since *Re Galloway*, 3 Terr. L. R. 88 (though, perhaps, not warranted by that case), of accepting a transfer from an executor or administrator as such to himself personally, where he is beneficially interested should not be disturbed. The proposed purchaser, being one of the administrators, and therefore a trustee, had no right to purchase without leave of the court; but, in approving of the sale to him, in order to carry out that approval, it should be ordered that he have leave to purchase. And, upon the evidence, the sale should be approved, seven of the eight persons beneficially interested in the land consenting, and the sale being an advantageous one. *Re Lockhart* (1912), 20 W. L. R. 413.

Devise of Estate Tail—Provision for Reduction to Life Estate if Devisee "Born" within Testator's Lifetime—Devisee en Ventre sa Mere at Time of Testator's Death—Strict Settlement.—*Villar* v. *Gilbey*, 75 L. J. Ch. 308; (1906) 1 Ch. 583; 94 L. T. 424; 54 W. R. 473; 22 T. L. R. 347.

Possibility of Reverter—Right of Entry.—*Pemberton* v *Barnes*, 68 L. J. Ch. 192; (1899) 1 Ch. 544; 80 L. T. 181; 47 W. R. 444.

Exception.—*Fraser, In re; Lowther* v. *Fraser*, 73 L. J. Ch. 481; (1904) 1 Ch. 726; 91 L. T. 48; 52 W. R. 516; 20 T. L. R. 414.

EXONERATION.

Devise of Lands Subject to Mortgages—Exoneration—R. S. O. 1897, ch. 128, sec. 37.—Held, that the daughters on paying the $150 were not entitled to hold their lands exonerated from the mortgage for $4,000 on the lands devised to them for under sec. 37 of the Wills Act, R. S. O. 1897, ch. 128, the devise was merely of an equity of redemption and the lands were still liable to the payment of the same. *Re Goulet*, 10 O. L. R. 197.

EXONERATION OF PERSONALTY.

Exoneration of Personalty.—The rule of administration that to effect interference with the rule which makes personal estate the primary fund for payment of debts there must be not only an expression of oneration of the real estate but a sufficient expression of exoneration of the personal estate, although criticised in *Kilford* v. *Blaney*, 55 L. J. Ch. 185;

31 Ch. D. 56, 61, was not excluded by the fact that the land was outside the jurisdiction. *Smith, In re; Smith* v. *Smith* (1913), 2 Ch. 216; 108 L. T. 952.

Gift to Widow.—A bequeathed his property to his wife in the following terms: "I leave and bequeath all my property, chattels, money, bank shares, and my life insurance, or whatever I am possessed of, or entitled to, to my beloved wife to be disposed of as she may think best for the good of our children:"—Held, that under this bequest, the wife became entitled beneficially to the whole of the property. *Berryman, In re; Berryman* v. *Berryman* (1913), 1 Ir. R. 21.

The Devolution of Estates Act, R. S. O. 1914 c. 119, vests the real as well as the personal estate of a deceased person in his personal representatives for the purpose of paying his debts; but, except in the case of a residuary devise specially provided for by section 6, the order in which different classes of property are applicable to the payment of debts has not been changed by the Act.

Re Hopkins Estate, 32 O. R. 315.

A testator by his will directed his executors to pay his debts, funeral expenses and legacies thereinafter given out of his estate, and proceeded: "My executors are hereby ordered to sell all my real estate, after the payment of all my just debts and funeral expenses, and all my property and personal effects, money or chattels, are to be equally divided between my children and their heirs, that is, the heirs of my son G. and daughter E., now deceased, and my son J., Mary or Hannah, or their heirs. Should any of my said heirs not be of age at my death, my executors are to place their legacies in some of the banks of Ontario until the said heirs are of age." Held, (1) That there was no intestacy either of the real or personal estate. It is to be presumed that the testator did not intend to die intestate, and the language showed that he did not intend his heirs to take his property as real estate, as he peremptorily directed a sale, making an actual conversion of it into money, thus blending the real and personal property into a common fund, and then bequeathed it all to the legatees. (2) That the persons entitled to share under the will took per capita and not per stirpes upon the same principle as in the case of Abrey v. Newman, 16 Beav. 431. (3) That the grandchild of G. was not entitled to a share, the children of G. taking in their own right and not in a representative capacity.

Wood v. *Armour*, 12 O. R. 146.

CHAPTER III.

PERSONAL PROPERTY DEVOLVING ON EXECUTORS OR ADMINISTRATORS.

Assets Defined.

It now becomes necessary to consider the various kinds of personal property which may devolve upon an executor or administrator, otherwise called " assets."

By assets, in the hands of an executor or administrator, is meant sufficient property, from the French assez, to make him chargeable to a creditor and a legatee or party in distribution, as far as such property extends.

The general rule as to what shall be said to be assets in the hands of an executor or administrator to charge him is thus laid down:—

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 to be to 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 lieu or by reason of that, and nothing else, shall be considered to be assets in the hands of the executor or administrator to make him chargeable to a creditor or legatee.

Touchstone 496.

Functions of Executor or Administrator as to Personalty.

We have seen that in Ontario before the Devolution of Estates Act, only personal property went to the executor or administrator. As since that Act all property real and personal devolves upon the personal representative, it is necessary to explain the functions of a personal representative with respect to all kinds of property. These functions as to personalty will be considered, 1. As to Chattels Personal; 2. Chattels Real; 3. Choses in Action. Their duties as to cautioning real property have been stated in the last chapter. Their other duties with regard to real property will also appear.

Chattels, Personal, Defined.

Chattels personal are properly and strictly speaking things movable, which may be annexed to or attendant on the person of the owner, and carried about with him from one part of the

world to another. Such as animals, household stuff, money, jewels, corn, garments and everything that can be properly put in motion and transferred from place to place. All these and other things of the same nature generally speaking belong to the estate of the executor or administrator.

LIFE ESTATE IN CHATTELS.

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.

CHATTELS ANIMATE.

Chattels animate may be sub-divided into such as are domestic and such as are ferae naturae. In such as are of a nature tame and domestic as horses, kine, sheep, poultry and the like, a man may have an absolute property, and they are therefore capable of being transmitted like any other personal chattel, to his executor or administrator. Also hounds, greyhounds and spaniels and the like, as they may be valuable, and may serve not only for delight, but profit, shall go to the executors or administrators. In those of a wild nature, i.e., such as are usually found at liberty and wandering at large, generally speaking, a man can have no property transmissible to his representative.

Black. Comm. 390, 391.

QUALIFIED PROPERTY IN ANIMALS FERÆ NATURÆ PER INDUSTRIAM.

But a qualified property may subsist in animals of the latter class per industriam hominis, by a man's reclaiming them and making them tame by art, industry or education, or by so confining them within his own immediate power that they cannot escape and use their natural liberty; and the animals so reclaimed or confined belong to the executor or administrator. Thus if the deceased have any tame pigeons, deer, rabbits, pheasants or partridges, they shall go to his executors or administrators. So, though they were not tame, if they were kept alive in any room, cage or such like place, as fish in a tank; but if at any time they regain their natural liberty, the property instantly ceases unless they have animum revertendi, which is only to be known by their usual custom of returning.

2 Black. Comm. 392.
As to Bees. See R. S. O., 1914, c. 107.

PROPTER IMPOTENTIAM.

A qualified property may also subsist in animals ferae naturae propter impotentiam; as in young pigeons, who, though not tame,

being in the dovehouse, are not liable to fly out, and they go to the executor or administrator.

ANIMALS RATIONE PRIVILEGII.

The animals which a man has ratione privilegii are considered as incident to the freehold and inheritance and did not pass to the executor or administrator. Thus deer in a park, or doves in a dovehouse, did not go to the executor or administrator, but they will go to him now.

FISH.

So if a man buys fish, as carp, bream, trout, etc., and put them into his pond, and dies, in this case the heir who has the water shall have them, because they were at liberty and could not be gotten without industry; but it is otherwise if they are in a tank or in a net or the like, for then they are severed from the soil. They now devolve upon the executor in both cases.

ESTATE OF EXECUTOR LIMITED BY THAT OF DECEASED.

But if the deceased has only a term for years in the lands in which the park, warren, dovehouse or pond is situate, the deer, doves and fish will go to the executor as accessory chattels, following the estate of their principal, namely, the park, warren, dovehouse or pond. It must be understood that the executor or administrator can have no further interest than the deceased had in them, i.e., a right to take to his own use as many as he pleases during his term, provided he leaves enough for the stores; for if the lessee for years of a park, or game preserve, kills so many of the deer, fish, game or doves, that there is not sufficient left for the stores, it is waste and will be equally waste in his executor or administrator.

Old authorities, Wms. p. 533.

VEGETABLE CHATTELS.

Personal effects of a vegetable nature are the fruit or other parts of a plant or tree, when severed from the body of it, or the whole plant or tree itself when severed from the ground. But unless they have been severed, trees and the fruit and produce of them from their intimate connection with the soil, follow the nature of their principal, and, therefore, when the owner of the land died, they descended to his heir and did not pass to the executor or administrator. Hence pears, apples and other fruits in hanging on the trees at the time of the death of the ancestor, went to his heir and not to the executor or administraor and so it is of hedges, bushes, etc., for these are all the natural and permanent profit

of the earth and are reputed parcel of the ground whereon they grow.

GROWING TIMBER.

Some cases exist where even growing timber trees are, owing to special circumstances, considered as chattels, and such as will pass to the executor or administrator. Thus if a tenant in fee simple grants away the trees they are absolutely passed from the grantor and his heirs and vested in the grantee; and if the latter should die before they are felled, they go to his executor or administrator. For in consideration of law they are divided as chattels from the freehold. So where a tenant in fee simple sells the land and reserves the trees from the sale, the trees are in property divided from the land, although in fact they remain annexed to it, and will pass to the executor or administrator of the vendor. But if the person so entitled to the trees distinct from the land, afterwards purchases the inheritance, the trees will be reunited to the freehold in property, as they are de facto.

Old authorities, Williams, p. 534.

EMBLEMENTS.

There are certain vegetable products of the earth which, although they are annexed to and growing upon the land at the time of the occupier's death, yet as between the executor or administrator of the person seised of the inheritance and the lien in some cases and between the executor or administrator of the tenant for life, and the remainder man, or reversioner are considered by the law as chattels and will pass as such. They are usually called emblements.

See *Cudney* v. *Cudney*, 21 Chy. 153.

FRUCTUS INDUSTRIALES.

The vegetable chattels so named are the corn and other growth of the earth, which are produced annually, not spontaneously, and thence are called fructus industriales. When the occupier of the land, whether he be the owner of the inheritance of an estate determining with his own life, has sown or planted the soil with the intention of raising a crop of such a nature, and dies before harvest time, the law gives to his executors or administrators the profits of the crop or emblements to compensate for the labour and expense of tilling, manuring and sowing the land. The rule is established as well for the encouragement of husbandry and the public benefit, as on the consideration in the case of a tenant for life, that the estate is determined by act of God.

Lawton v. *Lawton*, 3 Atk. 16; *Cameron* v. *Gibson*, 17 O. R. 233.

EXTENT OF DOCTRINE OF EMBLEMENTS.

The doctrine of emblements extends not only to corn and grain of all kinds, but to everything of an artificial and annual profit that is produced by labour and manuring. Melons and potatoes come under this heading. But the rule does not apply to fruit growing on trees, nor to the planting of trees. Therefore if a man sow the land with acorns or plant young fruit trees, or oak, elm, ash or other trees, these cannot be comprehended under emblements.

Graves v. *Weld*, 5 B. & A. 105.

GARDENERS' SHRUBS, ETC.

The case of trees, shrubs and other produce of their grounds planted by gardeners and nurserymen with an express view to sale may be mentioned as an exception, for they are removable by them or their executors as emblements are.

Lee v. *Risdon*, 7 Taunt. 191, but see *Wetherell* v. *Howells*, 1 Campb. 227.

GROWING CROP OF GRASS.

A growing crop of grass, even if sown from seed, and though ready to be cut for hay, cannot be taken as emblements, because the improvement is not distinguishable from what is natural product, although it may be increased by cultivation.

Evans v. *Roberts*, 5 B. & C. 8, 32.

REPRESENTATIVE OF TENANT, HOW FAR ENTITLED.

Where the deceased was seised in fee simple of the land, his personal representatives are entitled to emblements as against the heir, though not as against a doweress. So if the deceased was seised in fee tail, his executor or administrator is entitled to the privilege as against the heir in tail. But where a man is seised of the soil as joint tenant and dies, the corn, etc., sown goes to the survivor, and the moiety shall not go to the executors or administrators of the deceased.

REPRESENTATIVE OF VENDOR.

If a man seised in fee sows the land and then conveys it away and dies before the severance, the crops will not go to the executor of him who has conveyed away the land, but will pass with the soil as appertaining to it.

AS AGAINST A DEVISE.

The executor of a tenant in fee did not enjoy the rights to emblements as against a devisee; for if the land itself is devised, the growing crops passed to the devisee and the executor was excluded; and though the devise was made before sowing, and the

devisor afterwards sowed, and died before severance, the devisee formerly had them and not the executor. Now, under the Devolution of Estates Act, they go to the executor.

See *Fisher* v. *Trueman*, 10 U. C. R. 617 (former law).

UNCERTAIN ESTATE.

The rule is general that everyone who has an uncertain estate or interest, if his estate determines by the act of God before severance of the crop, shall have the emblements, or they shall go to his executor or administrator. Therefore, the administrator or executor of the tenant for life is entitled to emblements to the exclusion of the remainderman or reversioner, because in this case the estate of the tenant is determined by the act of God. So a tenant for years, if he shall live so many years, sows and dies before severance, his executor shall have the corn for the uncertainty of the determination of his estate.

Old authorities, Wms. p. 541.

DOWRESS AND HER EXECUTORS WHEN ENTITLED TO EMBLEMENTS.

If the husband sows the ground, and dies, and the heir assigns the land sown to the wife for her dower, she shall have the crop, and not the executors of the husband: for she shall be in de optima possessione viri, above the title of the executor. It was with reference to this especial privilege of a dowress, that at common law she could not, according to the more general opinion, devise corn which she herself had sown, nor did it go to her executors or administrators; but by the statute of Merton, 20 Hen. III. c. 2, the representatives of a tenant in dower, like those of any other tenant for life, are entitled to emblements.

TENANCY AT WILL.

A tenancy at will is determined by the death of the lessee, and his executor or administrator will be entitled to emblements.

Co. Lit. 55, b.

RIGHT TO TAKE EMBLEMENTS.

When there is a right to emblements, the law gives a free entry, egress and regress, as much as is necessary in order to cut and carry them away.

Hayling v. *Okey*, 8 Exch. 531, 545.

CHATTELS, PERSONAL, INANIMATE, PASS TO PERSONAL REPRESENTATIVE.

As to chattels personal inanimate, all of these pass to the executor or administrator, and although any one of them should be specifically bequeathed to a legatee, it will not vest in him until the executor has assented.

THREE CASES WHERE RIGHT OF PERSONAL REPRESENTATIVE BARRED.

There are three instances in which the right of the executor or administrator to the chattels personal inanimate of the deceased is barred to some extent in favour of certain special claimants. 1. Heirlooms and things in the nature thereof in respect of the heir or successor. 2. Fixtures in respect of the heir or devisee, or in respect of the remainderman or reversioner. 3. Paraphernalia and the like in respect of the widow.

HEIRLOOMS, FIXTURES.

As to heirlooms, there being no special custom in Ontario, the law as it stands in England with regard thereto seems inapplicable in this Province. Fixtures in Ontario, when personal, descend to the personal representative. When real, they devolve upon him under the Devolution of Estates Act. They need not therefore be considered in these pages further than to point out their general characteristics. When personal inanimate chattels are affixed to the freehold they are usually denominated fixtures.

ANNEXATION OF FIXTURES.

In order to constitute such an annexation to a freehold as will bring a chattel within the general rule that whatever is affixed to the realty is thereby made parcel of it, and partakes of all its incidents and properties; it is necessary that the article should be let into it, or united to the land or to substances previously connected therewith. It is not enough that it should be laid upon the land and brought into contact with it. The rule requires something more than mere juxta-position; as, that the soil shall have been displaced for the purpose of, receiving the article, or that the chattel should be cemented, or otherwise fastened to some fabric previously attached to the ground.

Wilde v. *Walters*, 16 C. B. 637; *Argles* v. *McMath*, 26 O. R. 224.

CHATTELS AFFIXED TO BUILDING.

If a chattel be affixed to a building merely for the more complete enjoyment and use of it as a chattel, it still remains a chattel, notwithstanding it is annexed to the freehold; and is never a part of it, any more than a carpet which is attached to the floor by nails for the purpose of keeping it stretched out: And on this principle, it was held, that cotton spinning machines, screwed into, and fixed firmly to, the floor were chattels and distrainable for rent.

See cases cited, Wms. p. 554.

IN WHAT CASES EXECUTORS ARE ENTITLED TO SEVER FIXTURES.

The second branch of the enquiry respecting fixtures remains to be investigated, viz., when chattels personal have been affixed

to the freehold, and have thus lost their chattel character, under what circumstances the executor or administrator of the person who affixed them is entitled to sever them, and reduce them again to a state of personalty, so as to form part of the estate of the personal representative.

RIGHT OF THE EXECUTOR OF TENANT IN FEE TO FIXTURES AS AGAINST THE HEIR.

In the case as between the executor or administrator, and the heir of tenant in fee, the old rule of law above mentioned, "quicquid plantatur solo, solo cedit," obtained with more rigour in favour of the inheritance, and against the right to disannex therefrom, and consider as a personal chattel, any thing which had been affixed thereto; whereas, in the case as between the executors of tenant for life or in tail, and the remainderman or reversioner, the right to the fixtures was considered more favourably for the executors.

OLD RULE BETWEEN THE EXECUTOR AND HEIR OF TENANT IN FEE.

The rule as anciently established, between the executor and heir of tenant in fee seems to have had no exceptions; whatever was affixed to the freehold descended to the heir as parcel of the inheritance.

RELAXATIONS WITH RESPECT TO EXECUTOR'S RIGHT AS AGAINST THE HEIR TO TRADE FIXTURES.

But in modern times relaxations of the rule have obtained; which may be considered, 1st, with respect to fixtures put up by the tenant in fee for the purposes of trade; and secondly, with respect to fixtures put up by him for ornament or domestic convenience.

The law seems now to be held not so strict as formerly, and if these things can be taken away without prejudice to the fabric of the house, it seemeth that the executor shall have them; as tables, although fastened to the floor; furnaces, if not made part of the wall: grates, iron ovens, jacks, clock-cases, and such like, although fixed to the freehold by nails or otherwise.

TO WHAT FIXTURES AN EXECUTOR IS ENTITLED AS AGAINST A DEVISEE OF TENANT IN FEE.

As between the executor and the devisee of a tenant in fee, the general rule is, that a devisee shall take the land in the same condition as it would have descended to the heir; and consequently he will be entitled to all articles that are affixed to the land, whether the annexation takes place before or subsequent to the date of the devise; and as to those fixtures which the executor may claim against the heir, he would be equally entitled against a devisee.

There seems no doubt but that if, from the nature or condition of the property devised, it is apparent that the intention was that the fixtures should go along with the freehold to the devisee, they will pass to him, although they are of such a sort that the executor might have been entitled to them as against the heir.

RIGHT TO FIXTURES OF THE EXECUTOR OF TENANT FOR LIFE OR IN TAIL AS AGAINST REMAINDERMAN.

As between the executor of tenant for life or in tail and reversioner of remainderman, the division employed in considering the right of the executor of tenant in fee will here be adhered to: viz.: 1. The claim to fixtures set up by the particular tenant for purposes of trade. 2. The claim to fixtures set up by him for ornament or domestic convenience.

Since the law is more indulgent in this respect to the executor of the particular tenant, than to the executor of the tenant in fee, it is clear that the authorities which are in favour of the executor's right as against the heir are equally so in favour of it as against the remainderman or reversioner.

CONSTRUCTIVE ANNEXATION OF CHATTEL TO FREEHOLD.

There may be a sort of constructive annexation of a chattel not actually affixed to the freehold, as if a man has a mill and the miller takes a stone out of the mill to the intent to pick it to grind the better, although it is actually severed from the mill, yet it remains parcel of the mill and will go to the heir. The same law of keys, and is some sort of doors, windows, rings, etc., which, although they are distinct things go with the inheritance of the house. So the sails of a windmill are parcel of the freehold. Dung in a heap is a chattel and goes to the executors but if it lies scattered upon the ground so that it cannot well be gathered without gathering part of the soil with it, then it is parcel of the freehold.
Longford v. *Mahony*, 4 Dr. & Warr. 81, 107.

Since that time the general ground the courts have gone upon, of relaxing the strict construction of law, is, that it is for the benefit of the public to encourage tenants for life to do what is advantageous to the estate during their term.

RIGHT OF EXECUTOR OF TENANT FOR LIFE, &C., TO ORNAMENTAL FIXTURES, &C.

With respect to the right of the executor of tenant for life, as against the remainderman or reversioner, to fixtures set up for ornament, or domestic convenience all the cases which support the right of the executor of tenant in fee to hangings, pier-glasses, tapestry, pictures, iron backs to chimneys, furnaces, grates, etc., are

express authorities in favour of the right of the executor of the tenant in fee.

CASES OF FIXTURES BETWEEN LANDLORD AND TENANT.

With respect to the decisions between landlord and tenant it has been so repeatedly laid down by the highest authorities that the right to fixtures is considered more favourably to the tenant as against his landlord, than to the executors of tenant for life, or in tail, as against the remainderman or reversioner, that it would be wrong to conclude that a fixture set up for ornament or domestic convenience, by a tenant for life, etc., may be claimed as personalty by his executor, from the fact that it has been decided to be a removable fixture, as between landlord and tenant.

But this is perfectly clear with regard to the decisions, as to fixtures, between landlord and tenant, that wherever it has been decided that fixtures are not removable by a common tenant, a fortiori, they are not removable by the executor of tenant for life or in tail, or the executor of tenant in fee. It will, therefore, be useful to point out some cases where the decisions have been against the right of removal by a common tenant.

EXECUTORS ARE IN NO CASE ENTITLED TO FIXTURES SET UP FOR AGRICULTURE.

It was decided in a celebrated case, after much deliberation, that the privilege established in favour of tenants in trade, does not extend to agricultural tenants, so as to entitle them to remove things, which they have erected for the purposes of husbandry. In that case it was held that a tenant could not remove a beast-house, carpenter's shop, fuel-house, cart-house, pump-house, nor fold-yard wall, erected for the use of his farm even though he left the premises exactly in the same state as he found them on his entry. Hence it is followed that the executors of tenants for life or in tail or in fee, were not entitled to remove, as trade fixtures, things erected for the purposes of agriculture.

Elwes v. *Maw*, 3 East, 28.

In England, statutes passed in 1851, 1875 and 1883, provided for compensation for agricultural fixtures.

THE FIXTURES MUST BE REMOVED BEFORE THE TENANCY EXPIRES.
WITHIN A REASONABLE TIME IN THE CASE OF TENANT FOR LIFE.

A tenant must use his privilege in removing fixtures, during the continuance of his term. for if he forbears to do so within this period, the law presumes that he voluntarily relinquishes his claim in favour of his landlord. Hence it follows, that if a tenant from year to year of a house dies, and his executor or administrator gives a notice to quit, he should take care to remove the fixtures,

or dispose of the right of the deceased to them before such notice expires. In the case of a tenant for life, or in tail, his executor must, it should seem, remove the fixtures to which he is entitled within a reasonable time after the death of the testator.

GENERAL CONCLUSION AS TO THE RIGHT TO FIXTURES.

In conclusion of the subject of the right of executors to fixtures generally, it may be observed, that, after all, the question whether fixtures be removable or not in a great measure depends on the individual circumstances of each particular case, with reference to the nature of the article, and the mode in which it is fixed.

Grymes v. *Boweren*, 6 Bingh. 439.

CHATTELS REAL.

Chattels real, which are such as concern or savor of the realty or in other words, issue out of or are annexed to real estate, formerly went to the executor or administrator and not to the heir. It became necessary, therefore, for an executor or administrator to know what interests in land should be comprised under the term of "chattels real." Now under the Devolution of Estates they devolve on the personal representative.

LEASES.

All leases and terms of lands, tenements and hereditaments of a chattel quality are chattels real, and will go to the executor or administrator.

The general rule for distinguishing these two kinds is that all interests for a shorter period than a life; or, more properly speaking, for a definite space of time measured by years, months or days, are deemed chattel interests; in other words, testamentary, and of the nature for the purposes of succession of other chattels or personal property.

CHATTEL ESTATE IN LEASE.

Thus not only an estate for one's own life, or for the life of another, is deemed a freehold; but if a man grant an estate to a woman during her widowhood or while she remained unmarried, or while she behaves herself; or to a man and woman during coverture, or so long as the grantee shall dwell in such a house, or so long as he pays £10, or the like, or until the grantee be promoted to a benefice, or for any like uncertain time; in all these cases the lessee has an estate of freehold in judgment of law, while a lease for 10,000 years is not a freehold, but a chattel interest.

A LEASE FOR YEARS MADE TO ONE AND HIS HEIRS SHALL GO TO THE EXECUTOR OF THE DEVISEE.

Since an estate of freehold or inheritance cannot be derived out of a term for years, no words of limitation can alter the nature of

the latter with respect to the purposes of succession. Thus if a lease for years be made to a man and his heirs, it shall not go to his heirs, but his executors.

LEASE FOR YEARS DEVISED TO A MAN IN TAIL SHALL GO TO HIS EXECUTORS.

Again, it is a principle of law, that a limitation of a personal estate to one in tail vests the whole in him. Therefore, where a term for years is devised to one and the heirs of his body, or to the heirs male of his body, the term, at the death of the devisee, shall go to the executor and not to the heir.

So if a lease for years is given to A. and the heirs male of his body, and for default of such issue, to B. and the heirs male of his body, these words give to A. the absolute property in the whole estate and interest transmissible to his personal representatives.

Donn v. *Penny*, 1 Meriv. 20.

A LEASE FOR YEARS GIVEN TO A. FOR LIFE, AND AFTERWARDS TO HIS HEIRS GENERAL OR SPECIAL WILL GO TO HIS EXECUTORS.

With respect to the limitation of real estates, where an estate for life is given to the ancestor, followed by a subsequent limitaton to his heirs general or special, the subsequent limitation, as in the case just stated, vests in the ancestor, and the heir takes not by purchase. So in the limitation of leasehold estates, generally speaking, if a term for years be devised to one for life, and afterwards to the heirs of his body, these words are words of limitation, and the whole vests in the first taker, and is transmissible to his executor.

INCORPOREAL HEREDITAMENTS.

The chattels real which go to the executor or administrator are not confined to terms or leases of lands, but extend to chattel interests in incorporeal hereditaments, such as leases for years of markets, profits and the like.

Old authorities, Wms. p. 515.

LEASES HELD IN JOINT TENANCY DO NOT PASS TO THE EXECUTOR, &C.

If a lease is made to several for a term of years, and one of the joint tenants dies, his interest accrues to the survivors, and his executors or administrators shall take none.

TERMS FOR YEARS VEST IN THE EXECUTOR THOUGH SPECIFICALLY DEVISED.

It may be advisable here to remark, that even when a term for years is specifically devised, it will, in the first instance, vest in the executor, by virtue of his office, for the usual purposes to

which the testator's assets shall be applied, and the legatee has no right to enter without the executor's special assent.

HE CANNOT WAIVE A LEASE THOUGH IT BE WORTH NOTHING.

If the testator had a term for years, this vests in the executor or administrator, and he cannot refuse it though it be worth nothing; for the executorship or administratorship is entire, and must be renounced in toto, or not at all.

EQUITABLE INTERESTS IN TERMS.

Generally speaking, the Courts of Equity follow the rules of law in their construction of equitable interests; and, consequently, the beneficial interests in a term, where the person entitled to it has no higher interest in the estate, is treated as a chattel interest, and is transmissible to the personal representatives in the same manner as the legal estate.

MORTGAGED PROPERTY.

With respect to the title of an executor or administrator of a mortgagee to the mortgaged property, this formerly depended on the fact whether the mortgagee was in fee or for years; in the former case, the legal estate in the land will descend to the heir. In the latter case it will go like any other term for years to the executor. But with regard to the money due upon the mortgage, it is to be paid to the executor or administrator of the mortgagee by reason of the rule of equity that the satisfaction shall accrue to the fund which sustained the loss.

Tabor v. *Tabor*, 3 Swanst. 636.

POWERS OF EXECUTORS OF MORTGAGEE.

Sections 10 and 11 of the Mortgage Act, R. S. O. 1914 c. 112 are as follows:

10. Where a person entitled to any freehold land by way of mortgage has died, and his executor or administrator has become entitled to the money secured by the mortgage, or has assented to a bequest thereof, or has assigned the mortgage debt, such executor or administrator, if the mortgage money was paid to the testator or intestate in his lifetime, or on payment of the principal money and interest due on the mortgage or on receipt of the consideration money for the assignment, may convey, assign, release, or discharge the mortgage debt and the mortgagee's estate in the land; and such executor or administrator shall have the same power as to any part of the land on payment of some part of the mortgage debt, or on any arrangement for exonerating the whole or any part of the mortgage lands, without payment of money; and such conveyance, assignment, release or discharge shall be as effectual as if the same had been made by the persons having the mortgagee's estate.

EFFECT OF RECEIPTS OF SURVIVING MORTGAGEE, ETC.

11. The payment in good faith of any money to and the receipt thereof by the survivor or survivors of two or more mortgagees, or the executors or administrators of such survivor, or their or his assigns, shall effectually discharge the person paying the same from seeing to the application or being answerable of the misapplication thereof, unless the contrary is expressly declared by the instrument creating the security.

EFFECT OF ADVANCE ON JOINT ACCOUNT, ETC.

Section 4 of the Mercantile Law Act, R. S. O. 1914, ch. 133, is as follows:

4.—(1) Where in a mortgage or an obligation for payment of money, or a transfer of mortgage or of such obligation, made after the 1st day of July, 1886, the sum, or any part of the sum advanced or owing is expressed to be advanced by or owing to more persons than one out of money, or as money, belonging to them on a joint account, or where a mortgage, or such an obligation, or such a transfer is made to more persons than one, jointly, and not in shares—the mortgage money, or other money or money's worth, for the time being due to such persons on the mortgage or obligation, shall be deemed to be and remain money or money's worth belonging to those persons on a joint account, as between them and the mortgagor or obligor; and the receipt in writing of the survivors or last survivor of them, or of the personal representative of the last survivor shall be a complete discharge for all money or money's worth for the time being due, notwithstanding any notice to the payer of a severance of the joint account.

Imp. Act, 44-45 Vict. c. 41, s. 61.

(2) This section shall apply only if and as far as a contrary intention is not expressed in the mortgage, or obligation, or transfer, and shall have effect subject to the terms thereof.

MORTGAGEE MAY CONVERT MORTGAGE.

A mortgagee may by a manifest declaration of his intent convert the mortgage as well as any other part of his personal estate into land and make it pass accordingly.

Noys v. *Mordaunt*, 2 Vern. 581.

MERGER OF CHARGE.

If the mortgagee become entitled to the land in fee simple, as if it descends upon or is devised to him, a question may arise between his heirs and executors whether the charge was to be considered as subsisting for the benefit of his personal representatives, or whether it was merged for the benefit of the person taking the land. The rule in these cases was that if it was indifferent to the party in whom this union of interest arises whether the charge be kept on foot or not, it would be extinguished in equity upon the presumed intention unless an act declaratory of a contrary intention and consequently repelling such presumption was done by him. But if a purpose beneficial to the owner can be answered by keeping the charge on foot, as if he were an infant, so that charge would be disposable by him, though the land would not; in these and similar cases equity will consider the charge as subsisting, notwithstanding though it may have been merged at law.

Byam v. *Sutton*, 19 Beav. 556.

DEVISE TO EXECUTOR TO PAY DEBTS.
EFFECT OF WILLS ACT.

At common law, where a man devises land to his executors for payment of his debts, or until his debts are paid, or until a par-

ticular sum be raised out of the rents or profits, the executors take only a chattel interest thereby; that is, an estate for so many years as are necessary to raise the sum required, and this interest determines when the rents or profits would have raised the sum, although the executor may have misapplied them. Now by the Wills Act any real estate, where devised to an executor or trustee, shall pass the fee simple, or other the whole estate of the testator, unless a definite term of years or an estate of freehold shall thereby be given to him expressly or by imputation.

TITLE BY CONDITION OR REMAINDER.

An executor or administrator may become entitled to chattels real by condition. As where a lease for years has been granted by the testator upon condition that if the grantee did not pay such a sum of money, or do other acts as the testator appointed, and the condition is not performed after the testator's death, the chattel real came back to the executor. Likewise a chattel real may accrue to the executor or administrator by remainder. Thus a remainder in a term of years, though it never vested in the testator in possession, and though it continue a remainder, shall go to his executor.

Old authorities, Wms. p. 529.

CONTINGENT EXECUTORY ESTATE.

Contingent and executory estates and possibilities in chattels real accompanied by an interest are transmissible to the personal representative of a person dying before the contingency upon which they depend takes effect. Thus where a lease for years is bequeathed to A. for life and after his death to B. for the residue of the term, B. has only an executory interest during the life of A., but this interest is transmissible to B.'s executors or administrators.

Lampet's Case, 10 Co. 46.

CHOSES IN ACTION.

Besides personal property of the testator or intestate in possession; that is where he had not only the right to enjoy, but had the actual enjoyment of the thing, property in chattels personal may also be in action, that is where a man has not the occupation but merely the right to occupy the thing in question, the possession whereof may be recovered by a suit or action, from whence the thing so recoverable is called a thing or chose in action.

PERSONAL ACTIONS FOUNDED ON COVENANTS, DEBTS, ETC.

With respect to such personal actions as are founded on any obligation, contract, debt, covenant or other duty, the general rule

is established that the right of action on which the testator or intestate might have sued in his lifetime survives his death, and is transmitted to his executor, and by 31 Edw. III. s. 1, c. 11, contained in the Trustee Act, R. S. O. 1914 c. 121, to his administrator. Therefore an executor or administrator shall have actions to recover debts of every description due to the deceased, either debts of record, or debts due on special contracts or under seal, or on simple contracts.

Wms. p. 604.

EXECUTOR OR ADMINISTRATOR SOLE REPRESENTATIVE AS TO PERSONALTY.

The executor or administrator is the only representative of the deceased that the law will regard with respect of his personalties, and no word introduced into a contract or obligation can transfer to another his exclusive rights derived from such representation.

EXECUTOR OR ADMINISTRATOR NEED NOT BE NAMED IN CONTRACT.

The representation of the deceased in matter of contract by his executor or administrator is so complete that generally speaking it is not necessary in order to transmit to the executor or administrator a right of enforcing a contract that he should be named in the terms of it.

ACTIONS FOR INJURY TO PERSONAL ESTATE.
TO REAL ESTATE.

An executor or administrator has the same actions also for injury done to the personal estate of the deceased in his lifetime, whereby it has become less beneficial to the executor or administrator as the deceased himself might have had whatever the form of action might be. Formerly actions founded on wrongs to the freehold did not survive, and, therefore, the executor could not maintain quare clausum fregit, nor for other waste in the lifetime of a testator on his freehold. Now by statute, executors may within a year after the death of the testator bring actions for injuries to real estate under the following authority: R. S. O. 1914 c. 121 (The Trustee Act).

41.—(1) Except in cases of libel and slander, the executor or administrator of any deceased person may maintain an action for all torts or injuries to the person or to the property of the deceased, in the same manner, and with the same rights and remedies as the deceased would, if living, have been entitled to do; and the damages when recovered shall form part of the personal estate of the deceased.

(2) Except in cases of libel and slander, if a deceased person committed a wrong to another in respect of his person or property, the person wronged may maintain an action against the executor or administrator of the person who committed the wrong.

(3) An action under this section shall not be brought after the expiration of one year from the death of the deceased.

42. A personal representative shall have an action of account as the testator or intestate might have had if he had lived.

13 Edw. 1. St. 1 Westminster ch. 23.

ACTION FOR PERSONAL INJURY SURVIVES.

An action of injury to the person now survives to the executor of the plaintiff, who can, in case of his death pendente lite, on entering a suggestion of the death and obtaining an order of revivor, continue the action.

Mason v. *Town of Peterborough*, 20 A. R. 683.

R. S. O. 1914, c. 151, also provides for obtaining compensation to families of persons killed by accident, and in duels, thus:—

LIABILITY FOR DAMAGES WHERE DEATH CAUSED BY WRONGFUL ACT, NEGLECT OR DEFAULT.

3. Where the death of a person has been caused by such wrongful act, neglect or default, as if death had not ensued, would have entitled the person injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death was caused under circumstances amounting in law to culpable homicide.

ASSESSMENT OF DAMAGES, INSURANCE PREMIUMS.

4.—(2) In assessing the damages in any action, whether commenced before or after the passing of this Act, there shall not be taken into account any sum paid or payable on the death of the deceased or any future premiums payable under any contract of assurance or insurance made before or after the passing of this Act.

WHEN ACTION MAY BE BROUGHT BY PERSONS BENEFICIALLY INTERESTED.

8.—(1) If there is no executor or administrator of the deceased, or there being such executor or administrator, no such action is within six months after the death of the deceased brought by such executor or administrator, such action may be brought by all or any of the persons for whose benefit the action would have been, if it had been brought by such executor or administrator.

REGULATIONS AND PROCEDURE IN SUCH CASES.

(2) Every action so brought, shall be for the benefit of the same persons, and shall be subject to the same regulations and procedure, as nearly as may be, as if it were brought by such executor or administrator.

DAMAGES.

ACTIONS ON COVENANTS REAL.

Where there are covenants real, that is, which run with the land and descend to the heir, though there may have been a former breach in the ancestor's lifetime, yet, if a substantial damage has taken place since his death, the personal representative is under the Devolution of Estates Act the proper plaintiff.

The former law was settled by *Kingdom* v. *Nottle*, 1 M. & S. 355.

It remains to advert to some particular instances respecting this portion of an executor's or administrator's estate, as well in which his title has been denied as where it has been established.

ANNUITY.

An annuity is a yearly payment of a certain sum of money granted to another in fee for life or for years, charging the person

of the grantor only. As it concerns no land it is so far considered personal property that although granted to a man and his heirs, or the heirs of his body, it is not a hereditament within the Statute of Mortmain, 7 Edw. I., statute 2, nor entailable within the statute de donis. In one respect an annuity partakes of the nature of real property, namely, that when granted with words of inheritance it is descendable and formerly went to the heir to the exclusion of the executor. If words of inheritance were employed in the grant it was held that the annuity would pass to the executors. The wording of the Devolution of Estates Act is sufficiently wide to include annuities which are personal, in as much as they are included in the term "personal property." A real annuity may perhaps be considered a chattel real. The latter point is not quite so certain, and there may be some doubt as to whether real annuities do descend to the executor. They may still be held to be the property of the heir.

BANK STOCK.

As to stock in an incorporated bank, the Dominion Banking Act (Dom. Acts, 1913, c. 9) provides as follows:

SHARES PERSONALTY.

36. The shares of the capital stock of the bank shall be personal property.

TRANSMISSION OF SHARES, HOW AUTHENTICATED.

47. If the interest in any share in the capital stock of any bank is transmitted by or in consequence of—

(a) The death of any shareholder; the transmission shall be authenticated by a declaration in writing, as hereinafter mentioned, or in such other manner as the directors of the bank require.

DECLARATION.

2. Every such declaration shall distinctly state the manner in which and the person to whom the share has been transmitted, and shall give his post office address and description, and such person shall make and sign the declaration.

ACKNOWLEDGMENT.

3. The person making and signing the declaration shall acknowledge the same before a Judge of a Court of Record, or before the mayor, provost or chief magistrate of a city, town, borough or other place, or before a notary public, or a commissioner for taking affidavits, where the same is made and signed.

TO BE LEFT WITH BANK.

4. Every declaration so signed and acknowledged shall be left with the general manager, or other officer or agent of the bank, who shall thereupon enter the name of the person entitled under the transmission in the register of shareholders.

EXERCISE OF RIGHTS AS SHAREHOLDER.

5. Until the transmission has been so authenticated, no person claiming by virtue thereof, shall be entitled to participate in the profits of the bank, or to vote in respect of any such share of the capital stock.

TRANSMISSION BY WILL OR INTESTACY.

50. If the transmission has taken place by virtue of any testamentary instrument, or by intestacy, the probate of the will, or the letters of administration, or act of curatorship or tutorship, or an official extract therefrom, shall, together with the declaration, be produced and left with the general manager or other officer or agent of the bank.

ENTRY.

2. The general manager or other officer or agent shall thereupon enter in the register of shareholders the name of the person entitled under the transmission.

TRANSMISSION BY DECEASE.

51. Notwithstanding anything in this Act, if the transmission of any share of the capital stock has taken place by virtue of the decease of any shareholder, the production to the directors and the deposit with them of—

(a) Any authenticated copy of the probate of the will of the deceased shareholder, or of letters of administration of his estate, or of letters of verification of heirship, or of the act of curatorship or tutorship, granted by any court in Canada having power to grant the same, or by any court or authority in England, Wales, Ireland or any British colony, or of any testament, testamentary or testament dative expede in Scotland; or,

(b) An authentic notarial copy of the will of the deceased shareholder, if such will is in notarial form according to the law of the province of Quebec; or,

(c) If the deceased shareholder died out of His Majesty's dominions, any authenticated copy of the probate of his will or letters of administration of his property, or other document of like import, granted by any court or authority having the requisite power in such matters; shall be sufficient justification and authority to the directors for paying any dividends, or for transferring or authorizing the transfer of any share, in pursuance of and in conformity to the probate, letters of administration, or other such document as aforesaid.

BANK NOT BOUND TO SEE TO TRUSTS.

52. The bank shall not be bound to see to the execution of any trust, whether expressed, implied or constructive, to which any share of its stock is subject.

RECEIPT.

2. The receipt of the person in whose name any such share stands in the books of the bank, or, if it stands in the names of more persons than one, the receipt of one of such persons, shall be a sufficient discharge to the bank for any dividend or any other sum of money payable in respect of such share, unless, previously to such payment, express notice to the contrary has been given to the bank.

BANK NOT BOUND.

3. The bank shall not be bound to see to the application of the money paid upon such receipt, whether given by one of such persons or all of them.

EXECUTOR OR TRUSTEE NOT PERSONALLY LIABLE.

53. No person holding stock in the bank as executor, administrator, guardian, trustee, tutor or curator—

(a) Of or for any estate, trust or person named in the books of the bank as being represented by him; or,

(b) If the will or other instrument under or by virtue of which the stock is so held be named in the books of the bank in connection with such holding;

shall be personally subject to any liability as a shareholder; but the estate and funds in his hands shall be liable in like manner and to the same extent as the testator, intestate, ward or person interested in such estate and funds would be, if living and competent to hold the stock in his own name.

EXECUTOR OR TRUSTEE LIABLE IF TRUST NOT NAMED.

3. If the estate, trust or person so represented, or will or other instrument, is not named in the books of the bank, the executor, administrator, guardian, trustee, tutor or curator shall be personally liable in respect of the stock, as if he held it in his own name as owner thereof.

Bank stock is personal property. So states a clause in the Dominion Banking Act (Dom. Acts, 1913, c. 9), (see last page); and it has been declared that such stock is personal property by Ontario legislation.*

SHARES IN JIONT STOCK COMPANY.

Shares in joint stock companies are declared to be personal estate by section 56 of the Ontario Companies' Act. (R. S. O. 1914, ch. 178.)

MASTERS AND SERVANTS.

By the death of the master his servant is discharged, and, therefore, neither the executors nor administrators of the former can bring an action to enforce the contract of service after his death. Nor has the executor or administrator, generally speaking, any interest in an apprentice bound to the deceased.

APPRENTICES.

By section 10 R. S. O. 1914, c. 147 (an Act respecting Apprentices and Minors), if the master of the apprentice dies, the apprentice, if a male, shall by act of law be transferred to the person, if any, who continues the establishment of the deceased, and such person shall hold the apprentice upon the same terms as the deceased, if living, would have done.

COPYRIGHTS, PATENTS, TRADE-MARKS.

Under the Acts respecting Patents of Invention and Copyright the expression "legal representatives" includes heirs, executors, administrators and assigns or other legal representatives. In the Act respecting Trade Marks the words "legal representatives' are not interpreted. The exclusive right to an industrial design is assignable by law, but there is no provision that the personal representative of the proprietor becomes entitled to the proprietor's rights. How far an administrator would be considered as assignee of an industrial design may be doubtful.

Patent of Invention, action against executor for profits.
Leslie v. *Calvin*, 9 O. R. 207.

LIFE INSURANCE POLICIES.

As to policies of life insurance, the rights and duties of executors and administrators are as follows. (Ont. Insurance Act.)

*Execution Act, R. S. O. 1914, c. 80, s. 12.

WHERE INFANTS ARE ENTITLED TO INSURANCE MONEY.

158.—(2) Where an action is brought to recover the share of one or more infants, all the other infants entitled, or the trustees, executors, or guardians entitled to receive payment of the shares of such other infants, shall be made parties to the action, and the rights of all the infants shall be determined in one action.

"HEIRS," "LEGAL HEIRS" OR "LAWFUL HEIRS," MEANING OF.

163.—(1) In insurance of the person "heirs," "legal heirs" or "lawful heirs" shall in a contract of insurance mean and include all the lawful surviving children of the assured and also the wife or husband if surviving the assured, or where the assured died without lawful surviving children and unmarried, it shall mean those persons entitled to take according to the Devolution of Estates Act.

APPLICATION OF SECTION.

(2) This section shall in the case of an assured dying after the 19th day of March, 1910, apply to insurance of the person effected on or before the 13th day of April, 1897, and to all such insurances thereafter effected.

DAYS OF GRACE FOR PAYMENT OF PREMIUMS.

164.—(1) Where the money payable by way of premiums, dues or assessments not being the initial premiums, dues or assessments under a contract, is unpaid, the assured or any beneficiary under the contract, or the executors, administrators or assigns of the assured or of any beneficiary may within thirty days from and including the first day on which the money is due, pay, deliver or tender to the company at its head office, or at its chief agency in Ontario, or to the company's collector or authorized agent, the sum in default.

TRANSMISSION OF PREMIUM BY REGISTERED POST.

(2) The payment, delivery or tender may be by sending the money in a registered letter, and it shall be deemed to have been paid, delivered or tendered at the time of the delivery and registration of the letter at a post office in Ontario.

EFFECT OF PAYMENT DURING DAYS OF GRACE.

(3) On such payment, delivery or tender, the contract shall be ipso facto revived, notwithstanding any agreement or stipulation to the contrary.

TO RUN CONCURRENTLY WITH ANY CREDIT ALLOWED BY INSURER.

(4) Such thirty days shall run concurrently with the period of grace or credit if any allowed by the insurer for the payment of a premium or an instalment of premium.

ASSESSMENTS OF BENEFIT SOCIETIES.

(5) This section shall not extend the time allowed by sub-section 1 of section 188, for the payment of contributions or assessments.

LIMITATION OF ACTIONS.

165.—(1) Subject to the provisions of section 89 and of sub-sections 2 to 9, notwithstanding any agreement, condition or stipulation to the contrary, any action or proceeding against the insurer for the recovery of any claim under the contract of insurance, may be commenced at any time within one year next after the cause of action arose and not afterwards.

WHERE DEATH IS PRESUMED.

(2) Where death is presumed from the person on whose life the insurance is effected not having been heard of for seven years, any action or proceeding may be commenced within one year and six months from the expiration of such period of seven years, but not afterwards.

WHERE DEATH BECOMES KNOWN.

(3) Where the death of the person on whose life the insurance is effected is unknown to the person entitled to claim under the contract, an action or proceeding may be brought within one year and six months after the death becomes known to him but not afterwards, but where the death is presumed as mentioned in sub-section 2, this sub-section shall not entitle the claimant to bring an action or proceeding after the time mentioned in that sub-section.

WHERE ACTION PREMATURELY BROUGHT.

(4) Where an action or proceeding brought within the prescribed period fails because of its having been prematurely brought and on that ground only, the plaintiff shall be entitled to bring a new action or proceeding at any time within the prescribed period or within six months after the final determination of the first action or proceeding.

WHEN ACTION MAY BE BROUGHT UNDER CONTRACT.

89.—(1) No action shall be brought for the recovery of money payable under a contract of insurance until the expiration of sixty days after proof, in accordance with the provisions of the contract, of the loss or of the happening of the event upon which the insurance money is to become payable or such shorter period as may be prescribed by any enactment regulating the contracts of the corporation or as may be fixed by the contract of insurance.

BENEFICIARY, ASSIGNEE, ETC., OF CONTRACT MAY SUE IN HIS OWN NAME.

(2) After such sixty days or shorter period any person entitled as beneficiary or by assignment or other derivative title to the insurance money, and having the right to receive the same and to give an effectual discharge therefor may sue for the same in his own name, any rule, stipulation or condition to the contrary notwithstanding.

INSURABLE INTEREST IN ONE'S OWN LIFE.

171.—(1) Every person of the full age of twenty-one years shall have an unlimited insurable interest in his own life and may effect bona fide at his own charge insurance of his own person for the whole term of life, or any shorter term for the sole or partial benefit of himself, or of his estate, or of any other person, whether the beneficiary has or has not an insurable interest in the life of the assured, and the insurance money may be made payable to any person for his own use or as trustee for another person.

FRAUDS IN PAYMENT OF PREMIUMS.

(2) If the premiums of such insurance were paid by the assured with intent to defraud his creditors, they shall be entitled to receive out of the insurance money an amount not exceeding the premiums so paid and interest thereon.

BENEFICIARY, HOW DESIGNATED.

(3) The assured may designate the beneficiary by the contract of insurance or by an instrument in writing attached to or endorsed on it or by an instrument in writing, including a will, otherwise in any way identifying the contract, and may by the contract or any such instrument, and whether the insurance money has or has not been already appointed or apportioned, from time to time appoint or apportion the same, or alter or revoke the benefits, or add or substitute new beneficiaries, or divert the insurance money wholly or in part to himself or his estate, but not so as to alter or divert the benefit of any person who is a beneficiary for value, nor so as to alter or divert the benefit of a person who is of the class of preferred beneficiaries to a person not of that class or to the assured himself, or to his estate.

EFFECT OF DECLARATION BY WILL.

(4) Where the instrument by which a declaration is made is a will such declaration as against a subsequent declaration shall be deemed to have been made at the date of the will and not at the death of the testator.

OPERATION OF GENERAL DECLARATION.

(5) Where the declaration describes the subject of it as the insurance or the policy or policies of insurance or the insurance fund of the assured, or uses language of like import in describing it, the declaration, although there exists a declaration in favour of a member or members of the preferred class of beneficiaries, shall operate upon such policy or policies to the extent to which the assured has the right to alter or revoke such last mentioned declaration.

APPOINTMENT OF TRUSTEES.

(6) The assured may, by the contract or by a declaration, or by any writing under his hand, appoint a trustee or trustees of the insurance money and may from time to time revoke such appointment in like manner, and appoint a new trustee or trustees and make provision for the appointment of a new trustee or trustees, and for the investment of the insurance money, and payment made to such trustee or trustees shall discharge the insurer.

BENEFICIARY FOR VALUE.

(7) A beneficiary shall be deemed to be a beneficiary for value only when he is expressly stated to be so in the contract, or in an endorsement thereon signed by the assured.

OTHER MODES OF ASSIGNMENT NOT AFFECTED.

(8) Nothing in this Act shall restrict or interfere with the right to effect or assign a policy in any other manner allowed by law.

PROVISION IN CASE OF DEATH OF PERSONS ENTITLED WHERE NO APPORTIONMENT.

(9) Where there are several beneficiaries, if one or more of them die in the lifetime of the assured and no apportionment or other disposition is subsequently made by him, the insurance shall be for the benefit of the surviving beneficiary or beneficiaries in equal shares if more than one; and if all the beneficiaries, or the sole beneficiary, die in the lifetime of the assured, and no other disposition is made by him, the insurance shall form part of the estate of the assured.

PROTECTION OF INSURER IN PAYING INSURANCE BEFORE NOTICE OF DECLARATION.

(10) Until the insurer has received the original or a copy of an instrument in writing affecting the insurance money or any part thereof, or of any appointment or revocation of an appointment of a trustee, the insurer may deal with and obtain a valid discharge from the assured, or with and from his beneficiaries, or with and from his trustees, executors, administrators or assigns in the same manner and with the like effect as if such instrument in writing, appointment, or revocation had not been made, but nothing in this sub-section shall affect the right of any person entitled by virtue of such instrument, appointment, or revocation to recover insurance money from the person to whom it has been paid by the insurer.

APPOINTMENT OF MOTHER WITHOUT SECURITY.

175.—(2) Where insurance money not exceeding $3,000 is payable to the wife and children of the assured, and some or all of the children are infants, the court may appoint the widow of the assured, if she is the mother of such infants, as their guardian without security and such insurance money may be paid to her as such guardian.

INVESTMENT OF SHARES. APPLICATION OF INFANTS' SHARES.

(3) A trustee, subject to the terms of the trust instrument, or a guardian may invest the money received in any security in which trustees under the law of Ontario may invest trust funds, and may from time to time alter, vary and transpose the investments; and where the money is held for infants, may also apply all or part of the annual income arising from the share or presumptive share of each of the infants, in or towards

his maintenance and education, in such manner as the trustee or guardian thinks fit, and may also with the approval of the Supreme Court or a Judge thereof, advance to and for any of the infants, notwithstanding his minority, the whole or any part of his share for his advancement or preferment in life or on his marriage.

DEATH OF ASSURED ABROAD, PAYMENT TO FOREIGN REPRESENTATIVE.

177.—(1) Where under a contract made or by law deemed to be made in Ontario, or a contract made by a corporation having its head office or chief agency in Ontario, the insurance money is payable to the representative of a person who at his death was domiciled or resident in a foreign jurisdiction, if no person has become his personal representative in Ontario, the money may on the expiration of two months after such death be paid to the personal representative appointed by the proper court of the foreign jurisdiction.

WHERE CONTRACT DIRECTS PAYMENT TO FOREIGN REPRESENTATIVE.

(2) Where such a contract provides that the insurance money may be paid to the personal representative appointed by the court of the jurisdiction in which the deceased may be resident or domiciled at the time of his death, the money may be paid to such representative or according to the terms of the contract at any time after the death.

INTESTACY: PAYMENT (WITHOUT REPRESENTATION), ACCORDING TO FOREIGN LAW.

(3) Where under such a contract the insurance money is payable to the representatives of a person who at the time of his death was domiciled or resident in a foreign jurisdiction and died intestate, the money may after the expiration of three months after such death, if no person has become his personal representative in Ontario, be paid to the person entitled according to the law of the foreign jurisdiction to receive the money and give a discharge for the same as if such money were by the terms of the contract payable in such foreign jurisdiction.

TESTACY: PAYMENT ACCORDING TO FOREIGN LAW.

(4) Where a testator domiciled or resident in a foreign jurisdiction disposes of the insurance money by a will valid according to the law of that jurisdiction, such money may be paid according to the terms of the contract at any time after the death, to the person entitled under such will to receive and give a valid discharge for money payable in such foreign jurisdiction.

WHERE GUARDIAN APPOINTED BY FOREIGN COURT.

(5) Where it appears by letters of guardianship or other like document, relating to persons under disability, issued by a court in a foreign jurisdiction, or by a certificate of the Judge under the seal of such court, that it has been shown to the satisfaction of such court that the assured at the maturity of the contract was domiciled or resident within its jurisdiction, and it also appears that security to the satisfaction of such court in respect of and for the due application and account of the money payable under the contract has been given by the guardian or other like officer appointed by such letters or documents, the Supreme Court or a Judge thereof upon application for the appointment of such guardian or like officer as trustee under this section, may dispense with the giving of security, if it is also shown that the infants or other beneficiaries under disability reside within the jurisdiction of the foreign court, and that the trustee is a fit and proper person.

APPLICATION OF SECTION.

(6) This section shall apply whether the death has or has not occurred before the passing of this Act.

WHO SHALL CONSTITUTE PREFERRED BENEFICIARIES.

178.—(1) Preferred beneficiaries shall constitute a class and shall include the husband, wife, children, grandchildren and mother of the

assured, and the provisions of this and the following three sections shall apply to contracts of insurance for the benefit of preferred beneficiaries.

WHERE TRUST CREATED BY THE PROVISIONS OF THE CONTRACT FOR BENEFIT OF PREFERRED BENEFICIARIES.

(2) Where the contract of insurance or declaration provides that the insurance money or part thereof, or the interest thereof, shall be for the benefit of a preferred beneficiary or preferred beneficiaries, such contract or declaration shall, subject to the right of the assured to apportion or alter as hereinafter provided, create a trust in favour of such beneficiary or beneficiaries, and so long as any object of the trust remains, the money payable under the contract shall not be subject to the control of the assured, or of his creditors, or form part of his estate, but this shall not interfere with any transfer or pledge of the contract to any person prior to such declaration.

INSURANCE FOR BENEFIT OF FUTURE WIFE—OR WIFE AND CHILDREN.

(3) Where two or more beneficiaries are designated but no apportionment is made, all of them shall share equally, and where it is stated in the contract or declaration that the insurance money or any part of it is for the benefit of the wife of the assured only, or of his wife and children generally, or of his children generally, the word "wife" shall mean the wife living at the maturity of the contract, and the word "children" shall include as well all the children of the assured living at the maturity of the contract, whether by his then or any former wife, as the children living at the maturity of the contract of any child of the assured who predecease him, such last mentioned children taking the share their parent would have taken if living, and the like construction shall prevail where the insurance is effected by a man while unmarried or a widower for the benefit of his future wife or his future wife and children, or of his children.

WHERE ASSURED HAS RE-MARRIED AFTER DESIGNATION.

(4) Sub-section 3 shall apply, whether or not the wife is designated by name or where the wife is designated by name and predeceases him the assured may revoke or alter such designation as if the wife were not of the class of preferred beneficiaries.

WHERE ASSURED UNMARRIED, OR WIDOWER WITHOUT ISSUE.

(5) Where an unmarried man or a widower effects the contract or declares it to be for the benefit of his future wife or of his future wife and children or of his children, but at maturity of the contract the assured is still unmarried, or is a widower without issue, the insurance money shall form part of his estate.

WHERE ASSURED DOES NOT MARRY THE SPECIFIED BENEFICIARY.

(6) Where an unmarried man or a widower effects or declares the contract to be for the benefit of his future wife, or future wife and children, and the intended wife is designated by name, or is otherwise clearly ascertained in the contract, but the intended marriage does not take place, all questions arising on such contract shall be determined as in the case of a beneficiary not belonging to the preferred class.

WHERE APPORTIONMENT MADE BUT BENEFICIARY PREDECEASES ASSURED.

(7) If one or more or all of the designated preferred beneficiaries, whether an apportionment has been made or not, die in the lifetime of the assured or if a sole preferred designated beneficiary dies in his lifetime, he may by a declaration provide that the share or shares of the person or persons so dying shall be for the benefit of the assured or of his estate or of any other person, whether or not such person belongs to the preferred class; and in the absence of any such declaration the share or shares of the person or persons so dying shall be for the benefit, in equal shares of the survivor or survivors of such designated preferred beneficiaries, except where the person so dying is a child of the assured, and leaves a child or children surviving him, in which case his share and any share to which he would have become entitled if he had survived, shall be

for the benefit of his child or children, in equal shares, and if there is no such surviving beneficiary and no such child entitled to take, the insurance shall be for the benefit in equal shares, if there is more than one person entitled, of the wife and children of the assured living at his death and the child or children of any deceased child who shall be entitled to the share which the parent if then living would have taken, and if there is no surviving wife, child or grandchild, the insurance money shall form part of the estate of the assured.

ASSURED MAY VARY BENEFIT OR BENEFICIARY.

179.—(1) The assured may by a declaration vary a contract or declaration previously made so as to restrict, extend, transfer or limit the benefits of the insurance to any one or more persons of the class of preferred beneficiaries to the exclusion of any or all others of the class or wholly or partly to one or more for life, or any other term, with remainder to any other or others of the class, but the assured shall not except as provided by sub-section 7 of section 178 revoke or alter any disposition made under the provisions of this Act in favour of any one or more of the preferred class except in favour of some one or more persons within the preferred class so long as any of the persons of the preferred class in whose favour the contract or declaration is made are living.

WHERE BENEFICIARY UNDER FRIENDLY SOCIETY CONTRACT IS LEADING A CRIMINAL OR IMMORAL LIFE.

(2) Where it is proved to the satisfaction of the executive officers of a friendly society that a preferred beneficiary is leading a criminal or an immoral life, and there is no other person to whom the assured may under the provisions of this Act divert the benefit, the assured may, with the consent of such executive officers, by a declaration provide that all right, title and interest of such beneficiary is forfeited and annulled; and thereupon such right, title and interest shall be forfeited and annulled accordingly; and the assured may then or thereafter make a new appointment in accordance with the provisions of this Act and the lawful rules of the society.

CASE OF OTHER CONTRACTS.

(3) Where the contract is made by an insurer other than a friendly society, upon petition, and upon the like facts as in subsection 2 mentioned being proved to the satisfaction of the Supreme Court or a Judge thereof the Court or Judge may make an order annulling the benefit and granting such other relief as under the circumstances appears proper.

ASSURED MAY DIRECT APPLICATION OF BONUSES AND PROFITS.

181.—(1) Notwithstanding that the insurance money may be payable to preferred beneficiaries or to a trustee for preferred beneficiaries, the assured may, in writing, require the insurer to pay the bonuses or profits, or portions thereof, accruing under the contract, to the assured, or to apply the same in reduction of the annual premiums payable by him in such way as he may direct; or to add such bonuses or profits to the benefit; and the insurer shall pay or apply such bonuses or profits as the assured directs; and according to the rates and rules established by the insurer; but the insurer shall not be obliged to pay or apply such bonuses or profits in any manner contrary to the stipulations in the contract or the application therefor.

SURRENDER OF CONTRACT.

(2) Where a contract of insurance is made or declared to be for the benefit of one or more preferred beneficiaries and all of them are of full age, they and the assured may surrender the contract or may assign the same either absolutely or by way of security.

POWER OF ASSURED AND ADULTS TO DEAL WITH POLICY.

(3) Where such preferred beneficiaries include children or grandchildren it shall be sufficient so far as their interests are concerned if all then living are of full age and join in the surrender or assignment.

WHO DEEMED PERSON ENTITLED TO BENEFIT OF POLICY.

(4) Where a person is entitled to a benefit only in the event of the death of another person named as a beneficiary, it shall be sufficient for the purposes of this section if such last mentioned person joins in the surrender or assignment.

JOINT TENANCY.

Survivorship holds place between joint tenants of chattel property as well as between joint tenants of inheritance or freehold. Hence an interest which a testator had in a chose in action jointly with another will not pass to his executor. But an exception is made in favour of merchants and traders, and persons engaged in joint undertakings in the nature of trade. The share of the deceased goes to his personal representative.

JOINT OBLIGATIONS.

On the other hand the liability of a deceased person as a joint contractor, obligor or partner, may be enforced against his estate under R. S. O. ch. 133 The Mercantile Law Amendment Act, s. 5, which provides as follows:

REMEDIES AGAINST REPRESENTATIVES OF DECEASED JOINT CONTRACTORS.

5. In case any one or more joint contractors, obligors or partners die, the person interested in the contract, obligation or promise, entered into by such joint contractors, obligors or partners, may proceed by action against the representatives of the deceased contractor, obligor or partner, in the same manner as if the contract, obligation or promise had been joint and several, and this notwithstanding there may be another person liable under such contract, obligation or promise still living, and an action pending against such person; but the property and effects of shareholders in chartered banks or the members of other incorporated companies, shall not be liable to a greater extent than they would have been if this section had not been passed.

NO ACTION TO BE DEFEATED FOR WANT OF PARTIES.

Under the Judicature Act, all matters in controversy between parties are to be finally determined. To carry out this intention of the Legislature, the Consolidated Rules of Practice provide that no action is to be defeated by want of parties, and the court may deal with the matter in controversy so far as regards the rights and interests of the parties before it.

RULES FOR JOINDER OF PARTIES.

All persons claiming relief jointly, severally or in the alternative, may be made plaintiffs. All persons against whom any relief is claimed jointly, severally or the alternative, may be made defendants. The defendants need not all be interested in all the relief claimed, or in all the causes of action. The defendant may also bring before the court persons not already parties against whom he seeks any relief related to or connected with the subject matter of the suit. Thus, all parties may be added that may be necessary to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the action.

METHOD OF EXCEPTION FOR NON-JOINDER.

The above enactment and rules remove the difficulties formerly met in actions against joint contractors.

Gildersleeve v. *Balfour*, 15 P. R. 293.

NO ABATEMENT BY REASON OF DEATH.

An action does not become abated by reason of the death of parties if the cause of action survives or continues. Whether the cause of action survives or not, there is no abatement by reason of death of parties between the verdict or finding of issues and the judgment, but the judgment may be entered notwithstanding the death.

ORDER ADDING PARTIES.

C. R. 300, 301 provide that where by reason of death or change of interest after the commencement of an action, other parties are required, an order adding such parties may be obtained. This rule applies where the cause of action survives or continues to some person not already a party.

LEASE OF LANDS HELD IN FEE FOR YEARS RESERVING RENT.

When a man, seized in fee, makes a gift in tail, or leases for life or for years, reserving rent, the whole rent which becomes due after his death formerly went with the reversion as an incident thereof to his heir and not to his executor. The reason given was that since during the continuance of the particular estate the reversioner loses the profits of the land, the rent of which is to be paid to him as compensation for his losses, and though rent should be expressly reserved to the lessor, his executor and assigns, without naming the heir, the executors could not have it, being strangers to the reversion, which is an inheritance. On the other hand, if a lessee for years made an under lease, reserving rent, the rent accruing after his death went to his executor or administrator, as it still goes, and not to his heir even though the reversion were to him and his heirs during the term, they mentioning the executors.

Again, if a man seized in fee of one acre of land and possessed of another acre for a term of years, made a lease rendering one entire rent, and died, the reversion of one acre went to his heir and the other to his executors. In this case the rent accruing after was apportioned between the heir and the executors.

NO REVERSION IN LESSOR.

Where no reversion was left in the lessor, and the rent was reserved to his executors, administrators and assigns, it formerly went, and now will go, to them and not to the heir.

RENT SEVERED FROM REVERSION.

If the rent be reserved for years, and be severed from the reversion, it formerly went and now goes to the executor or administrator, although the reversion went to the heir. Thus, if a man seized of land in fee made a lease for years reserving rent, and afterwards devised the rent to a stranger, and died, and the stranger was seized of the rent and died, his executors had this rent and not his heirs.

ARREARS OF RENT ACCRUED IN LIFETIME OF DECEASED.

Again, though the whole rent which accrued after the death of the lessor formerly went with the reversion to the heir, yet the arrears of rent which accrued and became payable in the lifetime of the testator or intestate went in all cases to his executor or administrator as part of his personal estate. The executors or administrators of tenant for life of a rentcharge, and of tenant pur autre vie after the death of cestui que vie might bring debt to recover the arrears of such rent at common law, although they could not formerly distrain for rent.

REMEDY UNDER 32 H. VIII., c. 37.

Before 32 Henry VIII. c. 37, contained in R. S. O. 1914, c. 155, the executors or administrators of a man seized of rent-service or rent-charge, or rent-seck, had no remedy for the arrears incurred in the lifetime of the testator or intestate. By that statute they may either distrain or have an action of debt.

APPORTIONMENT.

It was formerly important to ascertain the precise period at which rents become payable or other payments, such as annuities or dividends coming due at fixed periods, because an apportionment might be required between the executors representing the personal estate and other persons interested in the estate at large. These difficulties have been obviated by the Apportionment sections of the Landlord and Tenant Act.

INTERPRETATION.

2. In this Act,

ANNUITIES.

(a) "Annuities" shall include salaries and pensions.

DIVIDENDS.

(b) "Dividends" shall include all payments made by the name of dividend, bonus or otherwise out of revenues of trading or other public companies divisible between all or any of the members, whether such payments are usually made or declared at any fixed times or otherwise, but shall not include payments in the nature of a return or reimbursement of capital, and

RENT.

(c) "Rent" shall include rent service, rent charge and rent seck, and all periodical payments or renderings in lieu or in the nature of rent.

DIVIDENDS, HOW DEEMED TO ACCRUE.

3. Dividends shall for the purposes of this Act be deemed to have accrued by equal daily increment during and within the period for or in respect of which the payment of the same is declared or expressed to be made.

RENTS, ETC., HOW TO ACCRUE AND BE APPORTIONABLE.

4. All rents, annuities, dividends, and other periodical payments in the nature of income, whether reserved or made payable under an instrument in writing or otherwise, shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.

Imp. Act, 33-34 Vict., c. 35, s. 2.

WHEN APPORTIONED PART OF RENT, ETC., TO BE PAYABLE.

5. The apportioned part of any such rent, annuity, dividend, or other periodical payment shall be payable or recoverable in the case of a continuing rent, annuity, dividend or other such payment when the entire portion, of which such apportioned part forms part, becomes due and payable, and not before; and in the case of a rent, annuity or other such payment determined by re-entry, death or otherwise, when the next entire portion of the same would have been payable if the same had not so determined and not before.

Imp. Act, 33-34 Vict., c. 35, s. 3.

RECOVERING APPORTIONED PARTS.

6.—(1) All persons and their respective heirs, executors, administrators and assigns, and also the executors, administrators and assigns, respectively, of persons whose interests determine with their own deaths, shall have such or the same remedies for recovering such apportioned parts when payable, allowing proportionate parts of all just allowances, as they respectively would have had for recovering such entire portions, if entitled thereto.

Imp. Act, 33-34 Vict., c. 35, s. 4.

PROVISO AS TO RENTS RESERVED IN CERTAIN CASES.

(2) The persons liable to pay rents reserved out of or charged on lands or other hereditaments, and the same lands or other hereditaments shall not be resorted to for any such apportioned part forming part of the entire or continuing rent specifically, but the entire or continuing rent, including such apportioned part, shall be recovered and received by the heir or other person, who, if the rent had not been apportionable under this Act, or otherwise, would have been entitled to such entire or continuing rent, and such apportioned part shall be recoverable by action from such heir or other person by the executors or other persons entitled under this Act to the same.

POLICIES OF ASSURANCE, STIPULATION AGAINST APPORTIONMENT.

7. Nothing in the preceding provisions shall render apportionable any annual sums made payable in policies of assurance of any description, or extend to any case in which it is expressly stipulated that no apportionment shall take place.

Imp. Act, 33-34 Vict., c. 35, ss. 6 and 7.

NOR WHERE STIPULATION MADE TO THE CONTRARY.

Where the choses of action accrue after the decease of the testator or intestate, the rights of the executor or administrator to sue are as follows:—

Upon the death of the testator or intestate, if any injury is afterwards done to his goods and chattels the executor or administrator may bring an action for damages for the tort. He has his option either to sue in his representative capacity, and enter his suit as executor or administrator, or bring the action in his own name and his individual capacity.

EXECUTOR OR ADMINISTRATOR MAY SUE WHERE DECEASED COULD NOT.

This right of action and option exist in the executor or administrator whether he has ever had actual possession of the property or not; therefore, executors or administrators may maintain trespass for taking away the goods of the testator or intestate after his death, either in their own name or in their representative character, whether they were ever actually in possession of them or not; so an executor or administrator may sue as such as well in his own name upon a contract made with him in his representative character, and this he may do, not only in cases where the consideration flows from the deceased, but also in cases where the consideration flows directly from himself as executor.

Old cases, Wms. p. 659.

In many cases an action on which a testator himself could not have sued may accrue to the executor or administrator upon a contract made with the testator or intestate in his lifetime. Thus, if A. covenants with B to make him a lease of certain land by such a day, and B. dies before the day and before any lease made, if A. refuse to grant the lease when the day arrives to the executor of B., the executor shall have an action on the covenant. So, if a contract be made to deliver a horse on a given day to B. or his assigns, if B. die before the day limited for the delivery of the horse, his executor may maintain an action on the contract if A. refuse to deliver the horse to him, because by law he is the assignee of B. for such a purpose, and represents his person as to receiving any chattels real or personal.

Old cases, Wms. p. 666.

RIGHT IN REMAINDER.

Likewise a right to sue which never existed in the testator or intestate may accrue to the executor or administrator by remainder, as where a lease is made to B. for life, the remainder to his executors for years, or where a lease for years is bequeathed by will to A. for life and afterwards to B., who dies before A.

Wms. p. 668.

PLEDGES, RIGHTS OVER.

If no time be set for redemption of a pledge, it has been laid down that the pledgor must redeem, during his life, because his

executors cannot redeem. The pledgor is not confined to the lifetime of the pledgee. The tender should be to the executor of the pledgee.

Kemp v. *Westbrook*, 1 Ves. Sen. 278.

CONTINGENT AND EXECUTORY INTERESTS.

Contingent and executory interests, whether in real or personal estate, are transmissible to the representative of a party dying before the contingency upon which they depend takes effect. Where the contingency upon which the interest depends is the endurance of the life of the party entitled to it till a particular period, the interest itself will be extinguished by the death of the party before the period arrives, and will not be transmissible to the administrators.

Wms. p. 670.

PIN-MONEY.

An instance occurs of a claim founded on contract which might have been enforced by the deceased while alive, and yet is not transmitted to the executor or administrator in the case of arrears of pin money, to which the wife herself may be to some extent entitled, but which cannot be recovered to any extent whatever by her personal representatives. As between husband and wife, the former rules are entirely altered by the statute relating to the property of married women. In that statute the husband and wife are virtually divorced and their estates are considered with reference to each other as if they were strangers.

As between executor and widow, those gifts of money by a husband to a wife for clothes, or to purchase ornaments, or for her separate expenditure, which are usually called pin money, are good in equity as against the husband and all volunteer claimants through him.

RIGHTS OF MARRIED WOMEN.

As to the rights of married women the law now is as follows, according to the Married Woman's Property Act.

INTERPRETATION.

2. In this Act,

CONTRACT.

(a) "Contract" shall include the acceptance of any trust, or of the office of executrix or administratrix;

PROPERTY.

(b) "Property" shall include a thing in action.

LIABILITIES.

3. The provisions of this Act as to the liabilities of married women shall extend to all liabilities by reason of any breach of trust or devastavit

committed by a married woman who is a trustee or executrix or administratrix, either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration.

CAPACITY OF HOLDING PROPERTY AS A FEME SOLE.

4.—(1) A married woman shall be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a feme sole, without the intervention of a trustee.

POWER TO CONTRACT, TO SUE AND BE SUED.

(2) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort or otherwise, in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise.

MARRIED WOMAN AS AN EXECUTRIX, ADMINISTRATRIX OR TRUSTEE.

(3) A married woman, who is an executrix or administratrix, alone or jointly with any other person or persons, of the estate of any deceased person, or a trustee alone or jointly, of property subject to any trust, may sue or be sued, without her husband, as if she were a feme sole.

AS TO STOCK, ETC., TO WHICH A MARRIED WOMAN IS ENTITLED.

11. All deposits, all sums forming part of public stocks or funds, which on the 1st day of July, 1884, were standing in the sole name of a married woman, and all shares, stock, debentures, debenture stock, or other interests of or in any corporation, company, or public body, municipal, commercial or otherwise, or of, or in, any industrial provident, friendly, benefit, building or loan society, which, on the first day of July, 1884, were standing in her name, shall be deemed, unless and until the contrary is shown, to be the separate property of such married woman; and the fact that any such deposit, sum forming part of public stocks or funds, or of any share, stock, debenture, debenture stock, or other interest as aforesaid, is standing in the sole name of a married woman, shall be sufficient prima facie evidence that she is beneficially entitled thereto for her separate use, so as to authorize and empower her to receive or transfer the same, and to receive the dividends, interest and profits thereof, without the concurrence of her husband, and to indemnify all public officers, and all directors, managers and trustees of every such corporation, company, public body, or society as aforesaid, in respect thereof.

LEGAL REPRESENTATIVE OF MARRIED WOMAN.

23. For the purposes of this Act the legal personal representative of any married woman shall, in respect of her separate estate, have the same rights and liabilities and be subject to the same jurisdiction as she would have had or been subject to if she were living.

EXECUTION OF GENERAL POWER.

9. The execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities, and such property may be seized and sold under an execution against her personal representative after her separate property has been exhausted.

AS TO STOCK, ETC., TRANSFERRED, ETC., TO A MARRIED WOMAN.

12.—(1) All such particulars mentioned in the next preceding section which after the first day of July, 1884, were placed or transferred in or

into, or made to stand in the sole name of any married woman shall be deemed, unless and until the contrary be shown, to be her separate property in respect of which, so far as any liability may be incident thereto, her separate estate shall alone be liable, whether the same shall be so expressed in the document whereby her title to the same is created or certified, or in the books or register wherein her title is entered or recorded or not.

SUBJECT TO STATUTORY OR OTHER PROVISIONS.

(2) Nothing in this Act shall require or authorize any corporation or joint stock company to admit any married woman to be a holder of any share or stock therein to which any liability may be incident contrary to the provisions of any statute, charter, by-law, articles of association or deed of settlement regulating such corporation or company.

MARRIED WOMAN AS EXECUTRIX OR TRUSTEE.

4.—(1) A married woman, who is an executrix or administratrix, alone or jointly with any other person or persons, of the estate of any deceased person, or a trustee alone or jointly, of property subject to any trust, may transfer or join in transferring, any such particulars as are mentioned in section 11 of the Married Women's Property Act, without her husband, as if she were a feme sole.

BARE TRUSTEE.

(2) Where any freehold hereditament is vested in a married woman as a bare trustee she may convey or surrender the same as if she were a feme sole and without her husband joining in the conveyance.

PARAPHERNALIA.

The term paraphernalia* is used to signify the apparel and ornaments of a wife suitable to her rank and degree. What are to be so considered are questions to be decided by the court and will depend upon the rank and fortune of the parties.

DONATIO MORTIS CAUSA.

There is one other species of interest in the property of the deceased which vests neither in the personal representative, nor in his heir, nor in his widow. This is called a donatio mortis causa. To constitute such a gift there must be two attributes. 1. The gift must be with a view to the donor's death. 2. It must be conditioned to take effect only on the death of the doner by his existing disorder. 3. There must be a delivery of the subject of the donation. The deceased should at the time of the delivery not only part with the possession, but also with the dominion over the subject of the gift.

Hawkins v. *Blewitt*, 2 Esp. N. P. C. 663.
Ward v. *Bradley*, 1 O. L. R. 118.

HOW IT DIFFERS FROM A LEGACY.

A donatio mortis causa differs from a legacy in these particulars: 1. It need not be proved in the Surrogate Court. 2. No assent or other act on the part of the executor or administrator is necessary to perfect the title of the donee.

Tate v. *Hibbert*, 2 Ves. 120.

*Greek, para-pherne; over and above dower.

HOW IT DIFFERS FROM A GIFT INTER VIVOS.

A donatio mortis causa differs from a gift inter vivos in these respects, in which it resembles a legacy: 1. It is ambulatory, incomplete and revocable during the testator's life. 2. It is liable to the Succession Duties Act (R. S. O. 1914, c, 24). 3. It is liable to the debts of the testator upon deficiency of assets.

Ward v. *Turner*, 2 Ves. Sen. 434

PROPERTY REGARDED AS ASSETS THOUGH NEVER IN TESTATOR.

There are many instances in which property in the hands of an executor is regarded as assets, although it was never in the testator. Thus, if an executor renew a lease he shall account for the new lease as well as the old as assets. So if A. covenants with B. to make him a lease of certain lands by such a day, and B. dies before the day, and before any lease is made, A. is bound to make the lease to the executor of B., and the lease so made shall be assets in his hands; or, if A. refuses to grant the lease, he is liable to make the executor a compensation in damages, which are also assets. So if A. promises, on good consideration, to deliver to B. by such a day certain wares or merchandise, and this is not performed in the life of B., but delivery is made to his executor, the goods will be assets in his hands, as well as the money recovered in damages for not performing would have been.

CHATTELS WHICH NEVER VESTED IN TESTATOR.
ACCRETIONS.

Again chattels which never were vested in the testator in possession, but accrue to the executor by remainder will be assets in his hands. Thus if a lease be made to one for life, remainder to his executor for years, such remainder will be assets in the hands of the executor, though it were never in the testator. So where a lease for years is bequeathed to A. for life, and afterwards to B., who does before A.; although B. never had this term in him, it shall be assets in the hands of his executor. So a remainder in a term for years, though it never vested in the testator's possession, and though it still continued a remainder, shall be assets in the hands of the executor. For it bears a present value and is vendible. So goods which have accrued by increase since the testator's death are assets in the hands of the executor.

PROFITS ON EMPLOYMENT OF TESTATORS' GOODS IN TRADE.

Thus if the sheep, or other cattle of the testator, bear lambs, etc., after the testator's death, these, although never the property of the testator will be assets. So if the executor of a lessee for

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years enter into the tenements, the profits over and above the rent shall be assets. Therefore, if an executor has a lease for years of land of the value of £20 a year, rendering rent of £10 a year, it is assets in his hands only for £10 over and above the rent.

Vincent v. *Sharpe*, 2 Stark. 507.

CHATTELS COMING TO EXECUTOR BY CONDITION.

Again, if an executor employ the testator's goods in trade, the profits shall be assets, and whether the executor takes upon himself to carry on the testator's trade, or does so in pursuance of a provision in articles of partnership entered into by the deceased, or by the direction of the testator, contained in his will, or under the direction of the Court of Chancery, the profits of such trade shall be assets for which he shall be accountable.

Wakefield v. *Wakefield*, 2 O. L. R. 33.

CHATTELS MORTGAGED OR PLEDGED.

So chattels, real or personal, to which the executor becomes entitled after the death of the testator by force of a condition will be assets, as where a lease for years, or cattle, plate or other chattel was granted by the testator upon condition that if the grantee did not pay such a sum of money, or do other acts, etc.; and this condition is broken, or not performed after the testator's death, the chattel will be brought back to the executor and be assets.

REDEMPTION BY EXECUTOR.

The law is the same where the condition is that the testator shall pay money or do any other act to avoid the grant; accordingly chattels, whether real or personal, mortgaged or pledged by the testator, and redeemed by the executor, shall be assets in the hands of the executor for so much as they are worth beyond the sum paid on their redemption.

Glaholm v. *Rowntree*, 6 Ad. & Ell. 710.

Redemption by an executor before or after the time specified for redemption is elapsed has the same effect, the excess in the value of the thing beyond the money paid for redemption is regarded as assets.

RIGHTS OF FOREIGN ADMINISTRATOR.

Although, where different administrations are granted in different countries, that administration is deemed the principal or primary one which is granted in the country or domicile of the deceased; yet each portion of the estate must be administered in the country in which possession of it is taken and held under lawful authority. The administrator under a foreign grant has a

right to hold the assets received under it against the home administrator, even after they have been remitted to the country in which the home administration was granted. The only mode of reaching such assets is to require their transmission or distribution after all the claims against the foreign administration have been duly ascertained or settled.

ANCILLARY PROBATE OR ADMINISTRATION.

An ancillary probate or grant of administration in a foreign country is usually admitted by the comity of nations as a matter of course. This new administration, however, is made subservient to the rights of creditors and other claimants resident within the country where it is granted. The residuum is transmissible to the country of the original administrator only when the final account has been settled in the proper tribunal where the new administration is granted, upon the equitable principles adopted by its own law in the application and distribution of the assets found within its jurisdiction.

Ancillary Probate has already been explained, ante page 61.

QUEBEC WILL.

A will executed by a person when domiciled in the Province of Quebec before two notaries there, in accordance with the law of that Province, not acted upon or proved in any way before any court there, is not within the Act respecting Ancillary Probates and Letters of Administration.

In re Maclaren, 22 App. R. 18.

ASSETS "COMING TO HANDS OF EXECUTOR."

The general rule is that an executor or administrator shall not be charged with any other goods as assets than those which come to his hands. Considerable difficulty consists in ascertaining what is to be esteemed such a coming to the hands of the executor or administrator.

RIGHT OF ACTION AGAINST CONVERTOR.

It is said in Wentworth's "Office of an Executor," that if the testator, at the time of his death, had a stock of sheep in Cumberland, bullocks in Wales, fat oxen in Bucks, money, household stuff and plate in London, and his executor dwells at Coventry, namely, far from all these places, the executor has such an actual possession presently upon the testator's death that he may maintain trespass against any stranger taking them away, or spoiling them, and, therefore, that author considers it doubtful whether this shall not be such a possession in the executor, and such

a giving of these goods to his hands, as to charge him with payment of debts and legacies, and make his own goods liable instead of them.

However, it was laid down by Lord Holt that if an executor live at London, and the goods of which the testator died possessed are at Bristol, although the executor has such an immediate possession of them that he may maintain trover, in his own name against any convertor of them, and the damages recovered shall be assets in his hand; yet if he do not recover so much in damages as really the goods were worth, and that happens not through any fault of his he shall answer for no more than he recovers.

GOODS TAKEN WRONGFULLY FROM EXECUTOR.

Again, if goods come fully into the possession and hands of an executor or administrator, but are afterwards taken wrongfully from him, a question arises whether such goods shall be considered assets in his hands. As to these, an executor or administrator stands in the condition of a gratuitous bailee; with respect to whom the law is that he is not to be charged without some default in him. Therefore, if any goods of the testator 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 shall not be charged with these as assets.

GOODS TAKEN BY TRESPASSER.
PERISHABLE GOODS.

Again, if a trespasser takes goods out of the possession of an executor or administrator, although he is bound to sue the trespasser, if known, yet the executor or administrator shall not be answerable in assets for more than he recovers in the suit. But if he omits to sell the goods at a good price, and afterwards they are taken from him, then the value of the goods shall be assets in his hands, and not what he recovers, for there was a default in him. Again, if the goods be perishable goods, and before any default in the executor to preserve them or sell them at due value, they are impaired, he shall not answer for the first value, but shall give that matter in evidence to discharge himself; so if the testator's sheep or other beasts die, or if his ships perish by tempest, the executor shall not be charged with them as assets.

CHOSES IN ACTION, LIABILITY OF EXECUTOR FOR.
EXECUTOR TAKING OBLIGATION IN HIS OWN NAME.

With respect to choses in action, although debts of every description due to the testator are assets, yet the executor or ad-

ministrator is not to be charged with them till he has received the money. So if the executor or administrator recovers any damages or compensation for any injury done to the personal estate of the testator before or since his decease, or for the breach of any covenant or contract made with the testator, or with himself in his representative character all such damages thus recovered shall be assets in his hands, the costs and charges of recovering them being deducted; but he shall not be charged with them until he has reduced them into possession; but such debts or damages will be regarded as assets, although never in point of fact received, if they be released by the executor for the release in contemplation of law shall amount to a receipt. So if the executor takes an obligation in his own name for a debt due to the testator; he shall be equally chargeable as if he had received the money; for the new security has extinguished the old right and is quasi payment.

Sparkes v. *Restal*, 22 Beav. 587.

EXECUTOR SUING FOR MONEY HAD AND RECEIVED.

Where an executor sues for money had and received to his use as executor the debt or damages is assets immediately. For if the money was had and received by the defendant by the consent or appointment of the executor, it was assets in his hands forthwith, and if without his consent, yet the bringing of the action is such a consent that upon judgment obtained it shall be assets immediately without execution.

Jenkins v. *Plume*, 1 Salk. 207.

ASSETS NOT VENDIBLE.

There may be personal property of the testator or intestate to which his personal representative as such is entitled, which is not assets in his hands by reason of not being vendible.

Wms. p. 1293.

ESTATES PUR AUTRE VIE.

Estates pur autre vie are classed under this heading.

Such estates are certainly not estates of inheritance; they have been sometimes called, though improperly, descendible freeholds; strictly speaking, they are not descendible freeholds because the heir at law does not take by descent. If an action at common law had been brought against the heir on the bond of his ancestor he might have pleaded riens per descent, for these estates were not liable to the debts of the ancestor before the Statute of Frauds.

Per Lord Kenyon. *Doe dem Blake* v. *Luxton*, 6 T. R. 291.

Under the present Devolution of Estates Act, under section 3 (1), all such interests pass to the personal representative. They are devisable under the Wills Act (section 9).

SPECIAL OCCUPANCY.

The Statute of Frauds (29 Car. II. c. 3, s. 12), after permitting a devise of such estates to be made, enacts that if no devise is made of such estate the same is chargeable in the hands of the heir, if it shall come to him by special occupancy as assets by descent. In case there shall be no special occupant it shall go to the executors or administrators of the grantee, and shall be assets in their hands for payment of debts.

SURPLUS OF SUCH ESTATES. 14 Geo. II., c. 20, s. 9.

As the Statute of Frauds did not provide to whom the surplus of such estates, after the debts of the deceased owners thereof were satisfied should belong, 14 Geo. II., c. 20, s. 9, enacts that the said surplus shall be distributed in the same manner as the personal estate of the testator or intestate.

TENANT PUR AUTRE VIE DYING INTESTATE.

Both statutes omitted to provide for the case of a tenant pur autre vie dying intestate as to that estate, but having made a valid will of his personalty. In other words, these statutes omitted to state whether the surplus in such case should go according to the personal estate disposed of by the will, or as undisposed of personal estate. Nor was any provision made for the surplus which might be in the hands of an executor or administrator as special occupant. It was eventually settled that the executor held it as trustee for the residuary legatee.

Ripley v. *Waterworth*, 7 Ves. 425.

PROPERTY IN TESTATOR MUST HAVE BEEN ABSOLUTE.

The absolute property must have been vested in the testator in order to make them assets in the hands of the executor. Therefore, if the testator takes a bond for another in trust, and dies, this is not assets in the hands of his executor. So if the obligee assigns over a bond and covenants not to revoke, and dies, that bond is not assets in the hands of the executor of the obligee.

Deering v. *Torrington*, 1 Salk. 79.

TERM OF YEARS.

When a term for years is created for a particular purpose, as for raising money for payment of debts or portions for younger children, and the purpose for which the term was created is satisfied, the termor is considered in equity as a trustee for the

owner of the inheritance, although at law the term was deemed a term in gross in such trustee; in equity it follows the fee and is looked upon as completely consolidated with it; it was, therefore, not regarded as personal assets in the hands of the executor and the person entitled to the fee, but as real assets which go to the heir.

Thrufton v. *Atty.-Gen.*, 1 Vern. 341.

PROPERTY HELD BY TESTATOR FOR PARTICULAR PURPOSE.

Executors and administrators cannot be in better condition with respect to the estate of the deceased than he himself would have been in, and therefore, they cannot employ as general assets property which he would have been bound to apply to a particular purpose; thus a remittance in bills and notes for a specific purpose, namely, to answer acceptance, was received by an administrator in consequence of the death of the party to whom the remittance was made. It was held that the special purpose operated as a lien, and that the sum remitted could not be applied by the administrator as general assets.

DEED SET ASIDE AS FRAUDULENT.

Where a deed is set aside as fraudulent against any of the creditors of the deceased, the property becomes assets, and subsequent creditors are let in. An assignment within the statute 13 Eliz. c. 5, is utterly void against creditors, and the property assigned is assets in the hands of the executor.

Shears v. *Rogers*, 3 B. & Adol. 362.

EQUITABLE ASSETS DEFINED.

There are various interests frequently forming part of the estate of an executor or administrator which are not recognized as assets at law, and which, therefore, if administered at all, had to be administered in equity. This latter portion of the estate in the hands of the executor or the administrator, was called equitable assets, in contra-distinction to the former, which were called legal assets. An important distinction existed with respect to the administration of these two kinds of assets.

DIFFERENCE BETWEEN LEGAL AND EQUITABLE ASSETS DEFINED.

If they were legal, they had to be administered by the executor or administrator of the deceased in a course of administration having regard to those rules of priority among creditors formerly in existence. But if the assets in the hands of the executors were equitable, then, although the precedence in payment of debts to legacies had to be respected, yet, as among creditors, the assets had

to be applied in satisfaction of all the claimants pari passu, without any regard to the priority in rank of one debt to another; the principle of this distinction was that in natural justice and conscience, and in the contemplation of a Court of Equity, all debts being equal, the debtor was equally bound to satisfy them all, whether by specialty or by simple contract. Therefore, since a claimant upon equitable assets was under the necessity of going to a Court of Equity in order to reach them, that Court would act only according to the rule of doing justice to all creditors, without any distinction as to priority.

Shattock v. *Shattock*, L. R. 2 Eq. 182, 194.

The distinction between legal and equitable assets is, however, still of some importance, that is to say, in the following respects, namely: (1) In determining whether an executor or administrator is entitled to retain his own debt (whether contract or specialty) out of the assets; and (2) in determining semble the extent of the execution available for the creditor (plaintiff in an action); for when the court of law is sitting as such, that is to say, when the creditor's action is a purely legal action the execution would still be against the legal assets only; while if the action was properly framed as an equitable action, the execution or equitable relief would extend to the equitable assets as well as the legal assets.

Snell's Principles of Equity (Ed. 1894), p. 252). The statement as to retainer is inapplicable to Ontario.

FIXTURES.

Mill and Machinery.—A mill built on mud sills laid on piles and spiked to the piles and mill-machinery and plant therein were held to be attached to the freehold and to pass to the plaintiff by mortgages of the land and premises together with all buildings, fixtures, and appurtenances, and not to be exigible under the defendant's execution against the goods of the mortgagor; and held, that the plaintiff's mortgages were not assurances of personal chattels, so as to require registration under the Bills of Sale Act. *Reynolds* v. *Ashby*, 73 L. J. K. B. 946, and *In re Yates, Batcheldor* v. *Yates*, 57 L. J. Ch. 697, followed. *Small* v. *National Provincial Bank of England*, 63 L. J. Ch. 270, distinguished. *Kilpatrick* v. *Stone* (1910), 13 W. L. R. 634, 15 B. C. R. 158.

Vendor and Purchaser.—Shop fittings, consisting of shelving made in sections, each section being screwed to a bracket affixed to the wall of a building, the whole being readily removable without damage either to the fittings or the building, and gas and electric light fittings, consisting of chandeliers which were fastened by being screwed or attached in the ordinary way to the pipes or wires by which the gas and electric currents were respectively conveyed, and were removable by being unscrewed or detached without doing damage either to the chandeliers or the building, were placed in it by the owner of the freehold land on which it stood:—Held, that these articles became part of the land and passed by a conveyance of it to the defendants. *Bain* v. *Brand*, 1 App. Cas. 762; *Holland* v. *Hodgson*, L. R. 7 C. P. 328. *Hobson* v. *Gorringe* (1897), 1

Ch. 182, *Haggert* v. *Town of Brampton*, 28 S. C. R. 174, and *Argles* v. *McMath*, 26 O. R. at p. 248, followed. *Stack* v. *T. Eaton Co.*, 22 C. L. T. 322, 4 O. L. R. 335, 1 O. W. R. 511.

Wooden Building Erected—On Lot by Tenant.—Action to prevent removal of a building erected by defendant, tenant of plaintiffs. The building rested on rock, placed on the soil. The chimneys were supported by poles resting on rock. The front stoops supported on wooden posts, was formerly attached to a wooden block sidewalk:—Held to be a fixture. That it could be removed without materially injuring the freehold is immaterial. *Bing Kee* v. *Yick Chong*, 10 W. L. R. 110.

Wooden Building Seized.—As the house and stable merely rested on the land by their own weight, and were not considered part of the land, they are chattels liable to seizure under execution against goods. *Hamilton* v. *Chisholm*, 11 W. L. R. 134.

Building Resting by its own Weight on the land, that can be removed without injury to the land, though the removal integre salve et commode might be difficult, should not be considered as part of the land unless the circumstances are such as to shew that they were intended to be part of the land. *Blanchard* v. *Bishop* (1911), 19 O. W. R. 28, 2 O. W. N. 996.

Trade Fixtures.—By the lease of an unfinished shop the lessees covenanted at their own expense to "complete and finish . . . all necessary fittings for the carrying on of the trade of a provision merchant," and also to deliver up the demised premises in good repair at the end of the term. In pursuance of their covenant the lessees affixed certain fittings to the premises which became "trade fixtures," and they removed them shortly before the end of the term:—Held, that the covenant in the lease did not take away the right of the lessees during the term to remove the fittings as trade fixtures. *Mowats* v. *Hudson*, 105 L. T. 400.

Field Stones.—Held, without deciding whether field stones which lie imbedded in or upon the surface of the soil are part of the soil, that their character is at all events changed when they are taken from the place where they are found and piled up in another place. The stones by the act of severance ceased to be a natural deposit and became chattels; and the supposed intention of the deceased to use them for building purposes did not again change their character. *Lewis* v. *Gordon*, 15 O. R. 252, specially referred to. *Tucker* v. *Linger*, 21 Ch. D. 18, distinguished. *McCarthy* v. *McCarthy*, 20 C. L. T. 211.

Fence.—Although a fence is part of the realty, and although it might be that material placed along the line of a contemplated fence, but not used because the fence is not completed, also belongs to the freehold, yet the rails in question here did not become fixtures, because so far as the evidence shewed, there was an entire absence of contemplation to erect them into a fence, and they were, therefore, chattels which the defendant had the right to sell. *McCarthy* v. *McCarthy*, 20 C. L. T. 211.

Machinery.—A hay-fork was part of a plant consisting of a track, a truck, pulleys, a rope and the fork. The track was fastened with bolts or screws to the barn roof. Without the track, the truck would be useless; in fact, each of the articles was a joint in the whole, and the whole would be useless without its parts, or without any one of them:—Held, following *Gooderham* v. *Denholm*, 18 U. C. R. 214, that the hay-fork in question was a fixture, and the circumstance that it could be used again in connection with another track, truck, pulleys, and rope, of similar kind and dimensions, did not deprive it of its character. *McCarthy* v. *McCarthy*, 20 C. L. T. 211.

Furnace.—Furnace purchased on an agreement that the property in it should remain in the vendor until paid for, ceases to be a chattel when the purchaser annexes it to the freehold. Such an agreement merely confers a license on the vendor to enter and sever from the freehold what is

no longer a chattel so as to again make it a chattel. A purchaser of the realty without notice of the agreement is not bound by it, nor can the vendor recover possession of the chattel or damages for its conversion from the purchaser. *Hobson* v. *Gorringe* (1897), 1 Ch. 182, and *Reynolds* v. *Ashby* (1904), A. C. 466, followed. *Waterous* v. *Henry* (1884), 2 Man. L. R. 169, and *Vulcan Iron* v. *Rapid City* (1894), 9 Man. L. R. 577, overruled. *Andrews* v. *Brown* (1909), 19 Man. L. R. 4, 11 W. L. R. 149.

Machinery Leased to Company.—Certain articles of machinery were leased by the plaintiff for one year to a manufacturing company, and placed upon the company's premises. There was no agreement for purchase. Previous to this the company had mortgaged to the plaintiff their lands, including these premises, with all the plant and machinery thereon, or which should be brought thereon during the continuance of the mortgage. The plaintiff's articles of machinery were in some degree attached to the buildings in which they were placed, but all could be detached at a trifling cost, without doing substantial damage to the inheritance:—Held, upon the evidence, that the articles were so annexed to the freehold as prima facie to constitute them as between the company and the defendant, fixtures; and, the defendant not being a party to the agreement between the plaintiff and the company, that agreement, though it was merely one of hiring, and not the usual hire-purchase agreement, afforded no evidence to alter the prima facie character of the annexed property; and the plaintiff was not entitled to the articles as against the defendant. *Hobson* v. *Gorringe* (1897), 1 Ch. 182, and *Reynolds* v. *Ashby* (1903), 1 K. B. 87 (1904), A. C. 466, applied and followed. *Seeley* v. *Caldwell* (1908), 18 O. L. R. 472, 12 O. W. R. 1245.

The purposes to which premises have been applied should be regarded in deciding what may have been the object of the annexation of movable articles in permanent structures with a view to ascertaining whether or not they thereby became fixtures incorporated with the freehold, and where articles have been only slightly fixed, but in a manner appropriate to their use, and shewing an intention of permanently affixing them with the object of enhancing the value of mortgaged premises, or of improving their usefulness for the purposes to which they have been applied, there should be sufficient ground in a dispute between a mortgagor and his mortgagee for concluding that both as to the degree and object of the annexation, they become parts of the realty. *Haggart* v. *Town of Brampton*, 28 S. C. R. 174.

The "fixtures" included in the meaning of the expression "personal chattels" by the tenth section of the Nova Scotia "Bill of Sale Act" are only such articles as are not made a permanent portion of the land, and may be passed from hand to hand without reference to or in any way affecting the land and the "delivery" referred to in the same clause means only such delivery as can be made without a trespass or a tortious act. *Warner* v. *Don*, 26 S. C. R. 388.

A gas engine laid on a raised bed of concrete and fastened into the ground is a fixture, and is therefore not distrainable by the landlord or tenant. *Hobson* v. *Gorringe* (66 L. J. Ch. 114; (1897), 1 Ch. 182); and *Reynolds* v. *Ashby & Son* (72 L. J. K. B. 51; (1903), 1 K. B. 87) followed. *Hellawell* v. *Eastwood* (20 L. J. Ex. 154; 6 Ex. 295), not followed. *Crossley* v. *Lee*, 77 L. J. K. B. 199; (1908), 1 K. J. 86; 97 L. T. 850.

Glass-houses—Market Garden. *Mears* v. *Cullender*, 70 L. J. Ch. 621; (1901), 2 Ch. 388; 84 L. T. 618; 49 W. R. 584; 65 J. P. 615.

Furnace cannot be moved by mortgagor; *Scottish American* v. *Sexton*, 26 O. R. 77.

The principle which, as between tenant and landlord, enables the former to remove during his term chattels which he has affixed to the soil for the benefit of his trade applies also to the case of tenant for life and remainderman, and allows the former, or his personal representatives, to remove chattels affixed to improve the estate for his own enjoyment: *Hulse, In re; Beattie* v. *Hulse*, 74 L. J. Ch. 246; (1905), 1 Ch. 406; 92 L. T. 232.

The exception of ornamental fixtures from the rule Quicquid plantatur solo, solo cedit applies as well between tenant for life and remainderman as between tenant and landlord. *De Falbe, In re; Ward* v. *Taylor*, 70 L. J. Ch. 286; (1901), 1 Ch. 523; 84 L. T. 273; 94 W. R. 455.

The two principles, that where an object is so attached to the house as to become part thereof it goes to the heir; and where from its nature and purpose it is clearly not intended to form part of the realty, but is only attached thereto for the purpose of enjoyment during the occupancy of its owner, it is removable and goes to the executor, have been established from the earliest times and are still in force. These principles govern all cases of fixtures, whether between landlord and tenant for life and remainderman; and any apparent change in the law is not in the principles themselves, but arises from their application under altered conditions of life and habits. *Leigh* v. *Taylor*, 71 L. J. Ch. 272; (1902), A. C. 157; 86 L. T. 239; 50 W. R. 623.

Overholding.—Held, that a tenant's right to remove fixtures exists only during the tenancy and for such further time as the tenant holds the premises under a right still to consider himself as a tenant, but no right of removal exists after the termination of the lease where the tenant retains possession wrongfully. *Dundas* v. *Osment* (1907), 7 Terr. L. R. 342; 1 W. L. R. 363; 4 W. L. R. 116; 6 W. L. R. 86.

Trade Fixtures.—A machine which is kept in position by its own weight, and does not require fixing, is not a fixture, even though it is attached to and driven by fixed mechanism, and though its removal would cause some damage to the building. *Northern Press and Engineering Co.* v. *Shepherd*, 52 S. J. 715.

Market Garden—Glass-houses.—Glass-houses erected for the purpose of his trade by a tenant who is carrying on the business of a market gardener, with the knowledge of his landlord, are trade fixtures, and may be removed by the tenant during the tenancy though attached to the freehold. *Mears* v. *Cullender*, 70 L. J. Ch. 621; (1901), 2 Ch. 388; 84 L. T. 618; 49 W. R. 584; 65 J. P. 615; 17 T. L. R. 518.

Devisee and Executor.—If the owner of a house in fee affixes chattels to the freehold and dies without disposing of them as chattels by his will, the presumption is that he intended them to pass to the devisee of the house. Dictum of Lord Halsbury, L. C. in *Leigh* v. *Taylor*, (71 L. J. Ch. 272, 273; (1902) A. C. 157, 159), considered and explained. *Whaley, In re; Whaley* v. *Roehrich*, 77 L. J. Ch. 367; (1908), 1 Ch. 615; 98 L. T. 556.

FOREIGN ADMINISTRATOR.

Per Cur., I am of opinion that the certificate in this case is not sufficient, for two reasons. First, there is no evidence that the County Court of Grant is a court of record. The certificate of Mr. Liggett does not state such to be the case, nor is there any other evidence of that fact. Second, the certificate sets forth that the seal is the official seal of the Court, and the legend on the seal is "Grant County, Clerk of County Court." This does not signify that it is the seal of the court, and to receive the document in evidence would be directly at variance with what was laid down by the court in *Junkin* v. *Davis*, 22 C. P. 369. I may just draw attention to the fact that this case was considered in *Beebe* v. *Tanner*, 6 Terr. L. R., at p. 13. In that case the legend on the seal was "Clerk of the Surrogate Court, Sixth Judicial District, South Dakota, Walla County," but the clerk certified in effect that that seal was the seal of the court and that was held sufficient. The certificate in this case does not bring it within what was decided in *Beebe* v. *Tanner*. The certificate, therefore, does not comply with the requirements of the section of the Evidence Act referred to, and I must refuse the letters. *Re Wolf*, 8 W. L. R. 690.

Resignation of Executors in Foreign Country—Administration de Bonis non there—Ancillary Probate in Ontario.—A testa-

tor who died domiciled in Michigan, U. S., leaving property there and in this province, appointed certain persons executors, making them also trustees of four-sixths of his estate, and the proper Probate Court in Michigan granted probate to them in 1900. In 1903 they tendered to that court their resignation as executors, though not as trustees, and requested and obtained the appointment of a trust company as administrators de bonis non with the will annexed in their place. In 1904, however, they resumed an application, which had remained suspended since 1900, to the Surrogate Court of the County of Essex for ancillary probate, which was opposed by the beneficiaries of the estate in Ontario, who asked for administration de bonis non to be granted to the trust company or its nominee:—Held, affirming the decision of the surrogate Judge, that the court here ought to follow the Michigan grant to the trust company, and could not look into any of the circumstances which led up to it. *In re Medbury, Lothropp* v. *Medbury*, 11 O. L. R. 429.

Domestic and Foreign Creditors—Priorities.—In the administration of the Ontario estate, of a deceased domiciled abroad, foreign creditors are entitled to dividends pari passu with Ontario creditors. *Re Kloebe*, 28 Ch. D. 175, followed. *Milne* v. *Moore*, 24 O. R. 456.

Winding-up an Estate.—Held, that the foreign principal administrator in the winding-up of an estate has the entire conduct of the administration proceedings outside of the payment of the local creditors in full. *Re Donelly* (1911), 19 O. W. R. 708; 2 O. W. N. 1388.

Security for Costs—Money in Court—Motion for Payment out.—An executrix stands in no different position as to the liability to give security for costs from a litigant suing in his own right. And an executrix resident abroad, applying for payment out of court of moneys to the credit of her testator, was ordered to give security for costs of an alleged assignee of the fund, who opposed the application. The rule as to a security applies to a motion as well as to a petition. *Re Parker, Parker* v. *Parker*, 16 P. R. 392.

Foreign Testator.—Where a testator dies in a foreign country, leaving assets in this province, the court, at the instance of a legatee, will restrain the withdrawal of the assets from the jurisdiction, notwithstanding that there may be creditors of the testator resident where the testator was domiciled at the time of his death, and that there are no creditors resident in this province. *Shaver* v. *Gray*, 18 Chy. 419.

Legacy Paid under Special Agreement.—By an agreement entered into between the executors of an estate in Lower Canada and the residuary legatees, the former agreed to settle a particular legacy, and indemnify the residuary legatees from it. According to the laws of that country interest is not recoverable upon a legacy until suit brought therefor without an express promise; and the legatee referred to having sued there for the legacy, alleging an express promise by both executors, and residuary legatees to pay such interest, in which action the executors denied such promise, and got a verdict, but the residuary legatees allowed judgment by default, and afterwards filed a bill in this court to compel the executors to indemnify them against the liability they had incurred, the court, under the circumstances, dismissed the bill with costs. *Crooks* v. *Torrance*, 6 Chy. 518; 8 Chy. 220.

Creditor—Foreign Administration.—Held, failing any proof as to the law in Maine, it must be assumed to agree with the law here, according to which the court will not grant administration to a creditor, so long as one having a better claim, as is the case with the next of kin, is willing to act; and, inasmuch as the next of kin did not appear to have been cited before the court in Maine, the status of the creditor who obtained administration there, or of his appointee, was not such as to compel the Surrogate Judge here to pass over the next of kin. The appointment of a creditor as administrator is not as of right, but rests in the discretion of the Judge who appoints, and that cannot be interfered with by any peremptory writ, and R. S. O. 1877, c. 46, ss. 32, 36, do not better the claim of a

creditor. *Browne* v. *Phillips*, Ambl. 416, followed. *Re Hill*, L. R. 2 P. & D. 89, distinguished. *Re O'Brien*, 3 O. R. 326.

Ancillary Probate.—A will executed by a person when domiciled in the Province of Quebec before two notaries there, in accordance with the law of that province, not acted upon or proved in any way before any court there, is not within the Act respecting Ancillary Probates and Letters of Administration, 51 Vict., c. 9 (O.). *In re Maclaren*, 22 A. R. 18.

Foreign Administrator — Settling Claims.—Powers and obligations of foreign administrators dealing in Canada with foreign assets, and settling claims of Canadian creditors, considered. *Grant* v. *McDonald*, 8 Chy. 468.

Release of Mortgage.—A foreign administrator cannot effectually release a mortgagor on land in this province. *In re Thorpe*, 15 Chy. 76.

Foreigner Dying in Itinere.—The law of England as to granting probate or administration, is the law to be administered by our Probate and Surrogate Courts. Where a party domiciled in New York died suddenly in itinere in the County of Wentworth, in this province, having trifling personal effects of less value than 5 pounds:—Held, that the Surrogate Court of Wentworth had jurisdiction to grant administration of his effects. Such administration should be granted only to an inhabitant of this province. *Grant* v. *Great Western R. W. Co.*, 7 U. C. C. P. 438, affirmed on appeal, 5 L. J. 210.

The deceased was a resident of Buffalo, N.Y., being at the time of his death, which occurred in the County of Lincoln, Ontario, not possessed of any real or personal property in this province the plaintiff (his widow) obtained letters of administration from the Surrogate Court of York:—Held, the grant of letters by the Surrogate Court of York was valid and effectual, and,—Semble, that even if the deceased had left real or personal estate in some other county, the administration obtained in York had effect over the personal estate of the deceased in all parts of Ontario until revoked. *Jennings* v. *Grand Trunk R. W. Co.*, 15 A. R. 477.

Foreign Mortgagee.—Where a person, resident in a foreign country, dies possessed of mortgages on land situate in the province, the Surrogate Court of the county where the land lies may grant administration where the Surrogate Court of no other county has jurisdiction. *In re Thorpe*, 15 Chy. 76.

English Probate.—Probate of a will granted by the Court of Canterbury, gives no title to an executor to sue for a cause of action accruing in this country, the testator having died here. He must produce letters testamentary from the proper authority in this province. *White* v. *Hunter*, 1 U. C. R. 452.

FATAL INJURIES ACT.

Action under Fatal Injuries Act—Status of Administrator—Person Having no Interest in Estate — Action begun before Grant of Administration—Fiat—Judicial Act—Fraction of Day. —Action by the administrator of the estate of Augustino Fancelli, deceased, against Fauquier Brothers, to recover damages under Lord Campbell's Act for having negligently caused the death of deceased. Defendants, besides denying any negligence, pleaded that plaintiff was not, at the time of the commencement of the action, the administrator of the deceased. The damages were claimed in the statement of claim for Egidio and Creusa Fancelli, the father and mother of the deceased, both of whom were alleged to be living near Pisa, in Italy. It appeared at the trial that plaintiff had applied to the Surrogate Court of the District of Algoma, some time before the issue of the writ, for a grant to him of letters of administration, alleging himself to be authorized for the purpose by the father of the deceased, and that on 23rd January, 1903, an order was made by the Judge of that court for the issue to the plaintiff of letters

of administration, but that the letters of administration were not actually issued by the Registrar until 26th January, 1903. The writ of summons in the present action was issued on 23rd January, 1903:—Held, letters of administration taken out after action and before the trial, when the plaintiff brings his action as administrator, are sufficient to support the action. The Judge of the proper Surrogate Court had on the day the writ was issued ordered that letters of administration should be issued to the plaintiff, which was a judicial act and must be treated as taking precedence in point of time over the issue of the writ, which was not a judicial Act: *Converse* v. *Michie*, 16 U. C. C. P. 167; *Clark* v. *Bradlaugh*, 8 Q. B. D. 62. The existence of an order for their issue before the commencement of the action was at all events such a declaration of his right to obtain them as would make them when issued relate back to the date of the order. *Dini* v. *Fauquier*, 4 O. W. R. 295; 25 Occ. N. 11; 8 O. L. R. 712.

Fatal Accidents Act. — While the grandfather and grandmother could legally proceed with their action under R. S. O. 1897, c. 166, although brought within six months of the death, so long as there was no executor or administrator; yet an administratrix having been appointed and an action brought by her within the six months, she was entitled to proceed with it; and the first action was the one to be stayed. *Lampman* v. *Township of Gainsborough*, 17 O. R. 191, and *Holleran* v. *Bagnell*, 4 L. R. Ir. 740, explained and followed:—Held, that the administratrix would have the right in her action to claim damages sustained by the personal estate of the deceased. *Leggott* v. *Great Northern R. W. Co.*, 1 Q. B. D. 599, followed. *Mummery* v. *Grand Trunk R. W. Co.*, *Whalls* v. *Grand Trunk R. W. Co.*, 21 C. L. T. 343; 1 O. L. R. 622.

MARRIED WOMEN.

Undue influence of husband.—*Cox* v. *Adams* (1904), 35 S. C. R. 393, disapproved in so far as it held that no transaction between husband and wife could be upheld unless it was shewn that the wife had had independent advice. *Bank of Montreal* v. *Stuart*, C. R. (1911), 1 A. C. 1.

Annuity of Married Woman.—By the terms of a will, by which an annuity was given to a married woman, it was provided that the annuitant should be restrained from anticipating any property coming to her thereunder, and, further, that "if she should assign, dispose of, or charge the annuity, whether under disability or not," the annuity should cease. The married woman (the annuitant) purported to charge the annuity:—Held, that as she could not create a valid charge there was no forfeiture of the annuity. *Adamson, In re; Public Trustee* v. *Billing*, 109 L. T. 25; 57 S. J. 610; 29 T. L. R. 594.

Separate Estate of Wife—Restraint on Alienation—Power to Dispose of by Will.—Where a restraint on alienation is imposed in connection with the property of a married woman, no conveyance or contract can prevail to deprive her of such property, but the restraint does not extend beyond such transactions as would have the effect of transmitting that property in her lifetime. It does not, therefore, apply to the provisions of her will. *Borden* v. *James*, 40 N. S. R. 48.

Marriage before 1859.—Right of wife to dispose by will of property acquired after marriage. *Jordon* v. *Frogley*, 8 O. W. R. 265.

Acquiescence—Family Arrangement. — The owner of land, by letter written to his mother, directed that she should have the power to dispose of his property, and she by her will devised portions thereof to some, to the exclusion of others, of her children. Before reading this will, the executor named therein called her several heirs together, and suggested that they should sign an agreement to submit to and acquiesce in the provisions of such will, and they did sign an agreement:—Held, that this being in the

nature of a family agreement or settlement, the parties to it were bound thereby, and would be compelled to carry out the provisions of the will. One of the parties executing this agreement was, to the knowledge of all interested, under age at the time of the agreement:—Held, no answer to a bill by the infant after attaining twenty-one, against parties who had obtained the benefits of the will intended for them, notwithstanding the want of mutuality at the time of the agreement. *Melville* v. *Stratherne*, 26 Chy. 52.

Dower.—In Scribner on Dower, vol. 2, p. 481, the author says:—"The terms of the demise to the widow, although not amounting to expression, may raise a sufficiently clear implication of the testator's meaning, that the bequest to her of part of his land should be in satisfaction of her dower in the remainder of them. In such cases she will be obliged to elect between the devise to her and her legal title. The provisions which have been generally held inconsistent with the widow's legal right to dower are those which prescribed to the devisees a certain mode of enjoyment which shows the testator's intention that they should have the entirety of the property." In support he cites among others these following authorities: *Miall* v. *Brain*, 4 Madd. 119; *Butcher* v. *Kemp*, 5 Madd. 61; *Hall* v. *Hill*, 1 Dr. & War. 94. In the case of *O'Hara* v. *Chaine*, 1 Jo. & Lat. 662. "Where a testator having contracted to sell part of his fee simple estates, demised all his real and personal estate to trustees, and directed them to complete his contract with the purchasers, and to sell and convert into money all his real and personal estate, and out of the interest of the moneys to arise from the sale to pay an annuity to his wife for her life, and he empowered his trustees to lease such parts of his real estate as should not be sold, it was held by Sir E. Sugden, C., that the widow was bound to elect. Also see *Parker* v. *Sowerby*, 4 DeG. M. & G. 321. *McDonald* v. *Slater*, 4 E. L. R. 266.

Monthly Allowance to Widow—Payment out of Income of Corpus.—As the testator directs "the balance" at her marriage or death to be divided among the children, the word chosen is at least not inconsistent with the idea that he contemplated a possible reduction of capital. As put by Turner, L.J., in *Croley* v. *Wild*, 3 D. M. & G. 993, "the parties are placed by the will in the position of annuitant and residuary legatee, and not in that of tenant for life and reversioner," and, as said by Knight Bruce, L.J., in that case, "If the will ended with the gift of annuity, there would have been no question but that, however great or small the income of the estate might be, the annuity must have been paid in full to the last farthing of the property. If so, does the subsequent language show a clear intimation to the contrary?" Here the gift of "the balance" conveys no such intimation. I may refer to *May* v. *Bennett*, 1 Russ, 370, adopted in *Carmichael* v. *Gee*, 5 App. Cas 588; *Wroughton* v. *Colquhoun*, 1 DeG. & Sm. 36; and *Wright* v. *Callender*, 2 D. M. & G. 652; and in our own courts *Almon* v. *Lewin*, 5 S. C. R. 514; *Anderson* v. *Dougall*, 15 Ch. 405; *Jones* v. *Jones*, 27 Ch. 317; *Wilson* v. *Dalton*, 22 Chy. 160; and *Re McKenzie*, 4 O. L. R. 707, 1 O. W. R. 739.

Whatever virtue might be in the words "in the first place," as to which see *Lindsay* v. *Waldbrook*, 24 A. R. 604, is expended in the direction to pay debts and expenses.

If that allowance is in lieu of dower, it would not be subject to abatement, as the widow would be deemed a legatee for value, and in that case the three legacies would have to bear the brunt of the deficiency: *Re Greenwood* (1892), 2 Ch. 295, and cases there refererd to; and *Becker* v. *Hammond*, 12 Ch. 485, at p. 490. If the widow is entitled also to dower, then the annuity and the legacies, must abate proportionally: *Wroughton* v. *Colquhoun*, 1 DeG. & Sm. 36, 357; *Long* v. *Hughes*, ib. 364; and *Carr* v. *Ingleby*, ib. 362, as to which see *Re Sinclair* (1897), 1 Ch. 921.

One can have little doubt that it was not in his mind that she would have a claim upon the land for dower, and that it it a proper inference that he intended, if not that she should not have dower, at least to make such disposition as would be inconsistent with it.

On the authority of *Becker* v. *Hammond*, 12 Chy. 485, *Lapp* v. *Lapp*, 16 Chy. 159, 19 Chy. 608, *Murphy* v. *Murphy*, 25 Chy. 81, and *Elliott* v

Morris, 27 O. R. 485, it must, I think, be held that the widow must elect. *Re Morrison*, 7 O. W. R. 231.

DONATIO MORTIS CAUSA.

Presumption of Death—Commorientes. — *Beynon, In the goods of*, 70 L. J. P. 31; (1901), P. 141; 84 L. T. 271; 65 J. P. 246.

Donor's Cheque—Cheque Presented but not Paid in Donor's Lifetime—A cheque drawn by the donor and given but not resulting in payment, either actual or constructive, in the donor's lifetime, cannot be subject of a valid donatio mortis causa. *Beaumont, In re; Beaumont* v. *Ewbank*, 71 L. J. Ch. 478; (1902), 1 Ch. 889; 86 L. T. 410; 50 W. R. 389.

Hewitt v. *Kaye* (37 L. J. Ch. 633; L. R. 6 Eq. 198), and *Beak's Estate, In re; Beak* v. *Beak* (41 L. J. Ch. 470; L. R. 13 Eq. 489), followed. *Bromley* v. *Brunton* (37 L. J. Ch. 902; L. R. 6 Eq. 275), explained. *Ib.*

I. O. U.—An I. O. U. cannot be the subject of a donatio mortis causa. *Duckworth* v. *Lee* (1899), 1 Ir. R. 405.

Delivery—What is Sufficient Delivery through Medium of Third Party.—To effect a mortis causa donation it is not necessary that there should be personal delivery to the donee, but the donation may be effected by delivery to a third party on behalf of the donee. *Hutchieson's Executrix* v. *Shearer* (1909), S. C. 15.

LIFE INSURANCE.

Life Insurance—Infants.—Moneys payable to infants under a policy of life insurance may, when no trustee or guardian is appointed under secs. 11 and 12 of R. S. O. 1887 ch. 136, be paid to the executors of the will of the insured as provided by sec. 12, without security being given by them, and payment to them is a good discharge to the insurers. *Dodds* v. *Ancient Order of United Workmen*, 25 O. R. 570.

Change in Beneficiary—"Instrument in Writing"—Incomplete Will—Operation of—Insurance Act.—A will invalidly executed is not an "instrument in writing" effectual to vary the benefit of an insurance certificate under R. S. O. 1897 ch. 203, sec. 160, sub-sec. 1. *Re Jansen*, 12 O. L. R. 63, 8 O. W. R. 17.

Benefit Certificate—Designation of Beneficiary — Rules of Society—Will—Statutes—Widow—Election.—The widow was entitled to it: *Leadlay* v. *McGregor*, 11 Man. L. R. 9, and *Johnston* v. *Catholic Mutual Benefit Assn.*, 24 A. R. 88, followed. (2) The widow was not put to her election, and was entitled to the full benefit of the will, as well as to the moneys payable under the certificate. *Griffith* v. *Howes*, 5 O. L. R. 439, *Re Warren's Trust*, 26 Ch. D. 208, and in *Re Beale's Settlement* (1905), 1 Ch. 256 followed. *In re Anderson's Estate*, 3 W. L. R. 127, 16 Man. L. R. 177.

Life—Varying Apportionment—Postponing Payment till after Full Age—Ineffective Provision—R. S. O. 1897, ch. 203, sec. 160.—By her will a testatrix assumed to reapportion her insurance reducing the interest of a "preferred beneficiary" from $500 to $250, and further directed that he should not be paid his share till the age of twenty-five. At the age of twenty-one, however, he claimed the right to immediate payment:—

Held, that even if sec. 160 of the Insurance Act as to altering or varying apportionments of insurance moneys authorized such attempted postponement of payment, the provision was ineffective, for all persons who attain twenty-one are entitled to enter upon the absolute enjoyment of property given to them by will, notwithstanding any direction by the testator to the contrary, unless between twenty-one and the specified later age the property is given

for the benefit of another, or so clearly taken away from the devisees up to the time of their attaining such greater age as to constitute an intestacy as to the previous rents and profits; and it is impossible to distinguish between such a provision in regard to insurance and a like provision in regard to personal property bequeathed by will. *In re Canadian Home Circles, Eliza J. Smith Case*, 14 O. L. R. 322.

Insurance Policy—Attempt to Alter—Identification of Policy—Lapsed Bequest Falling into Residue.—The question is, does the will change the certificate as to the beneficiaries: That depends upon the meaning of sec. 160 of the Insurance Act, R. S. O. 1897, ch. 203, and evidence that its directions have been complied with. (Per Curiam.)

The manner of the identification of the policy is very explicitly and particularly provided for. It may be by instrument in writing attached to or indorsed on the policy, or, apart from actual attachment or indorsement, it may be identified by something equivalent in the way of specific reference by the number of the policy "or otherwise." That would, of course, include reference by date and amount and other means of incorporating one document with the other. Should the words "or otherwise" be extended further to cases where extrinsic evidence is required to complete the identification.

And the case in hand is not covered by any decision in our courts.

Where a trust is clearly and distinctly expressed on the policy itself in favour of one beneficiary so that it becomes a vested trust for that purpose, it should not be displaced or altered except by a document of equal evidential force in clearness and distinctness of designation.

The policy in question was not part of the testator's estate; so, perhaps, cases upon the exercise of powers in making appointments of property afford more light than can be elsewhere obtained.

A leading case is *Webb* v. *Honnor*, 1 Jac. & W. 352. *In re Mattingley's Trusts*, 2 J. & H. 496, . . . quoted with approval by Kay, J., in *Re Mills*, 34 Ch. D. 186, 193, it is laid down that the burden of proof rests on those who assert affirmatively that the power was exercised, and that the court must be satisfied of this by sufficient evidence. And in *Re Mills* was approved by the Court of Appeal in *Re Williams*, 42 Ch. D. 93.

The Wills Act, R. S. O. 1897, ch. 126, sec. 29, has no application to the case of limited powers, such as those exercisable with reference to beneficiaries under the Insurance Act: *Cloves* v. *Awdry*, 12 Beav. 604, but only to cases in which the testator has power to appoint in any manner he may think proper.

The power, if exercised by the testator in this case, would be so in a manner not warranted by the terms of the Insurance Act, and so afford internal evidence that he was not acting with reference to the trust fund. As remarked by Kay, J., in *Re Mills* (citing *Doe d. Hellings* v. *Bird*, 11 East 49), such indications are not to be disregarded.

Altogether I am not satisfied that the policy payable to the wife now in question was in any certain way identified by the testator, and, therefore, I hold that his will did not change the beneficiary.

The construction given by the courts to the case of lapsed legacies or lapsed appointments falling into the residue (as exhibited in *Falkner* v. *Butler*, Ambl. 514), does not seem warranted in dealing with attempts to change beneficiaries under the Insurance Act. The rule as to lapsed bequests falling into the residue is not founded on the intention of the testator, but upon a theory that the residuary clause is intended to embrace everything not otherwise effectually given: *Easum* v. *Appleford*, 5 My & Cr. 56, 61. It rests upon a supposition or hypothesis which should not be employed to take away the vested rights of the existing beneficiary unless that is explicitly and unmistakably done by the testator. Here the testator designates so much to his sister, which fails because contrary to the Insurance Act (sec. 160). He designates the residue to his daughter, which does to that extent take it away from the widow; but I see no propriety in or reason for holding that the widow is also to lose the $200 ineffectually dealt with by the testator. *Re Cochrane and Ancient Order of United Workmen*, 11 O. W. R. 956.

Life Insurance—Will—Bequest of Proceeds of Policy on Testator's Life—Existence of Several Policies Answering Description—Identification by Number or Otherwise.—Held, that a bequest of one of four policies, any one of which may be selected to answer the bequest, is not such a designation, even in favour of preferred beneficiaries, as meets the requirement of the Insurance Act, R. S. O. 1897, ch. 203, sec. 159, that in a designation by will the policy shall be identified "by number or otherwise." *MacLaren* v. *MacLaren*, 15 O. L. R. 142.

CHOSE IN ACTION.

Devise of All Testator's Property—Chose in Action.—A devise of all "my real estate and property whatsoever and of what nature and kind so ever," at a place named, does not include a debt due by the devisee, who resided and carried on business at such place, to the testator. Judgment of the Court of Appeal, 4 O. L. R. 682, 22 Occ. N. 379, affirmed. *Thorne* v. *Parsons*, 23 Occ. N. 180, 33 S. C. R. 309.

Power of Surrogate Court to Adjudicate on a donatio mortis causa.—Section 69 of the Surrogate Courts Act, 10 Edw. VII. ch. 31, does not confer power on the Judge of a Surrogate Court to adjudicate upon a claim to moneys of a deceased person under an alleged donatio mortis causa; the "claim or demand" referred to in sub-sec. 1 is a claim or demand against the estate by a "creditor." Where the Judge of a Surrogate Court, by consent of the claimant and of the administrators of the estate of an intestate heard evidence and adjudicated upon a claim of a person seeking to establish a donatio mortis causa in respect of moneys deposited in a savings bank to the credit of the intestate:—*Held*, that the Judge had no jurisdiction as such, both because sec. 69 did not apply to such a claim, and because the amount involved was more than $800 (1 Geo. V. ch. 18); and the consent could not confer jurisdiction upon the Judge to adjudicate as such; but his decision should be regarded as that of a quasi-arbitrator or private tribunal constituted by the parties; and, a right of appeal having been reserved by the consent under which he acted, an appeal lay from his decision, as from an award, to a Judge of the High Court, under the Arbitration Act, 9 Edw. VII. ch. 35. *Re Graham*, 25 O. L. R. 5, 709.

Bequest to Wife.—Whether in lieu of dower. *Re Taylor*, 3 O. W. R. 745.

Gift by Reference to the Statute of Distribution—Tenants in Common or Joint Tenants.—If a testator makes a gift to a class by reference to the Statute of Distribution, the interests which the class take as well as the persons constituting the class are determined by the statute. *Nightingale, In re; Bowden* v. *Griffiths*, 78 L. J. Ch. 196; (1909), 1 Ch. 385; 100 L. T. 292.

Where by his will a testator gave his real and personal estate to trustees with an ultimate trust as to a share thereof in favour of such persons "as under the statutes for the distribution of intestates' estates would be the next of kin" of a daughter of his, her next of kin, who were the four surviving daughters of the testator, took as tenants in common and not as joint tenants. The rule laid down in *Bullock* v. *Downse* (9 H. L. C. 1), considered and applied. Ib.

Next of Kin—Foreign Law.—Whole and half blood next of kin of a German subject. *Fergusson's Will, In re*, 71 L. J. Ch. 360; (1902) 1 Ch. 483; 50 W. R. 312.

"My Own Right Heirs"—Period of Ascertainment—"Then"—Division of Residue—Specific Devisee Entitled to Share.—The right heirs of the testator were those existing at the date of Marilla's death. Theobald on Wills, 5th ed., p. 312; *Long* v. *Blackhall*, 3 Ves. 486; *Wharton* v. *Barker*, 4 K. & J. 483; *Re Morley's Trusts*, 25 W. R. 825; *Sturge* v. *Great Western R. W. Co.*, 19 Chy. D. 444; *Re Milne, Grant* v. *Heyshaw*, 59 L. T. N. S. 628; *Harvey* v. *Harvey*, 3 Jur. 949; *Re Karn*, 2 O. W. R. 841.

"Legal Representatives."—Per curiam: the words "legal representatives" mean executors or administrators. That is the primary and legal meaning of the words and besides, that construction is, I think, controlled by authority. I refer to *In re Crawford*, 2 Drew. 230; *Hinchcliffe* v. *Westwood*, 2 DeG. & S. 216; *In re Turner*, 2 DeG. & S. 501; *In re Henderson*, 28 Beav. 656; *Chapman* v. *Chapman*, 33 Beav. 556; *Wing* v. *Wing*, 34 L. T. N. S. 41. There is here a prior life estate which the above cases shew, distinguishes this case from that of *Bridge* v. *Abbot*, 3 B. & C. 224, and *Colton* v. *Colton*, 2 Beav. 67. It is clear from the authorities that if any of the brothers and sisters had died after the making of the will, and before the testator's death, these words would not include the representatives of such person: *Corby* v. *French*, 4 Ves. 434a; *Bane* v. *Cook*, McLellan 168. In the case of *In re Webster's Estate*, 23 Ch. D. 742, May, J., says: "I have gone through the stream or rather through the divided currents of the authorities from *Christopher* v. *Naylor*, 1 Mer. 320, down to the present time, and I know of no authority which says that a gift to children or their heirs without more, entitles the heirs of children who were dead at the date of his will to take." That view in later cases was, I think, established by the Court of Appeal: *In re Muther, Groves* v. *Muther*, 43 Ch. D. 569, and *In re Wood, Tellett* v. *Colville;* (1894), 3 Ch. 381. I also refer to *In re Gorringe, Gorringe* v. *Gorringe*, 75 L. J. Ch. 116; *Parker* v. *Black*, 1 E. L. R. 129.

Administration Granted to Infant.—Letters of administration can not be treated as a nullity. The grant is an adjudication of the court having jurisdiction in the premises and is binding on the High Court. Even if the letters were revoked acts done during their currency would not be affected. The High Court has no power to revoke letters granted by the Surrogate Court. *Mutrie* v. *Alexander* (1911), 23 O. L. R. 396.

Protection Given to Trustee Acting Honestly and Reasonably.—Per Cur. I think that in this country that Statute (R. S. O. 1914 c. 121) ought to be very liberally applied for the purpose of relieving an executor or other trustee who has acted in good faith and reasonably. *Weir* v. *Jackson*, 5 O. W. R. 281, following *Perrins* v. *Bellamy* (1899) 1 Ch. 797.

Administrator Ad Litem.—The Court has no jurisdiction unless expressly conferred by Statute to appoint an administrator ad litem to defend an action not yet begun. *Re Hoover & Nunn*, 19 O. W. R. 418.

Administrator pendente lite. — The only authority which the court has to appoint an administrator pendende lite is that conferred upon it by the Surrogate Courts Act, sec. 56 of which, as interpreted by the Court of Appeal in *Beatty* v. *Haldan*, 4 A. R. 239, gives jurisdiction to the High Court, where an action is pending in it touching the validity of the will of any deceased person, to appoint such an administrator; and it may be that by force of sec. 35, where a cause is removed into the High Court under sec. 34, the Court has the same jurisdiction vested in it. *Re Gooderham*, 8 O. W. R. 685.

Administrator of Administrator.—P. L. died owning land in fee simple: letters of administration of his estate were granted to T. L. T. L. died and letters of administration were granted to the plaintiffs who sought to recover possession of the land of P. T. *Held*, that the legal estate passed to T. L. as administratrix of the estate of P. T. (*M'Dougall* v. *Gagnon*, 16 Man. L. R. 232) but was vested in her solely for the purpose of administration. There being no evidence to indicate that T. L. had in the course of administration conveyed the land to herself for her own benefit the plaintiffs had no title. *National Trust Co.* v. *Proulx*, 15 W. L. R. 349.

Retractation of Renunciation.—Where some executors prove and others renounce those who have renounced are allowed to retract as they can then be let in without altering the devolution of the representation. *In the goods of Stiles* (1898), p. 12. *Re Phipps*, 9 O. W. R. 982.

No jurisdiction in High Court to Set Aside Renunciation of Probate or Allow a Retractation.—See *Foxwell* v. *Kennedy*, 18 O. L. R. 782.

Ancillary Probate—Evidence—Application of Foreign Executors for ancillary probate of will. See evidence required *Re Wolf*, 8 W. L. R. 690, referring to *Beebe* v. *Tanner*, 6 Terr. L. R. at p. 13.

Foreign Administrator—Rights of.—Bills of Exchange drawn in Canada on New York, and taken by deceased to California. Respective rights of Ontario and California administrators. *Young* v. *Cushion*, 14 O. W. R. 717.

Domicile Law Applicable.—Held, upon the facts in this case, that although a testator's original domicile was in Ontario, he had changed it to the United States, which was his domicile at the time of his death, and his will therefore must be construed according to the laws of Minnesota, U.S., so far as regards all his personal estate, and his real estate there; according to the laws of Manitoba as regards his lands there; and as to the Ontario lands they devolved on his executors. *McConnell* v. *McConnell*, 18 O. R. 36.

Forum for Administration.—You must obtain probate or take out letters of administration in the country where the property exists, and when that is done you regulate the manner in which you distribute it or dispose of it by the law of the country where the testator was domiciled. *Campbell* v. *Beaufoy*, Johns 320. *Re Mikkelson*, 9 W. L. R. 610.

Jurisdiction of Court of Chancery.—A bill impeaching a will of which probate had been granted to the plaintiff by the Surrogate Court, stated that after the probate had been granted the plaintiff had discovered a subsequent will of the testator, and that this subsequent will was the deceased's last will. The wills disposed of both real and personal estate:—*Held*, that whether the will had been proved in common form or in solemn form, the Court of Chancery had jurisdiction to try its validity. *Perrin* v. *Perrin*, 19 Chy. 259.

The court has jurisdiction to set aside a will as having been executed under improper influence, or when the testator was not of sufficient capacity, without waiting for a revocation of probate. *Perrin* v. *Perrin*, 19 Chy. 259, on this point, approved of and followed. *Wilson* v. *Wilson*, 24 Chy. 377.

Jury.—Right to jury in actions to establish wills. See *Re Lewis*, *Jackson* v. *Scott*, 11 P. R. 107.

Setting up Alternative Will.—The defendant contested the validity of a will propounded by the plaintiff, and also propounded two earlier wills, under which, in the event of the last being invalidated, he claimed:—*Held*, that this was a proper subject of counterclaim. *Held*, also, that a general defence of fraud was admissible in such a case; but under that defence the defendant was required to give particulars immediately after the examination of the plaintiff. *Appleman* v. *Appleman*, 12 P. R. 138.

Law in Force in Manitoba 1870.—Held, that the law in force in 1870 (date of testator's death) in Rupert's Land was the law of England at the date of the Hudson's Bay Company charter, 1670, and, that being before the Statute of Frauds, it was not necessary that a will should be signed; but the document put forward as the will must have been intended by the testator as his will: there was no pretence that the document spoken of was assented to by the testator as his will; and the conclusion must be that the testator died intestate. *Larence* v. *Larence*, 17 W. L. R. 197.

Saskatchewan Surrogate Practice.—It is provided by sec. 39 of the Surrogate Courts Act that, unless otherwise provided by this Act or by the Rules of Court, the practice of the Surrogate Courts in Saskatchewan shall, so far as the circumstances will admit, be according to the practice in Her Majesty's Court of Probate in England as it stood on the 15th day of July, 1870; so that the law as laid down *In re Earl*, L. R. 1 P. & D. 453, and by the Imperial Act (20 & 21 Vict. ch. 77) is now the law of Saskatchewan, no provision having been made by statute or Rule regulating the practice under like circumstances. The appeal will therefore be dismissed. *Re Cook*, 11 W. L. R. 70.

Interference with Administration by Court.—Since the passing of Con. Rule 954, the courts have been chary of interfering with the administration of an estate by the personal representative duly appointed, unless something is made to appear proving incompetency or bad faith; and as, upon the facts at present appearing, an application for administration would be rightly refused, by parity of reasoning the land should for the present remain vested in the administratrix. If the administratrix were not acting properly, the course would be to apply for administration. *Re McCully, McCully* v. *McCully*, 23 O. L. R. 156, 709.

Proof in Solemn Form.—Upon proof in solemn form of the due execution of a will and the mental competence of the testator, the will was admitted to probate, by a decree in an action brought to establish the will. Under Order XXI., Rule 18, S. C. R., the defendant was held not liable for costs, the trial Judge considering that there were grounds for opposing the will. *Forest* v. *Spears* (1910), 13 W. L. R. 45.

Codicil Aiding Will.—C. died, leaving a will, which, after disposing of certain real property, proceeded as follows: "all the rest and residue of my real as well as personal estate, which I may die seised or possessed of, in reversion, remainder, or contingency, I will, devise, and bequeath unto my beloved wife Catharine, in trust to sell or dispose of any part or parcel thereof for the payment of my just debts, and to use and enjoy in such a manner as in her prudence and discretion will be most conducive to her own comfort and that of her children and grandchildren, during the term of her natural life," &c. Afterwards the testator added a codicil, referring to certain land obtained by him since the execution of the will, and bequeathing the same as follows: "I do now, therefore, by this codicil, to this my last will annexed, give and devise the said parcel or tract of land, as it is in the same deed and surrender more particularly described, to the same persons, my beloved wife and children, to whom I have devised all the rest and residue of my real estate in my will hereunto annexed," adding the usual words of publication:—Held, that the codicil, referring expressly to the will, must be looked upon as forming part of it; and that, taking the two together, the will might be construed to include all the testator's lands of which he should die seised or possessed, and not only those in reversion, remainder or contingency. *Doe d. Dickson* v. *Gross*, 9 U. C. R. 580.

"**Possibility**"—**Land.**—Held, that the word "possibility" in R. S. O. 1877 c. 106, s. 2, includes a "right of entry for condition broken," mentioned in s. 10, and is more extensive than the latter phrase; and might therefore be a subject of a devise, and is covered by the general name of "land." *In re Melville*, 11 O. R. 626.—Held, that a "condition of re-entry," or condition strictly so called, as distinguished from a "conditional limitation," is a means by which an estate or interest is prematurely defeated and determined, and no other estate created in its room. Ib.

Deed or Will, which?—Action for a declaration that defendant holds lands subject to a charge in favour of plaintiff. A father executed a document giving all his property, real and personal, to two sons, subject to charges to five other children. This document was under seal, and was at once recorded:—Held, that it was a deed, not a will. Declaration made as prayed, other children to be added as plaintiffs if they

consent, otherwise to be added as defendants. Application for sale to be made later. *Pratt* v. *Balcom*, 7 E. L. R. 236.

Deed Poll.—H., by deed poll, in consideration of natural love and affection, and of 5s., conveyed land to her daughter, R., in fee, adding after the habendum, "reserving, nevertheless, to my own use, benefit, and behoof, the occupation, rents, issues and profits of the said above granted premises for and during the term of my natural life:"—Held, a conveyance of the fee simple in the reversion, not a mere testamentary paper which the grantor could revoke by a subsequent deed. *Simpson* v. *Hartman*, 27 U. C. R. 460.

What Documents Constitute Will?—Where two or more documents bearing same date, purport to make a disposition of an estate, the probate issued by the Surrogate Court conclusively determines what documents constitute the last will of the testator, and it is not open to a High Court Judge, upon a motion for construction, to go behind the letters probate to determine what documents constitute the last will. *Gann* v. *Gregory*, 3 D. M. & G. 777, and *Re Cuff*, [1892] 2 Ch. 229, followed. *Re Wm. Smith* (1910), 16 O. W. R. 224.

Lands Title Office Practice.—The practice in the Lands Titles Office since *Re Galloway*, 3 Terr. L. R. 188, of accepting a transfer from an executor or administrator as such to himself personally where he is beneficially interested should not be disturbed. *Re Lockhart*, 20 W. L. R. 413.

Exemplification of Letters Issued by English Court.—On appeal the clerk of the Surrogate Court at Moosomin directed to attach the seal of the Court to an exemplification of probate granted by the High Court of Justice of England. *Re Chesshire*, 11 W. L. R. 257.

Official Administrator can in British Columbia like a trustee with full power to sell and convey the land of the deceased "sell such land without any order from the Court." *Re Neilson*, 8 W. L. R. 400.

Liability of Public Administrator. — Sale at alleged undervalue. *Re McKay*, 5 W. L. R. 79, following *Learoyd* v. *Whiteley*, 12 App. Cas. at p. 733.

Yukon Territorial Court.—Powers of.—In the Yukon Territory there is no Court of Probate or Surrogate apart from the Territorial Court which exercises all the functions of a separate Court of Probate. All proceedings relative to the estates of deceased persons are carried on in the Territorial Court. Compensation fixed therein. *Re Phiscator*, 8 W. L. R. 717.

Powers of Public Administrator of Yukon Territory Discussed.—*Re Tjerstrom*, 1 W. L. R. 385.

Disclaimer.—Where land is devised to a trustee, conduct which amounts to a disclaimer of the office of trustee will also amount to a disclaimer of the legal estate. *In Re Birchell; Birchell* v. *Ashton* (1889), 40 Ch. D. 436. *Foxwell* v. *Kennedy*, 18 O. W. R. 785.

Tenant for Life—Income.—Motion by the tenant for life under the trusts of a will for an order and direction as to whether or not any portion, and, if any, what portion, of the purchase price of certain lands included in the trusts, was payable to the applicant. Per Cur. I think this matter is governed by *Re Clarke*, 6 O. L. R. 551, 2 O. W. R. 980, following *In Re Cameron*, 2 O. L. R. 756, and *Walters* v. *Solicitor for the Treasury* (1900), 2 Ch. 107. *Re Childs*, 10 O. W. R. 108.

Limitation of Actions.—The payment of a part is an act from which the inference may be drawn that the debtor intended to pay the

balance though no special reference be made thereto at the time: and a payment on account of a debt is such part payment. *Ball* v. *Parker*, (1876) 39 U. C. R. 488 and *Boultbee* v. *Burke*, (1885) 9 O. R. 80 followed. *Scott* v. *Allen*, 26 O. L. R. 571.

Shares Held in Trust for Several—Action by One.—Where the trust fund is a certain ascertained sum of money of which the plaintiff is entitled to an aliquot part, he may maintain an action against the trustees to recover his aliquot share without making the other beneficiaries parties. It does not follow that where the subject of the trust is stock, the rights and interests of the others interested may not be affected by transferring a portion to one of the beneficiaries. *Snow* v. *Snow*, 3 Mad. 10. *Bechtel* v. *Zinkann*, 10 O. W. R. 1075.

Carrying on Business.—There are only two grounds on which executors carrying on the business of a testator after his death are entitled to indemnity out of the assets of the estate for the liabilities incurred by them in so doing in priority to general creditors. First, if the executors simply continue to carry on the business temporarily and for the mere purpose of effecting a sale of it as a going concern and with a view to any permanent operation as a money making enterprise they will, it appears, be entitled to be indemnified. Secondly, if they go further and continue to carry on the business not merely for the purpose of effecting a sale of it as a going concern but in a permanent way and for a considerable length of time as a profit-sharing enterprise then they will not be entitled to such indemnity unless it appears that the creditors have directly assented to their so doing. *Dowse* v. *Gorton* (1891) A. C. 190, *Wright* v. *Beatty*, 10 W. L. R. 598.

No Specific Performance of Breach of Trust.—A Court of Equity will not force an administrator specifically to perform a contract entered into by him the making of which in itself constitutes a breach of trust: *Oceanic Steam Navigation Co.* v. *Sutherland*, 16 Ch. D. 236, followed *St. Germain* v. *Reneault*, 12 W. L. R. 169.

Illegal Charge.—The devise of an estate is not wholly void because the estate has been charged to some extent with an illegal trust. *Doe d. Vancott* v. *Read*, 3 U. C. R. 244.

Discharge of Mortgage, Registration of. — Executors derive their title not from the letters probate of the will—which are merely evidence—but from the will; and before probate is issued they are clothed with their full title. *Aliter* in the case of an administrator. The executors of a mortgagee proved the will in Great Britain and registered the will and the foreign letters probate in the County in Ontario in which the mortgaged lands were situate (Registry Act 10 Edw. VII. c. 60, ss. 56, 65) (R. S. O. 1914 c. 124 ss. 56, 65); and a discharge of the mortgage executed by them was also registered.—Held, that the executors had the right to discharge the mortgage without proving the will in Ontario or having the probate resealed by a Surrogate Court in Ontario.—A foreign administrator has not the right under the statute to discharge a mortgage. *Re Thorpe* (1868), 15 Ch. 76. *Re Green and Flatt*, 29 O. L. R. 103.

Beneficial Interest.—A will disposed of the beneficial interest in land, but left the legal estate to descend to the heir:—Held, that lapse of time falling short of the statutory bar, was no defence by a purchaser from the heir-at-law. *Smith* v. *Bonnisteel*, 13 Chy. 29.

Change in Description.—It is no objection to holding lot 22 to pass, under a will, instead of lot 26, mentioned in it by mistake, that the registration of such a will thus changed in its most material contents, can afford no information on its face as to the lands affected by it. *Doe d. Lowry* v. *Grant*, 7 U. C. R. 125.

Undue Influence—Evidence.—In an action to impeach a will on the ground of undue influence it should not be upheld on the evidence of one witness, whose credibility is attacked, when the attesting witnesses may also be examined; and a new trial was ordered in this case because this had not been done.—As a general thing, witnesses to a will should inspect and judge of the testator's sanity before they attest. If he is not capable, the witnesses ought to remonstrate and refuse their attestation. *Madill* v. *McConnell*, 16 O. L. R. 314, 11 O. W. R. 345; 12 O. W. R. 124, 17 O. L. R. 209.

Undue Influence.—Where defendant had appeared on an examination for discovery, but on advice of her counsel had declined to write certain names, held that she should not be required to re-attend and write as requested. *Cook* v. *Winegarden* (1909), 14 O. W. R. 733, 1 O. W. N. 75.

Beneficial Owner—Consent to Lease Required.—At the time of the making of the lease the beneficial owner was M. W. A. The executors would not have been permitted to make a lease of the property without her consent. Lewin on Trusts, 10 ed. 708. See *Hessey* v. *Quinn*, 13 O. W. R. at p. 909.

Retainer of Solicitor Terminated by Death of Client.—*Whitehead* v. *Lord*, 7 Ex. 629; *Royce* v. *National Trust Co.*, 13 O. W. R. 1159.

CHAPTER IV.

POWER AND AUTHORITY.

POWER OF ADMINISTRATOR; OF EXECUTOR DE SON TORT.

After administration is granted the power of an administrator is equal to and with the power of an executor. An executor de son tort cannot bring any action in right of the deceased, except that if in possession of goods of the deceased, he can maintain an action against a wrongdoer in respect of such goods.

Elliott v. *Kemp*, 7 M. & W. 306.

RIGHT OF ENTRY AND POSSESSION OF GOODS.

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 descended to the heir in order to remove the goods of the deceased, provided he do so without violence. He also has the right to take deeds and other writings relative to the 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 might formerly, but not now, distrain them as damage feasant.

Stodden v. *Harvey*, Cro. Jac. 204.

RIGHT TO DISTRAIN.

Where a lessee for years underlets the land and dies, his personal representative may distrain at common law for the arrears of rent which became due in the lifetime of the deceased. Because these arrears were never severed from the reversion; but the executor or administration has the reversion and the rent annexed thereto in the same plight as the deceased himself had it, and it is not like a reversion which descended to the heir, while the arrears went to the executor or administrator.

Wade v. *Marsh*, 1 Roll. Abr. 672.

RIGHT OF DISTRESS AT COMMON LAW 32 H. VIII., c. 37.

But at common law the executors or administrators of a man seized of a rent service, rent charge, or in fee, or for his own life, or pur autre vie, could not distrain for the arrears incurred in the lifetime of the testator or intestate. By 32 Hen. VIII.

c. 37, it was enacted that executors may have action and distrain for rent due their testator in his lifetime. The Trustee Act contains the following provisions:—

RIGHT OF PERSONAL REPRESENTATIVES TO DISTRAIN FOR ARREARS.

59. The executors or administrators of a landlord may distrain for the arrears of rent due to such landlord in his lifetime, and may sue for the same in like manner as such landlord might have done if living, and the powers and provisions contained in this Act relating to distresses for rent shall be applicable to the distresses so made.

ABSOLUTE POWER OF DISPOSAL OF PERSONAL ESTATE.

It is a general rule of law and equity that an executor or administrator has an absolute power of disposal over the whole personal effects of his testator or intestate, and they cannot be followed by creditors, much less by legatees, either general or specific, into the hands of the alienee. The principle is that the executor or administrator in many instances must sell in order to perform his duty in paying debts, etc., and no one would deal with an executor or administrator if liable afterwards to be called to account. The power of the executor to mortgage the assets has been recognized by high authorities on several occasions.

Wms. p. 700. *Re Morgan*, 18 C. D. 93.

RIGHT TO PLEDGE.

So the executor may pledge a part of the assets for the purpose of better enabling him to administer the estate, and the pledgee may sell the things pledged if they are not redeemed within the proper time.

Russell v. *Plaice*, 18 Beav. 28, 29.

PURCHASER NEED NOT SEE TO APPLICATION OF PURCHASE MONEY.

It is not incumbent on the purchaser or mortgagee of the assets to see that the money is properly applied, though he knew he was dealing with an executor.

McLeod v. *Drummond*, 17 Ves. 154.

EXCEPTION TO GENERAL POWER.

Exception to the general power of the executor or administrator to dispose of the estate of the intestate or testator will be found in those cases only where collusion existed between the purchaser or mortgagee and the personal representative. That an executor may waste the money is not alone sufficient to invalidate the sale or mortgage. It must further appear that the purchaser or mortgagee participated in the devastavit or breach of duty in the executor.

Whale v. *Booth*, 4 T. R. 625.

FRAUDULENT TRANSFERS OR SALES.

Fraud and covin will vitiate any transaction and turn it to a mere colour. If, therefore, a man concerts with an executor by

obtaining the testator's effects at a nominal price, or at a fraudulent undervalue, or by applying the real value to the purchase of other subjects for his own behoof, or in any other manner contrary to the duty of the office of executor, such concert will involve the seeming purchaser or pawnee and make him liable to the full value.

Scott v. *Tyler*, 2 Dick. 725.

Where there exists such collusion as to render the dealing invalid, not only a creditor but a legatee, whether general or specific, is entitled to follow the assets. The right must be enforced within a reasonable time or it will be lost by acquiescence.

McLeod v. *Drummond*, 14 Ves. 154.

EXECUTOR CANNOT PURCHASE.

An executor cannot be allowed, either immediately or by means of a trustee, to be the purchaser from himself of any part of the assets, but shall be considered a trustee for the person interested in the estate, and shall account for the utmost extent of advantage made by him of the subject so purchased.

Hall v. *Hallett*, 1 Cox, 134; *Watson* v. *Toone*, 6 Madd. 153.

R. S. O. 1897, c. 128, s. 36, as to gifts to issue not lapsing, who leave issue on testator's death, applies only to cases of strict lapse, and not to the case of gifts to a class, such as a residuary bequest "equally among my children, share and share alike."

A testator died possessed of shares in a company. Afterwards, upon fresh allotments of stock being made, his executrix took up the additional shares, paying the premium out of her own money as to some of the shares and selling her right to others:—

Held, that she was not entitled as against the estate to such new shares, but only to a lien thereon for the amount advanced by her to take them up.

Re Sinclair, 2 O. L. R. 349. (See R. S. O. 1914 c. 120.)

EXECUTOR MAY SELL PARTNERSHIP SHARE.

The executor of a deceased partner is warranted in selling the share of the deceased to the surviving partners, if this can be done fairly and properly. A court of justice will look at such a transaction with close attention, for in dealings between the executor of a deceased partner and the surviving partners there may be an inequality in respect of knowledge which may be taken advantage of in such a way as to lead to inequitable and unfair results.

Chambers v. *Howell*, 11 Beav. 6.

ENDORSEMENT OF BILLS AND NOTES.

A promissory note or bill or exchange made payable to the deceased or his order, may be indorsed by his executor or adminis-

trator, and, generally speaking, there is no difference between the indorsement of a note by the deceased and one by his personal representative.

Watkins v. *Maule*, 2 Jac. & Walk. 243.
Bills of Exchange Act Dom. Statutes 1906 c. 119.

78. A bill is duly presented for acceptance which is presented in accordance with the following rule:

To Personal Representative.

(c) Where the drawee is dead, presentment may be made to his personal representative.

79. Presentment in accordance with the aforesaid rule is excused, and a bill may be treated as dishonoured by non-acceptance—

Drawee Dead.

(a) Where the drawee is dead.

Personal Representation.

87.—(3) When the drawee or acceptor of a bill is dead, and no place of payment is specified, presentment must be made to a personal representative if such there is, and with the exercise of reasonable diligence, he can be found.

53 Vict., c. 33, s. 45.

Notice.

97. Notice of dishonour in order to be valid and effectual must be given—

Personal Representative.

(c) In the case of the death, if known to the party giving notice, of the drawer or endorser, to a personal representative, if such there is and with the exercise of reasonable diligence he can be found.

Executor Claiming by Election.

An executor may, in some cases, claim by election, as where a testator at the time of his death was entitled out of several chattels to take his choice of one or more to his own use. If a man gives to A. such of his horses as A. and B. shall choose, the election ought to be in the life of A. If a man gives one of his horses to A. and B., after the death of A., B. may choose which he will take for an interest vested in them immediately by the gift. If a lease be granted to A. for 10 or 20 years as he shall elect, the executor is entitled to the election.

Again, if A. makes a lease for years to B. of 40 acres, parcel of 60, the election may be made by B.'s executors; so if the thing of which election is given is annual, and to have continuance, the heir or executor may make the election.

Old authorities, Wms. p. 713.

Executors and administrators may by virtue of their office dispose absolutely of terms of years which are vested in them in right of their testators or intestates or make an under lease. But

an executor or administrator cannot give an option of purchase at a future time.

Oceanic Steam Co. v. *Sutherland*, 16 C. D. 236.

If a lease be made for a term of years upon condition that if the lessee shall assign his term without the assent of the lessor it shall be lawful for the lessor to re-enter, the term, nevertheless, vests in the executor or administrator of the lessee without breach of the condition. If a lessor desires to exclude a specific devise of the term it seems he must do so by express terms.

Woodfall, Landlord and Tenant, 681.

When a lease for years with a condition or covenant restraining alienation or underletting comes into the hands of an executor or administrator if named in the covenant, he is bound thereby. If not named it is said to be doubtful whether he is bound.

Roe v. *Harrison*, 2 T. R. 429.

The executor's power of disposal over assets is not controlled or suspended by the commencement of an action for administration of the estate.

Reeves v. *Burrage*, 14 Q. B. 504.

DUTIES AND POWERS.

"May" does not necessarily mean "must;" the power conferred is discretionary. *Re Bennett, Bennett* v. *Philip* (1909), 14 O. W. R. 1076, 1 O. W. N. 213.

Sale of Shares in Company to be Formed—Sanction of Court. The court has no jurisdiction to sanction the sale of a testator's business for shares or debentures in a company to be formed to take it over. *Crawshay, In re; Dennis* v. *Crawshay*, 60 L. T. 357, followed. *West of England Bank* v. *Murch*, 52 L. J. Ch. 784; 23 Ch. D. 138, distinguished. *Morrison, In re; Morrison* v. *Morrison*, 70 L. J. Ch. 399; (1901) 1 Ch. 701; 84 L. T. 383; 49 W. R. 441; 8 Manson, 210.

Power to Give Receipt — Property Settled under General Power. — An administrator with the will annexed can give a valid receipt for settled personalty appointed by will under a general power, even where the appointor was a married woman who died before the coming into operation of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75) *Philbrick's Trusts, In re*, 13 W. R. 570, and *Hoskin's Trusts, In re*, 46 L. J. Ch. 817; 5 Ch. D. 229; 6 Ch. D. 281, applied. *Peacock's Settlement, In re, Kelcey* v. *Harrison*, 71 L. J. Ch. 325; (1902), 1 Ch. 552; 86 L. T. 414; 50 W. R. 473.

Payment into Court.—The testator provided that his daughter, an executrix, was to have the sole management of his estate during her life, and the executors afterwards. The person who was to have the sole control and management of the estate being entitled beneficially to the interest on the investments, the court refused to order a transfer into court. *Hellem* v. *Severs*, 24 Chy. 320.

Limiting Devise over—Management Vested in Trustees.—Held, that on the death of the mother, and the daughter attaining 21, she took an estate in fee simple, subject to the discretion of the trustees as to the

time of conveying the same, and not an estate in fee, with an executory devise over; but whether the trustees chose to exercise the discretion vested in them of conveying the estate to her or retaining it in their hands, for the purpose of managing it, she was entitled to the whole proceeds; and the management of the estate must be exclusively for her benefit. *Carradice* v. *Scott*, 22 Chy. 426.

Executor's Power before Probate.—An executor, without proving the will, has power to do almost all acts incident to his office. *Robinson* v. *Coyne*, 14 Chy. 561.

Cutting Timber.—A testator devised his farm ultimately to minor children, and directed that his executors should rent the same for the benefit of his wife, who was an executrix, and children; and that the timber from his farm should be used only for the use of the premises during his wife's widowhood; and that the executors should have full power to carry the will into effect:—Held, that it was the duty of the executors to prevent the executrix from cutting the timber for other purposes. *Stewart* v. *Fletcher*, 18 Chy. 21.

Exchange of Lands.—An executor or administrator cannot, having regard to R. S. O. 1887 c. 108, s. 9, and 54 Vict. c. 18, s. 2 (O.), make the lands of the testator or intestate the subject of speculation or exchange by him in the same manner as if the lands were his own. The court refused to decree specific performance of a contract by an executor to exchange lands of his testatrix for other lands, as the purpose of the exchange could not have been the payment of debts or the distribution of the estate and it was shewn that the beneficiaries objected to the exchange, and it did not appear that the official guardian had been consulted. *Tenute* v. *Walsh*, 24 O. R. 309.

Arbitration.—An executor or administrator may by a submission to arbitration preclude himself from pleading plene administravit, and thus render himself personally liable; but:—Held, on demurrer to the declaration set out in the report of this case, that an executor or administrator may, as such, refer to arbitration causes of action which arise in the lifetime of the testator or intestate, so as to bind the estate, and without making himself personally responsible. *Reid* v. *Reid*, 16 U. C. C. P. 247.

Award Fixing Executor's Indebtedness.—One of several executors being indebted to the estate, the matter was referred by himself and his co-executors, and a large sum awarded against him:—Held, that though the award might not be binding on the persons beneficially interested in the estate, it was binding on the executor, and in a suit by the executors he was decreed to pay the amount. *Koella* v. *McKenzie*, 15 Chy. 331.

Taxes.—Where executors and devisees in trust of land were assessed as owners:—Held, that they were properly so assessed, and that their own goods might be seized for the taxes. *Dennison* v. *Henry*, 17 U. C. R. 276.

Money Paid for Taxes.—M. was administrator of the estate of S., and was managing the real estate for the heirs; he was also one of the executors and trustees of E.; there was a sum of $808.55 due for taxes on some property of the S. estate, and M. paid the same money of the E. estate, directing the agent of that estate to charge the amount to the S. estate; M. did not enter the amount in his accounts with the S. estate as a loan, and, on the contrary, in the accounts which he rendered he took credit for the amount as a payment by himself. The heirs knew nothing of the loan until some time afterwards; they had not authorized M. to borrow money, and he was at the time indebted to them as agent in a sum exceeding the amount of the taxes; M. afterwards died insolvent, and indebted to both estates:—Held, that the E. estate could not hold the heirs of the S. estate liable for the $808.55, and was not entitled to a lien

therefor on the property in respect of which the taxes were payable. *Ewart* v. *Steven*, 18 Chy. 35; S. C., in the court below, 16 Chy. 193.

Tombstone.—A testator's sister erected a marble slab to his memory. His widow, the acting executirx, having in hands no funds of the estate, gave her note to the sister for the price, which was moderate in reference to the estate and degree of the deceased, but she had not paid the note, when she made her claim for it in an administration suit, and its allowance was opposed by the testamentary guardian of the infant legatees. The question did not affect creditors of the deceased, and it was not pretended that the estate was liable for the note or for the price of the slab:—Held, under these circumstances, that the amount should be allowed to the executrix. *Menzies* v. *Ridley*, 2 Chy. 544.

Where a testator provided for the erection "of a suitable tablet" over his grave "not to exceed $1,500," and also of monumental tablets or stones, &c., and the erection thereof over the graves of his deceased wives, and died worth $200,000, and the executors spent $3,000 on a monument to him and his wives, removing the remains of the deceased wives to the same burial place as the testator:—Held, that they might properly be allowed the said sum of $3,000 in their accounts. *Archer* v. *Severn*, 13 O. R. 316.

Assignee of Cestui Que Trust—Right to Custody of Deed of Assignment.—Where a trustee is distributing a trust fund of personalty, some shares of which have been assigned by the cestui que trust, he is not entitled, on paying such shares to the assignees, to require the deeds of assignment to be delivered up to him. *Palmer, In re; Lancashire and Yorkshire Reversionary Interest Co.* v. *Burke*, 76 L. J. Ch. 406; (1907), 1 Ch. 486; 96 L. T. 816.

Executors also Trustees.—Where the same persons are executors and trustees under a will, they do not lose their powers as such executors and become mere trustees, when all the testator's known debts are paid, or by mere lapse of time. *Ewart* v. *Gordon*, 13 Chy. 40. See *Cumming* v. *Landed Banking and Loan Co.*, 22 S. C. R. 246.

Discretion.—Where, under the terms of a will, executors and trustees are required to retain in their hands a sufficient sum to provide for the support of a lunatic, the court will not interfere with the exercise of the discretion given to the trustees as to the appropriation of the moneys for such purpose. *In re Sarjent*, 24 Occ. N. 357, 8 O. L. R. 260, 3 O. W. R. 769.

Executrix of Person in Possession of Goods.—Certain goods of testator were left in the house, where the plaintiff, his daughter, and her mother continued to live and use them for about a year, until the mother died, when defendant who had been living elsewhere, took possession of the house, with these things, and refused to deliver them up to the plaintiff as the mother's executrix:—Held, that the plaintiff had no such possession of these goods, either in her own right or through her mother, as to enable her to treat defendant as a wrong-doer; that as her mother's executrix she had no title; and that she therefore could not recover for them. *McCrary* v. *McCrary*, 22 U. C. R. 520.

A testatrix bequeathed a leasehold house to a son then abroad, and directed that, "in case he should not return and claim the said house," the same should accrue to another son, whom she appointed executor of her will. The executor informed the legatee of the bequest to him of the house, but did not mention the gift over to himself in the event of the legatee not returning and claiming. The legatee died abroad without having returned to claim the house:—Held, that there was no duty upon the executor to give notice to the legatee of the gift over in the event of his not returning to claim the house, and that the executor was not estopped from claiming the house under the gift over, which therefore took effect in his favour. *Lewis, In re; Lewis* v. *Lewis*, 73 L. J. Ch. 748; (1904) 2 Ch. 656; 91 L. T. 242; 53 W. R. 393.

Discretion to Apportion.—When trustees have a discretion to apportion between charitable objects and definite and ascertainable objects non-charitable, the trust does not fail, and in default of apportionment by the trustees the court will divide the fund equally between the objects charitable and non-charitable. *Gavacan, In re; O'Meara* v. *Atty.-Gen.* (1913) 1 Ir. R. 276.

Voluntary Subscription. — A payment of a mere voluntary subscription by a trustee cannot be allowed in his account, but where such payment, although in one sense voluntary, is made reasonably and in the honest belief that it will benefit the estate, either as saving a future compulsory payment of larger amount or as being fairly and reasonably necessary under the circumstances of the estate, it may be allowed. *How* v. *Winterton (Earl)*, 51 W. R. 262.

Dealing with real estate without authority.—Where executors, without any authority, assumed to manage the real estate, they were made to account for their acts, as if they had been duly empowered as trustees. In such a case it is their duty to keep accounts, and be ready at all times to explain their dealings. *Chisholm* v. *Barnard*, 10 Chy. 479.

Guardian and Manager.—A testator, after bequeathing to his wife his dwelling house and furniture and an annuity, continued as follows: "I give and bequeath unto G. B., and her children, the dwelling house they now occupy . . . the wife of C. R. B., and his children, appointing C. R. B., and G. B. joint guardians for the children above mentioned, and $500, all transactions to be null and void unless sustained in writing by both guardians." And in the 10th clause of his will he said: "I will and bequeath unto each of my grandchildren living at my death $100." C. R. B., was a son of the testator, and had children living at the testator's death:—Held, that the children meant were those of C. R. B. and G. B., and there was a simple gift to G. B. and her children, who took concurrently; and C. R. B. and G. B. were, by the above clause, made trustees for their children, and could give a good acquittance and discharge for the $500, but they were not authorized to receive, and could not give a good acquittance for, the moneys bequeathed to their children in the 10th clause. *In re Biggar, Biggar* v. *Stinson*, 8 O. R. 372.

Settlement of Estate.—The executor named in a will is not entitled to delay payment of legacies for the period of eighteen months from the decease of the testator, where it appears that there were ample funds in his hands to enable him to have paid the same at least twelve months and in the absence of evidence to show the existence of debts, claims or difficulties calling for eighteen months to dispose of them. Where it appears that there has been unreasonable delay, and a decree has been made allowing the beneficiary interest, after the expiration of the period of twelve months, such decree will not be disturbed. The executor under a will which has been set aside as void will be entitled, in taking the accounts, to credit for an amount paid out bona fide under the probate of the void will, but such payment is no answer to parties claiming under the terms of a previous will, subsequently admitted to probate, to have the terms of such will carried out. *Cullen* v. *McNeil*, 42 N. S. R. 346.

Signing Deed.—Executors empowered under a will to sell lands, are not bound to sign the deed in presence of each other, as arbitrators executing an award. *Little* v. *Aikman*, 28 U. C. R. 337.

Valuation of Real Estate for Division.—Held, that the executors, who were exercising, in some sense judicial functions, should either have excluded all interested, or should have invited all interested, to take part in appointing valuers; that there should therefore be another valuation of the farm, and if the parties desired, it might be referred to the master, or the executors might, on notice to all interested, proceed to do what was needful in that behalf. *Re Kerr, Kerr* v. *Kerr*, 8 O. R. 484.

Agreement to Pay for Church.—The testator having been interested in having a place of worship completed told the building committee to collect all they could from other members, and that he would see the building paid for; and the committee, relying on this assurance, completed the edifice, and incurred liability for the expense, and were out of pocket a considerable amount:—Held, that the executors were at liberty to discharge this sum out of their testator's estate. *Anderson* v. *Kilburn*, 22 Chy. 385.

Claim Paid under Mistake of Law.—If an administrator, on competent advice, pays a claim bona fide made against the estate, the money paid is not on his death, even though paid under a mistake in law, an unadministered asset so as to vest in an administrator de bonis non a right of action to recover it back. *Mayhew* v. *Stone*, 26 S. C. R. 58.

Compromise of Claim.—Where a claim is made against the estate of a testator, and the executors in the bona fide discharge of their duty compromise the claim, it is not necessary on passing the accounts of the executors that any corroborative evidence should be adduced. *Re Robbins*, 23 Chy. 162.

An administrator with the will annexed has no authority as such to compromise dower or other claims by assigning to the claimant a portion of the real estate of the deceased. *Irwin* v. *Toronto General Trusts Co.*, 24 A. R. 484.

Collection of Debts.—In considering whether evidence is sufficient to relieve an executor, as between him and legatees, in respect of uncollected debts of the testator, the lapse of time in connection with the smallness of the debt is proper to be taken into account. *McCargar* v. *McKinnon*, 17 Chy. 525.

Debt not Realized.—Quære, whether 32 Vict. c. 37 (O.) alters the law as to the liability of executors for assets of an estate lost by their negligence; but the fact of merely allowing a debt to remain outstanding is not per se negligence. *Re Johnston, Johnston* v. *Hogg*, 25 Chy. 261.

Accepting Land in Satisfaction of Debt.—Executors in the exercise of a prudent discretion, may accept land in payment of an execution debt. *McCargar* v. *McKinnon*, 17 Chy. 525.

Explaining Rights to Legatee.—Semble, there is no legal obligation upon an executor to disclose to a legatee his rights under a will. Dictum upon this point in *Brittlebank* v. *Goodwin*, 37 L. J. Ch. 377, 381; L. R. 5 Eq. 545, 550 observed upon. *Lewis, In re; Lewis* v. *Lewis*, 73 L. J. Ch. 748; (1904) 2 Ch. 656, considered. *Mackay, In re; Mackay* v. *Gould*, 75 L. J. Ch. 47; (1906) 1 Ch. 25; 93 L. T. 694; 54 W. R. 88.

Discretion as to Maintenance.—A discretion given to executors to apply the interest of a legacy to the maintenance and education of the legatees, nephews and niece of the testator, is not subject to the control of the court where there is no charge of fraud, or the like, against the executors. *Foreman* v. *McGill*, 19 Chy. 210.

Payment by Testator on Account of Purchase Money.—Where money has been paid by a testator on an agreement for the purchase of lands, which the vendor has failed to complete, it may be recovered back by the executors, as money had and received to the use of the testator. *Innes* v. *Brown*, 5 O. S. 665.

Time for Realizing—Collection of Debts. — Executors should proceed with promptitude to realize the assets; and the law presumes that, as a general rule, a year should be sufficient for this purpose. They should exercise a reasonable discretion as to suing debtors, and preserve evidence of having done so in the case of uncollected debts, the onus of proof being on them, and not on the legatees. But where the result proves

unfortunate, they are not charged with the loss, though the court should not concur in the propriety of the course which, in the bona fide exercise of their discretion, they took. A delay of ten months, which resulted in the loss of a debt, was held to require explanation. *McCargar* v. *McKinnon*, 15 Chy. 361.

POWER TO MORTGAGE.

Assignment of Mortgage.—An assignment by an administratrix of a mortgage, part of the assets of the intestate, was held valid, though not therein stated to be executed as administratrix. *Yarrington* v. *Lyon*, 12 Chy. 308.

Assignment of Mortgage by one Executor.—A. and B., executors and trustees under a will with power of sale, sell and take a mortgage to secure purchase money, they being in the recital named as executors. B., without the knowledge or consent of A., assigns the mortgage and appropriates the consideration money to his own use:—Held, that no estate passed under the assignment, except so far as the trust estate might be found debtor to B.; and also, that as between the contending equities of the trust estate and the assignee, the maxim qui prior est in tempore potior est in jure would apply in favour of the trust estate. *Henderson* v. *Woods*, 9 Chy. 539.

Where a mortgage was taken and the mortgagees were therein described as executors and devisees in trust, payments to one were held not to be thereby authorized. *Ewart* v. *Snyder*, 13 Chy. 55.

Power to Mortgage or Pledge.—An executor may mortgage or pledge any part of the personal estate of the testator, not previously alienated, even after twenty years from the death of the testator, and if he does so he will be presumed to be acting in the exercise of the duties imposed upon him by the will, so that the mortgagee or pledgee or other assignee will obtain a good title and be under no liability to the estate of the testator. *Solomon* v. *Attenborough*, 80 L. J. Ch. 503; (1911) 2 Ch. 159; 105 L. T. 11; 55 S. J. 535; 27 T. L. R. 471.

Mortgaging Trust Estate.—Divisional Court, held, that no power exists in the court to compel a trustee to execute a mortgage under the Act, the court has power only to authorize a mortgage by trustees.—When two trustees cannot agree as to the terms of a mortgage to be executed on the trust estate, they should either give up the trust or ask the advice of the court, and if there be no other way of settling the difficulty, an application should be made to remove one or both of the trustees. *Shepard* v. *Shepard* (1911), 20 O. W. R. 810; 3 O. W. N. 469.

Mortgage.—The administrators of the insolvent estate of a deceased mortgagor are not liable in damages to his mortgagee as upon a devastavit, because they release the purchaser of the equity of redemption in the mortgaged property from his liability to indemnify the mortgagor in respect of the mortgage. Judgment in 30 O. R. 684; 19 C. L. T. 280, affirmed. *Higgins* v. *Trusts Corporation of Ontario*, 20 C. L. T. 347; 27 A. R. 432.

Leave to Mortgage Lands of Testator.—An application for an originating summons for an order authorizing an executor to mortgage lands devised by a testator was refused, the material being insufficient.—And, semble, that the executor could not make a mortgage if the lands had been transferred to the devisee, who was primarily liable to pay the mortgage thereon created by the testator; although the executor might be authorized to take up that mortgage to protect the interests of chargees under charges created by the will. *Re Carley*, 18 W. L. R. 695, 698, referred to. *Re Materi* (1912), 21 W. L. R. 283.

Advance on Mortgage—Valuation.—Section 8, sub-section 1 of the Trustee Act, 1893, justifies trustees who are proposing to advance

trust money on mortgage in assuming that the valuer whose duty it is to advise them will satisfy himself of the facts as to the property on which it is proposed to make the advances which are necessary to the making of a satisfactory valuation, and relieves them of the liability to make enquiries themselves regarding the personality of the mortgagor and the details concerning the property. Observations in *Shaw* v. *Cates*, 78 L. J. Ch. 226; (1909), 1 Ch. 389, approved. *Solomon, In re; Nore* v. *Meyer*, 81 L. J. Ch. 169; (1912) 1 Ch. 261; 105 L. T. 951; 56 S. J. 109; 28 T. L. R. 84.

POWER COUPLED WITH AN INTEREST.

Power Coupled with an Interest. — A testator, J. C., by will "authorized and empowered" his executrix and executors, or a majority of them (naming five, of whom his wife, E. C., was one) to sell and convey certain lands, the lot in dispute among others, and to apply the proceeds to a specific purpose; and left all the rest and residue of his estate to his wife E. C., to be disposed of by her as she should see fit. E. C. subsequently sold to one J. W. the land in question for a valuable consideration, which consideration was applied according to the terms of the will. The plaintiff claimed title through the will of J. W. The other four executors of J. C. refused to act, except on one occasion, when it was proved that being sued they joined in a deed of conveyance (not of the lot in dispute in this action.) It was further proved that J. T. C. one of the defendants, had recovered a judgment in ejectment against N. and O., two of the plaintiffs. The defendant J. T. C. claimed title as heir-at-law of A. C., who was heir-at-law of J. C., and insisted that the conveyance of E. C. being void for want of power to convey, he was entitled to succeed as heir-at-law of J. C.:—Held, that E. C. having a power coupled with an interest, the conveyance was good, and the plaintiffs were entitled to prevail. *Wessels* v. *Carscallen*, 10 U. C. C. P. 215.

In 1848, J. H., by her will, devised as follows:—"The charges of my declining days and my funeral first to be paid, after which I give and bequeath all my real estate, known as, &c., to be sold to the best advantage, and which is to be divided in manner and form as follows." Certain legacies were granted to children and grandchildren, and the remainder of the estate was directed to be equally divided between two daughters of the testatrix. The will concluded thus—"for the execution of this my last will and testament, and I hereby nominate and appoint A. B., S. H., and W. H., joint executors, hereby giving them full power to settle all business by me kept unsettled, hereby revoking all other and former wills by me at any time heretofore made:"—Held, that the executors took a power, not a legal estate. *Hopkins* v. *Brown*, 10 U. C. R. 125.

Mortgage to Pay Debts.—The testatrix after a direction to him to pay her debts, devised land to her executor and trustee, and his executors and administrators, upon trust to retain it for his own use for life, and directed that, after his decease, his executors or administrators should sell the land and divide the proceeds among her children:—Held, that this was a devise of the land out and out as to the legal estate—the words "and his executors and administrators" being equivalent to "heirs and assigns;" the executor had the right by virtue of s. 16 of the Trustee Act, R. S. O. 1897 c. 129, to mortgage the entire fee for debts; and the mortgagee in such a mortgage, made within eighteen months of the death, was exonerated from all inquiry by s. 19. *In re Bailey*, 12 Ch. D. 268, and *In re Tanqueray-Willaume and Landau*, 20 Ch. D. at p. 476, followed. The Devolution of Estates Act, R. S. O. 1897 c. 127, does not apply to a case where the executor derives his title to the land from, and acts under, the will and the provisions of the Trustee Act. *Mercer* v. *Neff*, 29 O. R. 680.

Mortgage to Pay Legacies.—A testator bequeathed to each of his children $100 on attaining majority, and the residue of his property to his widow for life, to be divided amongst his children according to her judgment; or at any time to give such a portion to each or either as she thought proper. Letters of administration were granted to the widow, and

she, for the purpose of raising money wherewith to pay legacies, created a mortgage on the real estate, the equity of redemption in which was subsequently sold under execution at sheriff's sale, and the purchaser obtained by conveyance from the appointee of the widow the fee simple in the land:—Held, that the will operated as a devise of some estate to the widow, and made her a trustee of the realty, which she took charged with the legacies; and that under the terms of the will and the provisions of the Property and Trusts Act, 29 Vict. c. 28, s. 12, the widow had power to create the mortgage, and that the purchaser at sheriff's sale took subject thereto, and was bound to redeem or be foreclosed. *Lundy* v. *Martin*, 21 Chy. 452.

Power to Mortgage.—See *London and Canadian Loan and Agency Co.* v. *Wallace*, 8 O. R. 539; *Gordon* v. *Gordon*, 11 O. R. 611, 12 O. R. 593.

A devised as follows: "I give and bequeath to my wife, after my decease, the proceeds of one-half of all my lands, cattle, and other effects of every kind whatsoever to me belonging at the time of my decease; and the other half of my said lands, cattle, and effects of every kind whatsoever, I leave in the hands of my executrix and executors, to pay all my just debts, &c.:—Held, that the estate passed to the executors to sell, and not only a mere power to sell. *Dowling* v. *Power*, 5 U. C. C. P. 480.

"I give and bequeath to my wife after my decease the proceeds of one-half of all lands, cattle, and other effects of every kind whatsoever to me belonging at the time of my decease, and the other half of my said lands, cattle, and effects of every kind whatever, I leave in the hands of my executrix and executors, to pay all my just debts," &c.:—Held, that the executors took a power of sale, and not the fee. *Moore* v. *Power*, 8 U. C. C. P. 109.

A testator devised to his wife for life a parcel of land "with the power of sale at any time during her life, subject to the consent of my executors." Three executors were appointed by the will, one of whom died. A contract for sale of part of the land having been entered into, it was objected by the purchaser that the consent of the two surviving executors was not sufficient:—Held, that in the conflicting state of the authorities upon the question, the title was not one which the court would force upon a purchaser. Held, also, that under such a power the land could be sold in parcels. *Re MacNabb*, 1 O. R. 94.

TRUST.

Discretion to Apportion.—When trustees have a discretion to apportion between charitable objects and definite and ascertainable objects non-charitable, the trust does not fail, and in default of apportionment by the trustees the court will divide the fund equally between the objects charitable and non-charitable. *Gavacan, In re; O'Meara* v. *Atty.-Gen.* (1913), 1 Ir. R. 276. See *Marshall, In re; Marshall* v. *Marshall*, 108 L. T. 896.

Advance on Mortgage.—Section 8, sub-section 1 of the Trustee Act, 1893, justifies trustees who are proposing to advance trust money on mortgage in assuming that the valuer whose duty it is to advise them will satisfy himself of the facts as to the property on which it is proposed to make the advance which are necessary to the making of a satisfactory valuation, and relieves them of the liability to make enquiries themselves regarding the personality of the mortgagor and the details concerning the property. Observations in *Shaw* v. *Cates*, 78 L. J. Ch. 226; (1909), 1 Ch. 389 approved. *Solomon, In re; Nore* v. *Meyer*, 81 L. J. Ch. 169; (1912 1 Ch. 261; 105 L. T. 951; 56 S. J. 109; 28 T. L. R. 84.

It is the duty of a valuer acting for trustees to consider not only the value of the property, but the proportion which in his opinion as an expert and a practical man the trustees would in each particular case be justified in advancing, independently of any supposed rule relating to two-thirds of the value; though if he advises that the trustees may safely advance

two-thirds and no more, they are justified in acting on his report. *Solomon, In re; Nore* v. *Meyer*, 81 L. J. Ch. 169; (1912) 1 Ch. 261; 105 L. T. 951; 56 S. J. 109; 28 T. L. R. 84.

It is not necessary for a surveyor or valuer expressly to advise trustees to advance a particular sum. If he is instructed to survey a property and report on its value and the amount which the trustees can advance on it, and states in his report what he considers to be the value, and that the property forms a sufficient security for the proposed advance, the trustees in making the advance are making it "under the advice of the surveyor or valuer, expressed in the report" within the meaning of the subsection *Solomon, In re; Nore* v. *Meyer*, 81 L. J. Ch. 169; (1912) 1 Ch. 261; 105 L. T. 951; 56 S. J. 109; 28 T. L. R. 84.

Trust.—In order to constitute a good declaration of trust the court must be satisfied that the declaration of trust purported to be created is irrevocable. Where the declaration of trust is not communicated to any one, that raises a strong inference that it is not irrevocable. Where an interest in land is affected by the declaration of trust the same must be in writing signed by the party by law enabled to declare the trust in order to satisfy section 7 of the Statute of Frauds. *Cozens, In re; Green* v. *Brisley*, 82 L. J. Ch. 421; 57 S. J. 687.

Where the only evidence of a gift of a promissory note is its endorsement to the alleged donee without delivery, the title does not pass. Money deposited by one, in a savings account, in his own name and another's, payable to the survivor, as a rule becomes the property of the survivor absolutely. *In re Paul Daley*, 37 N. B. R. 483, distinguished. *Clark* v. *Clark* (1909), 4 N. B. Eq. 237.

CHAPTER V.

ESTATE OF EXECUTOR AND ADMINISTRATOR.
TIME OF VESTING.

DIFFERENCE AS BETWEEN EXECUTOR AND ADMINISTRATOR.

As the interest of an executor in the estate of the deceased is derived exclusively from the will, so it vests in the executor from the moment of the testator's death. On the other hand, the administrator derives his title wholly from the court; he has none until the letters of administration are granted, and the property of the deceased vests in him only from the grant.

Woolley v. *Clark*, 5 B. & A. 745, 746.

ADMINISTRATION BY RELATION.

For particular purposes the letters of administration relate back to the time of the death of the intestate, and not to the time of the granting them. Thus, although it was held that detinue could not be maintained by an administrator against a person who had got possession of the goods of the intestate after his death, but had ceased to hold them prior to the grant of administration, yet an administrator might have an action of trespass or trover for the goods of the intestate taken by one before the letters granted to him. Otherwise there would be no remedy for this wrongdoing.

Searson v. *Robinson*, 2 Fost. & F. 351.

LIMITATION OF REAL PROPERTY.

By The Real Property Limitation Act, R. S. O. 1914, c. 75, an administrator claims without interval from the death of the deceased. (Section 8).

BENEFIT OF CONTRACT BY RELATION.

Accordingly it would seem that whenever anyone acting on behalf of the intestate's estate, and not on his own account, makes a contract with another before any grant of administration, the administration will have relation back in order not to lose the benefit of the contract, so that the administrator may sue upon it as made to himself. Thus where money belonging to a testator at the time of his death, or due to him, and paid in after his death, or proceeding from the sale of his effects after his death, has, before the grant of administration, been applied by a stranger to the payment of the intestate's debts and funeral expenses, the ad-

ministrator may recover it from such stranger as money had and received to his use as administrator.

Welchman v. *Sturgis*, 13 Q. B. 552.

MOVABLES VESTED IN PRESENTI.

All movable goods, though in ever so many different and distant places from the executor, vest in the executor in possession presently upon the testator's death, for it is a rule of law that the property of personal chattels draws to it the possession.

INTEREST IN LANDS AS DISTINGUISHED FROM POWER.

A devise of the lands to executors to sell passed the interest in it; but a devise that executors shall sell the land, or that lands shall be sold by the executors, gave them but a power.

Doe v. *Shotter*, 8 A. & E. 905.

Section 8 of the Devolution of Estates Act, R. S. O. 1914, c. 119, is as follows:

TRUST ESTATES AND INTERESTS OF MORTGAGEES.

8. Where an estate or interest of inheritance in real property is vested on any trust or by way of mortgage in any person solely, the same shall on his death, notwithstanding any testamentary disposition, devolve to and become vested in his executor or administrator in like manner as if the same were personal estate vesting in him and, accordingly, all the like powers for one only of several joint executors or administrators as well as for a single executor or administrator and for all the executors and administrators together to dispose of and otherwise deal with the same shall belong to the deceased's executor or administrator with all the like incidents but subject to all the like rights, equities and obligations as if the same were personal estate vesting in him, and for the purposes of this section the executor or administrator of the deceased shall be deemed in law his heirs and assigns within the meaning of all trusts and powers.

Imp. Act, 44-45 Vict., c. 41, s. 30.

THINGS IMMOVABLE.

It is otherwise as to things immovable, as leases for years of lands or houses. Of these the executor or administrator was formerly not deemed to be in possession before the entry. The words of the "Devolution of Estates Act" are that such property, on the death of the deceased, devolves upon and becomes vested in his legal representatives. These words are, probably, sufficient to obviate the necessity for entry.

INTEREST IN GOODS OF TESTATOR.

The interest which an executor or administrator has in the goods of the deceased is very different from the absolute, proper, and ordinary interest which every one has in his own proper goods; for an executor or administrator has his estate as such in auter droit merely, as the minister or dispenser of the goods of the dead.

Pinchon's Case, 9 Co. 88, b. 2 Inst. 236.
Serle v. *Bradshaw*, 2 Cr. & M. 148.

EXECUTION AGAINST GOODS OF EXECUTOR.

Therefore, the goods of a testator in the hands of his executor cannot be seized in execution of a judgment against the executor in his own right.

Farr v. *Newman*, 4 T. R. 621; *Kinderley* v. *Jervis*, 22 Beav. 23.

MERGER.

With reference also to the principle that an executor or administrator holds the property of the deceased in auter droit merely, it has been laid down that in respect to land no merger can take place of the estate held by a man as executor in that which he holds in his own right.

Jones v. *Davies*, 5 H. & N. 767.

TERMOR OR EXECUTOR MAY ACQUIRE FEE.

Though a person is originally entitled to a term, or to an estate of freehold as an executor or administrator, yet in process of time he may become the owner of that estate in his own right. This happens in the case of executors when the executor is also residuary legatee, and he performs all the purposes of the will and holds the estate as legatee; or when the executor pays money of his own to the value of the term in discharge of the testator's debts, and with an intention to appropriate the term to his own use in lieu thereof.

EXECUTOR MAY ALIEN GOODS.

Since no man can bequeath anything but what he has to his own use, an executor cannot by his will dispose of any of the goods which he has as executor to a legatee; but, generally speaking, an executor or administrator in his own lifetime may dispose of and alien the assets of the testator. He has absolute power over them for this purpose, and they cannot be followed by the creditors of the deceased.

Farr v. *Newman*, supra.

HOW ESTATE PROPERTY MAY BECOME PROPERTY OF EXECUTOR.

It may be proper to consider how the property which the executor or administrator has at first in his representative character may become his own to his own use as his other goods, which he has not as executor or administrator. And first in regard to ready money left by the testator; on its coming into the hands of the executor, the property in the specific coin must of necessity be altered, for when it is intermixed with the executor's own money, it is incapable of being distinguished from it, although he shall be accountable for its value, and therefore a creditor of the testator

cannot by fieri facias executed on a judgment recovered against the executor, take such money as de bonis testatoris in execution.

But see *Re Hallett*, 13 C. D. 696.

EXECUTOR MAY TAKE SPECIFIC CHATTEL FOR DEBT.

So if the testator died indebted to the executor, or the executor not having ready money of the testator, or for any other good reason, shall pay a debt of the testator's with his own money, he may elect to take any specific chattel as a compensation; and if it be not more than adequate, the chattel by such election shall become his own.

Elliott v. *Kemp*, 7 M. & W. 313.

COMPLETE TRANSMUTATION OF PROPERTY.

So if the debt due to him from the testator amount to the full value of all his effects in the executor's hands, and there are no other creditors, there is a complete transmutation of the property in favour of the executor by the mere act and operation of the law; in the former case his election, and in the latter the mere operation of law shall be equivalent to a judgment and execution.

See contra *Hearn* v. *Wells*, 1 Coll. 333.

WHERE PROFITS OF LEASE ARE ASSETS.

So in the case of a lease to the testator, devolved on the executor, such profits only as exceed the yearly value shall be held to be assets; it therefore follows that if the executor pay the rent out of his own purse the profits to the same amount shall be his.

EXECUTOR MAY BUY TESTATOR'S GOODS WHERE SOLD UNDER FI. FA.

If a testator's goods be sold under fieri facias, the executor as well as any other person may buy such goods of the sheriff, and in case he does so, the property which was vested in him as executor shall be turned into his own property.

ADMINISTRATOR MAY ACQUIRE RIGHT TO GOODS.

As an executor, who is also a legatee, may, by assenting to his own legacy, vest the thing bequeathed in himself in the capacity of legatee; so an administrator, who is also entitled to share in the residue as one of the next of kin under the Statute of Distribution, may acquire a legal title in his own right to goods of the deceased either by taking them by an agreement with the parties entitled to share with himself under the statute, or even without such agreement, by appropriating them as his own share.

Elliott v. *Kemp*, 7 M. & W. 313.

ESTATES OF EXECUTOR AND ADMINISTRATOR SIMILAR.

After administration is granted the interest of the administrator in the property of the deceased is equal to and with the

interest of an executor. Executors and administrators differ in little else than in the manner of their constitution.

WHERE NO ESTATE PASSES BUT THE POWER ONLY.

A testator desired that his executors should sell and dispose of his land, and then appointed them to execute any deeds that might be necessary to the purchaser. Held, that the executors took no interest, but a mere power, and consequently that they could not distrain for rent accruing in their own time, before the land was sold.

Nicholl v. *Cotter*, 5 U. C. R. 564.

COURT WILL NOT INTERFERE WITH DISCRETION TO SELL.

If under a will a trustee has a discretion to sell or not to sell real estate, the court will not interfere by its advice or direction, but will leave the trustee to exercise his discretion.

In re Trusts of Will of Ann Parker, 20 Chy. 389.

ELECTION BY DOWERESS WHERE FUND BLENDED.

A testator having by his will blended his real and personal estate into a fund from which payments of income were to be made to his wife and other devisees, postponed the division of the corpus until after the death of the wife.

Held, that the wife was not bound to elect between her dower and the testamentary bestowments.

WHOLE FUND NOT DISPOSED OF EXECUTORS ARE TRUSTEES.

Where a will does not dispose of the whole personalty, the executors are trustees for the next of kin, unless the will expressly shows that the testator intended they should take the residue beneficially.

Thorpe v. *Shillington*, 15 Chy. 85.

Section 58 of the Trustee Act, R. S. O. 1914, ch. 121, is as follows:

58.—(1) When 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.

Imp. Act, 11 Geo. IV. and 1 Wm. IV,, c. 40, s. 1.

(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 in case of an intestacy.

Imp. Act, 11 Geo. IV. and 1 Wm. IV., c. 40, s. 2.

INTEREST.

Cash on Deposit—Rate of Interest.—Executors found a sum of money belonging to the testator in the hands of a loan company upon savings bank account, and allowed it to remain there at 3½ per cent. per annum, for more than two years after obtaining probate of the will. In January, 1902, they closed the savings bank account, and invested the money at 4 per cent. in a debenture, but 20 days later, fearing that they would be called on to distribute the money, they took over the debenture themselves as from its date, and put the money into a chartered bank at 3 per cent. The trusts of the will, so far as the property not specifically devised was concerned, were to provide for annuities and to divide the surplus amongst the residuary legatees:—Held, that the executors would not have been justified in making long or permanent investments of the money which came into their hands; in strictness they should have deposited it from the beginning in a chartered bank, where it would have earned only 3 per cent.; and, in accounting they should not be charged with more interest than they actually received, that is, 3½ per cent. while the money was on deposit with the loan company, 4 per cent. for the 20 days during which it was invested in a debenture, and 3 per cent. thereafter until distributed. *Inglis* v. *Beaty*, 2 A. R. 453, and *Spratt* v. *Wilson*, 19 O. R. 28, distinguished. *In re McIntyre; McIntyre* v. *London and Western Trusts Co.*, 24 Occ. N. 268; 7 O. L. R. 548; 1 O. W. R. 56; 3 O. W. R. 258.

Administration of Assets—Charge of Fraud—Benefit to Estate.—When an action charging a person with gross personal fraud both as administrator pendente lite and also as receiver of an estate was, in default of appearance by the plaintiff at the trial, dismissed with costs, and the plaintiff was unable to pay the costs, the receiver was not allowed out of the estate the costs of his defence of the action, on the ground that the defence had not and could not have resulted in any benefit to the estate. *Walters* v. *Woodbridge*, 47 L. J. Ch. 516; 7 Ch. D. 504, discussed, and principle applied. *Dunn, In re; Brinklow* v. *Shingleton*, 73 L. J. Ch. 425; (1904) 1 Ch. 648; 91 L. T. 135; 52 W. R. 345.

Rests—Costs.—In a suit against an executor for an account, the court, under the special circumstances, charged the executor with the costs of the suit, and with interest on the balances from time to time in his hands, and directed the account to be taken with annual rests. *Erskine* v. *Campbell*, 1 Chy. 570.

Rests.—An executor or trustee who has been guilty of negligence merely, in omitting to invest moneys, will be charged with interest at six per cent. *Wiard* v. *Gable*, 8 Chy. 458.

Where an executor had committed a breach of trust in selling lands to pay debts, for which the personal estate come to his hands had proved more than sufficient, and had also applied trust funds to his own use, the court ordered the account to be taken against him with annual rests. *Wiard* v. *Gable*, 8 Chy. 458.

Retaining Moneys.—The executors retained in their hands a sum of $1,100 to meet claims against the estate, and were not called upon to pay it into court:—Held, that the amount retained was not unreasonable and that the executors were not chargeable with interest in respect of it. *Thompson* v. *Fairburn*, 11 P. R. 333.

Held, that the executors in this case should be charged with interest upon the residue in their hands from the time when 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. *Boys' Home of the City of Hamilton* v. *Lewis*, 4 O. R. 18.

Costs of Unsuccessful Action—Personal Estate—Real Estate. — An executor without direct authority or obtaining indemnity, brought an action to recover a sum of money alleged to belong to the testator, and this action was dismissed with costs, the personal estate

being insufficient to pay the costs of the opposite party:—Held, that, though the general rule is that an executor acting in good faith is entitled to be recouped his costs of an unsuccessful action, this rule would not justify the executor resorting for this purpose to specifically devised real estate. *In re Champagne, St. Jean* v. *Simard*, 24 Occ. N. 234, 7 O. L. R. 537, 3 O. W. R. 515.

The widow contends that the codicil gives her either a fee simple or a power of disposing in fee of the property for her own benefit, and thus of practically cutting out the rights given by the will to the brother and sisters of the testator.—If he had intended to give her the enlarged estate for which she contends, and to deprive his brother and sisters of what he had given them, his intention would, I think, have been differently expressed. *Randfield* v. *Reeve*, 8 H. L. C. 325; *Doe d. Anderson* v. *Hamilton*, 8 U. C. R. 302; *Re Thomson's Estate*, 13 Ch. D. 144, 14 Ch. D. 263. In the last two cases the power of disposal given to the tenant for life was accompanied by further expressions, leaving no doubt as to the testator's meaning. *Re Armstrong*, 3 O. W. R. 798.

On the question whether the widow took a life interest in the real estate or whether she was entitled absolutely to the property, result in *Re Jones, Jones* v. *Richards* (1898), 1 Ch. 348, *Lloyd* v. *Tweedy* (1898), 1 Ir. R. 5, *In re Richards, Uglow* v. *Richards* (1902), 1 Ch. 76, and in *Re Tuck*, 10 O. L. R. 309, 6 O. W. R. 150 cited. I have also considered *Espinasse* v. *Luffingham*, 3 Jo. & Lat. 186. *In re Bush* (1885) W. N. 61, and *In re Pounder*, 56 L. J. Ch. 113. *Re Silverthorn*, 10 O. W. R. 799.

Absolute Gift of whole Estate to Widow.—The rule that where there are two inconsistent clauses in a will the later clause revokes the previous one is subject to the qualification that it must be reasonably clear that the testator intended to revoke the prior gift.—*In re Farrell*, 4 D. L. R. 760. *Adshead* v. *Willetts*, 9 W. R. 405, and *Kiver* v. *Oldfield*, 4 De G. & J. 30, followed. *Re Freedy* (1913), 25 O. L. R. 378.

Provision for Widow.—Where there is such reasonable provision made by a testator for his widow as warrants a strong inference that such provision was intended to be in lieu of dower, the widow is put to her election.—*Re Hurst*, 11 O. L. R. 6, distinguished. *Re Ouderkirk* (1913), 25 O. W. R. 185; 5 O. W. N. 191.

Trustees.—Where trustees under a will are charged with certain active duties which cannot be performed without having the legal estate in real property vested in them there is a gift of the fee to them by implication. *Murphy* v. *McGibbon* (1913), 13 E. L. R. 160.

CHAPTER VI.

OF THE EXONERATION OF THE REAL ESTATE BY THE PERSONAL.

PERSONAL ESTATE PRIMARY FUND FOR DEBTS.

It is a well-known rule that as between the real and personal representatives of all persons deceased, the personal estate in the hands of the executor or administrator is the primary and natural fund which must be resorted to in the first instance for the payment of debts of every description contracted by the testator or intestate. But this principle could only regulate the equitable administration of assets, and could not extend to the legal control of the creditor of the deceased; for it is discretionary with the creditor, if his debt is of a nature to bind both the real and personal estate, whether he will resort to the personal estate in the hands of the executor or to the real estate descended or devised. Therefore if the obligee of a bond brought an action of debt against the heir, the latter could not plead that there was an executor with assets.

Galton v. *Hancock*, 2 Atk. 426.

IN EQUITY CREDITORS PROCEEDINGS AGAINST REAL ESTATE ARE REIMBURSED.

In order, therefore, to support and enforce the primary liability of the personal estate as between the representatives of the deceased debtor, it is a rule in equity that if the creditor proceeded against the real estate descended or devised, the heir or devisee who sustained the loss should be allowed to stand in the place of a specialty creditor to reimburse himself out of the personal estate in the hands of the executors; provided such reimbursement did not prejudice any of the creditors, or any other party having an equal or a more favored claim with the heir or devisee respectively. Thus if the testator entered into a bond for himself and heirs, and died, and the obligee proceeded against the heir, and compelled him to pay the debt out of the real assets, the heir might recover it out of the assets in the hands of the executor; and this exoneration was extended not only to the heir-at-law, but also to the general devisee or a particular devisee.

Galton v. *Hancock*, *ut sup.*

MORTGAGEE MAY PROCEED AGAINST LAND OR FOR DEBT.

Again, it is discretionary with a mortgagee whether he will proceed for the recovery of his mortgage debt against the mortgaged land, which has come to the heir or devisee of the mortgagor,

or against his executor. But if the mortgagee recovers against the land, the heir or devisee shall, unless the case comes within the statute, be reimbursed out of the personal estate of the mortgagor. But the land cannot be exonerated out of the personal estate to the prejudice of any person having a prior claim to be satisfied, and therefore the heir or devisee shall not stand in the place of the mortgagee against the personal assets if by so doing he would disappoint any creditor or any legatee, except the residuary legatee or the widow's claim to paraphernalia.

Lipping v. *Lipping*, Wms. 736.

CREDITOR WITH GENERAL LIEN PROCEEDING.

If a creditor with a general lien on land as a mere bond creditor recovers the bond debt against the real estate devised, the devisee will be entitled to exoneration out of the personal estate to the disappointment of general legacies.

DEVISEE WHEN ENTITLED TO COMPEL EXONERATION.

The devisee would be entitled to compel the specific legatees to contribute to the payment of the debt, not wholly to exonerate the land.

Hensman v. *Fryer*, L. R. 3 Ch. App. 420.

The exoneration of the real estate out of the personal is confined to cases where the claim in question is the proper debt of the deceased; for, if it be not so, his heir or devisee must take the land cum onere. Thus, if a settler of real estate in contemplation of marriage, covenants for payment of the portions of children or widow's jointure; or, if a person makes a voluntary gift by way of charge, and covenants for the payment of the money, the land will be the primary fund for payment for in this case the charge is in its nature real and the covenant only an additional security.

See *Graves* v. *Hicks*, 6 Sim. 398.

ESTATE SUBJECT TO AN EXISTING MORTGAGE.

Again, if a man buys an estate subject to an existing mortgage, the land remains the proper fund for its discharge, and the heir or devisee of the purchaser cannot throw the debt on the personal estate as the primary fund for payment. So if an estate descends on an heir-at-law, or is devised charged with a mortgage debt, and the heir or devisee dies leaving the debt unpaid, the land will be the fund for payment and not the personal estate of the deceased heir or devisee.

WHEN A MORTGAGE BY DEVISEE WILL NOT CHARGE LAND.

Even a direct and original mortgage made by the person to whom land has descended or been devised, will not operate to

make his personal estate the primary fund for the discharge of the mortgage debt if the money borrowed was for the purpose of paying off the debts or legacies of the ancestor or devisor; and the law will be the same if a bond or note of hand is given by the heir or devisee for the payment of debts or legacies charged on the land. Although the debt is not originally the debt of the party, yet it is optional in him by the sufficient testimony of intention to render the debt his own, in which case his personal estate will, as between his real and personal representatives, become primarily liable to discharge the debt. But it requires clear evidence of intention to make the debt his own. Thus a charge by will of debts generally on his real and personal estate will not be sufficient of itself to shift the onus from land which came to him already mortgaged, whether by descent or by devise or by sale.

Lord Ilchester v. *Lord Caernarvon*, 1 Beav. 209.

Section 38 of the Wills Act, R. S. O. 1914, ch. 120, is as follows:

38.—(1) Where any person has died since the 31st day of December, 1865, or hereafter dies seized of or entitled to any estate or interest in any real estate, which, at the time of his death, was or is charged with the payment of any sum of money by way of mortgage, and such person has not, by his will or deed or other document, signified any contrary or other intention, the heir or devisee to whom such real estate descends or is devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate, or any other real estate of such person; but the real estate so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same is charged, every part thereof according to its value bearing a proportionate part of the mortgage debts charged on the whole thereof.

Imp. Act, 17-18 Vict., c. 113 (1).

(2) In the construction of a will to which this section relates, a general direction that the debts or that all the debts of the testator shall be paid out of his personal estate, or a charge or direction for the payment of debts upon or out of residuary real estate and personal estate or residuary real estate shall not be deemed to be a declaration of an intention contrary to or other than the rule in sub-section 1 contained, unless such contrary or other intention is further declared by words expressly or by necessary implication referring to all or some of the testator's debts charged by way of mortgage on any part of his real estate.

Imp. Act, 30-31 Vict. c. 69, s. 1, and 40-41 Vict. c. 31, s. 1.

(3) Nothing herein shall affect or diminish any right of the mortgagee to obtain full payment or satisfaction of his mortgage debt, either out of the personal estate of the person so dying, or otherwise; and nothing herein shall affect the rights of any person claiming under any will, deed, or document made before the first day of January, 1874.

CHAPTER VII.

MARSHALLING ASSETS.

CLAIMANT WITH TWO FUNDS.

If a claimant has two funds to which he may resort a person having an interest in one has a right to compel the former to resort to the other, if that is necessary for the satisfaction of both.

EQUITY WILL CONTROL ELECTION.

This principle is not confined to the administration of the estate of a person deceased, but applies wherever the election of a party having two funds will disappoint the claimant having the single fund, and accordingly the Court of Equity will, if necessary, control that election, and compel the one to resort to that fund which the other cannot reach. But the more general practice is to protect the claimant on the single fund by marshalling the assets.

PURCHASE MONEY PAID OUT OF PERSONAL ESTATE.

If the vendor of an estate the contract for which was not completed in the lifetime of the testator, who was the purchaser, is afterwards paid his purchase money out of the personal assets, the simple contract creditors of the testator shall stand in the place of the vendor with respect to his lien on the land sold against the devisee of that estate.

Selby v. *Selby*, 4 Russ. Ch. Cas. 336.

SPECIFIC DEVISE AND SPECIFIC LEGATEE.

A similar equity will be extended in favour of legatees; thus, where a specialty creditor, who has a general lien on the real estate as a creditor by bond, in which the deceased bound himself and his heirs, receives satisfaction out of the personal estate, and thereby exhausts it so as to leave nothing for the payment of legacies, the legatee shall stand in the place of such specialty creditor as against the real assets which have descended to the heir. But where the real estate does not descend to the heir, but is devised to a stranger, the assets are not marshalled in favour of general legatees so as to throw the creditors on the real assets devised. And this rule is not confined to specific devises of land, but extends to lands which pass under a residuary devise.

Lancefield v. *Iggulden*, L. R. Colh. 136.

ASSETS MARSHALLED IN FAVOUR OF GENERAL LEGATEES.

With respect to specific legatees the assets shall be so far marshalled against a specific devisee of real estate upon failure of

the general personal estate, that the devisee and specific legatee shall each, in proportion to their respective gifts, contribute to the payment of the specialty debt.

Bateman v. *Hotchkins*, 10 Beav. 426.

If a creditor has a specific lien on the real estate and resorts to the personalty, the assets will be marshalled in favour of general legatees as well as against real assets devised and descended. Thus, if the real estate subject to a mortgage be devised, and the mortgagee exhausts the personal assets, a pecuniary legatee shall stand in the place of the mortgagee upon the devised estate.

Middleton v. *Middleton*, 15 Beav. 450.

LEASEHOLD SUBJECT TO MORTGAGE SPECIFICALLY BEQUEATHED.

If a leasehold estate, subject to a mortgage, be specifically bequeathed, the specific legatee must take the legacy cum onere.

LEGACY NO CHARGE ON REAL ESTATE.

If the testator's personal estate be insufficient for the payment of his debts and legacies, and consequently the pecuniary legacies are entitled to have the assets marshalled, and to stand in the place of the mortgagee as against the leasehold estate.

Johnson v. *Child*, 4 Hare, 87.

Where one or more legacies are charged on the real estate, and there is another legacy which is not so charged; there the legatee which is not so charged shall stand in the place of the former legatees to be satisfied out of the real assets.

Scales v. *Collins*, 9 Hare, 656.

Where the general personal estate of a testator, not specifically bequeathed is insufficient for payment of his debts, a specific legatee of property charged by the testator in his lifetime with the payment of a sum of money must, as between such specific legatee and other specific legatees or devisees, bear the burden of the incumbrance; and a general direction in the will that the testator's debts shall be paid after his decease is not sufficient to throw any part of such burden on the specific devisees of real estate.

In re Butler; Le Bas v. *Herbert* (1894), 2 Ch. 250.

A testator bequeathed a pecuniary legacy to his son B. The personal estate was insufficient to pay the legacy in full after payment of debts and funeral and testamentary expenses.

Held, that B. was entitled to have the assets marshalled so as to stand in the place of creditors against the real estate so far as

the debts, funeral and testamentary expenses had been paid out of the personalty.

In re Salt; Brothwood v. *Keeling* (1895) ,2 Ch. 203.

No Marshalling in Favour of a Charity.

The court will not marshall assets in favour of a charitable bequest, so as to give it effect out of the personal assets, it being void so far as it touches any interest in land.

Beaumont v. *Olivera*, L. R. 4 Ch. 309.

Where a testator gave a charity after a pecuniary legacy all the residue of her personal estate, "save and except such parts thereof as cannot by law be appropriated by will to charitable purposes."

Held, that the gift of the residue did not operate as a direction to marshall the estate in favour of the charity, and that the impure personalty passed to the next of kin.

In re Somers-Cocks; Wegg-Prosser v. *Wegg-Prosser* (1895), 2 Ch. 449.

PART III.

PROCEDURE BY PERSONAL REPRESENTATIVES WITH REGARD TO ESTATE.

CHAPTER I.

1. FUNERAL.

FUNERAL EXPENSES, LIMIT FOR.

It is now proposed to consider the duties of an executor or administrator, and first, he must bury the deceased in a manner suitable to the estate he leaves behind him. 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 whatsoever. But the executor or administrator is not justified in incurring such as are extravagant even as it respects legatees or next of kin, nor as against creditors' wish he is not warranted in paying 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 offices of the parson, clerk and bearers; but not for the pall or ornaments.

Shelly's Case, 1 Salk. 296.

2. INVENTORY.

INVENTORY REQUIRED.

Executors must make a true and perfect inventory of all goods and chattels belonging to the deceased, and file the same on oath with the Surrogate Clerk.

CONTENTS OF INVENTORY.

The Surrogate bond is conditioned among other things for the exhibiting of true and perfect inventory of the goods, chattels and credits, of the deceased. In modern practice inventories are not required to be exhibited without being called for. In cases where there has been a great lapse of time between the death of the party and the citation calling for the inventory, the Court has frequently refused to enforce the exhibition of an inventory. The parties who may be cited to exhibit an inventory and account are not confined to the executor or administrator, but very often to those who,

upon the death of the executor or administrator, succeed to the representation of the original testator or intestate. An inventory exhibited by an executor or administrator ought to contain a full, true and perfect description and estimate of all the chattels, real and personal, in possession and in action to which the executor or administrator is entitled in that character as distinguished from the widow, or the donee mortis causa of the testator or intestate. It must also distinguish such debts as are separate from those which are doubtful or desperate. It cannot call for an account of the subsequent profits in the testator's business.

Pitt v. *Woodham*, 1 Hagg. 250.

Section 58 of the Surrogate Courts Act, R. S. O. 1914, ch. 62, is as follows:

58.—(1) The person applying for a grant of probate, or administration, shall, before the same is granted, make or cause to be made and delivered to the Registrar a true and perfect inventory verified by the oath of the applicant of all the property which belonged to the deceased at the time of his death.

(2) When after the grant of probate, or letters of administration, any property belonging to the deceased at the time of his death, and not included in such inventory, is discovered by the executor, or administrator, he shall, within six months thereafter, make and deliver to the Registrar an inventory, duly verified by oath, of such newly discovered property.

(3) Where the application or grant is limited to part only of the property of the deceased it shall be sufficient to set forth in such inventory the property intended to be affected by such application or grant.

3. REGISTRATION OF WILL.

REGISTRATION OF WILL.

Although it cannot be said that the registration of the will is actually the duty of the executor, no more appropriate place than the present can be found for stating the mode provided by our statutes for registering wills, and the effect of registering. R. S. O. 1914, c. 127. The Registry Act provides as follows:

2. In this Act,

(g) "Will" shall include codicil, probate of will and exemplification, and notarial or prothonotarial copy of a will, or of a probate of a will, and letters of administration with the will annexed, and a devise whereby land is disposed of or affected.

REGISTRATION OF WILLS.

56.—(1) A will shall be registered,

(a) By the production of the original will and the deposit of a true copy thereof with an affidavit verifying such copy, and with an affidavit sworn to by one of the subscribing witnesses to the will proving the due execution thereof by the testator; or,

(b) By the production of probate or letters of administration with the will annexed, or an exemplification or certified copy thereof, under the seal of any court in Ontario, or in Great Britain and Ireland, or in any British province, colony or possession, or in any foreign country having jurisdiction therein, and by depositing a true copy of the probate, letters of administration, or exemplification or certified copy with an affidavit verifying such copy.

VERIFICATION.

(2) The correctness of the sworn copy shall be verified by the registrar or his deputy.

PROOF OF TESTATOR'S DEATH.

(3) Where a will is registered by the production of the original will the affidavit of the subscribing witness or of some other person shall state that the testator is dead.

COMPLIANCE WITH REQUIREMENTS OF SUCCESSION DUTY ACT.

(4) Unless with the consent in writing of the Treasurer of Ontario an original will or an exemplification or certified copy of probate or letters of administration with the will annexed under the seal of any court in Great Britain and Ireland, or in any British province, colony or possession, or in any foreign country having jurisdiction therein, shall not be registered under this section unless accompanied by a certificate of the Registrar of the Surrogate Court of the county in Ontario where the deceased had a fixed place of abode, or where the lands, or any of them, devolving by the will are situate, showing that a statement has been filed with him similar to that required by section 11 of the Succession Duty Act, and such certificate shall be deposited with the registrar.

REGISTRATION OF LETTERS OF ADMINISTRATION.

57. Letters of administration which under the Devolution of Estates Act affect land shall be registered in the same manner as a probate of a will.

WILLS TO BE REGISTERED WITHIN TWELVE MONTHS FROM DEATH OF TESTATOR.

77. A will or the probate thereof and letters of administration with the will annexed registered within twelve months next after the death of the testator shall be as valid and effectual against subsequent purchasers and mortgagees as if the same had been registered immediately after such death; and in case the devisee, or person interested in the land devised in any such will, is disabled from registering the same within such time by reason of the contesting of such will or by any other inevitable difficulty without his wilful neglect or default, then the registration of the same within twelve months next after his attainment of such will, probate or letters of administration, or the removal of such impediment, shall be a sufficient registration within the meaning of this Act.

REGISTRY TO BE NOTICE.

75. The registration of an instrument under this or any former Act shall constitute notice of the instrument to all persons claiming any interest in the land, subsequent to such registration, notwithstanding any defect in the proof for registration, but nevertheless it shall be the duty of a registrar not to register any instrument except on such proof as is required by this Act.

2.—(d) "Instrument" shall include will, probate of will, grant of administration, caution under the Devolution of Estates Act or renewal thereof.

4. INSURANCE OF PROPERTY.

INSURANCE OF PROPERTY.

An executor was formerly in doubt whether it was within the scope of his duty to insure premises, part of the estate. This doubt is now removed by the following clause, which is embodied in The Trustee Act (R. S. O. 1914, c. 121):

23.—(1) A trustee may insure against loss or damage by fire, tempest or other casualty any building or other insurable property to any amount,

including the amount of any insurance already on foot, not exceeding three-fourths of the value of such building or property, and pay the premiums for such insurance out of the income thereof or out of the income of any other property subject to the same trusts, without obtaining the consent of any person who may be entitled wholly or partly to such income.

Imp. Act, 56-67 Vict., c. 53, s. 18.

(2) This section does not apply to any building or property which a trustee is bound forthwith to convey absolutely to any beneficiary upon being requested to do so.

5. PAYMENT OF TAXES.

An executor must take care to keep down the taxes on the land forming part of the estate. The mode of assessment is as follows (R. S. O. 1914, ch. 195. The Assessment Act):

INCOME IN CONTROL OF AGENT, ETC.

13.—(1) Every agent, trustee or person who collects or receives, or is in any way in possession or control of income for or on behalf of a person who is resident out of Ontario, shall be assessed in respect of such income.

PLACE OF ASSESSMENT.

(2) Every person assessed under this section shall be assessed at his place of business, if any, or if he has no place of business, at his residence.

LANDS HELD BY TRUSTEES, ETC. PROVISO.

37.—(12) Land held by a trustee, guardian, executor or administrator shall be assessed against him as owner or tenant thereof, as the case may require, in the same manner as if he did not hold the land in a representative capacity; but the fact that he is a trustee, guardian, executor or administrator shall, if known, be stated in column 5 of the roll. Provided, however, that such trustee, guardian, or administrator shall only be personally liable when and to such extent as he has property as such trustee, guardian, executor or administrator, available for payment of such taxes.

6. COLLECTION OF ASSETS.

EXECUTOR MUST COLLECT GOODS AND CHATTELS.

The next duty of the executor or administrator is to collect all the goods and chattels so inventoried, for that purpose the law invests him with large powers, and it is incumbent upon him to avail himself of his authority with reasonable diligence in the collection of the effects of the deceased.

EXECUTOR PERSONALLY LIABLE FOR DELAY.

Therefore if by unduly delaying to bring an action the executor or administrator has enabled a creditor of the deceased to avail himself of the Statute of Limitations, the executor or administrator will be personally liable.

Hayward v. *Kinsey*, 12 Mod. 573.

EXECUTOR MUST EXERCISE REASONABLE DISCRETION.

Executors should proceed with promptitude to realize the assets; and the law presumes that, as a general rule, a year should

be sufficient for this purpose. They should exercise a reasonable discretion as to suing debtors, and preserve evidence of having done so in the case of uncollected debts, the onus of proof being on them, and not on the legatees. But where the result proves unfortunate, they are not charged with the loss, though the court should not concur in the propriety of the course, which, in the bona fide exercise of their discretion, they took. A delay of ten months, which resulted in the loss of a debt, was held to require explanation.

McCargar v. *McKinnon*, 15 Chy. 361.

LIABILITY FOR RENTS AND PROFITS.

Delay on the part of executors to sell lands, which by the will are saleable for payment of debts will render the executors liable for rents and profits.

Emes v. *Emes*, 11 Chy. 325.

Section 26 of The Trustee Act, R. S. O. 1914, c. 121, is as follows. It is intended for the protection of persons paying money to others who are trustees.

26. The payment of any money to and the receipt thereof by any person to whom the same is payable upon any trust, or for any limited purpose, and such payment to and receipt by the survivor or survivors of two or more mortgagees or holders or the executors or administrators of such survivor or their or his assigns, shall effectually discharge the person paying the same from seeing to the application or being answerable for the misapplication thereof.

7. PAYMENT OF SUCCESSION DUTIES.

EXPLANATION OF SUCCESSION DUTY.

One of the first duties of the executor after ascertaining the amount of the estate come to his hands is to provide for succession duty. This duty is a tax by Government on estates of persons deceased, when those estates reach a certain value. As the amount is large it is only in exceptional cases that the question need be considered. But, as in these exceptional cases the interests involved are of importance, a clear understanding of the scope and intention of the Succession Duties Act is very necessary.

***Kennedy* v. *Protestant Orphans' Home*, 25 O. R. 235.**

IMPERIAL DUTIES FIVE IN NUMBER.

As our system in Ontario is founded upon the English Acts it is well to have some knowledge of the English system.

In England before the Finance Act of 1894 (57 & 58 Vict. c. 30), there were five kinds of duties payable on the death of a testator or intestate, known as probate, account, legacy, succession and estate duties. The probate and account duties were payable out of the general assets of the deceased, the legacy, succession and estate

duties were payable by the persons who benefitted by the legacy or succession. Probate duty was first introduced in 1694, legacy duty in 1780, succession duty in 1805, account duty in 1881, and estate duty in 1889. Some knowledge of these various kinds of duties is necessary in order to understand our present system.

PROBATE DUTY.

Probate duty was a stamp duty on affidavits for probate and letters of administration in the case of persons dying domiciled in the United Kingdom, varying with the amount of the estate.

Probate duty was the oldest form of death duty, having been established in 1694 (5 & 6 William and Mary, c. 21). It was called because it was collected by means of a stamp impressed on the grant of probate or letters of administration, such stamp denoting the amount of duty paid.

DEFINITION OF PROBATE DUTY.

Probate duty may be defined to be the price paid for clothing the executor or administrator with the right to take possession of the personal estate of the deceased person. The duty was payable in respect of the value of all personal estate of the deceased person, of which the executor became capable of taking possession by the mere fact of obtaining the grant of probate or administration. The duty was only payable in respect of personal property within the jurisdiction of the court, by which the grant was made, and from which the authority of the executor emanated. Since the duty was payable on everything of which the executor had a right to take possession by the mere fact of obtaining the grant, it followed that personal estate chargeable with duty included real property which at the time of the death of the deceased was personal estate in the eye of the law. Thus real property which the deceased had contracted to sell was chargeable with duty, so also was a share in the assets of a partnership, notwithstanding that they consisted of real property.

ESTATES PUR AUTRE VIE.

Estates pur autre vie in realty, although applicable by law as personal estate, continue in the eye of the law to be real estate, and were not chargeable with duty, nor did any direction of the deceased for converting his real estate into personal estate render it chargeable with duty if it was in effect real estate when he died, as, for instance, a direction contained in the will for an immediate sale.

PROBATE DUTY PAYABLE ON PERSONAL ESTATE ONLY.

Probate duty was, therefore, payable or not payable, according to what was the condition of the property at the time of the death,

if it was then personal estates, duty was payable, if it was not, duty was not payable.

PERSONAL ESTATE DEFINED.

By personal property was understood every interest of the deceased in personal property, whether in possession or remainder, whether vested or contingent, also personal property of which the deceased disposed by his will under a general power.

TRUST PROPERTY NOT SUBJECT.

Property to which the deceased was only entitled as trustee for other persons was not subject to probate duty.

PROBATE DUTY ABOLISHED.

The principal Imperial Probate Act was 55 Geo. III. c. 184 (1815). Probate duty was abolished after 1st August, 1894.

ACCOUNT DUTY.

Account duty was at the same rate as the probate duty. The property on which the duty was payable included (a) donationes mortis causa, (b) property voluntarily transferred to the deceased and any other person jointly so that a beneficial interest accrued to the latter by survivorship, (c) property passing by a voluntary settlement with a reservation of life interest to the settlor, or with any trust in favour of a volunteer, and whether made for valuable consideration or not, (d) money received under a policy of life insurance. The account was to be delivered by every person who acquired possession or assumed the management of any personal property of the foregoing descriptions.

OBJECT OF ACCOUNT DUTY.

Account duty was established in 1881 by section 38 of 44 Vict. c. 12, its object being to prevent the evasion of probate duty by gifts of property made in anticipation of death, or so framed as to enable the person making them to retain the control or enjoyment of the property during his life. Section 38 was amended by section 11 of 52 Vict. c. 7, and as amended is incorporated in the Imperial Finance Act of 1894, as will be seen later.

LEGACY DUTY.

Legacy duty was originally imposed in 1780, 20 Geo. III. c. 28. The tax after some changes, was finally imposed as a duty on property actually given to or devolving on the legatee or next of kin.

LEGACY DUTY ON WHAT CHARGEABLE.

Legacy duty was chargeable not only on legacies, but upon gifts such as residue, rent charges, annuities, benefits derived from

appointments under powers, of money charged on real estate, and even foregiveness of a debt due to the testator. Legacy duty attached not only on gifts by will, but also on the devolution of shares under an intestacy. The person primarily liable to pay was the executor or administrator.

HOW LEGACY DUTY BECAME PAYABLE.

Legacy duty became payable only under a will or an intestacy—the term legacy being applied equally to a share of personal property passing under an intestacy as to a gift by will.

DIFFERENCE BETWEEN LEGACY DUTY AND PROBATE DUTY.

Legacy duty differed from probate duty by looking to domicile and not to jurisdiction. In the eye of the law mobilia sequuntur personam,* personal property devolving under an intestacy presented no difficulty. There whatever came to the next of kin of the intestate paid duty as a legacy, but personal property devolving under a will in order to be liable to a legacy duty had to go to the person taking as an act of bounty from the testator. It must, in fact, have been a gift.

HOW LEGACY MAY BE GIVEN.

A legacy may be given two ways. It may be a gift out of the testator's own free personal estate, and simply attributable to his bounty, or it may be a gift out of personal estate which did not belong to the testator, but of which he had power to dispose.

LEGACY GIVEN UNDER GENERAL POWER.

Where a legacy is given, in exercise of a general power the legatee takes it through the bounty of the person exercising the power. Where the legacy is given in exercise of a special power the legatee takes it through the bounty of the person creating the power. In the former case it does not matter whether the power was created by deed or by will, for it is the exercise of the power that is the governing factor.

LEGACY UNDER SPECIAL POWER.

In the case of a legacy under a special power unless the power was created by will, the act of bounty proceeds from the person

* Thus, an American, domiciled in England, may by his will leave £100,000 consols to a legatee, but no legacy duty is payable. Where the domicile of the deceased was British his assets may consist of foreign government securities, debts due from foreigners, ships on the high seas, but no matter what they are, so far as they go to the legatee or next of kin legacy duty was payable. Hanson (1897), p. 20. See *Thomson* v. *Adv. General*, 12 Cl. & Fin. 1.

As to partnership interests out of the United Kingdom, see *Forbes* v. *Stevens*, L. R. 10 Eq. 479.

creating the power. Where a general power is created by a will, and is exercisable either by deed or by will, and it is, in fact, exercised by deed, the appointee takes simply under the deed. But if a special power is created by a will, and is exercisable either by deed or by will, and is, in fact, exercised by deed, in such a case the appointee takes a gift under the original will.

Att.-Gen. v. *Pickard*, 3 M. & W. 552.

PERSON WITH GENERAL POWER.

The person who, under a will, took a limited interest in personal property, and also a general power of appointment over it, was considered, upon exercising that power either by deed or by will, to have received a legacy under the original will.

PERSON TAKING INTEREST IN DEFAULT OF APPOINTMENT.

Where a person got under a will a general power of appointment over personal property, whether he also took a limited interest or not, which in default of appointment went to him absolutely, then quite independently of his exercising the power he was held to have received the legacy under the original will.

36 Geo. III., c. 52, s. 18.

HOW LEGATEE WAS ASCERTAINED.

As to who was the legatee under a will the rule was that the will alone was to be regarded in determining who was the legatee for the purposes of duty. A testator might give property to A. on all kinds of secret trusts, but A. was the legatee, so far as the revenue was concerned. Or, the testator might direct the actual legatee to be selected by his executors or other persons, and the person so selected was the legatee for such purposes.

Cullen v. *Att.-Gen. for Ireland*, L. R. 1 Eng. & Ir. App. 190.

LEGATEE NOT TAKING BENEFIT OF LEGACY.

The legatee was none the less a legatee for purposes of duty that he did not live to enjoy his legacy, and did not dispose of it. The only question being whether the legacy must travel through his estate in order to get to the person actually claiming it. Thus, where a testator gave the legacy to a son, who died in the testator's lifetime intestate, leaving issue, by virtue of the Wills Act the gift taking effect as if the death of the son had immediately followed that of the testator, the son was a legatee, and the duty had to be paid on the property as a legacy from the father to the son, and again as a legacy from the son to his next of kin. It was otherwise where a testator gave the legacy to A., or if he be dead to the persons who would have been entitled thereto if A. had died immediately after him (the testator), and A. died before

the testator. In such a case the testator himself marked out the persons to take in the event which happened of A.'s death, and A. was not a legatee, and the legacy was considered to devolve directly to the persons indicated by the testator.

See *Atty.-Gen.* v. *Lloyd*, 1895, 1 Q. B. 496.

DUTY A PERSONAL CHARGE.

The duty itself was a personal charge on the value of the legacy, calculated according to the relationship between the testator from whom the legacy was taken to come and the legatee.

WHEN DUTY FELL DUE.

The duty fell due at the death, but was payable on the value of the gift or legacy as it stood when the duty was paid, that is, with all accretions to the original amount.

LEGATEE DISCLAIMING LEGACY.

If a legatee disclaimed his legacy no duty was chargeable in respect of it as a legacy to him, but where once a legatee showed his acceptance of a legacy, although not actually paid over, his executors could not disclaim it so as to affect the duty. If a legacy was released for some consideration, or compounded for less than its value, duty was payable according to the value of the consideration or composition. If a legacy was given in satisfaction of another legacy, duty was paid on the subject yielding the largest duty. The executor was primarily liable for the duty, and it became actually payable so soon as the legacy was paid to or retained for the benefit of the legatee. A severance or setting aside of the legacy for purposes of administration did not amount to retainer for this purpose. It had to be so appropriated as to take it out of the possession or control of the executors, and to discharge them from further liability in respect of it.

Att.-Gen. v. *Munby*, 3 H. & N. 826.

LEGACY DUTY LEAST AFFECTED BY FINANCE ACT.

Of all the death duties Legacy duty was the least affected by the Finance Act of 1894; its incidence and the method of its calculation remain the same, only the class of exemptions is some what widened.

Hanson (1897), p. 19.

SUCCESSION DUTY.

Succession duty was a duty imposed on succession to real and settled personal property at the same rate as that attaching under Legacy duty. It was payable only on property which was not subject to Legacy duty, and in no case was more than one of the duties payable on the same property.

SUCCESSION DUTY DEFINED.

Succession duty was a tax placed on the gratuitous acquisition of property which passed on the death of any person by means of a transfer, which might be either a disposition or a devolution from one person called the predecessor, to another person (the successor). Property chargeable with this tax was called a succession.*

(1) *What Property could be the subject of the tax.*

WHAT PROPERTY COULD BE SUBJECT OF TAXATION.

The property which could be the subject of this tax was all real and leasehold estate situate in the United Kingdom, and all personal property not subject to legacy duty. Thus estates in land for life in tail, in fee, and for years were subject to succession duty as were also the corresponding interest in personal estate except where legacy duty was payable. If the forum of administration of the property was in the United Kingdom it was property liable to become subject to succession duty.

TESTATOR DOMICILED ABROAD.

If a testator domiciled abroad by his will bequeathed his personal estate in such a manner as would, if he were domiciled in England, create liability to succession duty, no succession duty was payable, although he might possess personal estate in England, because the forum for administration of his estate was not English.

ARISING UNDER AN ENGLISH SETTLEMENT.

On a succession arising under an English settlement (that is, in English form) of property invested in England with trustees resident in England, the duty was payable, although the settlor might have been or might be domiciled abroad, and although the persons entitled to the property were domiciled abroad.

Re Lovelace, 4 De G. & J. 340.

SUCCESSION CREATED UNDER GENERAL POWER OF APPOINTMENT.

A succession created by the exercise of a general power of appointment was liable to succession duty if the settlement (whether by deed or will) which created the power was an English settlement. It made no difference as to liability to succession duty whether the property was invested in England in pursuance of the

* A. by deed settled real estate on himself for life, remainder to his first son B. and the heirs of his body, with remainder to his second son C. and the heirs of his body, with remainder over.

Suppose A. died leaving B. alive who took possession and died without barring his estate tail. If A. left a son he took, by devolution from B. But if B. died without issue, and C. or one of his issue came into possession he took by disposition from A. the settlor.

specific directions of the settlement, or in consequence of the trustees' exercise of a discretion lodged in them by the settlement or in consequence of the property having been so invested prior to the settlement and allowed to remain unchanged.

Re Wallop's Trusts, 1 De G. J. & S. 656.

ULTIMATE TEST WHETHER SETTLEMENT WAS ENGLISH.

The ultimate test whether a settlement was English or not was the locality of the court to which the beneficiaries would have to apply for administration of the trusts of the settlement as against the trustees.

Re Cigala, 7 Ch. D. 351.

(2) *The Conditions of the incidence of succession.*

TRANSFER REQUIRED TO MAKE SUCCESSION.

There must have been a transfer, the effect of which was to make some person beneficially entitled upon a death, and the date of the death must have been since the 19th May, 1853, the date when the Succession Duty Act came into operation. For example: A settlement by which property was limited to A. for life, remainder to B., conferred a succession on B., and made him liable to duty whatever the date of the settlement, provided only that A. died after the 19th May, 1853.

Att.-Gen. v. *Lord Middleton*, 3 H. & N. 125.

SUCCESSOR ULTIMATELY GOING INTO POSSESSION.

Succession duty was payable by a successor who came into possession on a death, although he would by a lapse of time come into the same property if the death had not taken place. Thus, a gift to A. until the expiration of twenty-one years, or until he died, whichever might first happen, the remainder to B. if A. died before the end of twenty-one years, conferred a succession on B.

Att.-Gen. v. *Noyes*, 8 Q. B. D. 125.

INTEREST ON SUCCESSION NOT ACQUIRED UNTIL AFTER DEATH.

A person became entitled on a death so as to be liable to succession duty, although the interest of a succession was not required until the lapse of an interval after death. Thus, a testator leaving property to his widow during widowhood, and then to A.; on the widow's re-marriage, A. took upon the testator's death after an interval, and was liable for duty.

REVERSIONARY OR CONTINGENT INTEREST.

The interest acquired by a successor on the death of any person need not be immediate or even certain. A reversionary, or contingent interest acquired on a death rendered the person entitled

to it liable to duty, although the duty was not payable, unless and until the person liable had beneficial possession of the property.

Att.-Gen. v. *Gell*, 3 H. & C. 615.

DIFFERENCE BETWEEN DISPOSITION AND DEVOLUTION.

The transfer might be either by disposition or devolution of law. A disposition comprised any sort of conveyance, will, assignment, covenant, undertaking contract, act or obligation by which one person conferred a beneficial interest in property on another otherwise than for money or moneys worth.

Att.-Gen. v. *Montefiore*, 21 Q. B. D. 461.

CASES WHERE SUCCESSION DUTY DID NOT ATTACH.

Succession duty did not attach in cases of sale and purchase. Thus not only were ordinary purchases of reversionary interests in real or personal estate not subject to duty, but also every species of interest which would show that the substance of the transaction was not derived from any predecessor in succession. Marriage settlements were dispositions which gave rise to succession duty. The marriage being the cause and motive of the settlement, decided its character for the purpose of succession duty.

Lord Advocate v. *Sidgwick*, 4 Sco. Sess. Cas., 4th Ser., 815.

DEVOLUTION BY LAW.

Devolution by law included cases of transmission of an ancestor's property on his death intestate to his heir and next of kin, and also the case of an heir succeeding to an estate pur autre vie as special occupant. The predecessor was the settlor, testator or donor, who conferred the property.

WHO MIGHT BE A PREDECESSOR.

The person whose death gave rise to the liability to succession duty might be anyone, and need not be, and often, in fact, was not the predecessor. If there were more predecessors than one, and the proportional interest derived from each was not distinguishable, then, in default of an agreement being come to with the revenue, the succession was deemed to take from each successor in equal proportions.

16 & 17 Vict. c. 51, s. 13.

SUCCESSOR DEFINED.

The successor was the person on whom the property was conferred. Mere trustees and executors were not successors, because they did not take a beneficial interest in property, and it was a beneficial acquisition of property which created a liability to succession duty.

16 & 17 Vict. c. 51, s. 2.

RULES FOR ASCERTAINING WHO WAS THE PREDECESSOR.

It was a matter of great importance to determine in a particular case who was the predecessor and what was the disposition or devolution under which a given succession arose. The following rules have been stated: (1) An heir coming into possession either as heir in tail or in fee as of a previous holder took for the purpose of succession duty by devolution from the last possessor of the estate, who was the predecessor.

Lord Saltoun v. *Adv. Gen.*, 3 Macq. 673.

(2) Where a person coming into possession did so as a person named or designated, he took for the purpose of succession duty by disposition from the settlor or testator, who was the predecessor.

Earl of Zetland v. *Lord Adv.*, 3 App. Ca. 505.

(3) Where a succession was created by the exercise of a power of appointment (whether general or special), the instrument creating the power whether a deed or will, was the disposition. The appointment was read into this instrument, and the predecessor ascertained accordingly.

Re Lovelace, 4 De G. & J. 340.
Re Barker, 7 H. & N. 109.

Except in the two cases following:—

(a) If the power was a general power which could be exercised by the donee for his own benefit, and which took effect upon the death of any person, then the donee of the power, when he exercised it, was to be taken to be entitled to a succession from the donor of the power. And if the donee of the power so exercised the power as to create a new succession, he became the predecessor, his appointment the disposition, and his appointee the successor.

For example—X. by deed settled property on A. for life the remainder to B. (A.'s husband) for life, remainder in default of issue of A. and B. as A. should appoint. This power took effect on B.'s death without issue, and if A. survived and exercised the power she took a succession from X., and if she so appointed as to create a succession, she was the predecessor, and the instrument of appointment the disposition.

(b) If the power was a general power, and the property in default of appointment went to the donee of the power absolutely, it was considered that any transfer (creating a succession) by him, whether by appointment or conveyance, was a disposition by him, as predecessor.

See *Att.-Gen.* v. *Charlton*, 4 App. Ca. 444.

(4) Succession duty being essentially a tax on the transfer of property, it followed that a person could not confer a succession

on himself, so as to render himself liable to duty in respect of that succession, for in such a case there was in reality no transfer at all.

Lord Braybrooke v. *Att.-Gen.*, 9 H. L. C. 158.

(5) A person could not take a succession on his own death. This followed necessarily from the provisions of the statutes relating to succession duty, under which no one was liable to pay the duty unless and until he was in actual enjoyment of the property.

16 & 17 Vict. c. 51, s. 19.

THREE FACTORS FOR SUCCESSION "POSTPONED SUCCESSION."

A succession arose wherever there were the three factors, viz., a predecessor, a successor, and a disposition or devolution conferring an interest to take effect on a death. Sometimes the succession was "postponed." Suppose property vested in A. by some gratuitous title, which did not create a succession, to be subject to a charge of £100 a year in favour of B. for his life, on B.'s death, as A. gets an increase of benefit to the extent of the annuity, which then ceases, he was said to have "postponed" succession.

16 & 17 Vict. c. 51, s. 5.

SUCCESSION SUBJECT TO CHARGE OR INTEREST.

There could be a succession subject to a charge or interest. If the charge was created by the expectant successor himself and did not confer a separate or new succession, he had to pay duty when the succession fell into possession exactly as if he had created no such charge. If the charge had not been created by the expectant successor, then the successor paid duty on the property minus the charge, and on the determination of the charge he paid on the increased value of the succession which then accrued to him. Thus, under a will property is charged with an annuity to X. for her life, and subject thereto settled on A. On the death of the testator A. paid duty on the property, less the annuity, and on the death of X. paid duty on the increased value of the succession represented by the amount of the annuity.

Re Peyton, 7 H. & N. 287.

SUCCESSION DUTY PAYABLE AT DEFERRED PERIOD ON AN INCREASE.

Again, a case of succession duty payable at a deferred period on an increase of beneficial interest could arise in another way. A gratuitous transfer of property made to take effect in præsenti so that no succession was created, but the grantor reserved a benefit to himself or some other person ascertainable only by reference to death. In such a case the grantee as successor was deemed to take a succession on the determination of the reserved benefit,

the annual value of which was equal to the annual amount or value of the reserve benefit. Thus, A. by deed of gift granting real estate to B., reserving to himself a life annuity, no duty was payable on the execution of the deed, because no succession was created; but on A.'s death B. became liable for duty as on a succession from A., the annual value of which was equal to and measured by the annuity.

Att.-Gen. v. *Noyes*, 8 Q. B. D. 715.

ACCELERATION OF TITLE TO SUCCESSION.

But where the title to a succession was accelerated by the surrender or extension of a prior interest, the duty was still payable at the same time and in the same manner as if no acceleration had taken place. Thus, suppose property settled on A. for life, remainder to B., and A. assigned his life interest to B., B. did not pay duty until the death of A.

See *Ex p. Sitwell*, 21 Q. B. D. 466.

(3) *Who had to pay the duty.*

SUCCESSION DUTY WHEN PAYABLE.

Succession duty was not payable until the property which constituted the succession was in actual enjoyment. The liability to the duty attached from the moment of the creation of the succession, but payment of the duty was not enforceable until the property was in possession; thus, property settled or devised by X. in favour of A. for life, remainder to B., so that X. was the predecessor and B. had a succession expectant on A.'s death, the liability to duty existed from the date of the settlement, or the death of the testator, as the case might be; but no duty was payable by B. until A.'s death reduced B.'s succession into possession. The lapse of time between the creation and the discharge of the liability to succession duty and the changes which events, or the acts of the original successor might produce in the ownership of the property during this interval, might produce all sorts of complications.

See 16 & 17 Vict. c. 51, s. 20.

SUPERSESSION OF ESTATE BY PARAMOUNT RIGHT.

If the original successor survived and retained the property until it fell into possession, and all things remained as they were when the succession was created, no question arose; but, although the successor survived, and had done nothing to alter his interest in the property, change might have come from an external source. Thus his estate might have been superseded by the coming into operation of some paramount right, or the exercise of a power of

appointment. In such a case the liability to duty determined, as the succession never came into enjoyment.

JOINT TENANCY, SEVERANCE OF.

Suppose a joint tenancy created in A. and B. had given rise to a succession, A. and B. paid duty each in respect of his interest in possession; that is, an interest in a moiety of the property during the joint lives of A. and B. If during the joint lives there was a severance of the joint tenancy, no further duty was payable by either A. or B. If, however, there was no severance, and A. died first, so that the whole property survived to B., he took a succession in the whole property from the original settlor as predecessor; but, if the joint tenancy when created did not give rise to a succession, then if there was no severance the survivor took the property as a succession from the deceased joint tenant as predecessor.

See 16 & 17 Vict. c. 51, s. 3.

ASSIGNMENT BY SUCCESSOR BY WAY OF GIFT.

The successor to the property might assign the succession to some other person by way of gift, so that no new or separate succession was created by the transfer. The duty then became payable by the assignee at the time and rate at which it would have been payable if no assignment had been made. Thus property settled by X. on A. for life, remainder to B., and B. transferred his succession to C., on the death of A., C. became liable to duty at the rate determined by B.'s relationship to X. But suppose property settled on A. for the life of B., remainder to B., here B. had no succession, because he could not take one on his own death; but if he assigned to C., he conferred on C. an interest to take effect on his (B.'s) death, and thereby created a succession.

See *Att.-Gen.* v. *Gardner*, 1 H. & C. 639.

Again, suppose B. settled property on A. for life, remainder to B., B. was the predecessor, and no claim to duty could arise on his disposition in his own favour; but if B. assigned his reversion to C., C. took a succession from B., and became liable to duty.

ASSIGNMENT OF REVERSION.

An expectant successor might sell his succession. In this case duty became payable by the purchaser at the time and rate at which it would have been payable if no sale had taken place. An expectant successor might assign his succession so as to create a new succession. Thus, suppose X., having settled real estate on A. for life, remainder to B., and B. assigned his reversion to trustees in trust for himself for life, remainder to his children, and died in the

lifetime of A. On A.'s death B.'s children came into possession and paid duty on the succession from their father, created by his assignment of his reversion.

SALE BY EXPECTANT SUCCESSOR.

No duty was payable in respect of B.'s expectant succession, because that duty would only begin to be payable after B. had been in possession of the property, and, as this never happened, B.'s succession had no taxable value. In a similar case, if the property were personal estate on the children taking possession, one duty only would be payable, but at the highest rate.

DEATH OF EXPECTANT SUCCESSOR.

If the expectant successor died, the result was the same whether he died testate or intestate, one duty only was chargeable, and that at the highest rate which was applicable.

16 & 17 Vict. c. 51, s. 20.

SUCCESSION DUTY PERSONAL DEBT TO CROWN.

Succession duty was a personal debt due to the Crown from the successor. All trustees, guardians, committees, tutors or curators in whom any property subject to duty or the management of it was vested, were similarly liable. Lastly, all persons claiming by alienation or other derivative title, in whom property subject to duty was vested at the time the succession became an interest in possession, were personally liable for the duty.

15 & 16 Vict. c. 51, s. 44.

FIRST CHARGE ON ALL PROPERTY.

Succession duty was a first charge on all property comprised in the succession, but when property was sold under a power of sale which required the proceeds to be settled in the same manner as the original property, the claim and charge for succession duty was shifted from the property sold to the proceeds of sale and to the substituted property when purchased.

15 & 16 Vict. c. 51, s. 41.

CONSISTED OF PERSONALTY.

Succession duty consisted of a percentage, varying according to the relationship between the predecessor and successor, upon the value of the succession, i.e., the property or interest of the successor.

ESTATE DUTY 1894, EXPLAINED.

In England, by the Finance Act of 1894, a new duty was established, called Estate Duty. This duty though based on probate duty, also effects and has something in common with legacy duty and succession duty. It superseded probate duty, while it

left legacy duty practically untouched. It altered succession duty by charging it according to the principal value of real property, which the person succeeding is able to dispose of as he pleases. What it taxes is not the interest to which some person succeeds on a death, but the interest which ceased by reason of the death. It is leviable in respect of all property, both real and personal, of which the deceased could dispose, or in which the interest shifted by reason of his death.

57 & 58 Vict. c. 30.

ADOPTS PRINCIPLE OF TAXING PERSONAL PROPERTY WHEREVER SITUATE.

In the case of a person domiciled in England his personal property, wherever situate, is made subject to duty, thus adopting the principle of mobilia sequuntur personam, from legacy duty, and departing from the principle which governs probate duty, namely, that the property taxed must be within the jurisdiction of the court granting the probate. Real and leasehold property situate abroad are not considered a subject for taxation.

WHERE DECEASED DIES ABROAD.

Where the deceased dies abroad estate duty will be leviable on all his property, whether personal or real, situate in England.

The property taxed by the Finance Act falls into two main divisions—property of which the deceased was competent to dispose, and property over which he had no power of disposition.

(1) The property of which the deceased was competent to dispose. Such property includes:—

(a) His free realty or free personalty. This sort of property presents no difficulty. It makes no difference to whom the property is left, or whether the deceased died testate or intestate. The values of his property are added together, and the only effect of the difference in their nature is as to the manner in which the duty is payable.

"COMPETENT TO DISPOSE" DEFINED.

The words "competent to dispose" are defined as follows: (2a, 2c, of 57 & 58 Vict. c. 30, Imperial Finance Act).

A person shall be deemed competent to dispose of property if he has such an estate or interest therein, or such general power as would, if he were sui juris, enable him to dispose of the property, including a tenant in tail, whether in possession or not; and the expression "general power," includes every power or authority enabling the donee or other holder thereof to appoint or dispose of property as he thinks fit, whether exercisable by instrument inter vivos or by will, or both, but exclusive of any power exercisable in a fiduciary capacity under a disposition not made by himself, or exercisable as tenant for life under the Settled Land Act, 1882, or as mortgagee. (2a).

Money which a person has a general power to charge on property shall be deemed to be property of which he has power to dispose. (2c).

DEFINITION ADOPTED BY ONTARIO ACT.

These sub-sections were adopted in 1899 by clause (g) added to section 4 of R. S. O. 1897, ch. 24. The same clause appears in Revised Statutes, 1914, ch. 24, as sub-section g (2) of section 7. In sub-section (g) of 1914 there are omissions. In the 1899 sub-sections the estate under a "limited" power was included as under a "general" power. The limitation is omitted in 1914, (g).

(2) In 1899 s.-s. (g) after the words "enable him to dispose of the property as he thinks fit," the words following appear: "or to dispose of the same for the benefit of the children or some of them." These words are omitted in 1914, sub-section (g).

PROPERTY INEFFECTUALLY PARTED WITH BY DECEASED.

(b) Property, whether real or personal, belonging to the deceased, which he has for the purpose of duty ineffectually parted with during his life. The object of the section dealing with this matter is to prevent evasions. The account duty above mentioned was imposed to achieve the same object; but this duty is now abolished, the estate duty taking its place.

ESTATE DUTY NOW PAYABLE IN ALL CASES WHERE ACCOUNT DUTY PAYABLE.

Estate duty is now payable in all cases in which account duty would formerly have been payable, and on real property as well as personal; the sections of the Account Duty Act being extended to cover real property as well as personal, and omitting any reference to "voluntary" transactions.

CLAUSES OF IMPERIAL ACT.

These cases are, therefore, defined as follows:—

(a) Any property taken as a donatio mortis causa made by any person dying after the first day of August, one thousand eight hundred and ninety-four, or taken under a disposition, made by any person so dying, purporting to operate as an immediate gift inter vivos, whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been bona fide made twelve months before the death of the deceased, or property taken under any gift, whenever made, of which bona fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise.

(b) Any property which a person dying after such day having been absolutely entitled thereto, has caused or may cause to be transferred to or vested in himself and any other person jointly, whether by disposition or otherwise, including any purchase or investment effected by the person who was absolutely entitled to the property either by himself alone, or in concert, or by arrangement with any other person, so that the beneficial interest therein or in some part thereof passes or accrues by survivorship on his death to such other person.

(c) Any property passing under any past or future settlement (including any trust, whether expressed in writing or otherwise), made by any person dying after such day by deed or any other instrument not taking effect as a will, whereby an interest in such property, or the proceeds of sale

thereof, for life or any other period determinable by reference to death, is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right, by the exercise of any power, to restore to himself, or to reclaim the absolute interest in such property or the proceeds of sale thereof.

The charge under the said section shall extend to money received under a policy of assurance, effected by any person dying after the first day of August, 1894, on his life, where the policy is wholly kept up by him for the benefit of a donee, whether nominee or assignee, or a part of such money in proportion to the premiums paid by him, where the policy is partially kept up by him for such benefit.

(*d*) Any annuity or other interest purchased or provided by the deceased, either by himself alone, or in concert, or by arrangement with any other person to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased.

As Adopted by Ontario.

For purposes of comparison the clauses in the Ontario Act founded on the above sub-sections of the Imperial Act now follow:

Donationes Mortis Causa, and Gifts inter vivos.

(b) Any property taken as a donatio mortis causa, or taken under a disposition operating or purporting to operate as an immediate gift inter vivos, whether by way of transfer, delivery declaration of trust or otherwise made since the first day of July, 1892, or taken under any gift whenever made, of which property actual and bona fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor, or of any benefit to him whether voluntary or by contract or otherwise, except as hereinafter mentioned.

Ontario Statutes 1914 c. 10, s. 5 substituted for clause (b) in subsection 2 of subsection 7 of R. S. O. 1914 c. 24.

Property Vested Jointly with Interest to Survivor.

(c) Any property which a person having been absolutely entitled thereto, has caused, or may cause to be transferred to, or vested in himself, and any other person jointly, whether by disposition or otherwise, so that the beneficial interest therein, or in some part thereof, passes or accrues by survivorship on his death to such other person, including also any purchase or investment effected by the person who was absolutely entitled to the property either by himself alone or in concert, or by arrangement with any other person;

R. S. O. 1914 c. 24, s. 7, sub-sec. 2 (c).

Property Passing under Settlement, etc.

(d) Any property, passing under any past or future settlement, including any trust, whether expressed in writing or otherwise, and if contained in a deed or other instrument effecting the settlement, whether such deed or other instrument was made for valuable consideration or not, as between the settlor and any other person, may by deed or other instrument not taking effect as a will, whereby an interest in such property or the proceeds of sale thereof for life, or any other period determinable by reference to the death, is reserved, either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right by the exercise of any power to restore to himself, or to reclaim the absolute interest in such property, or the proceeds of sale thereof, or to otherwise resettle the same or any part thereof.

R. S. O. 1914 c. 24, s. 7, sub-sec. 2 (d).

ANNUITIES, INSURANCE, ETC.*

(e) Any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased.

R. S. O. 1914 c. 24, s. 7, sub-sec. 2 (*e*).

It will be seen that s.-s. (b, c, d, and e), s.-s. (2), sec. 4 of R. S. O. 1914, c. 24, The Succession Duty Act, are copied from above clauses of the Imperial Act. These clauses were, as before stated, originally contained in s. 38 (2) of the Imperial Customs and Inland Revenue Act of 1881 (44 Vict. c. 12), defining the property to be included by an executor in his account as amended by s. 11 of the Imperial Customs and Inland Revenue Act, 1889 (52 Vict. c. 7).

Since the first adoption of these four sub-sections other items have been added in Ontario as follows:

PROPERTY TRANSFERRED IN CONTEMPLATION OF DEATH.

(a) Any property, or income therefrom voluntarily transferred by deed, grant, bargain, sale or gift made in general contemplation of the death of the grantor, bargainor, vendor, or donor, and with or without regard to the imminence of such death, or made or intended to take effect in possession or enjoyment after such death to any person in trust or otherwise, or the effect of which is that any person becomes beneficially entitled in possession or expectancy to such property or income.

R. S. O. 1914 c. 24, s. 7, sub-sec. 2 (a) as amended by section 4 Ont. Statutes 1914 c. 10. The word "general" was inserted before the word "contemplation" and the words "with or without regard to the imminence of such death" after the word "donor."

POLICIES OF INSURANCE.

(f) Money received under a policy of insurance effected by any person on his life, where the policy is wholly kept up by him for the benefit of any existing or future donee, whether nominee or assignee, or for any person who may become a donee, or a part of such money in proportion to the premiums paid by him, where the policy is partially kept up by him for such benefit.

R. S. O. 1914 c. 24, s. 7, sub-sec. 2 (f).

***Annuity not a "Legacy."**—A bequest in a will of the interest or income of a fund is not a "legacy given by way of annuity," within the meaning of sec. 11 (1) of the Succession Duty Act, 7 Edw. VII. ch. 10, but simply a gift of interest or income.—Where the whole of the succession duty attributable to the share of the income from a residuary trust fund bequeathed to a daughter of the testator was paid by his executors to the Treasurer of Ontario, and the legatee died about a year and a half after the death of the testator, when only one of the four "equal consecutive annual instalments" mentioned in section 11 (1) would have been paid if the method of payment by instalments had been adopted:—Held, that the payment was a voluntary one, not made under a mistake of fact; and, if made under a mistake of law, no part of the money could be recovered by the executors by the Crown.—Semble, that the payment was not improvident. *Bethune* v. *The King*, 26 O. L. R. 117, 706.

PROPERTY OVER WHICH DECEDENT HAD POWER OF DISPOSAL.

(g) Any property of which the person dying was at the time of his death competent to dispose; and a person shall be deemed competent to dispose of property if he has such an estate or interest therein or such general power as would, if he were sui juris, enable him to dispose of the property as he thinks fit, whether the power is exercisable by instrument inter vivos or by will or both, including the powers exercisable by a tenant in tail whether in possession or not, but exclusive of any power exercisable in a fiduciary capacity under a disposition not made by himself or as mortgagee. A disposition taking effect out of the interest of the person so dying shall be deemed to have been made by him whether concurrence of any other person was or was not required. Money which a person has a general power to charge on property shall be deemed to be property of which he has the power to dispose.*

R. S. O. 1914 c. 24, s. 7, sub-sec. 2 (g). See page 229 ante.

DOWER AND CURTESY.

(h) Any estate in dower or by the curtesy in any land of the person so dying of which the wife or husband of the deceased becomes entitled on the decease of such person.

R. S. O. 1914 c. 24, s. 7, sub-sec. 2 (h).

PROPERTY SUBJECT TO DUTY.

The following property, as well as all other property, is subject to succession duty upon a succession:

PROPERTY IN ONTARIO.

(a) All property situate in Ontario and any income therefrom passing on the death of any person, whether the deceased was at the time of his death domiciled in Ontario or elsewhere.

LOCAL SITUS OF SPECIALTY.

(b) Debts and sums of money due and owing from persons in Ontario to any deceased person at the time of his death on obligation or other specialty shall be property of the deceased situate in Ontario, without regard to the place where the obligation or specialty shall be at the time of the death of the deceased.

R. S. O. 1897 c. 24, s. 7 (1) (a) (b).

SETTLED PROPERTY.

AREA OF TAXATION.

(2) Property over which the deceased had no power of disposition. Such property was of a kind with which probate duty had no concern, viz., settled property. The scheme of the Act is to tax not the interest which has ceased, but the property out of

*WHERE PERSON HAS GENERAL POWER OF APPOINTMENT.

Property passing upon the death in respect to which any person is given a general power to appoint, as is mentioned in clause (g) of subsection 2 of section 7, shall be liable to duty and the duty thereon shall be payable in the same manner and at the same time as if the property itself had been given to the donee of the power.

R. S. O. 1914 c. 24, s. 15 (3).

A correction of a reference in subsection 3 of section 15 is made by section 8 of chapter 10 Ontario Statutes 1914. "2" is substituted for "3."

which the interest was enjoyed; thus A. has a life interest in £10,000, estate duty is payable on his death, not according to the value of the life interest he has enjoyed, but on £10,000. It would be unfair that A.'s estate in such a case should pay the duty on the full value of the property in which he only had a partial interest. Consequently, the duty, is made payable out of the property itself, in which fresh interests have in the meantime arisen. It is not easy to adjust taxation on the one person's interest out of another person's estate—the successor, in fact, paying for the predecessor. But although the Act taxes property in which the deceased or any other person had an interest ceasing on the death of the deceased to the extent to which a benefit accrues or arises by the cesser of such interest, the latter would only show the area of taxation. This area is limited to the property covered by that interest. If the interest was an interest in the income of the whole property, the whole capital value is charged with duty. If it was an interest in part, only so much of the capital as produced that part is taxed. The interest to which the successor succeeded by the death is immaterial, the only question is in what amount of property did an interest cease.

57 & 58 Vict. c. 30, s. 7 (7).

INTEREST NEED NOT HAVE BEEN THE INTEREST BELONGING TO DECEASED.

The interest which ceased need not have been an interest which the deceased had in the property; thus property is settled on A. during the life of B., and then over. Estate duty is payable on B.'s death in respect of the cesser of that interest. This does not prejudice B., for the duty is not paid out of his estate, but out of the property, nor is the property aggregated so as to affect the rate of duty payable on his estate. The interest that ceased on death may only have ceased in the sense of having altered its nature. If so, it makes no difference, and estate duty is payable on the principal value of the property.

CHANGE OF INTEREST MUST TAKE PLACE ON DEATH; DIFFERENCE FROM SUCCESSION DUTY.

The change of interest to be taxable with estate duty must take place on death. If a life interest is given, for instance, to a woman during widowhood, and she marries again, no estate duty is payable on that devolution. So, too, it only attaches to property existing at the death. This is one of the points which show how estate duty differs from succession duty. Succession duty, dealing as it did with successions, had to provide, and did provide, for successions taken by anticipation. Estate duty, being of the nature of a

probate duty, is only concerned with what passes at the death. With previous transactions, in so far as they are genuine, it has nothing to do. Consequently, in the case of settlements, the only question is what is the property comprised in the settlement at the date of the death. For instance, property settled on A. for life, then B. for life, then for their children as they jointly appoint. A. and B. appoint part of the trust fund to a child, and at the same time release their life interest, so that the part so appointed is paid out at once to the child. No estate duty is payable on the death of A. in respect of the trust funds so taken out of settlement.

ESTATE DUTY NOT PAYABLE ON EVERY DEVOLUTION.

Estate duty is not payable on every devolution of settled property. One payment frees it until the death of some person who has been able to dispose of the property as he pleased. Thus, A., by will, settles property on B. for life, then on C. for life, then on D. in tail. Estate duty is payable on A.'s death, and will not again be payable until the death of D.; but duty will be payable on D.'s death, notwithstanding D. may have disentailed and resettled the estate before his own death. So if a person dies prior to his interest in settled property coming into possession, no duty is payable on his death, provided that subsequent limitations under the settlement continue to exist.

57 & 58 Vict. c. 30, s. 5 (2).

PROPERTY IN JOINT NAMES OF DECEASED AND SOME OTHER PERSON.

Another kind of property of which the deceased could not dispose, and which is liable to estate duty, is property belonging to him which he has placed in the joint names of himself and some other person. For instance, A. transfers £500 stock into the joint names of himself and his wife, and dies in his wife's lifetime. Estate duty is payable notwithstanding, on his death, on the value of the stock.

57 & 58 Vict. c. 30, s. 21 (5).

VALUE ON WHICH ESTATE DUTY IS LEVIED.

The value in respect of which the estate duty is levied is in nearly every case the principal value of the property in which an interest passes. This is so whether the interest is absolute or limited; thus the deceased leaves a freehold estate, to which he was entitled in fee, and was also entitled to a life interest in another freehold estate and in certain personal property; estate duty is payable on the principal value of the real and personal estate, in which he had only a life interest, in exactly the same way as on the principal value of the estate of which he was the owner in fee simple.

WHEN DECEASED ENJOYS INCOME NOW TAXED.

When the deceased enjoyed the income of property, that property is taxable according to its principal value. If he had only an interest in part of the income, the principal value of the whole property is apportioned according to the income it is actually producing. For example, if the deceased had a rent charge of £200 issuing out of property, the principal value of which is £20,000, producing an annual income of £800, the principal and taxable value of that rent charge is £5,000.

REVERSIONARY INTERESTS.

In the case of reversionary interests of the deceased, if the duty is paid at once, the value for estate duty is the selling value of that interest at the time of the death. The principal value of any property is taken to be its market value.

57 & 58 Vict. c. 30, s. 7 (6).

DEDUCTIONS ALLOWED.

The principal value having been arrived at certain deductions are allowed in calculating the duty.

(1) Reasonable funeral expenses.

(2) As to personal property abroad which is taxable in England by additional expense in administering it or realizing it by reason of the property being abroad, up to five per cent. may be allowed and duty paid in a foreign country may be deducted from the value of the property.

(3) Debts and incumbrances whether payable out of the general personal estate or charged on specific property, are allowed with this exception, that if incurred or created by the deceased, they must have been for full consideration in money or money's worth, wholly for the benefit of the deceased, and taking effect out of his interest. Thus, if the deceased on his daughter's marriage has covenanted to pay, or has charged his property with a certain sum of money, that sum, if owing at his death, cannot be deducted as a debt or an incumbrance.

(4) So, too, debts owing by the deceased to persons resident abroad, unless they are charged on property in England, or are to be paid in England, must be deducted in the first instance from the deceased's personal estate abroad, if he has any.

57 & 58 Vict. c. 30, s. 7.

In Ontario the allowances made in computing dutiable value are as follows:

4. In determining the dutiable value of property or the value of a beneficial interest in property the fair market value shall be taken as at the date of the death of the deceased, and allowances shall be made

for reasonable funeral expenses, debts and encumbrances and Surrogate Court fees (not including solicitor's charges); and any debt or encumbrance for which an allowance is made shall be deducted from the value of the land or other subject of property liable thereto; but an allowance shall not be made:—

(a) For any debts incurred by the deceased or encumbrances created by a disposition made by him unless such debts or encumbrances were created bona fide for full consideration in money or money's worth wholly for the deceased's own use and benefit and to take effect out of his estate; nor

(b) For any debt in respect whereof there is a right to reimbursement from any other estate or person unless such reimbursement cannot be obtained; nor

(c) More than once for the same debt or encumbrance charged upon different portions of the estate; nor

(d) Save as aforesaid, for the expenses of the administration of the estate or the execution of any trust created by the will of the deceased or by any instrument made by him in his lifetime.

R. S. O. 1914 c. 24, s. 4.

Exceptions as to the following property as defined by Ont. Stat. 1914 c. 10, s. 6 repealing sub-sec. 3 of 7 of R. S. O. 1914, s. 24.

(a) Given absolutely more than three years before the death of the donor to a child, son-in-law or daughter-in-law, or to the father or mother of the donor, which does not exceed in the case of any one person the sum of $20,000 in value or amount.

(b) Given by the donor where the gift is proved to have been absolute and to have taken effect in the lifetime of the donor and to have been part of his ordinary and normal expenditure and to have been reasonable, having regard to the amount of his income and the circumstances under which the gift was made, of which property actual and bona fide possession and enjoyment shall have been assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor or of any benefit to him, whether voluntary or by contract or otherwise.

(c) Given by the donor in his lifetime and not exceeding in value the sum of $500 in the case of any one donee, or

(d) Actually and bona fide transferred for a consideration in money or money's worth paid to the transferor for his own use and benefit, except to the extent, if any, to which the value of the property transferred exceeds that of the consideration so paid.

AGGREGATION.*

The value of the personal estate of the deceased, of his real estate, and of any property of which he was not able to dispose, but which passes on his death, in fact, of each subject of property is taken separately, so that the duty may be adjusted according to

*In the Ontario Act "aggregate value" is defined as follows:

(a) "Aggregate value" shall mean the fair market value of the property after the debts, encumbrances, and other allowances authorized by section 4 are deducted therefrom, and for the purposes of determining the aggregate value and the rate of duty payable the value of property situate out of Ontario shall be included.

R. S. O. 914 c. 24, s. 2.

This principle is called aggregation and was new in the Finance Act of 1894.

57 & 58 Vict. c. 30, s. 4.

the nature of the subject of property payable by different persons, and borne in different ways. But for the purpose of ascertaining the rate at which estate duty is payable on each subject of property, the principal value of the different subjects of property is added together.

Thus suppose the deceased had a life interest on 10,000*l*, a general power of appointment over 40,000*l*, a freehold estate for 20,000*l*, and free personalty extending to 5,000*l*; the rate at which estate duty will be payable on each of these subjects of property is determined by their aggregate value namely, 75,000*l*; so that the general rate will be 5 per cent. on each of these sums, although if there were no such aggregation the rate of duty would be considerably less.

When Duty may be Paid.

In the case of reversionary interests of the deceased, duty may be paid at the option of the person accountable, either with the duty in respect of the rest of the estate, or when the interest falls into possession. If the duty is not paid at the death, the value of the reversionary interest is taken for aggregation purposes, i.e., for determining the rate of duty on the rest of the estate at its then present value, then when the interest falls into possession the duty is paid according to its value at that date, and the rate is determined by adding the value of the rest of the estate as ascertained.

57 & 58 Vict. c. 30, s. 7 (6).

What Property Aggregates.

It is only property in respect of which estate duty is leviable that is aggregated; so that any property free from duty is also free from aggregation. There are some exceptions to aggregation which need not be repeated here. I have thought it well to mention this feature of the Imperial succession duty as our system is one of calculation of the aggregate value, not varying with a particular species of property.

Who Pays the Duty.

The person to pay the duty varies according to the nature of the property. The duty in respect of all personal property, whether situate abroad or in England, of which the deceased could dispose, must be paid by his legal personal representative, who may also pay the duty on any property which by the will is under his control, or which the persons accountable for duty ask him to pay.

57 & 58 Vict. c. 30, s. 6 (2).

Duty on Personal Estate How Payable.

As to the duty on the personal estate which he must pay, and for which he is accountable, the duty is payable as in probate duty, out of the residuary personal estate. Where the personal estate is locally situate abroad, and, therefore, does not pass to the legal

personal representative as such, the duty is recoverable from the trustees or other persons into whose hands it comes. As to personal estate of which the deceased could dispose by virtue of a general power, if he exercised the power and appointed an executor, so that the executor would be entitled to receive the fund, the duty would be paid out of the residuary personal estate. If the deceased did not exercise the power, and the property passed to some other person, although the executor would have to pay the duty out of the residuary personal estate, he could recover it from the trustees or owners of the property so passing.

57 & 58 Vict. c. 30, ss. 8 (3), 9 (5).

FROM WHAT FUNDS EXECUTOR MAY PAY DUTY.

With regard to property which is under the control of the executor by virtue of the will, he may pay the duty at once out of the residuary personal estate, and the same as to other property not under his control, but the duty on which the persons accountable ask him to pay; in both cases, however, the duty so paid is recoverable against the property itself, the payment out of the residue being only by way of convenience. In cases in which the legal personal representative is not accountable for the duty, the property itself bears its own duty, and the only burden which the taxation of property of which the deceased could not dispose, imposes on his own free property is that there may be an increase of the rate of duty on the latter property owing to the principal of aggregation. The manner in which the duty is raised is either by sale or mortgage, or a terminable charge on the property, and the person to so raise it is the accountable person whether he has an interest in the property or not.

57 & 58 Vict. c. 30, s. 9 (5).

The duty is collected by stamps and Commissioners of Inland Revenue are appointed to manage the duty.

LIABILITY FOR DUTY TO WHAT PROPERTY ATTACHED.

The liability for the duty attaches to the legal personal representative as to all personal property of which the deceased was competent to dispose; as to all other property, to the person accountable. A bona fide purchaser for valuable consideration without notice is in no case liable to or accountable for estate duty. In addition to this personal liability, where property does not pass to the executor, a rateable part of the estate duty is charged on the property in respect to which it is payable. The duty remains charged until a certificate of the discharge has been obtained, or in the case of purchasers for value or mortgagees, six years have

elapsed from the date of notice, or two years from the time for the payment of the last instalment of the duty, or in the absence of notice, twelve years from the event which gave rise to a claim.
57 & 58 Vict. c. 30, s. 8.

SETTLEMENT ESTATE DUTY.

Settlement estate duty is an extra duty of 1 per cent. imposed on settled property, that is, property for the time being limited to or in trust for any persons by way of succession.

AREA OF TAXATION.

The area of taxation is the actual or net amount of the settled property, and the duty is paid in the same manner and at the same time as the rest of the estate duty.
57 & 58 Vict. c. 30, s. 22.

SCHEME OF ONTARIO ACT, R. S. O. 1914, c. 24

The above sketch of the English Act, upon which our system is founded, will now enable us to understand the scope of our Act. This Act is printed in an appendix at the end of this book, but some parts of it must be repeated here. The provisions which state what property in Ontario is subject to succession duty have already been given, page 231, ante.

PROPERTY, MEANING OF.

The word "property" in this Act includes real and personal property of every description, and every estate or interest therein capable of being devised or bequeathed by will or of passing on the death of the owner to his heirs or personal representatives, Section 2 (g) of Act.

Further definitions in section 2 are:

"CHILD."

(c) "Child" shall include any lawful child of the deceased or any lineal descendant of such child born in lawful wedlock or any person adopted while under the age of twelve years by the deceased as his child or any infant to whom the deceased for not less than five years immediately preceding his death stood in loco parentis or any lineal descendant of such adopted child or infant as aforesaid born in lawful wedlock.

"EXECUTOR."

(d) "Executor" shall include administrator.

"INTEREST IN EXPECTANCY."

(e) "Interest in expectancy" shall include an estate, income or interest in remainder or reversion and any other future interest, whether vested or contingent, but shall not include a reversion expectant on the determination of a lease.

"PASSING ON THE DEATH."

(f) "Passing on the death" shall mean passing either immediately on the death or after an interval, either certainly, or contingently, and either originally or by way of substitutive limitation, whether the deceased was at the time of his death domiciled in Ontario or elsewhere.

In this connection it is necessary to know what constitutes in Ontario a "Succession." The explanation is as follows:

WHAT DISPOSITIONS AND DEVOLUTIONS OF PROPERTY SHALL CONFER SUCCESSIONS.

Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death happening after the first day of July, 1892, whether the death was heretofore or shall hereafter happen, of any person domiciled in Ontario, either immediately or after any interval, either certainly or contingently, and either originally, or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person so domiciled to any other person in possession or expectancy shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a "succession," and the term "successor" shall denote the person so entitled.

R. S. O. 1914 c. 24, s. 3.

WHEN ACT SHALL NOT APPLY.

The exceptions to the Act are contained in section 2 of chapter 10 Ontario Statutes 1914, substituted for section 6 of R. S. O. 1914, c. 24. They are:

EXEMPTIONS FROM SUCCESSION DUTY.

No Duty Shall be Leviable,—

(a) On any estate the aggregate value of which does not exceed 10,000.

(b) On property passing by will, intestacy or otherwise to or for the benefit of the grandfather, grandmother, father, mother, husband, wife, child, daughter-in-law or son-in-law of the deceased where the aggregate value of the property of the deceased does not exceed $50,000.

(c) Where the whole value of any property passing to any one person does not exceed $500.

(d) On property devised or bequeathed for religious, charitable or educational purposes to be carried out in Ontario or by a corporation or a person resident in Ontario or on the amount of any unpaid subscription for any like purpose made by any person in his lifetime to any corporation or person mentioned in this subsection for which his estate is liable.

(e) On any bond, debenture or debenture stock issued by a corporation having its head office in Ontario, transferable on a register at any place out of Ontario and which is owned by a person not domiciled at the time of his death in Ontario.

RATES OF DUTIES.

The duties payable are set out in section 7 of chapter 10, Ontario Acts, 1914, which repeals section 8 of R. S. O. 1914, chapter 24, which see in Appendix.

PROPERTY SITUATED OUTSIDE OF ONTARIO MUST BE INCLUDED.

It must be borne in mind that hereafter in determining under section 2 of chapter 10 of the Ontario Statutes 1914, which repeals section 6 of the Revised Statute, the aggregate value of the property of any person dying after 1st May, 1914, the value

of his property situate outside of this Province must be included, as well as the value of the property situate within this Province.

But where the Treasurer is satisfied that in any part of the British Dominions other than Ontario, or in any foreign country to which this section applies, any estate, legacy, or succession duty is paid by reason of the succession in Ontario, an allowance for the duty so paid shall be made from the amount payable to this Province with respect to the same property; provided that any such allowance shall be made only as to such part of the British Dominions or as to such foreign country to which the Lieutenant-Governor in Council shall have extended the provisions of this section. Provided also that the Lieutenant-Governor in Council may revoke any Order in Council made under this section.

R. S. O. 1914 c. 24, s. 9.

ALLOWANCE IN RESPECT OF DUTY PAID ELSEWHERE.

Where any estate, legacy or succession duty is payable in any part of the British Dominions other than Ontario, or in a foreign country by the law of that country, in respect of which no allowance of duty is made under section 9, and the Treasurer is satisfied that by reason of such succession, any duty is payable there in respect of it, he may allow the amount of that duty to be deducted from the value of the succession in Ontario.

R. S. O. 1914 c. 24, s. 5.

"AGGREGATE" AND "DUTIABLE" VALUE.

By section 2 of the Ontario Act, "aggregate value" means the value of the property before any debts or other allowances or exemptions are deducted. "Dutiable value" means the value after the debts or other allowances or exemptions authorized by the Act are deducted.

R. S. O. 1914 c. 24, s. 2 (a) (b).

WHEN DUTY PAYABLE ON FUTURE ESTATES OR INTERESTS.

As to future estates:—

Where the dutiable property (real or personal) includes any future or contingent estate, income or interest, the duty on such estate, income or interest may be paid within the time limited by sub-section 1 of section 16, and, where so paid, the duty shall be on the value of such estate, income or interest computed under the Act, as at the death of the deceased. By consent of the Provincial Treasurer in writing, duty may be paid after the time so limited and before such estate, income or interest comes into possession; but in event of such consent, the duty shall then be on a

value not less in any event than the value of such estate, income or interest computed under the Act as at the date when the duty is paid; and no deduction shall be made for duty paid or payable on any prior estate, income or interest. The duty on any future contingent estate, income or interest, if not sooner paid (as in this sub-section provided) shall be payable forthwith when such estate, income or interest comes into possession, in which case the duty shall be on the value computed under the Act as at the date of such coming into possession; and no deduction shall be made for duty paid or payable on any prior estate, income or interest.

R. S. O. 1914, c. 24, s. 16 (1) (2) and (3).

DUTY PAID BEFORE ESTATE COMES INTO POSSESSION.

Where the duty on any future or contingent estate, income or interest has been paid by the executor, administrator or trustee before such estate, income or interest comes into possession, the duty so paid shall be charged on such future or contingent estate, income or interest, and shall be paid with interest at the rate mentioned in section 8, to the executor, administrator or trustee, as the case may be, by the person who is to become entitled to such future or contingent estate, income or interest; and if not sooner repaid shall then be repaid at the time when such estate, income or interest comes into possession.

WHERE NO PERSON IS ENTITLED TO THE PRESENT ENJOYMENT OF A FUTURE OR CONTINGENT ESTATE.

Where, in respect of any future or contingent estate or interest, there is no person beneficially entitled to the present income or enjoyment, or where there is some part thereof to which there is no person so entitled, the duty on such future or contingent estate or interest, or any part thereof, as the case may be, shall be payable on the present value computed as provided by section 13 and is payable within eighteen months after death of the deceased.

R. S. O. 1914, c. 24, s. 16 (4).

COMMUTING DUTIES ON ESTATES OR INTERESTS IN EXPECTANCY.

The duty payable in respect of a future estate or interest may be commuted for a present payment, a present value being set upon such duty, regard being had to the contingencies affecting the liability to and rate and amount of the duty and interest.

R. S. O. 1914, c. 24, s. 16 (5).

When the duty on any interest in expectancy has been commuted and paid before the interest in expectancy falls into possession, such expectancy is chargeable with the duty paid and must be repaid with interest at 4 per cent.

R. S. O. 1914 ch. 24, s. 16 (6).

Where by reason of the number of deaths by which property has passed or of the complicated or contingent nature of the interests involved it is difficult or onerous to ascertain exactly the rate or amount of duty payable, the Treasurer may by way of composition assess a sum as the value of the property or interest in expectancy and receive the same in full discharge.

R. S .O. 1914, ch. 24, s. 16 (7).

By section 11 of the Succession Duty Act of 1914, repealing similar provisions in the Revised Statute, the following provisions are made for the liabilty for duty and for the filng of an inventory. Special attention is directed to sub-section 3 which makes the filing of an inventory and the giving of security a condition precedent to the issue of letters probate or letters of administration. Under the practice before the passing of this Act the amount of the bond was required to be not exceeding 10 per cent. of the value of the property. Now the bond is to be in a penal sum to be fixed by the Treasurer in each case.

11.—(1) Every heir, legatee, donee or other successor and every person to whom property passes for any beneficial interest in possession or in expectancy shall be liable for the duty upon so much of the property as so passes to him, and shall within six months after the death of the deceased or such later time as may be allowed by the Treasurer make and file with the Registrar of the Surrogate Court of the county or district in which the deceased had a fixed place of abode or in which the property or any part thereof is situate a full, true and correct statement under oath showing:—

(a) A full inventory in detail of all the property of the deceased person and the fair market value thereof on the date of his death.

(b) The several persons to whom the same passes, their places of residence and the degrees of relationship, if any, in which they stand to the deceased.

WHERE ONE FILES STATEMENT OTHERS TO BE RELIEVED.

(2) Where any one of the persons mentioned in subsection 1 has made and filed the statement required by that subsection, the Treasurer may dispense with the making of the statement by any other of them.

DUTY AND LIABILITY OF EXECUTORS, ETC.

(3) Before the issue of letters probate or letters of administration to the estate of a deceased person a statement under oath similar to that required by subsection 1 shall be made by the executor or administrator applying therefor and filed with the Surrogate Registrar of the county or district in which the application is made, and if the duty has not been paid by the successors or security to the satisfaction of the Treasurer given, the applicant shall in consideration of the grant applied for being made furnish a bond in a penal sum to be fixed by the Treasurer, executed by himself and two sureties, to be approved by the Registrar, conditioned for the due performance of his duty under this Act as to accounting for the succession duty to His Majesty for which the property of the deceased is chargeable in default of payment being made by the persons liable therefor.

ACCEPTING LUMP SUM AS SECURITY.

(3a) The Treasurer may accept a sufficient sum as security for the due payment of any duty in lieu of or in addition to any other security,

and he may in such case allow to the depositor interest thereon at a rate not exceeding three per cent. per annum upon so much thereof as from time to time exceeds the amount of duty which has become payable under this Act.

Subsection 4 of Section 11 of the Revised Statute is not affected by the amendment of 1914. Subsection 4 is as follows:

PROPERTY NOT DISCLOSED ON APPLICATION FOR PROBATE, ETC.

(4) If at any time it shall be discovered that any property was not disclosed upon the grant of letters probate, or of administration, or the filing of the account, the person acting in the administration of such property, and the person who is liable for the duty payable under this Act, shall pay to the Treasurer the amount which, with the duty, if any, previously payable or paid on such property, shall be sufficient to cover the duty chargeable according to the true value thereof at the rates fixed by this Act, together with interest thereon, and shall at the same time pay to the Treasurer as a penalty a further duty of twenty-five per cent. of the duty chargeable on the value of the property not disclosed, and shall also, within two months after the discovery of the omission, deliver to the Surrogate Registrar an affidavit or account setting forth the property so not disclosed, and the value thereof, in default of which he shall incur a penalty of $10 for each day during which the default continues.

R. S. O. 1914 c. 24, s. 12 (1).

In the Revised Statute, 1914 (s. 12) (1) the Judge was given the power to hear and determine the liability of the "executor, successor and other persons" liable therefor. By s. 12 of the Succession Duty Act 1914, the word "executor" is struck out.

Personal representatives cannot transfer property until duty is paid. This prohibition is contained in Section 13 of Chapter 10 of Ontario Acts 1914, which is substituted for Section 18 of the Revised Statute. Section 13 is as follows:

EXECUTORS NOT TO TRANSFER PROPERTY.

(1) No executor or trustee shall in the first instance be personally liable to pay the duty or any property to which any legatee, donee or other successor is beneficially entitled, but an executor, trustee or other person in whom any interest in any property so passing to any legatee, donee or other successor, or the management thereof, is at any time vested, shall not transfer such property to the person so entitled without deducting therefrom the duty for which such successor is liable and any executor, trustee or other person who transfers such property without deducting the duty therefrom shall pay to the Treasurer the amount of such duty in respect of such property and interest thereon together with an additional rate of fifty per cent. of the duty payable in respect of such property, and such combined amounts shall be recoverable against the executor, trustee or other person so chargeable.

MONEY RETAINED BY EXECUTOR TO BE PAID OVER TO TREASURER.

(2) Every sum of money retained by an executor or trustee or paid into his hands for the duty on any property shall be paid by him forthwith to the Treasurer or as he may direct.

3. Such executor and trustee shall for the purpose of the collection and payment of any duty which under the provisions of this Act it is his duty to collect and pay over to the Treasurer be deemed to be an officer for the collection thereof within the meaning of the Public Revenue Act.

APPRAISEMENT, VALUATION OF PROPERTY AND MODE OF ASSESSING.

In case the Treasurer is not satisfied with the value of any property as sworn to or with the correctness of any inventory, he may call upon the Surrogate Judge of the County in which the property, or any part thereof is situate, to investigate. The Judge after notice to those interested will make the enquiry and hear and determine all questions relative to the liability of property, the amount of duty and the successor and other persons liable therefor. The Judge has all the powers of a Judge of a County Court, and the judgment the same effect as a judgment of a County Court.

The Surrogate Judge may and shall, at the instance of the Provincial Treasurer, direct the sheriff of the county to make a valuation of the appraised property as stated in the inventory or omitted from it. The appraisement must then be made of the property at its fair market value and a report must be made by the sheriff in writing to the Surrogate Judge.*

R. S. O. 1914 c. 24, s. 12 (2).

In all cases value of future or contingent or limited estates, incomes or interests in respect of which the duty is payable is determined by the rule, method and standards of mortality and of value which are employed by the Provincial Inspector of Insurance in ascertaining the value of policies of life insurance and life annuities for the determination of the liabilities of life insurance companies, except that the rate of interest to be taken for all purposes of computation under this section is four per cent. per annum.

R. S. O. 1914, c. 24, s. 13.

When this appraisement is made the Surrogate Judge has for the purpose of the Act the power to appoint a guardian for infants who have no guardian, but must obtain the consent of the official guardian.

R. S. O. 1914 c. 24, s. 12 (2).

APPEAL FROM APPRAISEMENT OR ASSESSMENT.

The Treasurer or any other person dissatisfied with the appraisement or assessment has the right of appeal within thirty days to the Divisional Court, whose decision shall be final, but no appeal shall lie unless the property in respect of which such appeal is made shall exceed in value $10,000.

R. S. O. 1914 c. 24, s. 14 (1).

*By section 10 of chapter 10 of Ontario Statutes 1914 the Treasurer has also the power to issue a Commission of Enquiry as to transfers of property inter vivos.

Subsection (2) of Section 14 places costs in the discretion of the Court or Judge but on the County Court scale.

DUTIES TO BE PAID WITHIN 18 MONTHS FROM DEATH OF OWNER.

The duties imposed by the Act are due at the death of the deceased and payable within eighteen months afterwards. If they are paid within eighteen months no interest is charged, but if not paid, interest at the rate of five per cent. per annum is charged, and the duties with the interest are a lien upon the property in respect to which they are payable. Duties on annuities are payable in four equal consecutive payments, the first to be paid before the falling due of the first year's annuity, and each of the three others within the same period in each of the next succeeding three years, and for nonpayment interest is collectable.

R. S. O. 1897, c. 24, s. 15 (1).

TIME FOR PAYMENT OF DUTY WHERE INCOME ACCUMULATED.

Where the whole or any part of the income or interest of any property is directed to be accumulated for the benefit of any person or persons or class, such property shall be deemed an interest in possession, passing at the death of the deceased, and the duty thereon shall be payable within eighteen months thereafter.

R. S. O. 1914, c. 24, s. 15 (2).

FOREIGN EXECUTORS NOT TO TRANSFER STOCKS UNTIL DUTY PAID.

Section 10 of R. S. O. 1914, c. 24, provides as follows:—

10. No foreign executor shall assign or transfer any bond, debenture, stock or share of any bank or other corporation whatsoever, having its head office in Ontario, standing in the name of the deceased person, or in trust for him, until the duty, if any, is paid or security is given as required by section 11, and any such bank or corporation allowing a transfer of any debenture, bond, stock or share contrary to this section shall be liable for such duty.

For Section 11 see page 244 ante.

REFUNDING DUTY UPON SUBSEQUENT PAYMENT OF DEBTS.

Where any debts are proved against the estate of a deceased person after the payment of legacies or distribution of property from which the duty has been deducted, or upon which it has been paid, and a refund is made by the legatee, devisee, heir or next of kin, a proportion of the duty paid must be re-paid to him by the executor or by the Provincial Treasurer.

R. S. O. 1914, c. 24, s. 19.

FURTHER TIME MAY BE GRANTED.

The Lieutenant-Governor in Council or the Surrogate Judge may, on notice to the Treasurer and on terms as to interest, extend the time for payment of the duty for a period not exceeding one

year or longer with the Treasurer's consent, where it appears that payment within the time prescribed by the Act is impossible, owing to some cause over which the person has no control.

R. S. O. 1914, c. 24, ss. 15 (1), 17.

DUTIES ARE DEBTS DUE TO CROWN.

Succession duties may be recovered as debts due to the Crown,

R. S. O. 1914, c. 24, s. 21 (1).

CAUTION.

Where duty is claimed in respect of any land, or money secured by mortgage, or charge upon land, the Treasurer may cause to be registered in the Registry Office, or in the Land Titles Office, a caution claiming duty in respect of such land, mortgage, or charge by reason of the death of the deceased, and the land, mortgage or charge shall upon such registration, be subject to the lien of the Crown for duty, but a lien exists independently of the caution.

R. S. O. 1914, ch. 24, s. 22.

CERTIFICATE OF DISCHARGE TO BE GIVEN BY PROVINCIAL TREASURER.

When the duty or any part thereof has been paid or secured the Treasurer shall, if required, give a certificate to that effect which shall discharge from any further claim for such duty the property mentioned in the certificate; but the Treasurer is not bound to grant such certificate until the expiration of one year from the death of the deceased.

R. S. O. 1914, ch. 24, s. 15 (4).

CERTIFICATE NOT A DISCHARGE IN CASE OF FRAUD, EXCEPT AS TO BONA FIDE PURCHASER.

Such certificate does not discharge any person or property from duty in case of fraud or failure to disclose material facts, and does not affect the rate of duty payable in respect of any property afterwards shewn to have passed on the death, and the duty in respect of such property shall be at such rate as would be payable if the value were added to the value of the property in respect of which duty has been already accounted for. A certificate purporting to be a discharge of the whole duty payable in respect of any property included in the certificate exonerates from duty property in the hands of a bona fide purchaser for valuable consideration without notice.

R. S. O. 1914, ch. 24, s. 15 (5.)

MATTERS TO BE DETERMINED BY SUPREME COURT IN ACTION.

The Supreme Court is given jurisdiction to determine what property is liable to duty under this Act, the amount of such duty and the time or times when the same is payable.

R. S. O. 1914, ch. 24, s. 21 (2).

8. PAYMENT OF DEBTS.

ORDER OF PAYMENT OF DEBT.

Before any debt or duty whatsoever, funeral expenses, with the proper limitation as to amount, are to be allowed out of the estate of the deceased.

The next thing to justify and occasion expense is the proving of the will or taking out of administration.

The third occasion of disbursement by the executor or administrator is the payment of debts, and in such payment he must be careful to observe the rules of priority, for if he pay those of a lower degree first he must on a deficiency of assets answer those of a higher out of his own estate.

2 Black. Comm. 511.

In Ontario as appears from the following section of R. S. O. 1914, c. 121, The Trustee Act, all debts are payable pari passu.

53. On the administration of the estate of a deceased person, in the case of a deficiency of assets, debts due to the Crown and to the personal representative of the deceased person, and debts to others, including therein debts by judgment or order, and other debts of record, debts by specialty, simple contract debts, and such claims for damages as are payable in like order of administration as simple contract debts shall be paid *pari passu* and without any preference or priority of debts of one rank or nature over those of another; but nothing herein shall prejudice any lien existing during the lifetime of the debtor on any of his real or personal property.

In the administration of the Ontario estate of a deceased domiciled abroad, foreign creditors are entitled to dividends pari passu with Ontario creditors.

Re Kloebe, 28 Ch. D. 175, followed. *Milne* v. *Moore*, 24 O. R. 456.

A discretion is allowed executors and administrators as to settling debts due the estate.

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, and 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.

PAYMENT OF DEBTS OUT OF RESIDUARY ESTATE.

6. Subject to provisions of section 38 of the Wills Act the real and personal property of a deceased person comprised in any residuary devise or bequest shall, except so far as a contrary intention appears from his

will or any codicil thereto, be applicable rateably, according to their respective values, to the payment of his debts, funeral and testamentary expenses and the cost and expenses of administration.

EXECUTOR PAYING STATUTE BARRED DEBT.

Though as a general rule an executor may pay a statute-barred debt, he may not pay such a debt when it has been judicially declared to be statute-barred. Whether an executor may pay a statute-barred debt against the declared wish of his co-executor, quære.

An executor against the wish of his co-executor paid a debt which had been declared on an administration summons, to be statute-barred: Held, that both he and the payee, who had received the money through the wrongful act of her agent, and that agent who had notice of all the facts, were liable to refund.

Midgley v. *Midgley* (1893), 3 Ch. 282.

EXECUTOR OMITTING TO SATISFY DEBT OR CLAIM.

The mere circumstances of want of notice of a debt or claim against the estate of the deceased, will not excuse an executor or administrator from the payment or satisfaction of it if the assets were originally sufficient for the purpose, notwithstanding that in ignorance of the existence of the debt or claim he has bona fide handed over the assets to legatees or parties entitled in distribution; but lapse of time may operate as a waiver of the right of a creditor or claimant by way of laches on his part so as to preclude him from the claiming of the insufficiency of the assets. And now by the Ontario Statute (R. S. O. 1914, c. 121, The Trustee Act).

56.—(1) Where a trustee or assignee acting under the trusts of a deed or assignment for the benefit of creditors generally, or of a particular class or classes of creditors, where the creditors are not designated by name therein, or a personal representative has given such or the like notices as in the opinion of the court in which such trustee, assignee, or personal representative is sought to be charged, would have been directed to be given by the Supreme Court in an action for the execution of the trusts of such deed or assignment, or in an administration suit, for creditors and others to send in to such trustee, assignee, or personal representative, their claims against the person for the benefit of whose creditors such deed or assignment is made, or against the estate of the testator or intestate as the case may be, at the expiration of the time named in the notices, or the last of the notices, for sending in such claims, he may distribute the proceeds of the trust estate, or the assets of the testator or intestate as the case may be, or any part thereof amongst the persons entitled thereto, having regard to the claims of which he has then notice, and shall not be liable for the proceeds of the trust estate, or assets, or any part thereof, so distributed to any person of whose claim he had not notice at the time of the distribution.

(2) Nothing in this section shall prejudice the right of any creditor or claimant to follow the proceeds of the trust estate or assets, or any part thereof, into the hands of persons who have received the same.

As to contested claims see The Surrogate Courts Act c. 62, s. 69 as follows:

69—(1) Where a claim or demand is made against the estate of a deceased person which, in the opinion of his personal representative, is unjust, in whole or in part, or where such personal representative has notice of such a claim or demand, he may, at any time before payment serve the claimant with a notice in writing that he contests the same in

whole or in part, and, if in part, stating what part and also referring to this section.

(2) Subject to the provisions of subsection 3, the claimant may thereupon apply to the Judge of the Surrogate Court out of which the probate or letters of administration of the estate issued for an order allowing his claim and determining the amount of it, and the Judge shall hear the parties and their witnesses and shall make such order upon the application as he may deem just and if he does not make such application within thirty days after receiving the notice or within such further time as the Judge either before or after the expiration of the thirty days may allow, he shall be deemed to have abandoned his claim and the same shall be forever barred.

(3) Where the claim amounts to not more than $100 and is otherwise within the jurisdiction of the Division Court the application shall be made to a Judge of a Division Court in which an action for the recovery of the claim might be brought, and shall be heard by the Judge at the sittings of such court unless the claimant and the personal representative consent to the application being made to the Judge of the Surrogate Court and in that case the application may be made to him.

(4) Not less than seven days' notice of the application shall be given to the personal representative, and where the application is to be made to the Surrogate Court Judge, shall also be given to the Official Guardian if infants are concerned, and to such, if any, of the persons beneficially interested in the estate as the Judge may direct.

(5) Where the application is made to the Judge of the Surrogate Court in addition to the persons to whom notice has been given any other person who is interested in the estate shall have the right to be heard and to take part in the proceedings.

(6) If the amount of the claim or the part of it which is contested exceeds $200, an order of the Judge shall be subject to appeal as provided by sub-section 5 of section 34, and the order, unless reversed on appeal and as varied if varied on appeal, when filed in the County Court of the county shall, irrespective of the amount of the claim, become and may be enforced in like manner as a judgment of that court.

(7) Where the claim or the part of it which is contested amounts to $800 or more, instead of proceeding as provided by this section, the Judge shall, on the application of either party, or of any of the parties mentioned in sub-section 5, direct the creditor to bring an action in the Supreme Court for the recovery or the establishment of his claim on such terms and conditions as the Judge may deem just.

(8) The order of the Judge of a Division Court shall have the effect of, and may be enforced in like manner as a judgment of that court.

(9) Where the claim amounts to not more than $100 and is otherwise within the jurisdiction of the Division Court, the fees and costs shall be according to the tariff of that court, and in other cases the fees payable to the Judge of the Surrogate Court and to the Registrar shall be the same as are allowed on an audit in an estate of a value equal to the amount of the claim or so much thereof as is contested.

(10) Where an appeal lies as provided by sub-section 6, if the personal representative does not appeal from the order, the Official Guardian or any person beneficially interested in the estate may by leave of a Judge of the Supreme Court appeal therefrom.

(11) Where the personal representative appeals, the Official Guardian and any person beneficially interested in the estate may by leave of the Court which hears the appeal appear and be heard in support thereof.

(12) The provisions of this section shall apply notwithstanding that the claim or demand is not presently payable and that for that reason an action for the recovery of it could not be brought and in such a case the order of the Judge shall not be enforceable by execution until the claim or demand becomes payable.

REQUISITE FOR NOTICE.

A notice by an executor or trustee under s. 56 R. S. O. 1914, c. 121, besides calling for claims against the estate, 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, and such notice should be published in localities where claimants on the estate reside, or in the "Ontario Gazette" if their residence is unknown.

Where the executors of a sole surviving executor of an estate in giving notice for claims under the statute, omitted to give the proper notice for claims against the estate of which their testator had been to their knowledge executor, with which they had never intermeddled and of the existence of claims against which they were unaware, they were held liable to the cestui que trust to whose knowledge the existence of the notice was not shown to have come, for a fund for which their testator was responsible; and the fact that administration de bonis non of the estate of which their testator had been executor was subsequently granted to another person, did not under the circumstances of this case affect their liability.

Steward v. *Snyder*, 30 O. R. 110.

An executor or administrator may compel a creditor to enforce his claim by action if he takes advantage of the above provision.

CONTINGENT DEBTS AND LIABILITIES.

With respect to contingent debts and liabilities, a question of great importance arises namely whether an executor can safely make payment of legacies, or deliver over a residue, where there is an outstanding covenant of his testator (or bond, with a condition, or the like), which has never yet been broken, and which may or may not be broken hereafter. When such liabilities exist an executor is not bound to part with the assets either to a particular or residuary legatee without a sufficient indemnity, or without impounding a sufficient part of the residuary estate for that purpose. For otherwise if the contingent covenant, etc., should afterwards be broken, the executor would be liable to answer the damages de bonis propriis without any fault in him.

As to contingent liabilities on covenants in leases an executor may proceed as follows:

54.—(1) Where a personal representative, liable as such to the rents, or upon the covenants or agreements contained in a lease or agreement for a lease granted or assigned to the testator or intestate has satisfied all liabilities under the lease or agreement for a lease, which accrued due and were claimed up to the time of the assignment hereinafter mentioned, and has set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the lessee to be laid out on the property demised, or agreed to be demised, although the period for laying out the same may not have arrived, and has assigned the lease, or agreement for lease, to a purchaser

thereof, he may distribute the residuary estate of the deceased to and among the parties entitled thereto, without appropriating any part, or any further part thereof, as the case may be, to meet any future liability under such lease, or agreement for lease.

Imp. Act, 22-23 Vict., c. 35, s. 27.

(2) The personal representative so distributing the residuary estate shall not be personally liable in respect of any subsequent claim under the lease, or agreement for lease.

(3) Nothing in this section shall prejudice the right of the lessor, or those claiming under him, to follow the assets of the deceased into the hands of the person or persons to or amongst whom they have been distributed.

55.—(1) Where a personal representative, liable as such to the rent or upon the covenants or agreements contained in any conveyance on chief rent or rent-charge, whether any such rent is by limitation of use, grant or reservation, or agreement for such conveyance, granted or assigned to or made and entered into with the testator or intestate has satisfied all liabilities under the conveyance, or agreement for a conveyance, which accrued due and were claimed up to the time of the conveyance by him hereinafter mentioned, and has set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the grantee to be laid out on the property conveyed, or agreed to be conveyed, although the period for laying out the same may not have arrived, and has conveyed such property, or assigned such agreement for conveyance to a purchaser thereof, he may distribute the residuary estate of the deceased to and amongst the persons entitled thereto, without appropriating any part, or any further part thereof, as the case may be, to meet any further liability under such conveyance, or agreement for conveyance.

Imp Act, 22-23 Vict., c. 35, s. 28.

(2) A personal representative so distributing the residuary estate shall not be personally liable in respect of any subsequent claim under the conveyance, or agreement for conveyance.

(3) Nothing in this section shall prejudice the right of the grantor, or those claiming under him, to follow the assets of the deceased into the hands of the person or persons to or amongst whom they have been distributed.

DIRECTION BY TESTATOR TO DISTRIBUTE EQUALLY.

If a testator directs his executor to make an equal distribution of the assets among all his creditors, such direction must be read subject to the creditors priorities among themselves, if any.

ABSOLUTELY PRIVILEGED DEBTS.

The only absolutely privileged debts are such as are secured by some particular security assigned by the testator for the better securing such particular debts.

It was formerly a privilege of the executor that he had a right to retain for his own debt due to him from the deceased in preference to all other creditors of equal degree, thus remedying errors from the mere operation of law, on the ground that it would be absurd and incongruous that he should sue himself, or that the same hand should at once pay and receive the debt.

RIGHT OF RETAINER BY EXECUTOR.

He could retain not only for debts which he claimed beneficially, but also for those to which he was entitled as trustee. This right of retainer exists no longer.

Willis v. *Willis*, 20 Chy. 396; *Re Ross*, 20 Chy. 385.

EXECUTOR MAY PURCHASE AT PUBLIC AUCTION.

An executor is entitled to take the personal property at its value for a debt due by the estate to him, and his purchase at public auction of the testator's personal estate, in lieu of money due him was held valid.

Yost. v. *Crombie*, 8 C. P. 159.

MAY RETAIN DEBT BARRED BY STATUTE.

He may retain a debt barred by the statute. Quære, where the personal estate of a testator is exhausted can he retain such a debt out of the proceeds of real estate.

Crooks v. *Crooks*, 4 Chy. 615.

EXECUTOR MAY IMPOUND SHARES TO PAY DEBT OF PERSONS ENTITLED.

Under their father's will two of his sons were to receive a share of the proceeds of certain land to be sold on the death of his widow, who was still alive. They also owed the testator a certain debt, which, by the will, was to be payable in five yearly instalments from the time of his death.

About two years subsequent thereto the sons made an assignment for the benefit of their creditors under the Act respecting assignments for benefit of creditors. R. S. O. 1897, c. 147.

Held, (1) that the effect of the assignment was by virtue of section 21, sub-section 4, of that Act, to accelerate payment of the debt due to the estate.

(2) That the executors being also trustees of the land of which the sons were to receive shares when sold, under the will, held security for their claim, within the meaning of that Act, having (because of the Devolution of Estates Act) the right to impound the sons' share under the will as against their debt to the estate. This security the executors and trustees should value pursuant to R. S. O. 1897, c. 147.

Tillie v. *Springer*, 21 O. R. 585.

WHAT LAW IS TO GOVERN IN ADMINISTRATION OF ASSETS.

If a debtor dies domiciled in Ontario, where debts are payable pari passu, and leaves assets in a foreign country, by the law of which some debts are preferred to others, and administration is duly taken out in Ontario, and also in the place of the situs of the foreign assets, what rule is to govern in the administration of the assets? The law of the domicile? Or the law of the situs? It is held (Wilson v. Lady Dunsany, 18 Beav. 293), that the personal assets of the testator must be administered on the principle of the law of his domicile. Later authority (Carron Iron Co. v.

Maclaren, 5 H. L. 455), seems to favour the law of the situs of the assets this seems a more reasonable view to take.

Re Kloebe, 28 Ch. D. 175. Followed in *Milne* v. *Moore*, 24 O. R. 456.

EXECUTOR PAYING DEBT OF AN INFERIOR NATURE.

If an executor or administrator pays a debt of a lower degree before one of a higher he must, on a deficiency of assets, answer that of a higher out of his own estate, provided at the time of such payment he had notice of the existence of the superior debt. An executor may voluntarily pay a debt of an inferior nature before one of a superior of which he had no notice; otherwise it would be in the power of a superior creditor to ruin an executor by suppressing his security till all the assets were exhausted in the payment of debts of an inferior degree.

Harman v. *Harman*, 2 Show. 492.

CREDITORS OF EQUAL DEGREE.

Among creditors of equal degree an executor may pay one in preference to another. A voluntary payment of a creditor by an executor or administrator, with notice of the commencement of an action by another creditor and before judgment, is a good payment and will be allowed to him in passing his accounts.

Re Radcliffe, 7 C. D. 733.

EXECUTOR PAYING ONE CREDITOR IN FULL CAUSES PRESUMPTION OF ASSETS TO PAY ALL.

The effect of section 34 of R. S. O. 1914, c. 121, is to disable an executor from giving preference to one creditor over another, so that where he pays one creditor in full the presumption is that he has assets sufficient to pay all; and if, upon a final adjustment of the accounts of the estate, it is made to appear that one creditor has received payment in full, either voluntarily or by process of law, and that there is a deficiency of assets, such creditor will be ordered to refund at the instance of the other creditors, the statute thus placing creditors and legatees in this respect upon the same footing.

Chamberlain v. *Clark*, 9 A. R. 273.

ORDER IN WHICH ASSETS RESORTED TO BEFORE ACT.

Before the passing of the Devolution of Estates Act the order in which assets could be resorted to was as follows:—

1. The general personal estate not bequeathed at all or by way of residue only.

2. Real estate devised in trust to pay debts.

3. Real estate descended to the heir and not charged with the payment of debts.

4. Real or personal estate charged with the payment of debts, and (as to realty) devised specifically or by way of residue, or suffered, by reason of lapsed devise, to descend, or (as to personalty), specifically bequeathed, subject to that charge.

5. Specific legacies (including demonstrative legacies) and demonstrative legacies which have become general.

6. Specific legacies (including demonstrative legacies that so remain), specific devises and residuary devises not charged with debts.

7. Real or personal estate subject to a general power of appointment which has been actually exercised by deed (in favour of volunteers) or by will.

8. Paraphernalia of widow.

AFTER ACT.

Since the passing of the Act the order will be:—

1. The general real and personal estate not devised or bequeathed at all, or devised or bequeathed by way of residue only, whether charged or not with payment of debts, and by reason of lapsed devise suffered to descend subject to that charge.

2. Real estate devised in trust to pay debts.

3. Real and personal estate devised or bequeathed specifically charged with the payment of debts.

4. General pecuniary legacies, including annuities and demonstrative legacies which have become general.

5. General pecuniary legacies, including annuities that so remain, and specific devises, not charged with debts.

6. Real or personal estate subject to a general power of appointment which has been actually exercised by deed (in favour of volunteers), or by will.

7. Paraphernalia of widow.

Canadian Law Times, 1890 Ed., 97.

REGISTRATION.

Registry Act, 1910, ch. 60—Wills to be Registered within Twelve Months from Death of Testator.—A will or the probate thereof, and letters of administration with the will annexed registered within twelve months next after the death of the testator shall be as valid and effectual against subsequent purchasers and mortgagees, as if the same had been registered immediately after such death; and in case the devisee, or person interested in the land devised in any such will is disabled from registering the same within such time by reason of the contesting of such will or by any other inevitable difficulty without his wilful neglect or default, then, the registration of the same within twelve months next after his attainment of such will, probate or letters of administration, or the removal of such impediment, shall be a sufficient registration within the meaning of this Act.

Devise—Registration — Death of Witnesses.—*Bawtenheimer* v. *Miller*, 2 O. W. R. 393.

(Reference to *Sugden* v. *Lord St. Leonards*, 1 P. D. 154; *Baxendale* v. *DeValmar*, 57 L. T. N. S. 556; *Fairfield* v. *Morgan*, 2 B. & P. (N. R.) 38; *Wright* v. *Marson*, 44 Sol. J. 67; *Hauer* v. *Sheetz*, 2 Binn. (Pa.) 537; *Doe d. Forsythe* v. *Quackenbush*, 10 U. C. R. 148.)

Tombstone.—T. C. by his will directed that $700 should be expended for tombstones for himself and others. If expended legacies could not be paid in full. Held following *Trimmer* v. *Danby*, 25 L. J. Ch. 424 that the direction might be disregarded in distributing: *Re Carley*, 18 W. L. R. 695 (Sask.).

Inevitable Difficulty—Notice.—The widow kept possession of the will for eleven months after the death of the testator, when she burned it for the purpose of enabling her to borrow money on the property devised, and she subsequently sold her interest under the will—an estate for life—and the only child professed to convey, as heir-at-law, to one R., who created a mortgage, under which the property was sold to D., a bonâ fide purchaser without notice, who afterwards agreed to sell to R. for the amount of his purchase money, interest and costs:—Held, that there was not any such inevitable difficulty as afforded a reason for the will not being registered within twelve months after the death of the testator, and that therefore D. was entitled to the protection of the registry laws (R. S. O. 1877 c. 111, s. 75), as against the infant devisees; but it appearing that R. had notice of the will when he purchased from the widow and heir-at-law, the court declared the infants entitled to redeem. *Re Davis*, 27 Chy. 199.

Failure to Register.—Semble, that a will is sufficient to give an estate, although not registered under 35 Geo. II. c. 5. *Doe d. Link* v. *Ausman*, Tay. 300.

Inevitable Difficulty—Notice.—By the will the plaintiffs were to come into possession when they should become of the age of twenty-one years, not being less than twelve years from the date of the testator's death, and they were infants of tender years at the time when, after the death of H. O'N., the defendant A. O'N., their father and guardian, agreed with the other heirs-at-law for the purchase of their shares, on the assumption that H. O'N. had died intestate, and obtained conveyances from them. A. O'N. and the other heirs-at-law were at this time aware of the facts in regard to both the wills, and were also aware that, after probate of the will of the 23rd April had been refused, it was the opinion of the solicitor for the estate that the will of the 17th April was properly executed and that probate might be obtained:—Held, that the plaintiffs' rights were not defeated or prejudiced by the agreement and conveyances referred to; nor were the plaintiffs' rights defeated by the registration of the conveyances to A. O'N. and his assignment and mortgage to O.; for A. O'N. had actual notice and knowledge of the plaintiffs' rights; and that the plaintiffs, who were not guilty of any wilful neglect or default, were prevented from registering the will by "inevitable difficulty" or "impediment" within the meaning of R. S. O. 1877 c. 111, s. 75. *O'Neill* v. *Owen*, 17 O. R. 525.

Infancy.—Infancy is not an inevitable difficulty within s. 15 of the Registry Act, 35 Geo. II. c. 5, so as to preclude the necessity of an infant devisee registering the will within six months, to avoid a conveyance by the heir-at-law. *McLeod* v. *Truax*, 5 O. S. 455. Approved of in *Mandeville* v. *Nicholl*, 16 U. C. R. 609.

Person Dying Abroad.—By the Registry Act, 35 Geo. III. c. 5, s. 15, the devisee claiming under a will made abroad, and where there had been no "inevitable difficulty" in the way of registering, was not allowed six months to register the will. Quære, as to effect of that Act

in registering the wills of persons dying abroad. *Doe d. Eberts* v. *Wilson*, 4 U. C. R. 386.

Purchaser for Value.—A person who purchases land from the heir with notice of the terms of the will, but under an erroneous supposition that, according to the true construction of the terms, the land was not affected by it, cannot set up, as against claimants under the will, the defence of a purchaser for value without notice. *Smith* v. *Bonnisteel*, 13 Chy. 29.

Time.—By 9 Vict. c. 34, all devisees without exception were allowed twelve months to register the will. *Doe d. Eberts* v. *Wilson*, 4 U. C. R. 386.

Title not Registered—Bona Fide Purchaser.—Under 9 Vict. c. 34, the objection that the will was not registered within six months after the death of the testatrix, nor previous to a conveyance by the heir-at-law, is not valid, when the grantee in such conveyance is not a bonâ fide purchaser for value, nor where, when the will was made, the title was not a registered title. *Doe d. Ellis* v. *McGill*, 8 U. C. R. 224.

Memorial.—In ejectment it was proved that defendant had the will, on which plaintiffs' title depended, in his possession when it was last seen, and that notice to produce it and a subpœna duces tecum had been served upon him. Defendant not having produced it, the registrar of the county produced a memorial of it, which was proved by one of the witnesses thereto, who also swore that he saw one McA. draw the will, and the latter swore that the memorial was a true copy of the will, which had been executed in his presence and that of another:—*Held*, that this evidence was properly admitted. *Hamilton* v. *Lightbody*, 21 C. P. 126.

In ejectment, in proof of the existence of a will, one H. swore that he saw the will, giving an explicit statement of its contents, and it also appeared that the devisees, of whom the heir-at-law was one, all submitted to and acted upon it:—*Held*, sufficient evidence of the existence of the will. Held, also, that the will was sufficiently proved by the execution and registry by the heir-at-law of a memorial of the will, it being a declaration against his proprietary interest, and he being dead at the time of the trial. Semble, it was, on this ground, good primary evidence, not only against the heir-at-law and those claiming under him, but against third parties. *Brown* v. *Morrow*, 43 U. C. R. 436.

A registered memorial twenty years old of a will executed by a devisee when possession of the land has been consistent with the registered title, is good evidence of the devise therein contained. *Gough* v. *McBride*, 10 C. P. 166, specially referred to. *McDonald* v. *McDougall*, 16 O. R. 401.

Proof of Loss.—It appeared that search for the will was made in the office in which it would have been had it been admitted to probate; in the different registry offices of the counties in which the several parcels of land, of which the testator died seised, were situate; among the papers of the owners of the several parcels; among the papers of the only executor of three named in the will who could be found; among the papers of the draftsman of the will, and among those of several of the devisees:—Held, sufficient to let in secondary evidence of the will.—Held, also, that plaintiff's case was within s. 26, c. 51, R. S. O., 1877, under which they had served notice. *Brown* v. *Morrow*, 43 U. C. R. 436.

"Je veux"—Words of Direction or Desire — Refusal to Register Transfer.—By his will, written in French by himself, the testator gave everything to his wife, using language which, if uncontrolled by what followed, would have been sufficient to make an absolute gift to her of all his property, real and personal. He then used language translated as follows: "I direct that . . my body be sent to Belgium . . . ; I direct that my wife pay . . $400 to Z. G. . . I leave to my wife . .

to give what she shall think suitable to our daughter B. when she shall marry. In case that our daughter B. shall not marry, or that she shall die without having a child, I direct that, after the death of my wife all that she shall have had of my succession be divided between the Simon and Pirson families"—that is, his own and his wife's relatives. The words "I direct" in the translation read in the original "je veux" wherever they occurred. The wife was executrix, and, as such, executed a transfer of certain lands of the testator to herself personally in fee simple, the title to the lands being registered under the Real Property Act.—Semble, that the absolute estate to the widow was cut down to a life estate by the subsequent words:—Held, at all events that the words "je veux" could not, in the absence of the Simon and Pirson families, be construed as words of mere desire, and that the District Registrar was justified, upon the will as it stood, in refusing to register the transfer. *Re Simon* (1910), 14 W. L. R. 56.

ACTIONS BY AND AGAINST EXECUTORS.

Specific Performance.—Action against executors of will of plaintiff's father to compel specific performance of an agreement with his father by which latter agreed to devise a part of his farm to him if he would continue to work thereon:—Held, that there was no part performance to take this case out of the operation of the Statute of Frauds. Plaintiff cannot recover compensation for services as there is no implied contract between parent and child to pay wages. *Leach* v. *Young* (1909), 14 O. W. R. 55.

Action by and against Executors.—Where an action is brought by a creditor against an executor in respect of a debt due to him from the testator, and in the action the executor does not either plead plene administravit, or set up his retainer, and the creditor recovers judgment, the executor cannot in an action brought to administer his testator's estate set up his right of retainer as against the judgment creditor. *Marvin, In re; Crawter* v. *Marvin*, 74 L. J. Ch. 699; (1905), 2 Ch. 490; 93 L. T. 509; 54 W. R. 74; 21 T. L. R. 765.

Action of Trespass.—An administrator can bring an action in respect of a trespass against the real estate in the interval between the death of the testator and the grant of the letters of administration, and he can, if necessary, before the grant obtain the appointment of a receiver to prevent a wrong being done to the estate. The principle laid down in *Foster* v. *Bates*, 13 L. J. Ex. 88, 90; 12 M. & W. 226, 233 applied. *Pryse, In re*, 73 L. J. P. 84; (1904) P. 301; 90 L. T. 747.

Survival of Action.—R. S. O. 1897 c. 129, s. 11 providing that in case any deceased person has committed a wrong to another in respect of his person or his real or personal property, the person so wronged may maintain an action against the administrators or executors of the person who committed the wrong, does not give authority to maintain an action against one who is an administrator ad litem merely, but only against an administrator in the ordinary sense of the term, that is, a general administrator clothed with full power to collect the assets, pay the debts, and divide the estate. *Hunter* v. *Boyd*, 22 C. L. T. 50, 3 O. L. R. 183, 1 O. W. R. 79, 2 O. W. R. 724, 1055.

Semble, that the administrator of J. H. did not properly and fully represent the next of kin entitled to share in the estate of J. H., and they would not be bound by any decision in their absence. *Re Hall*, 14 O. R. 557.

Sale under Execution—Heir not sui juris.—When an execution is issued against the lands of a deceased person in the hands of his executors, and the heir is an infant, or not competent, or not aware of the proceedings, the executors should act in the matter of the sale as a prudent owner would. *In re Davis*, 17 Chy. 603.

Execution.—Orders should not be made ex parte allowing issue of execution against goods of a testator or intestate in the hands of an execu-

tor or administrator. *In re Trusts Corporation of Ontario and Boehmer*, 26 O. R. 191.

Real Estate—Sale of.—Real estate cannot be sold in this province under an execution obtained against an executor de son tort. *McDade d. O'Connor* v. *Dafoe*, 15 U. C. R. 386; *Wrathwell* v. *Bates*, 15 U. C. R. 391; *Graham* v. *Nelson*, 6 U. C. C. P. 280.

Under 5 Geo. II. c. 7, real estate in the colonies is liable to satisfy a judgment for damages in an action of covenant. *Nugent* v. *Campbell*, 3 U. C. R. 301.

Bond—Demand.—Quære, whether, as a general rule, when a demand upon executors is necessary it must be made upon all. Semble, not in order to support an action on a contract of the testator, but that a demand upon one would be insufficient to cast any new or personal liability on another executor. *County of Bruce* v. *Cromar*, 22 U. C. R. 321.

Liability of Estate for Work Done for Administrator.—An estate in the hands of an administrator is not liable for work done or services performed at the request of the administrator, although the estate gets the benefit of the work and services, but the administrator is liable in his personal capacity in such a case. *Farhall* v. *Farhall*, L. R. 7 Ch. 123, followed. *Dean* v. *Lehberg*, 6 W. L. R. 214, 17 Man. L. R. 64.

Personal or Representative Capacity.—To determine whether a demand sued for on the record is one claimed by the plaintiffs as executors or not, the test now is, would the money when recovered be assets of the estate. *Elliott* v. *Croker*, 8 U. C. R. 156.

Tort of Trustee.—Where damages have been recovered against a trustee in respect of a tort committed in the ordinary management of the trust estate, the person recovering can avail himself of the trustee's right of indemnity, and proceed directly against the trust estate. *Raybould, In re; Raybould* v. *Turner*, 69 L. J. Ch. 249; (1900) 1 Ch. 199; 82 L. T. 46; 48 W. R. 301.

Promissory Note—Debt of Estate.—Action on a promissory note payable on demand, signed by the defendant, as "executor of an estate," but, not expressly restricted to payment out of the estate:—Held, that the defendant was personally liable. The note was given in renewal of a former one (similarly signed) which was not a demand note, but payable at a definite time, the debt being originally the testator's:—Held, that there was a good consideration, for the former note, if not for the demand note, namely, forbearance on the part of the plaintiffs, and the defendant was liable thereon; and his antecedent liability was a valuable consideration for the demand note; s. 27, Bills of Exchange Act. Upon appeal from an order for judgment on the pleadings leave to amend by setting up the Statute of Frauds was refused. *Union Bank of Canada* v. *McRae*, 21 Occ. N. 409, 496.

Dower action.—Held, that the defendants, executors under the will of N. S., devising "all and every the messuages and tenements whatsoever, whereof or wherein I have or am entitled to any estate of freehold or inheritance, by virtue of any mortgage or mortgages, unto and to the use of my executors (the defendants) to the intent," &c., took such an estate as to make them liable in an action for dower. *Low* v. *Sparks*, 14 U. C. C. P. 25.

Negligence.—An action for injury to the person now survives to the executor of the plaintiff, who can, in case of his death, pendente lite, on entering a suggestion of the death and obtaining an order of revivor, continue the action. *Mason* v. *Town of Peterborough*, 20 A. R. 683.

Personal Action.—Where one converts to his own use and sells the goods of the plaintiff, and dies after writ issued, but before declaration, the action may be continued against his executors, and they are liable on account for money had and received. *Frederick* v. *Gibson*, 37 N. B. R. 126.

Testator's Fraud.—In the absence of fiduciary relationship no recovery can be had against the representatives of a deceased person who is charged with fraud unless profit has accrued to the wrongdoer's estate. *Hamilton, Provident and Loan Society* v. *Cornell*, 4 O. R. 623.

Devastavit.—In an action of debt against an administrator to make him personally liable upon a judgment recovered by default against the goods of the intestate alleging waste:—Held, that the record of the judgment in the first action and the writ of fi. fa. thereon, and the sheriff's return of nulla bona, were sufficient prima facie evidence to show a devastavit, and that the production by defendant of writs of fi. fa. against the intestate's goods, with the sheriff's return of feci thereon, without proving the judgments on which they were founded, was not sufficient evidence to show that the intestate's estate had been exhausted. *Wilson* v. *Andrew*, 6 U. C. C. P. 428.

Power of Attorney to Collect Debts.—A person intending to take out letters of administration executed a power of attorney to a creditor of the intestate, authorizing him to receive all moneys due the intestate. The power was given upon an agreement that the attorney should pay himself out of any money he should receive. The appointor afterwards revoked the power, and then took out letters of administration:—Held, that the power was not valid against the administrator, and that payments made to the attorney by a debtor after administration granted and with notice of the revocation, were unauthorized, and did not discharge the debtor. *Sinclair* v. *Dewar*, 19 Chy. 59; 17 Chy. 621.

Indorser of Note Executor of Holder.—A. makes a note payable to B. or order; B. indorses to C., who indorses to D.; D., the holder, dies leaving B. one of the executors; the executors of D. sue C.:—Held, that D. having made B. his executor, B. was discharged, and that there was no remedy against the subsequent indorser. *Jenkins* v. *McKenzie*, 6 U. C. R. 544.

Revocation of Probate.—The general rule that a judgment can only be set aside on the ground of fraud against those of the parties who obtained it by fraud, has no application to a probate action in which the will is good or bad against all the world. *Birch* v. *Birch*, 71 L. J. P. 58; (1902) P. 130; 86 L. T. 364; 50 W. R. 437.

Probate as Evidence.—Where a probate is used as evidence under C. S. U. C. c. 16, it is evidence of the testator's death as well as of the will. *Davis* v. *Van Norman*, 30 U. C. R. 437.

Proof of Representative Character.—The plaintiffs declared as executors, laying promises to the testator and to the plaintiffs after his death, and on an account stated with the plaintiffs. Defendant pleaded only the general issue, and plaintiffs proved an acknowledgment of the debt by defendant to them as executors:—Held, that it was not necessary to produce probate to prove their representative character. *Dickson* v. *Markle*, Dra. 286. See, also, *McGill* v. *Bell*, 3 O. S. 618.

Tort of Testator.—Under R. S. N. S. 1900 c. 177, s. 2, dealing with actions against executors for injuries done by deceased, although the action is brought in the lifetime of the deceased, if he dies before judgment there can be no recovery against the estate, if six months have elapsed between the acts complained of and the death.—Reasons for not allowing costs. *McDonald* v. *Dickson*, 40 N. S. R. 560.

POWER TO LEASE.

Lease after Execution.—A lease of lands made by the agent of an executor, after delivery to the Sheriff of a fi. fa. lands against such executor, will only convey an interest subject to such fi. fa. *Sloan* v. *Whalen*, 15 U. C. C. P. 319.

Renewal of Lease.—Under the Devolution of Estates Act the executor of a deceased lessor can make a valid renewal of a lease pursuant to the covenant of the testator to renew. *Re Canadian Pacific R. W. Co., and National Club*, 24 O. R. 205.

Power to Lease.—A testator devised his lands to trustees, to distribute and divide the same amongst his wife and children, so soon as the youngest surviving child attained twenty-one. The trustees, professing to act in pursuance of the powers given by the will, put up portions of the property at auction for an absolute term of twelve years, at the expiration of which the youngest child would attain twenty-one, with a privilege to the lessee of removing any buildings upon the premises at the expiration thereof; or if he declined purchasing, stipulated that the improvements would be paid for by the lessors. On a bill filed by the trustees to enforce specific performance of this contract:—Held, that the agreement was ultra vires, and the bill was dismissed but without costs, the defendant having set up several grounds of defence which entirely failed. *Dalton* v. *McBride*, 7 Chy. 288.

POWER OF SALE.

Covenant.—Where executors conveyed land under a power of sale in the will of testator, but covenanted for themselves, their heirs, etc., in the deed, for good title:—Held, that they were personally liable, and that the grant by them as executors could not control their express covenant. *McDonald* v. *McDonald*, 6 O. S. 109.

Power to Sell Lands.—Under what is now section 18 of the Trustee Act, R. S. O. 1897, c. 129, the executors had power to sell, the testator having created such a charge as is described in section 16, and not having devised the real estate to the executors in trust; that section 16 of the Devolution of Estates Act, as found in R. S. O. 1897, c. 127 (which first became law in 1891), did not oblige the executors to sell under the Devolution of Estates Act, for by s.-s. (2) that section is not to derogate from any right possessed by an executor or administrator independently of the Act; that if the testator had devised the land to the executors upon trust, the machinery of the Devolution of Estates Act was not to be applied. *Re Booth's Estate*, 16 O. R. 429; and no more should it where the executors have a statutory power of sale to satisfy a charge. *Re Moore and Langmuir*, 21 C. L. T. 562.

Power to Sell Lands after Expiration of Two Years after Testator's Death.—Executors have power to sell lands after the expiration of two years from the testator's death, notwithstanding his direction contained in his will to the effect that his lands should be sold within two years from his death. *Re Walton & Bailey* (1910), 17 O. W. R. 760; 2 O. W. N. 428.

Powers of Executors.—Section 9 of the Devolution of Estates Act enables executors to sell for the payment of debts, and the power to sell is not qualified by section 16. That section was intended to make it clear that executors had power to sell for the purpose of distribution where there were no debts as well as where there were debts; and the consent of the Official Guardian, on behalf of infants, lunatics, and non-concurring heirs or devisees, is only necessary when the sale is for the purposes of distribution only. The power of sale given to executors by section 18 of the Trustee Act was exercisable in this case, notwithstanding the last clause of section 20; "a devise to any person in fee or in tail, or

for the testator's whole estate and interest," does not mean a devise of a life estate to one or more others, either jointly or successively, and with, it may be, executory devises over to still other persons, so that his whole fee simple, or less estate, whatever it may be, is disposed of; but it means a devise of his whole interest, whatever it may be, whether it be an estate in fee simple or any less interest, to the same person or persons, either as joint tenants or tenants in common. *In re Wilson, Pennington* v. *Payne*, 54 L. T. N. S. 600; 2 Times L. R. 443, approved. *Re Ross & Davies*, 24 C. L. T. 213; 7 O. L. R. 433; 3 O. W. R. 215.

Power to Sell.—A direction to trustees to sell at their absolute discretion is not equivalent to a direction that they may sell or not at their absolute discretion; and in the first case the time and mode of sale are in their discretion, but they are not entitled to abstain from following the directions of the will because the tenants for life will then receive a better income. *Atkins, In re; Newman* v. *Sinclair*, 81 L. T. 421.

Executor's Power over Realty.—The power of an executor over the real estate of his testator is, since the Land Transfer Act, enlarged, and he has now the same power in dealing with it as he previously had in dealing with the personal estate. His power of realizing the estate for the benefit of creditors is paramount to the provisions of the will. The phrase trustee "or other person" in section 44 of the Trustee Act, 1893, does not include an executor. *Cavendish and Arnold's Contract, In re*, 56 S. J. 468.

"**My said Executors.**"—Held, that the expression "my said executors" was merely a compendious form of designating "executors and trustees," and that the power of sale could be exercised by the plaintiff, the trustee for the time being. *Robinson, In re; Sproule* v. *Sproule* (1912), 1 Ir. R. 410.

Executors — Implied Power to Sell Land — Devolution of Estates Act—Vendor and Purchaser.—After giving the whole of her estate, real and personal, to her stepson and his wife and their three children, the testatrix proceeds: "It is my will that the personal effects shall be kept in the family, but the real estate shall be sold and equally divided, and I appoint my stepson, Harry Roberts, and his daughter, Annie Roberts, to execute this will." Held, that the executors had an express power of sale, not dependent upon nor affected by the Devolution of Estates Act. *Re Roberts and Brooks*, 25 C. L. T. 400; 6 O. W. R. 49; 10 O. L. R. 395.

Legacy Charged on Land—Sale by Executors in Order to Pay the Legacy. — A testator devised to his daughter a lot of land charged with a legacy. The daughter predeceased the testator, leaving two children to whom the lot descended. On an application by the executors at the instance of the official guardian, it was:—Held, that it was the duty of the executors to sell the land and pay the legacy. *Re Eddie*, 22 O. R. 556.

Sale to Pay Legacies.—Held, that the legacy in the will set out in the report of this case, as well as the debts of the testators, were a charge on his real estate, and that the administrator with the will annexed had power to sell the real estate, no question being raised as to the personal estate being insufficient to satisfy the debts and legacies. *In re Eaton Estate*, 7 P. R. 396.

Sale—Surviving Executor. — Where executors are given express power to sell lands, whether coupled with an interest or not, such power can be exercised by a surviving executor. The Devolution of Estates Act and amendments do not interfere with an express power of sale given by a will to executors extending beyond the periods of vesting prescribed by those Acts. *In re Koch and Wideman*, 25 O. R. 262.

Sale—Executor of Surviving Executor.—A testator by his will directed his real and personal property to be sold and the proceeds to be

divided and distributed, and appointed two executors to carry out his will, both of whom died before the estate was realized:—Held, that the executor of the last surviving executor of the testator's will had power to sell and convey the land. *Re Stephenson, Kinnee* v. *Malloy*, 24 O. R. 395.

Sale of Real Estate—Mortgage for Price.—Under a certain will the executors were directed to sell and dispose of a farm "either at public or private sale as to them may seem best, for the best price, and on the most advantageous terms that reasonably can be obtained for the same:" —Held, that the power to sell involved a power to secure part of the price by means of a mortgage on the property sold, the manner of sale being left to the discretion of the trustees. *Re Graham Contract*, 17 O. R. 570.

Delay in Selling.—Delay on the part of executors to sell lands, which by the will are saleable for payment of debts, will render the executors liable for rents and profits. *Emes* v. *Emes*, 11 Chy. 325.

Renunciation—Power of Sale.—Where a power of sale is given to executors qua executors, and not by name, they cannot, after they have once renounced, execute such power. *Travers* v. *Gustin*, 20 Chy. 106.

Executors — Power to Sell Lands — Power to Exchange — Vendor and Purchaser.—A testator devised her real estate to be equally divided between her children when the youngest of them attained twenty-one with a power to the executor "to sell or dispose of any or all of the above real estate, should he think it in the interest of my children to do so, and should he pay off any debt or debts now standing against such real estate, the same to be deducted from such sale or sales:"—Held, that the executor had no authority to exchange the lands of the testatrix for other lands. *In re Confederation Life Association and Clarkson*, 23 Occ. N. 325, 6 O. L. R. 606.

J. C. died in 1867, having by will provided as follows: "And whereas trouble . . . may arise among my family with regard to the property . . . on account of its being out of the power of my trustees to sell or dispose of the property, I hereby order, direct, and fully authorize at and after twenty years after my death, my trustees . . . to absolutely sell and dispose of my said property in T. to the best advantage, provided only that it be the wish of a majority of my heirs who may then be living, to do so and not otherwise, &c." In 1887, a meeting of a large majority of those interested was held, and it was decided to sell by public auction. On an application by the plaintiffs, who were trustees for one of the heirs, and represented only a one-sixth share of the property, for the usual order for partition and sale, which was resisted by a majority of the heirs:—Held, that the land in question was vested in the trustees on the express trust to sell at the end of twenty years from the testator's death provided a majority of the heirs were in favour of a sale, which was proved, and that the jurisdiction to partition was ousted. *Re Dennis, Downey* v. *Dennis*, 14 O. R. 267.

Purchaser's Duty.—A testator devised all his real and personal estate to his executors in fee, in trust for sale to pay debts:—Held, that a bona fide purchaser for value was not bound to inquire whether there were debts which authorized the executors to sell. *Burke* v. *Battle*, 17 U. C. C. P. 478.

Specific Devise.—A testator by his will directed his executors to pay all his debts, &c., out of his estate. Then followed specific devises of his estate to his wife, children and nephews and a direction to his executors to sell the chattels, excepting the household furniture bequeathed to his wife, and out of the proceeds to pay the debts and to invest the balance for the benefit of the wife and children. By a codicil he directed his executors if necessary, to sell in the first place lot A. specifically devised as aforesaid, to pay off any debts or incumbrances against his estate; and in the event of such sale being insufficient

to pay said debts, &c., then in the next place to sell and dispose of lot B. also so specifically devised. The executors before disposing of lots A and B sold to defendant the growing timber on lot C, a lot specifically devised to the plaintiffs, the defendant purchasing in good faith and on his solicitor's advice that the executors had the right to sell to pay debts; and defendant entered and cut down and carried away the timber. Subsequently the defendant purchased the land from the mortgagees thereof, the land having been mortgaged by testator. The plaintiffs, at the testator's decease, were under age, and did not become of age until after the trespass complained of, when they brought trespass against defendant claiming as damages the value of the timber so cut. There was no entry or possession taken by plaintiffs before action commenced: — Held, (1) that the general language of the will was controlled by the codicil, and so the debts were not charged on the unappropriated estates; and therefore the executors had no power to sell the timber on the land in question. (2) That if a power of sale was given to the executors it could not be exercised until after the lands specifically appropriated had been sold. (3) That the purchaser, not shielded by s. 30 of 29 Vict. c. 20 (O.) was bound to see that the power was rightly exercised. *Baker* v. *Mills*, 11 O. R. 253.

Time.—A testator directed all his estate, real and personal, to be sold for the purpose of dividing the proceeds amongst his children, which sale was to take place in eighteen months from his death; but the will empowered the executors to withhold the sale of the estate, "real and personal, more than what is necessary to defray the above mentioned charges, if they should deem it for the benefit of my heirs, provided such sale shall not be delayed longer than five years from my decease." The real estate was not sold within the five years:—Held, notwithstanding, that the trustees could make a good title, the limitation of the time being only directory. *Scott* v. *Scott*, 6 Chy. 366.

Receiving Payment.—Devisees in trust for sale of real estate must jointly receive or unite in receipts for the purchase money, unless the will provides otherwise, and the case is not affected by the property being charged with debts and the power of sale being to the executors eo nominee. *Ewart* v. *Snyder*, 13 Chy. 55.

Probate to One of Two Executors—Right to Sell Land.—A testatrix devised and bequeathed all her real and personal property to two executors in trust to carry out the provisions of her will, directing payment of her debts out of the estate, with full power in their discretion to sell all or any of her property, and to invest the proceeds, as they might deem best, and to pay the income thereof to the husband during his lifetime and after his death to sell the property and divide the same equally between her children. One of the executors renounced probate, which was granted to her husband, the other executor, who, some years after, without having registered a caution, contracted to sell certain of the lands to pay debts:—Held, that he had power to make a valid sale, and that the devise being to the executors, s. 13 of the Devolution of Estates Act, which requires a caution to be registered, in no way interfered with such power. *In re Koch and Wideman*, 25 O. R. 262, followed. *In re Hewett and Jermyn*, 29 O. R. 383.

Approval of Court or Guardian.—Where a will devised lands to the executors on trust to sell the same:—Held, that the case was not within s. 8 of the Devolution of Estates Act, and the approval of the official guardian or an order of the court was not necessary to a sale. *Re Booth's Trusts*, 16 O. R. 429. See *Moore* v. *Mellish*, 3 O. R. 174; *Hefferman* v. *Taylor*, 15 O. R. 670.

Naked Power of Sale.—A testator desired that his executors should sell and dispose of his land, and then appointed them to execute any deeds that might be necessary to the purchaser:—Held, that the executors took no interest but a mere power, and consequently that they could not distrain for rent accruing in their own time, before the land was sold. *Nicholl* v. *Cotter*, 5 U. C. R. 564.

A will, after giving several pecuniary legacies, contained this direction: "When my lands are sold and all the legacies paid, the money remaining is to be divided" in the manner therein stated. There was no other residuary clause. The testator named two executors, adding: "In them I repose full confidence that they will act fair and consistent:"—Held, that all the lands were to be sold; and that the executors had power to sell them although they had not the legal estate. *Woodside* v. *Logan*, 15 Chy. 145.

Personal Discretion.—A testator devised real estate to his granddaughter; and, in case of her dying without lawful issue, he directed the property to be sold by his executors; and from the proceeds of this and his other property he directed certain legacies to be paid, and the remainder to be applied at the discretion of his executors to missionary purposes:—Held, that these provisions shewed a personal trust in the executors for the purposes specified, and that the contemplated "dying without issue" was a dying without issue living at the granddaughter's death. *Re Chisholm*, 17 Chy. 403, 18 Chy. 467.

Survivor.—The testator devised lot A., with power "to the executors herein mentioned" to sell and invest the proceeds, the devisee to receive the interest during her life, and after his death the proceeds to be divided among the testator's family; and in the clause appointing two executors were added the words "to see my will carried into effect:"—Held, that this was not a bare power in the executors, but a power coupled with an interest, vested in them in the character of executors, and that the surviving executor could make a good title to the land. *Re Ford*, 7 P. R. 451.

Power of Sale—Administrator with the Will Annexed.—Replevin for iron ore taken from land in the province of Quebec. It appeared that R., the patentee of the land, by his will, made in 1829, authorized his executors to sell and convey all his estate, real and personal, for such considerations, upon such terms, and in such manner as they might judge best, and bequeathed the proceeds to different persons. Four executors were named, of whom only two proved the will, and the last of these two died in 1861. Administration with the will annexed was granted on the 20th May, 1873, to E. S., who conveyed to the plaintiff on the 31st May:—Held, that under 36 Vict. c. 20 s. 40 (O.), E. S. clearly had power to sell to the plaintiff. Before the execution of this deed the ore in question had been severed from the land, but the deed purported to convey not only the land, but all iron and other ores which might have been at any time severed from the land:—Held, that the ores passed by this conveyance; for though a chattel, and the conveyance would not except in equity, pass the legal title to it, yet the heir in whom it was vested would be a trustee for the administrator, the donee of the power, and it might be presumed that such donee as cestui que trust, had authority from the heir as trustee to dispose of it. *Stuart* v. *Baldwin*, 41 U. C. R. 446.

Advice of Court.—A testator authorized his executors to sell his real estate consisting of his homestead and property in St. Thomas, but stated that it was not his will to have his property in St. Thomas disposed of until the proceeds of it could be laid out in real estate to a fourth better advantage and with the consent of the heirs. On a bill filed to have the rights of the parties declared and the affairs of the estate wound up, the court referred it to the master to inquire as to the propriety of selling both the homestead and the St. Thomas property. *Travers* v. *Gustin*, 20 Chy. 106.

Implied Power to Sell.—A testator by his will devised as follows: "Also, it is my will, that when the aforesaid property be sold, that the interest be put to the clothing and schooling of my children, and to the support of my wife, so long as she remains my widow;" and by a subsequent clause named certain persons executors of his will; "and of the aforesaid estate and effects, and to apply the same according to the directions in the said will;"—Held, that the executors had full power to sell

and convey the lands in fee, and that a child of the testator, born after the making of the will, was not a necessary party to the conveyance. *Glover* v. *Wilson*, 17 Chy. 111.

It is not settled whether, under a will that went into effect before 29 Vict. c. 28, s. 15, a charge of debts on real estate by the will gave executors an implied power to sell. *Grummet* v. *Grummet*, 14 Chy. 648. See S. C. 22 Chy. 400.

A testator devised his lands, charged with payment of debts, to his wife for life, and in the event of her death or marriage, to his children, "to be held for them till they come of age by the executors hereinafter named, to be applied for their use and benefit in the way and manner as the said executors shall see best, and when the above children shall come of age the residue of the above property shall be given to the children in equal shares." The executors were not expressly authorized to sell, but the testator had directed that his wife should not have power to dispose of any part of the property without the consent of his executors:—Held, (1) that the necessary implication from these words was, that she had power to sell with their assent; and the executors and executrix—the widow—having sold the real estate and applied a large portion of the proceeds in the support and maintenance of the children, held (2) that the sale was valid, and that the executors were entitled to be allowed the amount so expended for maintenance, which was moderate, in passing their accounts in the master's office; and semble, that the fact of the debts having been charged on the lands, implied a power in the executors to sell. *Grummet* v. *Grummet*, 22 Chy. 400. See S. C. 14 Chy. 648.

Lands Specifically Devised.—Testator devised land to his wife for life, remainder to his nephew T., in fee. He then devised specific land to be disposed of by his executors for the payment of his debts, and added "and I also do hereby acknowledge and authorize them to sell, grant and convey, in full and proper manner, any, all, or such of my real estate as may be necessary to the payment and liquidation of any and all such just debts as may be due by me and not otherwise provided for:"—Held, that the executors had power to sell the land in question. They conveyed to one P., a creditor, who was to pay the widow a certain sum for her dower, and the residue to other creditors. Held, that the legal estate passed, whether the sale could be impeached in equity or not. Executors in such a case are not bound to sign the deed in presence of each other, as arbitrators executing an award. *Little* v. *Aikman*, 28 U. C. R. 337.

Payment of Debts.—Lands are devised to trustees to carry out the will of the testator, who reserved six lots, which he desired should be sold for payment of debts, not charged on lands; the residue to his grandchildren:—Held, that the trustees had a right to sell the whole of such property for payment of debts left unpaid by the personal estate and the lots specially appointed to be sold for that purpose; and that a purchaser who had not notice that all the debts not charged on lands were paid, would be justified in assuming that the trustees were properly proceeding to a sale. *Duff* v. *Mewburn*, 7 Chy. 73.

Implied Power of Sale.—B. bequeathed to his wife, A., the land in question, "to be at her disposal if agreeable to the executors," of whom she was not one, "so long as she remains a widow," adding, "I wish and desire the aforementioned farm to be sold for the discharge of my lawful debts, and the residue accruing therefrom to be laid out in the payment or part payment of another for the support of my family." He then directed that his two eldest sons should have the property when they came of age, after his wife's death, if she should remain a widow, and if she should marry they were to come into possession when of age, and that these two sons were to pay to the other children a proportion equal to their part of the property, adding, "all the above to be done to the wishes of the aforementioned executors." None of the executors proved or acted and in 1851 letters of administration, with the will annexed, were granted to the widow, who in the same year conveyed to defendant, describing herself in the deed as "sole devisee (with power of sale for purposes set forth) under the will of," &c. She married again about 1853. This sale she swore she made in order to pay the testator's debts, and

the purchase money so applied:—Held, that the sale directed by the will being for the payment of debts, the power to sell was vested by implication in the executors; that she did not take it as administratrix; that on her marriage her own interest was at an end; and that the sons could, therefore, eject defendant without any notice to quit or demand of possession. *Banting* v. *Gummerson*, 24 U. C. R. 287.

Delegated Power.—After devising all his real and personal estate to his executors in fee in trust for sale to pay debts, by a subsequent clause the testator directed that all his real estate, not specifically devised or required to pay debts, should be sold by his executors as they thought best, and the moneys arising from the sale and from other sources should after payment of debts be invested by them: Quære, whether a mere power was created by this clause of the will, and if so, whether it was well executed by a delegated power; or whether a similar estate might not be deemed to be continued in the executors for the objects of the second as well as for those of the first clause. *Burke* v. *Battle*, 17 U. C. C. P. 478.

A testator devised all his estate, real and personal, to trustees upon trust as soon after his death as might be expedient to convert into cash so much of his estate as might not then consist of money or first-class mortgage securities, and to invest the proceeds and apply the corpus and income in a specified manner. A later part of the will contained the following provision: "In the sale of my real estate or any portion thereof I also give my said trustees full discretionary power as to the mode, time, terms, and conditions of sale, the amount of purchase money to be paid down, the security to be taken for the balance and the rate of interest to be charged thereon, with full power to withdraw said property, from sale and to offer the same for resale from time to time as they may deem best:"—Held, that the later clause merely gave a discretion as to the details and conditions of the sale, and did not qualify or override the specific direction to sell as soon after the testator's death as might be expedient. *Lewis* v. *Moore*, 24 A. R. 393.

Discretionary Power of Sale.—A testator devised all his real and personal estate to trustees, and declared that it should be lawful for the, or the survivor of the, or the heirs, executors, and administrators of such survivor to make sale and dispose of all or any part of the said farms, lands, &c., either together or in parcels, and either by public auction or private contract, and for such price and prices as to them or him should seem fit and reasonable, and to lay out and invest the money to arise from such sale or sales in the purchase of stocks, government or real securities, in the province of Canada:—Held, that the power or trust was discretionary not only as to the time of sale, but also as to whether there should be a sale at all or not, and that it operated no conversion of the land into personal estate until exercised. *Rowsell* v. *Winstanley*, 7 Chy. 141.

If under a will a trustee has a discretion to sell, or not to sell, real estate, the court will not interfere by its advice or direction, but will leave the trustee to exercise his discretion. *In re Parker Trusts*, 20 Chy. 389.

Estate with Direction to Sell.—Testator appointed his wife and two others, "trustees of my property, to be held in trust for the benefit of my said wife and children." He directed that they should hold one farm for the use of his daughters, notwithstanding they might marry, and two other farms for any child born after his decease—devised his homestead to his eldest son—and added: "I will and devise that the 500 acres of wild land," describing it, "to be sold, and the proceeds to be divided among my said sons and daughters in equal proportions, share and share alike, when the youngest comes of age:"—Held, that the trustees took a fee in the wild land, not a mere power to sell. *Young* v. *Elliott*, 23 U. C. R. 420.

Direction to Sell.—A testator, in an inartificially drawn will, directed his debts to be paid, and bequeathed to his wife £125 to be paid her from the sale of his farm, which he required his executors to advertise and sell for the best price that could be obtained for it, and also to

retain possession if she thought fit, in lieu of all dower and thirds, to have and to hold to her heirs and assigns for ever. After giving legacies to his children, adding to each "to have and to hold to him, his heirs, executors, administrators, and assigns, for ever"—the testator willed and devised, that, should any assets remain in the hands of his executors after paying the foregoing devisees, the same should be equally divided between his sons and daughters named, share and share alike: — Held, that the direction to sell was for the benefit of all the legatees, and not of the wife only. *Smith* v. *Bonnisteel*, 13 Chy. 29.

Direction to Raise Money.—The powers of a trustee, who is directed to raise or to pay money out of rents and profits, to sell the trust estate, considered and acted upon. *Sproatt* v. *Robertson*, 26 Chy. 333.

Probate Required for Sale.—The real estate vests in all the executors, whether they prove the will or not, unless in the latter case by renunciation or otherwise they have made it impossible for them to obtain a grant of probate; and the executors who have proved the will have no power to convey the legal estate without either the concurrence of or disclaimer by the other executor who has not proved: *Re Pawley and London & Provincial Bank* (1900), 1 Ch. 58. But general executors of the testator's real estate in England can sell and make a good title without the concurrence of special executors appointed of property situate in a foreign country or in the colonies (1902) 1 Ch. 187,

See section 43 of Trustee Act (Chapter 121 R. S. O. 1914) which authorises sale after probate.

ACCOUNTS.

Passing of Accounts—Prior Account in Surrogate Court.—The defendant an executor brought into the proper Surrogate Court the accounts of certain estate of which he was the executor, which were passed by the 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 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 purpose:—Held, that on the taking of the accounts in the Master's office the account taken and passed by the Surrogate Court Judge was under sec. 72, no mistake or fraud having been shown, 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*, 13 O. L. R. 679.

Application by Administrator. — On an application to pass accounts, a statement and account of the administration—a schedule in the nature of an inventory—must be filed setting forth clearly the details of the estate and of the applicant's disposition thereof. The practice to be followed in passing accounts laid down. *Re Lopwell* (1899), 6 Terr. L. R. 467.

Executors' and Trustees' Accounts.—The accounts approved by the Judge were brought before him under the provisions of s. 72 of the Surrogate Courts Act, as amended by 2 Edw. VII. c. 12, s. 11, and 5 Edw. VII. c. 14 s. 1:—Held, that under that section, it is only so far as mistake or fraud is shown, that the binding effect of the approval is taken away; and the language of the section plainly indicates that it is 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 accounting party. *Re Wilson and Toronto G. T. C.*, 15 O. L. R. 596, 11 O. W. R. 214.

Passing Accounts — Corroboration — Payment of Claims—Statutory Declarations.—A Judge sitting on the probate side of the court passing accounts is not bound by the rule of procedure requiring claimants against the estate to give corroborative proof of their claims.

This rule of procedure is applicable only when the claim comes to be contested in Court. Semble, a Judge sitting without a jury is not bound any more than is a jury to apply it under all circumstances. The responsibility of paying claims falls upon the administrator; he must use care and judgment in considering them, 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 has thought fit to pay. Remarks on the usual form of statutory declaration proving claims. *In re Blank Estate*, 5 Terr. L. R. 230.

Appeal by plaintiff from ruling of Master in Ordinary in course of a reference under a consent judgment to take the account of defendant Gardner as executor. The Master certified that he had adopted the result of an accounting before a Surrogate Court Judge up to the time of such accounting. R. S. O. 1897, ch. 59, sec. 72, is this, that the account of the dealing of the executor with the estate being filed and approved of by the Judge shall be binding upon any person notified and attending on the proceedings in any subsequent investigation of the account in the High Court—except in so far as mistake or fraud is shewn in the account so approved. This investigation is substantially an auditing of the accounts, and it was so treated in *Re Russell*, 8 O. L. R. 481, 3 O. W. R. 926. It is just the sort of examination and approval of accounts that was dealt with in the English case cited in 27 and 28 Ch. D., where the audit was by an officer appointed under the rules of a benefit society. *Holgate* v. *Shutt*, 27 Ch. D. 111 and 28 Ch. D. 111; *Edinburgh Life Assurance Co.* v. *Allen*, 23 Chy. 230, which has been followed without question ever since. The investigation is substantially an auditing of the accounts, and it was so treated in *Re Russell*, 8 O. L. R. 481, 3 O. W. R. 926. *Re Wilkie*, 7 O. W. R. 474.

Passing Accounts.—Whether or not a purchase of property by a husband in the name of his wife in a gift is a question of the husband's intention at the time of the purchase. Prima facie it will be considered a gift, but this presumption may be rebutted. The evidence, however, for such purpose must be clear, but quære, whether when the party seeking to rebut the presumption gives evidence, he must swear positively to an intention to create a trust. *Re Hobson Estate* (1901), 7 Terr. L. R. 182.

On the taking of the accounts in the Master's office the account taken and passed by the Surrogate Court Judge was, under s. 72, no mistake or fraud having been shown, 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. 63 V. c. 17, s. 18 (O.), 5 Edw. VII. c. 14 (O.), and Con. Rules 666 and 667, referred to as to the powers and duties of the Master in taking accounts, s. 72 applying to trustees as well as executors. *Gibson* v. *Gardner*, 7 O. W. R. 474, 8 O. W. R. 526, 13 O. L. R. 521.

Surrogate Courts.—The practice of the Surrogate Courts in this province is to apply the provisions of s. 59 of the Act more liberally than do the English Courts the corresponding provision of the English Probate Act. *Carr* v. *O'Rourke*, 22 C. L. T. 207, 3 O. L. R. 632, 1 O. W. R. 331.

Jurisdiction of Probate Court—Res Judicata.—A court of probate has no jurisdiction over accounts of trustees under a will, and the passing of accounts containing items relating to the duties of both executors and trustees is not, so far as the latter are concerned, binding on any other court, and a court of equity, in a suit to remove the executors and trustees, may investigate such accounts again and disallow charges of the trustees which were passed by the Probate Court. *Grant* v. *Maclaren*, 23 S. C. R. 310.

Infant—Liability to Account.—In a suit for the partition of the real estate of an intestate who was one of the executors of his father's will and had taken possession of the personal estate, and who died a minor, it was claimed on behalf of infant legatees, who had not been paid their legacies, that an account should be taken of the personal estate come to the hands of such executor, and that their shares thereof might

be charged upon the land in question before partition. — Held, that the executor having been a minor, his estate was not liable to account therefor. *Nash* v. *McKay*, 15 Chy. 247.

Surrogate Courts—Passing Accounts—Executors and Administrators — Trustee — Creditor's Claim — Surrogate Courts Act, R. S. O. 1897, ch. 59, sec. 72—5 Edw. VII. ch. 14 (O.).—A Surrogate Court Judge on passing the accounts of an executor, administrator, or trustee, under the provisions of sec 72, of the Surrogate Courts Act, as amended by 5 Edw. VII. ch. 14 (O.), has no jurisdiction to call upon a creditor of the estate to prove his claim and to adjudicate upon that claim and allow it or bar it. If, however, the executor, administrator, or trustee, has in good faith paid the claim of a creditor before bringing in his accounts, the Surrogate Court Judge has jurisdiction to consider the propriety of that payment and to allow or disallow the item in the accounts. Order of the Surrogate Court of Elgin barring the claim of a creditor set aside as having been made without jurisdiction. *In re MacIntyre*, 11 O. L. R. 136.

Account — Surrogate Court—Estoppel. — The Surrogate Courts of Ontario 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 Hen. VIII. c. 5, the effect of Rule 19 of the Surrogate Court Rules of 1892, as limited by s. 73 of the Surrogate Courts Act, R. S. O. 1897 c. 59, being to bring the practice back to that in force under the ancient statute. It is not only the duty of an executor or administrator to file an inventory and render an account when duly called upon to do so, but it is his privilege to do so voluntarily in any case in which he is liable to be called upon, and this privilege in case of his death extends to his personal representative, though not at the same time the representative of the original testator, and even though there is a surviving representative of the original testator. Where, therefore, the executors of an executor brought into the proper Surrogate Court an account of the dealings of their testator, with the assets of the estate of the original testator, treating in the account as cash received by the accounting executor certain promissory notes, and the account was audited and approved after due notice to the surviving executor of the original testator, it was held, in an issue of the High Court between the surviving executor of the original testator and the executors of the deceased executor, upon pleading so framed as to raise not only the question of the property in this note, but also the question of the right to the proceeds thereof, that the audit and approval of the account were a binding adjudication as against the surviving executor that the proceeds of the notes were payable to the estate of his deceased co-executor. *Cunnington* v. *Cunnington*, 21 Occ. N. 552, 2 O. L. R. 511.

SUCCESSION DUTIES,

Direction to Pay Debts and Testamentary Expenses—Specific Legacies—Residue—Succession Duties — Exoneration or Specific Legacies.—It was contended that under a direction in a will to pay debts and funeral expenses, the executors were bound to pay the succession duties out of the residue, to the exoneration of the specific legatees:—Held, by the Divisional Court, approving *Kennedy* v. *Protestant Orphans' Home*, 25 O. R. 235; *Manning* v. *Robinson*, 29 O. R. 483, and *Re Holland*, 3 O. L. R. 406, that succession duty does not come within the description either of a debt or a part of the testamentary expenses, and that the specific legacies not being specially exonerated by the will, were not to be exonerated from their proportion of the succession duties payable upon the whole of the estate, at the expense of the residuary legatees. *Re Bolster*, 25 C. L. T. 455, 6 O. W. R. 300, 10 O. L. R. 591.

Residue—Pro Rata.—A testator devised and bequeathed all his real and personal estate to his executors and trustees for the purpose of paying a number of pecuniary legacies, some to personal legatees, and others to

charitable associations, and provided that the residue of his estate should be divided pro rata among the legatees:—Held, that it was the duty of the executors to deduct the succession duty payable in respect of the pecuniary legacies before paying the amounts over to the legatees, and they had no right to pay such succession duty out of the residue left after paying the legacies in full. Where the residue of an estate is directed to be divided pro rata among prior legatees they take such residue in proportion to the amount of their prior legacies. *Kennedy* v. *Protestant Orphans' Home*, 25 O. R. 235.

Succession Duty.—Where trustees of a will incurred costs and paid duties abroad in respect of foreign property specifically bequeathed, they having as executors assented to the bequest,—Held, that both the foreign costs and the foreign duty must be borne by the specifically bequeathed property and not by the residue. *Brewster, In re; Butler* v. *Southam*, 77 L. J. Ch. 605; (1908) 2 Ch. 365, followed. *Perry* v. *Meddowcroft*, 12 L. J. Ch. 104; 4 Beav. 197, 204 doubted. *De Sommery, In re; Coelenbier* v. *De Sommery*, 82 L. J. Ch. 17; (1912), 2 Ch. 622; 107 L. T. 253; 57 S. J. 78.

LIMITATION OF ACTIONS.

Limitation of Action.—A testator devised the residue of his real and personal estate to trustees upon trust for sale and conversion and out of the moneys produced by such sale and conversion to pay his debts:—Held, that the testator by creating a mixed fund and imposing a duty not on the executors, but on the trustees, of paying his debts out of that mixed fund, had created a charge not of a part but of the whole of the debts on the real estate, and that it could not be said that any particular part of the debts was attributable to the personal estate; therefore no part of a claim for a debt was barred by the Statutes of Limitation if brought within twelve years of the testator's death. Query in *Stephens, In re; Warburton* v. *Stephens*, 59 L. J. Ch. 109, 111; 43 Ch. D. 39, 45, answered in the negative. *Raggi, In re; Brass* v. *Young & Co.*, 82 L. J. Ch. 396; (1913) 2 Ch. 206; 108 L. T. 917.

Administration—Account — Sums Paid to Beneficiaries Six Years before Action—Statute of Limitations.—In an administration action at the suit of a creditor the liability of an executor in respect of moneys honestly paid away by him to beneficiaries is not, by virtue of section 8 of the Trustee Act, 1888, barred at the expiry of six years from the date of the payment. Dictum of Fletcher Moulton, L. J., in *Lacons* v. *Warmoll* (76 L. J. K. B. 914; (1907) 2 K. B. 350) not followed. *Blow; In re; St. Bartholomew's Hospital* v. *Cambden*, 82 L. J. Ch. 207; (1913) 1 Ch. 358; 108 L. T. 413; 57 S. J. 303; 29 T. L. R. 279—Warrington, J., reversed. 58 S. J. 136; 30 T. L. R. 117.

RIGHT OF RETAINER.

Right of Retainer.—An executor may retain his simple contract debt as against both specialty and simple contract creditors, inasmuch as by Hinde Palmer's Act both classes of creditors are made of equal degree as regards priority of payment in the administration of estates. The ratio decidendi in *Samson, In re*, 76 L. J. Ch. 21; (1906) 2 Ch. 584, and in *Jennes, In re*, 53 S. J. 376, applied in support of the executor's right of retainer. *Wilson* v. *Coxwell*, 52 L. J. Ch. 975; 23 Ch. D. 764, and *Jones, In re; Calver* v. *Laxton*, 55 L. J. Ch. 350; 31 Ch. D. 440, not followed. *Olpherts* v. *Coryton* (No. 1), (1913), 1 Ir. R. 211. See contra page 274.

An executor or administrator cannot, by paying off creditors of the estate, create a demand in his own favour that will give him a right of retainer in priority to other creditors. All that he would under such circumstances be entitled to would be to stand in the place of the creditors he has paid off; and if there prove to be a deficiency of assets, he will only be entitled to be paid pro rata with the general creditors of the estate. *Willis* v. *Willis*, 20 Chy. 396.

An executor is entitled to take the personal property at its value for a debt due by the estate to him, and his purchase at public auction of the testator's personal estate, in lieu of money due him, was held valid. *Yost* v. *Crombie*, 8 U. C. C. P. 159.

He may retain a debt barred by the statute. Quære, where the personal estate of the testator is exhausted, can he retain such a debt out of the proceeds of real estate. *Crooks* v. *Crooks*, 4 Chy. 615.

Where an executor of a creditor is also administrator or executor of such creditor's debtor, the right of retainer arises when there are any assets, and he will be assumed to have exercised such right without any actual act of appropriation being established; and though his claim would otherwise be barred by the Statute of Limitations. *Kline* v. *Kline*, 3 Ch. Ch. 161.

The right of retainer out of legal assets applies to equitable as well as to legal debts, especially in a case where there is no competition of creditors. *Kline* v. *Kline*, 3 Ch. Ch. 161.

Where the estate of a deceased person is insolvent, the provisions of the Act respecting trustees displace any right on the part of the executor to retain in full, and as against an executor claiming as creditor, any other creditor may set up the Statute of Limitations. *Re Ross*, 29 Chy. 385.

Debt Barred by Statute.—The right of an executor to retain or set off the share of one of the next-of-kin in the estate under a partial intestacy against a debt owing by him to the estate, notwithstanding that it is barred by the Statute of Limitations, depends upon whether there was due from the legatee a debt for which but for the Statute of Limitations he could have been sued. *Wheeler, In re; Hankinson* v. *Hayter*, 73 L. J. Ch. 576; (1904), 2 Ch. 66; 91 L. T. 227; 52 W. R. 586.

Executor Equitable Tenant for Life.—An executor, who is a tenant for life and cestui que trust, is not entitled to retain a sum due from the testator's estate for interest, where there are trustees competent to sue for the corpus of the sum. *Dunning, In re; Hatherley* v. *Dunning*, 54 L. J. Ch. 900, followed. *Loomes* v. *Stotherd*, 1 L. J. (o.s.) Ch. 220; 1 Sim. & S. 458, examined and explained. *Hayward, In re; Tweedie* v. *Hayward*, 70 L. J. Ch. 155; (1901), 1 Ch. 221; 84 L. T. 256; 49 W. R. 296.

An executor whose debt largely exceeds the value of his testator's estate may retain the entire assets in specie without first realizing them. *Woodward* v. *Darcy* (*Lord*), 1 Plowd. 184 and *Chapman* v. *Turner*, 9 Mod. 268; s. c. Vin. Abr. "Executor," D. 2, p. 71, discussed. *Gilbert, In re; Gilbert, ex parte*, 67 L. J. Q. B. 229; (1898) 1 Q. B. 282; 77 L. T. 775; 46 W. R. 351; 4 Manson, 337.

A debt in respect of which an executor has exercised his right of retainer must be treated as a debt paid by him, and not as money remaining in his hands. Where therefore an executor has, without notice of any claim for succession duty, fully administered his testator's estate, retaining a portion of the assets in payment of a debt to himself, a subsequent claim for succession duty cannot be enforced against the portion of the assets so retained by the executor. *Fludyer, In re; Wingfield* v. *Erskine*, 67 L. J. Ch. 620; (1898), 2 Ch. 562; 79 L. T. 298; 47 W. R. 5.

Right of Wife to Retain as Executrix.—Section 3 of the Married Women's Property Act, 1882, which deals with loans by a wife to her husband, does not apply to the subject of retainer by a woman as executrix of her husband. Consequently, the right of a woman who is executrix of her late husband to retain out of the assets of his estate come to her hands the amount of a loan made by her out of her separate estate to her husband for the purpose of his business is not taken away by the joint operation of that section and section 10 of the Judicature Act, 1875, in cases where the estate is insolvent. *Leng. In re; Tarn* v. *Emmerson*, 64 L. J. Ch. 468, 471, 472; (1895), 1 Ch. 652, 657, 660, and *May, In re; Crawford* v. *May*, 60 L. J. Ch. 34; 45 Ch. D. 499, followed.

Ambler, In re; Woodhead v. *Ambler*, 74 L. J. Ch. 367; (1905), 1 Ch. 697; 92 L. T. 716; 53 W. R. 584; 21 T. L. R. 376.-C. A.

The Land Transfer Act, 1897, does not enable an administratrix out of the proceeds of sale of real estate to retain a debt due to her from the intestate's estate in priority to other creditors. *Williams, In re; Holder* v. *Williams*, 73 L. J. Ch. 82; (1904) 1 Ch. 52; 89 L. T. 580; 52 W. R. 318; 20 T. L. R. 54.

An executor can retain the whole of his testator's chattels for the payment of a debt due to him from his testator, and is not obliged to appropriate chattels of the exact amount of his debt. When the chattels are realized the balance over (if any) goes to the other creditors. *Broad, In re; Official Receiver, ex parte*, 105 L. T. 719; 56 S. J. 35—D.

The doctrine of *Cherry* v. *Boultbee*, 9 L. J. Ch. 118; 4 Myl. & Cr. 442, namely, that executors may retain out of a legacy or share of residue a debt owing to their testator by the legatee—does not entitle them to retain a joint debt owing from a firm out of the legacies or a share of residue given to the individual partners. *Smith* v. *Smith*, 31 L. J. Ch. 91; 3 Giff. 263 explained and distinguished. *Turner* v. *Turner*, 80 L. J. Ch. 473; (1911) 1 Ch. 716; 104 L. T. 901.

An executor may retain his simple contract debt as against both specialty and simple contract creditors, inasmuch as by Hinde Palmer's Act both classes of creditors are made of equal degree as regards priority of payment in the administration of estates. The ratio decidendi in *Samson, In re*, 76 L. J. Ch. 21; (1906) 2 Ch. 584, and in *Jennes, In re*, 53 S. J. 376, applied in support of the executor's right of retainer. *Wilson* v. *Coxwell*, 52 L. J. Ch. 975; 23 Ch. D. 764 and *Jones, In re; Calver* v. *Laxton*, 55 L. J. Ch. 350; 31 Ch. D. 440, not followed. *Olpherts* v. *Coryton* (1913), 1 Ir. R. 211. Affirmed *Solomon* v. *Attenborough*, 80 L. J. Ch. 503; (1911) 2 Ch. 159; 105 L. T. 11; 55 S. J. 535; 27 T. L. R. 471.

An executor or administrator does not lose his right of retainer out of money paid into court because he himself applies for the order under which the money is so paid in. The right of retainer need not be expressly reserved in the order. *Langley, In re; Johnson* v. *Langley*, 68 L. J. Ch. 361.

The personal representative may still retain his own debt, notwithstanding a decree for administration made in a suit by other creditors, notwithstanding the assets out of which he seeks to retain came to his hands after the decree, and notwithstanding the present form of a creditor's administration bond which provides for a due course of administration "rateably and proportionably and according to the priority required by law and not unduly preferring his own debt or the debts of any other of the creditors of the deceased by reason of being an administrator as aforesaid." *Nunn* v. *Barlow*, 2 L. J. (o.s.) Ch. 123; 1 Sim. & S. 588, examined and followed. *Davies* v. *Parry*, 68 L. J. Ch. 346; (1899) 1 Ch. 602; 47 W. R. 429.

Creditor Appointed Administrator.—*Davies* v. *Parry*, 68 L. J. Ch. 346; (1899) 1 Ch. 602, approved. *Belham, In re; Richards* v. *Yates*, 70 L. J. Ch. 474; (1901) 2 Ch. 52; 84 L. T. 440; 49 W. R. 498-C. A. See also *Belham; In the goods of; Richards* v. *Yates*, 84 L. T. 300, 49 W. R. 448.

Payment out of Court.—An executor's or administrator's right of retainer is only applicable to a fund which he has actually or constructively got into his possession. Money paid into court on his application does not come constructively into his possession. *Pulman* v. *Meadows*, 70 L. J. Ch. 97; (1901) 1 Ch. 233; 84 L. T. 26.

Appropriation of Securities.—A sole executor who is also a beneficiary cannot validly appropriate towards his own legacy or share of residue any securities which have no market value and at his own price. *Bythway, In re; Gough* v. *Dames*, 80 L. J. Ch. 246; 104 L. T. 411; 55 S. J. 235.

ADVERTISEMENT FOR CREDITORS.

The administrators of the estate of an intestate, who died in 1906, inserted three times in a newspaper published at the place in Ontario where the intestate was residing at the time of his death, an advertisement headed "Notice to Creditors," given pursuant to R. S. O. 1897, c. 129, calling upon "all creditors and others having claims against the estate" of the deceased to send them in to the solicitor for the administrators by a named date, and stating that after such date they would not be liable to any person of whose claim notice should not have been received:—Held, that the advertisement was sufficient; that it covered next of kin; and that the absentee would be barred if he were hereafter to make any claim; and, therefore, the administrators should divide the assets amongst those entitled as though the absentee were assuredly dead without ever having had issue. *Re Ashman*, 10 O. W. R. 250; 15 O. L. R. 42.

Creditor Overpaid—Action by Administratrix.—An administratrix, having given the statutory notice for creditors, after expiry of the time therein mentioned, paid money on a claim, and afterwards, new claims being made against the estate, sought to recover a portion of the money back as on an overpayment:—Held, that she had no locus standi to maintain the action. *Leitch* v. *Molsons Bank*, 27 O. R. 621.

Advertisement for Claims.—Publication in the Ontario Gazette of an advertisement for creditors, pursuant to R. S. O. 1887, c. 110, s. 36, is not necessary to release executors from liability for payments made by them. *Re Cameron, Mason* v. *Cameron*, 15 P. R. 272.

Advertisement for Next of Kin.—A testator by his will directed that his executor should distribute his residuary estate amongst churches and charities, or otherwise as he might think fit. The executor advertised for heirs and next of kin of the testator without result, and then paid into court the money representing the residue. Upon a petition under R. S. O. 1887, c. 110, s. 37, for the advice of the court as to the construction of the will and as to further advertising for next of kin, the court refused to make any order in the absence of any of the heirs or next of kin. *Re Harley's Estate*, 17 P. R. 483.

LIABILITIES OF EXECUTORS AND ADMINISTRATORS—RELIEF FROM.

Relief.—A trustee to be entitled to relief under s. 3 of the Judicial Trustees Act, 1896, must act both honestly and reasonably, the mere fact that he acted honestly is not sufficient. *Barker, In re; Ravenshaw* v. *Barker*, 77 L. T. 712; 46 W. R. 296. See *In re Smith; Smith* v. *Thompson*, 71 L. J. Ch. 411; 86 L. T. 401.

Relief.—Executors and trustees who have left outstanding a debt forming part of the estate of their testator, and have thereby lost part of the sum due, will be relieved under s. 3 of the Judicial Trustees Act, 1896, from the consequences of their action, where the construction of the will under which they are acting is doubtful, and they have thought that on a reasonable interpretation of it, it was not their duty to call in the debt. *Grindey, In re; Clews* v. *Grindey*, 67 L. J. Ch. 624; (1898), 2 Ch. 593; 79 L. T. 105; 47 W. R. 53.

Liability of Retired Trustees.—In order to make retiring trustees liable for a breach of trust committed by their successors, it must be clearly shown that the very breach of trust which was in fact committed was contemplated by the former trustee when the retirement took place, and that they were guilty as accessories before the fact to such breach of trust. It is not sufficient to prove that they rendered easy or even intended a breach of trust, if the breach of trust so intended was not in fact committed. *Head* v. *Gould*, 67 L. J. Ch. 480; (1898) 2 Ch. 250; 78 L. T. 739; 46 W. R. 597.

DEFAULTERS.

Defaulting Trustee.—The rules as to following trust funds in the hands of defaulting trustee apply against the assignee of a defaulting trustee as fully as against the trustee himself. The beneficial owner has a charge on the property wrongfully disposed of and may follow it wherever it can be distinguished. In this respect there is no distinction between an express trustee and an agent or a bailee or anybody else in a fiduciary position. *Smith* v. *Faulkner*, 40 N. S. R. 528.

Technical Breaches of Trust—Relief from—Limitation of Actions—Trustee Acts.—Where it was held that the appointment of executors to carry out the alternative provisions of the will never took effect, it was also held that the persons named as executors, having applied for and obtained probate, became trustees for the persons entitled upon an intestacy; payments made by them to those who would have been beneficially entitled if the alternative provisions had taken effect were breaches of trust; but the statute of limitations was a bar to a recovery in respect of any of those breaches which occurred more than six years before the action was brought: R. S. O. 1897, c. 129, s. 32:—Held, moreover, that the executors were entitled to be relieved from personal liability for all breaches of trust committed by them under 62 V., 2nd Sess., c. 15, they having acted honestly and reasonably, in view of the facts that the construction of the will was doubtful; the trial Judge took the same view of its effect as they did, and for eleven years everybody interested in the estate acquiesced in that view. *Henning* v. *Maclean*, 21 Occ. N. 434, 2 O. L. R. 169.

PRECATORY TRUST.

Precatory Trust—Secret Trust.—"Desire"—Annual Allowance.—Testatrix by will gave her property equally between her two daughters for their own absolute use, and expressed her "desire" that each of them should, during the lifetime of her son, pay to him one-third of the respective incomes of her said two daughters accruing from the moneys and investments under her will:—Held, that the will created no trust enforceable by the son. *Oldfield, In re; Oldfield* v. *Oldfield*, 73 L. J. Ch. 400; (1904), 1 Ch. 549; 90 L. T. 392.

In the rule laid down by Lord Alvanley in *Malim* v. *Keighley* (2 Ves. 333, 335), and adopted by the House of Lords in *Knight* v. *Boughton* (11 Cl. & F. 513, 548, 549)—namely, "Wherever any person gives property, and points out the object, the property and the way in which it shall go, that does create a trust, unless he shews clearly that his desire expressed is to be controlled by the party; and that he shall have an option to defeat it," the words "the way in which it shall go" are to be read in the imperative sense, and there is nothing in the decisions of the Court of Appeal in *Diggles, In re; Gregory* v. *Edmonson* (39 Ch. D. 253); *Hamilton, In re; Trench* v. *Hamilton* (64 L. J. Ch. 799; (1895) 2 Ch. 370), and *Williams, In re; Williams* v. *Williams* (66 L. J. Ch. 485; (1897) 2 Ch. 12), which is contrary to the rule so affirmed in the House of Lords.

SHARES.

Shares in Company.—As between tenant for life and remainderman, trustee shareholders have no option, but must take the greatest benefit offered by the company. *Bouch* v. *Sproule*, 56 L. J. Ch. 1037; 12 App. Cas. 385 followed. *Evans, In re; Jones* v. *Evans*, 82 L. J. Ch. 12; (1913) 1 Ch. 23; 107 L. T. 604; 19 Manson 397; 57 S. J. 60.

Shares.—Where a testator bequeaths a certain number of shares in a private company, and the will provides that if the legatee should by the articles be restricted from taking the shares in any other way than by buying them, then the bequest shall be an alternative one of money for the purchase of a like holding, the fact that the legatee is so restricted operates to make the bequest the alternative one of money to buy the shares. *White, In re; Theobald* v. *White*, 82 L. J. Ch. 149; (1913) 1 Ch. 231; 108 L. T. 319; 57 S. J. 212.

Held, that the term "money" in clause 6 was intended by the testator to embrace his entire residuary personal property. See Jarman on Wills, 5th ed., p. 725; Am. & Eng. Encyc. of Law, 1st ed., vol. 15, p. 702.—The

personal estate not being sufficient, after payment of debts, to satisfy the pecuniary legacies, the residuary real estate should not be used to supplement the personal estate in satisfying the pecuniary legacies; the testator did not intend that his real and personal estates should be regarded as one mass, but he treated them as two distinct masses. *Greville* v. *Browne*, 7 H. L. C. 689, distinguished. *Wells* v. *Row*, 48 L. J. Ch. 476, *James* v. *Jones*, L. R. 9 Ir. 489, *Gyett* v. *Williams*, 2 J. & H. 429, Re *Bailey*, 12 Ch. D. 268, and *Totten* v. *Totten*, 20 O. R. 505, referred to. *Re Bailey*, 2 O. W. R. 889.

Legacy—Interest Accruing from Investment Funds.—The testator left by his will $40,000 to be set aside and invested in good securities, his executors to pay the net annual interest and income to Sophia Coleman during her natural life, and at her death he directed that the principal sum should be paid and transferred to the University of Mount Allison. A like provision was made for Florence Black.

The executors carried out the directions of the will by investing the two sums of $40,000 each in bank and other stocks, a list of which has been annexed to the paper herein. Since the investments, some of the companies have decided to increase their capital, and it is anticipated that others may do so. These companies have allotted to the present shareholders a preferential right of taking up the new shares. These rights are valuable, and the holders are entitled to sell them. The question has now arisen which class of legatees under the will is entitled to the benefit of the money from the sale of these rights—that is to say, the life interest, or the remainder interests, or the residuary estate.

Cook on Corporations, ch. 33, sec. 559, deduces from all the cases this rule. "The right to subscribe for new shares at par upon an increase of the capital stock which is an incident of the ownership of the stock, does not belong as a privilege to the life tenant, but such an increment must be treated as capital, and be added to the trust found for the benefit of the remaindermen. This is equally the rule whether the trustee subscribes for the new stock for the benefit of the trust, or sells the right to subscribe for valuable consideration in either event, the increase goes to the corpus."

As I understand *Bouch* v. *Sproule*, 12 A. C. 385, where all the cases are reviewed, followed by *In re Armitage* (1893), 3 Ch. 337, the result is the same as stated in the above citation from Cook. *In re Estate of Jairus Hart*, 5 E. L. R. 98.

CARRYING ON BUSINESS.

Carrying on Testator's Business—Debts Incurred by Executors—Claim to Indemnity in Priority to Testator's Creditors.—The executors of a testator who for their own benefit carry on their testator's business without any agreement with his creditors, but without any interference by them, are not entitled, in priority to such creditors, to an indemnity out of the estate against debts which the executors incur in carrying on the business. *Oxley, In re; Hornby* v. *Oxley*, 58 S. J. 138; 30 T. L. R. 170.

ACTS BEFORE REVOCATION.

Where administration of the estate of a deceased person is granted in the genuine belief that there is no will and subsequently upon a will being discovered administration is revoked and the will proved by the executors appointed thereunder, the grant of administration is not merely voidable but void ab initio, and dispositions of the assets by the supposed administrator before the revocation are also void. *Hewson* v. *Shelley*, 82 L. J. Ch. 551; (1913) 2 Ch. 384; 109 L. T. 157; 57 S. J. 717; 29 T. L. R. 699.

PLEDGE.

Pledge by Executor.—The proper inference to be drawn from the facts was that at the date of the pledge the executors had assented to the trust dispositions taking effect, and held the plate as trustees; that, therefore, the deceased executor had no power to pledge the plate, and the existing trustees were entitled to recover it. *Attenborough* v. *Solomon*, 82 L. J. Ch. 178; (1913) A. C. 76; 107 L. T. 833; 57 S. J. 76; 29 T. L. R. 79.

CHAPTER II.

ESTATES OF INSOLVENT DECEASED PERSONS.

The estates of insolvent deceased persons may be administered according to the provisions of R. S. O. 1914, ch. 121, which is as follows:—

63.—(1) On the administration of the estate of a deceased person, in case of a deficiency of assets, every creditor in proving his claim shall state whether he holds any security for his claim or any part thereof, and shall give full particulars of the same and if such security is on the estate of the deceased debtor, or on the estate of a third person for whom the estate of the deceased debtor is only indirectly or secondarily liable, the creditor shall put a specified value on such security, and the personal representative, under the authority of the other creditors of the estate of the deceased, or of the court if the estate is being then administered under the direction of or by a court, may either consent to the creditor's ranking for the claim, after deducting such valuation, or may require from the creditor an assignment of the security at an advance of ten per cent. upon the specified value to be paid out of the estate as soon as the personal representative has realized such security, in which he shall be bound to the exercise or ordinary diligence; and in either case the difference between the value at which the security is retained or taken, as the case may be, and the amount of the claim of the creditor shall be the amount for which he shall rank upon the estate of the deceased debtor.

(2) If the claim of the creditor is based upon a negotiable instrument upon which the estate of the deceased debtor is only indirectly or secondarily liable, and which is not mature or exigible, the creditor shall be considered to hold security within the meaning of this section, and shall put a value on the liability of the person primarily liable thereon, as his security for the payment thereof, but after the maturity of such liability and its non-payment, he shall be entitled to amend and re-value his claim.

64. A creditor holding any such security on the estate of a deceased debtor, or on the estate of a third person for whom the estate of such debtor is only indirectly or secondarily liable, may release or deliver up such security to the personal representative, or he may by statutory declaration delivered to the personal representative set a value upon such security; and from the time he shall have so released or delivered up such security or valued the same, the debt to which such security applied shall be considered as an unsecured debt of the estate, or as being secured only to the extent of the value set upon such security; and the creditor may rank as and exercise all the rights of an ordinary creditor, for the amount of his claim, or to the extent only of so much thereof as exceeds the value set upon such security as the case may be.

65.—(1) Where a person claiming to be entitled to rank on the estate holds security for his claim or any part thereof, of such a nature that he is required by this Act to value it, and he fails to value the same, the Judge of the Surrogate Court, who granted the probate or letters of administration, may, upon summary application by the personal representative, of which application three days' notice shall be given to such claimant, order that unless a specified value shall be placed on such security and notified in writing to the personal representative within a time to be limited by the order such claimant shall, in respect of the claim, or the part thereof for which the security is held, be wholly barred of any right to share in the proceeds of such estate.

(2) If a specified value is not placed on such security and notified in writing to the personal representative according to the exigency of the order, or within such further time as the Judge may allow, the claim or part thereof, as the case may be, shall be wholly barred as against such estate.

(3) Where an estate is being administered by or under the direction of a court, such court shall exercise the jurisdiction conferred by this section upon the Judge of the Surrogate Court.

CHAPTER III.

OF THE LIABILITY OF THE EXECUTOR OR ADMINISTRATOR IN RESPECT OF THE ACTS OF DECEASED.

LIABILITIES OF DECEASED.

Besides the payment of the debts of the deceased, the executor or administrator must settle the liabilities of the deceased. These liabilities were formerly of two kinds, personal and real. The personal liabilities were a charge on the assets come to the hands of the executor. The real liabilities were a charge on the heir so far as assets descended to him. Now under s. 7 of the Devolution of Estates Act, the personal representative has to satisfy both kinds of liabilities, receiving for that purpose both kinds of assets.

Section 7 above referred to is as follows:—

7. When any part of the real property of a deceased person vests in his personal representative under this Act, such personal representative, in the interpretation of any Act of this Legislature, or in the construction of any instrument to which the deceased was a party, or under which he is interested, shall, while the estate remains in him, be deemed in law his heir, as respects such part, unless a contrary intention appears, but nothing in this section shall affect the beneficial right to any property, or the construction of words of limitation of any estate in or by any deed, will or other instrument.

CLAIMS ON WHICH RIGHT OF ACTION SURVIVES.

With respect to such claims as are founded upon any personal obligation, contract, debt, covenant or other duty, the right of action on which the testator or intestate might have been sued in his lifetime, survives his death and is enforceable against his executor or administrator.

Wms. p. 1346.

EXECUTOR ANSWERABLE FOR DEBTS TO AMOUNT OF ASSETS.

The executors or administrators are, therefore, answerable, as far as they have assets, for debts of every description due from the deceased, whether debts of record, as judgments or recognizances, or debts due on special contract, as for rent or on bonds and the like under seal, or debts on simple contracts, as notes unsealed, and promises not in writing either expressed or implied.

CLAIM FOR DAMAGES.

There is no difference between a promise to pay a debt certain and a promise to do a collateral act which is uncertain and rests only in damages, as a promise by the testator to give such a fortune with his daughter, to deliver up such a bond, etc., for wherever,

in those cases, the testator himself is liable to an action his executors shall be liable also.

Sanders v. *Esterbie*, 1 Roll. Rep. 266.

EXECUTORS NEED NOT BE NAMED IN CONTRACT.

The executors or administrators so completely represent their testator or intestate with respect to the liabilities above mentioned that every bond or covenant or contract of the deceased includes them, although they are not named in the terms of it, for the executors or administrators of every person are implied in himself.

Hyde v. *Skinner*, 2 P. Wms. 197.

LIABILITY AGAINST EXECUTOR THOUGH NOT NAMED.

In many cases a liability may accrue against the executor or administrator after the death of the testator or intestate upon a contract made in his lifetime, although the executor or administrator be not named therein. Thus an executor is liable upon a bond which becomes due, or a note payable subsequently to the death of the testator. So, if A. is bound to build a house for B. before such a time, and A. dies before the time, his executors are bound to fulfil this contract, and in cases of this kind the executors will be liable, even where the heir is named and the executors are not named in the contract.

Williams v. *Burrel*, 1 C. B. 402.

THE HEIR NOT BOUND UNLESS NAMED.

The executors or administrators formerly more actually represented their testator or intestate than the heir did the ancestor, for if a man binds himself his executors or administrators are bound though not named, but it was not so of the heir, however large an amount of the real assets may have descended to him. But as executors and administrators will hereafter be "heirs" under section 7 above—in all cases if a man binds himself his whole estate will now be liable.

EXECUTOR NOT BOUND ON PERSONAL CONTRACT.

Executors or administrators are not liable upon a contract of the deceased if not named, where the contract is personal to the testator or intestate, for in such an instance no liability attaches upon the executors or administrators, unless a breach was incurred in the lifetime of the deceased. Thus, if an author undertakes to compose a work, and dies before completing it, his executors are discharged from this contract, for the undertaking is merely personal in its nature, and by the intervention of death has become impossible to be performed.

Robinson v. *Davison*, L. R. 6 Exch. 269, 274.

LIABILITY OF AN EXECUTOR FOR TORTS OF DECEASED.

With regard to the liability of an executor in respect of the tortious acts of the deceased, it was a principle of the common law that if an injury was done either to the person or property of another for which damages only could be recovered in satisfaction, the action died with the person by whom the wrong was committed.

Kirk v. *Todd*, 21 C. D. 484.

ACTIONS FOR MALFEASANCE OR MISFEASANCE.

And if the cause of action was founded upon any malfeasance or misfeasance, was a tort, or arose ex delicto, such as trespass for taking goods, trover, false imprisonment, assault and battery, slander, libel, diverting a watercourse, obstructing lights, and in many other cases of the like kind the rule was actio personalis moritur cum persona, and if the person by whom the injury was committed died no action of that kind could be brought against his executor or administrator.

FORMS OF ACTION NOW ABOLISHED.

Under the old practice in some of the cases above mentioned a remedy which could not be had in one form of action might be had in another. Thus, although at the common law an action of trover upon a conversion of the testator's goods died with him, yet if the goods, etc., taken away continued still in specie in the hands of the executor or administrator of the wrongdoer, replevin or detinue lay against such executor or administrator to recover them back, or trover laying the conversion to have been by the executor, or in case they were sold an action for money had and received to recover their value again. An action on the custom of the realm against a common carrier is for a tort and supposed crime, and the plea was not guilty, therefore, at the common law it did not lie against the carrier's executors, but an action of assumpsit. So, if a man took a horse of another and brought him back again, an action of trespass did not lie at the common law against his executor, though it would against him, but an action for the use and hire of the horse lay against the executor. So, if a man dealt as agent for another without authority, his executor, though he could not be sued for the tort, might be made liable upon an implied contract.

ACTIONS OF TRESPASS, EJECTMENT AND WASTE.

Again, at common law an action of trespass for mense profits could not be maintained against an executor or administrator, yet he was perhaps liable in an action for use and occupation for the

rent up to the date of the demise in the action of ejectment. But if there was a recovery in ejectment no action lay against the executor for use and occupation for the rent subsequent to the day of the demise laid in the plaintiff's pleading; because having treated the holding as founded on trespass, the plaintiff could not afterwards treat it as founded on contract. So an action of waste did not lie at the common law against an executor for waste committed by his testator it being a tort which dies with the person, nor was an executor chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to his testator from the sale or value of the trees he was.

So if a man committed equitable waste and died; as where a tenant for life, without impeachment of waste, and as such having a right at law to cut timber on the estate and the property in the trees abused that power by cutting ornamental trees or trees not ripe for cutting, the Court of Equity had the jurisdiction to make the personal representatives of the party who committed such waste accountable for the produce of it.

Lansdowne v. *Lansdowne*, 1 Madd. 116.

In the modern practice these distinctions are abolished, and forms of action no longer exist.

RIGHTS AND LIABILITIES OF EXECUTORS UNDER TRUSTEE ACT.

The rights and liabilities of executors and administrators with respect to torts or injuries to the person, or to the real or personal estate of the deceased are as already stated enlarged by section 41 (1), (2), (3) of The Trustees Act, R. S. O. 1914, c. 121. These sections need not be repeated. They are set out in full (ante p. 142).

BREACHES OF TRUST.

Courts of Equity have always charged persons in the character of trustees with the consequence of a breach of trust, and their representatives also whether they derive benefit from the breach of trust or not.

Watsham v. *Stinton*, 1 De G. J. & S. 678.

EXECUTOR MUST SATISFY JUDGMENT.

An executor or administrator is bound as far as he has assets to satisfy all judgments recovered against the testator or intestate without regard to the circumstance whether a judgment was founded on a cause of action which would not survive his death, e.g., libel, or slander.

RECOGNIZANCE.

An executor or administrator is also liable upon a recognizance entered into by the deceased, and upon all the inferior debts of

record of the deceased as fines imposed by justices or at the Assizes or General Sessions, or the like.

JOINT CONTRACTS.

In case of a joint contract, where several contract on the same part, if one of the parties die his executor or administrator was formerly discharged from all liability, and the survivor or survivors alone could be sued, and if all the parties were dead the executor of the last survivors was alone liable. It has already appeared that by section 5 of The Mercantile Law Amendment Act, R. S. O. 1914, c. 133, representatives of the deceased joint contractors are liable although the other joint contractors be living.

Ante p. 153.

PARTNERSHIP DEBTS.

In the case of a partnership debt, although at law, upon the death of a partner, the remedy against his executor was formerly extinguished, inasmuch as a partnership contract is joint, yet they always could be sued in equity, and now may be sued as in any other case.

LIABILITY TO CREDITORS OF FIRM.

The estate of a deceased partner is liable in equity to the creditors of the firm, although the legal remedy exist only against the survivors. The joint creditor may in the first instance resort to the assets of the deceased partner, leaving the personal representatives of the deceased partner to their remedy over against the surviving partner.

Kendall v. *Hamilton*, 3 C. P. D. 403. *Re Hodgson*, 31 C. D. 177.

DISCHARGE OF DECEASED PARTNER'S ESTATE.

The deceased partner's estate must continue liable until the debts which affected him at the time of his death are in some way fully discharged. The discharge may take place in various ways, not only by direct payment, but also by dealings with the continuing partners operating as a payment of the joint debt, or from the creditors having agreed to take and taking the security of the surviving partners in discharge of the joint debt. Further, if the dealing of the creditor with the surviving partners has been such as to make it equitable that he should go against the assets of the deceased partner, he will not, upon general rules and principles, be entitled to the benefit of the demand.

Winter v. *Innes*, 4 Miln. & Cr. 101.

BANK SHARES.

The liability of executors in respect of bank shares has already been stated (p. 144).

COVENANT OF TESTATOR.

In every case where the testator is bound by a covenant the executor shall be bound by it, if it be not determined by the death of the testator; that is, unless it is such a covenant as was to be performed by the person of the testator.

Bally v. *Wells*, 3 Wils. 27.

BREACHES OF COVENANT BY EXECUTOR.

The executor is not only liable upon all covenants by the testator, which have been broken in his lifetime, but, moreover he is answerable for all breaches in his own time, as far as he has assets, for the privity of contract of the testator is not determined by his death.

Coghill v. *Freelove*, 3 Mod. 326.

COVENANTS IN LEASES.

Again, although a covenant in a lease should be of a nature such as to run with the land so as to make the assignee of the term liable for a breach of it after the assignment. Yet this shall not discharge the executor of the original lessee from a concurrent liability on the covenant as far as he has assets, even although the lessor shall have accepted the assignee as his tenant. Therefore, where the lessee has assigned the term in his lifetime the lessor may still maintain an action of covenant against the executor of the lessee upon an expressed covenant for payment of rent, even although the lessor has accepted the assignee for his tenant, and so may the assignee of the reversion by virtue of the statute 32 Henry VIII. c. 34.

Rowley v. *Adams*, 4 M. & Cr. 534.

ASSIGNMENT OF TERM BY EXECUTOR.

So if the executor himself assigns the term the lessor may afterwards bring covenant against the executor, notwithstanding any acceptance of the assignee as tenant, and so may also the assignee of the reversion. Therefore, the executor has a right to require from the purchaser of a lease that such purchaser shall covenant for indemnity against the payment of rent, and performance of covenants, notwithstanding the executor himself is not bound to enter into a covenant for title, but only that he has done no act to encumber.

Rowley v. *Adams*, 4 M. & Cr. 540.

DISTINCTION BETWEEN EXPRESSED COVENANT AND COVENANT IN LAW.

There is a distinction with respect to this liability between an expressed covenant and a mere covenant in law. For no action lies against an executor or administrator upon a covenant in law which

is not broken till after the death of the testator. An executor will be liable for rent accrued after the death of the testator so long as the lease continues, and as far as he has assets, notwithstanding the lessor assigned the term before his death or the executor has done so since. But if the lessor has accepted the assignee as his tenant, then, although an action of covenant may be maintained on an expressed covenant for its payment during the continuance of the lease, no action of debt will lie against the executor for rent accrued since the assignment. If the whole rent was incurred in the lifetime of the testator an action to recover it from the executor must be brought against him in his representative character; but in an action of debt for rent incurred after the death of the lessee, if the executor enters upon the demised premises the lessor has his election either to sue him as executor or to charge him personally as assignee in respect of the perception of the profits. If the executor does not enter he is still chargeable as executor, because he cannot so waive the term as not to be liable for the rent as far as he has assets.

LIABILITY OF RENT AFTER ENTRY BY EXECUTOR.

Where the executor, having entered, is sued for rent incurred after his entry, he cannot plead plene administravit, even although he be sued as executor, for it the rent be of less value than the land, as the law prima facie supposes so much of the profits as suffice to make up the rent is appropriated to the leasor, and cannot be applied to anything else, and, therefore, the defence of plene administravit confesses a misapplication, since no other payment out of the profits can be justified till the rent is answered, and if judgment be given against the executor it is de bonis propriis. But if the land be of less value than the rent, the executor may plead a special matter, namely, that he has no assets, and that the land is of less value than the rent.

EXTENT OF EXECUTOR'S LIABILITY ON LEASE.

The executor is chargeable personally with so much of the land as the premises are worth; therefore if the profits have been less than the land, and, therefore, cover a part only, that part should be admitted and the rest defended for.

WAIVER OF LEASE BY EXECUTOR.

On the same principle although an executor, generally speaking, cannot waive the term, for he must renounce the executorship in toto or not at all, yet if the value of the land is of less amount than the rent, and there is a deficiency of assets, he may waive such a lease. And if there are assets to bear the yearly loss for some

years, but not during the whole term, then the executor must pay the rent as long as the assets hold out, and must then waive the possession, giving notice to the reversioner. But if the executor be sued as executor for rent incurred after the death of the testator, he may plead plene administravit, for that is a good defence wherever no other judgment can be given, but only against the defendant as executor. So where an executor is charged as executor in covenant for non-payment of rent incurred in the defendant's own time plene administravit is a good defence, although the defendant might have been charged as assignee of the term.

Collins v. *Crouch*, 13 Q. B. 542.

TERM ASSIGNED BY TESTATOR.

If the term was assigned by the testator, it seems clear that the executor cannot be charged as assignee, because the lease did not pass to him, but still he will be liable as executor for the rent, unless the lessor has accepted the assignee as his tenant, and even in that case the executor will be liable as executor on the covenant.

EXECUTOR ENTERING ASSIGNING LEASE.

If the executor enters and afterwards himself assigned the lease, then he is chargeable as assignee for that time only during which he occupied, and if he is sued for rent incurred by himself since the assignment he is liable in his representative character only.

PURCHASER OF REAL ESTATE DYING WITHOUT PAYING PURCHASE MONEY.

If the purchaser of real estate dies without having paid the purchase money his heir-at-law or the devisee of the land purchased will be entitled to have the estate paid for by the executor or administrator, and if the personal estate cannot be got in, and the heir or devisee pays for the land out of his own pocket he may afterwards call upon the personal representative to reimburse him. So, if the personal estate is insufficient to perform the contract, and the agreement is on that account rescinded, yet the heir or devisee will be entitled to the personalty so far as it goes. But if by reason of the complication of the testator's affairs, the purchase money cannot be immediately paid, and the vendor for that reason rescinds the contract, yet on the coming in of the assets the devisee of the estate contracted for may compel the executor to lay out the purchase money in the purchase of other estates for his benefit. But if a title cannot be made, or there was not a perfect contract, or the court should think the contract ought not to be executed, in all these cases there is no conversion of real estate into personal upon which the right of the executor, on the one hand, and of the

heir or devisee, on the other, depends, and, therefore, if the vendor dies the estate will go to the heir-at-law of the vendor in the same manner as if no contract had been entered into, and the heir or devisee of the purchaser will not be entitled to the money agreed to be paid for the lands, or to have any other estate bought for him.

Broome v. *Monck*, 10 Ves. 597.

SPECIFIC LEGACY CHARGED BY TESTATOR.

Where a specific legacy is pledged or charged by the testator, the specific legatee is entitled to have his legacy redeemed or exonerated by the executor, and if the executor fails to perform that duty, the specific legatee is entitled to compensation of the amount of his legacy out of the general assets of the testator. Therefore, if a legacy be of a silver cup or of a jewel, and it be in pledge at the testator's death, the legatee has a right to call upon the executor to redeem it, and to deliver it to him.

CALLS ON SHARES.

Legatees of specific legacies of shares in banking or other companies are, generally speaking, liable to pay calls made subsequent to the testator's death.

SERVICES OF APPRENTICE.

On the death of a master the agreement for services on the part of an apprentice is at an end, generally speaking, and it seems that the executors of the master are discharged from all agreements and covenants for the instruction of the apprentice; for these are considered as personal to the testator and determined by his death. But the covenant on the part of the master for maintenance of the apprentice still continues in force; and, therefore, executors are liable in an action on covenant as far as he has assets, if he neglects to maintain him.

R. v. *Chaplain*, *Comberb*, 324.

SERVICES PERFORMED FOR TESTATOR.

If a man perform services for the testator without any view to a reward, but in expectation of a legacy, he cannot, in the absence of an understanding between the parties that he was to be paid only by a legacy set up any demand for his services against the executor or administrator.

LeSage v. *Coussmaker*, 1 Esp. 188.

GIFT OF TESTATOR.

An executor cannot be compelled to complete the gift of the testator, therefore, an act of bounty which has not been perfected by the testator is of no avail against his executor.

Field v. *Smith*, 14 Ves. 491.

ESCROW.

If a person who has delivered a deed as an escrow to be handed over to the party for whose use it is made, upon the performance of some condition, happen to die before the performance of the condition, and the condition be afterwards performed, the deed is available, notwithstanding the death of him who made it.

Copeland v. *Stephens*, 1 B. & A. 606.

CONTINUING GUARANTEE.

If a man enters into a continuing guarantee and dies, his executor is not liable upon it for advance made after the testator's death, which operates as a revocation.

Bradley v. *Morgan*, 1 Hurlst. & C. 240.

Under the Devolution of Estates Act the executor of a deceased lessor can make a valid renewal of a lease pursuant to the covenant of the testator to renew.

Re C. P. R. and National Club, 24 O. R. 205.

Sections 24 and 25 of The Trustee Act, R. S. O. 1914, ch. 121, are as follows:—

24.—(1) A trustee of any leaseholds for lives or years which are renewable from time to time may, if he thinks fit, and shall, if thereto required by any person having any beneficial interest, present or future, or contingent, in the leaseholds, use his best endeavours to obtain from time to time a renewed lease of the same land on reasonable terms, and for that purpose may from time to time make or concur in making a surrender of the lease for the time being subsisting, and do all such other acts as are requisite: but where by the terms of the settlement or will the person in possession for his life or other limited interest is entitled to enjoy the same without any obligaton to renew or to contribute to the expense of renewal, this section shall not apply unless the consent in writing of that person is obtained to the renewal on the part of the trustee.

Imp. Act, 56-57 Vict., c. 53, s. 19.

(2) If money is required to pay for the renewal, the trustee effecting the renewal may pay the same out of any money then in his hands in trust for the persons beneficially interested in the land to be comprised in the renewed lease, and if he has not in his hands sufficient money for the purpose, he may raise the money required by mortgage of the land to be comprised in the renewed lease, or of any other land for the time being subject to the uses or trusts to which that land is subject, and no person advancing money upon a mortgage purporting to be made under this power shall be bound to see that the money is wanted, or that no more is raised than is wanted for the purpose or to see to the due application of the money.

25. A trustee desiring to pass the accounts of his dealings with the trust estate may file his accounts in the office of the Surrogate Court of a county or district in which he or a co-trustee is resident or in which any part of the trust estate is situate, and the proceedings and practice upon the passing of such accounts shall be the same and have the like effect as the passing of executors' or administrators' accounts in the Surrogate Court; but in the case of trustees under a will the accounts shall be filed and passed in the office of the Surrogate Court by which probate of the will was granted.

CHARGES ON LAND.

Where debts and legacies are charged on real and personal estate, and there is no direction to sell the real estate, the personalty is the primary fund to pay, and the realty is liable only in case of a deficiency.

Davidson v. *Boomer*, 17 Chy. 509, in app. 18 Chy. 475.

A testator by his will bequeathed certain legacies of different amounts to his sons and daughters, and directed his "real and personal property" to be sold by auction, and then added, "And the household furniture also to be sold by auction, and the proceeds of the sale to be equally divided amongst my daughters." Held, that the legacies to the sons and daughters were payable out of the mixed fund of real and personal estate.

In re Gilchrist-Bohn v. *Fyfe*, 23 Chy. 524.

A testator by his will after directing payment of his debts by his executors, gave his personal estate and the dwelling house with the land occupied therewith, to his wife for life, and after her decease to his daughter M., and gave M. a legacy of $2,000. He then devised the residue of his real estate to his executors in trust, to lease same and pay the interest to his wife for life, and after her death, to sell same and divide proceeds between his children, share and share alike. At the time of testator's death, the personal estate was of small value, and was exceeded by the amount of the debts; and it did not appear whether, when the will was made, the testator had sufficient personal estate out of which the legacy could be paid.

Held, that M., could not claim to have the $2,000 paid out of the proceeds of the real estate devised to the executors, but that there should be no reduction from her share by reason of the real estate devised to her.

Held, also that the children of a deceased child took the share of the proceeds of the real estate which their parent was entitled to.

Totten v. *Totten*, 20 O. R. 505.

Products and services charged on land. A testator by his will devised his farm to his grandson charged with the supply of certain products and personal services in favour of a daughter and grand-daughter.

On a disagreement between the parties a tender of the products and services was made and refused, and an action was brought to have them declared a charge on the land, and for a money compensation.

Held, that the refusal of the products did not deprive the plaintiffs of the right to recover their value, but that they were not entitled to compensation for the personal services proffered and refused.

Murray v. *Black*, 21 O. R. 372.

Legacy charged on lands. A testator devised to his daughter a lot of land charged with a legacy. The daughter predeceased the testator, leaving two children to whom the lot descended.

On an application by the executors at the instance of the Official Guardian, it was:

Held, that it was the duty of the executors to sell the land and pay the legacy.

Re Eddie, 22 O. R. 556.

LAND CHARGED WITH PAYMENT OF MONEY—EFFECT OF DEVOLUTION OF ESTATES ACT.

Section 38 of the Wills Act which provides that mortgage debts are primarily chargeable on the lands, is not affected by the Devolution of Estates Act.

Mason v. *Mason*, 17 O. R. 325.

Section 38 of the Wills Act: Held, not to apply to cases where the land is charged with the performance of an obligation other than the payment of money.

In a case such as suggested, where the statute was held not to apply, it was considered no bar to the chargee's right to be paid out of the personal estate of the intestate, that he was himself also heir-at-law of the intestate.

Slater v. *Slater*, 3 Chy. Chamb. 1.

JUDGMENT AGAINST EXECUTORS.

Upon the issue of ne unques administrator, the plaintiff, producing such letters of administration as he has pleaded, will be entitled to succeed. If they do not give the plaintiff a right to sue, by reason of anything extrinsic, such as the place of residence of defendant, &c., the fact must be pleaded specially. Upon the issue of ne unques administrator de bonis non, the plaintiff need not produce the administration granted to the former administrator. *Beard* v. *Ketchum*, 5 U. C. R. 114.

Sale of Land under Invalid Judgment.—The land of a testator or intestate is liable to be sold only for his debt, and where it is shewn that the judgment was not in fact recovered in respect of such a debt, but that the execution creditors never were creditors of the deceased, a sale of the land under it cannot be supported. *Freed* v. *Orr*, 6 A. R. 690.

Form of Judgment.—In an action of seduction, continued against the administratrix of the original defendant, who died before the trial, the administratrix denied the plaintiff's right to recover, but did not set up plene administravit, and a verdict for $500 was recovered by the plaintiff:—Held, that the judgment should be that the debt and costs should be levied de bonis testatoris; et si non de bonis propriis as to the costs only. The Judicature Act has not altered the form of the judgment in such cases. *Lince* v. *Faircloth*, 14 P. R. 253.

The practice in force before the Judicature Act, under which a plaintiff taking issue on and failing on an executor's plea of plene administravit, could not have judgment of assets quando, no longer exists, and it is now proper to give a plaintiff judgment of assets quando, if his debt be established and such a judgment be desired. *McKibbon* v. *Feegan*, 21 A. R. 87.

Ne Unques.—On a plea of ne unques executors by two, the plaintiff may have a verdict against one only. *Earl of Elgin* v. *Slawson*, 10 U. C. R. 289.

Judgment against Executors.—A judgment against executors is only prima facie evidence of its being for a debt due by the testator, and the parties interested in the real estate are at liberty to disprove it. The effect of the Devolution of Estates Act and amendments, acted upon by the registration of a caution under the sanction of a County Court Judge, after the twelve months have expired, was to place lands of the testator again under the power of his executors so that they could sell them to satisfy debts; and that the expression "in the hands" of executors, as applied to property of the testator, is satisfied if it is under their control and saleable at their instance; and that the operation of a devise of lands is only postponed for the purposes of administration, and the estate does not pass through the medium of the executors, but by the operation of the devise. *Ianson* v. *Clyde*, 20 C. L. T. 116, 31 O. R. 579.

Creditors Impeaching Judgment against Executors.—A judgment obtained against an executor upon a debt of the deceased, is conclusive evidence of the indebtedness to the plaintiff as against all other creditors of the deceased, and is so in administration proceedings, though the administration is of goods and lands.

Semble, such a judgment is only prima facie evidence against heirs-at-law and devisees of the deceased. *Eccles* v. *Lowry*, 23 Chy. 167, commented on. *Re Hague, Traders Bank* v. *Murray*, 13 O. R. 727.

BREACH OF TRUST.

Payment on Notes Made without Consideration.—Upon appeal from the order of a Surrogate Court upon the passing of executor's accounts:—Held, that payments made by them to the payees of promissory notes signed by the testator, with notice that such notes were made without consideration and were intended by the testator as gifts to the payees, were not protected either by the prima facie presumption of a valuable consideration raised by s. 30 of the Bills of Exchange Act, 53 Vict. c. 33 (D.) or by the provisions of s. 31 of R. S. O. 1887 c. 110, making it lawful for "executors to pay any debts or claims upon any evidence that they may think sufficient." *Re Williams*, 27 O. R. 405.

Executor Discharging His Own Mortgage.—H. by his will appointed F. and W. executors and trustees of his estate. F. for the purpose of securing a debt due by him to the estate, executed a mortgage to W., W. died intestate, and F., five years subsequently having agreed to sell the mortgaged premises to M., executed a statutory discharge of the mortgage, purporting to do so as sole surviving executor, and then conveyed the estate to M.:—Held, affirming, 13 O. R. 21, that the act of F., in executing such discharge, had not the effect of releasing the land from the mortgage. *Beaty* v. *Shaw*, 14 A. R. 600. See *McPhadden* v. *Bacon*, 13 Chy. 591.

Sale and Management of Real Estate—Allowing Lands to be Sold.—Executors suffered judgment against them at law for a debt of their testator; and the lands were sold upon process issued thereon, although one of the executors owed the estate a larger amount. The court ordered both executors to make good the difference between what the lands were actually worth, and the amount realized upon the sale. *McPhadden* v. *Bacon*, 13 Chy. 591.

Administrator Obtaining Deed.—Where A. having only a bond for a deed, and not having paid all the purchase-money, conveyed in fee to B., and died, and B. went into possession and continued for several years, when A.'s administrator obtained a conveyance in fee to himself from the person who had given A. the bond:—Held, that the administrator was guilty of a fraud, and that his title could not prevail against B. *Doe d. Dobie* v. *Vanderlip*, 5 O. S. 85.

Misappropriation by Agent.—When a testamentary executrix employs an agent as attorney, she 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 funds committed by such agent, although he was a notary public of excellent standing prior to the misappropriation. *Law* v. *Gemley*, 18 S. C. R. 685.

Negligence—Agent's Fund.—Executors, relying in good faith on the statement of their testator's solicitor that he had in his hands securities sufficient to answer a fund they were directed by the will to invest for an annuitant, distributed the estate. Subsequently it was found that before the testator's death the solicitor had misappropriated the money given to him by the testator to invest, and had, in fact, at the time of the representation, no securities or money in his hands:—Held, that the executors were protected by the Trustee Limitation Act, R. S. O. 1897, c. 129, s. 32. Held, also, that payments made from time to time by the solicitor to the annuitant, ostensibly as of interest received by him from the fund, did not keep alive the right of action against the executors. Judgment below, 30 O. R. 532, reversed. *Clark* v. *Bellamy*, 27 A. R. 435.

Fund in Hands of Trustee for Beneficiary.—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. 655, 707, specially referred to. *Re McNeill Estate* (1911), 19 W. L. R. 691.

Money Lost by Fire.—Where an executor alleged that he had kept money belonging to the estate for several years in his house, until the same destroyed by fire and the money lost, the court held the executor guilty of a breach of trust, and his affidavit as to the destruction being unsatisfactory, refused to discharge him from custody under a writ of arrest. *Lawson* v. *Crookshank*, 2 Ch. Ch. 426.

Duty of Trustees.—The concluding words of section 21, sub-section 2 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), involve the exercise of active discretion on the part of the trustee allowing time for payment and not the mere passive attitude of leaving matters alone. Loss which has arisen from carelessness or supineness of the trustee is altogether outside the sub-section. *Greenwood, In re; Greenwood* v. *Firth*, 105 L. T. 509.

Personal Discretion of Trustees.—Every power given to trustees which enables them to deal with or affect the trust property is prima facie given to them ex officio as an incident of their office, and passes with the office to the holders or holder thereof for the time being. Whether a power is so given ex officio or not depends in each case on the construction of the document giving it, but the mere fact that the power is one requiring the exercise of a very wide personal discretion is not enough to exclude the prima facie presumption. *Smith, In re; Eastick* v. *Smith*, 73 L. J. Ch. 74; (1904), 1 Ch. 139; 89 L. T. 604; 52 W. R. 104; 20 T. L. R. 66.

By 61 Vict. c. 26, a trustee who has acted honestly and reasonably, and ought fairly to be excused for the breach of a trust, and for omitting to obtain the directions of the Court in Equity in the matter in which he committed such breach, may be relieved by the Court from personal liability for such breach. Relief granted, but without costs. *Simpson* v. *Johnston*, 22 Occ. N. 38, 2 N. B. Eq. Reps. 333.

The provisions of 62 Vict. (2) c. 15, s. 1, relieving trustees from the consequences of technical breaches of trust who have acted "honestly and reasonably," does not render competent as evidence the opinions of bankers or other financial men as to whether the trustee has so acted in the course he has taken or omitted to take. The general rule of evidence still applies that mere personal belief or opinion is not evidence, and that 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. The nearest approach to a working rule, is, that, 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 the time and determine for ourselves what, having regard to the opinion prevalent at that time in the neighbourhood and concurrent with the transaction, would have been considered the prudent course for them to have adopted. This is a different thing to asking the opinion of witnesses of what would have been done or what would have happened under stated circumstances several years ago, as was sought in this case. *Smith* v. *Mason*, 21 C. L. T. 260, 1 O. L. R. 594.

Breach of Trust.—Under the Nova Scotia statute, 2 Edw. VII. c. 13, and Order XXXII., Rule 3, a Judge may exercise judicial discretion towards relieving a trustee from liability for technical breaches of trust, and, for that purpose, may direct the admission of any evidence which he may deem proper for the taking of accounts. *Cairns* v. *Murray*, 37 S. C. R. 163.

Consent of Cestui Que to Breach.—As a general rule a cestui que trust who consents to a breach of trust by a trustee cannot complain as between himself and the trustee, of loss occasioned by that breach of trust. This rule is quite independent of, and is not affected by, section 45 of the Trustee Act, 1893, which empowers the court to impound, by way of indemnity to the trustee, any interest in the trust estate of a cestui que trust at whose instigation or request, or with whose consent in writing, the trustee has committed a breach of trust; and the rule does not require the consent to the breach of trust to be in writing.

Fletcher v. *Collis*, 74 L. J. Ch. 502; (1905), 2 Ch. 24; 92 L. T. 749; 53 W. R. 516.

A testator devised his estate to his three executors upon trust. One of the executors was a solicitor, and with regard to him the will provided that in the administration and management of the estate, he should be entitled to the same professional remuneration as if he were not trustee. Another executor was in England, and the third the defendant was told by the testator, that the solicitor-trustee was to have the management of the estate, and consented to act upon that understanding. All three proved the will and acted as trustees, but the whole management of the estate was left to the solicitor, and at his death, it was found that he had, without the knowledge of the defendant, misappropriated the moneys of the estate, and that his own estate was insolvent. The testator had perfect confidence in the solicitor, who up to the time of his death was reputed to be wealthy:—Held, that the defendant, having acted honestly and reasonably within the meaning of 62 V. (2), c. 15, s. 1, was not liable to make good to the estate the loss occasioned by the misconduct of the solicitor. *Dover* v. *Denne*, 22 Occ. N. 204, 3 O. L. R. 664, 1 O. W. R. 297.

Permitting Money to Remain in Hands of Solicitor.—Sub-section 3 of s. 17 of the Trustee Act, 1893, does not render a trustee liable for permitting trust money to remain for an unnecessary time in the hands or under the control of a solicitor whom the trustee has appointed, under s.-s. 1, as his agent to receive it, by permitting him to have the custody of a deed containing a receipt, unless the trustee knows, or ought to have known, that the solicitor has received the money. *Sheppard, In re; De Brimont* v. *Harvey*, 80 L. J. Ch. 52; (1911), 1 Ch. 50; 103 L. T. 424; 55 S. J. 13.

SERVICES.

In Chitty on Contracts, 14th ed., p. 482, this is said: "Nor can an action be maintained for services performed upon an understanding that the plaintiff was to make no charge, but that he should receive a legacy at the death of the person to whom they were rendered. But the mere fact of these having been performed in the expectation of receiving a legacy will not take away the plaintiff's right of action." For that he cites *Baxter* v. *Gray*, 3 M. & G. 771. And that case refers to *Osborne* v. *Guy's Hospital*, relied upon in the judgment here, and explains it. "The plaintiff had been on terms of great intimacy with Mrs. Bostock, visiting her daily and occasionally rendering her surgical assistance. Having an expectation of a legacy he had never sent in any bill in her lifetime, but finding that she had not left him anything by her will be made the above claim upon the defendant," namely, 500 pounds, for medicines and attendances upon her between 1829 and 1840.

Tindal, C.J., says in his judgment: "If the evidence had shewn that the work and labour were done upon an understanding between the parties that the plaintiff was to be remunerated by a legacy, that would have amounted to an agreement that he was to make no charge. But if the work and labour were performed under a hope of a legacy, I see no reason why the plaintiff should not on such hope failing him, be, as it were, remitted to his legal rights.

The law on the subject was correctly laid down in *Osborne* v. *Guy's Hospital*, 2 Strange 728, where Raymond, C.J., told the jury that they were to consider how it was understood by the parties at the time of doing the business. Here no proof was given of any understanding as to the way in which the plaintiff was to be remunerated. (The italics are in the report.) And Erskine, J., in part said: "It is true that it also appeared that he forbore to send in his bill under an expectation of receiving a remuneration in the shape of a legacy. But unless an understanding could be proved that he was not to make any charge I think he was entitled, on his being disappointed in his expectation, to require payment for the services which he had rendered to the deceased."

Further light is thrown on *Osborne* v. *Guy's Hospital* by this observation in Leake on Contracts, p. 3, where it is cited.

"Promissory expressions reserving an opinion as to the performance do not create a contract as in cases of employment upon the terms of such

remuneration as the employer thinks right to give, or upon the terms of being remunerated by a testamentary provision."

This passage will re-explain the case of *Smallcross* v. *Wright*, 12 Beav. 563, relied on by the executor. In that case Dr. Knight, who had for many years attended the testator, but had received no remuneration, stated in his affidavit that the testator promises "to pay him for his services or leave him an equivalent," and the Master of the Rolls held that he could not recover. *In re Ansley, Ex parte Chesley*, 3 E. L. R. 237.

Liability Incurred on Faith of Promise—Corroboration.—Held, that there was sufficient corroboration of the evidence of the plaintiff as required by R. S. O. 1877 c. 62, and that the second agreement or promise by the testator was not voluntary, the former promise, even if barred by the statute, being a sufficient consideration, as well as a conveyance to the daughter made in pursuance of it; and a decree was made for payment of the legacy of $1,000, less the two sums of $260 and $200 with interest from one year after the death of the testator on the balance. *Halleran* v. *Moon*, 28 Chy. 319.

CHAPTER IV.

PAYMENT OF LEGACIES.

The next duty of an executor after payment of debts is payment of legacies.

LEGACY DEFINED.

A legacy is defined to be "some particular thing or things given or left, either by a testator in his testament, wherein an executor is appointed, to be paid or performed by his executor, or by an intestate in a codicil or last will, wherein no executor is appointed, to be paid or performed by an administrator."

Ward v. *Grey*, 26 Beav. 485.

KINDS OF LEGACIES.

Of legacies there are two kinds—general and specific. A legacy is general when it is so given as not to amount to a bequest of a particular thing or money of a testator distinguished from all others of the same kind. A legacy is specific when it is a bequest of a specified part of the testator's personal estate, which is so distinguished. Thus, for example, "I give a diamond ring," is a general legacy, which may be fulfilled by the delivery of any ring of that kind; while, "I give the diamond ring presented to me by A.," is a specific legacy, which can only be satisfied by the delivery of the identical subject. Again, if the testator, having many brooches or horses, bequeath a "brooch" or "a horse" to B., in these cases the legacy is general. But a bequest of such a part of my stock of horses which A. shall select, to be fairly appraised, to the value of $800," or of "all the horses which I may have in my stable at the time of my death," is specific.

Wms. p. 911.

DIFFERENCE BETWEEN GENERAL AND SPECIFIC LEGACIES.

The distinction between these two sorts of legacies is of the greatest importance; for, if there be a deficiency of assets, a specific legacy will not be liable to abate with the general legacies; while, on the other hand, if the specific legacy fail by the ademption or inadequacy of its subject, the legatee will not be entitled to any recompense or satisfaction out of the general personal estate. So that, though specific legacies have in some respects the advantage of those that are general, yet in other respects they are distinguished from them to their disadvantage.

Wms. p. 912

SPECIFIC BEQUEST OF THING NOT IN EXISTENCE.

Again, if there be a specific bequest of a thing described as already in existence, and no such thing ever did exist among the testator's effects, the legacy fails. Thus, although a gift of "my grey horse" will pass a black horse, which is not strictly grey, if it be found to have been the testator's intention that it should pass by that description; yet if the testator had no horse, the executor is not to buy a grey one. On the other hand, if the bequest is of "a horse," and no horse be found in the testator's possession at the time of his death, the executor is bound, provided the state of the assets will allow him, to procure a horse for the legatee.

Wms. p. 912.

It seems to have been once considered as the criterion of a specific legacy, that it is liable to ademption. But this has since been repeatedly denied. And it has ever been held that a legacy may be specific, notwithstanding the testator expressly provides that it "shall not be deemed specific, so as to be capable of ademption."

Jacques v. *Chambers*, 2 Coll. 435.

ADEMPTION.

A testator bequeathed to W. L. £1,500, "due to me by R. C., and secured by mortgage." After the making of this will, and in testator's lifetime, R. C. sold to one H., the property mortgaged, and the testator, to facilitate the sale and secure the debt due him, took from H. a mortgage of this and other property, and a covenant to pay the amount; retaining the mortgage from R. C., under which he held the legal estate in the land, and the bond originally obtained from R. C. for the debt. The testator died without altering his will in regard to this legacy. Held, that the legacy was not adeemed.

Loring v. *Loring*, 12 Chy. 103.

The testator by his will made in July, 1877, devised to his son G. certain real estate and brewery, expressing that "this devise be accepted by and to be in full discharge of any and every claim he shall have against my estate at the time of my decease." In a subsequent clause, "L.," the testator declared that in the event of selling lands specifically devised, the proceeds were to be substituted for the lands by charging the proceeds against the real estate of the testator. The testator was indebted to G. in the sum of $36,146.86, and on the 8th October, 1879, the parties met and agreed that the testator should sell part of the lands devised to him, including the brewery, to G. for $27,000, and the brewery plant for $6,987.20,

which was credited on G.'s claim against the testator. G. subsequently under clause "L." claimed against the estate of the testator, payment of the amount for which the brewery premises and plant were sold, he swearing that he was ignorant of the contents of the will. Thereupon the plaintiffs, two of the executors and trustees, instituted proceedings seeking to obtain a construction of the will. Held, reversing the judgment of the court below, that the agreement entered into between the father and son superseded the devise to the son.

Archer v. *Severn*, 8 A. R. 725.

COURTS AVERSE TO SPECIFIC LEGACIES.

Courts in general are averse, from construing legacies, to be specific, and the intention of the testator with reference to the thing bequeathed must be clear. To enter into a discussion as to what legacies are to be construed as specific, and what general, is part of the subject of construction of a will.

CASES OF SPECIFIC LEGACIES.

It may be stated, however, that as to legacies of money, under some circumstances such legacies may be held to be specific, as, of a certain sum of money in the hands of A.

2. Every devise of land is specific, and so is a bequest of a lease for years of a farm.

3. As to bequests contained in the residuary clause, the question whether such bequests are specific or general may become important where it is contended that the bequest is specific, so as to exonerate the personal estate, which is the subject of it, from debts and legacies, and charge the realty therewith, or where the personal estate so bequeathed comprises property which is wearing out rapidly, such as leaseholds or long annuities, and it is given to one for life, remainder to another.

GENERAL BEQUESTS OF PERSONAL ESTATE.

The bequest of all a man's personal estate generally is not specific, but if a man having personal property at A., and elsewhere bequeath all his personal estate at A. to a particular person, the legacy is specific.

Robertson v. *Broadbent*, 8 App. Cas. 812.

GENERAL RESIDUARY CLAUSE.

A general residuary clause is not the less general because it contains an enumeration of some of the particulars of which it may consist. Nor does the fact that a specific legacy is excepted out of a general residue make a gift of that general residue specific.

Taylor v. *Taylor*, 6 Sim. 246.

CONTINGENT AND EXECUTORY INTERESTS.

Contingent and executory interests, though they do not vest in possession, may vest in right, so as to be transmisible to the executors or administrators of the party dying before the contingency upon which they depend takes effect. Where that contingency is the endurance of life of the party till a particular period, the interests will obviously be altogether extinguished by his death before that period.

Wms. p. 954.

LAPSE OF LEGACIES.

The general principle as to the lapse of legacies by the death of the legatee, may be stated to be that if the legatee die before the testator's decease, or before any other condition precedent to the vesting of the legacy is performed, the legacy lapses, and is not payable to the executors or administrators of the legatee.

EXTINGUISHMENT.

Unless a legatee survives the testator the legacy is extinguished, neither can the executors or administrators of the legatee demand it.

Old authorities, Wms. p. 955.

LEGATEE DYING BEFORE TESTATOR.

Even where a legacy is given to a man and his executors, administrators and assigns, or to a man and his representatives, if the legatee dies before the testator, though the executors are named yet the legacy is lost. If, instead of personal representatives, the word "heirs" be used, it has been held that this shows an intention on the part of the testator that the persons he designates as heirs are to take by way of substitution whenever the legatee may die, and there shall be no lapse, though he die in the lifetime of the testator.

Re Porter's Trusts, 4 Kay & J. 188.

A testator bequeathed personal estate to his two sisters, M. and S., and to their children, all to share alike if living. One of the sisters died before the testator. Held, that her share lapsed.

Bradley v. *Wilson*, 13 Chy. 642.

A testator devised all his estate ("lands and chattels") to his mother for life, and after her death to his sister P. H., absolutely, charged with legacies to several persons. One of the legatees died after the testator, but before his mother, the tenant for life. Held, that the legacy did not lapse, but was a vested interest in the legatee, and as such went to his personal representative.

Pollard v. *Hodgson*, 22 Chy. 287.

TESTATOR MAY DECLARE THAT LEGACY SHALL NOT LAPSE.

A testator may declare on the face of a will that the legacy shall not lapse, and he may provide a substitute for the legatee dying in his lifetime. To effect this object he must declare expressly, or in terms from which his intention can be with sufficient clearness collected, what person or persons he intends to substitute for the legatee dying in his lifetime.

Brown v. *Hope*, L. R. 14 Eq. 343.

LEGACY TO TWO JOINTLY.

If a legacy be given to two persons jointly, although one of them happen to die before the testator, such interest will not be considered lapsed or undisposed of, but will survive to the other legatee; but where legacies are given to legatees as tenants in common, if any of them die before the testator, what was intended for those legatees will lapse into the residue.

Morley v. *Bird*, 3 Ves. 628.

LEGACY TO ONE FOR LIFE.

In case of a legacy to a legatee for life, with remainder to another legatee, if the tenant for life dies before the testator, the remainder over takes effect upon the death of the testator.

Lee v. *Pain*, 4 Hare, 225.

LEGACY WITH LIMITATION OVER.

If a legacy be given to a person with a limitation over if he should die under twenty-one, or before the happening of any other event, and he dies in the lifetime of the testator under the prescribed age, or before such other event happens, the legacy over does not lapse.

Re Gaitskell's Trusts, L. R. 15 Eq. 386.

TIME WHEN LEGACY PAYABLE.

If a legacy be given generally without specifying the time when it is to be paid, it is due on the day of the death of the testator, though not payable till the end of the year next after the testator's death. This delay is merely an allowance of time for the convenience of the executor, and does not prevent the interest vesting immediately on the testator's death. Hence, if the legatee happen to die within the year his personal representative will be entitled to the legacy.

Garthshore v. *Chalie*, 10 Ves. 13.

FUTURE TIME FOR PAYMENT OF LEGACY DEFINED.

When a future time for the payment of a legacy is defined by the will the legacy will be vested or contingent according as,

upon construing the will, it appears whether a testator meant to annex the time to the payment of the legacy or to the gift of it.

RULES OF CONSTRUCTION.

In ascertaining the intention of the testator in this respect, the Courts of Equity have established two positive rules of construction: 1st. That a bequest to a person payable, or to be paid at or when he shall attain twenty-one years of age, or at the end of any other certain determinate term, confers on him a vested interest immediately on the testator's death, as debitum in praesenti solvendum in futuro, and transmissible to his executors or administrators, for the words "payable" or "to be paid," are supposed to disannex the time from the gift of the legacy, so as to leave the gift immediate, in the same manner in respect of its vesting, as if the bequest stood singly, and contained no mention of time. 2nd. That if the words "payable" or "to be paid" are omitted, and the legacies are given at twenty-one, or if, when, in case, or provided the legatees attain twenty-one or any other future definite period, these expressions annex the time to the substance of the legacy, and make the legatee's right to it depend on his being alive at the time fixed for its payment. Consequently, if the legatee happens to die before that period arrives, his personal representative will not be entitled to the legacy.

Shrimpton v. *Shrimpton*, 31 Beav. 425.
Hanson v. *Graham*, 6 Ves. 245.

EXCEPTIONS TO FIRST RULE.

The exceptions to the first rule are: 1. The rule itself is always subservient to the intention of the testator, and, therefore, if upon construing the whole will, it clearly appears, that the testator meant the time of payment to be when the legacy should vest, no interest shall be transmissible to the executors or administrators if the legatee dies before the period of payment. If the testator thinks proper to say distinctly that his legatees, general or residuary, shall not be entitled to the property unless they live to receive it, there is no law against such intention, if clearly expressed.

Johnson v. *Crook*, 12 C. D. 639.

2. If the event upon which the legacy is directed to be paid be uncertain as to its taking place, then the legacy becomes a conditional legacy, and will not devolve on the executors or administrators unless the conditions be performed by the happening of the event.

Old Authorities, Wms. p. 975.

EXCEPTIONS TO SECOND RULE.

The exceptions to the second rule are:

1. Where a testator bequeaths a legacy to a person at a future time, and either gives him the intermediate interest or directs it to be applied for his benefit, the court there construes the disposition of the interest to be an indication of the testator's intention that the legatee should, at all events, have the principal, and on these grounds holds such legacies to be vested.

Vaudry v. *Geddes*, 1 R. & M. 208.

2. Where a person bequeaths a sum of money, or other personal estate to one for life, and after his decease to another, the interest of the second legatee is vested, and his personal representatives will be entitled to the property, though he dies in the lifetime of the person to whom the property is bequeathed for life.

Leake v. *Robinson*, 2 Meriv. 363.

CHILDREN TAKE VESTED INTEREST.

In construing a settlement or will which makes a provision for children subject to a prior life-interest, the court leans strongly in favour of that construction by which the children will take a vested interest at twenty-one or marriage, whether they survive the tenant for life or not. The presumption is that the child acquires a vested and transmissible interest at the period when it is most needed, viz., at twenty-one, if a son, or on marriage or at that age, if a daughter.

Re Knowles, 21 C. D. 806.

LEGACIES PAYABLE OUT OF REAL ESTATE.

As to legacies payable out of real estate only, the first rule, as above stated, as adopted, with reference to legacies payable out of the personal estate, viz., that when the gift and time of payment are distinct the legacy vests immediately, does not hold, generally speaking.

Wms. p. 999.

EXCEPTIONS TO RULE AS TO LEGACIES CHARGED ON LAND.

There is an exception to this rule respecting vesting of legacies charged on land. Thus, when a legacy is bequeathed to a child on attaining twenty-one or marrying, or any other event personal to him, the legacy is evidently postponed to the time specified, from its being considered that the legatee will then want the benefit of the legacy; whereas, when the estate is devised to a person for life, and after his decease is charged with the legacy, the legacy is evidently postponed till the decease of the devisee for life from its being incompatible with his life estate, that it should be raised in his lifetime.

LEGACIES CHARGED ON MIXED FUND.

It sometimes happens that legacies are charged on a mixed fund; that is, both on real and personal estate. In that case the personal estate is considered to be the primary fund and the real estate to be the auxiliary fund for the payment of legacies. So far as the personal fund will extend to pay them the case is governed by the same rules as if the legacies were payable out of the personal estate only. So far as the real estate must be resorted to for the payment of the legacies, the case is governed by the same rules as if they were charged on real estate only.

Re Hudson's Trusts, 1 Dru. 6.

Legacies directed to be paid out of a mixed residue are a charge on land.

Young v. *Purves*, 11 O. R. 597.

CONDITIONAL LEGACY.

A conditional legacy is defined to be a bequest, whose existence depends upon the happening or not happening of some uncertain event by which it is either to take place or be defeated.

CONDITIONS PRECEDENT OR SUBSEQUENT.

Conditions are either precedent or subsequent. When a condition is precedent the legatee has no vested interest till the condition is performed. When a condition is subsequent the interest of the legatee vests in the first instance, subject to be divested by the non-performance or breach of the condition.

IMPOSSIBLE CONDITION PRECEDENT.

When a condition precedent to the vesting of the legacy is impossible the bequest is discharged of the condition, and the legatee will be entitled as if the legacy were unconditional. If the impossibility of the condition is unknown to the testator, the impracticability of the performance will be a bar to the claim of the legatee.

Lowther v. *Cavendish*, 1 Eden. 116.

IMPOSSIBLE CONDITION SUBSEQUENT.

Where a condition subsequent is impossible, the condition is void, and the legacy single and absolute. If a condition precedent requires an act which is malum in se then not only the condition but the bequest itself is void.

Walker v. *Walker*, 2 De G. F. & J. 255.

PERFORMANCE OF CONDITION SUBSEQUENT ILLEGAL.

When a performance of a condition subsequent is illegal, then the condition is void, and the bequest freed from it as though it had been given unconditionally.

Egerton v. *Lord Brownlow*, 4 H. L. C. 1.

PERFORMANCE OF CONDITION PRECEDENT.

Although the general rule is that conditions precedent must be strictly performed, yet if the condition is performed so as to substantially fulfil the testator's intention it is sufficient. But the observance of the time mentioned in the condition may be material to the due performance of it. In all cases where there is a limitation over of the legacy, upon the legatee not performing a condition within the time prescribed for that purpose, if the terms are not literally applied, then the condition will be held not to be performed within the intent and meaning of the testator.

PERFORMANCE OF CONDITIONS SUBSEQUENT.

With respect to the performance of conditions subsequent, the general rule is that they are to be construed with great strictness, as they go to divest estates already vested; therefore, the very event must happen, or the act with all its details must be done in order to deprive the legatee of his legacy.

Re Clark's Trusts, L. R. 9 Eq. 378.

CONDITION THAT LEGATEE SHALL NOT DISPUTE WILL.

A condition that the legatee shall not dispute the will is valid, though it has been in general considered as in terrorem merely, and will not operate as a forfeiture by reason of the legatees having disputed the validity or effect of the will, but where the legacy is given over to another person, in case of a breach of such condition, then if the legatee controvert the will his interest will cease and vest in the other legatee. If, instead of being given over to a stranger, the legacy is limited over to the executors, in the event of the condition being broken, such condition is still merely regarded as in terrorem and not obligatory.

Cooke v. *Turner*, 15 M. & W. 727.

CONDITIONS IN RESTRAINT OF MARRIAGE.

As to conditions in restraint of marriage, conditions which do not directly or indirectly import an absolute injunction to celibacy are valid; thus, conditions restraining marriage under twenty-one, or other reasonable age, without consent of executors, guardians, etc., or requiring or prohibiting marriage with particular persons, and the like, are valid and legal conditions.

Hodgson v. *Halford*, 11 C. D. 959.

IN ABSOLUTE RESTRAINT OF MARRIAGE.

The law will not allow conditions in absolute restraint of marriage, but if property is limited to a person until that person marries, and when such marriage happens, then over, such limitation may be valid.

Jones v. *Jones*, 1 Q. B. D. 179.

IN RESTRAINT MARRIAGE WITHOUT CONSENT.

As to conditions in restraint of marriage without consent, not under the age of twenty-one or other reasonable age, but generally, such conditions are in terrorem merely, if there is no disposition over, and, whether precedent or subsequent are inoperative for the vesting or divesting of a legacy; but if there is a direction that the legacy, in the event of a breach or non-performance of such a condition, shall go over to another legatee, the condition is obligatory.

Lloyd v. *Branton*, 3 Mer. 116.

REQUIRING MARRIAGE WITH CONSENT.

In the instance of conditions requiring marriage with the consent of executors or trustees, it has been decided that such consent must be obtained before or at the marriage. A subsequent approbation will not be a performance of the condition.

Clarke v. *Parker*, 19 Ves. 17.

UNCONDITIONAL CONSENT.

A general consent given to the legatee after attaining majority will be sufficient, and an unconditional consent once given cannot be retracted unless for good reasons, moral or pecuniary, afterwards discovered.

LeJeune v. *Budd*, 6 Sim. 441.

REFUSAL TO CONSENT.

If an executor or trustee, whose consent is required, refuse to execute his power, the court will direct an enquiry into the proposed marriage and as to its propriety.

Clarke v. *Parker*, 19 Ves. 18.

LEGACIES TO PERSONS AS EXECUTORS.

Where legacies are given to persons in the character of executors, and not as marks of personal regard only, such bequests are considered to be given upon an implied condition, namely, that the parties clothe themselves with the character in respect of which the benefits were intended for them.

Abbot v. *Massie*, 3 Ves. 148.

PRESUMPTION IN SUCH CASES.

The presumption is that a legacy to a person appointed executor is given to him in that character, and it is on him to show something in the nature of the legacy, or other circumstances arising on the will to repel the presumption. The presumption will be rebutted, if it appears either from the wording of the bequest or from the fair construction of the will that the bequest is given to him independently of his character as executor.

Re Appleton, 29 C. D. 893.

PERFORMANCE OF CONDITION.

If the legatee prove the will with an intention to act under it, that will be a sufficient performance of the condition, or if the legatee unequivocably manifests an intention to act in the executorship, as by giving directions about the funeral of the testator, and be prevented by death from further entering upon his office, that will also be a performance of the condition.

Lewis v. *Matthews*, L. R. 8 Eq. 277.

TWO LEGACIES TO SAME PERSON. CUMULATIVE LEGACIES.

Where the testator has twice bequeathed a legacy to the same person, it becomes a question whether the legatee be entitled to both or one only; that is, whether the second legacy shall be regarded as merely a repetition of the prior bequest, or whether it shall be construed as an additional bounty and cumulative to the former benefit.

Lobley v. *Stocks*, 19 Beav. 393.

INTERNAL EVIDENCE OF INTENTION OF TESTATOR.

1st. Where there is no internal evidence of intention, the following positions of law appear established.

I. If the same specific thing is bequeathed twice to the same legatee in the same will, or in the will, and again in a codicil, in that case he can claim the benefit only of one legacy, because it could be given no more than once.

II. Where two legacies of quantity of equal amount are bequeathed to the same legatee in one and the same instrument, there also the second bequest is considered a mere repetition, and he shall be entitled to one legacy only.

III. Where two legacies of quantity of unequal amount are given to the same person in the same instrument, the one is not merged in the other, but the latter shall be regarded as cumulative, and the legatee is entitled to both.

IV. Lastly, where two legacies are given simpliciter to the same legatee by different instruments, in that case, also the presumption is, that the latter is cumulative, whether its amount be equal or unequal to the former.

Wms. p. 1035.

2nd. Where there is internal evidence of the intention of the testator. In many cases the will or codicil affords intrinsic evidence that the second gift was intended by the testator as a mere substitution for the first, and consequently that one legacy alone was intended. For example, where a later codicil appears to be a

mere copy of the former, with the addition of a single legacy, or when it is manifest that the latter instrument was made for the purpose of explaining or better ascertaining the legacies bequeathed by the former. So if in two instruments the legacies are not given simpliciter, but the motive of the gift is expressed, and in both instruments the same motive is expressed and the same sum is given, the court considers the two coincidences as raising a presumption, that the testator did not, by the second instrument, mean a second gift, but meant only a repetition of the former gift. But the court raises this presumption only where the double coincidence occurs of the same motive and the same sum in both instruments. It will not raise it if the same motive be expressed in both instruments, and the sums be different. Consequently, the legatee is in such case entitled to both sums.

Russell v. *Dickson*, 4 H. L. C. 293.
Lord v. *Sutcliffe*, 2 Sim. 273.

INTERNAL EVIDENCE THAT LEGACY CUMULATIVE.

The ordinary inference that legacies are cumulative, arising from the fact of their being of unequal amount, or of their being given by different intruments, may be strengthened by internal evidence as, where one is given generally, and the other for an express purpose, or where one reason is assigned for the former and another for the latter; or where the legacies are not ejusdem generis, as where an annuity and a sum of money are given, or two annuities of the same amount by different instruments, the one payable quarterly, the other half-yearly; or where one legacy is vested and another contingent.

Lee v. *Pain*, 4 Hare, 223.

DEBTOR BEQUEATHING LEGACY TO CREDITOR.

Where a debtor bequeaths to his creditor a legacy equal to or exceeding the amount of his debt, it is presumed, in the absence of any intimation of a contrary intention, that the legacy was meant by the testator as a satisfaction of the debt. This presumption of satisfaction is rebuttable, as, where the debt was not contracted till after the making of the will, or where the debt is due upon a current account, or where it was upon a bill of exchange or other negotiable security.

Re Fletcher, 38 C. D. 573.

LEGACY CONTINGENT NOT SATISFACTION.

If a legacy is at all contingent or uncertain, it is not deemed a satisfaction of a debt; nor where the legacy is payable immediately after the death of the testator. A legacy of a specific chattel is not a satisfaction of a debt.

Byde v. *Byde*, 1 Cox, 49.

PRESUMPTION OF SATISFACTION OR PERFORMANCE.

Where a parent is under obligation by articles or settlement to provide portions for his children, and he afterwards makes a provision by will for them, such testamentary provision is presumed to be a satisfaction or performance of the obligation.

Thynne v. *Glengall*, 2 H. L. C. 131.

PRESUMPTION, HOW REPELLED.

This presumption may be repelled or fortified by intrinsic evidence derived from the nature of the two provisions. Where the two provisions are of the same nature, or where there are but slight differences, the two instruments afford intrinsic evidence against a double provision. Where the two provisions are of a different nature, the two instruments afford intrinsic evidence in favour of a double provision.

Glover v. *Hartcup*, 34 Beav. 74.

CREDITOR BEQUEATHING LEGACY TO DEBTOR.

Where a creditor bequeaths a legacy to his debtor, and either does not notice the debt or mentions it in such a manner as to leave his intention doubtful; and after his death the securities for the debt, if any exist, are found uncancelled among the testator's property, the legacy to the debtor is not considered as necessarily or even prima facie a release or extinguishment of the debt.

EVIDENCE REQUIRED.

Evidence clearly expressive of the intention to release is required if a testator expressly bequeaths the debt to his debtor; this, being no more than a release by will, operates only as a legacy, and the debt is assets, therefore, subject to the payment of the testator's debts.

Eden v. *Smyth*, 5 Ves. 341.

LEGATEE INDEBTED TO TESTATOR.

Where a legatee is indebted to the testator, the executor may retain the legacy either in part or full satisfaction of the debt by way of a set-off.

Strong v. *Bird*, L. R. 18 Eq. 315.

APPOINTMENT OF DEBTOR TO OFFICE OF EXECUTOR.

Where there is an appointment of a debtor to the office of executor, the debt due from the debtor-executor is considered to have been paid to him by himself, and the executor is accountable for the amount of his debt as assets.

Strong v. *Bird*, L. R. 18 Eq. 315; *Re Appelbe* (1891), 3 Chy. 422; *Re Hyslop* (1894), 3 Chy. 522.

APPOINTMENT OF CREDITOR EXECUTOR.

If a debtor makes his creditor, or the executor of his creditor, his executor, this alone is no extinguishment of the debt though there be the same hand to receive and pay; but if the executor has assets of the debtor, it is an extinguishment because it is within the rule that the person who is to receive the money is the person who ought to pay it, but if he has no assets he is not the person who ought to pay, though he is the person who ought to receive it.

INCONSISTENT GIFTS.

If a gift to one legatee in the earlier part of the will is inconsistent with a subsequent gift to another legatee in the will, or in a codicil, this inconsistency operates as an ademption or revocation of the earlier gift.

COMPLETION OF TITLE TO SPECIFIC LEGACIES.

As to specific legacies; in order to complete the title of a specific legatee to his legacy, the thing bequeathed must, at the testator's death, remain in specie as described in the will, otherwise the legacy is considered as revoked by ademption. For instance, if the legacy be of a specified chattel, in possession, as of a gold chain, or a bale of wool, or a piece of cloth, the legacy is adeemed, not only by the testator's selling or otherwise disposing of the subject in his lifetime, but also if he should change its form so as to alter the specification of it; as if he should convert the gold chain into a cup, or the wool into cloth, or make the piece of cloth into a garment, the legacy shall be adeemed.

NO ADEMPTION OF DEMONSTRATIVE LEGACIES.

The rule of ademption does not apply to demonstrative legacies, i.e., to legacies of so much money, with reference to a particular fund for payment. As for instance, legacies given out of a particular stock, or debt, or term; for although the particular fund be not in existence at the testator's death, the legatees will be entitled to satisfaction out of the general estate.

TESTATOR PLEDGING ARTICLE SPECIFICALLY BEQUEATHED.

If a testator pawns or pledges an article specifically bequeathed, a right of redemption is left in him and passes to the legatee at his death so as to enable him to call on the executor to redeem and deliver it to him.

PRESUMPTION OF PORTION.

If a father gives a legacy to a child it must be understood as a portion, because it is a provision by a parent for his child; and if the father afterwards alvances a portion for that child, as upon

marriage, it will be a complete ademption of the legacy, where the advances are equal or larger than the testamentary portions.

Ex p. Pye, 18 Ves. 153.

ADEMPTION PRO TANTO.

Where the sums advanced are less than the sums bequeathed, it is an ademption pro tanto.

Re Pollock, 28 C. D. 552.

(2) *Who may be legatee.*

WHO MAY BE LEGATEE.

Every person is capable of being a legatee. A bankrupt may be a legatee, but the interest in the legacy belongs to the assignees.

By section 17 of the Ontario Wills Act, if any person attests the execution of any will to whom, or to whose wife or husband, any beneficial devise, legacy, estate, interest, gift, or appointment, of, or affecting any real or personal estate, other than and except charges and directions for the payment of any debt, is thereby given or made, such devise, legacy, estate, interest, gift or appointment, shall so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person, or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift or appointment, mentioned in such will.

(3) *Of the payment of legacies.*

PAYMENT OF LEGACIES CAUSING DEFICIENCY.

It is obvious that as the whole personal estate is liable in the hands of the executor to the payment of the debts of the testator, the executor must take care to discharge them before he satisfies any description of legacy. There is no distinction in this respect in favour of specific legacies. Hence, if an executor, although acting bona fide and under the conviction that the assets are amply sufficient for the payment of the testator's debts, permits specific legatees to retain or possess articles bequeathed to them, he will be answerable for the value of those articles, if there should ultimately be a deficiency of assets, although the deficiency should be occasioned by subsequent events, which he had no reason to anticipate; and the court will direct an account to be taken of the value of the property so possessed by the legatees, and interest to be computed, unless it is certain that the assets will ultimately be sufficient to pay all the creditors.

Wms. p. 1078.

CREDITOR ALLOWED IN TO PROVE HIS CLAIM.

Where there is a suit for the administration of a testator's assets, a creditor will be permitted, on paying the costs of the proceedings, to prove his debt, as long as there happens to be a residuary fund in court, or in the hands of the executor, and to pay out of that residue. If a creditor does not come in till after an executor has paid away the residue, he is not without remedy, though he is barred from the benefit of the judgment. If he chooses to sue the legatees and bring back the fund, he may do so; but he cannot affect the legatees, except by suit; and he cannot affect the executor at all.

Wms. p. 1085.

(4) *Of the abatement of legacies.*

ABATEMENT AS BETWEEN LEGATEES.

In case the assets be sufficient to answer the debts and specific legacies, but not the general legacies, the latter are subject to abatement.

This abatement must take place among all the general legatees in equal proportions; and the executor has no power to give himself a preference in regard to his own legacy.

SPECIFIC LEGACIES NOT ABATED.

Generally speaking, nothing shall, in such cases, be abated from the specific legacies. But if the testator bequeaths specific legacies, and also pecuniary legacies, and directs by his will that such pecuniary legacies shall come out of all his personal estate, or words equivalent thereto; then, if there be no other personal estate than the specific legacies, they must be intended to be subject to those which are pecuniary; otherwise, the words of the bequest to the pecuniary legatees would be nugatory.

Wms. p. 1088.

PARTICULAR GENERAL LEGATEES.

A residuary legatee has no right to call upon particular general legatees to abate. The whole personal estate, not specifically bequeathed, must be exhausted before those legatees can be obliged to contribute anything out of their bequests.

Baker v. *Farmer*, L. R. 3 Ch. App. 537.

ANNUITIES MUST BE PAID.

So if there is a simple bequest of an annuity, there is no doubt but that, however great or small the income of the testator's property may be, the annuity must be paid in full to the last farthing of the property.

Croly v. *Weld*, 3 *DeGex.* M. & G. 996.

LIFE INTEREST AND REVERSIONER.

The general rule is that if there be a clear gift of a life interest and reversion, and the estate proves insufficient, each party, the tenant for life and the reversioner, must bear the loss in proportion to his interest; but if there is a gift of an annuity, and a residuary gift, the annuity takes precedence, and the whole loss falls on the residuary legatee.

Mitchell v. *Wilton*, L. R. 20 Eq. 269.

NO PREFERENCE AMONG GENERAL LEGACIES.

Among legacies in their nature general, there is no preference of payment; they shall all abate together, and proportionally, in case of a deficiency of assets to satisfy them all. But this must be understood only as among legatees, who are all volunteers for if there be any valuable consideration for the testamentary gift, as where a general legacy is given in consideration of a debt owing to the legatee, or of the relinquishment of any right or interest, as of her dower by a widow, such legacy will be entitled to a preference of payment over the other general legacies, which are mere bounties, and it should seem that the preference will be allowed, though the bequest should exceed the value of the right or interest relinquished by the legatee but it is requisite that the right or interest should be subsisting at the testator's death.

Blower v. *Morret*, 2 Ves. Sen. 422.

LEGACIES TO EXECUTORS FOR CARE AND TROUBLE, ETC.

A legacy, which is in its nature general, and given to a volunteer, will not be entitled to any exemption from abatement, on the ground of its being applied to any particular object or purpose. Thus legacies of a certain sum each to executors for their care and trouble, or of sums for mourning rings, or to servants or to charities, are not to be preferred to other general legacies. And although the bequest is made in favour of a wife or child of the testator, it can claim no preference, but must abate with the rest of the general legacies.

See *Re Schweder's Estate* (1891), 3 Ch. 44.

ANNUITY CHARGED ON PERSONAL ESTATE.

An annuity charged on the personal estate in a general legacy, therefore as between annuitants and legatees there is no priority where there is a deficient estate, but both must abate proportionately, and whether an annuity is to commence immediately on the death of a testator, or at a future date, this principle will equally apply.

Miller v. *Huddlestone*, 3 Mac. & G. 513.
Innes v. *Mitchell*, 1 Phill. Ch. C. 716.

PRIORITY EXPRESSED AMONG GENERAL LEGATEES.

If, by the express words or fair construction of the will, the intent of the testator is clearly manifest to give one general legatee a priority over the others, that intention must be carried into effect. For instance, if a testater gives legacies to A., B. and C. with the proviso, that if the assets should fall short for the satisfaction of those legacies, A., notwithstanding, should be paid her full legacy; the abatement must be borne proportionately by the legacies of B. and C. only.

Marsh v. *Evans*, 1 P. Williams, 668.

ONUS IN SUCH CASE.

But the onus lies on the party seeking priority, to make out that such priority was intended by the testator, and the proof of this must be clear and conclusive.

Miller v. *Huddlestone*, 3 Mac. & G. 523.

LIEN ON SPECIFIC FUNDS.

Where there are specific or demonstrative legacies, that is bequests of money with reference to a particular fund for their payment, and not simply a gift of the specific fund itself. In those cases legatees have such a lien upon the specific fund that they will not be obliged to abate with the general legatees.

Tempest v. *Tempest*, 20 L. J. Ch. 500.

ASSETS SPECIFICALLY BEQUEATHED.

As long as any of the assets not specifically bequeathed remain, such as are specifically bequeathed are not to be applied in the payment of debts, although to the complete disappointment of the general legatees; but when the assets not specifically bequeathed are insufficient to pay all the debts, then the specific legatees must abate, in proportion to the value of their individual legacies.

Fielding v. *Preston*, 1 DeG. & J. 438.

A testator bequeathed "unto my sister M. J. such sum as will, together with what shall be at her credit in my books at Montreal, make $6,000." At the time of the making of the will there was $3,258.47 at M. J.'s credit, but subsequently the testator disposed of his business, and as part of the arrangement placed an additional sum of $2,000 to M. J.'s credit, making the whole sum at her credit $5,258.42; of this sum, $3,000 was placed on a special account at interest, $2,000 was agreed to be paid to her by the purchasers, and the balance, $258.42, was paid in cash, and her account balanced in the books, leaving nothing at her credit. Held, that M. J.'s legacy was to be reduced by the amount of testator's debt to her at the time of his death; that what had taken place

amounted to payment of the debt; and that she was entitled to the legacy of $6,000.

Wilkes v. *Wilkes*, 1 O. R. 131.

LEGACY TO EXECUTOR AS COMPENSATION.

Where a testator gives a legacy to his executors, expressly as a compensation for their trouble, and there is a deficiency of assets, such legacy does not in this country abate with legacies which are mere bounties, even though the legacy somewhat exceeds what the executors would otherwise have been entitled to demand.

Anderson v. *Dougall*, 15 Chy. 405.

PROPORTIONAL ABATEMENT.

A testator out of the proceeds of his real estate and personal estate, gave to one son $200, to another $100, and to the third $1,800, the balance to be equally divided between his daughters, six in number, naming them. By a codicil he revoked the bequest to the second named son of $100, and gave an additional sum of $100 to the first named son. The household furniture to be equally divided between his two daughters last named in the will. Held, that these legacies were specific, and not merely demonstrative, and if the fund was insufficient to pay them all, they must abate proportionately.

Bleeker v. *White*, 23 Chy. 163.

Testatrix by her will left all her property, by general words, to her executors, upon trust, inter alia; (5) to set apart $4,500 and pay the income to the plaintiff, one of her sons; (6) to realize on all the residue of the estate, and after providing for maintenance of unsold portions, to pay $1,400 to a second son and $2,000 to a third, and, when all the residue should be realized, to divide it equally between these two; (7) after the death of the plaintiff to divide the $4,500 among his children, adding, "It is my will that my son Robert (the plaintiff) is to get no benefit from my estate, except as provided in this will, the provision herein made being in lieu of any share in the insurance on my life." Two policies of insurance on her life formed part of the estate of the testatrix, and she had besides effected an insurance for $2,000 on her life, payable to the three sons, which was in force at the time of her death. Held, that in the event of the assets not being sufficient to admit of the setting apart of the $4,500 and the payment of the two legacies of $1,400 and $2,000, the $4,500 was first to be provided for without abatement, and the other two legacies were to come out of the residue and abate in the event of a deficiency.

King v. *Yorston*, 27 O. R. 1.

CHARITABLE AND OTHER LEGACIES OUT OF MIXED FUND.

Though there can be no marshalling in favour of charities, yet where charitable and other legacies are payable out of a mixed fund, the proceeds of realty, impure personalty and personalty, the charitable legacies do not fail in toto, but must abate in the proportion which the sum of the realty and impure personalty charged with charitable gifts bears to the pure personalty.

In re Staebler, 21 A. R. 266.

A testator by his will directed that a farm should be sold, and that his executors should "first out of the said proceeds set apart the sum of $2,000, and invest the same in some safe security for the benefit of and for the maintenance and education of" the testator's grandson, subject to certain provisions as to payment of income and corpus, and then further directed that "out of the proceeds of the sale of the land there shall be paid the following legacies" to three daughters and a son of the testator. Held, that the general rule of equality among legatees applied, and that, there not being sufficient to pay all legacies in full, the grandson's legacy should abate proportionately.

Lindsay v. *Waldbrook*, 24 A. R. 604.

(5) *The Executor's assent to a legacy.*

EXECUTOR MUST ASSENT TO LEGACY.

The whole property of the testator, as has already been shown, devolves upon his executor. It is his duty to apply it in the first place to the payment of the debts of the deceased, and he is responsible to the creditors for the satisfaction of their demands, to the extent of the whole estate, without regard to the testator's having by the will directed that a portion of it shall be applied to other purposes. Hence, as a protection to the executor, the law imposes the necessity that every legatee, whether general or specific, and whether of chattels real or personal, must obtain the executor's assent to the legacy before his title as legatee can be complete and perfect.

Wms. p. 1101.

LEGATEE CANNOT TAKE POSSESSION WITHOUT.

Hence, also, the legatee has no authority to take possession of his legacy without such assent, although the testator, by his will, expressly direct that he shall do so; for if this were permitted, a testator might appoint all his effects to be thus taken, in fraud of his creditors.

LEGATEE HAS INCHOATE RIGHT.

Before such assent, however, the legatee has an inchoate right to the legacy, such as is transmissible to his own personal representatives, in case of his death before it be paid or delivered.

TESTATOR FORGIVING DEBT.

Again, if the testator by will forgive a debt due to him from a particular person, it is the better opinion, that the assent of the executor is necessary to give effect to the testator's intention.

LEGATEE TAKING POSSESSION WITHOUT CONSENT.

If without the executor's assent the legatee takes possession of the thing bequeathed to him, the executor may maintain an action of trespass or trover against him; so, although a chattel, real or personal, specifically bequeathed, be in the custody or possession of a legatee, and the assets be fully adequate to the payment of debts, he has no right to retain it in opposition to the executor; by whom, in such case, an action will lie to recover it.

REFUSAL OF CONSENT.

If an executor refuses his assent without cause, he may be compelled to give it by a Court of Equity.

WHAT SHALL CONSTITUTE CONSENT.

With respect to what shall constitute such assent on the part of the executor, the law has for this purpose prescribed no specific form; and it may be either express or implied.

Mason v. *Farnell*, 12 M. & W. 674.

MUST BE UNAMBIGUOUS.

The act or expression deemed sufficient to impart that assent should be unambiguous.

Doe v. *Harris*, 16 M. & W. 517.

MAY BE PRESUMED.

The assent of the executor may be presumed; on the principle, that in the absence of evidence, the executors shall be taken to have acted in conformity with their duty; as when executors die after the debts are paid, but before the legacies are satisfied.

MAY BE UPON CONDITION.

The assent of the executor may also be upon a condition precedent, as if he should tell the legatee that he will pay the legacy, provided the assets are sufficient to answer all demands. But the condition must not be one that the executor had no authority to impose, e.g., provided the legatee will pay the executor a certain sum annually.

MAY BE BEFORE PROBATE.

A person appointed executor may assent to a legacy before he proves the will, and even if he dies without taking probate, his assent will be effectual.

ASSENT OF ONE OF SEVERAL.

If several executors are appointed, the assent of any one of them is sufficient; and, therefore, if there be a legacy to one of several executors, he may take it of his own assent without the others.

Townson v. *Tickell*, 3 B. & A. 40.

ASSENT TO SPECIFIC LEGACY.

After an assent by the executor to a specific legacy, the interest in the chattel bequeathed vests in the legatee, so that he may take proceedings to recover it, even against the executor himself.

ASSENT CANNOT BE RETRACTED.

If an executor once assent to a legacy he can never afterwards retract; and, notwithstanding a subsequent dissent, a specific legatee has a right to take the legacy, and has a lien on the assets for that specific part, and may follow them. But if the assent has not been completed by payment, in the case of a general legacy, or possession, in that of a specific one, and its recall is not attended with injury to a third person, as to a bona fide purchaser from the legatee on the faith of such assent, it seems only reasonable, that the executor under particular circumstances, should have the power of retracting it; as where he assents upon the reasonable ground for considering that the assets are sufficient to answer all demands, but unknown debts are unexpectedly claimed, which occasion a deficiency. Moreover, if the assent has been completed by payment or possession, and afterwards debts appear, of which the executor had no previous notice, he may compel the legatee to refund.

Doe v. *Guy*, 3 East. 123.

HAS RELATION TO DEATH.

The assent of an executor has relation to the time of the testator's death. Such assent by relation confirms the intermediate grant to the legatee of his legacy.

LEGACY TO EXECUTOR.

In the case of a legacy bequeathed to an executor, his assent is as necessary to a legacy's vesting in him in the capacity of legatee, as to a legacy's vesting in any other person.

ASSENT MAY BE EXPRESSED OR IMPLIED.

His assent to his own legacy may, as well as his assent to that of another legatee, be either expressed or implied. Until he has

made his election he takes the legacy as executor, though all the debts have been paid independently of such bequest.

EFFECT OF ENTERING INTO POSSESSION OF A TERM OF YEARS.

With regard to the effect of entry by the executor into possession of a term of years bequeathed to him, the following distinction exists: Where the entire term is given to the executor, an entry will amount to an election to take as legatee. But where a sole executor, or one of several executors, takes an interest in a leasehold estate for life, or any partial interest, he must do something more than enter, in order to give assent to his legacy.

Doe v. *Sturges*, 7 Taunt. 217.

EXECUTOR LEGATEE RENOUNCING PROBATE.

If an executor legatee renounce probate, his assent to his own legacy will be ineffectual, and if he take the thing bequeathed without the permission of the administrator cum testamento annexo, he will incur the same liabilities as any other legatee so acting.

(6) *At what time legacies are to be paid.*

ONE YEAR ALLOWED FOR PAYMENT.

On the principle that the assent of an executor to a legacy is necessary, he cannot, before a competent time has elapsed, be compelled to pay it. A period fixed by the Civil Law for that purpose, which our courts have also prescribed, and which is analogous to the Statute of Distribution, is a year from the testator's death. During which it is presumed that the executor may fully inform himself of the state of the property; but within that period he cannot be compelled to pay a legacy, even in a case where the testator directs it to be discharged within six months after his death.

Brooke v. *Lewis*, 6 Madd. 358.

EXECUTOR MAY PAY AT EARLIER DATE.

This allowance is merely for convenience in order that the debts of the testator may be ascertained and the executors made acquainted with the amount of assets, so as to be able to make a proper distribution of them. However, if the state of the testator's circumstances be such as to enable the executors to discharge legacies at an earlier date they may do so.

Gartshore v. *Chalie*, 10 Ves. 13.

LEGACY SUBJECT TO LIMITATION OVER.

Where a legacy is given generally subject to a limitation over upon a subsequent event, the devesting contingency will not prevent the legatee from receiving his legacy at the end of a year from the

testator's death, and he is not bound to give security for repayment of the money in case the event should happen.

Fawkes v. Gray, 18 Ves. 131.

WHEN ANNUITY BEGINS.

If an annuity be given by will it commences immediately from the testator's death, and, therefore, the first payment must be made at the expiration of a year next after that event.

Stamper v. Pickering, 9 Sim. 176.

ANNUITY PAYABLE MONTHLY.

Where an annuity is expressly directed to commence within the year, as at the first quarter day after the testator's death; or where an annuity is given with the direction that it shall be paid monthly, the money will be due at the first quarter day, or at the end of the first month after the testator's death, although not payable by the executor till the end of the year.

Storer v. Prestage, 3 Madd. 168.

BEQUESTS WITH DIRECTION FOR APPLICATION OF MONEY.

Where there is a bequest of money to or in trust for legatees absolutely, but with the direction for the enjoyment or application of the money in a particular mode for their benefit, as where it is given to purchase an annuity for the legatee, or to place him out apprentice, or to enable him to take holy orders, or towards "helping him to purchase a country residence," the legatees will be entitled to receive the capital immediately, regardless of the particular mode directed for the enjoyment or application.

See *Re Mabbett* (1891), 1 Ch. 707.

ANNUITY TO "A" FOR LIFE WITH DIRECTIONS AS TO.

Where a testator gives an annuity to A. for life, and directs the first payment to be made within one month from his, the testator's death, the annuity commences from the death of the testator, and though the first year's payment is due at the appointed time, the payment for the second year does not become due till the end of the year.

QUARTERLY PAYMENTS.

Where a testator gives an annuity to A. for life, payable quarterly, the first payment to be made within eighteen months after his death, the annuity does not commence until fifteen months from the death of the testator.

Irvin v. Ironmonger, 2 Russ. & M. 531.

DATE FOR FIRST PAYMENT.

In an annuity is given, the first payment is paid at the end of the year from the death but if a legacy is given for life with re-

mainder over, no interest is due until the end of two years. It is only interest on the legacy, and till the legacy is payable there is no fund to produce the interest.

Gibson v. *Bott*, 7 Ves. 97.

BEQUEST OF RESIDUE CARRIES INCOME.

With respect to a bequest of the residue of a personal estate for life with remainder over, the person taking the residue for life is entitled to the income in some shape or other from the death of the testator. Where the testator simply bequeaths all the residue of his personal estate for life, with remainder over, without any direction to invest it in any particular manner, as between the tenant for life and the remainderman, where the residue consists in part or wholly of property in its nature perishable and daily wearing out, the tenant for life will not be entitled to the annual produce which the property annually wearing out is actually making; but to interest from the death on the estimated value. The rule is that the tenant for life is to be allowed as from the death of the testator, the income of such parts of the personal estate as were at his death and have remained in a state of investment which ought to be recognized and allowed to be continued by a Court of Equity.

Howe v. *Lord Dartmouth*, 7 Ves. 137.

PORTIONS OF ESTATE NOT INVESTED.

With regard to those parts of a personal estate which neither were at the testator's death, nor have since been in such a state of investment as ought to be recognized and allowed to be continued by the court, they must be valued at a period of one year after his death, and interest from his death on the value so taken must be paid to the tenant for life.

Meyer v. *Simonsen*, 5 DeG. & Sm. 723.

BEQUEST TO TENANT FOR LIFE SPECIFIC.

Where the bequest to the tenant for life is specific, the legatee in remainder is not entitled to have the property converted; notwithstanding, by reason of its being a decreasing fund, the legacies over may altogether fail.

Bethune v. *Kennedy*, 1 My. & Cr. 114.

CHATTELS TO "A" FOR LIFE, REMAINDER TO "B."

If personal chattels are bequeathed to A. for life and remainder to B., A. will be entitled to the possession of the goods upon signing and delivering to the executor an inventory of them admitting their receipt expressing that he is entitled to them for life,

and that afterwards they belong to the person in remainder. No security is required unless a case of danger is shown.

Conduitt v. *Soane*, 1 Coll. 285.

GIFT FOR LIFE OF THINGS CONSUMABLE.

A gift for life of things quæ ipso usu consumuntur as corn and wine if specific, is an absolute gift of the property, but if residuary, the things must be sold and the interest of the produce paid to the legatee for life.

Porter v. *Tournay*, 3 Ves. 314.

FARMING STOCK AND IMPLEMENTS.

Farming stock and implements of husbandry are not things quæ ipso usu consumuntur, within this rule.

Groves v. *Wright*, 2 Kay & J. 347.

PAYMENT WHERE LEGATEE IS INFANT.

Where the legatee is an infant, the executor cannot safely pay him or any other person on his account until he attains twenty-one, unless under the provisions of the Trustee Act, R. S. O. 1914, c. 121, s. 38.

INTERMEDIATE INTEREST NOT DISPOSED OF.

If a legacy be given to A. to be paid at twenty-one, and the intermediate interest is not given, and A. dies before that period, his representative must wait for the money until the time when A., if living, would have attained twenty-one. But where interest is given during the minority, and the legatee dies under age, his executors or administrators will be entitled immediately on his death.

See *Gawler* v. *Standerwick*, 2 Cox 15 (charged on land, difference).

LEGACY TO "A" AT 21 OR TO "B."

Again, in case a legacy be left to A. at twenty-one, and if he die before that period, then to B.; and A. dies before he attains his age, B. shall be entitled immediately, for he does not claim under A., but the devise is a distinct substantive bequest to take effect on the contingency of A.'s dying during his minority.

Feltham v. *Feltham*, 2 P. Wms. 271.

GIFTS VESTED IN CHILDREN.

A testator by his will directed that his estate should be divided upon his youngest child attaining the age of twenty-one years, the income of the estate in the meantime to be paid to the wife, for the benefit of herself and the children. The only gift was contained in the direction to pay and divide upon the arrival of the period of distribution.

Held, that the gift vested prior to the enjoyment of the corpus of the estate, which was only postponed in order to provide for the maintenance of the family.

Held, also, that the gift vested in each child upon attaining the age of twenty-one, and that no child who did not attain that age was intended to take a share of the corpus.

Re Douglas, 22 O. R. 553.

POSTPONEMENT OF PAYMENT.

Where a testator gives a legatee an absolute vested interest in a defined fund, so that according to the ordinary rule he would be entitled to receive it on attaining twenty-one; but, by the terms of the will, payment is postponed to a subsequent period, e.g., till the legatee attains the age of twenty-five, the court will, nevertheless, order payment on his attaining twenty-one, for at that age he has the power of charging or selling or assigning it, and the court will not subject him to the disadvantage of raising money by these means when the thing is absolutely his own. So, although a legacy is directed to accumulate for a certain period, e.g., until the legatee attains the age of thirty; yet if he has an absolute indefeasable interest in the legacy, he may require payment the moment he is competent by reason of having attained twenty-one to give a valid discharge.

Gott v. *Wairne*, 3 C. D. 278.

WHEN LEGATEES ENTITLED TO APPLY TO COURT.

Although legatees are not entitled in any case to receive their legacies before the day of payment arrives, yet they are entitled to go into the High Court of Justice and pray that a sufficient sum be set apart to answer the legacy when it shall become due, but not so if it is to be raised out of real estate.

Gawler v. *Standerwick*, 2 Cox. 15.

LOSS BY PARTIAL FAILURE OF FUNDS.

When a fund has been appropriated for the payment of an annuity given by a will, a question may arise whether the legatee is to suffer the loss consequent upon the partial failure of the fund. Where the annuity is a charge upon the whole personal estate, the executor cannot affect the legatee's right to the entire annuity by any appropriation.

Gordon v. *Bowden*, 6 Madd. 342.

TESTATOR'S DEBTS DEPENDING UPON FOREIGN PROCEEDINGS.

Where the existence and amount of a testator's debts are contingent and depend upon the result of legal proceedings before

a foreign tribunal, which are not likely to be speedily settled, the court in administering his assets will not be induced by that circumstance to direct an appropriation of the fund in court to answer pecuniary legacies subject to such demands as creditors may eventually establish.

Thomas v. *Montgomery*, 1 Russ. & M. 729.

(7) *To whom legacies are to be paid.*

EXECUTORS MUST PAY DEBTS TO PROPER PARTIES.

An executor must be careful to pay legacies into the hands of those who have authority to receive them. If a legacy is given to A. to be divided between himself and family, and the executor pays the legacy to A., it is a good payment to discharge the executor.

Robison v. *Tickell*, 8 Ves. 142.

WHERE LEGATEE IS INFANT.

It is a general rule that where a legatee is an infant, and would be entitled to receive the legacy if he were of age, the executor is not justified in paying it either to the infant or to the father, or any other relation of the infant on his account without the sanction of the court.

Dagley v. *Talferry*, 1 P. Wms. 285.

ADVANCES ON ACCOUNT OF MAINTENANCE.

An executor is not bound to pay the legacy into court till the expiration of a year from the testator's death.

How far an executor can make advances for maintenance on account of a legacy will be discussed later in the chapter dealing with the duties and powers relating to the children of the testator.

PRESUMPTION OF DEATH OF LEGATEE.

Where a legacy is given to a legatee who has been abroad and not heard of for a long time, the court may, in proper case, presume him to be dead. The executor may avoid all responsibility by paying the amount into court.

NOTICE OF CHARGE ON LEGACY.

An executor who receives notice that a legatee has charged his legacy is bound to withhold all further payment to him, and the executor can create no new charges or rights of set-off after that time.

Stephens v. *Venables*, 30 Beav. 625.

ILLUSORY APPOINTMENTS.

A power is sometimes given to trustees or executors to appoint a certain sum of money to several objects in such manner

that none of the objects can be excluded by the donee of the power from a share of such property, as "to all and every child or children" of the testator, or to any other person; in such case it would be a good legal execution of the power if the greater part of the fund be given to one of the children and the residue, however small, for example $1, be distributed among the rest. Courts of Equity at a very early period assumed in such cases the power of controlling such appointments, which were merely illusory.

Under the Judicature Act, as equity now prevails, in case of conflict such appointments will be subject to the jurisdiction of the court.

(8) *Interest upon legacies.*

SPECIFIC LEGACIES.

Specific legacies are considered as separated from the general estate and appropriated at the time of the testator's death, and consequently from that period whatever produce accrues upon them, and nothing more or less, belongs to the legatee. Therefore, where there is a specific legacy of stock, the dividends belong to the legatee from the death of the testator, and it is immaterial whether the enjoyment of the principal is postponed by the testator or not.

See *Turner* v. *Buck*, L. R. 18 Eq. 301.

GENERAL LEGACIES.

General legacies in their nature carry interest, which must be computed from the time at which the principal is actually due and payable. In a case where the testator has not fixed any time of payment, the executor is by law allowed one year from the testator's death to ascertain and settle his affairs, at the end of which time the court, for the sake of general convenience, presumes the personal estate to have been reduced into possession. Upon that ground interest is payable from that time, unless some other period is fixed by the will.

Wood v. *Penvyre*, 13 Ves. 333.

LEGACY IN SATISFACTION OF DEBT.

If a legacy is decreed to be a satisfaction of a debt, the court allows interest from the death of the testator.

Clarke v. *Sewell*, 3 Atk. 99.

LEGACY BY PARENT.

In the case of a legacy given to a child by a parent, or one in loco parentis, whether by way of portion or not, the court will give interest from the death to create a provision for its maintenance.

Wickett v. *Dolley*, 3 Ves. 13.

INTEREST COMMENCES AT END OF YEAR.

After the expiration of the year from the death of the testator the legacy will carry interest, although payment be from the condition of the estate impracticable, and although the assets have been unproductive.

Fisher v. *Brierley*, 30 Beav. 268.

ANNUITY, INTEREST ON.

An annuity bestowed by will without mentioning any time of payment is considered as commencing from the death of the testator, and the first payment is due at the expiration of one year, from which period interest may be claimed in cases where it is allowed at all.

FORFEITURE BY NON-PAYMENT.

Generally speaking the court has refused any application for interest upon the arrears of annuities given by will, unless in case where the person charged with the payment of the annuity has at law incurred a forfeiture by non-payment against which he is obliged to seek relief in equity. There no assistance will be given him by the court except upon terms of equity, namely: By consenting to pay the grantee of the annuity the arrears due with interest.

Tone v. *Brown*, 5 H. L. C. 578.

TIME OF PAYMENT FIXED BY TESTATOR.

Where the time of payment is fixed by the testator, the general rule is that the legacies will not carry interest before the arrival of the appointed time, as for instance, when the legatee shall attain 21, nor will it make any difference that the legacy is vested.

Varley v. *Winn*, 2 Kay & J. 700.

FUND SEVERED ON DEATH.

Where, however, a fund is severed immediately from the testator's death for the benefit of the objects of the gift, not only is the gift vested, but carries interest, though the only gift is in a direction to pay it at a future time.

Dundas v. *Wolfe Murray*, 1 Hemm. & M. 425.

INTEREST WHEN ALLOWED AS MAINTENANCE.

If the testator is the parent or in loco parentis of the legatee, whether the legacy be vested or contingent, if the legatee be not an adult, interest on the legacy is allowed as maintenance from the time of the death of the testator if there is no other provision for that purpose, the court will determine the quantum of allowance, where the legatee is the child of the testator, and the specific legacy is given by the will for main.enance, no greater allowance can be

claimed for that purpose, although it be less than the usual rate of interest upon the legacy.

Re George, 5 C. D. 857.

This exception is not extended in favor of nephews and nieces nor of grandchildren unless the testator was in loco parentis.

PAYMENT OF LEGACY POSTPONED.

Where the payment of a legacy is postponed by a testator to a future period, as until the legatee attains 21, and the will directs that when that period arrives the payment shall be made with interest, the legacy shall bear interest only from the end of the year of the testator's death.

Knight v. *Knight*, 2 Sim. & Stu. 792.

VESTED LEGACY TO INFANT.

Where a vested legacy, either particular or residuary, is given to an infant without appointing any time for payment, and it is subject to a limitation over upon a divesting contingency, which takes effect as where the legacy is given upon condition to divest it upon the death of the legatee under 21, and he dies under that age, yet as the legacy was payable at the end of the year after the testator's death, his executor or administrator and not the legatee over will be entitled to the interest which accrued on the legacy during the infant legatee's life.

Webb v. *Kelly*, 9 Sim. 469.

GIFT OF RESIDUE WHERE BEQUEST VESTS IMMEDIATELY.

Where there is a gift of a residue and the bequest is such as to vest immediately, but is not payable until the legatee shall attain 21, and there is a bequest over divesting the legacy in case he dies under that age, in that case also, although the legatee dies under 21, his personal representative is entitled to the interest which became due during the legatee's life.

Skey v. *Barnes*, 3 Meriv. 345.

CONTINGENT LEGACIES.

The rule is otherwise with respect to contingent legacies. So, where a particular legacy, though vested, is not payable till 21, and nothing is said in the will that shows the testator's intention to give interest in the meantime, in such case, if the legacy be divested by the death of the legatee before attaining 21, his personal representatives cannot claim the interest accruing until his death.

PARTICULAR LEGACY.

But where a particular legacy is given, even contingent upon the event of the legatee attaining 21, with interest in the meantime, and the legatee dies before that age, the arrears of interest

up to the time of his death will, it seems, belong to his personal representatives.

Errington v. *Chapman*, 12 Ves. 20.

INTEREST TO BE COMPUTED ON PRINCIPAL.

Interest upon legacies is to be computed on the principal only, and not upon the principal and interest. Under particular circumstances the court will allow the legatee compound interest, as where there is an express direction in the will that the executor should lay out the fund to accumulate and he neglects to do so.

Raphael v. *Boehm*, 11 Ves. 92.

LEGACY OUT OF SALE OF LANDS.

A testatrix by her will directed that a legacy should be paid out of the proceeds of the sale of lands and that the lands should be sold at any time within two years after her death.

Held, that interest upon the legacy should be allowed from the day when the two years expired; or, if the lands were sooner sold, from the date of sale.

Re Robinson, 22 O. R. 438.

As the land was directed to be sold within three years from the testator's death, the legacies bore interest from the date when the lands should have been sold.

McMylor v. *Lynch*, 24 O. R. 632.

ELECTION BY WIDOW, LIABILITY FOR INCOME.

Testator by his will left the income of his estate to his wife for life, and directed that after her death it should be disposed of as set out in a codicil not to be opened until after her death. By the codicil he disposed of all his estate among his children, giving to two of them, after the death of his wife, a certain property which in reality belonged to her. His widow, without proving the will, received all the income of the estate for five years, after the lapse of which the will and codicil were proved. She then elected against the will.

Held, that her election related back to, and she was liable to account from, the date of the testator's death; but, as she was not called upon to elect until this action was brought, she would not be charged with interest in the meantime.

Davis v. *Davis*, 27 O. R. 532.
Interest on Legacies.
Toomey v. *Tracey*, 4 O. R. 708.

(9) *In what currency legacies are to be paid.*

MUST BE IN MONEY OF COUNTRY OF DOMICILE.

Where legacies are given generally it will be presumed that the testator intended that they should be paid in the money of the

country in which he was domiciled, and the will was made without regard to the currency of the place where the legatees reside.

Yates v. *Madden*, 16 Sim. 613.

(10) *The payment or delivery of specific legacies.*

BEFORE WILLS ACT.

Before the Wills Act the general rule was that in order to confine a bequest to the date of the will the expressions must refer unequivocally to the property which the testator then had, otherwise they would not be allowed to have that effect. Thus, if the bequest were general, as if all the testator's goods in a particular house or place, whatever personal chattels were found there at the time of his death would pass though not there at the date of the will.

Beaufort v. *Dundonald*, 2 Vern. 739.

SINCE WILLS ACT.

By section 27 of the Wills Act, the will of every person who has died since the 31st December, 1868, or afterwards, is construed with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will.

ARTICLES SPECIFICALLY BEQUEATHED.

It is the duty of executors as far as possible to preserve articles specifically bequeathed according to the testator's wish, and unless compelled they ought not to apply them to the payment of debts. It is also the duty of executors to get in all the testator's estate, whether specifically bequeathed or otherwise and the expense incurred in so doing must be paid out of the general estate as part of the expense of the administration.

Clive v. *Clive*, Kay 600.

WHO HAS RIGHT OF SELECTION.

If a testator dying solvent bequeaths to A. a given number of articles forming part of a stock of articles of the same description, as, for instance, if he has twenty horses in his stable, and bequeaths six of them, the legatee and not the executor has the right of selection.

Tapley v. *Eagleton*, 12 C. D. 683.

UNOPENED PACKET.

If a testator directs his executor to deliver a specified packet, part of the property of the deceased, to a particular legatee, un-

opened, the executor cannot consistently with his duty comply with this direction.

Pelham v. *Newton*, 2 Cas. Temp. Lee.

(11) *Election.*

PRINCIPLE OF ELECTION.

It is a principle of equity that a person who accepts a benefit under an instrument must adopt the whole, giving full effect to its provisions, and renouncing every right inconsistent with it. If, therefore, a testator assumes to dispose of property belonging to A., and devises to A. other lands, or bequeaths to him a legacy by the same will, A. will not be permitted to keep his own estate and enjoy at the same time the fruits of the devise or the bequest made in his favour; but must elect whether he will part with his own estate and accept the provisions of the will, or continue in the enjoyment of his own property and reject that bequeathed.

Wollaston v. *King*, 8 L. R. Eq. 165.

TESTATOR ERRONEOUSLY ASSUMING TO OWN PROPERTY.

The testator need not be aware that the property of which he undertakes to dispose is not his own. The obligation will be equally imposed on the legatee, although the testator proceeded on an erroneous supposition that both the subjects of bequest were absolutely at his own disposal. The intention of the testator to dispose of property which is not his own should be clear, and must appear upon the face of the will for parol evidence of intention is inadmissible for the purpose of showing it.

Dillon v. *Parker*, Cl. & F. 303.

Where the provisions of a will are absolutely inconsistent with the widow's claims of dower, the widow must make her election.

TESTATOR MAKING TWO BEQUESTS TO SAME PERSON.

Where a testator makes two bequests to the same person, one of which happens to be onerous, and the other beneficial the legatee will not be allowed to reject one and retain the other. In such cases it is a question of the intention of the testator to be gathered from the will, whether the legatee must elect to take all or none of the gifts in the will, or whether he may accept the beneficial gift and repudiate that which is burdensome. The party bound to elect is entitled to first ascertain the value of the funds. An election under a misconception of the extent of claims on the fund elected is not conclusive.

Dillon v. *Parker*, 1 Swanst. 332.

(12) *Refunding legacies.*

REFUNDING LEGACIES.

Under certain circumstances legatees are bound to refund their legacies or a rateable part of them.

Whenever an executor pays a legacy the presumption is that he has sufficient to pay all legacies, and the court will oblige him, if solvent, to pay the rest, and not permit him to bring a bill to compel the legate whom he voluntarily paid to refund.

Orr v. *Kaimes*, 2 Ves. Sen. 194.

LEGACY PAID IN SUIT.

But where the payment of a legacy is under compulsion of a suit, he is entitled to compel the legatee to refund in case of a deficiency of assets.

Noel v. *Robinson*, 1 Vern. 94.

LEGATEES COMPELLED TO REFUND.

Again, if the executor pays away the assets in legacies, and afterwards debts appear of which he did not have previous notice and which he is obliged to discharge he may compel the legatees to refund.

Doe v. *Guy*, 3 East. 120.

UNSATISFIED CREDITOR MAY COMPEL LEGATEE TO REFUND.

Where the testator's funds at the time of his death are not sufficient to pay both debts and legacies, it is clear that an unsatisfied creditor can compel a satisfied legatee to refund, where the legacy was paid to him voluntarily or by compulsion. He has the same right, although the testator's funds at the time of his death were sufficient to pay both debts and legacies, and although the assets were handed over to the legatee by the personal representatives in ignorance of the creditor's demands.

Marsh v. *Russell*, 3 M. & Cr. 31.

NOT SO IF ASSETS ORIGINALLY SUFFICIENT.

If the assets were originally sufficient to satisfy all the legacies, and afterwards by the wasting of the executor there is a deficiency, an unsatisfied legatee cannot oblige a satisfied one to refund whether the legacies were paid him with or without suit; but if the assets were not originally sufficient to pay all the legatees, and one legatee receives his legacy in full, in that case the unsatisfied legatees may compel the one so paid to refund. In no case where the executor is solvent can an unsatisfied legatee maintain a suit against another who has been satisfied, because the remedy is in the first place against the executor who by paying the one legacy has admitted assets to pay all.

Orr v. *Kaimes*, 2 Ves. Sen. 194.

INTEREST NOT CHARGED.

If a legacy has been erroneously paid to a legatee who has no further property in the estate, in recalling that payment the rule of the court is not to charge interest. But, if the legatee is entitled to another fund making interest in the hands of the court, justice must be done out of his share.

Jervis v. *Wolferstan*, L. R. 18 Eq. 18.

(13) *Charitable Bequests.*

SUPERSTITIOUS USES.

All bequests to superstitious uses are illegal and void, but bequests to charitable uses are not only legal and valid, but are in some measure favoured by our law.

Wms. p. 802.

LEGACY TO SUPERSTITIOUS USES.

A legacy to a superstitious use is explained in Elmsley v. Madden, 18 Chy. 386, as a legacy which is intended to promote some doctrine contrary to law. Such a legacy is void. The statute which originally prohibited this species of legacy was 1 Edw. VI. c. 14, but in the case cited of Elmsley v. Madden, that statute was declared inapplicable to this province. In that case a bequest by a member of the Roman Catholic Church of a sum of money for the purpose of paying for masses for his soul was upheld. In England as late as 1880 such a bequest was held void. (Re Fleetwood, 15 Ch. D. 596). An Ontario instance of a bequest being held void on the ground of its being subversive of Christianity is furnished by the case of Kinsey v. Kinsey, 26 O. R. 99, where a bequest for the promotion of free thought and free speech in the Province of Ontario was set aside.

As to wills of testators dying before the 14th day of April, 1892, the Statute of Mortmain (9 Geo. II. ch. 36), applied. As to wills of testators dying on and after the 14th day of April, 1892, the Act consolidated as ch. 112 of the Revised Statutes of 1897 applied.

That Act was considered in the case of Manning v. Robinson, 29 O. R. 485, and it was there pointed out that section 8 was not in any of the Imperial Acts, even in 54 & 55 Vict. c. 73, on which our own Act was based.

Section 8 is as follows:—

8. Money charged or secured on land or other personal estate arising from or connected with land, shall not be deemed to be subject to the provisions of the Statutes known as the Statutes of Mortmain or of Charitable Uses as respects the will of a person dying on or after the 14th day of April, 1892, or as respects any other grant or gift made after the said date. 55 V. c. 20, s. 8.

This section 8 is not continued in legislation subsequent to 1897.

In 1902 a further Mortmain Act was passed, which was founded on the Imperial Acts 51-52 Vict. c. 42, s. 10; and 54-55 Vict. c. 73, s. 3.

The Revised Statute of 1897 and the Act of 1902 were consolidated in 1909 as chapter 58. This last consolidation is repeated in the consolidation of 1914, as chapter 103.

In view of the fact that the original Mortmain Act has not been in force in Ontario since 1902, it is not thought necessary to recite it. The present law is as follows:—

FORFEITURE ON UNLAWFUL ASSURANCES OF ACQUISITION IN MORTMAIN.

Land shall not be assured to or for the benefit of, or acquired by or on behalf of any corporation in mortmain, otherwise than under the authority of a license from His Majesty the King, or of a statute for the time being in force, and if any land is so assured, otherwise than aforesaid, the land shall be forfeited to His Majesty from the date of the assurance, and His Majesty may enter on and hold the land accordingly. R. S. O. 1914, c. 103, s. 3.

IMP ACT, 51-52 VICT. c. 42, s. 1.

SAVING FOR RENTS AND SERVICES, IMP. ACT, 51-52 VICT. c. 42, s. 3.

No entry or holding by, or forfeiture to, His Majesty shall merge or extinguish, or otherwise affect, any rent or service which may be due in respect of any land to His Majesty.

R. S. O. 1914 c. 103, s. 5.

The Lieutenant-Governor may grant licenses in mortmain.

R. S. O. 1914 c. 103, s. 4.

Assurances to or for the benefit of charitable uses are allowed for the purposes declared by the Act to be legal and under the restrictions therein set out, but not otherwise.

IMP. ACT, 51-52 VICT. c. 42, s. 13 (2).

(1) These "charitable uses" were defined formerly by Statute 43 Eliz. c. 4, viz., the right of aged, impotent, and poor people, the maintenance of sick and maimed soldiers and mariners, the maintenance of schools of learning, free schools and scholars in universities, the repair of bridges, ports, havens, causeways, churches, sea banks, and highways, the education and preferment of orphans, the relief, stock or maintenance of houses of correction, provision for the marriages of poor maids, the support, trade and help of young tradesmen, handicraftsmen and persons in poor circumstances; the relief or redemption of prisoners or

captives, and the aid or ease of any poor inhabitants; concerning payment of taxes, and any other purposes similar to those hereinbefore mentioned.

Under the Revised Statute of 1914, charitable uses are defined as follows:—

(a) The relief of poverty;

(b) Education;

(c) The advancement of religion; and

(d) Any purpose beneficial to the community not falling under the foregoing heads.

R. S. O. 1914 c. 103, s. 2 (2).

The conditions under which assurances may be made to charitable uses are as follows:—

The assurance must be made to take effect in possession for the charitable uses to or for the benefit of which it is made immediately from the making thereof.

The assurance must be without any power of revocation, reservation, condition or provision, for the benefit of the assurer, or any person claiming under him.

The assurance must be made at least six months before the death of the assuror, and if of stock in the public funds, by transfer thereof in the public books kept for the transfer of stock, at least six months before such death.

Provided that the assurance, or any instrument forming part of the same transaction may contain all or any of the following provisions so, however, that they reserve the same benefits to persons claiming under the assuror, as to the assuror himself; namely:

(i.) The grant or reservation of a peppercorn, or other nominal rent.

(ii.) The grant or reservation of mines or minerals.

(iii.) The grant or reservation of any easement.

(iv.) Covenants or provisions as to the erection, repair, position or description, of buildings, the formation or repair of streets or roads, or as to drainage, or nuisances, and covenants or provisions of the like nature for the use and enjoyment, as well of the land comprised in the assurance as of any other adjacent or neighbouring land.

(v.) A right of entry on non-payment of any such rent, or on breach of any such covenant or provision.

(vi.) Any stipulation of the like nature, for the benefit of the assurer, or of any person claiming under him.

R. S. O. 1914 c. 103 s. 6.

CONSIDERATION, WHAT IT MAY CONSIST OF.

If the assurance is made in good faith on a sale for full and valuable consideration, that consideration may consist wholly or partly of a rent, rent charge, or other annual payment, reserved or made payable to the vendor, or any other person, with or without a right of re-entry for non-payment thereof.

R. S. O. 1914 c. 103, s. 2 (1) *d.*

The sections of the Revised Statutes of 1914, ch. 103, sec. 3, prohibiting mortmain, and 6 lastly recited, are declared by section 9 of the Act not to apply to the following assurances:—

(a) Assurance to or in trust for any incorporated university, college or school in Ontario, or for the support and maintenance of students thereat.

(b) An assurance otherwise than by will in trust for any society incorporated or unincorporated, associated for religious purposes, or for the promotion of education, art, literature, science, or other like purposes of land not exceeding two acres for the building for such purposes, or on which a building for such purposes has been erected (Imp. 51 & 52 V. c. 42, s. 7).

VOLUNTARY ASSURANCES.

Exemptions from the restrictions imposed by the Act are allowed in favour of: (1) Parks, (2) Public Museums, (3) Public Library, (4) Schools or School Houses, but in the last case the land if not required for actual school use, must be sold in two years.

LAND DEVISED BY WILL.

Land may be devised by will for charitable uses, but must be sold within 2 years from the death of the testator subject to the powers of the Supreme Court to extend the time. If not extended the land vests in the Accountant of the Supreme Court to be sold.

R. S. O. 1914 c. 103, s. 10.

Section 11 of R. S. O. 1914, c. 103, is as follows:—

11. Any personal estate by will directed to be laid out in the purchase of land to or for the benefit of any charitable use, shall, except as hereinafter provided, be held to or for the benefit of the charitable use as though there had been no direction to lay it out in the purchase of land.

R. S. O. 1914 c. 103, s. 11.

The result is that personalty which is an interest in land is no more under the restrictions of mortmain law than pure personalty. Every kind of personal property may be bequeathed for charitable objects.

The other principal clauses of the Revised Statute are as follows:—

The whole of the Revised Statute is printed as an appendix. It will suffice here to point out that by section 10, when land remains unsold after the expiration of two years an application may be made to the High Court to compel sale.

DISCRETION TO TRUSTEES.

The testator gave the trustees of his will a discretion as to how the fund was to be used for the advancement of the cause he had in view, and where that is the case, the authorities show it a reason for not directing a scheme.

Appropriation of Specific Assets.—Executors or trustees have power to appropriate specific assets to answer settled shares of residue, though the interests of infants are concerned. *Lepine, In re; Dowsett* v. *Culver*, 61 L. J. Ch. 153; (1892) 1 Ch. 210, and *Richardson, In re; Morgan* v. *Richardson*, 65 L. J. Ch. 512; (1896) 1 Ch. 512, applied and extended. *Nickels, In re; Nickels* v. *Nickels*, 67 L. J. Ch. 406; (1898) 1 Ch. 630; 78 L. T. 379; 46 W. R. 422.

The principle upon which the rule proceeds, that under a will containing a trust for sale and conversion executors and trustees are entitled to appropriate specific assets to answer shares of residue, is that it must be competent for executors and trustees to agree with the beneficiary that they will sell the particular assets to the beneficiary and set off the amount against the money which they would otherwise have to pay to him, and that it is not necessary for them to go through the form of first converting the assets and then handing over to the beneficiary the money which the beneficiary may be desirous of immediately re-investing in the very assets which had just been sold. The doctrine, therefore, of appropriation is not confined to pure personal estate, but extends to chattels real and also to real estate which is subject to a trust for sale and conversion. *Beverley, In re; Watson* v. *Watson*, 70 L. J. Ch. 295; (1901) 1 Ch. 681; 84 L. T. 296; 49 W. R. 343.

Although section 4, subsection 1 of the Land Transfer Act, 1897, applies as well to personal as to real estate, it has not taken away from executors and trustees the power of appropriation which existed before the Act, at all events in cases where there is a trust for asle and conversion. *Beverley, In re; Watson* v. *Watson*, 70 L. J. Ch. 295; (1901) 1 Ch. 681; 84 L. T. 296; 49 W. R. 343.

Legacy Payable at Twenty-one. — The intention that a legacy should carry interest, which is presumed where a testator merely gives a future legacy with a power to the executors to maintain the legatee out of the legacy, cannot be presumed in a case where a testator in addition to such a future legacy makes provision for the maintenance of the legatee out of some other fund. *West, In re; Westhead* v. *Aspland*, 82 L. J. Ch. 488; (1913) 2 Ch. 345; 109 L. T. 39.

Pett v. *Fellows* (1 Swanst. 561n.), *Leslie* v. *Leslie* (Ll. & G. 1), and *Churchill, In re; Hiscock* v. *Lodder* (79 L. J. Ch. 10; (1909) 2 Ch. 431), distinguished. Ib.

Bequest between Brother, his Wife and their Daughter—Latent Ambiguity.—A testatrix left her residuary estate to be divided "between my brother, his wife and their daughter." There were five daughters. Evidence was admitted that the testatrix was intimate with only one of the daughters, and that in a revoked will she had left her half her residuary estate:—Held, that the residue must be divided in three equal shares between the brother, his wife and their daughter. *Jeffery, In re; Nussey* v. *Jeffery*, 58 S. J. 120.

Gift to "Children," Illegitimate Children Excluded.—*Held*, that only the two legitimate children of F. by his wife could take under the gift. *Brown, In re; Penrose* v. *Manning* (63 L. T. 159), followed. *Du Bochet, In re; Mansell* v. *Allen* (70 L. J. Ch. 647; (1901) 2 Ch. 441), not followed. *Pearce, In re; Alliance Assurance Co.* v. *Francis* (1913), 2 Ch. 674; 109 L. T. 514.

Executory Devise over on a Contingency—Restricted to Time Prior to Period of Distribution.—In a will, where there is a period of distribution, a gift over on death means death before the period of distribution. *Kerr's Estate, In re* (1913), 1 Ir. R. 214.

Demonstrative Legacy. — A demonstrative legacy directed to be paid out of a reversionary fund affords no exception to the general rule stated by Lord Cairns in *Lord* v. *Lord*, 36 L. J. Ch. 533, 538; L. R. 2 Ch. 782, 789, that where no time for payment is fixed a legacy is payable at and bears interest from the end of a year after the testator's death. *Walford* v. *Walford*, 81 L. J. Ch. 828; (1912) A. C. 658; 107 L. T. 657; 56 S. J. 631.

Contingent Legacy without Interest.—Where a contingent legacy is given by a will, but interest is not given in the meantime, the executor is not entitled to invest the amount of the legacy and appropriate the investment to it in such a way that the legatee would receive any profit or bear any loss arising from the investment before the happening of the contingency. He can set apart and invest a reasonable sum to secure payment of the legacy if it should become payable, but the investment and the income thereof will, until the contingency happens, remain part of the estate of the testator. *Hall, In re; Foster* v. *Metcalfe*, 72 L. J. Ch. 554; (1903) 2 Ch. 226; 88 L. T. 619; 51 W. R. 529.

Funds Set Apart to Answer Annuity.—Where residue is bequeathed on trust to pay an annuity to A, and after the decease of A to pay the corpus to B, the court has jurisdiction to order, in spite of opposition by A, that a fund shall be set apart to answer the annuity, and the balance be paid over to B. *Harbin* v. *Masterman*, 65 L. J. Ch. 195; (1896) 1 Ch. 351.

"**Purchaser.**"—Where a tetsator's residuary estate comprises leaseholds of so onerous a nature that they can only be assigned on the executors paying the assignees a sum of money to accept the assignments, such assignees are not "purchasers" within the meaning of section 27 of the Law of Property Amendment Act, 1859, and consequently the executors ought to set apart out of the residuary estate a sufficient sum to meet future liabilities in respect of the rents reserved by and the covenants contained in the leases. *Lawley, In re; Jackson* v. *Leighton*, 81 L. J. Ch. 97; (1911) 2 Ch. 530; 105 L. T. 571; 56 S. J. 13.

Possession.—Where a will, which was treated by the parties as devising the testator's farm to his executors, gave his widow all the rents, issues, and profits thereof, after deducting all the necessary expenses thereout to be paid by his executors . . . to his widow by half-yearly payments during the residue of her natural life, but devised the dwelling house on the farm to herself directly and not to the trustees; gave them power to lease and keep under lease the farm with the exception of the dwelling house; directed them to sell the stock, crops, and farming implements, and to permit the widow to take firewood from the bush part of the farm for the use of the dwelling house; it was held that the widow was not entitled to the personal possession of the farm. *Whiteside* v. *Miller*, 14 Chy. 393.

The rule is that when property is devised in trust to pay the rents and profits to the cestui que trust, the cestui que trust is entitled to the possession. *Whiteside* v. *Miller*, 14 Chy. 393.

This rule applies though there are charges on the property; proper terms being in that case imposed by the court as the condition of giving possession. But the court will not give possession to the cestui que trust

where it sees that doing so would do violence to the intention of the testator. *Whiteside* v. *Miller*, 14 Chy. 393.

Legacies—Abatement.—A testator by certain clauses of his will devised and bequeathed property to some of his children, adding to each of these clauses a statement of the value of the property mentioned in the clause.—By another clause he devised certain land to his daughter Margaret, subject to a payment of a legacy of $200 to her daughter. He did not add to this clause a statement of the value of the land.—The will provided that in case of deficiency in the estate each legatee should be liable to abatement, but that in the event of a surplus, "the same shall be divided equally between each." There was a residue. Held, that the stated valuations were not intended to be the basis for abatement and that Margaret and her daughter were entitled to participate in the surplus, the devisees and legatees taking share and share alike. *Patterson* v. *Hueston*, 40 N. S. R. 4.

Discretionary Trust for Benefit of Person for Life—"Accumulation" of Surplus Rents—Devolution—Income or Capital of Residuary Estate.—To direct the accruing income of a fund to be invested and the income of the investment to be paid to a tenant for life is not to direct an accumulation. *Crawley* v. *Crawley* (4 L. J. Ch. 265); 7 Sim. 427) and *O'Neill* v. *Lucas* (2 Keen, 313) followed. *Phillips, In re; Phillips* v. *Levy* (49 L. J. Ch. 198), commented on and not followed. Ib. *Pope, In re; Sharp* v. *Marshall*, 70 L. J. Ch. 26; (1901) 1 Ch. 64; 49 W. R. 122.

Appropriation—Contingent Legacy without Interest. — *Hall, In re, Foster* v. *Metcalfe*, 72 L. J. Ch. 554; (1903) 2 Ch. 226; 88 L. T. 619; 51 W. R. 529.

Specific Gift.—From whichever point of view this bequest is looked at, it fails. The gift is of a specific nature—the interest on certain payments. It is not a gift of money charged upon or to be paid out of any particular property. The thing itself is given with particular interest. *Hefferman* v. *McNab*, 1 O. W. R. 165.

Ascertainment of Sum to be Set Apart.—P. having an estate estimated at 60,000 pounds by will provided that after payment of the debts and certain pecuniary legacies, a sum sufficient to secure an annuity of 500 pounds during her life should be invested for the use of his widow; that 5,000 pounds should be invested for each of his four daughters; and that the residuary estate should be divided equally among testator's three sons, J., P., and W., when W., the youngest, should attain majority. And in case the value of the estate should not prove sufficient after providing for the annuity and the daughters' portions, to produce 7,000 pounds for each of the sons, then a rateable reduction should be made from the share of each child. He also directed that after the decease of his wife the sum set apart for securing her annuity should be equally divided among his children. He provided that in case his sons desired to continue his business his executors should afford them facilities therefor, and should sell to them at a fair valuation the store and stock-in-trade. Stock was being taken at the time of his death, and the goods in hand were, in accordance with his custom, valued by adding 75 per cent. to their sterling price, at 13,990 pounds. The sons J. and P. having agreed to continue the business, were charged in the books with that sum. The estate proved to be of only one-half the value at which it was estimated at testator's death, so that there was insufficient, without taking into account the value of the stock, to realize the widow's annuity and the portions for the daughters. The valuation of the stock was proved to be about twice its actual value, and no actual consent had been given by J. and P. to be charged with it at its estimated value:—Held, that there had been no absolute sale of the stock to them and that they were only chargeable with it at its actual value; that the sum required to be set apart to raise the annuity for the widow, who had died, and which should be divided among all the children, and not go to the sons as part of the residuary estate, was such a sum as, being invested at six per cent. per

annum, the legal rate at the time of testator's death, would produce 500 pounds per annum. *Paterson* v. *McMaster*, 11 Chy. 337.

Will—Construction.—Testator by his will conveyed property to trustees upon trust to pay to his daughter an annuity of $1,000 during her life and on her death to invest the securities set apart to pay said annuity and to divide such investment among his daughter's children on the youngest coming of age. The will then provided that should the daughter be alive on her youngest child coming of age, the daughter, if she would see fit, might have and receive from the trustees the fund set apart to yield said annuity and the same should be absolutely assigned to her free from all control of her husband. The youngest child came of age in the lifetime of the daughter, who died without making a request to have the fund transferred to her:—Held, that there was an absolute trust in favour of the children, which would not have been defeated had the request been made. *In re Fisher Trusts* (1907), 3 N. B. Eq. 536.

Land Charged with Performance of Obligation. — Section 33 of the Act to amend the law of Property and Trusts 29 Vict. c. 28, which enacts that when any person, after 31st December, 1865, dies seised of land charged with the payment of any sum of money by way of mortgage, the heir or devisee shall not be entitled to have the mortgage debt discharged out of the personal estate:—Held, not to apply to cases where the land is charged with the performance of an obligation other than the payment of money. In a case such as suggested where the statute was held not to apply, it was considered no bar to the chargee's right to be paid out of the personal estate of the intestate, that he was himself also heir-at-law of the intestate. *Slater* v. *Slater*, 3 Ch. Ch. 1.

Advance to Tenant for Life.—Trustees having power with the consent of the tenant for life to lend upon personal credit without security can lend trust money on the personal credit of the tenant for life, provided the tenant for life is a person to whom such advance might otherwise be prudently made. The contrary statement of law in Lewin on Trusts (10th ed.) 335 disapproved. *Keays* v. *Lane*, Ir. R. 3 Eq. 1, discussed. *Laing's Settlement, In re; Laing* v. *Radcliffe*, 68 L. J. Ch. 230; (1899) 1 Ch. 593; 80 L. T. 228; 47 W. R. 311.

Tenant for Life, Liability of.—The tenant for life is only liable to keep leasehold properties in such a state of repair as they were in when he became tenant for life on the death of the settlor, and accordingly the trustees of the property should, at the date of the death of the settlor, do all repairs necessary to put the property in a proper state of repair, to satisfy the covenants in the leases, and pay the same out of the corpus of the estate. Repairs to freeholds must be borne by the corpus. *Sutton, In re; Sutton* v. *Sutton*, 56 S. J. 650.

Equitable Tenant for Life.—In the case of mere legal estates or of equitable estates (where the trustee takes a bare legal estate only without powers of management) the court will not sanction expenditure out of capital on the application of the tenant for life, unless the expenditure is such as is authorized to be made out of the capital moneys by the provisions of the Settled Land Acts. The rule in *De Teissier, In re; De Teissier* v. *De Teissier*, 62 L. J. Ch. 552; (1893) 1 Ch. 153, approved and followed. *Willis, In re; Willis* v. *Willis*, 71 L. J. Ch. 73; (1902) 1 Ch. 15; 85 L. T. 436; 50 W. R. 70.

LEGACIES.

Legacies—Overpayment of Legatees under Judgment—Mistake—Repayment—Interest.—A testator by his will gave to two trustees his estate, real and personal, and directed the trustees to pay: (1) to a sister a legacy of $500, in case of her death to her daughter, and in case of the death of her daughter to the daughter's children in equal shares; (2) to a niece a legacy of $500; (3) to the children of another niece a

legacy of $500; and (4) to a charitable institution a legacy of $500; with a direction that, should there not be sufficient to pay all the legacies, there should be a proportionate abatement; and then directed that should there be any residue after payment of the legacies it should be divided and paid "to and among my legatees hereinbefore named and referred to and my said trustees or the survivor of them in even and equal shares and proportions:"—*Held*, that the children of the niece, who were five in number, were entitled between them to one-fifth of the residue and not to one-ninth each. Proceedings were taken in the year 1882 for the administration of the estate, and, without, as was held in the previous judgment of this Court, 27 A. R. 242, proper proceedings being taken, it was assumed that there were no children of the niece, and the amount of their legacy and their share in the residue was divided among the charitable institution, the trustees and one of the other legatees:—Held, that the trustees and the charitable institution were bound to repay the excess which they had received; *per curiam*, with interest from the date of proceedings taken by the children of the niece; and per Maclennan, J.A., dissenting, with interest from the date of distribution under the report in the administration proceedings. *Uffner* v. *Lewis* (*No. 2*). *Boys' Home* v. *Lewis* (*No. 2*), 23 C. L. T. 217, 5 O. L. R. 684, 2 O. W. R. 441.

Legatees entitled to a share of the residue of an estate are not bound by the accounts and proceedings in an administration action instituted by other residuary legatees in which they have not been added as parties, and of which they have received no notice. The judgment in such an action, however, enures to their benefit, and makes a fresh starting point in their favour as against the defence of the Statute of Limitations.

In the absence of reasonable efforts by the executors of an estate to discover the whereabouts of persons entitled to share in the residue, they are not protected if they, even under the order and direction of the court, distribute the residue among the other persons entitled.

Will—Legacy—Acceptance of.—*Reese* v. *Engelbach*, L. R. 12 Eq. 225; *Gregg* v. *Coates*, 23 Beav. 33; *In re Williams, Andrew* v. *Williams*, 52 L. T. N. S. 41; *Attorney-General* v. *Christ's Hospital*, 1 R. & M. 626; *In re Skingley*, 3 Macn. & G. 229; *Messenger* v. *Andrews*, 4 Russ. 478. As stated by Vice-Chancellor Bacon in the first-mentioned case at p. 237: "Upon the authority of the case of *Messenger* v. *Andrews*, and, even without the authority of that case, upon very plain principles of justice and law, the defendant, who admits that he has enjoyed the benefits given to him by a will upon the conditions expressed in it, under a personal liability, which can be enforced in this court, of fulfilling those conditions." *Gillespie* v. *Gillespie*, 8 W. L. R. 725.

Bequests to Grandchildren.—Upon the facts as set out, I am of opinion that the gifts to the grandchildren must be confined to those living at the time of the death of the testator. (*In re Wenmoth's Estate*, 37 Ch. D. 266, distinguished). There is in the present case an immediate gift of personal estate to the grandchildren of the testator. I follow in *Re Powell* (1898), 1 Ch. 227. *In re Stephens* (1904), 1 Ch. 322, distinguished. It appears to me that these are distinct legacies, and so the class is to be ascertained at the death of the testator. Reference to *Ringrose* v. *Bremboar*, 2 Cox. Eq. 384; *Hughes* v *Hughes*, 3 Bro. C. C. 434; *Pilkington* v. *Pilkington*, Ir. R. 29 Ch. 370; *Walker* v. *Shore*, 15 Ves. Jr. 122; Jarman on Wills, p. 1018; Theobald on Wills, 6th ed., p. 302; *Storrs* v. *Benbow*, 3 DeG. M. & G. 390. *Re Moffatt*, 11 O. W. R. 485.

Legacy to "Wife"—Person Designated as Wife not Married to Testator.—A testator bequeathed a legacy to his "wife": Held, that the woman with whom the testator had lived, but to whom he had not been married, was entitled to the legacy. *Brown, In re; Golding* v. *Brady*, 54 S. J. 251; 26 T. L. R. 257.

Gift of Income to Daughter until She Should Marry—Gift over of Residue on Marriage—Death Unmarried—Absolute Interest or Determinable Life Interest.—A testatrix by her will gave all her residuary estate to trustees upon trust to pay the income of the

trust premises to her daughter until she should marry, and after her marriage to pay to her a legacy of £3,000 thereout, and then to divide the balance equally between the testatrix's sons surviving the testatrix. The daughter died without having been married:—Held, that there was no indefinite gift of income to the daughter, and that therefore she did not take an absolute interest in the residue, but took only during her life or until her marriage, and that consequently the gift over took effect on her death. *Rishton* v. *Cobb* (9 L. J. Ch. 110; 5 Myl. & Cr. 145) distinguished. *Jones* v. *Westcomb* (1 Eq. Ca. Abr. 245) applied. *Mason, In re; Mason* v. *Mason*, 79 L. J. Ch. 605; (1910), 1 Ch. 695; 102 L. T. 514; 54 S. J. 425.

The testator bequeathed to Hannah Wright for her separate use a mortgage held by the testator against property of her husband, and all moneys secured thereby and unpaid at the testator's death:—Held, that she was a legatee, and as such entitled also to share in the residue. *Edwards* v. *Smith*, 25 Chy. 159.

The testator directed his executors "to cancel all claims I may have at the time of my death against my nephew H. T., and to cancel all promissory notes I may have against my nephew, J. T.; and to cancel all claims I may have against A. H.; and such cancelling shall in no way be construed as satisfaction or part satisfaction of any legacies herein given:"—Held, that this constituted these three persons legatees, and as such they were entitled also to share in the residue. *Edwards* v. *Smith*, 25 Chy. 159.

W. S. and J. S. were entitled to the interest of purchase-money invested on the sale of land:—Held, that they were thus annuitants, that as such they fell within the definition of legatees, and, therefore, were also entitled to share in the residue. *Edwards* v. *Smith*, 25 Chy. 159.

The devisee of real estate is not a legatee, and therefore where such a one claimed a share in such residue, the court refused him his costs. *Edwards* v. *Smith*, 25 Chy. 159.

Right of Legatees to Immediate Payment—Application of Rule to Charities.—The rule which, after having been adumbrated in several cases, as, e.g., by Sir Lancelot Shadwell, V.-C., in *Josselyn* v. *Josselyn*, 9 Sim. 63. was laid down clearly by Lord Langdale, M.R., in *Saunders* v. *Vautier*, 14 Beav. 115, is as follows: "Where a legacy is directed to accumulate for a certain period, or where the payment is postponed, the legatee, if he has an absolute indefeasible interest in the legacy is not bound to wait until the expiration of that period, but may require payment the moment he is competent to give a valid discharge." See also *Gosling* v. *Gosling*, Johns. 265, per Wood, V.-C. (Lord Hatherley). The rule was applicable to charities: *Harbin* v. *Masterman* (1894), 2 Ch. 184, pp. 187-193, inclusive; and in that opinion the Court of Appeal and subsequently the House of Lords agreed: *Harbin* v. *Masterman* (1894), 2 Ch. 184, pp. 195-200; *Wharton v. Masterman*, (1895), A. C. 186. *Re Youart*, 10 O. W. R. 376.

Where two legacies were payable at the expiration of a year after the testator's death, and another legacy would not be payable for twelve years, and did not bear interest in the meantime, and the executor paid the legacies immediately payable—sufficient property to all appearance remaining to meet the future legacy—and let the residuary legatee into the enjoyment of the residue, on his undertaking to pay the legacy when it became due out of the assets, and subsequently, with the assent of the executor, a portion of a personal residue was appropriated to the satisfaction of a devise of land worth a certain sum, or its proceeds:—Held, that the executor had not so admitted assets as to warrant a personal decree against him at once. *Coleman* v. *Whitehead*, 3 Chy. 227.

Partial Revocation—Legacy to A as Executor and Trustee.—A testator by his will appointed A one of his executors and trustees, and gave him, if he should prove the will, and in addition to any other sum to which he might be entitled under the will, a legacy of £1,000. After bequeathing certain pecuniary legacies he gave one-third of his residuary estate to A. The testator made a codicil by which, after reciting the appointment of A as executor and the legacy of £1,000, he revoked such appointment and also the legacy, and appointed B executor in place of A,

and gave him a legacy of £200 for his trouble in acting as executor, and he declared that his will should be construed and take effect as if the name of B were inserted in his will "throughout" instead of the name of A:—Held, that the declaration did not amount to an implied revocation of the gift of one-third of the residue to A, but was simply incidental to and consequential upon and involved in the carrying out of the testator's intention of substituting B for A, and that, therefore, A was entitled to the one-third of the residue. *Freeman, In re; Hope* v. *Freeman*, 79 L. J. Ch. 678; (1910), 1 Ch. 681; 102 L. T. 516; 54 S. J. 443.

Payment of Income of Estate to Children and Grandchildren.—A direction in the will of a testator to pay income to his named children during their lives, or, in the event of the death of any of them leaving issue, then to pay the parent's share to such issue in equal shares per stirpes, is not void for remoteness under the rule against perpetuities, because all the persons to whom income is directed to be paid must be ascertained and the interests conferred upon them become vested within twenty-one years from the expiration of the lives in being.—For the same reason, a direction, in the event of any child dying without issue leaving a husband or wife in needy circumstances, to pay a proportion of the income to such needy husband or wife, does not offend against that rule.—*Hale* v. *Hale*, 5 Ch. D. 643, *Pearks* v. *Moseley*, 5 App. Cas. 714, and *Seaman* v. *Wood*, 22 Beav. 591, distinguished, because the wills in those cases contained provisions postponing the vesting of the interests conferred to a period which might be beyond the period allowed by the rule.—A future interest created by a will is not obnoxious to the rule, if it begins or becomes vested within the proper period, although it may end beyond it: Jarman on Wills, pp. 301, 348; *Gooch* v. *Gooch*, 14 Beav. 565, 3 DeG. M. & G. 266; and *Stuart* v. *Cockerell*, L. R. 7 Eq. 363, L. R. 5 Ch. 713. *Re Crichton Estate* (1913), 25 W. L. R. 18.

Defined Payment—Executor—Mortgagee—Change of Circumstances.—Held that the provision giving the executors the option of deferring payment of the legacies during his lifetime was made in his case as mortgagor and this relation no longer existing and he having now no interest in deferring the payment of the legacies plaintiff had become entitled to them. *Re Boyd, Boyd* v. *Boyd*, 2 O. W. R. 1056.

"Household Furniture and Effects" — Whether Including Jewellery, Horses and Carriages.—*Hammersley, In re; Heasman* v. *Hammersley*, 81 L. T. 150.

Abatement—Legacy in Satisfaction of Debt—Forgiveness of Debt—Specific Legacy.—*Wedmore, In re; Wedmore* v. *Wedmore*, 76 L. J. Ch. 486; (1907) 2 Ch. 277; 97 L. T. 26; 23 T. L. R. 547.

"Surviving."—*Inderwick* v. *Tatchell*, 72 L. J. Ch. 393; (1903), A. C. 120; 88 L. T. 399.

Gift to Person by Wrong Name. — *Ratcliffe, In re; Young* v. *Beale*, 51 W. R. 409.

Gift of "Carriages"—Motor Car.—*Denholm's Trustees* v. *Denholm* (1908), S. C. 43.

To Servants—"One Year's Wages."—*Ravensworth, In re; Ravensworth* v. *Tindale*, 74 L. J. Ch. 353; (1905) 2 Ch. 1; 92 L. T. 490; 21 T. L. R. 357.

Gifts of Sums Exceeding £100 Each — Gift by Subsequent Codicil of £50 Additional "so that Each Received £100." — *Segelcke, In re; Ziegler* v. *Nicol*, 75 L. J. Ch. 494; (1906) 2 Ch. 301; 54 W. R. 624; 95 L. T. 708.

To Attesting Witness — Codicil. — *Trotter, In re; Trotter* v. *Trotter*, 68 L. J. Ch. 363; (1899) 1 Ch. 764; 80 L. T. 647; 47 W. R. 477.

Specific Legacy — Upkeep between Death of Testator and Assent by Executor—Liability of Legatee.—The cost of the upkeep of a specific legacy incurred between the death of the testator and the assent of the executor must be borne by the specific legatee and not by the general residuary estate. *Pearce, In re; Crutchley* v. *Wells*, 78 L. J. Ch. 484; (1909) 1 Ch. 819; 100 L. T. 699; 53 S. J. 419; 25 T. L. R. 497.

Suicide of Husband and Wife—Survivorship. — Where the bodies of a husband and wife were found in a river tied together in such circumstances that a verdict of suicide was returned at the coroner's inquest, the court gave leave to swear the death of the wife on or since the day she was last seen, and that there was no reason to believe that her husband had survived her. *Good, In the goods of*, 24 T. L. R. 493.

Admission of Assets.—Payment of a legacy in full is a prima facie admission of assets to pay all the legacies in full, because, if the assets are not sufficient for this purpose, all the legacies must abate in proportion; but it is open to explanation. *Coleman* v. *Whitehead*, 3 Chy. 227.

When an executor pays some legacies, and makes provision for the others, he has not conclusively admitted assets, because the provision which was made for the unpaid legacies must abate in proportion, but it is open to explanation. *Coleman* v. *Whitehead*, 3 Chy. 227.

Contingent Legacy—Date from which Interest Payable on.—R. W., by his will dated June 11, 1906, directed his trustees to pay the income of his residuary estate to J. for life, and after J.'s death he directed his trustees to convert such estate into money, and out of the proceeds to pay the sum of £1,000 to M. and to pay one moiety of the remainder of the proceeds to M. and the other moiety to S. The testator died on January 29, 1908; J. died February 26, 1908:—Held, that M. was entitled to interest on her legacy of £1,000 as from the death of J. *White, In re; White* v. *Shenton*, 101, L. T. 780.

CORROBORATION.

Claim against Estate of Deceased Person.—Although there is no corroboration, effect may be given to a claim against the estate of a deceased person if the uncorroborated testimony of the claimant is completely convincing. Where a transfer of property has been taken in the name of a third person for the purpose of effecting an immoral or illegal purpose, the court will not lend any assistance to the actual purchaser in recovering from the transferee the evidences of ownership, at least when the illegal or immoral purpose has been carried out. *Bakewell* v. *Mackenzie*, 1 W. L. R. 68, 6 Terr. L. R. 257.

SATISFACTION.

The rule applicable is thus stated in Roper on Legacies, p. 200: "If a testator direct his freehold or leasehold estate to be sold, and disposes of the proceeds in such a form as to evince an intention to bequeath them specifically, the testamentary dispositions will be specific, the money is sufficiently identified and severed from his other property, and, since he has sufficiently marked his intent to distribute the identical proceeds, the bequests are accompanied with all the requisites of specific legacies.

In re Ovey, Broadbent v. *Barrow*, 20 Ch. D. 676, the Court of Appeal had to consider what is necessary to constitute a specific legacy. Without attempting to give an exhaustive definition of a specific legacy, the Master of the Rolls (Jessel) indicated that, speaking generally, it is necessary to make a legacy specific, that the subject of it be a part of the testator's property, a part emphatically as distinguished from the whole, a severed or distinguished part, and not the whole in the meaning of being the totality of the testator's property, or the totality of the general residue of his property, after having given legacies out of it, and Lindley, L. J., adopted as a working though not an exhaustive definition, of a specific legacy, that it is "a bequest of a specified part of the testator's personal estate which is so distinguished." p. 684. The case was taken to the House of Lords, and is reported, sub nom. *Robertson* v. *Broadbent*, 8 App. Cas. 812, and there

the Lord Chancellor Selborne said that the principle of the exemption of personal estate specifically bequeathed from being applied in payment of pecuniary legacies is that it is necessary to give effect to the intention apparent by the gift, and, referring to the power of the testator, as against all persons taking benefit under his will, to release a particular chattel forming part of his personal property from liability for his debts, said: "The same principle applied to everything which a testator identifying it by a sufficient description and manifesting an intention that it should be enjoyed or taken in the state and condition indicated by that description, separates in favour of a particular legatee from the general mass of his personal estate the fund out of which pecuniary legacies are in the ordinary course payable." 815.—Speaking of this statement, Lord Blackburn said: "I do not know if it were necessary to give a definition of a specific legacy that any would come nearer to my idea than what has just been said by the Lord Chancellor in this case:" p. 820. *Re Moyer*, 10 O. W. R. 6.

Covenant to Settle Sum of Money—Gift by Will.—*Blundell, In re; Blundell* v. *Blundell*, 75 L. J. Ch. 561; (1906), 2 Ch. 222; 94 L. T. 818; 22 T. L. R. 570.

Promises to Devise—Adopted Child—Specific Performance.—An agreement to make a will in favour of an adopted child may be enforced against the personal representatives of the obligor. *Roberts* v. *Hall*, 1 O. R. 388.

Services of a Child.—The plaintiff was induced to give up the employment at which she was earning her living, and to go and live with her mother, in consequence of her mother's promise to leave her all her property at her death. Upon a claim against the mother's executors for payment for the services rendered, it was shewn that during three years at least the plaintiff's services were understood not to be gratuitous. The mother having failed to make provision as agreed. The plaintiff was held entitled to recover on a quantum meruit for her services during the time stated.—It was also held that the plaintiff, who was divorced from her husband, must be assumed to be emancipated and not a minor. *In re Slaughenwhite*, 38 N. S. R. 47; 26 C. L. T. (1906), 397.

CHARITY.

No General Charitable Intention.—On the construction in a will of a charitable gift for a particular purpose, which purpose it was impracticable to carry out,—Held, that there was no paramount intention shown in the will to benefit any particular class of charitable objects, and that, inasmuch as the particular directions given in connection with the gift failed, the gift itself failed, and no scheme should be directed. *Biscoe* v. *Jackson*, 56 L. J. Ch. 93, 540; 35 Ch. D. 460 discussed and distinguished. *Wilson, In re; Twentyman* v. *Simpson*, 82 L. J. Ch. 161; (1913), 1 Ch. 314; 108 L. T. 321; 57 S. J. 245.

Secret Trust.—The testatrix had definitely communicated to Dr. Le P. before or contemporaneously with making her will her intention already formed that the residue should be disposed of in a particular manner, and he had accepted the trust:—Held, therefore, the existence of a trust being disclosed on the face of the will, that it was not necessary that the trust should be communicated to and accepted by all the trustees, and the ultimate residue was held upon trust for the three daughters of Dr. Le P. *Gardom, In re; Le Page* v. *Atty.-Gen.*, 108 L. T. 955.

INTEREST.

General Rule.—The principle upon which an administrator should be charged with interest on funds belonging to the estate considered and acted on. *McLennan* v. *Heward*, 9 Chy. 178.

An administrator *de bonis non* having obtained a decree against the representatives of a deceased administrator for an account of his dealings

with the estate:—*Held*, that he was entitled to charge the representatives with interest, &c., in the same manner, and to the same extent, as one of the next of kin might have done. *McLennan* v. *Heward*, 9 Chy. 178.

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. *Inglis* v. *Beatty*, 2 A. R. 453.

The English rules regulating the award of interest against executors and trustees may be approximated in this Province: (1) 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.; (2) By charging him who has broken his trust by using the money 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 (3) By charging him who makes gain out of his trust by embarking the money in speculative or trading adventures, with the profits, or with compound interest, as the case may be. The executors in this case kept considerable and constantly increasing balances in their hands from year to year, and allowed the acting executor to use the money as he pleased. It was not proved that any profit was made out of it, and no special evidence was given to shew what the current rate of interest during the period was; but the notes and mortgages held by the executors bore interest for the most part at six per cent. The Master charged the executors with interest at six per cent. per annum, with annual rests upon moneys in their hands belonging to the estate, and allowed them the usual commission and costs. On an appeal from the report of the Master it was held, that the interest should be charged at six per cent.; but that the awarding of compound interest was opposed to the spirit of the decision in *Inglis* v. *Beatty*, 2 A. R. 453, and could only be upheld as being in the nature of a penalty imposed on the executors. *In re Honsberger, Honsberger* v. *Kratz*, 10 O. R. 521.

Compound Interest.—An executor will not necessarily be charged with compound interest in all cases except those in which there is a mere neglect to invest. *Inglis* v. *Beatty*, 2 A. R. 453.

Where an executor retained a portion of the trust money under the belief that it was his own, and had acted on that supposition for many years, without objection from those interested under the will, and it did not appear that he had used the money in trade:—Held, that under the circumstances he was only chargeable with simple interest. *Inglis* v. *Beatty*, 2 A. R. 453.

Discretion as to Investing.—Where moneys are left by will to be invested at the discretion of the executor or trustee, the discretion so given cannot be exercised otherwise than according to law, and does not warrant an investment in personal securities or securities not sanctioned by the Court:—Held, that an executor and trustee who deposited funds so left in trust for infants, at three and a half or four per cent. interest, in a savings bank, did not conform to his duty; and his failure to do so exposed him to pay the legal rate of interest for the money, although he acted innocently and honestly; and the acquiescence of the statutory guardian of the infants, not being for their benefit, did not relieve him:—Held, also, that the defendant was not entitled to costs out of the fund, but that he should be relieved from paying costs. *Spratt* v. *Wilson*, 19 O. R. 28.

Compound Interest Chargeable.—In an administration action, although no allegation of wilful default is made in the pleadings, trustees may be charged with compound interest on balances in their hands where they ought to have so dealt with the trust funds as to have received such interest—e.g., where there is a trust for accumulation. *Knott* v. *Cottee*, 16 Beav. 77, followed. *In re Barclay, Barclay* v. *Andrew*, 68 L. J. Ch. 383; (1899), 1 Ch. 674; 80 L. T. 702.

Misconduct.—Executors and trustees may be charged with interest as well as principal in respect of sums lost through their misconduct, though the principal never reached their hands. *Sovereign* v. *Sovereign*, 15 Chy. 559.

Neglect and Default.—Although the Court will order executors or trustees to make good moneys lost by neglect or default, it will not also charge them with interest on those sums. *Vanston* v. *Thompson*, 10 Chy. 542.

Rate of Interest.—Although the rule is, that executors or trustees will be charged with what they ought to have made, with what they actually did make, or with what they must be presumed to have made, out of the moneys of the testator, come to their hands; still, where such moneys had, before the repeal of the usury laws, been invested in first class security at the rate of six per cent. per annum, the Court, on appeal from the Master's report, considered the executors were not called upon, at the risk of being charged with the extra amount of interest, to call in those moneys and re-invest the same at the rates which the evidence shewed money could have been loaned at. *Smith* v. *Roe*, 11 Chy. 311.

Goods Taken by Executors at Undervalue.—The goods of the testator were, by arrangement between the executors, taken by one of themselves at the price of $515, after the same had been valued by appraisers at $733.69. On an appeal from the Master's report charging the executors with the lesser sum, it was shewn that the appraised value was reasonable, and the court ordered the executors to be charged with that amount, and with interest from the time of the appraisement in 1857; the lapse of time not being considered sufficient to bar the right to interest. *Cudney* v. *Cudney*, 21 Chy. 153.

Charitable Bequest—Gift of Income. — The rule is incontrovertible that a gift of income without limitation of time is tantamount to and operates as a gift of the capital, in the absence of other disposition thereof. But this rule is subject to the qualification that a testator has the power of giving interest without vesting the corpus in the donee of the interest by expressing such an intention. Kingsford, Wills p. 692. *Re Chambers; Chambers* v. *Wood*, 10 O. W. R. 1089.

Bequest of Income.—By his will, among other provisions, Christopher Nelson directed that his grandson Christopher Brown "shall have the interest derived from $300, provided my executors consider it necessary for maintenance, which amount shall be kept invested in trust by my executors." Under this provision it is contended on behalf of Christopher Browu that he is entitled to be paid the corpus of the sum of $300. The argument on his behalf is, that the bequest of interest amounts to an absolute and unqualified bequest of income, and that it therefore, carries with it to the beneficiary the right to payment of the corpus.

The following authorities were referred to on behalf of Christopher Brown: *Re Johnson* (1894), 3 Ch. 204; *Rishton* v. *Cobb*, 5 My. & Cr. 145; *Sanderson* v. *Vautier*, 4 Beav. 115; *Willison* v. *Gourley*, 10 O. W. R. 853; *Re Canadian Order of Home Circles and Smith*, 14 O. L. R. 322, 9 O. W. R. 738; *McFarlane* v. *Henderson*, 16 O. L. R. 172, 11 O. W. R. 218; *Re Coward*, 56 L. T. 278; Theobald on Wills, 6th ed., p. 465.

Per Cur.—I have looked at all these cases. Most of them establish the proposition that an unqualified gift of income carries to the beneficiary the right of immediate payment of the principal; others are authority for the proposition that where the absolute right to money is bequeathed to a legatee, it is not competent to the testator to postpone his enjoyment of the legacy until some period after he attains the age of 21 years. In the view which I have taken of the present case, it is not possible to apply either of these propositions.

His right to the interest for maintenance, if absolute and unfettered by any discretion of the executors, would at most be for the term of his life, and such a right does not carry with it a right to the corpus of the fund from which the interest is to arise. *Re Hammer*, 9 O. L. R. 348, 4 O. W. R. 474. *Re Nelson*, 12 O. W. R. 760.

Mixed Fund—Interest—Majority.—The legacies were made contingent upon the beneficiaries coming of age, when they became vested,

but the time of payment is postponed till the widow dies. 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. Interest is not to be exacted when by the direction of the testator there is nothing in hand to pay the legacy. *Toomey* v. *Tracey*, 4 O. R. 708, distinguished. See *Crickett* v. *Dolby*, 3 Ves. 16. *Re Scadding*, 4 O. L. R. 632, 1 O. W. R. 467, 683.

Advances in Lifetime of Testator.—Held, that there was nothing in the language of the will indicating any intention to charge up against the legatees any sum beyond the moneys actually advanced, and they were not chargeable with interest on any of these advances except from the date of the widow's death. *In re Rees*, 17 Ch. D. 701, *In re Dallmeyer* (1896), 1 Ch. 372. *In re Lambert* (1897), 2 Ch. D. 169, and *In re Whiteford* (1903), 1 Ch. 889, referred to. *Re Sweazy*, 3 O. W. R. 360.

CHAPTER V.

CONSTRUCTION SECTIONS OF WILLS ACT.

EXECUTOR MUST DISPOSE OF LAND.

Where, as is usually the case, the estate of a deceased person includes both real and personal property, the executor of a will is bound to carry out the testator's intentions with regard to the land as well as to the personalty. The questions which arise must be determined by a construction of the will.

DEVOLUTION OF ESTATES ACT.

Where there is an intestacy, the devolution of real estate is provided for by statute as will presently be seen. But since the

Reading—In Words—Testator's Intention.—In construing wills it is the duty of the court to ascertain, if possible, what the testator really meant from the language he has used. The exact words are not to be followed in their literal meaning if it be plain that to do so would frustrate the real intention of the testator. If from a consideration of the whole will it is plain that to place a literal meaning upon one clause would have the result of defeating the clear intention, it is necessary even to do violence to the language used. The thing to be ascertained is, what is the testator's will? *Patterson, In re; Dunlop* v. *Greer* (1899), 1, Ir. R. 324.

Rule of Uniformity.—Whenever in a deed, will or other document it is found that a word has some particular meaning when its meaning can be clearly made out, the presumption is that it means the same thing when its meaning is not so clear. *Birks, In re; Kenyon* v. *Birks*, 69 L. J. Ch. 124; (1900) 1 Ch. 417; 81 L. T. 741.

Ambiguity Explained by Reference to Codicil.—Where there is an ambiguity in a will, it may be explained by reference to a recital in a codicil, provided that the latter is not obviously erroneous. *Darley* v. *Martin* (22 L. J. C. P. 249; 13 C. B. 683) and *Grover* v. *Raper* (5 W. R. 134) followed. *Venn, In re; Lindon* v. *Ingram*, 73 L. J. Ch. 507; (1904) 2 Ch. 52, 90 L. T. 502; 52 W. R. 603.

Power of Court to Look at Original Will.—In order to construe a doubtful clause in a will, the court may look at the original will to ascertain the punctuation, the introduction of capital letters, parenthesis, and other marks indicating where a sentence begins or ends. *Reeves* v. *Reeves* (1909), 2 Ir. R. 521.

Reason for Making Will—Construction of Document—Parol Evidence.—When a will is made in terms expressly contingent upon an event, that event must occur before the will can become operative; but when the possibility of the contingency is merely stated as a reason for making the will, the latter becomes operative whether the contingency occurs or not. If a testator write "Should I die to-morrow my will is," his death must occur on the morrow to make the paper operative, whereas if he write "Lest I die to-morrow my will is," that will be operative whether he die on the morrow or not. The question is to be decided on the construction of the terms used, and should these be ambiguous the court is entitled to take into consideration the surrounding circumstances, including the declarations, if any, of the testator. *Vines* v. *Vines*, 79 L. J. P. 25; (1910) P. 147; 102 L. T. 141; 54 S. J. 272; 26 T. L. R. 257.

Devolution of Estates Act, both real and personal property devolve on the personal representative. Therefore, in case of an administration with will annexed, real as well as personal property will devolve on the administrator—the former subject to the will, the latter under the statute.

RULES FOR CONSTRUCTION OF WILLS RELATING TO LANDS.

Hence, so long as executors and administrators had only to deal with personal property, treatises relating to their powers and duties were properly confined to the subject of personal property. Under the present state of the law, the subject cannot be said to be complete without some exposition of the rules adopted for the construction of wills relating to real estate.

A glance at the large volumes devoted to this subject will show that to attempt to include even their gist in these pages would be impossible. All that can be done is to show that certain difficulties have been removed by statute, explain what those difficulties were, and state the statutory solution. It will be found that many of the difficulties which have been removed are those more commonly occurring. These statutory rules are known as the Construction Sections of the Wills Act, R. S. O. 1914, c. 120 (ss. 26 to 38 inclusive).

26. No conveyance or other act made or done subsequently to the execution of a will, of or relating to any real estate or personal estate therein comprised, except an act by which such will is revoked as aforesaid, shall prevent the operation of the will with respect to such estate, or interest in such real estate or personal estate, as the testator had power to dispose of by will at the time of his death.

Imp. Act, 1 Vict., c. 26, s. 23.

By section 8—section 26 does not apply to the will of any person who died before the 1st of January, 1869, but applies to the will of every person who has died since the 31st December, 1868.

27.—(1) Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will.

Imp. Act, 1 Vict., c. 26, s. 24.

(2) This section shall apply to the will of a married woman made during coverture, whether she is or is not possessed of or entitled to any separate property at the time of making it, and such will shall not require to be re-executed or re-published after the death of her husband.

Imp. Act, 56-57 Vict., c. 63, s. 3.

By section 8—section 27 also does not apply to the will of any person who died before the 1st of January, 1869, but applies to

the will of every person who has died since the 31st December, 1868.

In wills made before the 1st of January, 1869, every devise of freehold lands speaks from the date of the will, and describes only the land then belonging to the testator.

CODICIL REPUBLISHES WILL.

A codicil republishes the will so as to make the will speak from the date of the codicil, and include lands acquired before the date of the codicil. But a codicil does not revive a legacy revoked, adeemed or satisfied.

Powys v. *Mansfield*, 3 Myl. & Cr. 376.

BEQUESTS OF LEASEHOLDS.

A bequest of leaseholds speaks from the date of the will, and does not include after acquired leaseholds nor a renewed lease.

James v. *Dean*, 11 Ves. 383.

A bequest of all my personal estate or residue of my personal estate, means the personal estate existing at the death of the testator.

Under section 27 in wills made after the 1st of January, 1869, descriptions of real or personal estate refer to and comprise the property answering to the description at the death of the testator.

LANDS CONTRACTED TO BE PURCHASED.

With respect to lands contracted to be purchased by testator (including lands contracted to be purchased after the date of will) a general devise of testator's lands includes lands contracted to be purchased by testator, but not actually conveyed.

Acherley v. *Vernon*, 10 Mod. 518.

LANDS CONTRACTED TO BE SOLD.

Lands contracted to be sold are lands of which the testator was a trustee, and the legal estate in them passes to the executor in trust for the purchaser. The devisee will not be entitled to the purchase money.

Ross v. *Ross*, 20 Ch. 203.

GENERAL POWERS OF APPOINTMENT.

As regards general powers of appointment the effect of the 26th and the 30th sections of the Act is to make all general devises and bequests operate as an execution by anticipation of all general powers vested in the testator at the time of his death, although created by an instrument subsequent in date to the will unless the language of the power be such as to forbid its being exercised by anticipation.

SPECIAL POWERS OF APPOINTMENT.

Even special powers of appointment created after the date of the will may be exercised by a bequest contained in the will, if the bequest contains a sufficient description of the particular property afterwards made the subject of the power to show that the testator had the subject of the power in view, which is the test of execution as regards special powers.

Stillman v. *Weedon*, 16 Sim. 26.

EXCEPTIONS TO RULE OF SECTION 27.

There are two exceptions to the rule laid down by section 27.

(1) Where the date of the will as opposed to the death is distinctly referred to.

Cole v. *Scott*, 1 Mac. & G. 518.

(2) Where there is a sufficient particularity in the description of the specific subject of gift showing that an object in existence at the date of the will was intended.

See *Webb* v. *Byng*, 1 K. & J. 580.

28. Unless a contrary intention appears by the will, such real estate as is comprised or intended to be comprised in any devise in such will contained which fails or becomes void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary devise, if any, contained in such will.

Imp. Act, 1 Vict., c. 26, s. 25.

LAPSED DEVISE TO SINK INTO RESIDUARY DEVISE, IMP. ACT, 1 V. C. 26, S. 25.

A gift of the residuary personal estate of the testator comprises every interest in the personal estate which the will in effect does not otherwise dispose of; thus, a general residuary bequest carries lapsed and void legacies.

Leake v. *Robinson*, 2 Mer. 393.

A testator may show an intention to confine a residuary bequest, so as to exclude from it in effect property specifically given.

See *Wainman* v. *Field*, Kay 507.

EFFECT OF GIFT OF RESIDUE OF PERSONAL ESTATE.

The most important exception to the comprehensiveness of a general residuary bequest is that it does not include any part of the residue itself which fails. Residue means all of which no effectual disposition is made by will other than the residuary clause; but when the disposition of the residue itself fails to the extent to which it fails the will is inoperative.

Skrymsher v. *Northcote*, 1 Sim. 570.

A general residuary bequest contingent in terms carries the intermediate income which is not undisposed of but accumulates.

Trevanian v. *Vivian*, 2 Ves. Sen. 430.

RESIDUARY DEVISES BEFORE 1ST JAN. 1874.

As to residuary devises in wills made before the 1st of January, 1874, a residuary devise of real estate does not include specific devises which lapse. In wills made or republished after the 1st of January, 1874, real estate comprised in a devise which fails or is void passes under the residuary devise in a will unless an intention appear to the contrary.

INTERMEDIATE RENTS AND PROFITS.

Devises of real estate to take effect at a future period do not in general carry the intermediate rents and profits until the period of vesting.

Genery v. *Fitzgerald*, Jac. 468.

But where the real and personal estate are given together, such a gift, although contingent in terms, carries the intermediate rents and profits of the real estate, as well as the income of the personal estate.

REAL ESTATE CONTRACTED TO BE SOLD.

Where the real estate is directed by will to be sold, a general or residuary bequest of the testator's personal property does not prima facie include the proceeds of such real estate directed to be sold.

Maugham v. *Mason*, 1 V. & B. 410.

29. A devise of the real estate of the testator, or of the real estate of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner and any other general devise which would describe a leasehold estate, if the testator had no freehold estate which could be described by it, shall be construed to include his leasehold estates, or any of them to which such description will extend, as well as freehold estates, unless a contrary intention appears by the will.

Imp. Act, 1 Vict., c. 26, s. 26.

In wills made before the 1st of January, 1874, "a devise of lands," or "lands and tenements," does not prima facie include leasehold for years unless at the time of the devise the testator had no freehold lands answering to the description. In wills made or republished on or after the 1st of January, 1874, every general devise of lands, etc., prima facie includes leaseholds for years as well as freeholds.

30. A general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate or any real estate to which such description will extend, which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention appears by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal estate described in a general manner, shall be construed to include any

personal estate, or any personal estate to which such description will extend, which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention appears by the will.

Imp. Act, 1 Vict., c. 26, s. 27.

If a will does not purport to be in execution of the particular power or of all powers vested in the testator, devises and bequests contained in the will prima facie do not include property not the testator's own, but over which he has a power of disposition.

Webb v. *Honnor*, 1 J. & W. 352.

But if the property subject to the power be sufficiently described so that it is clear that the testator had in view the subject of the power a devise or bequest will operate as an execution of the power.

Lownds v. *Lownds*, 1 Y. & J. 445.

BEQUEST OF SUM OF STOCK.

A bequest of a sum of stock of the same description as that subject to the power is not description of the property subject to the power so as to show an intention to execute the power, but is a mere general legacy.

Nannock v. *Horston*, 7 Ves. 391.

A gift by will of legacies identical with the amount of the fund does not in general show an intention to execute the power.

Davis v. *Thomas*, 3 De G. & Sm. 347.

As regards real estate; if a testator devise "all his lands" or "all his lands in A.," or "all his real estate," and has at the time of the devise no lands of his own answering to the description, lands over which he had a power will pass by the devise.

DISTINCTION BETWEEN GENERAL AND SPECIAL POWERS.

The 30th section introduces a distinction between general powers of appointment and special powers. The latter are unaffected by the statute, but with regard to general powers general devises of real estate are deemed to extend to general powers.

In wills made or republished on or after the 1st of January, 1874, a general residuary bequest will include not only property ineffectually attempted to be bequeathed, but also property over which the testator had a general power of appointment, and which he by his will ineffectually appointed; thus, if a testator in exercise of a general power of appointment gives £5,000 to A., and gives the residue of his personal estate to B., and A. dies in the testator's

lifetime, the £5,000 appointed to A. will pass under the residuary gift to B.

Bernard v. *Minshull*, 1 Johns. 276.

31. Where any real estate is devised to any person without any words of limitation, such devise shall, subject to The Devolution of Estates Act, be construed to pass the fee simple, or other the whole estate or interest, which the testator had power to dispose of by will, unless a contrary intention appears by the will.

Imp. Act, 1 Vict., c. 26, s. 28.

In wills made before the 1st of January, 1874, a devise of lands to A. simpliciter confers an estate for life unless an intention appear to the contrary.

Hogan v. *Jackson*, Cowp. 306.

"ESTATE."

As the word "estate" may either mean the land itself or the testator's interest in it, in order to limit the operation of the preceding rule it is held that the word "estate" is sufficient to pass the fee simple of land although accompanied by words of locality or occupation.

But the word "estate" must be an operative word occurring in the gift itself. If the testator devise lands to A. simpliciter and afterwards refers to the same lands as "the said estate" this does not carry the fee to A.

Burton v. *White*, 1 Exch. 535.

A devise of "all my effects real and personal" passes a fee simple of lands.

Lord Torrington v. *Bowman*, 22 L. J. Ch. 236.

INDEFINITE DEVISE ENLARGED BY CHARGE.

In wills made before the 1st of January, 1874, a devise of lands to A. he paying £10 to B. passes the fee simple; but a devise to A. subject to a charge of £10, passes only an estate for life. The rule in such a case is that an indefinite devise is enlarged to a fee simple by a charge however small on the person of the devisee or on the quantum of interest devised to him, but not if the devise is merely subject to a charge.

Burton v. *Powers*, 3 K. & J. 170.

In wills made before the 1st of January, 1874, if lands are devised to A. indefinitely with a gift over in event of A. dying under twenty-one; A., if he attains that age, takes a fee simple.

Frogmorton v. *Holyday*, 3 Burr. 1618.

Section 31, above set out, alters the above rules in the case of wills made or republished on or after the 1st day of January,

1874, and in such wills a devise of lands without words of limitation passes the fee simple unless an intention appears to the contrary.

This section applies only to devises of previously existing estates or interests, and not to the devise of an estate created by the will.

Nicholls v. *Hawkes*, 10 Hare. 342.

A devise of rents and profits to A. without words of limitation in a will prior to the 1st of January, 1874, passes only an estate for life, but in a will made or republished on or after the 1st of January, 1874, a devise of the rents and profits of the land will by force of the 31st section pass the fee simple of the land.

See *Crawford* v. *Lundy*, 23 Ch. 244.

33. In any devise or bequest of real estate or personal estate, the words "die without issue," or "die without leaving issue," or "have no issue," or any other words which import either a want or failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention appears by the will, by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise; but this Act shall not extend to cases where such words import if no issue described in a preceding gift be born, or if there be no issue who live to attain the age, or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue.

Imp. Act, 1 Vict., c. 26, s. 29.

34. Where any real estate is devised to a trustee or executor, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years absolute or determinable, or an estate of freehold is thereby given to him expressly or by implication.

Imp. Act, 1 Vict., c. 26, s. 30.

EFFECT OF THIRTY-THIRD SECTION.

Effect of 33rd section.—If (in a will since 1st January, 1874), real estate be devised to A. and his heirs, or to A. indefinitely, with a limitation over to take effect on the death of A. without issue, or without having or leaving issue, A. will not (as before) take an estate tail with remainder over, but an estate in fee, with an executory devise over in the event of his death without issue living at his death.

So, if the devise be to A. for life, with a limitation over on his death without issue, A. will not, as before, take an estate tail, but an estate for life only, with the like executory devise over.

Again, if personal estate be given to A., with a bequest over to B. upon the death of A. without issue, the gift over will not (as

before) be void for remoteness, but will take effect as a contingent executory bequest upon the death of A. without issue living at his death.

SCOPE OF SECTION 32.

In order to understand section 33, it is necessary to premise that section 32 only applies to a case where the word "heir" or "heirs" is used, and no contrary or other intention is signified by the will. Cases where such other intention is signified must, therefore, be considered.

DEVISE TO "HEIRS MALE OF BODY."

Under a devise to "heirs male of the body" the heir male of the body taking by purchase need not be heirs general. Thus, if a devise be to the "heirs male of the body" of A. who has died leaving a younger son and daughter of a deceased eldest son, the younger son will take an estate in tail male by virtue of the devise, although the granddaughter is heir.

Angell v. *Angell*, 9 Q. B. 328.

"Heirs male of the body" or "issue male" mean descendants in the male line only, that is males claiming through males.

Bernal v. *Bernal*, 3 My. & Cr. 559.

A. AND HIS HEIRS.

In a deed a limitation to A. and his heirs male confers an estate in fee, the word "male" being rejected as repugnant; but with respect to devises, the rule is that heirs male in a will mean "heirs male of the body."

Lindsay v. *Colyear*, 11 East. 548.

A. FOR LIFE WITH REMAINDER TO "HEIR."

A devise to A. for life with remainder to the "heir" or "heir male of the body" without words of inheritance super-added creates an estate tail in A.; but where words of limitation are added to a devise to the heirs male, A. takes an estate for life only, and the heir male of his body takes an estate in tail male as purchaser.

White v. *Collins*, 1 Com. Rep. 389; *Archer's Case*, 1 Rep. 66.

RULES OF CONSTRUCTION OF WORD HEIR.

With the intention of restraining the meaning of "heirs" to "heirs of his body," certain rules of construction have been adopted. (1)—A devise of real estate to A. and his heirs confers only an estate tail, heirs being construed heirs of his body.

Good v. *Good*, 7 E. & B. 295.

(2) A devise of real estate to A. and his heirs followed by a limitation over to take effect on a general failure at any time of

issue or heirs of the body of A. vests in A. only an estate tail, the word "heirs" being construed to mean "heirs of the body."

Ellis v. *Ellis*, 9 East. 382.

Now in wills made or republished on or after the 1st of January, 1874, the expressions "die without issue," etc., are prima facie restricted to failure of issue at the death of the person, and therefore, cannot have the effect of restraining heirs to mean heirs of the body.

If the expressions "on failure of issue" or "in default of issue," are not within the 33rd section, then in a case of a devise to A. and his heirs with a gift over on failure of issue of A., A. will take an estate tail.

DEVISE TO B. HEIR-AT-LAW.

(3) If real estate is devised to B. on failure of heirs of A., and B. is capable of being heir to A., the word "heirs" is construed to mean "heirs of the body." But if B. be not capable of inheriting land from A., the meaning of the word "heirs" will not be restricted.

Harris v. *Davis*, 1 Coll. 423; *Tillburgh* v. *Barbut*, 1 Ves. Sen. 89.

A gift of real estate to the heir after the death of a particular person is considered necessarily to imply not so much an intention to benefit that person as an intention to exclude the heir during his life, which can only be effected by leaving a life estate to the person in question. Therefore, if real estate be devised after the death of A. to B., the heir-at-law of the testator, and the will contains no disposition of the property during the life of A., A. takes an estate for life by implication; but if B. is not the heir-at-law A. takes no estate.

Rex v. *Inhabitants of Ringstead*, 9 B. & C. 218.

PERSONAL ESTATE TO A. OR HIS HEIRS.

If personal estate is given to A. "or" his heirs the word "heirs" is read as a word not of limitation, but of substitution so as to prevent a lapse; but in a case of real estate, a devise to A. "or" his heirs gives to A. an estate in fee, the word "or" being read "an."

Read v. *Snell*, 2 Atk. 645.

In devises of real estate the words "heirs of the body" following a gift to the ancestor, are words of limitation, and create an estate tail notwithstanding the addition of other inconsistent words or expressions.

Jordan v. *Adams*, 9 C. B. N. S. 483.

WORDS OF LIMITATION DO NOT EXCLUDE RULE.

Words of limitation, whether general or super-added to a gift to the heirs of the body, do not exclude the operation of the rule. Thus a devise to A. for life with remainder to the heirs of his body, share and share alike their heirs and assigns (or heirs male) would vest in A. an estate tail, the inconsistent words being rejected as repugnant.

Mills v. *Seward*, 1 J. & H. 733.

In directions to settle lands by way of executory trusts, the rule is not so inflexibly applied.

Papillon v. *Voice*, 2 P. Wms. 471.

BEQUEST OF PERSONAL ESTATE TO A. OR THE HEIRS OF HIS BODY.

A bequest of personal estate or chattels real to A. or the heirs of his body, or to A. for life and after his decease to the heirs of his body, vests the property in A. absolutely.

Williams v. *Lewis*, 6 H. L. C. 1013.

It has sometimes been laid down that whatever words in a devise of real estate would create an estate tail, confer the absolute interest in personal estate.

"ISSUE" EQUIVALENT TO HEIRS OF THE BODY.

As regards the words "heirs of the body," the statement is correct, but with regard to the word "issue" there is a difference. The word "issue" in devises of real estate is prima facie a word of limitation, and is equivalent to "heirs of the body." Thus a devise to A. and his issue, or to A. for life and after his decease to his issue, vests in A. an estate tail.

Roddy v. *Fitzgerald*, 6 H. L. C. 823.

While words of distribution are insufficient to alter the meaning of "heirs of the body," on the other hand words of distribution and limitation annexed to a devise to issue suffice to show that the issue should take by purchase.

Lees v. *Mosley*, 1 Y. & C. 589.

EXECUTORY TRUST.

The rule which construes "issue" as a word of limitation in devises, does not apply so strictly to a direction to sell lands by way of executory trusts. Thus if lands be directed to be settled on A. for life with remainder to his issue, A. will be held to take for life only.

Meure v. *Meure*, 2 Atk. 265.

"ISSUE" AS APPLIED TO BEQUESTS OF PERSONAL ESTATE.

The rule that "issue" is prima facie a word of limitation does not extend to bequests of personal estate. If it be clear that

the testator intended to make such a disposition of personal estate as if made in a case of real estate would amount to an estate tail, the first taker will take the absolute interest; but it is not the case that every expression which would create an estate tail in real estate will be held to indicate the same intention in the case of personal estate. Thus if personal estate or chattels be given to A. for life, and after his decease to his issue, A. takes for life only and the issue take in remainder; although there be a gift over on failure of issue of A.

Ex parte Wynch, 5 D. M. G. 188.

DEVISE TO A. AND HIS CHILDREN.

A devise of real estate to A. and his children, A. having no children at the time of the devise vests in A. an estate tail, children being considered as a word of limitation.

Wild's Case, 6 Rep. 17.

BEQUEST TO A. AND HIS CHILDREN.

A bequest of personal estate to A. and his children is prima facie a gift to the parent and the children concurrently. Thus if a gift be immediate, A. and his children (if any) living at the death of the testator, will take as joint tenants, and if no children at that period A. will take the whole. If the gift be deferred, A. will take jointly with the children living at the testator's death and subsequently born before the period of distribution, and if no children A. will take the whole. Again, if A. predeceased the testator, the gift would not lapse, but his children would be entitled.

Mason v. *Clarke*, 17 B. 130; *Cunningham* v. *Murray*, 1 DeG. & S. 366; *Read* v. *Willis*, 1 Coll. 86.

DEVISE TO A. FOR LIFE WITH GIFT OVER.

A devise of real estate to A. for life, or to A. indefinitely followed by a gift over on general failure of issue vests in A. an estate tail.

Machell v. *Weeding*, 8 Sim. 4.

DEVISE TO SEVERAL.

But since the 1st of January, 1874, a devise to a person indefinitely with a gift over on his death without issue, will confer an estate in fee simple with an executory devise over on death without issue living at the death, and a devise for life with a like gift, confers only an estate for life.

BEQUEST TO SEVERAL.

A bequest of personal estate to A. with a gift over on a general failure of his issue, vests the property in A. absolutely.

If real estate be devised to several or to a class as tenants in common with a limitation over on failure of issue of all the devises, cross-remainder in tail are prima facie to be implied amongst them.

Atkinson v. *Barton*, 3 DeG. F. & J. 339; *Ray* v. *Gould*, 15 U. C. R. 131.

If personal estate be given to several or to a class as tenants in common for life with a gift over on the death of the survivor, cross limitations for life must be implied amongst them.

Pearce v. *Edmeades*, 3 Y. & C. 246.

DEVISE TO A. WITH LIMITATION OVER ON DEATH UNDER 21.

If real estate be devised to A. in fee simple with a limitation over in the event of A. dying under twenty-one, or without issue, the word "or" will be read "and," and the gift over will be construed to take effect only in the event of A. dying under twenty-one and without issue.

Right v. *Day*, 16 East. 69.

MEANING OF SECTION 33.

Having thus examined the manner of creating an estate tail, whether by the correct use of technical terms or by implication, we come now to consider the meaning of section 33.

DIE WITHOUT ISSUE IN WILLS BEFORE 1ST JAN., 1874.

Where there is a devise of an estate tail followed by a limitation over in the event of the devisee dying without issue, the rule for wills made before the 1st of January, 1874, is laid down that the words "die without issue" are construed to mean the death of the person spoken of, and failure of his issue at the time of his death or at any time afterwards, unless the context shows the meaning to be confined to a failure of issue at the time of his death.

Candy v. *Campbell*, 2 Cl. & F. 421.

The rule applies to real and personal estate; thus, if real estate be devised to A. and his heirs, or to A. for life, or to A. indefinitely with a limitation over, in the event of A. dying without issue, A. takes an estate tail with remainder over (heirs being considered heirs of the body).

FAILURE OF ISSUE IN LIFETIME OF OTHER PERSONS.

So if personal estate be given to A. with a limitation over in the event of A. dying without issue, A. takes an absolute interest, the gift over being void for remoteness. But the rule does not apply where a gift over is on the death under a given age without issue. Thus a devise to A. or to A. and his heirs with a gift over

if A. dies under twenty-one without issue, vests in A. an estate in fee with an executory devise over in the event of the failure of issue at his death and not an estate tail.

Toovey v. *Bassett*, 10 East. 460.

DIE WITHOUT LEAVING ISSUE EQUIVALENT TO "DIE WITHOUT ISSUE."

In wills prior to 1874, the words "die without issue" may be restrained to mean a failure of issue at the death of a person and not an indefinite failure of his issue. This construction is exemplified in the following cases:—

(1) Where the gift over is expressly to take effect on the death of a person. Thus if real estate is devised to A. and his heirs, and if A. dies without issue, to B. upon the death of A., the latter words restrain the gift over to a failure of issue at the death, and A. takes an estate in fee with an executory devise over and not an estate tail.

King v. *Frost*, 3 B. & Ald. 546.

If personal estate be given to A. with a gift over if A. die without issue, upon the death of A. the gift over will take effect as an executory bequest on failure of issue at the death.

Pinbury v. *Elkin*, 1 P. W. 563.

(2) Where there is a bequest of personal estate to several as tenants in common, with a gift over of the share of any one dying without issue to the survivors or survivor, the presumption is raised that an indefinite failure of issue was not contemplated, and the words "die without issue" will be restricted to a failure of issue at the death of the person whose share is spoken of.

Ranelagh v. *Ranelagh*, 2 My. & K. 441.

But under a devise to several and their heirs as tenants in common, with a gift over on the death of any without issue to the survivors, the devisees will take estates tail.

(3) Where there is a devise to A. and his heirs with a gift over if A. should die under twenty-one, or having attained twenty-one, should die without issue, the words "die without issue" are restrained to the failure of issue at the death.

Glover v. *Monckton*, 3 Bing. 13.

But the cases in which "die without issue" are restricted to failure of issue at the death of a person whose issue is spoken of, must be distinguished from those in which, although not so restricted, it is still confined to a failure of issue in the lifetime of certain other persons. Thus if real estate be devised to A. and his heirs, with a gift over upon the death of A. without issue in the life

time of B., and B. be living at the testator's death, A. takes an estate in fee with an executory devise over on failure of his issue within the given period, and not an estate tail.

Pells v. *Brown*, Cro. Jac. 590.

In wills made before the 1st of January, 1874, in relation to real estate, the words "die without leaving issue" are equivalent to "die without issue," and import a failure of issue at the death of the person whose issue are spoken of, or at any time afterwards, unless an intention appear to the contrary. But, with relation to personal estate and chattels real, the words "die without leaving issue" import a failure of issue at the death of the person spoken of and not an indefinite failure of his issue.

Forth v. *Chapman*, 1 P. W. 663.

*CONSTRUCTION OF WILLS AFTER 1ST JAN., 1874.

Under section 33 in wills made or republished after the 1st of January, 1874, in devises and bequests of real or personal estate, the expressions "die without issue," "die without having issue," "die without leaving issue," are construed to mean a failure of issue at the death of the person whose issue is spoken of, and not an indefinite failure of issue unless an intention appear to the contrary.

WHAT ESTATE MAY BE TAKEN BY TRUSTEES UNDER DEVISE TO THEM.

Two questions may arise respecting the nature and quality of the estate taken by trustees under a devise to them:—

(1) What is the quantum of estate and interest beneficial as well as legal, vested in the trustees for the active purposes (if any) of the trusts reposed in them?

(2) What becomes of the legal estate (if any) remaining after the active purposes of trusts are satisfied does it remain in the trustees, or pass from them to the cestuis que trust?

As to the quantum or estate taken by the trustees for the active purposes of the trust, a devise of real estate to a trustee in trust to pay the rents and profits to A. vests the legal estate in the trustee, but a devise to a trustee in trust to permit A. to receive the rents and profits vests the legal estate in A.

Barker v. *Greenwood*, 4 M. & W. 429.

WORD HEIR NEED NOT BE INSERTED TO CARRY FEE.

In devises to trustees, it is not necessary that the word "heirs" should be inserted to carry the fee at law; for if the purposes of the trust cannot be satisfied without having a fee, courts

*Section 33 printed on page 353 ante.

of law will so construe it. Thus, if in a will prior to the 1st of January, 1874, lands be devised unto and to the use of trustees and their heirs in trust for A. indefinitely, the estate of A. is not extended to a fee simple, because the estate taken by the trustee is coextensive only with the trust to be performed, and it is, therefore, limited to an estate during the life of A., but a devise unto and to the use of A. in trust for B. and his heirs gives A. the whole legal fee simple.

Challenger v. *Sheppard*, 8 T. R. 597.

DEVISE TO TRUSTEE IN TRUST TO PAY DEBTS.

Again, if the devise be to the trustee in trust to pay the testator's debts and subject thereto in trust for A., A. takes an equitable fee simple.

WILL AFTER 1ST JAN., 1874.

In wills made or republished on or after the 1st of January, 1874, in no case are trustees to take an indefinite term of years for the purposes of the trust, and any devise under which before the passing of the Act a trustee would have been held to take an indefinite or uncertain term of years, shall now be construed to pass the fee.

35. Where any real estate is devised to a trustee without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, is not given to any person for life, or such beneficial interest is given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall, subject to The Devolution of Estates Act, be construed to vest in such trustee the fee simple or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust are satisfied.

Imp. Act, 1 Vict., c. 26, s. 31.

WILLS BEFORE 1ST JAN., 1874, WHAT ESTATE TAKEN BY TRUSTEES.

As regards the disposition of such legal estate as is not required to be vested in the trustees for the active purposes of the trust: the rule is that in wills made before the 1st January, 1874, where real estate is devised to trustees, although with words of inheritance, prima facie the trustees take only as much of the legal estate as the purposes of the trust require.

Blagrave v. *Blagrave*, 4 Exch. 550.

TRUSTS TO PRESERVE CONTINGENT REMAINDERS.

The rule applies to limitations to trustees in trust to preserve contingent remainders. Thus if lands be devised to A. for life with remainder to trustees and their heirs in trust to preserve contingent remainders with remainder to the first and other sons

of A. in tail and there are no other contingent remainders subsequently limited, the estate of the trustees, though not entirely limited to the life of A., will be restricted to that period by implication, since the purpose of the trust cannot continue longer and the remainder over will be legal and not equitable.

CONSTRUCTION OF INDEFINIFE TERM OF YEARS.

The rule that the estate taken by trustees is restricted to the quantity necessary for the performance of trusts was carried out by the adoption of the construction of an indefinite term of years and a determinable fee.

CONSTRUCTION OF INDEFINITE TERM OF YEARS.

Where the estate was limited to trustees simpliciter or to trustees and their executors or administrators upon trust out of the annual rents and profits only to raise a given sum of money to pay debts, legacies, etc., with a direct devise over of the beneficial interest; it was held that the trustees took the legal estate only for an uncertain term of years sufficient to raise the entire sum and the estates of the devisees in remainder were legal estates.

Ackland v. *Lutley*, 9 A. & E. 879.

Where the devise was to trustees and their heirs in trust to pay debts or to raise a sum of money with limitations over, it was considered that the trustees might take the fee simple only until the money required had been raised, and when it should have been raised without a sale, the legal fee in the trustees should determine and the devisees over take legal estates. A devise to trustees in trust to pay the testator's debts vests in them the absolute legal fee. But a charge of debts on the lands devised, the trustees not being directed to pay the debts, does not enlarge the estate of the trustees.

Kenrick v. *Lord Beauclerk*, 3 B. & P. 178.

DEVISE TO PAY ANNUITY.

In wills made before the 1st of January, 1874, a devise to trustees and their heirs in trust to pay an annuity out of the annual rents and profits only and subject thereto in trust for A. in fee, the annuity not being a charge on the corpus of the lands, vests the legal estate in the trustees for life only during the life of the annuitant.

Adams v. *Adams*, 6 Q. B. 860.

ANNUITY A CHARGE ON THE CORPUS.

But if the annuity be a charge on the corpus of the land, as if lands be devised to trustees in trust to pay thereout an annuity

to A., and subject thereto in trust for B., the trustees take the fee simple.

Fenwick v. *Potts*, 8 D. M. G. 506.

DEVISE FOLLOWED BY POWERS.

Where a devise to trustees upon trusts which standing alone would not vest in them the whole legal estate is followed by a power to sell, lease or mortgage not limited to the period of continuance of the active trusts, the trustees are held to take the whole legal fee and not a mere limited estate with a super-added power to sell or lease.

Watson v. *Pearson*, 2 Exch. 581.

Similarly a devise to trustees followed by a general power of leasing vests in them a fee simple.

Riley v. *Garnett*, 3 De G. & Sm. 629.

DEVISE TO PAY RENTS, AND ON DEATH, TO CONVEY.

If a devise be to trustees in trust to pay the rents and profits to A. for life, and after his death to convey the estate to B., the trustees take a fee simple.

Shelley v. *Edlin*, 4 Ad. & E. 582.

MEANING OF SECTIONS 35 AND 36.

The rule that the legal estate vested in trustees is limited to the amount necessary for the performance of the active trust reposed in them is now laid down by the 35th section. With regard to sections 35 and 36, their meaning and effect are thus stated by Mr. Hawkins, remembering that the numbers should read 35 and 36, according to the present Ontario Act:—

The 34th and 35th sections of the Wills Act have been described as obscure and even conflicting; their meaning, however, will be apprehended by observing, that the 34th section, which speaks of a devise passing "the fee simple or other the whole estate or interest of the testator," relates to the quantity of estate to be taken by a trustee for the purposes of the trust; while the 35th section, which declares that a devise shall vest in trustees "the fee simple or other the whole legal estate" in the premises devised, relates to the disposition of the legal estate not required for the purpose of the trust. The 34th section enacts that in no case shall trustees or executors be held, for the purposes of the trust, to take an indefinite term of years; the 35th section enacts that where the estate of the trustees is not expressly limited they shall in all cases take either an estate determinable on the life of a person taking a beneficial life interest in the property, or the absolute legal estate in fee simple.

Effect of the 35th section.—The 35th section seems to have been chiefly aimed at the doctrine, now (as before observed) abandoned, of a determinable fee. Its operation in other respects will be as follows:—

1st. The ordinary case of a devise to trustees in trust to pay the rents and profits to A. for life, and after his decease in trust for B. and his heirs, is left unaltered; the legal estate will still vest in B. after the death of A.

So, in the case of a devise to A. for life, with the remainder to trustees and their heirs in trust to preserve contingent remainders, with remainder to the first and other sons of A. in tail, with vested remainders over; the

estate of the trustees to preserve will still be restricted by implication to the life of A.

2ndly. Trusts to pay annuities will be altered. A devise to trustees in trust to pay an annuity to A. for life, and subject thereto in trust for B., will now vest in the trustees the whole legal fee simple, and not an estate during the life of the annuitant, although the annuity be payable out of the annual rents and profits only.

3rdly. Trusts during minority will present a difference. If the devise be to trustees in trust to apply the rents and profits for the maintenance of A. during his minority, and when A. attains twenty-one in trust for A. during his life, with remainders over, the legal estate will still as before vest in A. on his attaining twenty-one, inasmuch as the beneficial interest is given to him for life, and the purposes of the trust cannot continue longer.

But if the devise be (after the trust during minority) in trust for A. on his attaining twenty-one, in fee or in tail, and not for life only, the section will apply, and the whole legal estate will remain in the trustees, so that the estate of A. will be equitable only.

It may be a question whether, if the trusts declared are to pay the rents and profits to several persons (not to one only) successively for life, with remainders over, the legal estate will vest in the trustees in fee simple or for the lives of the respective persons taking beneficial life interests.

The section appears to apply to every case where there is no express limitation of the estate to be taken by the trustee, although the gifts over to the persons beneficially entitled may be in the form of a direct devise to them. Thus, if the gift be, "I devise Whiteacre to A. and his heirs in trust to apply the rents and profits during the minority of B. for his benefit, and when B. attains twenty-one I devise Whiteacre to B.—" it would appear that the trustees must, notwithstanding the latter words, take the fee by force of the 35th section.

The last two sections of the construction clauses of the Wills Act are as follows:—

36. Where any person to whom any real estate is devised for an estate tail or an estate in quasi entail, dies in the lifetime of the testator, leaving issue who would be inheritable under such entail, and any such issue are living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention appears by the will.

Imp. Act, 1 Vict., c. 26, s. 32.

37. *Where any person, being a child or other issue of the testator, to whom any real estate or personal estate is devised or bequeathed, for any estate or interest not determinable at or before the death of such person, dies in the lifetime of the testator, leaving issue, and any of the issue of such person are living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention appears by the will.

Imp. Act, 1 Vict. c. 26, s. 33.

*By section 27 of chapter 21 of the Ontario Statutes for 1914, section 37 of The Wills Act, is repealed and the following section substituted therefor:

37. Where any person, being a child or other issue of the testator to whom any real or personal estate is devised or bequeathed for any estate or interest not determinable at or before the death of such person, dies in the lifetime of the testator either before or after the making of the will, leaving issue, and any of the issue of such person are living at the time of the death of the testator, such devise or bequest shall not lapse

Residuary Bequest to Nephews and Nieces.—The court supplied the word "children" in the following clause in testator's will, "my three nieces and five nephews, children of Barry S. Cooper" and held that these eight took to the exclusion of the other nieces and nephews of testator. *Re Cooper* (1913), 25 O. W. R. 112; 5 O. W. N. 151; 14 D. L. R. 172.

but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention appears by the will.

It will be seen that the words "either before or after the making of the will" are inserted after the word "testator."

CHAPTER VI.

PAYMENT OF THE RESIDUE.

PAYMENT OF RESIDUE.

Where the executor has paid all the succession duties the debts, the funeral and testamentary expenses, and all the legacies heretofore mentioned, he must in the last place pay over the surplus or residue of the estate to the residuary legatee, or devisee, if any such be nominated.

DEATH OF RESIDUARY LEGATEE.

If the residuary legatee dies before the payment of debts, and before the amount of the surplus is ascertained, yet it shall devolve to his personal representative.

Wms. p. 1192.

RIGHTS OF RESIDUARY LEGATEE.

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, testamentary expenses, debts and legacies, and hand over the clear residue to the residuary legatee.

Wightwick v. *Lord*, 6 H. L. 217, 235.

RESIDUARY DEVISE.

As to residuary devises. By section 28 of the Wills Act, unless a contrary intention appears by the will, such real estate or interest therein as is comprised or intended to be comprised in any devise, which lapses or becomes void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary devise if any contained in the will.

MODE OF CONSTITUTING RESIDUARY LEGATEE.

No particular mode of expression is necessary to constitute a residuary legatee. It is sufficient if the intention of the testator be plainly expressed in the will, that the surplus of his estate, after payment of debts and legacies, be taken by a person there designated.

Fleming v. *Burrows*, 1 Russ. 276.

TO WHAT RESIDUARY LEGATEE ENTITLED.

Where the residuary legatee is nominated, generally he is entitled in that character 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.

Rose v. *Rose*, 17 Ves. 347.

FAILURE OF PARTICULAR INTENT, EFFECT OF.

The foundation of the general rule in respect to lapsed legacies is that the residuary clause is understood to be intended to embrace everything not otherwise effectually given, because the testator is supposed to take the particular legacy away from the residuary legatee only for the sake of the particular legatee. So that upon the failure of the particular intent the court gives effect to the general intent.

Easum v. *Appleford*, 5 M. & Cr. 61, 62.

RESIDUARY BEQUEST TO SEVERAL AS TENANTS IN COMMON.

When, therefore, from the construction of the will the presumption in favor of such general intent is negatived, the rule does not apply, and the lapsed legacy is undisposed of. Such is the case of a residuary bequest to several as tenants in common. The share of one dying in the testator's lifetime does not pass.

Bryan v. *Twigg*, L. R. 3 Eq. 433.

The testator may by the terms of the bequest narrow the title of the residuary legatee so as to exclude him from lapsed legacies, as where it appears to be the intention of the testator that the residuary legatee should have only what remained after the payment of legacies.

Bland v. *Lamb*, 2 Jac. & Walk. 406.

RESIDUARY LEGATEE MAY BE EXCLUDED FROM LAPSED LEGACIES.

Again, the testator may so circumscribe and confine the residue, as that the residuary legatee instead of being a general legatee shall be a specific legatee, and then he shall not be entitled to any benefit accruing from lapse unless what shall have lapsed constitute a part of the particular residue.

De Trafford v. *Tempest*, 21 Beav. 564.

RESIDUE OF ESTATE BEQUEATHED TO JOINT TENANTS.

Where the residuary estate is bequeathed to several persons in joint tenancy, if one or more of them happen to die in the lifetime of the testator, or after his death, but before the severance of the joint tenancy in the residue, their shares will survive to the others; but if the residue be given to several as tenants in common, the shares of the deceased shall not go to the survivors, but shall devolve on the testator's next of kin according to the Statute of Distributions as so much of the personal estate remaining undisposed of by the will, in case the death happen in the lifetime of the

testator, or shall go to the personal representatives of the deceased legatee in case his death took place after that of the testator.

Peat v. *Chapman*, 1 Ves. Sen. 542.

SEVERANCE AS BETWEEN RESIDUARY LEGATEES.

But where a money legacy or residue is given to more persons than one by any mode of expression which denotes a severance, the legatees will be tenants in common, as where the gift is to A. and B. "share and share alike," or "equally to be divided between them," or "respectively," or "between them."

Ryves v. *Ryves*, L. R. 11 Eq. 539.

CO-EXECUTORS AS SUCH TAKE RESIDUE.

Where co-executors take a residue in that character, they take as joint-tenants; therefore if one of them dies after the death of the testator, but before the severance of the joint tenancy in the residue, his share will survive to his co-executors, and his own executors or administrators will be excluded as well as the next of kin of the testator.

Knight v. *Gould*, 2 M. & K. 299-303.

WHEN RESIDUE GOES TO NEXT OF KIN.

If the testator neither makes any disposition of the residue, nor appoints an executor, the residue belongs clearly to the next of kin; but, if the testator appointing an executor makes no disposition of the residue, the question arises whether it belongs to such executor or to the next of kin.

RIGHT OF EXECUTOR TO RESIDUE.

At law it has been the rule from the earliest period that the whole personal estate devolves on the executor, and if, after payment of the funeral expenses, testamentary charges, debts and legacies, there shall be any surplus it shall vest in him beneficially.

Urquhart v. *King*, 7 Ves. 225.

In equity the rule has been the same as at law, the executor by the mere force of the appointment takes all the undisposed of residue of the personal estate as well beneficial as legal.

But where a necessary implication or strong presumption has appeared, that the testator meant to give only the office of executor, and not the beneficial interest in the residue, in all such cases the executor has been considered a trustee for the next of kin of the testator, or in cases where no next of kin can be found, a trustee for the Crown.

ANNUITANT, RIGHTS OF.

Annuitant, Rights of.—An annuitant is not guilty of such laches as would disentitle her to recover arrears of her annuity merely on the ground that she has not actively enforced the performance of the duty of the trustees to pay her such annuity regularly. *Rix, In re; Rix* v. *Rix*, 56 S. J. 573.

The annuitants were not entitled to have the estate of the testator realized and converted into money further than might be necessary for the payment of his debts and funeral and testamentary expenses; their right was limited, after this had been done, to having the annuities sufficiently secured by the setting apart of such part of the estate as might be adequate for that purpose. *In re Parry*, 42 Ch. D. 570, and *Harbin* v. *Masterman* (1896), 1 Ch. 351, followed. *Hicks* v. *Ross* (1891), 3 Ch. 499, referred to. It is only when the persons whose estate is liable to pay an annuity and the annuitant both consent, that an annuity may be redeemed out of the estate; and the order should be varied so as to require that consent. *Re McIntyre, McIntyre* v. *London and Western Trusts Co.*, 22 C. L. T. 90, 3 O. L. R. 212, 1 O. W. R. 56.

Payment out of Corpus.—Held, that the annuities given to the daughters, and the arrears of their annuities, were chargeable on the corpus of the real and personal estate subject to the right of the widow to have a sufficient sum set apart to provide for her annuity. *Almon* v. *Lewin*, 5 S. C. R. 514.

Annuities—Abatement.—Where the income of an estate, which was made applicable to the payment of annuities, had for some years been insufficient to satisfy them, the court held that the annuities did not bear interest, and that they were not payable out of the corpus of the estate. *Wilson* v. *Dalton*, 22 Chy. 160.

A lapsed pecuniary legacy will fall into the first, and not the second of such residuary dispositions; but a lapse, in whole or in part, of the first residuay disposition will enure for the benefit of the persons entitled under the second. *Isaac, In re; Harrison* v. *Isaac*, 74 L. J. Ch. 277; (1905) 1 Ch. 427; 92 L. T. 227.

"Residuary Legatee" — After-purchased Real Estate—Extrinsic Evidence.—The words "residuary legatee" in a will, being prima facie referable to personal and not to real estate, do not in the absence of a context sufficient to modify that prima facie reference constitute a residuary devise of real estate not otherwise disposed of by the will, even where the property in question is shewn to have been acquired after the date of the will. *Gibbs, In re; Martin* v. *Harding*, 76 L. J. Ch. 238; (1907) 1 Ch. 465; 96 L. T. 423.

CHAPTER VII.

DUTIES AND POWERS WITH RESPECT TO CHILDREN OF DECEASED.

CHILDREN OF DECEASED.

An executor often finds one of the most delicate parts of his duty to be that towards the children of the deceased. If the mother survive she may not be appointed guardian under the will and may resent the exclusion. Or, she may be appointed guardian and may marry again. In either case the executor will find his position unsatisfactory.

The following provisions of the Act respecting Infants, R. S. O. 1914, c. 153, deal with these points:—

CUSTODY OF INFANTS.

Order as to custody of and right of access to infant at the instance of mother.

2. (1) The Supreme Court or the Surrogate Court, upon the application of the mother of an infant, who may apply without a next friend, may make such order as the court sees fit regarding the custody of the infant and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter, vary or discharge the order on the application of either parent, or, after the death of either parent, of any guardian appointed under this Act, and in every case may make such order respecting the costs of the mother and the liability of the father for the same, or otherwise, as the court may deem just.

ORDER AS TO MAINTENANCE.

(2) The court may also make an order for the maintenance of the infant by payment by the father, or out of any estate to which the infant is entitled, of such sum from time to time as, according to the pecuniary circumstances of the father or the value of the estate, the court deems reasonable.

WHERE MOTHER GUILTY OF ADULTERY.

(3) No order directing that the mother shall have the custody of or access to an infant shall be made in favour of a mother against whom adultery has been established by judgment in an action for criminal conversation or for alimony.

INFANT'S REAL ESTATE.

WHEN SALE OR LEASE OF INFANT'S ESTATE MAY BE AUTHORIZED.

5. (1) Where an infant is seized, possessed of or entitled to any real estate in fee or for a term of years, or otherwise, and the Supreme Court is of opinion that a sale, mortgage, lease or other disposition of the same, or of a part thereof, or of any timber, not being ornamental, growing thereon, is necessary or proper for the maintenance or education of the infant, or that for any cause his interest requires or will be substantially promoted by such disposition, the court may order the sale, mortgage, or the letting for a term of years, or other disposition of such real estate, or any part thereof, to be made under the direction of the court or of one of its officers, or by the guardian of the infant, or by a person appointed for the

purpose, in such manner and with such restrictions as may be deemed expedient, and may order the infant to convey the estate.

EXCEPTION.

(2) No sale, mortgage, lease, or other disposition shall be made contrary to the provisions of a will or conveyance by which the estate has been devised or granted to the infant or for his use.

WHO MAY APPLY. INFANT'S CONSENT.

13. The application shall be in the name of the infant by his next friend, or guardian; but shall not be made without the consent of the infant if he is of the age of fourteen years or upward unless the court otherwise directs or allows.

WHEN A SUBSTITUTE MAY BE APPOINTED TO CONVEY.

14. Where it is deemed convenient the court may direct some other person in the place of the infant to convey the estate.

VALIDITY OF SUCH CONVEYANCE.

15. Every such conveyance, whether executed by the infant or by a person appointed to execute the same in his place, shall be as effectual as if the infant had executed the same, and had been of the age of twenty-one years at the time.

APPLICATION OF PROCEEDS.

16. The money arising from such sale, lease or other disposition, shall be laid out, applied and disposed of in such manner as the court directs.

CHARACTER OF SURPLUS MONEY.

17. On any sale or other disposition so made, the money raised, or the surplus thereof, shall be of the same nature and character as the estate sold or disposed of; and the heirs, next of kin, or other representatives of the infants shall have the like interest in any surplus which may remain at the decease of the infant, as they would have had in the estate sold or disposed of, if no such sale or other disposition had been made.

GUARDIANS.

APPOINTMENT OF GUARDIANS BY SURROGATE COURT. WHEN INFANT'S CONSENT NECESSARY.

26 (1) The Surrogate Court may appoint the father of the infant or may with the consent of the father, appoint some other suitable person or persons to be the guardian or guardians of the infant, but if the infant is of the age of fourteen years no such appointment shall be made without his consent.

WHERE NO FATHER OR AUTHORIZED GUARDIAN OR INFANT DOES NOT CONSENT.

(2) If the infant has no father living or any guardian authorized by law to take the care of his person and the charge of his estate, if any, or if he is of the age of fourteen years and does not give the consent mentioned in the next preceding sub-section, upon the written application of the infant, or of any friend of the infant residing within the jurisdiction of the Surrogate Court to which the application is made, and after proof of twenty days' public notice of the application in some newspaper published within the county or district to the Surrogate Court of which the application is made, the court may appoint some suitable and discreet person or persons to be guardian or guardians of the infant, whether the infant is or is not entitled to any property.

SECURITY BY THE GUARDIAN. CONDITION OF BOND.

27. Subject to the provisions of The Guarantee Companies Securities Act, and of The Ontario Companies Act, the court shall take from every guardian, appointed under s. 26, a bond in the name of the infant, in such penal sum and with such sureties as the Judge approves, conditioned that

the guardian will faithfully perform his trust, and that he, or his executors or administrators, will, when the infant becomes of the full age of twenty-one years, or whenever the guardianship is determined, or sooner if thereto required by law, render a true and just account of all goods, money, interest, rents, profits or other estate of the infant, which shall have come into the hands of the guardian, and will thereupon without delay deliver and pay over to the infant, or to his executors or administrators, the estate or the sum which may be in the hands of the guardian belonging to the infant, deducting therefrom and retaining a reasonable sum for the expenses and charges of the guardian; and the bond shall be recorded by the registrar of the court in the books of his office.

WHEN MOTHER TO BE GUARDIAN ALONE OR JOINTLY.

28. (1) On the death of the father of an infant the mother, if surviving, shall be the guardian of the infant, either alone, when no guardian has been appointed by the father, or jointly with any guardian appointed by the father.

WHEN COURT MAY APPOINT GUARDIAN.

(2) Where no guardian has been appointed by the father, or if the guardian appointed by the father is dead, or refuses to act, the Supreme Court or the Surrogate Court may from time to time appoint a guardian or guardians to act jointly with the mother.

WHEN MOTHER MAY APPOINT GUARDIAN.

(3) The mother of an infant may, by deed or will, appoint any person or persons to be the guardian or guardians of the infant after the death of herself and the father of the infant, if the infant be then unmarried; and where guardians are appointed by both parents they shall act jointly.

PROVISIONAL APPOINTMENT BY MOTHER.

(4) The mother of an infant may, by deed or will, provisionally nominate some fit person or persons to act as guardian or guardians of the infant after her death jointly with the father of the infant, and the court after her death, if it be shown that the father is for any reason unfitted to be the sole guardian of his children, may confirm the appointment of such guardian or guardians, who shall thereupon be empowered to act, or may make such other order in respect of the guardianship as may be deemed just.

DIRECTION BY COURT ON MATTERS AFFECTING INFANT.

(5) In the event of guardians being unable to agree among themselves, or with the father, upon a question affecting the welfare of an infant any of them, or the father, may apply to such court for its direction, and the court may make such order as may be deemed just.

REMOVAL OF GUARDIANS.

29. (1) Testamentary guardians and guardians appointed or constituted by virtue of this Act, shall be removable by the Supreme Court or by the Surrogate Court, for the same causes for which trustees are removable.

WHAT SURROGATE COURT OR JUDGE TO ACT.

31. (1) The Surrogate Court, referred to in ss. 2 and 26 to 28, is the Surrogate Court of the county or district in which the infants or any or either of them reside.

AUTHORITY OF GUARDIANS.

GUARDIAN'S AUTHORITY.

32. Unless where the authority of a guardian appointed or constituted by virtue of this Act is otherwise limited the guardian so appointed or constituted during the continuance of his guardianship,

TO ACT FOR WARD.

(a) shall have authority to act for and on behalf of the infant;

TO APPEAR IN ACTIONS.

(b) may appear in any court and prosecute or defend any action or proceedings in his name;

TO MANAGE REAL AND PERSONAL ESTATE, ETC.

(c) shall have the charge and management of his estate, real and personal, and the custody of his person and the care of his education; and

TO APPRENTICE WARDS.

(d) shall have authority to apprentice the infant in accordance with the provisions of The Apprentices and Minors Act.

(2) *Payment for Maintenance.*

EXECUTOR CANNOT PAY FOR MAINTENANCE.

An executor will be guilty of a devastavit if he applies the assets in payment of a claim which he is not bound to satisfy: as if he makes disbursements in the schooling, feeding or clothing of the children of the deceased subsequent to his decease.

Giles v. *Dyson*, 1 Stark. N. P. C. 32.

EXECUTOR MUST NOT PAY INFANT'S LEGACY TO INFANT.

An executor cannot without risk pay any part of the legacy bequeathed to an infant either to the infant or any person for his use. Therefore, the executor was formerly not justified in applying any part of the capital of the legacy for the maintenance or advancement of the child, or for any other purpose than mere necessaries without the sanction of the court. But with respect to the interest of the sum bequeathed, the executor may apply a requisite part of it for the support of the infant legatee without the authority of the testator, if he does no more than the court would have directed if it had been resorted to in the first instance.

MAINTENANCE OUT OF INCOME.

As to payments for maintenance out of the income, they can be made only when the legacy is vested in possession; not when it is vested and payable in futuro, nor when it is contingent.

An executor must be careful not to pay money for the maintenance of an infant until it is clear that on a final settlement of all claims relating to the testator's estate there will be a clear fund out of the income of which maintenance can be provided.

INTERMEDIATE MAINTENANCE.

The gift of a legacy not vested in possession carries with it the right to intermediate maintenance whenever the will either expressly or by implication authorizes the provision of maintenance.

IMPLICATION OF INTENTION TO MAINTAIN.

An intention is implied in the absence of directions to the contrary.

1. Where the donor was the father of the legatee, or stood in loco parentis towards him.

2. Where a legacy is given contingently to members of a class of infants (a), if it is inevitable that one or more of the members of a class will ultimately take, or (b), if the consent of all parties who may be ultimately interested in reversion or otherwise, has been obtained.

ADVANCEMENT OF INFANTS.

By advancement of infants is meant payments made for the purpose of insuring a permanent benefit to an infant generally by establishing him in some profession or career. Advancement out of capital is governed by the rules stated above with regard to maintenance.

WHERE TESTATOR PARENT OR IN LOCO PARENTIS.

Where the testator is the parent or in loco parentis of an infant legatee, whether the legacy be contingent or vested, the interest on the legacy shall be allowed as maintenance from the time of the death of the testator.

WHERE BEQUEST VESTED AND IMMEDIATE.

Where a bequest is vested and immediate so that the legatee if he were of age would be entitled to receive his legacy at the end of the year from the testator's death, the court will order maintenance out of the interest of the legacy, although no express provision be made for the maintenance, and even though the income be expressly directed to accumulate, provided the parents of the infant legatee are unable to maintain him. No allowance will be made if the parents be of ability. No maintenance will be ordered out of the interest where the legacy is contingent, unless, perhaps, by the consent of the legatees over, in instances where they are competent to give it.

Evans v. *Massey*, 1 Yonge & Jerv. 196.

DISCRETION TO EXECUTORS.

A discretion given to executors to apply the interest of a legacy to the maintenance and education of the legatees, nephews, and niece of the testator, is not subject to the control of the court where there is no charge of fraud or the like against the executors.

Foreman v. *McGill*, 19 Chy. 210.

SUMMARY APPLICATION FOR MAINTENANCE.

Where an infant's fund is in court or under the control of the court, a summary order may be granted for the application of it in maintenance, upon a simple notice of motion.

But if the money is outstanding in the hands of trustees or others, unless they submit to the jurisdiction, summary proceedings are inappropriate.

And a summary application by the guardian of infants for payment to him or into court, by the administrator of the estate of the infants' father, of a fund in his hands, was dismissed, where it was opposed by the administrator.

Re Coutts, 15 P. R. 162.

MAINTENANCE.

Will—Construction—Bequests to Children—Death of Children—Devolution of Shares—Vested or Contingent Interests—Income—Maintenance.—The rule regarding the vesting of interest in a case such as this, as laid down by Theobald, 6th ed., p. 563, is that "when the only gift is to be found in the direction to pay or divide, where the payment is deferred for reasons personal to the legatee, the gift will not vest till the appointed time." There is, however, a recognized exception to this rule, that if the interest upon a legacy is given to the legatee in the meantime till the time of payment arrives the gift is vested. This exception, however, is subject to certain limitations, and one of the limitations appears to me to be applicable to the present case. The principle is stated by Theobald, p. 566, as follows: "A distinction must be drawn between the gift of a sum to each member of a class at 21 with a gift of the interest upon the several shares in the meantime, and the gift of an aggregate fund to a class as they respectively attain 21 with a direction that the whole interest is to be applied for their maintenance in the meantime; in the latter case, as the fund is to be kept together and the whole interest applied for maintenance, nothing will vest before 21." The same distinction is pointed out in Williams on Executors, 10th ed., p. 981 et seq. In *In re Parker*, 16 Ch. D. 44, Jessel, M.R., said: "It appears to me that this case is different from that of *Fox* v. *Fox*. In my opinion, when a legacy is payable at a certain age, but is in terms contingent, the legacy becomes vested when there is a direction to pay the interest in the meantime to the person to whom the legacy is given, and not the less so when there is superadded a direction that the trustees shall pay the whole or such part of the interest as they shall think fit, but I am not aware of any case where, the gift being of an entire fund payable to a class of persons equally on their attaining a certain age, a direction to apply the income of the whole fund in the meantime for their maintenance has been held a vested interest in the member of the class who does not attain that age." This principle has been followed in later cases, the latest to which my attention has been called being *Re Gosling* (1902), 1 Ch. 945. This last mentioned case was reversed on appeal, but not on the ground of dissent from the principle, but on the ground that the principle did not apply, and that the beneficiaries were entitled to definite shares of the interest. *Re Sandison*, 5 W. L. R. 317.

Legacy—Maintenance.—Legacy to a grand-nephew payable at twenty-one, with power to trustees to apply the whole or any part towards the advancement in life "or otherwise for the benefit" of the legatee, whether under twenty-one or not, carries interest from the death of testatrix, and the interest is applicable for maintenance of the legatee during minority. *Pett* v. *Fellows* (1 Swanst. 561n.), and *Leslie* v. *Leslie* (Ll. & G. 1) applied.

Churchill, In re; Hiscock v. *Lodder*, 79 L. J. Ch. 10; (1909) 2 Ch. 431; 101 L. T. 380; 53 S. J. 697.

Bequest to Widow—Maintenance of Children—Trust—Rights of Children.—The position of the widow and children under this will is the same as that which was under consideration in *Allen* v. *Furness*, 20 A. R. 34.

The testator had only three children born at the date of the will; one more was born in his lifetime after the date of the will. Under the terms of the will, the three children only take the residuary estate, and the fourth takes no share in either principal or income: *Re Emery's Estate*, 3 Ch. D. 300; *Re Stephenson* (1897), 1 Ch. 75, 81. *Re Shortreed*, 2 O. W. R. 318.

Maintenance.—The widow and administratrix of an intestate got in his personal estate, occupied the real estate, received the rents and profits thereof, and spent a considerable sum in improving it. She also maintained the infant heirs, to whom no guardian had been appointed:—Held, that the personal estate, and the proceeds and profits of the real estate come to her hands, must first be applied towards payment of debts, and then to reimburse her for the sums spent in the infants' maintenance. No allowance was made for her improvements, but she was not charged with any increase in rental caused thereby. *In re Brazill, Barry* v. *Brazill*, 11 Chy. 253.

Gift to Trustee—Held, that where there is a gift to a trustee for the education and support of a named beneficiary, the latter is entitled to the fund absolutely upon coming of age. *Hanson* v. *Graham*, 6 Ves. 249, referred to. *Re McKeon* (1913), 25 O. W. R. 146; 5 O. W. N. 190.

Child of Testator — Appropriation — Interest — Maintenance —Life Tenant—Accumulations of Surplus Income.—The Rule that interest is payable from the testator's death on a legacy to an infant child of the testator contingently on attaining twenty-one, where no other fund is provided for maintenance, only means that it carries interest for the purpose of the maintenance of the infant, and the infant does not acquire an immediate vested right to the interest on the legacy or to the income of a fund appropriated to answer it.

So far as their language is concerned, the Judges who established the rule in such cases construed the will of the father as giving the interest to the child independently of the happening of the contingency; but, the practice of the court having been to take a different view, that practice ought now to be followed. *Ib.*

Bowlby, In re; Bowlby v. *Bowlby*, 73 L. J. Ch. 810; (1904), 2 Ch. 685; 91 L. T. 573; 53 W. R. 270.

Hanson v. *Graham*, 6 Ves. 239, and *In re Gossling, Gossling* v. *Elcock* (1903), 1 Ch. 448, establish a rule of construction which is applicable to the language of this will, and accords, in my opinion, with what was the testator's intention. That rule is, that where there is a gift by will of a share or residue to be paid or transferred to the legatee on his attaining a particular age, with a direction that in the meantime the income of the share shall be applied for his maintenance, the share is vested and not contingent. *Re Livingston*, 9 O. W. R. 335.

Interest on Legacy—Gift to Adult—Obligation to Maintain Infants.—*Crane, In re; Adams* v. *Crane*, 77 L. J. Ch. 212; (1908), 1 Ch. 379.

Bequest of Right to a "Home."—This is pretty well covered by authority. *Augustine* v. *Schrier*, 18 O. R. 192, is in point. I am of opinion that William is entitled to reside in the house upon the farm mentioned during the lifetime of his mother.

For these reasons I am of opinion that William is not entitled to board or maintenance from his brother. He is entitled only to suitable room accommodation, with necessary right of ingress, egress, and regress, and such use of the premises as is reasonably included in the word "home," apart from board or clothing. The right of William to such room as will give him a home in the house mentioned is a personal right, and the exercise and enjoyment of that right must be such as not to interfere with the rights

of Alexander or his grantee or lessee to the full use and occupation of the remainder of the premises. . . .

(*Judge* v. *Splann*, 22 O. R. 409; *Cameron* v. *Adams*, 25 O. R. 229, and *Mannox* v. *Greener*, L. R. 14 Eq. 456, referred to.

Re McMillan, 3 O. W. R. 418.

Advancement.—It is clear on the authorities, which is *Lowther* v. *Bentinck*, L. R. 19 Eq. 166, that a power to apply capital for the advancement in life of a child, has a well recognised meaning. Sometimes enlarging expansions, such as "or otherwise for the benefit" are used. In the absence of any such enlarging expression the word "advancement" as pointed out in *Re Kershaws Trusts*, L. R. 6 Eq. 322, is to be read as a word appropriate to an early period of life. *Brooke* v. *Brooke*, 20 O. W. R. 29.

Custody of Infants.—A Surrogate Court has no right to the custody of the property of infants or lunatics; and the Judge of the Surrogate Court has no jurisdiction to order payment of an infant's money into that Court. He may order it to be paid into the High Court. *Re Mercer*, 26 O. L. R. 427.

CHAPTER VIII.

DISTRIBUTION UNDER PRESENT LAW.

Original Power of King to Seize Goods of an Intestate.*

In ancient time when a man died without making any disposition of such of his goods as were testable, it was said that the king, who is parens patriæ, and has the supreme care to provide for all his subjects, used to seize the goods of the intestate to the intent that they should be preserved and disposed of for the burial of the deceased, the payment of his debts, to advance his wife and children, if he had any, and, if not, those of his blood.

Powers Exercised in County Court, and as Vested in Ordinary.

This prerogative the king continued to exercise for some time by his own ministers of justice, and probably in the County Court, where matters of all kinds were determined; and it was granted as a franchise to many lords of manors, and others who had a prescriptive right to grant administration to their intestate tenants and suitors in their own courts Baron and other courts. Afterwards the Crown, in favour of the Church, invested prelates with this branch of the prerogative, for it was said none could be more fit to have such care and charge of the transitory goods of the deceased than the Ordinary, who all his life had the cure and charge of the soul. The goods of the intestate being thus vested in the Ordinary, as trustee, to dispose of them in pios usus, it was found that the clergy took to themselves, under the name of the Church and the poor, the whole of the residue of the deceased's estate after the partes rationabiles of the wife and children had been deducted, without paying even his lawful debts and charges thereon.

13 Edw. I., c. 19.

By Stat. Westm. 2 (13 Ed. I., c. 19), it was enacted that the Ordinary should be bound to pay the debts of the intestate, as far as his goods extended, in the same manner that executors were bound in case the deceased had left a will.

Powers of Ordinary Abused.

However, in Snelling's case, it was resolved that if the Ordinary took the goods into possession, he was chargeable with the debts

*The first four paragraphs of this chapter are already printed on pages 14 and 15. They are repeated here in order to make a full statement of the subject of distribution.

of the intestate at common law, and that the Statute Westminster 2 was made in affirmance of the common law; but, though the Ordinary was either at common law or by force of this statute liable to the creditors for their just and lawful demands, yet the residuum, after payment of debts, remained still in his hands, to be applied to whatever purpose the conscience of the Ordinary should approve. The flagrant abuses of which power occasioned the Legislature to interpose in order to prevent the Ordinaries from keeping any longer administration in their own hands or those of their immediate dependents. Therefore Stat. 31 Edw. III. Stat. 1, c. 2, provides:—

> "That in case where a man dieth intestate the Ordinarys shall depute of the next and most lawful friends of the dead person intestate to administer his goods, which person so deputed shall have action to demand and recover as executors the debts due to the said deceased intestate in the King's Court to administer and dispend for the soul of the dead, and shall answer also in the King's Court to others to whom the said deceased was holden and bound in the same manner as executors shall answer, and they shall be accountable to the Ordinarys as executors be in the case of testament as well as of the time past as of the time to come."

ORIGINAL ADMINISTRATIVE OFFICERS.

This is the original administrative. They were the officers of the Ordinary, appointed by him in pursuance of the statute, and their title and authority were derived exclusively from the Ecclesiastical Judge by grants which were denominated letters of administration.

SPIRITUAL COURT TAKES BONDS FROM ADMINISTRATOR.

After the Ordinary was divested of the power of administering an intestate's effects, and compelled to delegate such authority to the relations of the deceased, the spiritual court attempted to enforce a distribution, and took bonds of the administrator for that purpose; such bonds were prohibited by the temporal courts, and declared to be void in point of law, on the ground that by the grant of administration the ecclesiastical authority was executed and ought to interfere no further. Thus the administrator was entitled exclusively to enjoy the residue of the testator's effects, after payment of the debts and funeral expenses.

ORIGIN OF STATUTE OF DISTRIBUTION.

The hardships of this privilege upon those of kin to the intestate, in equal degree with the administrator, was the occasion of making the Statute of Distribution, 22 & 23 Chas. II., c. 10. That statute, after empowering the Ordinary on the granting of administration to take a bond of the administrator, with two or more sureties, proceeds in section 3 to enact as follows: "And

also that the said Ordinaries and Judges respectively shall, and may, and are enabled to proceed and call such alministrators to account for and touching the goods of any person dying intestate; and, upon hearing and due consideration thereof, to order and make just and equal distribution of what remaineth clear (after all debts, funeral, and just expenses of every sort first allowed and deducted), amongst the wife or children or children's children, if any such be; or, otherwise, to the next of kindred to the dead person, in equal degree or legally representing their stocks pro suo cuique jure according to the laws in such cases and the rules and limitation hereafter set down; and the same distributions to decree and settle and to compel such administrators to observe and pay the same by the due course of his majesty's ecclesiastical laws; saving to every one supposing him or themselves aggrieved their right of appeal as was always in such cases used."

DEVOLUTION OF ESTATES ACT.

The closing words of section 4 (1) of the first Devolution of Estates Act extended to all property, real and personal, of persons dying on and after 1st July, 1886, the rules of distribution theretofore in force for personal property only. The words were "and so far as the said property is not disposed of by deed, will, contract or other effectual disposition, the same shall be distributed as personal property not so disposed of is hereafter to be distributed."

HOW PERSONAL PROPERTY IN ONTARIO IS DISTRIBUTED.

Personal property in Ontario was thus distributed according to the rules laid down by the Statute of Distributions, 22 & 23 Chas. II., c. 10. By virtue of chapter 111 of the Revised Statutes of 1897, an Act adopting the law of England in certain matters, the statute of Distributions, with its amendments, became part of the law of Ontario as modified by our statutes passed since 15th October, 1792.

See *Lamb* v. *Cleveland*, 19 S. C. R. 83.

PRESENT LAW OF DISTRIBUTION.

The present law of distribution in Ontario is now fixed by s. 30 of the Devolution of Estates Act, as follows:—

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 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 representations admitted among collaterals after brothers' and sisters' 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.

32. Subject to provisions of section 55 of The Trustee Act, no such distribution shall be made until after one year from the death of the intestate, and every person to whom in distribution a share shall be allotted shall, if any debt owing by the intestate shall be afterwards sued for and recovered or otherwise duly made to appear, refund and pay back to the personal representative his rateable part of that debt and of the costs of suit and charges of the personal representative by reason of such debt out of the part or share so allotted to him, thereby to enable the personal representative to pay and satisfy such debt, and shall give bond with sufficient sureties that he will do so.

Section 55 of the Trustee Act relates to liability of executor in respect of rents in conveyances on rent charge.

First, of the Rights of the Widow.

12.—(1) The real and personal property of every man dying intestate and leaving a widow but no issue shall, where the net value of such real and personal property does not exceed $1,000, belong to his widow absolutely and exclusively.

(2) Where the net value exceeds $1,000, the widow shall be entitled to $1,000, part thereof, absolutely and exclusively and shall have charge thereon for such sum, with interest thereon from the date of the death of the intestate at 4 per centum per annum until payment.

(3) The provision for the widow made by this section shall be in addition and without prejudice to her interest and share in the residue of the real and personal property of the intestate remaining after payment of such sum of $1,000 and interest, in the same way as if such residue had been the whole of the intestate's real and personal property, and this section had not been enacted.

ELECTION BY WIDOW.

Provision is made by the same Act for an election by the widow between the rights thereby conferred and her dower.

9.—(1) Nothing in this Act shall take away a widow's right to dower; but a widow may by deed or instrument in writing, attested by at least one witness, elect to take her interest under this Act in her husband's undisposed of real property, in lieu of all claim to dower in respect of the real property of which her husband was at any time seised, or to which at the time of his death he was beneficially entitled; and unless she so elects she shall not be entitled to share in the undisposed of real property.

9.—(2) The personal representative of the deceased may by notice in writing require his widow to make her election, and if she fails to execute and deliver a deed or instrument of election to him within six months after the service of the notice, she shall be deemed to have elected to take her dower.

(3) Where the widow is an infant or a lunatic the right of election may be exercised on her behalf by the Official Guardian with the approval of a Judge of the Supreme Court, or by some person authorized by a Judge

of the Supreme Court to exercise it; and the Official Guardian or the person so authorized may, for and in the name of the widow, give all notices and do all acts necessary or incidental to the exercise of such right.

MODE OF ELECTION.

Where a widow desires to take, under the Devolution of Estates Act, her interest in the proceeds of her husband's undisposed of real estate, in lieu of dower, she must so elect by an instrument in writing, pursuant to s. 9, s.-s. (1), even where the lands have been sold under an order of the court at her instance, free from her dower, and the proceeds are in court.

Re Galway, 17 O. R. 49.

WHERE WIDOW HAS ACCEPTED EQUIVALENT IN LIEU OF DOWER.

Section 9 of the Devolution of Estates Act, which gives the widow the right of election, between her dower and a distributive share in her deceased husband's lands, does not apply where by marriage settlement she has accepted an equivalent in lieu of dower. In such case she has no right to any share in the lands.

Toronto General Trusts Co. v. *Quin*, 25 O. R. 250.

AS TO ELECTION BY WIDOW.

See *Reid* v. *Harper*, 16 O. R. 422, and *Re Ingolsby*, 10 O. R. 283.

As to application by personal representative to sell free from dower, see page 114, ante.

WIDOW HAVING RECEIVED OTHER BENEFITS IN OTHER COUNTRIES.

By section 12 of R. S. O. 1914, c. 119, the widow of an intestate who has left no issue is entitled to $1,000 out of his real estate in Ontario, notwithstanding that she may have received other benefits under the laws of another country out of his estate in that country.

Sinclair v. *Brown*, 29 O. R. 370.

WIDOW MAY ELECT AFTER LANDS SOLD BY COURT.

When on administration by the court of the estate of an intestate lands have been sold, the widow, although declared entitled to dower by the judgment, may, though more than a year has elapsed from the death of her husband, elect to take her distributive share in lieu of dower, provided the estate be not yet distributed on the footing of her having retained her dower right.

Baker v. *Stuart*, *No.* (2), 29 O. R. 388, 25 A. R. 445.

Second, the Rights of the Husband.

RIGHTS OF HUSBAND.

A husband being entitled to the grant of administration of his wife's effects, was therefore before the Statute of Distributions

held entitled, as all administrators were, to the exclusive enjoyment of the residue. Doubts, however, arose whether the husband's right was not superseded by that Statute. The Statute of Frauds, 29 Car. II., c. 3, s. 25, set this doubt at rest by providing that the husband should still continue to hold the right of claiming administration of his wife's estate and to enjoy the benefit of that estate as theretofore.

Where husband has renounced, see *Dorsey* v. *Dorsey*, 30 O. R. 183.

Section 29 (1) of the Devolution of Estates Act now provides as follows for the distribution of the property of a married woman deceased intestate.

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 pre-deceased her.

Section 29 (2) of the Devolution of Estates Act provides as follows:—

(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 is 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.

Third, the Rights of the Children and Lineal Descendants of the Deceased Person.

RIGHTS OF CHILDREN.

After the allotment of a third to the widow, the statute directs a distribution of the residue by equal portions to and amongst the children of the intestate, and "such persons as legally represent such children," in case any of the said children be then dead.

Children and relatives who are illegitimate shall not be entitled to inherit under any of the provisions of this Act. R. S. O., 1914, c. 119, s. 27.

HOW FAR REPRESENTATIVES OF CHILDREN ADMITTED.

By the words "such as legally represent such children," their representatives to the remotest degree are admitted; but the term must be understood of descendants, and not next of kin; as, for example, if a son of the intestate is dead, leaving a widow and child, the widow shall take nothing and the child the whole of the father's share; yet the widow, though not strictly one of the next

of kin, is, in the same sense as the child, a legal representative of the personal estate of the father.

Price v. *Strange*, 6 Madd. 161, 162.

CHILDREN ALL EQUALLY ENTITLED.

Where none of the intestate's children are dead after the wife has had the third allotted to her, the remaining two-thirds shall, in pursuance of the statute, be equally divided among all the children of the intestate, as in this case they all claim in their own right.

HALF BLOOD.

A brother or sister of the half-blood are equally entitled to a share with one of the whole blood, inasmuch as they are both equally near of kin to the intestate.

Smith v. *Tracey*, 1 Mod. 209.

POSTHUMOUS CHILD.

A posthumous child has also the same rights, but such a child is only to be treated as a born child where such construction is necessary for the benefit of that child.

Blasson v. *Blasson*, 2 De G. J. & Sm. 665.

INTESTATE LEAVING ONLY ONE CHILD.

If the intestate leave only one child, such case is not to be considered as omitted. By the statute, therefore, in case an intestate also leave a wife, she shall only have a third part, and the other two-thirds shall go to such child; and where the intestate leaves an only child, and no widow, although, literally speaking, there can be no distribution, yet such only child shall be entitled to the whole personal estate.

CO-HEIRS TAKE AS TO TENANTS IN COMMON.
DESCENDANTS, ETC., BORN AFTER DEATH OF INTESTATE TO INHERIT.

By section 18 of the Act, where an inheritance or a share of an inheritance descends to several persons under such provisions, they shall take as tenants in common in proportion to their re-respective rights.

18. Where real property becomes vested under this Act in two or more persons beneficially entitled under this Act, they shall take as tenants in common in proportion to their respective rights, unless in the case of a devise they take otherwise under the provisions of the will of the deceased.

CHILDREN ALL DEAD ALL LEAVING ISSUE.

Where the intestate's children are all dead, all of them having left children, the parties take per capita, or, in other words, equal shares in their own right.

2 Black Comm. 517.

SOME CHILDREN DEAD, SOME LIVING.

Where some of the intestate's children are living, and some dead, and such as are dead have each of them left children; in this case, the children of the deceased children take per stirpes, that is to say, not in their own right, but by representation.

DISTINCTIONS BETWEEN DEVOLUTION OF ESTATES ACT AND STATUTE OF DISTRIBUTIONS AS TO ADVANCEMENT.

Section 28 s.-s. 1 to 4 inclusive of the Devolution of Estates Act deal with the subject of advancement. They apply to both real and personal estate. The sections of the Devolution of Estates Act are as follows:—

28.—(1) If any child of an intestate has been advanced by him by settlement or portion of real or personal property, or both, and the same has been so expressed by the intestate in writing, or so acknowledged in writing by the child, the value thereof shall be reckoned, for the purposes of this section only, as part of the real and personal property of such intestate to be distributed under the provisions of this Act; and if such advancement is equal to or greater than the amount of the share which such child would be entitled to receive of the real and personal property of the deceased, as so reckoned, then such child and his descendants shall be excluded from any share in the real and personal property of the intestate.

(2) If such advancement is less than such share, such child and his descendants shall be entitled to so much only of the real and personal property as is sufficient to make all the shares of the children in such real and personal property and advancement to be equal, as nearly as can be estimated.

(3) The value of any real or personal property so advanced shall be deemed to be that, if any, which has been acknowledged by the child by an instrument in writing; otherwise such value shall be estimated according to the value of the property when given.

(4) The maintaining or educating, or the giving of money to a child without a view to a portion or settlement in life, shall not be deemed an advancement within the meaning of this Act.

ADVANCEMENT.

The end and intent of the statute was to make provision for all the children of the intestate equally as near as could be estimated.

2 Black Comm. 516.

MOTHER'S PROPERTY NOT BROUGHT INTO HOTCH-POT.

This provision applies only to the distribution of the estate of the intestate father; and, therefore, if a mother, being a widow, advances a child and dies intestate, leaving many children, the child advanced shall not bring what he received from his mother into hotch-pot.

Bennet v. *Bennet*, 10 C. D. 474.

CHILD MAY KEEP ADVANCED PROPERTY.

The statute takes nothing away that has been given to any of the children, however unequal that may have been, how much soever it may exceed the remainder of the personal estate left by the intestate at his death, the child may, if he pleases, keep it, and if he

be not contented, but would have more, then he must bring into hotch-pot what he has before received.

STATUTE ONLY APPLIES WHERE ACTUAL INTESTACY.

The provision in the statute applies only to the case of actual intestacy; and where there is an executor, and, consequently, a complete will, though the executor may be declared a trustee for the next of kin, they take as if the residue had been actually given to them. Therefore a child advanced by his father in his lifetime, or provided for in the will, cannot be called upon to bring, his share into hotch-pot.

Stewart v. *Stewart*, 15 C. D. 539.

GRAND-CHILDREN MUST BRING IN PARENTS' ADVANCEMENT.

If a child who has received any advancement from his father shall die in his father's lifetime leaving children, such children shall not be admitted to their father's distributive share unless they bring in his advancement, since, as his representatives, they can have no better claim than he would have had if living.

Proud v. *Turner*, 2 P. Wms. 560.

NO BENEFIT TO WIDOW BY ADVANCEMENT.

A child advanced in part shall bring in his advancement only among the other children, for no benefit shall accrue from it to the widow.

Kirkcudbright v. *Kirkcudbright*, 8 Ves. 51, 64.

CHARGES MAY BE ADVANCEMENT.

The statute extends not only to land settled on a younger child by the father; but also to charges upon land for such child; so if the father settle a rent out of his land on a younger child it is within the statute, and so is a reversion settled upon any child but the heir.

Edwards v. *Freeman*, 2 P. Wms. 442.

ADVANCES UNDER SETTLEMENT.

A provision made for a child by a settlement, whether voluntary or for a good consideration, as that of marriage, is an advancement.

Phiney v. *Phiney*, 2 Vern. 638.

ADVANCES BY DEED.

It is not requisite to constitute an advancement that the provision should take place in the father's lifetime. If by deed he settle an annuity to commence after his death on one of his children, it is an advancement; so a portion secured to the child, although in futuro, is an advancement. Thus a portion for a daughter, to be raised out of land on her attaining the age of 18, or the day of her marriage, was held to be an advancement to

her when she married, although she was under that age and unmarried at the time of the intestate's death.

Edwards v. *Freeman*, 2 P. Wms. 445.

CONTINGENT PORTIONS.

A portion which was at first contingent shall clearly be considered an advancement when the contingency has happened. But the contingency must be limited as necessary to arise within a reasonable time, and the contingency must be valued.

OFFICES.

With respect to the sort of benefit which shall constitute an advancement, it has been held that if a father buy for a son any office, civil or military, this is to be considered as an advancement, either partial or complete, according to the comparative value of the estate to be distributed.

Pusey v. *Desbouverie*, 3 P. Wms. 317.

ANNUITY.

PRESENTS NOT AN ADVANCEMENT.

An annuity is an advancement to be brought into hotch-pot, namely, the value at the date of the grant. On the other hand, small, inconsiderable sums of money given to the child by the father, or mere trivial presents, he may make to a child, as of a gold watch, or wedding clothes, are not to be deemed an advancement; nor shall money expended by the father for the maintenance of a child, nor given to bind him apprentice, nor laid out in his education at school, at the university, or on his travels.

Taylor v. *Taylor*, L. R. 20 Eq. 155.

Fourth, the Rights of the Next of Kin of the Intestate.

RIGHTS OF NEXT OF KIN.

The 30th section of the Devolution of Estates Act provides that the distribution shall be as follows:—One-third to the wife of the intestate and all the residue equally among the children of the intestate, and if deceased, their legal representatives, and in case there be no children, or legal representatives of them in existence, a moiety of the intestate's estates shall be allottd to his widow, and the residue shall be distributed equally among his next of kin in equal degree and their representatives, and for the purpose of said section the father and the mother and the brothers and sisters of the intestate shall be deemed of equal degree, but the same section enacts that there shall be no representatives admitted among collaterals after brothers' and sisters' children. In case there be neither wife nor children, then all the estate shall be distributed among the next of kin in equal degree.

How next of Kin Ascertained.

It becomes necessary to inquire who are the "next of kin." Proximity is settled according to the rules of the civil law.

The next of kin referred to by the statute are to be ascertained by the same rules of consanguinity as those which determine who are entitled to letters of administration.

Consanguinity.

Consanguinity, or kindred, is defined as the connection or relation of persons descended from the same stock. This consanguinity is either lineal or collateral.

Lineal Consanguinity.

Lineal consanguinity is that which subsists between persons of whom one is descended in a direct line from the other, as between Propositus and his father, grandfather, great-grandfather, and so upwards in the direct ascending line, or between Propositus and his son, grandson, great-grandson, and so downwards in the direct descending line. Every generation in this lineal direct consanguinity constitutes a different degree, reckoning either upwards or downwards. The father of the Propositus is related to him in the first degree, and so, likewise, is his son; his grandsire and grandson in the second; his great-grandsire and great-grandson in the third. This is the only natural way of reckoning the degrees in the direct line; and therefore universally obtains as well in the civil and canon as in the common law. This lineal consanguinity, it may be observed, falls strictly within the definition of vinculum personarum ab eodem stipite descendentium; since lineal relations are such as descend one from the other, and both, of course, from the same common ancestor.

2 Black Comm. 203.

Collateral Kindred.

Collateral kindred answers to the same description; collateral relations agreeing with the lineal in this that they descend from the same stock or ancestor; but differing in this that they do not descend one from the other. Collateral kinsmen are such then as literally spring from one and the same ancestor, who is the stirps, or root, the stirps, trunk or common stock, from whence these relations are branched out. As if John Stiles has two sons, who have each a numerous issue; both these issues are lineally descended from John Stiles as their common ancestor; and they are collateral kinsmen to each other, because they are all descended from this common ancestor, and all have a portion of his blood in their veins, which denominates them consanguineos.

2 Black Comm. 204.

COLLATERAL CONSANGUINITY.

It must be carefully remembered that the very being of collateral consanguinity consists in this descent from one and the same ancestor. Thus, Titius and his brother are related; why? because both are derived from one father. Titus and his first cousin are related; why? because both are descended from the same grandfather; and his second cousin's claim to consanguinity is this: that they are both derived from one and the same great-grandfather. In short, as many ancestors as a man has, so many common stocks ht has, from which collateral kinsmen may be derived.

2 Black Comm. 205.

HOW DEGREES ARE COUNTED.

The mode of calculating the degrees in the collateral line for the purpose of ascertaining who are the next of kin, conforms, as it has been above observed, to that of the civil law, and is as follows: To count upwards from either of the parties related to the common stock, and then downwards again to the other, reckoning a degree for each person, both ascending and descending; or, in other words, to take the sum of the degrees in both lines to the common ancestor.

2 Black Comm. 207.
Brown v. *Farndell*, Carth. 51.

The Propositus and his cousin-german are related in the fourth degree—because, following the rule of computation, from the Propositus ascending to his father is one degree: from him to the common ancestor, the grandfather, two: then descending from the grandfather to the uncle, three; and from the uncle to the cousin-german, four. Again, the second cousin of the Propositus is related in the sixth degree; because from the Propositus, ascending to his father is one degree; from his father to his grandfather, two; from his grandfather to his great-grandfather, the common ancestor, three; then, descending, from the great-grandfather to the great-uncle of the Propositus, four; from the great-uncle to the great-uncle's son, five; from his great-uncle's son to his second cousin, six. It will be observed, that kindred are found distant from the Propositus by an equal number of degrees, although they are relations to him of very different denominations. Thus, a grand-daughter of the sister, and a daughter of the intestate's aunt (i.e., a great niece and a first cousin), are in equal degree, being each four degrees removed.

DISTINCTIONS FROM COMMON LAW RULES AS TO SUCCESSION TO INHERITANCES.

Several distinctions may be observed, with reference to the corresponding rules of the common law, respecting succession to inheritances.

1st. Relations by the father's side and the mother's side are in equal degree of kindred, for, in this respect, dignity of blood gives no preference. Hence it may happen that relations are distant from the intestate by an equal number of degrees, who are no relation at all to each other.

2nd. The half-blood are kindred of the intestate, and have been excluded from the inheritance of land only on feudal reasons. Therefore, brothers and sisters of the half-blood are entitled to an equal share of the intestate's estate with the brothers and sisters of the whole blood, and the brother of the half-blood shall exclude the uncle of the whole blood.

2 Black. Comm. 505.

3rd. As younger children must stand in the same degree of kindred as the eldest, primogeniture can give no right to preference.

Warwick v. *Greville*, 1 Phillim. 124.

4thly. The right to administration will follow the proximity of kindred though ascendant; and therefore, when a child dies intestate, without wife or child, leaving a father, the father was formerly entitled to the personal effects of the intestate as the next of kin, exclusive of all others. Indeed, anciently, that is in the reign of Henry I., a surviving father could have taken even the real estate of his deceased child. But this law of succession was altered soon afterwards, for we find by Glanville that in the time of King Henry II. the father could not take the real estate of his deceased child, the inheritance being then carried over to the collateral line; and it was subsequently held an inviolable maxim that an inheritance could not ascend; but this alteration of the law never extended to personal estate. So if a man dies intestate, leaving no nearer relations than a grandfather or grandmother, and an uncle or aunt, the grandfather or grandmother being in the second degree though ascendant will be entitled to the exclusion of the uncle or aunt who are related only in the third degree. So a great-grandmother is equally entitled as an aunt.

Lloyd v. *Tench*, 2 Ves. Sen. 215.

However, though the ecclesiastical law of England acknowledges the rights of ascendants generally, yet it does not recognize

them to the extent of the civil law, according to which ascendants of whatever degree shall be preferred before all collaterals, except in the case of brothers and sisters. But our law prefers the next of kin, though collateral, before one who, though lineal, is more remote.

Stanley v. *Stanley*, 1 Atk. 458.

5thly. Those in equal degree are equally entitled whether males or females.

The preference of males to females which exists in the succession to inheritances seems to have arisen entirely from the feudal law; and has never been applied to rights respecting personal estate.

EXCEPTION TO RULE OF COMPUTATION AS TO PROXIMITY OF KINDRED.

It remains to notice certain exceptions to the rule of computation above stated, of the proximity of kindred.

1st. The parents of an intestate are as near akin to him as his children; for they are both in the first degree; but in our law children are allowed the preference, and so are their lineal descendants to the remotest degree.

Evelyn v. *Evelyn*, Ambl. 192.

2nd. Where the nearest relations, according to the above computation, are a grandfather or a grandmother and brothers or sisters of the intestate, although these are all related in the second degree, yet the latter are entitled to the exclusion of the former.

RECAPITULATION.

To recapitulate, in the first place the children, and their lineal descendants to the remotest degree; and on a failure of children, the parents of the deceased with brothers and sisters are entitled to the administration; then grandfathers and grandmothers, then uncles or nephews, great-grandfathers and great-grandmothers, and lastly cousins.

RIGHT OF HUSBAND OF NEXT OF KIN WHO RENOUNCES.

If the sole next of kin is a married woman, and renounces, the grant is made to the husband; for he has an interest, and the grant must follow the interest, and the wife cannot, by renouncing, deprive her husband of his right to the grant. This principle would not, however, seem to apply where by reason of the Married Women's Property Acts the wife is absolutely entitled to the property as her separate property as if she were a feme sole, for in that case the husband had no interest; but if the wife, sole next of kin, died intestate, her husband's right would revive.

Haynes v. *Matthews*, 1 Sw. & Tr. 460.

RIGHTS OF HEIR-AT-LAW EQUAL TO THAT OF NEXT OF KIN UNDER LAND TRANSFER ACT, 1897, WHERE THERE IS REAL ESTATE.

It must be borne in mind that as regards intestates who die after the coming into operation of the Land Transfer Act, 1897, the heir-at-law, where there is real estate, is put on an equal footing with the next of kin as regards the right to a grant of administration.

DISTRIBUTION OF ESTATE OF PERSON DYING INTESTATE AND WITHOUT ISSUE.

It was held in Re Colquhoun, 26 O. R. 104, that on the death of a person intestate, leaving no issue, the children of a predeceased sister or brother were not entitled under section 6 of the Devolution of Estates Act, to share in competition with a surviving father, mother, brother or sister of the intestate, but Re Colquhoun was overruled by Walker v. Allen, 24 A. R. 336, and it is there laid down that where brothers and sisters share in an intestacy, children of deceased brothers and sisters also share per stirpes.

WIDOW AND FATHER SURVIVING.

If a man dies intestate without a child, but leaving a widow and a father, then the personal estate shall go in moieties between the wife and father.

Keilway v. *Keilway*, Gill Eq. Cas. 190.

HOW MOTHER, BROTHERS AND SISTERS TAKE.

So, with respect to the mother, before the statute of 1 Jac. II., c. 17, if a child had died intestate, without a wife, child or father, his mother was entitled as his next of kin in the first degree to his whole personal estate. But by that statute, section 7, now section 31 of the Devolution of Estates Act, it is enacted, "that if, after the death of a father any of his children shall 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." The principle of this provision is that otherwise the mother might marry and transfer all to another husband.

Blackborough v. *Davis*, 1 P. Wms. 49.

WHEN MOTHER TAKES.

If the intestate left neither wife nor child nor father, and there be neither brother or sister nor nephew or niece, the case is without the statute, and the whole of such intestate's effects shall devolve, as before the statute, to his mother.

Jackson v. *Prudholme*, M.S. 11 Vin. Abr. 196.

MOTHER-IN-LAW AND STEPMOTHER CANNOT TAKE.

It is clear that the mother-in-law or step-mother of an intestate, not being of his blood, can claim nothing under the Statute of Distributions.

Rutland v. *Rutland*, 2 P. Wms. 216.

BROTHERS AND SISTER PREFERRED TO GRANDMOTHER OR GRANDFATHER.

If the intestate left neither children nor parents, but his nearest surviving relations be brothers and sisters and grandfather or grandmother, then the brothers and sisters are preferred to the grandfather and grandmother.

GRANDMOTHER OR GRANDFATHER PREFERRED TO UNCLES OR AUNTS.

Nevertheless, if the intestate leaves no nearer kindred than a grandfather or a grandmother, and uncles and aunts, the grandfather or grandmother being in the second degree, will be entitled to the whole personal estate, exclusive of the uncles or aunts who are only in the third degree.

Woodruff v. *Wickworth*, Prec. Chan. 527.

GREAT-GRANDFATHERS.

Hence, also, great-grandfathers or great-grandmothers, being in the third degree, are entitled to a distributive share with uncles and aunts.

Lloyd v. *Tench*, 2 Ves. Sen. 215.

GRANDFATHER EXPATERNA AND GRANDMOTHER EXMATERNA.

Where the intestate leaves a grandfather by the father's side, and a grandmother by the mother's side, his next of kin, they shall take in equal moieties as being in equal degree, for here dignity of blood is not material.

AUNTS AND NIECES AND UNCLES AND NEPHEWS.

Aunts and nieces, uncles and nephews, being all in the third degree, are all equally entitled. Hence, where the intestate left two aunts and a nephew and a niece, children of a deceased brother, Lord Hardwicke ordered the surplus to be divided into four equal parts equally among them, holding that as they were all in equal degree, the children were to take in their own right, and not by representation; but that if their father had been living he would have been entitled to the whole.

Buissiers v. *Albert*, 2 Cas. Temp. Lee, 51.

AFFINITY GIVES NO TITLE.

Affinity or relationship by marriage, except in the instance of the wife of the intestate, gives no title to a share of his property under the statute. Therefore if the intestate had a son and a

daughter, and they both die, the former leaving a wife and the latter a husband; upon the intestate's death afterwards, such husband and wife have neither of them any claim on the estate.

NO REPRESENTATION AFTER BROTHERS' AND SISTERS' CHILDREN.

The thirtieth section of the Devolution Act provides that there shall be no representation admitted among collaterals after brothers' and sisters' children. This provision must be construed to mean brothers and sisters of the intestate, and not as admitting representation, when the distribution happens to fall among brothers and sisters who are remotely related to the intestate, for the intestate is the subject of the Act; it is his estate, his wife, his children, and for the same reason his brothers' and sisters' children; for he is equally corelative to all. Therefore, if the intestate should leave an uncle and the son of another uncle deceased, the latter shall have no distributive share. So, if the next of kin of the intestate should be nephews and nieces, a child of a deceased nephew or niece will not be admitted to share in the distribution.

CHILDREN OF DECEASED BROTHER AND SISTER TAKE PER CAPITA.

If the intestate's brothers and sisters were at the time of his decease all dead, and having left children, such children shall all take per capita. Therefore, if an intestate leave a deceased brother's only son, and ten children of a deceased sister, the ten children of the deceased sister shall take ten parts in eleven with the son of the deceased brother. But in the event of some of the intestate's brothers and sisters being alive and some dead, and such as are dead having left children, such children take per stirpes by way of representation. Therefore, if an intestate left a brother alive and ten children of a deceased sister, such ten children will take one moiety of the personal estate, and their uncle the other.

Begley v. *Cook*, 3 Drew. 662.

Fifth, of the Distribution when the Intestate was Domiciled Abroad.

PERSONAL PROPERTY DISTRIBUTED BY JUS DOMICILII.

The distribution of the personal estate of the intestate is to be regulated by the law of the country in which he was domiciled inhabitant at the time of his death, without any regard whatsoever to the place either of the birth or of the death, or the situation of the property at that time. It is part of the law of Ontario that personal property should be distributed according to the jus domicilii. If, therefore, a man die domiciled in this country,

and administration be taken out to him here, debts due to him or other of his personal effects, abroad, shall be distributed according to the law of Ontario for the lex loci rei sitæ is not to be recognized. On the other hand, if a man domiciled abroad die intestate his whole property here is distributed according to the laws of the country where he was so domiciled. A man's domicile is prima facie the place of his residence; but this may be rebutted by showing that such residence is either constrained from the necessity of his affairs or transitory.

Whicker v. *Hume*, 7 H. L. 164.

Sixth, of the Payment of the Residue.

DISTRIBUTION OF RESIDUE.

Although s. 32 of the Devolution of Estates Act enacts that no distribution of an intestate's effects, shall be made until one year be expired after his death, yet if a person entitled to a distributive share shall die within the year such interest shall be considered as vested in him, and shall go to his personal representatives for this proviso makes no suspension or condition precedent to the interest of the parties, but was inserted merely with a view to creditors.

The statute also is in the nature of a will framed by the legislature for all such persons as die without having made one for themselves, and by consequence the parties entitled in distribution resemble a residuary legatee, and it has been always held that if such legatee dies before the amount of the surplus is ascertained, still his representative shall have the whole residue, and not the representative of the first testator.

The position of a personal representative as "heir" is defined as follows:—

HOW FAR PERSONAL REPRESENTATIVES TO BE DEEMED "HEIRS."

7. When any part of the real property of a deceased person vests in his personal representative under this Act such personal representative, in the interpretation of any Act of this Legislature, or in the construction of any instrument to which the deceased was a party, or under which he is interested, shall, while the estate remains in him, be deemed in law his heir, as respects such part, unless a contrary intention appears; but nothing in this section shall affect the beneficial right to any property, or the construction of words of limitation of any estate in or by any deed, will or other instrument.

Section 32 of the Wills Act (R. S. O. 1914, c. 120), is as follows.

32. Where any real estate is devised by any testator, dying on or after the 5th day of March, 1880, to the heir or heirs of such testator, or of any other person, and no contrary or other intention is signified by the will, the words "heir" or "heirs" shall be construed to mean the person or persons to whom the real estate of the testator or of such other person as the case may be would descend under the law of Ontario in case of an intestacy.

MY OWN RIGHT HEIRS.

"My own right heirs."—A testator, who left him surviving his widow and one daughter, devised specifically described property to his daughter, and the residue of his estate to his executors upon trust for his widow and daughter in certain events with limited power to the daughter to dispose thereof by will. He then directed that "in case my daughter shall have died without leaving issue her surviving and without having made a will as aforesaid, my trustees shall (after the death of my wife if she survive my said daughter) sell all my estate, real and personal and divide the same equally amongst my own right heirs, who may prove to the satisfaction of my said trustees their relationship within six months from the death of my said wife or daughter, whichever may last take place."

The daughter died unmarried in her mother's lifetime, having made a will assuming to dispose of the residue.

Held, that the daughter was entitled to take as the "right heir" of the testator.

Coatsworth v. *Carson*, 1 A. R. 24.

MY LAWFUL HEIRS.

"My lawful heirs." The general rule that where a testator devises property to his "heirs" the heirs are to be ascertained at the time of his death, is not affected by the fact that the person answering that description is the taker of a preceding particular interest under the will.

Where, therefore, a testator after a gift to his wife and only child for their joint lives and to the survivor for life directed that "at the decease of both, the residue of my real and personal property shall be enjoyed by both and go to the benefit of my lawful heirs," the child was held entitled to the residue.

Thompson v. *Smith*, 23 A. R. 29.

FAILURE OF ISSUE.

"Failure of Issue."—By his will, testator devised to his son the use of and during his lifetime certain land, but if he died without issue, then it was to be equally divided between two named grandsons, and by a subsequent clause, on the death of testator's widow, he directed that the said land and all other property not bequeathed by his will should be equally divided amongst all his children. The son died, leaving issue, his mother predeceasing him.

Held, that under R. S. O. 1887, c. 109, s. 32, the failure of issue referred to was a failure during the son's lifetime or at his death and not an indefinite failure, and that by virtue of a subsequent

clause he took a life estate and not an estate tail by implication, and that on the termination of the life estate the lands fell in and formed part of the residue.

Martin v. *Chandlar*, 26 O. R. 81.

NEAREST OF KIN; TIME OF ASCERTAINING.

In the absence of any controlling context, the persons entitled under the description "nearest of kin" in a will are the nearest blood relations of the testator at the time of his death in an ascending and descending scale.

And where the testator devised his farm to his only child, a daughter, giving his widow the use of it until the daughter became of age or married, provided that in the event of the latter dying without issue "then in that case" it should be equally divided between his "nearest of kin," and the daughter died while still an infant and unmarried.

Held, that although the persons intended by the description took only in defeasance of the fee simple given to the daughter alone in the first instance, she was nevertheless entitled as one of "the nearest of kin" and the widow, as heiress-at-law of the daughter, and the father and mother of the testator, were each entitled to an undivided one-third in fee simple as tenants in common.

Bullock v. Downes, 9 H. L. C. 1; Mortimore v. Mortimore, 4 App. Cas. 448; and Re Ford, Patten v. Sparks, 72 L. T. N. S. 5, followed.

The word "then" introducing the ultimate devise, was not used as an adverb of time, but merely as the equivalent of the expression "in that case" which followed it, and did not affect the construction of the will.

Brabant v. *Lalonde*, 26 O. R. 379.

MODE OF DIVISION.

A testator who died in 1840, by his will in that year, devised all his property to certain persons as executors and trustees upon trust for the maintenance and support of his wife and unmarried daughters, as long as they should continue unmarried, and live with his widow, and then directed that "when my beloved wife shall have departed this life, and my daughters shall have married or departed this life, I direct and require my trustees and executors to convert the whole of my estate into money to the best advantage by sale thereof, and divide the same equally among those of my said sons and daughters who may be then living, and

the children of my said sons and daughters who may have departed this life previous thereto."

Held, that the division must be per stirpes and not per capita.
Wright v. *Bell*, 18 A. R. 25.

CONSTRUCTION OF WORD "HEIR."

A testator, who died on the 8th of November, 1867, by his will, made on the 15th of October, 1867, devised lands in Ontario to his wife until her death or marriage, and upon her death or marriage to his son, "should he be living at the happening of either of said contingencies," and if not then living "unto the heirs of the said (son)." The son died in July, 1885, intestate and unmarried, and the widow died in February, 1887.

Held, that the Act abolishing heirship by primogeniture, 14 & 15 Vict. c. 6, applied, and that all the brothers and sisters of the son were his "heirs," and entitled to take under this devise.

Tylee v. Deal (1873), 19 Chy. 601, and Baldwin v. Kingstone (1890), 18 A. R. 63, distinguished.
Sparks v. *Wolff*, 25 A. R. 326.

POSTPONEMENT OF DIVISION.

The testatrix devised and bequeathed all her real and personal estate (except her ready money) to one M. for life; and upon the death of M. she directed that all her real and personal estate should be sold; and the proceeds thereof, together with all her other moneys, she bequeathed to (among others) the sons and daughter of her sister M. A. There were at the date of the will two daughters of M. A. living. Held, that parol evidence was admissible to show that the testatrix intended to benefit only one of the daughters; and that the evidence showed that she intended to exclude the other. Held, also that the division of the ready money was postponed until the death of M., the tenant for life.
McIntosh v. *Bessey*, 26 Chy. 496.

PERIOD OF DISTRIBUTION.

Testratrix devised all the rents and profits of her estate to C., an unmarried daughter, so long as she remained unmarried; and upon her marriage the whole to be divided between her and her four sisters, but if she died unmarried the division must be among her four sisters; and in case of either of these four dying before the marriage or death of C., the share of the one so dying was to go to the children. Then followed a provision that in case of the death of any of her said daughters, without leaving child or children, the share of such daughter was to be divided among the surviving daughters and the children of deceased daughters. Held, reversing the decree of the Court of Chancery (26 Chy. 310), that

it was the intention of the testatrix that there should be a distribution of the estate upon the marriage of C., and that on the event happening each of the daughters took an immediate absolute interest.

Munro v. *Smart*, 4 A. R. 449.

PERIOD OF DISTRIBUTION.

A testator, in 1856, devised certain land to M., and in case of her death without issue, then to the heirs C. and E., "to be equally divided between them." C. died after the testator, leaving five children. M. died after C. without issue. E. survived at the date of the hearing, having one child living. Held that the period of distribution was upon the death of the first taker, M., so that those were entitled who were then the heirs of C. and E., and that they took per capita and not per stirpes.

Sunter v. *Johnson*, 22 Chy. 249.

PERIOD OF DISTRIBUTION.

A testator devised his lands to his wife "to have and to hold the said premises with appurtenances unto the said J. S., for and during her natural life, and afterwards unto the surviving children of my cousin T. S. S., to be divided share and share alike." Held, that the period of distribution was after the death of the tenant for life—the wife; and that the children of T. S. S. who were living at that date, or their issue, were the only parties entitled to the estate.

Smith v. *Coleman*, 22 Chy. 507.

HEIRS AT LAW.

By a will of personal estate, after a life estate had been given to the testator's widow, it was provided by a residuary clause that the property should be sold and the proceeds equally distributed among the testator's nephews and nieces, such bequests on the death of any of them entitled to the same previously to the period of distribution to go to their "heirs-at-law." At the time of this action the widow of the testator was still alive, but some of the nephews and nieces had died. Held, that the will gave a vested interest to such nephews and nieces as should be alive at the time of the testator's death, but the period of distribution was the death of the widow; and the bequest to the nephews and nieces was subject to be divested as to those of them who should die before the said period of distribution, in favour of their representatives, who were entitled to take in substitution for the original legatee, and, semble, for this reason it was to be inferred that by "heirs-at-law" the testator meant to express that the benefit was to go to the

persons who would inherit the personal estate—that is to say, the next of kin.

Harrison v. *Spencer*, 15 O. R. 692.

Distributing Assets — Advancement — Hotchpot.—J. H. died intestate, and among his assets was a promissory note for $500 made by his son in respect of moneys received by the latter from him. The son predeceased J. H. and died intestate and insolvent, leaving a child, who, under the Statute of Distributions, was entitled to a one-fifth distributive share of the estate of J. H.:—Held, that the grandchild of J. H. was not bound to bring the $500 into hotchpot before sharing in the estate of J. H., and that R. S. O. 1877 c. 105 ss. 41-43, did not apply to this case. *Re Hall*, 14 O. R. 557.

Difference between the law of England and our own as to advancements to children commented on. Under our law advancement is neither a loan nor debt to be repaid, nor an absolute gift. It is a bestowment of property by a parent on a child, on condition that if the donee claims to share in the intestate estate of the donor, he shall bring in this property for the purpose of equal distribution. *Re Hall*, 14 O. R. 557.

Resulting Trust—Money Placed in Name of Third Person.—The testatrix placed a sum of £500 on deposit at a bank in the name of her niece, towards whom she was not in loco parentis. She retained the deposit note in her own possession, and did not inform her niece of the fact of the deposit having been made. The testatrix subsequently made a codicil to her will purporting to dispose of the money:—Held, that there was a presumption of a resulting trust in favour of the testatrix and no evidence to rebut the presumption. *Howse, In re; Howes* v. *Platt*, 21 T. L. R. 501.

Husband and Wife.—Whether grain crops grown and harvested by a husband on his wife's land are the property of the husband or of the wife is always a question of fact, and the test to be applied is, was it or was it not the intention of the wife to part with the control and disposition of the land to her husband for the purpose of enabling him to maintain himself and family? If such was her intention, the crops are the property of the husband. In passing an administrator's accounts the parties interested have, as a rule, the right to a strict examination of the same and also to have witnesses examined viva voce if desired, and as a rule the costs of all parties attending the passing should be paid out of the estate. *Re Winters Estate* (1904), 7 Terr. L. R. 250.

Conversion—Election to Take in Specie.—To establish an election to take in specie and free from a trust to convert, it is necessary to have sufficient evidence of the election to be derived from declarations or acts and conduct of the parties; and, where it is sought to establish such an election by a person only entitled subject to the rights of third persons, it must be shewn in like manner that such persons have assented. *Sisson* v. *Giles*, 32 L. J. Ch. 606; 3 De G. J. & S. 614, and *Mutlow* v. *Biggs*, 45 L. J. Ch. 282; 1 Ch. D. 385, applied. *Douglas and Powell, In re*, 71 L. J. Ch. 850; (1902) 2 Ch. 296.

Emblements.—A testator had sown a quantity of grain which was in the ground after his decease. One of the next of kin sought to charge the executors with the value thereof, but the land on which it was, having been devised to the widow for life, it was:—Held, on appeal, that she, not the executors, was entitled to the emblements. *Cudney* v. *Cudney*, 21 Chy. 153.

Bequest of Legacies to Several Persons of Sums Equal to Debts Secured by Promissory Notes—Time for Payment of Legacies.—*Roberts, In re; Roberts* v. *Parry*, 50 W. R. 469.

Legacies—Specific and Demonstrative—Abatement of.—In the event of assets not specifically bequeathed being insufficient to pay debts,

specific and demonstrative legacies abate rateably. *Turner, In re; Armstrong* v. *Gamble* (1908), 1 Ir. R. 274.

The goods of a deceased husband, exempt from seizure, under the Execution Act, R. S. O. 1897, Ch. 77, are not, except as to funeral and testamentary expenses, assets in the hands of his executors for the payment of debts, the effect of s. 4 of that Act being to give his wife a parliamentary title thereto. *In re Tatham*, 21 Occ. N. 530, 2 O. L. R. 343.

Sale of Goodwill.—Held, that although the administratrix was not bound to sell the goodwill of the testator's business as a surgeon and physician yet, having done so, the proceeds were assets, for which she must account. *Christie* v. *Clark*, 27 U. C. R. 21; S. C., 16 U. C. C. P. 544.

Hanna Hunt by her will directed her estate to be sold, and the proceeds to be divided into four equal shares, one share to be paid to each of her four children, naming them. Susanna Jewell, a daughter, predeceased the testatrix, intestate, leaving a husband and two infant children. R. S. O. ch. 128, sec. 36, *Eager* v. *Furnivall*, 17 Ch. D. 115, *Johnson* v. *Johnson*, 3 Hare 157, and *In re Scott* (1901), 1 K. B. 228, were referred to:—Held, that the husband of Susanna Jewell was entitled to a one-third interest in the share given to his wife, the infant children taking the remaining two-thirds. *Re Hunt*, 5 O. L. R. 197, 2 O. W. R. 94.

Taking as a Class.—Where a testator, after devising certain lands to "my trusty friends J. L. and R. M." on certain trusts for the maintenance and education of his son, J. E., and devising the residue, real and personal, to the said "J. L. and R. M., or the survivor of them" in trust to sell and distribute the proceeds in payment of certain legacies, therein specified, continued, "should there ultimately be any residue, I direct my said trustees, or the survivors of them to divide and pay the same to and among my legatees, hereinbefore named and my said trustees, or the survivor of them in even and equal shares and proportions:"—Held, that the trustees took as a class, i.e., one share between them, equal to the shares taken respectively by the legatees; for looking at the whole will, it appeared that the testator was speaking of the trustees in their official capacity, and regarding them as one legal person. *Boys' Home* v. *Lewis*, 4 O. R. 18.

Insolvent Estate — Rateable Distribution.—By the statute 29 Vict. c. 28, s. 28, the assets of a deceased debtor, in case of deficiency, are to be distributed amongst his several creditors pari passu, and without any priority over each other; and where the executrix in such a case allowed judgment to be recovered by two creditors, and execution to be issued, under which they were paid nearly in full, when by applying to the court in that action, the proper distribution of the estate would have been ordered, the court charged her, in favour of the other creditors of the estate, with the excess beyond the rateable proportion of the claim due the execution creditors; giving an order over in favour of the executrix against those creditors, who were ordered to pay to the other parties to the suit all the costs, other than those of proving their claim at the amount allowed by the court, and to his extent they were held entitled to recover their costs. *Taylor* v. *Brodie*, 21 Chy. 607.

Deficient Estate —Priority. — An executor and trustee, who has by the court, and who has properly incurred liabilities to trade creditors, is entitled to an indemnity in respect of such liabilities; and where the assets are deficient, the amount of such indemnity takes priority on allocation over the costs which had been awarded by the court, on further consideration, to a plaintiff legatee. The trade creditors of the business stand in the shoes of the executor, and are subrogated to his rights of indemnity and priority. *Moore* v. *M'Glynn* (1904), 1 Ir. R. 334.

Distribution of Estate.—In the absence of reasonable efforts by the executors of an estate to discover the whereabouts of persons entitled to.

share in the residue, other persons who have received a share of the residue must refund, for the benefit of the persons whose claims have been ignored, the amount received in excess of the sum payable if the division had been properly made. *Uffner* v. *Lewis—Boys' Home of Hamilton* v. *Lewis*, 20 C. L. T. 296, 27 A. R. 242. See *Re Ashman*, 10 O. W. R. 250, 15 O. L. R. 42.

New Brunswick, 1903, c. 161, provides, in part, as follows: "And if there be no widow, all such surplusage shall be distributed equally amongst the children, and if no child, to the next of kindred in equal degree, of the intestate and their representative."—Held, affirming an order of the Carleton County Probate Court, that the word "children" in the above enactment must be construed to include a grandchild of the intestate.—*Per* Barker, C.J., that the question in controversy was settled by the decision of the Supreme Court of Canada in *Lamb* v. *Cleveland* (19 S. C. R. 78).—*Per Barry, J.*, that a construction of the enactment which would permit grandchildren to share is consonant to reason and justice, and conforms to the general scope of the statute, which was intended by the legislature to provide for an equitable distribution of an intestate's estate, first among his descendants, or failing descendants, then among his next of kin. *Re Kennedy* (1911), 10 E. L. R. 167.

Real Estate Assets for Payment of Debts.—The Administration of Estates Act, 1833, which makes real estate of a deceased person assets for payment of debts, does not create a lien or charge on the estate, and therefore a creditor cannot, without obtaining a judgment, attach the rents and profits of such estate. *Moon, In re; Holmes* v. *Holmes*, 76 L. J. Ch. 535; (1907) 2 Ch. 304.

Payment of interest by the specific devisee of part of a testator's real estate, which was subject to a mortgage created by the testator, is sufficient to keep the mortgagee's right of action alive against the specific devisees of other parts of the real estate which were not subject to the mortgage, and thus entitle the mortgagee to an order for administration of the whole of the testator's real estate. The principles laid down in *Roddam* v. *Morley*, 1 De G. & J. 1, applied. *Bradshaw* v. *Widdrington*, 71 L. J. Ch. 627; (1902) 2 Ch. 430, discussed. *Lacey, In re; Howard* v. *Lightfoot*, 76 L. J. Ch. 316; (1907) 1 Ch. 330.

Specialty and Simple Contract Debts.—Since 29 Vict., c. 28, s. 28, abolishing all distinction between the different classes of debts in the administration of an estate, it is no defence for an executor sued on a promissory note of his testator, that there are specialty debts unpaid more than equal to the goods not administered. *Parsons* v. *Gooding*, 33 U. C. R. 499.

Creditor Overpaid—Action by Other Creditors.—The effect of s. 30 of R. S. O. 1877, c. 107, is to disable an executor from giving preference to one creditor over another, so that where he pays one creditor in full the presumption is that he has assets sufficient to pay all; and if, upon a final adjustment of the accounts of the estate, it is made to appear that one creditor has received payment in full, either voluntarily or by process of law, and that there is a deficiency of assets, such creditor will be ordered to refund at the instance of the other creditors, the statute thus placing creditors and legatees in this respect upon the same footing. *Chamberlain* v. *Clark*, 9 A. R. 273; 1 O. R. 135.

Right of Preference—Specialty Creditors—Simple Contract Creditors.—An executor's right of preference of one creditor over another before a judgment for administration has not been abolished by the Administration of Estates Act, 1869 (commonly called Hinde Palmer's Act), and as a result of that Act can now be exercised as against specialty and simple contract creditors on an equal footing, so that a simple contract creditor of the testator may be preferred by the executor to a specialty creditor. *Hankey, In re; Smith* v. *Hankey*, 68 L. J. Ch. 242; (1899), 1 Ch. 541, overruled. *Samson, In re; Robins* v. *Alexander*, 76 L. J. Ch. 21; (1906), 2 Ch. 584; 95 L. T. 633.

Conversion of Reversionary Interest.—The rule in *Howe* v. *Dartmouth (Earl)*, 7 Ves. 137; 1 Wh. & Tu. L. C. (7th ed.), 68, which requires

the conversion of wasting securities and reversionary interests, may apply to a case of an absolute gift subject to an executory limitation; but the inference as to the intention of the testator, upon which the rule is based, is weaker in such a case than when the testator has given the property to persons successively as tenants for life and remainderman. *Bland, In re; Miller* v. *Bland*, 68 L. J. Ch. 745; (1899), 2 Ch. 336.

Neglect to get in Assets.—An executor will not be charged on the footing of wilful default for loss of interest arising from not paying off a mortgage, where he has no assets in hand which he can apply in redemption of the mortgage and the property is charged with an amount in excess of its value. *Stevens, In re; Cooke* v. *Stevens*, 67 L. J. Ch. 118; (1898) 1 Ch. 162; 77 L. T. 508; 46 W. R. 177.

Retention of Assets by Executors.—Where in a case admittedly governed by the law as it stood before the Law of Property Amendment Act, 1859, executors had retained assets as an indemnity fund against contingent liabilities that might arise under leases which had formerly been the property of their testator but had not become vested in the executors, and there was no privity of estate between them and the lessors, the court made an order for the distribution of the fund amongst the beneficiaries, it being admitted that the executors would be amply protected by the order of the court. *King* v. *Malcott*, 22 L. J. Ch. 157; 9 Hare, 692, and *Dodson* v. *Sammell*, 30 L. J. Ch. 799; 1 Dr. & S. 575, discussed. *Nixon, In re; Gray* v. *Bell*, 73 L. J. Ch. 446; (1904) 1 Ch. 638.

Admission of Assets.—The mere payment of a legacy by an executor of a will is not conclusive as an admission of assets. *Schneider, In re; Kirby* v. *Schneider*, 22 T. L. R. 223.

Assets.—The goods of a deceased husband, exempt from seizure, under the Execution Act, are not, except as to funeral and testamentary expenses, assets in the hand of the husband's executors for the payment of debts, the effect of s. 4 of that Act being to give his wife a parliamentary title thereto. A piano belonging to the wife was dealt with by the husband under his will as part of his estate, by giving it to his son:—Held, that the wife must elect either to allow the son to retain it, under the gift to him, or to take it herself, making good to the son the value thereof, out of the provisions made for her in the will. *In re Tatham*, 21 C. L. T. 530; 2 O. L. R. 343.

Accruing Possessory Title.—A person having a power of attorney to sell certain lands, entered into possession after the death of the owner, with an intention to acquire the title, and died in possession, but before his possession had ripened into a title:—Held, that he had such an interest as passed under a general devise in his will. Held, also, that the devisees were entitled to claim the property in equity, as against the testator's heirs, who had gone into possession; but that a suit for the purpose could be successfully resisted by shewing sufficient length of possession by the heirs after the testator's death to give a title as against the plaintiffs. *Howard* v. *Howard*, 15 Chy. 516.

In addition to the presumption against intestacy as to any portion of the testator's estate, there is internal evidence in the will itself that this testator intended then, and by that will, to dispose of all he had. I quite concede what was argued by Mr. Rowell, that a Judge ought not, because of any difficulty or embarrassment that would or possibly could arise from declaring intestacy as to the corpus or any part of the estate, to hesitate to so declare. It is for me, if possible, to ascertain from this will what was the intention of the testator. Lord Cottenham said, in *Lassence* v. *Tierney*, 1 Mach. & G. 551, cited in *Hancock* v. *Watson* (1902), A. C. 22, that if the terms of the gift are ambiguous, you must seek assistance in construing it—in saying whether it is expressed as an absolute gift or not—from the other parts of the will. *Re Chapman*, 4 O. L. R. 130; 1 O. W. R. 434.

Promise Acted upon by Promisee.—The owner of property may make a representation in respect of giving the same so as to form a contract sufficient to bind him to carry it out, although the representation is,

that the property is to be given by a revocable instrument; and the more so, if in consequence of the representation the person to whom it is made changes his condition. Where, therefore, a father wrote to his son stating that he had devised to him certain portions of his real estate, and expressed a wish for his son to leave his then residence and settle beside the father, and that if he did so he would leave the land to the son at his death, and his son acting upon this, left his residence and went to live beside his father:—Held, that from that time the will was no longer revocable. *Fitzgerald* v. *Fitzgerald*, 20 Chy. 410.

Remuneration for Maintenance—Implied Promise — Annual Payments.—Held, that apart from the Statute of Frauds, the evidence was not such as the court could act upon by decreeing specific performance of the alleged agreement in substitution of the actual will of the deceased, duly executed, and admitted to probate without objection from the plaintiff or any one else. Such an agreement must be supported by evidence leaving upon the mind of the court as little doubt as if a properly executed will had been produced and proved before it. Held, however, that the plaintiff was entitled, under the circumstances, to remuneration for the board, lodging and care of the deceased for six years, as upon an implied promise to pay a reasonable sum per annum. Such a promise was not a special promise to pay at death, and did not give the plaintiff a right to recover more than six years' arrears. *Cross* v. *Cleary*, 29 O. R. 542.

Complete Disposition.—It ought not to be assumed either that an intestacy was intended. *Lett* v. *Randall*, 10 Sim. 112; Jarman, 5th ed., p. 809; or that the testator had forgotten to make disposition of an important part of his estate. *Re Burke*, 12 O. W. R. 1000.

Valid and Invalid Conditions.—Where a devise is made upon two conditions, one of which is void, the other, though good by itself, being coupled with the void one, will also be rejected. *Re Babcock*, 9 Chy. 427.

In *Cambridge* v. *Rous*, 8 Ves. 12, at p. 25, Sir William Grant, M.R., lays down the following: "It has been long settled that a residuary bequest of personal estate (for it is otherwise as to real), carries, not only everything not disposed of, but everything that in the event turns out not to be disposed of." This was cited with approval by Blake, V.-C., *In Corporation of Whitby* v. *Liscombe*, 22 Ch. 203, at p. 215. *Re Biden*, 4 W. L. R. 479.

General Rule.—It is a principle of construction that the same meaning shall, as far as possible, be given to the same words in the same will. *Boys' Home* v. *Lewis*, 4 O. R. 18.

I think the jewellery does not pass under the word "effects" to Mrs. Hudson, but is available for the same purposes as the cash. *Re Ashenden*, 3 O. W. R. 425.

The second question is whether the mortgage or mortgage debt is liable in priority to the real estate of the said James Way, deceased, for the payment of all his debts and funeral expenses, and the expenses attending the execution of his will and the administration of his estate. *Re Way*, 6 O. L. R. 616.

Debt due by Testator to Legatee—Satisfaction of Debt—Presumption.—There are several conflicting presumptions which have to be considered in dealing with this matter. There is in this class of cases a leaning against the presumption of satisfaction, and the court lays hold of minute circumstances to take a case out of the rule. White & Tudor's L. C. in Eq., 2nd ed., vol. II., p. 393, and cases cited.

The absence from the will of any direction to pay debts and legacies furnishes an argument in favour of the executor's contention. Smith's Principles of Equity, 3rd ed., p. 526.

All the text books state that it appears that a legacy given by the will of a parent to a child is not upon any different footing from that of a legacy by any other person as a satisfaction of a debt, not being a portion. (Reference to *Tolson* v. *Collins*, 4 Ves. 482.)

The circumstances which I think will take this bequest out of the general rule are that the present legacy is not payable for a year, but Frances Josephine can, without delay, commence proceedings for the administration of Thomas Watson's estate with a view to the recovery of

what is due to her thereupon. See *Re Dowse, Dowse* v. *Glass*, 50 L. J. Ch. 285; also *Re Horlock, Calhoun* v. *Smith* (1895), 1 Ch. 516.

I have referred also to the following authorities: Story's Eq. Jur., 2nd Eng. ed., sec. 1122; Brett's L. C. in Mod. Eq., p. 322; *Plumbett* v. *Lewis*, 3 Hare 316; *Crichton* v. *Crichton* (1896), 1 Ch. 870; *Meinertzager* v. *Walters*, L. R. 7 Ch. 670; *Deels* v. *Strutt*, 5 T. R. 690; *Matthews* v. *Matthews*, 2 Ves. Sen. 635; Williams on Executors, 9th ed., p. 1162; *Cole* v. *Cole*, 5 O. S. 748; Roper on Legacies, 2nd Am. from 4th Eng. ed., p. 1028. *Re Watson*, 5 O. W. R. 354.

Satisfaction of Portion.—The law on the point involved is well stated in 19 Am. & Eng. Encyc. of Law, p. 1246: "Where a parent makes a provision by will in favour of a child to whom he had previously secured a portion by marriage settlement . . . the presumption is that such provision was intended as a satisfaction of the portion, and it will be held to be such, in the absence of evidence proving the contrary." *Re Vidal*, 12 O. W. R. 1081.

Residuary Bequest—Distribution among Legatees in Proportion to their Legacies—Legatees of Income—Interest—Subscription to Charity. — Held (distinguishing *Grassick* v. *Drummond*, 1 S. & S. 517), that the legatees of the residue should have their shares determined in all respects on the basis of the particular legacies bequeathed in the former part of the will. *Re Sloane*, 3 O. W. R. 848.

DOMICIL.

Third, as to the domicil of the deceased. At first I was disposed to think that, on the facts, this must be held to be where his residence was, but on further consideration of the circumstances, and the special nature of the business carried on, which required the residence of one of the proprietors to be at San Francisco, I have come to the conclusion that it was not the intention of the deceased to abandon his domicil of origin. It is not at all unlikely, indeed a fair inference from the evidence that the longer he was practically compelled to live in that foreign country the less he liked it, and refused to identify himself with its institutions, and looked forward to the time he could return to the, in many ways, more congenial surroundings of the land of his birth and of his family, his "home," as he often referred to it. Since the recent judgment of the House of Lords on domicil in the important case of *Winans* v. *Attorney-General* (1904), A. C. 287, it would be presumptuous in me to endeavour to add to the subject for, as the Lord Chancellor says: "the law is plain that where a domicil of origin is proved, it lies upon the person who asserts a change of domicil to establish it, and it is necessary to prove that the person who is alleged to have changed his domicil had a fixed and determined purpose to make the place of his new domicil his permanent home." And Lord Macnaghten says, at p. 291, that said burden is a "heavy" one, and quotes the language of Lord Westbury that it must be shewn "with perfect clearness and satisfaction." And Lord Macnaghten goes on to say that "a change of domicil is a serious matter—serious enough when the competition is between the domicils both within the ambit of one and the same kingdom or country—more serious still when one of the two is altogether foreign," as is the case here.

Applying the above principle to the facts before us, the onus has not been discharged, to my satisfaction at least. Many other cases were cited, but I only refer to that of *Capdeville* v. *Capdeville*, 18 W. R. 107, which is strongly in favour of the respondent; see also *Att.-Gen* v. *Countess de Wahlstadt*, 3 H. & C. 373.

At the conclusion of the argument our attention was called to a change in sec. 6 of the Wills Act made by the amendment of 1902, ch. 73, sec. 2, whereby said section 6 is made, in its fifth line, to conform to the English Wills Act, and read "made or acknowledged," instead of "made and acknowledged," as theretofore.

But it is not out of place to remark that the attestation clause states that the will was "signed by the testator as and for his last will and testament," etc., which in this respect follows the form given in Hayes & Jar-

man's Concise Form's of Wills (1898), as being a compliance with all the essential requirements of the statute, pp. 25 (notice), 128, 484, 487. *Hopper* v. *Dunsmuir*, 3 W. L. R. 32.

Legacies directed to be paid out of a mixed residue are a charge on land.

Young v. *Purvis*, 11 O. R. 597.

HOTCHPOT. See pages 385 and 400.

Where the sole executor and universal devisee and legatee under a will dies before the testator, there is an intestacy, and section 5 of the Statute of Distribution applies, and children of the deceased who have received advances from him in his lifetime must bring the advances into hotchpot before receiving their shares in his estate. *Ford, In re Ford* v *Ford*, 71 L. J. Ch. 778; (1902) 2 Ch. 605; 87 L. T. 113; 51 W. R. 20.

Where there is an intestacy in respect of the beneficial interest in a share of residue, such share being vested in trustees:—Held, that, there being a gift to the trustees upon certain trusts, the implication of law in favour of the executors was excluded, and that therefore the Executors Act, 1830, did not apply, and children of the testator taking the undisposed of share as his next-of-kin were not bound to bring advances made to them into hotchpot, in accordance with the provisions of the Statute of Distribution, s. 5, *Williams* v. *Arkle* (45 L. J. Ch. 590; L. R. 7 H. L. 606) followed. *In re Roby; Howlett* v. *Newington*, 76 L. J. Ch. 454; (1907) 2 Ch. 84; 97 L. T. 172.

Method of Computation.—*Hargreaves, In re; Hargreaves* v. *Hargreaves*, 88 L. T. 100, considered, and the method of computation adopted therein applied. *Hart, In re; Hart* v. *Arnold*, 107 L. T. 757.

Hotchpot.—Some blunder having evidently been made in the will, the latter part of the hotchpot clause must be treated as fitting or intended to fit the introductory part, and that F. P. H. and G. E. W., though living, must bring into hotchpot the sums of £4,000 and £3,000 respectively. *Haygarth, In re; Wickham* v. *Haygarth*, 82 L. J. Ch. 328; (1913) 2 Ch. 9; 108 L. T. 756.

Beneficial Interest or Trust.—A testator bequeathed to his wife his entire worldly effects to be managed as best she could for the benefit of their children:—Held, that the wife took no beneficial interest. *Hickey, In re; Hickey* v. *Hickey* (1913) 1 Ir. R. 390.

Life Interest to Widow with Power to Encroach for Maintenance.—*Re Johnson*, 27 O. L. R. 472, following *Re Thompson's Estate*, (1879-80) 14 Ch. D. 263.

Creditor's Claims.—Claim by Executor.—If an executor has in good faith paid the claim of a creditor, the Surrogate Court Judge has jurisdiction to consider the propriety of that payment, and to allow or disallow the item in the accounts. There can be no difference between a payment to another creditor and a retainer by the executor to pay his own claim.

In *Re Russell*, 8 O. L. R. 481 it was decided that the Surrogate Court Judge could not determine whether a certain specific sum of money alleged to belong to the estate, was an asset of the estate. The law was amended by 5 Edw. VII. ch. 14 (1905), now R. S. O. 1914 c. 62, s. 20. *In Re MacIntyre*, 11 O. L. R. 136 it was decided that the Surrogate Court Judge had not the power to compel a creditor to prove his claim in the Surrogate Court, and to allow or bar it. *Shaw* v. *Tackaberry*, 29 O. L. R. 490.

Claim for Services—No Promise.—Per Cur. under the authority of such cases as *Walker* v. *Boughmer* (1889), 18 O. R. 448; *Money* v. *Grout* (1903), 6 O. L. R. 521; and *Johnson* v. *Brown* (1909), 13 O. W. R. 1212, and 14 O. W. R. 272, the plaintiff cannot succeed, at least for the time down to October 1st, 1910, when the monthly payments ceased. *Smith* v. *Hopper*, 21 O. W. R. 891 to 894. As to limitation see *Cross* v. *Cleary*, 29 O. R. 542.

TABLE OF DISTRIBUTION.

If the Intestate die leaving:	*His representatives take thus:*
Wife and child or children	One-third goes to wife, rest to child or children; if children dead, then to their lineal descendants, except such child or children (not heirs-at-law) who had estate by settlement of intestate or were advanced by him in his lifetime equal to the other shares.
Wife only	$1,000 to wife, rest half to wife and half to next of kin in equal degree to intestate or their legal representatives, or if no next of kin to Crown. As to rights of wife to extent of $1,000.
No wife or child	All to the next of kin, and to their legal representatives.
Child, children or their representatives	All to him, her or them.
Children by two wives...........	Equally to all (all being equally of kin).
If no child, children or representatives	All to next of kin, in equal degree to intestate.
Child and grandchild by deceased child.......................	Half to child, half to grandchild, who takes by representation.
Husband only	Half to him and half as if he had predeceased intestate.
Husband and child or children..	One-third to husband and two-thirds to children.
Father and mother.............	Half to each.
Father, mother, brother or sister..	Equally to all.
Mother and brother or sister.....	Whole to them equally.
Wife, mother, brother, sister, and nieces or nephews........	Half to wife, residue to mother, brothers, sisters and nieces, but nephews and nieces take *per stirpes*.
Wife and father................	Half to each.
Wife, mother, nephews and nieces	One-half to wife, one-fourth to mother, and one-fourth to nephews and nieces per capita.
Wife, brother or sister and mother	Half to wife, half to brothers and sisters and mother equally.
Father only....................	The whole.
Mother only....................	The whole.
Wife and mother................	Half to wife and half to mother.
Brother and sister only..........	The whole equally.
Brother and sister and wife....	Half to wife, half to brother and sister equally.
Brother or sister of whole blood, and brother and sister of half blood	Half to each.
Posthumous brother or sister, and mother	Half to each.
Posthumous brother or sister, and brother or sister born in lifetime of father............	Half to each.
Father's father and mother's mother	Half to each.
Uncle's or aunt's children, and brother's or sister's grandchildren	All equally.
Grandfather and grandmother, uncle or aunt	All to grandfather and grandmother equally.

If the Intestate die leaving:	*His representatives take thus:*
Two aunts, nephew and niece....	All equally.
Uncle and deceased uncle's child..	All to uncle.
Uncle by a mother's side, and deceased uncle's or aunt's child..........................	All to uncle.
Nephew by brother, and nephew by half-sister..................	Equally.
Brothers or sisters, and nephews or nieces....................	Nephews or nieces take *per stirpes*, others equally.
Nephew by deceased brother, and nephews and nieces by deceased sister..............	Equally, *per capita*.
Nephews and nieces, uncles and aunts	All equally.
Brother or sister and grandfather..	All to brother or sister.
Brother's grandson and brother or sister's daughter.........	All to daughter.
Brother and two aunts..........	All to brother.
Brother and wife................	Half to each.
Mother and brother	Equally.
Wife, and mother, and children of deceased brother or sister..	Half to wife, one-fourth to mother, one-fourth to deceased brother's or sister's children *per stirpes*.
Wife, brother or sister, and children of deceased brother or sister	Half to wife, one-fourth to brother or sister *per capita*, one-fourth to deceased brother's or sister's child *per stirpes*.
Brother or sister and children of a deceased brother or sister..	Half to brother or sister *per capita*, half to children of deceased brother or sister *per stirpes*.
Grandmother and sister	All to sister.
Cousins of same degree..........	Equally *per capita*.

CHAPTER IX.

OF THE LIABILITY OF AN EXECUTOR OR ADMINISTRATOR WITH RESPECT TO HIS OWN ACTS.

LIABILITY OF EXECUTOR.

The executor may be sued as executor on a promise made by him as executor, and such promise will charge the defendant no further than a promise of the testator.

Wms. p. 1412.

PROMISE BY EXECUTOR.

In actions which are brought against an executor, in the character of executor, to recover the demand out of the testator's estate, a promise by the executor is a mere nudum pactum if there were no assets.

Rann v. *Hughes*, 7 T. R. 350.

PERSONAL LIABILITY OF EXECUTOR.

A promise by an executor or administrator to pay a debt of the testator, or to answer damages, will not make him personally liable unless there be a sufficient consideration to support the promise. For a bare promise by the executor does not make him liable out of his own estate, but he is still chargeable only as executor, and to the extent of the assets in his hands, in the same manner as he would have been had no such promise been made. By the Statute of Frauds the executor or administrator will not be liable, unless the promise is in writing, but although the promise be in writing it is of no more effect since the statute than before, unless it be by deed, or there be a good consideration for it.

PROMISE BY ADMINISTRATOR.

A promise by an administrator by word of mouth, made before administration if granted may, under certain circumstances be binding upon him afterwards.

FORBEARANCE OF SUIT.

Forbearance of suit is good consideration without assets at the time of the promise. So if an executor be indebted to J. S., in £100, who demands the money, the executor is chargeable only in respect of assets and not otherwise, but if he promises to pay the debt at a future day it becomes his own debt to be satisfied out of his own estate.

Goring v. *Goring*, Yelv. 11.

DELIVERY UP OF DEEDS BY SOLICITOR.

Where an attorney delivered up deeds to an executor, which he was not obliged to do until his bill was paid, and these deeds were of great use to the executor in several suits which were then carrying on, it was held that this was a sufficient consideration to make the executor liable to the attorney's whole demand, whether there were assets or not.

Hamilton v. *Incledon*, 4 Bro. P. C. 4.

ASSETS GOOD CONSIDERATION.

Having assets is a good consideration for a promise by an executor or an administrator to pay a debt of the deceased, or to answer damages out of the executor's own estate.

In the Ontario Statutes of 1913, a revised Statute of Frauds was introduced as c. 27. This new statute included 29 Car. II. c. 3, which had been printed as c. 338 of R. S. O. 1897, and also ss. 6, 7, 8 and 9 of c. 146 of R. S. O. 1897, an Act respecting Written Promises and Acknowledgments of Liability. This statute of 1913, is continued in the Revised Statutes of 1914, as c. 102, with the historic short title of The Statute of Frauds.

Sections 9 and 10 of R. S. O. 1897, c. 338, are as follows:—

9. It shall and may be lawful for every sheriff or other officer, to whom any writ or precept is, or shall be, directed at the suit of any person of, for, and upon any judgment, statute or recognizance, hereafter to be made or had to do, make, and deliver execution unto the party, in that behalf suing, of all such lands, tenements, rectories, rents, and hereditaments, as any other person be in any manner of wise seized, or possessed, or hereafter shall be seized, or possessed, in trust for him against whom execution is so sued, like as the sheriff or other officer might, or ought to have done, if the said party against whom execution hereafter shall be so sued had been seized of such lands, tenements, rectories, rents, or other hereditaments, of such estate as such other person be seized of in trust for him, at the time of the said execution sued; which lands, tenements, rectories, rents and other hereditaments by force and virtue of such execution shall accordingly be held and enjoyed, freed and discharged from all incumbrances of such person as shall be so seized or possessed in trust for the person against whom such execution shall be sued;

And if any cestui que trust hereafter shall die leaving a trust in fee simple to descent to his heir, then, and in every such case such trust shall be deemed and taken and is hereby declared, to be assets by descent and the heir shall be liable to and chargeable with the obligation of his ancestors for and by reason of, such assets as fully and amply as he might or ought to have been, if the estate in law had descended to him in possession, in like manner as the trust descended; any law, custom, or usage to the contrary in any wise notwithstanding.

10. Provided always no heir that shall become chargeable by reason of any estate, or trust, made assets in his hands by this law shall by reason of any kind of plea or confession of the action, or suffering judgment by nient dedire, or any other matter be chargeable to pay the condemnation out of his own estate, but execution shall be sued of the whole estate so made assets in his hands by descent in whose hands soever it shall come after the writ purchased in the same manner as it is to be at and by the common law, where the heir at law pleading a true plea judgment is prayed against him thereupon; anything in the present Act contained to the contrary notwithstanding.

First part of s. 9 of R. S. O. 1897, c. 338, is placed in The Execution Act, R. S. O. 1914, c. 80; the latter part and s. 10 omitted as covered by the Devolution of Estates Act, R. S. O. 1914, c. 119.

29 CHARLES II. c. 3, s. 4.

By the 5th section of the Statute of Frauds, formerly 29 Charles II., c. 3, now R. S. O. 1914, c. 102, it is enacted that:—

5. No action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge any person upon any special promise to answer for the debt, default or miscarrriage of any other person, or to charge any person upon any agreement made upon consideration of marriage or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorized.

Section 6 of the same Act (R. S. O. 1914, c. 102), provides:—

CONSIDERATION FOR PROMISE TO ANSWER FOR ANOTHER NEED NOT BE IN WRITING.

No special promise made by any person to answer for the debt, default, or miscarriage of another person, being in writing and signed by the party to be charged therewith, or by some other person by him thereunto lawfully authorized, shall be deemed invalid to support an action, or other proceeding to charge the person by whom the promise was made, by reason only that the consideration for the promise does not appear in writing or by necessary inference from a written document.

This Act removes the difficulty raised by Wain v. Warlters, 5 East. 10, which decided that the consideration of the promise as well as the promise itself should be in writing, otherwise it was void.

SUBMISSION TO ARBITRATION.

Where an executor submits in broad terms by a submission to arbitration to pay whatever shall be awarded, and the arbitrator awards that he shall pay a certain sum, he is personally bound to perform the award, whether he has assets or not. For if an executor or administrator thinks fit to refer generally all matters in dispute to arbitration without protesting against the reference being taken as an admission of assets, it will amount to such an admission.

The Arbitration Act is R. S. O. 1914, c. 65.

LIABILITY FOR FUNERAL EXPENSES.

If an executor or administrator gives orders for the funeral, or ratifies or adopts the acts of another party who has given such

orders, he makes himself liable individually, and not in his representative character for the reasonable expenses; and notwithstanding that, generally speaking, an administrator is not bound as such by his acts done before the letters of administration were obtained, yet it would seem that if before taking out letters he gives orders or sanctions the orders which another person has given for the funeral of the deceased, he will be thereby bound after he has become administrator to satisfy the charges incurred under such orders.

Lucy v. *Walrond*, 3 Bing. N. C. 841.

CARRYING ON OF TRADE OF DECEASED.

A trade is not transmissible, but is put an end to by the death of the trader. Executors, therefore, have no authority in law to carry on the trade of their testator, and if they do so, unless under the protection of the Court of Chancery, they run great risk, even though the will contains a direction that they should continue the business of the deceased. The case of an executor or administrator in this respect is very hard, for if the trade be beneficial the profits are applicable to the purposes of the trust, and the executor or administrator derives no personal benefit from the success; if, on the contrary, the trade proves a losing concern the executor, on failure of assets, will be personally responsible for the debts contracted in the business since the testator's death to the extent of all his own property.

Vulliamy v. *Noble*, 3 Mer. 614.
Townend v. *Townend*, 1 Giff. 201.

CONTINUATION OF PARTNERSHIP.

Where partners covenant that they and their respective executors and administrators will continue partners for a certain term of years, and one of them dies before the term has expired, his executors or administrators cannot be compelled to become partners personally, though the covenant is binding on the estate of the deceased partner in their hands.

Spence's Case, 17 Beav. 203.

EXECUTOR CONTINUING TO TRADE.

If an executor, without any authority from the will, take upon himself to trade with the assets, the testator's estate will not be liable in case of his bankruptcy. The testator's creditors and legatees will have a right to prove demands for such of the assets as have been wasted by the executor in the trade in proportion to their respective interests.

With respect to such of the assets as can be specifically distinguished to be a part of the testator's estate they will not pass to the assignee in insolvency.

SPECIFIC PART OF ASSETS FOR TRADE.

The testator may by his will limit the power of his executor to carry on the trade, and set aside a specific part of the assets which he may sever from the general mass of his property for that purpose. Then the rest of the assets will not be affected by an insolvency, although the whole of the executor's private property would be subject to the liability.

Thompson v. *Andrews*, M. & M. 116.

PRIORITY OF CREDITORS AND EXECUTORS.

A testator's business was carried on by his executors under the provisions of his will and with the assent of his creditors, and was properly carried on. Questions considered: (1) The relative rights of the creditors of the testator and the subsequent trade creditors of the executors against the assets of the testator's estate at the time of his death, and against the assets subsequently acquired for the estate by carrying on the business; (2) the executor's right to indemnity; and (3) the right of the trade creditors to avail themselves of that indemnity. Held, that the executors were entitled (in priority to the testator's creditors) to be indemnified against the liabilities which they had properly incurred, and that the indemnity was not limited to that portion of the assets which had came into existence or had changed its form since the testator's death.

Dowse v. *Gorton*, C. A. 40 Ch. D. 536 (varied by H. L. (E.) (1891) A. C. 190); *In re Brooke* (1896), 2 Ch. 600.

NEW CAPITAL CANNOT BE EMBARKED.

A testator's direction to his executors to continue to carry on business with his surviving partners, does not authorize the executors to embark any new capital in the business.

Smith v. *Smith*, 13 Chy. 81.

INDEMNITY TO EXECUTORS.

Where the trustees and executors of a will carried on the testator's business after his death, and incurred trade debts, and were in default in payment of money: Held, that to deprive them of their indemnity they must be in default in payment and not merely in rendering accounts, and that the trade creditors were entitled to prove against the estate through the right of the trustees to indemnity.

In re Kidd, Kidd v. *Kidd* (1894), W. N. 73.

WHEN EXECUTORS BOUND TO CONTINUE BUSINESS.

When the law speaks of executors not carrying on the business of their testator, it means that they are not to buy and sell.

There are many cases when executors not only may but are bound to continue the business to a certain extent.

Wms. p. 1432.

CONTRACT TO BUILD A HOUSE.

If a party contracts for himself and his executors to build a house, and dies, the executors must go on or they will be liable in damages for not completing the work.

Marshall v. *Broadhurst*, 1 Cr. & J. 405.

CONTRACT TO PUBLISH A BOOK.

If a bookseller undertakes to publish a work in parts, and before the completion dies, a subscriber has a claim upon the estate to complete the work. So, if a man makes half a wheelbarrow or half a pair of shoes and dies, the executors may complete them, and they are not bound to sacrifice the property of their testator by selling articles in an imperfect state. So, if the deceased die possessed of a manufactory, his executors would be justified in continuing the works for a reasonable time if this should be requisite for the purpose of selling the machinery and premises to advantage, and they will not be charged with any loss sustained in employing of assets, and so continuing the trade, if they act according to their best judgment.

Collinson v. *Lister*, 20 Beav. 356.

POWER TO CARRY ON TESTATOR'S BUSINESS.

The assets of a deceased person are not liable for debts incurred by an executor or administrator in continuing the trade or business of the deceased. *Lovell* v. *Gibson*, 19 Chy. 280.

A testator's business was carried on for about two years after his death by his executors in accordance with a power in his will, and afterwards, by leave of the court in an administration proceeding brought by the executors for their own protection, until the business was sold by order of the court. Considerable liabilities were incurred by the executors in carrying on the business, and the assets were insufficient to pay both the creditors of the testator and those of the executors. The testator's creditors, who were chiefly members of his family, were aware that the business was being carried on not for the purpose of selling it as a going concern, but in the hope of realizing a fund sufficient to pay them in full, and did not interfere:—Held, that they must be taken to have assented to the carrying on of the business, and that the executors were entitled in priority to the testator's creditors to be indemnified out of the assets in hand against the liabilities incurred by them in carrying on the business. *Dowse* v. *Gorton*, (1891), A. C. 190, and *Brooke* v. *Brooke* (1894), 2 Ch. 600, followed and applied. *Hodges* v. *Hodges* (1899), 1 Ir. R. 480.

Where the executors continue the business of the testator after his death only temporarily and for the mere purpose of effecting sale of the business as a going concern, they are entitled to indemnity out of the estate in respect to liabilities properly incurred by them in the management of the business. *Dowse* v. *Gorton* (1891), A. C. 190; 60 L. J. Ch. 745; 64 L. T. 809, followed. As a general rule the indemnity will only be ordered as against unsecured creditors, except where the assent of the secured creditors is given to the continuation of the business, and where such con-

sent is given there will be no distinction made between secured and unsecured creditors, except, however, that the executors must look first to the property on which there is no security before they can look to the property covered by the security. To prove the assent of secured creditors something more than knowledge and acquiescence on the part of the creditors must be shown; *Dowse* v. *Gorton*, followed. *Brooke* v. *Brooke* (1894), 2 Ch. 600, 64 L. J. Ch. 21; 71 L. T. 398, disapproved and not followed.—Where, however, the circumstances are such that it would be unjust to the executor to strictly enforce the rule that secured creditors have priority over the executors' claim for indemnity, that rule will be relaxed. *Wright* v. *Beatty*, 2 Alta. L. R. 89.

The mere assent of the creditors is not sufficient to constitute the executor their agent: *Re Millard*, 72 L. T. 823. An administration order can be obtained by a creditor whose debt was incurred by executors in carrying on business under an authority in the will, although the testator himself had incurred no debts which remained unpaid: *Re Shorey*, 79 L. T. 349.

The substitution of new trustees is no bar to an action against the retired partner to make good the trust fund, though the old trustees are neither parties nor witnesses, and there are concurrent remedies both against the partnership estate and the estate of the retired partner. *Smith* v. *Patrick*, 70 L. J. P. C. 19; (1901), A. C. 282; 84 L. T. 740—H. L. (Sc.).

A testator's direction to his executors to continue to carry on business with his surviving partners, does not authorize the executors to embark any new capital in the business. *Smith* v. *Smith*, 13 Chy. 81.

Statute of Limitations.—V. brought into the Master's office in 1901 a claim for goods supplied to the executor, between July, 1890, and March, 1892, for use in carrying on the hotel business of deceased under authority conferred by his will:—Held, that a person supplying goods to an executor under such circumstances has no right against the estate, but he may sue the person who incurred the debt, and he also has a right to be subrogated to any right of indemnity which the executor has against the estate in respect of the liability so incurred. *In re Firth* (1892), 1 Ch. 342; *Dowse* v. *Gorton* (1891), A. C. at p. 199. 2. That the executor was estopped from disputing the claim against the estate. 3. That the claim was not barred by the Limitations Act. *In re Braun, Braun* v. *Braun*, 23 Occ. N. 96; 14 Man. L. R. 346.

Carrying on Business.—Where trustees, under powers in that behalf, have carried on their testator's business after his death and employed his trust estate therein, and one of them has made default for which he alone is liable, the creditors of the business will not, on account of such default, be precluded from their right to rank against the testator's estate by subrogation to the right of the innocent trustee to be indemnified in respect of debts properly incurred by the trustees in carrying on the business. The principle of *Dowse* v. *Gorton*, 60 L. J. Ch. 745; (1891), A. C. 190, and *Johnson, In re; Shearman* v. *Robinson*, 49 L. J. Ch. 745; 15 Ch. D. 548, applied. *Frith, In re; Newton* v. *Rolfe*, 71 L. J. Ch. 199; (1902), 1 Ch. 342; 86 L. T. 212.

Sale of Business—Lease of Premises.—Where under a will no express power was given to carry on the deceased's business— a brewery business—an order sanctioning the carrying on of the same by the personal representatives was refused, but it was held that they had a discretionary power either to sell the chattel property with a lease of the brewery or to sell the business as a going concern with a lease of the premises until the date fixed for distribution, and an agreement for sale, if deemed advisable, but subject to the approval of the beneficiaries, on an infant beneficiary attaining her majority. *In re Brain*, 25 Occ. N. 44; 9 O. L. R. 1; 4 O. W. R. 263.

COSTS.

Action Against Executor without Demand for Account.—Where an executor, by his misconduct in the management of the estate, causes a suit, and but for the fact of the suit having been brought the assets would have been dissipated, the court will not, as a general rule, allow such executor his costs out of the estate, although no loss has been sustained; and where in such a case, the party interested filed a bill without calling upon the executor for an account, or affording him any opportunity of showing that his dealings were correct, the court refused the costs of the suit to either party up to the taking of the accounts, but directed the executor to pay the subsequent costs. *Simpson* v. *Horne*, 28 Chy. 1. See *Erskine* v. *Campbell*, 1 Chy. 570.

Costs of Unsuccessful Action.—Though the general rule is that an executor acting in good faith is entitled to be recouped his costs of an unsuccessful action, this rule would not justify the executor resorting for this purpose to specifically devised real estate. *Re Champagne, St. Jean* v. *Simard*, 24 C. L. T. 234, 7 O. L. R. 537, 3 O. W. R. 515.

Action for Receiver.—Where a bill was filed against an executor and trustee for the administration of an estate, and praying a receiver on the ground of the executor having become embarrassed, and of his misconduct, and the circumstances were such as to justify alarm on the part of the cestui que trust, the executor was charged with so much of the costs of the suit up to the hearing as was occasioned by the suit being for a receiver. *Bald* v. *Thompson*, 17 Chy. 154.

Action to Pass Accounts.—An executor or administrator has no right to file a bill merely to obtain an indemnity by passing his accounts under the decree of the court. There must be some real question to submit to the court or some dispute requiring interposition, when he will be entitled to his costs; otherwise he will not receive them. And if it should appear that his conduct has been mala fide or unreasonable, he will be ordered to pay defendant's costs. *White* v. *Cummings*, 3 Chy. 602.

Administration Action.—Under an administration order obtained by a creditor, the executors admitted a certain sum in hand, part of which they objected to pay into court, on the ground that it had been paid by them to their solicitor for watching and protecting the interest of the estate upon claims of creditors brought into the Master's office.—Held, that they were entitled to do so; as it is the duty of the executors to protect and look after the interest of the estate upon these inquiries, and this they do, not strictly as accounting parties, but in virtue of their representative character. *Re Babcock's Estate*, 8 Chy. 409.

A retaining fee paid by executors to their solicitor in an administration suit may be a reasonable disbursement. *Chisholm* v. *Barnard*, 10 Chy. 479.

Bona Fide Defence.—Where executors in good faith unsuccessfully defended a suit on a note given by their testator, the court, in pronouncing a decree against them, declared them entitled to deduct their costs as between solicitor and client, out of their testator's estate. *McKellar* v. *Prangley*, 25 Chy. 545.

Executors having omitted to set up the defence that they had fully administered or had not assets to pay any balance that might be found due, petitioned to have the decree rectified so as to exempt them from liability for a greater amount than the assets come to their hands; the court made the order as asked, but, under the circumstances, directed the executors to pay the costs of the application. *McKellar* v. *Prangley*, 25 Chy. 545.

Breach of Trust.—An executor or trustee will sometimes be entitled to his costs in a suit for administration, notwithstanding he may have committed a breach of trust, if no loss is sustained by the estate by reason of such breach. *Waird* v. *Gable*, 8 Chy. 458.

Claim not Allowed—Books not Kept.—An executor who obtains an order for the administration of his testator's estate, is not always entitled to the costs. An executor took out an administration order for the purpose of establishing a claim which he made against the estate, and of having it paid by sale of the realty; but he failed to prove his claim, and, on the contrary, a small balance was found against him. It appeared, also, that he had not kept proper books of account as executor:—Held, that he should pay the costs of the suit. *Sullivan* v. *Sullivan*, 16 Chy. 94.

Costs and Expenses of Administration.—Executors are usually entitled to their costs, as between solicitor and client, out of the estate; and if the executors, in addition to the costs of the suit, have incurred any other costs, charges, and expenses in the administration of the estate, on this fact being stated to the Court, but not otherwise, an inquiry will be directed, and the Master will be auhorized to include them in his account. *Story* v. *Dunlop*, 13 Chy. 375.

Disputing Claims.—In an administration suit, the 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 Chy. 21.

Executor Acting without Proving Will.—Where an executor and trustee named in a will had acted as such to the advantage of the estate, without having proved the will, he was allowed his costs, as between party and party, of an administration suit to which he was a party defendant, excepting some costs which he had needlessly incurred. *Sunley* v. *McCrae*, 2 Ch. Ch. 231.

Imperfect Accounts.—In a suit for administration it appears that the personal representative had kept very imperfect accounts of the estate, and that those brought into the Master's office had been made up partly from memory:—Held, a sufficient justification for the institution of the suit, and that the plaintiff was entitled to the costs from the defendant up to the hearing, although no loss had occurred to the estate. *Killins* v. *Killins*, 29 Chy. 472.

Improper Management.—Executors may be deprived of their costs where they have improperly managed the affairs of the estate, though not guilty of any wilful misconduct; and this rule was acted on where the personal representative of one of the executors was a party to the suit, though he had not acted in the management of the estate; his testator's estate being ample. *Kennedy* v. *Pingle*, 27 Chy. 305.

Just allowance — Unsuccessful Litigation—Advice of Court.—Where the administrators of the estate of a deceased assignee for creditors defended in good faith an action brought by his successor in the trust to recover damages for breach of trust committed by the intestate, and being unsuccessful, were obliged to pay the plaintiff's costs and those of their own solicitors, they were held entitled to credit for these payments 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. *In re Williams*, 22 A. R. 196.

Liability of Estate for Costs of Administrator's Action.—Where an administrator brought an unfounded action against the testator's widow, which she was put to costs in defending:—Held, that her only remedy for such costs against the administrator personally, not against the estate. *Rodgers* v. *Rodgers*, 13 Chy. 457.

Litigation with Third Persons.—In litigating with third persons, executors are, with respect to costs, in the same position as parties who litigate in their own right. *Great Western R. W. Co.* v. *Jones*, 13 Chy. 355.

Moderation of Costs.—Where an executor has in good faith paid his solicitor's bill of expenses incurred in administering the estate, the Master may, without taxing the bill, moderate it by deducting charges which appear not to be proper. *McCargar* v. *McKinnon*, 17 Chy. 525.

Personal Liability.—Executors employing an attorney, are personally responsible to him for the costs. *Dickson* v. *Crooks*, M. T. 4 Vict.

A trustee or executor stands in the same position as any other litigant with respect to costs. *Smith* v. *Williamson*, 13 P. R. 126.

Resisting Doubtful Claim.—The court, although it considered the plaintiff entitled to be paid his demand, though the executor, under the peculiar circumstances, was justified in having resisted payment without the sanction of the court, and that in the administration of the estate the executor would be entitled to be paid his costs of litigation. *Griffith* v. *Paterson*, 20 Chy. 615.

Solicitor Executor.—On the passing of executor's accounts, one of the executors being a member of the firm of solicitors who acted for the estate, the bill of costs of the executors' solicitors' firm was objected to on the ground that an executor can make no profit out of the estate:—Held, that the solicitors' bill of costs might be allowed as part and parcel of the remuneration. *Re Leckie*, 36 C. L. T. 136.

Suit Recklessly Instituted.—The next friend of infants filed a bill against the mother of the infants—their guardian appointed by the Surrogate court—and her husband, alleging certain acts of misconduct, which were not established in evidence; and the accounts taken under the decree resulted in shewing a balance of about $22 in the hands of defendants. The court being of opinion that the suit had been instituted recklessly and without proper inquiry, ordered the next friend of the plaintiffs to pay the costs of the defendants as between party and party. *Hutchinson* v. *Sargent*, 17 Chy. 8.

No Assets—Executor's Costs.—It is a general rule as held in *Bluett* v. *Jessop*, Jac. 240. that where a creditor proceeds against a personal representative for the administration of the personal estate, and the result shews that there was no personal estate at the time of the commencement of the suit, and therefore nothing to pay the costs of the personal representative, and that the personal representative is not in any default, the plaintiff must indemnify the personal representative in respect of the costs of the proceedings. *Hibernian Bank* v. *Lauder* (1898), 1 Ir. R. 262.

Disallowance of Part of Costs.—The executors in this case were held entitled to their costs because the action was not occasioned by their misconduct; but they were disallowed the costs of such part of the inquiry as was caused by the misapplication of the funds or their failure to make reasonably accurate entries of their dealings with the estate. *In re Honsberger, Honsberger* v. *Kratz*, 10 O. R. 521.

Neglect to Furnish Account.—Where executors or trustees have been guilty of gross neglect in furnishing proper accounts, the Court has power to visit them not only with the costs of proceedings instituted by a beneficiary for the purpose of obtaining an account and administration (so far as necessary) of the trust estate, but also with the costs of taking the account. *Skinner, In re; Cooper* v. *Skinner*, 73 L. J. Ch. 94; (1904), 1 Ch. 289; 89 L. T. 663; 52 W. R. 346.

Administration of Assets—Incidence of Costs. — The Land Transfer Act, 1897, has not the effect of causing the costs of an administration action to be borne, proportionately to their respective values, by the real estate and the personal estate. Thus, costs of probate or of letters of administration are still borne by the personal estate. *In re Jones; Elgood* v. *Jones*, 71 L. J. Ch. 6; (1902), 1 Ch. 92; 85 L. T. 608; 50 W. R. 215.

Administration of Assets—Costs of Administration of Real Estate.—It is a rule established by *Patching* v. *Barnett*, 51 L. J. Ch. 74, that costs exclusively occasioned by the administration of real estate must be borne by the real estate, and that this rule remains unaffected by the Land Transfer Act, 1897. *Jones, In re; Elgood* v. *Jones*, 71 L. J. Ch. 6; (1902), 1 Ch. 92, followed. *Betts, In re; Doughty* v. *Walker*, 76 L. J. Ch. 463; (1907), 2 Ch. 149; 96 L. T. 875.

Personal Liability of Personal Representative for Work Done.—If the plaintiff sues an executor, as executor, for work done for the defendant, as executor, at his request, and alleges that defendant, as executor, promised to pay, the defendant is charged in his personal, and not in his representative, capacity, as work cannot be performed for another in his representative character: *Farhall* v. *Farhall*, L. R. 7 Ch. 123; *Corner* v. *Shew*, 3 M. & W. 350; Williams on Executors, 10th ed., vol. 2, p. 1416. Work or services performed for an executor, at his request, are recoverable against him personally, he being entitled to recoup himself from the assets of the estate where the work and services were for the benefit of the estate. *Dean v. Lehberg*, 6 W. L. R. 214.

CHAPTER X.

OF THE LIABILITY OF AN EXECUTOR OR ADMINISTRATOR IN RESPECT TO HIS OWN TORTIOUS OR NEGLIGENT ACTS.

Devastavit Defined.

A violation or neglect of duty by an executor or administrator which makes him personally responsible, is called in law a devastavit, or a wasting of the assets. It is defined to be a mismanagement of the estate and effects of the deceased in squandering and misapplying the assets contrary to the duties imposed on him, for which an executor or administrator must answer out of his own pocket, as far as he had, or might have had, assets of the deceased.

Liability of Executor.

An executor is personally liable for all breaches of the ordinary trusts by a court are considered to arise from his office.

Re Marsden, 26 C. D. 783.

Where personal property is bequeathed to executors, as trustees, taking probate of the will is in itself an acceptance of the particular trusts.

General Rule as to Liability.

The general rule as to the liability of executors and administrators in this respect is founded on two principles: (1) In order not to deter persons from undertaking this office the court is extremely liberal in making every possible allowance, and cautious not to hold executors or administrators liable upon slight grounds. (2) Care must be taken to guard against an abuse of their trust.

Tebbs v. *Carpenter*, 1 Madd. 298.

Negligence, Collusive Sale.

Executors and administrators may be guilty of a devastavit not only by a direct abuse of the effects of the deceased, as by spending or consuming or converting to their own use, but also by such acts of negligence and wrong administration as will disappoint the claimants on the assets. An example of plain and palpable abuse is the application of the assets to the satisfaction of the executor's own debt to a third party. So, where the executor collusively sells the testator's goods at an under value, when he might have obtained a higher price for them, it is a devastavit, and he shall answer the real value.

Rice v. *Gordon*, 11 Beav. 265.

MAL-ADMINISTRATION.

Examples of devastavit arising from the mal-administration of the executor or administrator are misapplying the assets in undue expenses for the funeral; payment of debts out of their legal order to the prejudice of such as are superior, or by assent to, or payment of a legacy when there is not a fund sufficient for creditors.

TERM OF YEARS.

If the executor surrenders or otherwise fails to preserve the residue of a term of years where the land is of greater yearly value than the rent, it is a devastavit.

Thompson v. *Thompson*, 9 Price. 476.

ASSIGNMENT OF TERM.

If the rent be greater than the yearly value of the land, and the testator was the assignee of the term, the executor may be guilty of a devastavit in neglecting to exonerate the estate of the testator from its liabilities in respect of the lease, by assigning it to some other person.

Rowley v. *Adams*, 4 M. & Cr. 534.

MAINTENANCE OF CHILDREN.

An executor will be guilty of a devastavit if he applies the assets in payment of a claim which he is not bound to satisfy as if he makes disbursements in the schooling, feeding or clothing of the children of the deceased subsequently to his decease.

Giles v. *Dyson*, 1 Stark N. P. C. 32.

PAYMENT OF DEBT BARRED BY STATUTE.

An executor may pay a debt proved to be justly due by his testator, although barred by the Statute of Limitations, he is not bound to plead the statute to an action commenced against him by a creditor of the testator.

Lewis v. *Rumney*, L. R. 4 Eq. 451.

MUST USE DUE DILIGENCE.

Such acts of negligence or careless administration as defeat the rights of creditors or legatees, or parties entitled in distribution, will amount to a devastavit; for, if persons accept the trust of executors, they must perform it. They must use due diligence and not suffer the estate to be injured by their neglect.

DELAY IN PAYMENT OF DEBT.

So, if an executor delays the payment of a debt payable on demand with interest and suffers judgment for the principal and interest incurred after the testator's death, this is a devastavit,

for the interest, unless the executor can show that the assets were insufficient to discharge the debt immediately, and where the executor permits debts carrying interest to run on, when he had in his hands a fund to pay them, he shall be charged with interest at that rate.

Bate v. *Robins*, 32 Beav. 73.

DELAY IN COMMENCING ACTION.

Again, if the executor by his delay in commencing an action, has enabled the debtor of his testator to protect himself under a plea of the Statute of Limitations, this amounts to a devastavit.

East v. *East*, 5 Hare. 348.

MONEY ON BOND.

Where, for more than three years, executors permitted money to remain due on bond to their testator, without enquiring into the circumstances and situation of the obligor, or calling upon him to pay in the money, the executors, on the obligors becoming bankrupt, were held responsible.

Attorney-General v. *Higham*, 2 Y. & Coll. Ch. C. 634.

GOODS STOLEN.

If any goods of the testator are stolen from the possession of an executor, or from the possession of a third person to whose custody they have been delivered by the executor, or are lost by casualty, as by accidental fire, the executor is not charged with these as assets.

Jones v. *Lewis*, 2 Ves. Sen. 240.

REAL SECURITIES.

Where an executor puts out the money of his testator, upon a real security, which there is no reason then to suspect, but afterwards such security proves bad, the executor is not accountable for the loss any more than he would have been entitled to the profits had it continued good.

Ingle v. *Partridge*, 34 Beav. 41.

PERSONAL SECURITIES.

An executor or administrator lending money of the deceased upon bond, promissory note or other personal security is guilty of a breach of trust, and is personally answerable if the security proves defective, even though a will gives the executors power to lend on personal property, it does not enable them, even as against legatees, to accommodate a trader with a loan on his bond.

Lowry v. *Fulton*, 9 Sim. 115.

EXECUTOR LENDING TO CO-EXECUTOR.

Where a testator empowers his executors to lend money on personal security, he must be taken to rely upon the united

vigilance of them all with respect to the solvency of the borrowers. If one of them lends to the other this object is defeated, consequently such a loan is a breach of trust, and a misappropriation of the fund, and if any mischief arises to the estate of the testator the executors will be liable.

Warwick v. *Richardson*, 10 M. & W. 284.

UNEMPLOYED MONEY.

An executor is not justified in unnecessarily keeping his testator's money dead in his hands, and, therefore, if the exigencies of his office do not require otherwise, the executor should invest the unemployed money in such securities as are allowed by the statute.

UNAUTHORIZED SECURITIES.

If an executor lays out his testator's money in unauthorized securities, and there is any shrinkage in value, the loss will be thrown on him, although there be no mala fides on his part. On the other hand, if any profit happen by the rise of the stock in which the executor has laid out the money he shall not have the benefit, but it shall accrue to the estate of his testator.

Phayre v. *Perce*, 3 Dow. 128.

INSUFFICIENT SECURITIES.

Where trustees are bound to invest money in public funds, and instead of doing so retain the money in their hands, or invest it upon insufficient security, the cestuis qui trustent may elect to charge them either with the amount of the money or with the amount of the stock which they might have purchased with the money.

Pride v. *Fooks*, 2 Beav. 430.

DISCRETION TO INVEST.

Where they are not bound to invest money in authorized stock, or in any specific security, but by the terms of the trust have a discretion to invest it in various ways, they are chargeable with the whole amount of the trust fund together with the interest.

Robinson v. *Robinson*, 1 De G. M. & G. 247.

Executors ought not, without great reason, to permit money to remain upon personal security longer than is absolutely necessary.

NEGLECT TO REALIZE.

Where executors have neglected to realize assets which are outstanding on an improper investment, there is no fixed period

at which the loss is to be calculated, it depends upon the particular nature of the property and the evidence affecting it.

Marsden v. *Kemp*, 5 C. D. 598.

It is not the duty of the executor to call in money invested on real security where no risk is apparent.

Re Gabourie, Casey v. *Gabourie* 13 O. R. 635.

RULES AS TO AUTHORIZED INVESTMENTS.

The present rules as to authorized investments are contained in The Trustee Act, R. S. O. 1914, c. 121.

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.

Imp. Act, 23-24 Vict., c. 145, s. 25.

Sub-section 1 of s. 28 of The Trustee Act is amended by s. 28 of c. 21 of Ontario Acts, 1914, by adding after the word "Manitoba" in the last line but one of the said sub-section, the words "British Columbia."

(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.

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.

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.

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 that 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 advise of the valuator expressed in the report.

Imp. Act, 51-52 Vict., c. 59, s. 4.

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.

Imp. Act. 57-58 Vict., c. 53, s. 9.

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.

LIABILITY IN CASE OF CHANGE OF CHARACTER OF INVESTMENT.
IMP. ACT, 57 V. C. 10, S. 4.

Section 34 of the Trustee Act:—

34. A trustee shall not be chargeable with 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.

Imp. Act, 57-58 Vict., c. 10, s. 4.

AGENT FOR EXECUTOR.
FAILURE OF BANKERS.

If an executor appoints another to receive the money of his testator, and he receives it, it is the same thing as if the executor himself had actually received it, and will be assets in his hands. But with respect to losses sustained by the failure of bankers, or

other persons into whose hands the money of the testator has been deposited by the executor, where the money was made from necessity or conformably to the common usage of mankind, the executor will not be responsible for the loss.

Fenwick v. *Clarke*, 31 L. J. Ch. 728.

AUCTIONEER.

Where executors employ an auctioneer to sell any portion of the assets, and he receives the deposit and fails to pay it over, the executors will not, generally speaking, be held personally liable for the loss.

Edmonds v. *Peake*, 7 Beav. 239.

The former law has been relaxed somewhat, by the following provisions of The Trustee Act (R. S. O. 1914, c. 121).

20. Subject to the provisions of The Devolution of Estates Act where a trust for sale or a power of sale of land or personal estate is vested in a trustee, he may sell or concur with any other person in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or by private contract subject to such conditions respecting title or evidence of title or other matter as the trustee thinks fit, with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract for sale and to re-sell, without being answerable for any loss.

Imp. Act, 56-57 Vict. c. 53, s. 13, part.

21.—(1) No sale made by a trustee after the 4th day of May, 1891, shall be impeached by any beneficiary upon the ground that any of the conditions subject to which the sale was made, were unnecessarily depreciatory, unless it also appears that the consideration for the sale was thereby rendered inadequate.

Imp. Act 56-57 Vict. c. 53, s. 14.

(2) No such sale shall after the execution of the conveyance be impeached as against the purchaser upon the ground that any of the conditions subject to which the sale was made were unnecessarily depreciatory unless it appears that the purchaser was acting in collusion with the trustee at the time when the contract for the sale was made.

(3) No purchaser, upon any such sale, shall make any objection against the title upon this ground.

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.

Imp. Act. 56-57 Vict., c. 53, s. 17.

(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.

By s. 67 of c. 21 of Ontario Acts of 1914, it is provided as follows:—

Where persons who are subjects of Italy, Germany, Austro-Hungary or Belgium, or of any other country which may be designated by Order-in Council, are entitled to moneys which have been paid into Court or in the hands of an executor or administrator, such moneys may be paid out to the Consul-General of any of the said countries respectively.

RESPONSIBILITY FOR ACTS OF CO-EXECUTOR.

A devastavit by one of two executors or administrators shall not charge his companion, provided he has not intentionally, or otherwise, contributed to it for the testator having misplaced his confidence in one shall not operate to the prejudice of the other. Therefore, an executor is not, under ordinary circumstances, responsible for the assets come to the hands of his co-executor. But where an executor possessing assets of his testator, hands over these assets to a co-executor, and they are misapplied by that co-executor, then the executor who hands them over shall be answerable for their misapplication, unless he can show a good reason for having so acted. But if an executor is merely passive by not obstructing his co-executor from getting the assets into his possession, the former is not responsible, if the one in any way contributes to enable the other to obtain possession; he is answerable, notwithstanding his motive be innocent, unless he can assign a sufficient excuse. Thus, if by agreement among several executors, one is to receive and intermeddle with such part of the estate and another with such a part, each of them will be chargeable for the whole, because the receipts of each are pursuant with the agreement made between them. Therefore, an executor having a fund standing in the joint names of himself and another cannot, upon the mere representation of the co-executor, if false, be justified in doing an act that is an exercise of power over that fund. First, the act must be necessary for the purposes of the will, and then the person, to whom the representation is made, has imposed upon him at least ordinary and reasonable diligence to enquire whether the representation is true.

Broadhurst v. *Balguy*, 1 Y. & C. 16.

CO-EXECUTOR A BANKER.

If one executor places the property of the testator in the hands of the other, who happens to be a banker, or in such a situation that the act is not imprudent, the executor so depositing shall not be charged in case of a loss, for if he had been a sole executor, and under the same circumstances placed the money in the banker's hands, he would not have been liable.

EFFECT OF TAKING PROBATE.

One executor is not answerable for the receipt of the other, merely by taking probate, permitting the other to possess the assets, and joining in acts necessary to enable him to administer.

Styles v. *Guy*, 1 Mac. & G. 422.

PASSIVE ACQUIESCENCE.

It is the duty of all executors to watch over, and if necessary, to correct the conduct of each other, and an executor, as well as a trustee, who stands by and sees a breach of trust committed by his co-trustee becomes responsible for that breach of trust.

See *Archer* v. *Severn*, 13 O. R. 316.

In cases of the description above considered, a trustee or executor will not be protected by the usual indemnity clause, exonerating him from all responsibility, on account of the acts of his co-trustees or co-executors.

Wilkins v. *Hogg*, 3 Giff. 116.

"UNNECESSARY" ACT.

An executor who does an act by which his co-executor obtains sole possession of assets of the testator, is only liable for misapplication by his co-executor, if the act was "unnecessary." Such an act is not unnecessary if done in the regular course of business. A made his wife B., J., and C., his executors. A. was the registered holder of certain American railway shares; these shares could either be sold as registered shares or be unregistered, and then sold as shares to bearer; the latter was the ordinary course of business. J. requested B. and C. to unregister the shares. This was done. J. misappropriated part of the proceeds, and absconded within eleven months of A.'s death: Held (1), that unregistering the bonds and handing them to J. to sell were not "unnecessary" acts, and that B. and C. were not liable for J.'s misappropriation; (2) that as J. was trusted by A., and as B. and C. had no reason to suspect him, there had been no such delay in calling upon J. for an account as to make B. and C. liable.

In re Gasquoine, Gasquoine v. *Gasquoine* (1894), 1 Ch. 470.

ADMINISTRATION OF PART OF ASSETS.

If an executor administers part of the assets, he shall be charged with such as he has received, although he has renounced the executorship, and paid the money to a co-executor who proved the will. For executors must either wholly renounce, or if they act to a certain extent as executors and take upon them that character, they can be discharged only by administering the assets themselves or administering the estate through the court. But

an executor who has not proved is not to be considered as acting by assisting a co-executor, who has proved, in writing letters to collect debts or by writing directly to a debtor of the testator requiring payment.

DISCLAIMING EXECUTOR AS AGENT.

So if one of two persons named executors disclaims and renounces, who afterwards possesses himself of assets, as agent to the other, who has proved the will, the former does not thereby become accountable as executor.

Lowry v. *Fulton*, 9 Sim. 104.

EFFECT OF PROVING WILL.

Where an executor has once proved the will, he cannot renounce his representative character and act under another. He can do no act in regard to the estate for which he is not answerable as executor.

RECEIPT BY EXECUTOR OR TRUSTEE.

Where executors join in a receipt, both having the whole power for the whole fund, both are chargeable.

Where trustees join, each not having the whole power, joining being necessary, only the person receiving the money is chargeable.

Gregory v. *Gregory*, 2 Y. & C. 315.

EFFECT OF CONCURRENCE OR ACQUIESCENCE.

Although concurrence in the act of devastavit on the part of the parties injured by it, or acquiescence without original concurrence will release the executors, yet the court must inquire into all the circumstances which induced the concurrence or acquiescence, and ascertain whether their conduct really amounts to such a previous sanction or subsequent ratification as ought to relieve the executors from responsibility.

Davies v. *Hodgson*, 25 Beav. 177.

PROFITS.

An executor must account for all profits which have accrued in his own time, either spontaneously or by his acts, out of the estate of the deceased.

Sugden v. *Crossland*, 3 Sm. & G. 192.

EXECUTOR CANNOT BE PURCHASER.

An executor cannot be allowed, either immediately or by means of a trustee, to be a purchaser of any part of the assets, but shall be considered a trustee for the persons interested in the estate, and shall account for the utmost extent of advantage made by him of the subject so purchased. See page 187 ante.

Smedley v. *Varley*, 23 Beav. 358.

EXECUTOR COMPOUNDING CLAIMS.

If an executor compounds debts or mortgages, and buys them in for less than is due upon them, he shall not take the benefit of it himself; but other creditors and legatees shall have the advantage of it, and for want of them the benefit shall go to the party who is entitled to the surplus.

Barton v. *Hassard*, 3 Dr. & Sm. 461.

PRIVATE SECURITIES.

If an executor lays out the assets on private securities, although he shall answer for all deficiencies which may be caused thereby, he must account to the estate for all benefit.

Adye v. *Feuilleteau*, 1 Cox. 24.

EXECUTOR ACTING CONTRARY TO TRUST.

An executor, if he takes upon himself to act with regard to the testator's property in any other manner than his trust requires, puts himself in this situation, that if there be any loss he must replace it; but he cannot possibly be a gainer by it, any gain must be for the benefit of his cestui que trust.

Crosskill v. *Bower*, 32 Beav. 86.

WHEN INTEREST MAY BE CHARGED.

There are two grounds on which an executor or administrator may be charged with interest:

1. That he has been guilty of negligence in omitting to lay out the money for the benefit of the estate.

2. That he himself had made use of the money or had committed some other misfeasance to his own profit and advantage.

KEEPING MONEY IN HAND.

It may frequently 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 the fund is not considered distributable until after that time; but if an 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.

Davenport v. *Stafford*, 14 Beav. 319.

Where an executor alleged that he had kept money belonging to the estate for several years in his house, until the same was destroyed by fire and the money lost, the court held the executor guilty of a breach of trust, and his affidavit as to the destruction being unsatisfactory, refused to discharge him from custody under a writ of arrest.

Lawson v. *Crookshank*, 2 Chy. Chamb. 426.

MONEY RETAINED OR PAID UNDER MISTAKE.

An executor is not to be charged with interest for a balance in his hands retained under a false apprehension of his right, nor for money paid away under a mistake as to the legal right of it.

Gallivan v. *Evans*, 1 Ball. & B. 191.

EXECUTOR USING ESTATE FUNDS.

If an executor makes use of estate money he ought to pay the interest he made. If the fund is employed in trade the cestuis que trustent have a right to an option of taking either the interest or the profits which have arisen from the trade. But they must take either the profits for the whole period, or the interest for the whole period.

Heathcote v. *Hulme*, 1 J. & W. 122.

EXECUTOR MIXING TRUST FUNDS WITH PRIVATE MONEYS.

If an executor or other trustee mixes trust funds with the private moneys, and employs them both in a trade or adventure of his own, the cestui que trust may, if he prefers it, insist upon having a proportionate share of the profits instead of interest on the amount of the trust funds so employed.

Portlock v. *Gardner*, 1 Hare. 594.

TAKING ACCOUNT WITH RESTS.

Taking an account with rests, means that under it the interest computed on the balance due at the end of the first year is to form part of the balance due at the end of the second year, and upon which interest is then to be computed, and so on from year to year to the end of the account.

DISCRETION AS TO ALLOWING INTEREST.

It is not usual to allow interest on claims where there is no fraud, or wilful withholding of accounts, only a loose mode of dealing between the parties. The discretion under which a jury may allow interest applies to the master's office.

Re Kirkpatrick, 10 P. R. 4.

ONTARIO RULES AS TO INTEREST.

The English rules regulating the award of interest against executors and trustees may be approximated in this province, (1) 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.; (2) by charging him who has broken his trust by using the money 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 (3) by charging him who makes gain out of his trust by embarking the money in speculative or trading adventures with the profits or with compound interest, as the case may be. The executors in this case kept considerable and constantly increasing balances in their hands from year to year, and allowed the acting executor to use the money as he pleased. It was not proved that any profit was made out of it, and no special evidence was given to shew what the current rate of interest during that period was; but the notes and mortgages held by the executors bore interest for the most part at six per cent. The master charged the executors with interest at six per cent. per annum, with annual rests upon moneys in their hands belonging to the estate, and allowed them the usual commission and costs. On an appeal from the report of the master, it was:—Held, that the interest should be charged at six per cent.; but that the awarding of compound interest was opposed to the spirit of the decision in Inglis v. Beatty, 2 A. R. 453, and could be only upheld as being in the nature of a penalty imposed on the executors.

Re Honsberger, 10 O. R. 521.

DISCRETION AS TO INVESTMENTS.

Where moneys are left by will to be invested at the discretion of the executor or trustee, the discretion so given cannot be exercised otherwise than according to law, and does not warrant an investment in personal securities or securities not sanctioned by the court:—Held, that an executor and trustee who deposited funds so left in trust for infants, at three-and-a-half or four per cent, interest, in a savings' bank, did not conform to his duty; and his failure to do so exposed him to pay the legal rate of interest for the money, although he acted innocently and honestly; and the acquiescence of the statutory guardian of the infants, not being for their benefit, did not relieve him:—Held also, that the defendant was not entitled to costs out of the fund, but that he should be relieved from paying costs.

Spratt v. *Wilson*, 19 O. R. 28.

ALLOWANCE FOR REASONABLE EXPENSES.

An executor or administrator is entitled to be allowed all reasonable expenses which have been incurred in the conduct of his office, except those which arise from his own default. It is a general principle that an executor or administrator shall have no allowance at law or in equity for personal trouble and loss of time in the execution of his duties; nor is the case altered by

the executors' renunciation of the executorship and his afterwards assisting in it; nor although it should appear that he has deserved more, and has benefited the estate to the prejudice of his own affairs.

Robinson v. *Pett*, 3 P. Wms. 249.

SURVIVING PARTNER.

A surviving partner, being an executor, is not entitled, without expressed stipulation, to have allowance for carrying on the trade after the testator's death.

SOLICITOR TRUSTEE.

A trustee, who is a solicitor, is entitled to be repaid such costs, charges and expenses only as he has properly paid out of his pocket, and where an executor and trustee employs his co-trustee, who is a solicitor, to transact the legal business of the trust, the solicitor is only entitled to costs out of pocket.

AGENT EXECUTOR.

An agent, who is appointed an executor of his principal, is not entitled to charge commission on business done subsequently to the testator's death.

EXECUTOR AUCTIONEER.

An executor, who acts as auctioneer in the sale of assets, is not entitled to charge commission.

COMPENSATION.

Compensation to executors and administrators is now awarded under the authority of s. 67, s.-s. (1) to (5) of The Trustee Act (R. S. O. 1914, c. 121), which are as follows:—

67.—(1) A trustee, guardian or personal representative, shall be entitled to such fair and reasonable allowance for his care, pains and trouble, and his time expended in and about the estate, as may be allowed by a Judge of the Supreme Court, or by any Master or Referee, to whom the matter may be referrrd.

(2) The amount of such compensation may be settled although the estate is not before the Court in an action.

(3) The Judge of a Surrogate Court in passing the accounts of a trustee under a will or of a personal representative or guardian, may from time to time allow to him a fair and reasonable allowance for his care, pains and trouble, and his time expended in or about the estate.

(4) 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 circumstance, and the allowance shall be increased by such amount as may be deemed fair and reasonable in respect of such services.

(5) Nothing in this section shall apply where the allowance is fixed by the instrument creating the trust.

NO INFLEXIBLE STANDARD.

The right of an executor to compensation depends entirely upon the above Act, and as that statute has fixed no standard,

each case is to be dealt with on its own merits, according to the discretion of the Judge. The courts have laid down no inflexible rule in this regard, and the adoption of any hard and fast commission (such as five per cent.) would defeat the intention of the statute.

Re Fleming, 11 P. R. 426.

GRATUITOUS SERVICES.

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. *Barnard*, 10 Chy. 479.

SURROGATE JUDGE.

Where a suit for the administration of an estate is pending, it is improper for the Surrogate Judge to interfere by ordering the allowance of a commission to trustees or executors.

Cameron v. *Bethune*, 15 Chy. 486.

EMPLOYMENT OF AGENT.

An executor who has proved the will, or a person taking out letters of administration, cannot retire from his duty, but must collect the estate himself; but an executor is justified in having recourse to an agent to collect the assets in cases where a provident owner might well employ a collector, and the executor will therefore be allowed the expense so incurred in his account.

SOLICITOR'S COSTS.

If an executor pays a solicitor for his trouble and attendance in the transacting and conduct of the testator's affairs, he ought to be allowed and repaid what he pays. But an executor is not entitled to be allowed, without question, the amount of the bill of costs which he has paid. The officer of the court without regularly taxing the bill will moderate the amount.

Johnson v. *Telford*, 3 Russ. Ch. Cas. 477.

SOLICITOR EXECUTOR.

Where a solicitor is appointed executor and is at liberty to charge for his professional services, he is only entitled to charge for services strictly professional, and not for matters which an executor ought to do without the intervention of a solicitor, such as for attendances to pay premiums on policies, attending at the bank to make transfers, attendances on auctioneers, legatees and creditors.

Harbin v. *Darby*, 28 Beav. 325.

ADVANCES BY EXECUTOR.

If an executor borrows money or advances it out of his own pocket to pay the debts of his testator which carry interest, or

satisfy some of his testator's creditors who are very importunate and threaten to bring actions, he is entitled, not only to be paid in full in priority to creditors, but also to an allowance of interest for the money so advanced and borrowed.

Small v. *Wing*, 5 Bro. P. C. 72.

Sections 70, 71, 72 and 73 of The Trustee Act, R. S. O. 1914, ch. 121, are as follows:—

70. The Supreme Court may order the costs of and incidental to any application, order, direction, conveyance, assignment or transfer under this Act, or any part thereof, to be paid or raised out of the property in respect of which the same is made, or out of the income thereof, or to be borne and paid in such manner and by such persons as the court may deem proper.

71. Subject to section 72, unless otherwise expressed therein, the provisions of this Act shall apply to all trusts whenever created, and to all trustees whenever appointed.

72. The powers, rights and immunities conferred by this Act are in addition to those conferred by the instrument creating the trust, but shall have effect subject to the terms thereof.

73. Nothing in this Act shall authorize a trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do by the instrument creating the trust.

The following cases will prove useful as an indication of the leaning of the courts where the proceedings are taken against executors.

COMPENSATION.

Where a legacy is given to executors as compensation, they are at liberty to claim a further sum under the statute if it is not sufficient. *Denison* v. *Denison*, 17 Chy. 306.

G. W., by will directed his executors to retain for their own use and benefit the sum of $200 each, in lieu of all charges for their services in performing the duties imposed on them as executors of this my will:— Held, that under no circumstances could the executors who had accepted probate claim a larger sum than the amount specified as compensation for their services. *Denison* v. *Denison*, 17 Chy. 306, doubted. *Williams* v. *Roy*,. 9 O. R. 534.

Semble, that if an executor refused otherwise to act, and if it was found impracticable to deal with those entitled to the assets, the court would have jurisdiction to permit the compensation given by the statute to be awarded to him on condition of his relinquishing what was given to him by the will. *Williams* v. *Roy*, 9 O. R. 534 .

Rate of Commission.—Four per cent. on all transfers of stock and all moneys paid in and collected:—Held, not unreasonable. *Torrance* v. *Chewett*, 12 Chy. 407.

Rests.—Where an administrator who had acted as agent for the intestate during his lifetime, had, with the assent of the deceased, used moneys belonging to him, without any attempt at concealment as to his so using them, the court refused to take the account against the administrator with rests. The Master having allowed the estate of the administrator a commission of five per cent. on moneys passing through his hands in his lifetime, the court refused on appeal to disturb such allowance. *McLennan* v. *Heward*, 9 Chy. 178.

Where the agent, after the decease of the principal intestate, had procured letters of administration to his estate, and subsequently the person

who became possessed of the assets as the personal representative of the administrator refused to account, and a bill was filed to enforce it, the court, under the circumstances, there being no evidence of any improper dealing with the estate either by the administrator or those representing him, allowed the defendants a commission of five per cent. on all moneys received and paid over or properly expended by themselves or their testator, and two and a half per cent. on all moneys received by him or them, but not yet paid over; but refused the costs of the suit. S. C., ib. 279.

Services by Agent.—In no case will an executor be entitled to allowance for services performed by an agent, which were so performed by him gratuitously. *Chisholm* v. *Barnard*, 10 Chy. 479.

The old rule as to compensation of trustees has only been abrogated by the Surrogate Act so far as relates to trusts under wills. *Wilson* v. *Proudfoot*, 15 Chy. 103.

Where an executor had retained money in his hands unemployed, for which on passing his accounts he was charged by the accountant with interest and rests, he was, notwithstanding, allowed his commission and costs of the suit. *Gould* v. *Burritt*, 11 Chy. 523.

The court will not refer it to the surrogate Judge to settle the amount of compensation or commission to be allowed to an administrator or executor, but having possession of the subject matter of litigation will finally dispose of the rights of all parties. *McLennan* v. *Heward*, 9 Chy. 279.

Under the circumstances of this case the court refused to the surviving executor, and to the executor of the deceased executor, their costs of the suit; the court, however, being satisfied that neither of them had been guilty of any wilful misconduct, did not charge them with costs, and allowed them the amount of their commission; but refused to allow them to receive the legacies given by the will, which were expressed to be in remuneration for their trouble. *Kennedy* v. *Pingle*, 27 Chy. 305.

Where the estate was large, requiring great care and judgment in its management for a number of years, the court sustained an allowance of $1,500 to the principal executor and trustee, and $1,500 to the others jointly. *Denison* v. *Denison*, 17 Chy. 306.

An executor who discharges his duty honestly but owing to want of business training keeps his accounts loosely and inaccurately is entitled to compensation for his care, pains and trouble, but the amount of compensation should not, in such a case, be relatively large. Compensation when allowed should be credited to the executor at the end of each year. *Hoover* v. *Wilson*, 24 A. R. 424.

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. *In re Honsberger, Honsberger* v. *Kratz*, 10 O. R. 521.

A commission should not in general be allowed to an executor or a trustee in respect of sums which he did not receive, but is charged with on the ground of wilful default. *Bald* v. *Thompson*, 17 Chy. 154.

The fact that, on an account being taken in the Master's office pursuant to a decree in an administration suit, a balance has been found against an executor, some of the items of which are the result of a surcharge, is not alone sufficient to disentitle him to compensation under R. S. O. 1877 c. 107, s. 41. *Sievewright* v. *Leys*, 1 O. R. 375.

Where there is a bequest of a share of the residuary estate to executors it is 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 is nevertheless one of the elements to be considered in dealing with the question of compensation:—Held, that in this case, the executors, were entitled to compensation, notwithstanding a bequest to them, of a share of the residue because the amount of the residue was, when the will was made and after the testator's death, a matter of extreme uncertainty; nevertheless, no percentages should be allowed on the share of the residue, which the executors took under the residuary clause in the will. *Boys' Home of the City of Hamilton* v. *Lewis*, 4 O. R. 18.

Where the executors carried on testator's business for some years through an agent, one of the executors visiting the place occasionally to

supervise the business generally:—Held, that a commission on the moneys received from this source was not a proper mode of compensating the executors, but that they were entitled to be compensated therefor; and that not illiberally. *Thompson* v. *Freeman*, 15 Chy. 384.

The rule laid down in the last case followed, and executors held entitled to compensation under the Surrogate Act, 22 Vict. c. 93, for services performed before the passing of the Act. *McMillan* v. *McMillan*, 21 Chy. 369.

Where a testator gives a legacy to his executors, expressly as a compensation for their trouble, and there is a deficiency of assets, such legacy does not in this country abate with legacies which are mere bounties, even though the legacy somewhat exceeds what the executors would otherwise have been entitled to demand. *Anderson* v. *Dougall*, 15 Chy. 405.

Compensation to Executor.—The testator bequeathed to M., one of his executors, the interest due on the amount in the savings bank or building society after the death of his daughter B., and the interest annually on the mortgages till twenty-one years from the testator's death was given to him, "to recompense him for the trouble and expense of attending to this my will." In a subsequent clause $100 was given to him "as compensation for his coming from Hamilton quarterly, to submit the statements and accounts, and receipts and expenditure, and deposit receipts to the solicitor as above mentioned:"—Held, that these were not inconsistent bequests, the one being for the care and management of the estate; the other for a specific item of expense—the coming from Hamilton—and might both well stand together. But as M.'s care of the estate was by the will only to arise after B.'s death, and therefore might never come into operation, he was not entitled to claim the $100 until he did enter on the management. *Hellem* v. *Severs*, 24 Chy. 320.

An executor who is one of a banking firm cannot charge the ordinary banker's commission against his testator's estate. *Heighington* v. *Grant*, 5 M. & Cr. 258, 262.

An executor who acts as auctioneer in the sale of assets is not entitled to charge commission. *Kirkman* v. *Booth*, 11 Beav. 273.

Nor if he is a partner with others can the partnership make a charge: *Matthison* v. *Clarke*, 3 Drew. 3.

Compensation.—Held, that such compensation should be paid out of the son's estate, and not that of the testatrix. *In re E. J. E. Church Estate—Athole Church Trust*, 18. 12 O. L. R. 712.

Where a suit for the administration of an estate is pending in this court, it is improper for the surrogate Judge to interfere by ordering the allowance of a commission to trustees or executors. *Cameron* v. *Bethune*, 15 Chy. 486.

The rule of the court is to allow compensation to trustees of real estate under a will, as well as to executors. *Bald* v. *Thompson*, 17 Chy. 154.

An executor is entitled to interest on money advanced by him, and properly expended in the management of the estate. *Menzies* v. *Ridley*, 2 Chy. 544.

Where advances were made by way of loan to the managing executor, as such, and subsequently security was taken therefor from him on part of the assets of the estate, such advances being made and security taken in good faith on the part of the lender, and it appeared that some of the advances were duly entered in the books of the estate, and the name of the lender, who had no other transactions with the estate, appeared as a creditor in several annual balance sheets sent to the other executors by their agent, and no objection on their part was ever made; the court refused, at the instance of such executors, to order the securities to be

delivered back to them, without payment of such advances. *Ewart* v. *Gordon*, 13 Chy. 40.

Beneficial Interest.—When property is bequeathed to executors on trusts which are too uncertain for execution, the executors are not beneficially entitled. *Davidson* v. *Boomer*, 15 Chy. 1.

Where a will does not dispose of the whole personalty, the executors are trustees for the next of kin, unless the will expressly shews that the testator intended they should take the residue beneficially. *Thorpe* v. *Shillington*, 15 Chy. 85.

Bequest to Executor — Forfeiture by Renunciation. — A testator devised his estate to W. P., a resident of Scotland, and to two others, residents of Canada, in trust to convert and divide the same; and appointed the same parties executors of his will. To W. P. he bequeathed $5,500, and to the two others $1,500 and $500 respectively over and above any expenses to be incurred in the nature of travelling expenses or expenses incident thereto, and generally in the management of his estate. For the convenience of the other creditors, W. P. renounced probate of the will:— Held, that by such renunciation he had forfeited the bequest in his favour. *Paton* v. *Hickson*, 25 Chy. 102.

Management of Estate.—Remuneration of trustees whose duties extend over a number of years should be an annual allowance for their services in looking after the corpus of the fund for receiving repayments upon principal and re-investing. This allowance should not be based upon the amount so collected and re-invested, but should be based upon the nature of the property and the amount of responsibility involved. *Re Berkeley's Trust* (1879), 8 P. R. 193, and *Re Williams* (1902), 4 O. L. R. 501, 1 O. W. R. 534, followed. *Re Patrick Hughes* (1909), 14 O. W. R. 630.

Remuneration of Trustees.—Held, following *Re Berkeley's Trusts*, 8 P. R. 193, that an annual allowance should be made for looking after the corpus of the fund, and that it should not depend upon the amount collected and invested, but should be a fixed annual allowance, based on the nature of the property and the consequent degree of care and responsibility involved. *In re Williams*, 22 C. L. T. 323, 4 O. L. R. 501, 1 O. W. R. 501.

The general rule is, that a trustee-solicitor is not entitled to charge the estate with fees for any professional services, but that an exception, which is not to be extended, has been established by the decision of Lord Cottenham in *Cradock* v. *Piper*, 1 Macn. & 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. *In re Williams*, 22 C. L. T. 323, 4 O. L. R. 501, 1 O. W. R. 501.

Money Advanced to Pay for Land.—The lessee of land, with the right to purchase, devised the same to his son, if it could be paid for, and if it could not, that one half should be sold, and the purchase money paid for the other half, which he gave to his son, an infant. The executor advanced out of his own moneys sufficient to pay the price of the land, and the lessors conveyed to the devisee. The personal estate being exhausted, the court, under the circumstances, directed a sale of that portion of the lot which the testator desired should be sold, if it should appear upon inquiry before the Master that the payment to the lessors was for the benefit of the infant. *Lanni* v. *Jermyn*, 9 Chy. 160.

Residuary Gift to Executor.—The presumption that a legacy to an executor is prima facie given to him in that character for his trouble does not arise if the gift is of residue. *Griffiths* v. *Pruen* (11 Sim. 202) followed. *Maxwell, In re; Eivers* v. *Curry* (1906), 1 Ir. R. 386.

Devise to Executor—Whether In Lieu of Compensation.—The executor of a deceased person's estate was also the executor of an estate in which the deceased was beneficially interested. In passing his accounts

in respect to the last named estate, after the deceased's death, the executor credited himself with having received for the deceased on account of her share in such last named estate a specified sum of money. On subsequently passing his accounts in respect to the deceased's estate, and being charged with the sum, as having been received by him for the deceased, he alleged that he had not then received it, but had in fact paid it out in small sums to the deceased during her lifetime:—Held, that this was not a matter occurring before the death of the deceased, and therefore, the evidence of the executor to establish his contention did not require to be corroborated under s. 10 of the Evidence Act, R. S. O. 1897 c. 61. A testatrix by her will devised to her brother certain lands free from incumbrances, personal capacity, and therefore did not preclude him from claiming com-with a direction for the payment out of general personal estate of any the devise was not given to him in his capacity of executor, but in his pensation for his services to the estate. *Compton* v. *Bloxham*, 2 Coll. 201, distinguished. Where an executor has been guilty of negligence, mismanagement and breach of trust in his management of the estate, but incumbrance thereon, and she appointed him her executor:—Held, that there has been nothing of a dishonest or fraudulent character, and the losses resulting are capable of being compensated for, and made good in money, the executor is not to be deprived of compensation. *McClenaghan* v. *Perkins*, 23 Occ. N. 84, 5 O. L. R. 129, 1 O. W. R. 191, 752.

Money Paid for Partner's Interest.—Executors became personally liable to the surviving partner of the testator for the payment of a sum supposed to be equal to his share in the estate, and he thereupon released to them all his interest in the partnership estate, which was by them wound up, and the proceeds applied in liquidation of the testator's debts. This arrangement was found beneficial to the testator's estate, and the executors were held entitled to a first charge on the proceeds of the estate for the moneys paid by them to the surviving partner, and for what they still owed him on their personal obligation, as also the amount of commission allowed them by the Judge of the Surrogate Court. *Harrison* v. *Patterson*, 11 Chy. 105.

General Rule.—The rate of compensation to executors or trustees should depend upon the amount passing through their hands, and the time and labour spent by them. In this case, a commission of five per cent. on all moneys received and expended by them, and half that amount on the moneys received but not expended, having been allowed, an appeal from the Master's report, on the ground of excess, was allowed. ***Thompson*** v. ***Freeman***, 15 Chy. 384.

The right of an executor to compensation depends entirely upon R. S. O. 1877 c. 107, ss. 37, 41, and as that statute has fixed no standard, each case is to be dealt with on its merits, according to the discretion of the Judge. The courts have laid down no inflexible rule in this regard, and the adoption of any hard and fast commission (such as five per cent.) would defeat the intention of the statute. Order below, 11 P. R. 272, reversed. *Re Fleming*, 11 P. R. 426.

There is no fixed rate of compensation applicable under all circumstances for services of executors and trustees. They are entitled to reasonable compensation, and what that is, must be governed by the circumstances of each case. *Robinson* v. *Pett*, 2 W. & T. C. L. Eq. 214. ***Chisholm*** v. ***Barnard***, 10 Chy. 481, and *Thompson* v. *Freeman*, 15 Chy. 385, followed. Considering the amount and nature of the estate, $3,000 was allowed as compensation to the executors who were solicitors. *Re Griffin* (1912), 23 O. W. R. 254; 3 O. W. N. 1049.

In fixing the amount of compensation to trustees, there should be taken into consideration: (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. Such compensation, while fair and just, must be reasonable but not necessarily liberal. *Re Sanford Estate*, 18 Man. L. R. 413, 10 W. L. R. 82.

A testator directed that "any trustee or executor hereunder being a solicitor or other person engaged in any profession or business shall be

entitled to charge and be paid all usual professional or other charges for any business done by him or his firm in relation to the management and administration of my estate . . . . whether in the ordinary course of his profession or business or not and although not of a nature strictly requiring the employment of a solicitor or other professional person:"—Held, that, under this clause, a trustee could not charge for his time and trouble except in the course, whether ordinary or not, of his profession or business. *Fish, In re; Bennett* v. *Bennett*, 62 L. J. Ch. 977; (1893) 2 Ch. 413, distinguished. *Clarkson* v. *Robinson*, 69 L. J. Ch. 859; (1900) 2 Ch. 722; 83 L. T. 164; 48 W. R. 698.

A testator directed that one of his executors and trustees, who was a solicitor, should be the solicitor to the trust, and should be allowed "all professional and other charges for his time and trouble notwithsanding his being such executor and trustee:"—Held, that the solicitor-trustee was not entitled to charge for work done capable of being done by a trustee personally, and not requiring the employment of a solicitor. *Ames, In re; Ames* v. *Taylor*, 25 Ch. D. 72, and *Fish, In re; Bennett* v. *Bennett*, 62 L. J. Ch. 977; (1893) 2 Ch. 413, distinguished. *Chalinder & Herington*, In re, 76 L. J. Ch. 71; (1907) 1 Ch. 58; 96 L. T. 196; 23 T. L. R. 71.

Profit—Costs—Power to Charge—Solicitor—Trustee. — *White, In re; Pennell* v. *Franklin*, 67 L. J. Ch. 502; (1898) 2 Ch. 217; 78 L. T. 770; 46 W. R. 676.

"Testamentary Expenses" — Intestacy — Costs of Administration—Costs of Probate Action—Estate Duty.—*Clemow, In re; Yeo.* v. *Clemow*, 69 L. J. Ch. 522; (1900) 2 Ch. 182; 82 L. T. 550; 48 W. R. 541. Followed in *Treasure, In re; Wild* v. *Stanham*, 69 L. J. Ch. 751; (1900) 2 Ch. 648; 83 L. T. 142; 48 W. R. 696.

Improvements.—An executrix, who had an annuity charged on the income of the estate, real and personal, expended money in good faith in improving the real estate, and in other unauthorized ways, and was in consequence found largely indebted to the estate:—Held, that her expenditure in improvements should be allowed so far as it had enhanced the value of the estate. *Morley* v. *Matthews*, 14 Chy. 551.

Compensation, Principle for Fixing.—In fixing the amount of compensation to trustees there should be taken into consideration (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: *Re Toronto General Trusts and Central Ontario R. W. Co.*, 6 O. W. R. 354; *Re Sanford*, 10 W. L. R. 82.

RIGHTS BEFORE GRANT.

Rights before Grant.—Since the Ontario Judicature Act, the rule in equity prevails as opposed to that at law, that letters of administration when obtained relate back to the death, and it is sufficient if a plaintiff suing as administrator qualifies before the trial. *Trice* v. *Robinson*, 16 O. R. 433.

The rule in equity is, that when a person is entitled to obtain letters of administration he may begin an action as administrator before he has fully clothed himself with that character; but the same doctrine does not apply where the person immediately entitled to obtain administration is not the one who begins the action. *Trice* v. *Robinson*, 16 O. R. 433, distinguished. *Chard* v. *Rae*, 18 O. R. 371.

Where the point is specially raised on the pleadings as to the time when the letters of administration were obtained, it devolves upon the court to ascertain whether an action was begun in time by a properly constituted plaintiff. *Chard* v. *Rae*, 18 O. R. 371.

Executors Defending before Probate. — Executors having defended an action on a note as executors and judgment having been recovered against them as such, they were held to have accepted office; want

of probate was immaterial and the sheriff's sale on such judgment was valid. *McDonald* v. *McDonald*, 17 A. R. 192.

Judgment before Probate.—The title of an executor being derived from the will and not from the probate, the court refused to restrain execution against the lands of a deceased debtor on a judgment recovered against the executor before probate. *Stump* v. *Bradley*, 15 Chy. 30; and see *Mandeville* v. *Nicholl*, 16 U. C. R. 609.

INVESTMENTS.

Trust for Sale.—Trustees who have a trust for sale and conversion with powers at their discretion to postpone conversion and to retain existing investments, are not under any duty to make or preserve evidence that they have exercised such discretion. The assumption is, if they postpone conversion and retain existing investments, that they have properly exercised their discretion. Observations on the duties of trustees with respect to the retention of investments. *Oddy, In re; Connell* v. *Oddy*, 104 L. T. 128.

It is now held that trustees having a power with the consent of the tenant for life to lend trust funds on personal security may lend them on personal security to the tenant for life: *In re Lang's Settlement* (1899), 1 Ch. 593. The proposition to the contrary in Lewin on Trusts, 10th ed., p. 335, purporting to be founded on *Keays* v. *Lane*, L. R. 3 Eq. 1, is not followed.

Direction as to "Securities"—Extrinsic Evidence.—*Rayner, In re; Rayner* v. *Rayner*, 73 L. J. Ch. 111; (1904), 1 Ch. 176; 89 L. T. 681; 52 W. R. 273.

Tenant for Life and Remainderman—Unauthorized Securities — Wasting Securities — No Trust for Conversion — Power to Trustees to Retain Enjoyment of Income in Specie.—Where a will contains no trust for conversion and the tenant for life of the residue is given the entire income thereof, he is entitled to the income of the unauthorized securities retained by the trustees under a power of retainer whether the securities are of a permanent or of a wasting nature. *Nicholson, In re; Eade* v. *Nicholson*, 78 L. J. Ch. 516; (1909), 2 Ch. 111; 100 L. T. 877.

There is no distinction for the purposes of the application of the rule in *Howe* v. *Dartmouth (Earl)*, (7 Ves. 137a), between unauthorized securities of a wasting nature and those of a permanent nature. Ib.

Investment.—Held, following *In re Cameron*, 2 O. L. R. 756, that the life tenants were entitled to some portion of this sum. The life tenants then, in effect, elected to treat this property as a satisfactory investment. The rate of interest was to be determined by the rate which could be obtained on securities upon which trustees may invest. *Walters* v. *Solicitor for the Treasury* (1900), 2 Ch. 107 followed. *In re Clarke, Toronto General Trusts Corporation* v. *Clarke*, 24 Occ. N. 23, 6 O. L. R. 551, 2 O. W. R. 980.

Investment.—Executors were empowered to invest in "any corporation or company municipal, commercial or otherwise." Held, that the trustees had power to invest in the stocks, funds, or securities of companies, incorporated or unincorporated, formed or registered within the United Kingdom, but carrying on business abroad, and also of companies formed or registered outside the United Kingdom. *Stanley, In re; Tennant* v. *Stanley*, 75 L. J. Ch. 56; (1906), 1 Ch. 131, 93 L. T. 661, 54 W. R. 103.

Where a testator authorized his executors to invest the surplus of his estate in public securities:—Held, that municipal debentures were not thereby authorized. *Ewart* v. *Gordon*, 13 Chy. 40.

Special Direction as to Investments.—The testator, a resident of Ontario, but temporarily resident in New York, was possessed of real and personal property in Ontario, and also of personal property invested in

United States securities. By his will he named one resident of the United States (his brother-in-law) and two persons residents of Ontario, as his executors, to whom he bequeathed all his personal estate, upon trust as soon as conveniently might be to sell, call in and convert into money such part of his estate as should not consist of money, and thereout to make certain payments, and invest the balance of such moneys in or upon any of the public stocks or funds of the Dominion of Canada, of the Province of Ontario, or upon Canadian Government or real securities in the Province of Ontario, or in or upon the debentures of any municipality within the Province of Ontario aforesaid, or in or upon the shares, stocks, or securities of any bank, incorporated by Act of Parliament of Canada, paying a dividend, with power to vary the said stocks, funds, debentures, shares and securities: "And as respects my American securities, having the fullest confidence in the judgment and integrity of the said W. E. C. my brother-in-law and trustee, I direct my trustees to be guided entirely by his judgment as to the sale, disposal and reinvestment thereof, or the permitting of the same to be and remain as they are, until maturity thereof, and I declare that my said trustees or trustee shall not be responsible for any loss to be occasioned thereby":—Held, that this did not authorize the reinvestment of moneys realized on the sale or maturing of any of these securities in the United States, but that the executors were bound to bring them into this country, and invest them in one or other of the securities enumerated by the testator. *Burritt* v. *Burritt*, 27 Chy. 143.

Investment in Bond of Unincorporated Body.—A power to invest trust moneys in "bonds, mortgage debentures, debenture stock, preference or other shares of any public company or body corporate, municipal, commercial or otherwise," is confined to such investments in public companies and bodies duly incorporated. A trustee invested trust funds subject to such a power in the bond or debenture of a body called "The Trustees for the Town and Harbour of Whitehaven," which at the time of investment were unincorporated:—Held, such investment was a breach of trust. *Wood* v. *Middleton*, 79 L. T. 155.

Investment Authorized in "Public Company":—Held, that "public company" was confined to companies within the United Kingdom. *Castlehow, In re; Lamonby* v. *Carter*, 72 L. J. Ch. 211; (1903), 1 Ch. 352; 88 L. T. 455.

Option to Trustees to take Improper Investment.—The liability of a trustee for an improper investment will not be affected by the fact that the security upon which the improper investment was made has been since disposed of, as against a cestui que trust who never consented to the improper investment or did anything to put it out of the power of the trustee to obtain the benefit of such investment. *Salmon, In re; Priest* v. *Uppleby*, 42 Ch. D. 351, considered. *Head* v. *Gould*, 67 L. J. Ch. 480; (1898), 2 Ch. 250; 78 L. T. 739; 46 W. R. 497.

Excess Income.—A trustee who has paid the whole of the income arising from unauthorized investments of a trust fund to the tenant for life cannot, where no loss has resulted to the fund, be called upon to repay to the estate, as part of the capital of the fund, so much of the income as exceeded the amount which would have arisen if the fund had been properly invested. *Appleby, In re; Walker* v. *Lever*, 51 W. R. 153.

Jurisdiction of Court to Sanction.—The court has no jurisdiction to give its sanction to a scheme, however beneficial to the cestuis que trustent it may appear to be, whereby trustees are to make a continuing investment not authorized by the will of the testator. *Tollemache, In re*, 72 L. J. Ch. 539; (1903), 1 Ch. 955; 88 L. T. 670; 51 W. R. 597.

Jurisdiction of Court to Sanction.—The extreme limits of the jurisdiction of the court to authorize trustees to go beyond the terms of a trust instrument are laid down in *New's Settlement, In re; Langham* v. *Langham*, 70 L. J. Ch. 710; (1901), 2 Ch. 534.

Investment.—An order was made authorizing an executrix to convert certain shares in a company bequeathed to her for life with remainder

to her children into shares of a new company (in which the old one was about to be merged), such shares not being an investment authorized by the Trustees Investment Act, but it appearing that the arrangement would be for the benefit of the estate. *In re Strathy Trusts*, 21 C. L. T. 339.

BROKER—DEATH OF CLIENT.

Broker—Death of Client.—Where there is a running account between a broker and his client, and the client dies, the account may be closed by the broker at once, whether he is a member of the Stock Exchange or not; if he be unable to sell the shares, he may take them over himself at a proper valuation, provided that he does not thereby prejudice his client's estate. *Finlay, In re; Wilson & Co.* v. *Finlay*, 82 L. J. Ch. 295; (1913) 1 Ch. 565; 108 L. T. 699; 57 S. J. 444; 29 T. L. R. 436.

The legal personal representative of the client could, however, bring an action to set aside the transaction and to redeem. Ib.

CO-EXECUTOR.

Acts of Co-executor—Allowing Co-executor to Receive Purchase Money.—Held, that under the circumstances of this case, the executrix was not responsible to the estate for the misappropriation by her co-trustee.—Held, also, that even if she had been liable for the principal money so misappropriated, she would not have been for the interest, inasmuch as the principal never came into her hands. *McCarter* v. *McCarter*, 7 O. R. 243; *Burrows* v. *Walls*, 5 DeG. M. & G. 233; *Rodbard* v. *Cooke*, 25 W. R. 556; and *Cowell* v. *Gatcombe*, 27 Beav. 568, distinguished. *Re Crowter, Crowter* v. *Hinman*, 10 O. R. 159.

Allowing Solicitor to Receive Purchase Money.—When one or more of several trustees acts or act in getting in and dealing with the trust funds an inactive trustee is accountable therefor equally with the others, if having the means of knowledge by the exercise of ordinary vigilance, he stands by and permits a breach of trust to go on. *McCarter* v. *McCarter*, 7 O. R. 243.

Breach of Trust by one Executor—Notice—Inquiry.—After all the debts of an estate are paid, and after the lapse of years from the testators and trustees dealing with assets is so dealing qua trustee and not as tor's death, there is a sufficient presumption that one of the several execu- executor, to shift the burden of proof. *Ewart* v. *Gordon*, 13 Chy. 40, discussed. *Cumming* v. *Landed Banking and Loan Co.*, 22 S. C. R. 246.

Executor Discharging his own Mortgage.—Quære, whether the discharge of mortgage, to be valid, did not require the signature of both executors. *McPhadden* v *Bacon*, 13 Chy. 591. See *Beaty* v. *Shaw*, 13 O. R. 21, 14 A. R. 610.

Misappropriation of Funds.—H. and C. were appointed 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, but of this C. was not aware. The will contained the usual indemnity clause exonerating each from liability for the other:—Held, that C. was not liable for the sum appropriated by H. *King* v. *Hilton*, 29 Chy. 381.

Payment of Purchase Money to One Executor.—Devisees in trust for sale of real estate must jointly receive or unite in receipts for the purchase money, unless the will provides otherwise, and the case is not affected by the property being charged with debts, and the power of sale being to the executors eo nomine. *Ewart* v. *Snyder*, 13 Chy. 55.

Where such a mortgage was taken and the mortgagees were therein described as executors and devisees in trust, payments to one were held not to be thereby authorized. *Ewart* v. *Snyder*, 13 Chy. 55.

Unauthorized Investments.—A testator who, by his will, expressed the fullest confidence in C. (one of his trustees), directed them to be guided entirely by the judgment of C. as to the sale, disposal, and re-investment of his American securities, and declared that his trustees should not be responsible for any loss occasioned thereby. C. having made unauthorized investments of these moneys which proved worthless, the Master charged his co-trustee B. with the amount thereof:—Held, that even if at the suit of creditors B. might have been chargeable, yet as against legatees he was exonerated. *Burritt* v. *Burritt*, 29 Chy. 321.

Using Money.—Where one of two executors who was entitled under the will of his testator to a large sum charged on the real estate, but which could not be considered a legacy or a debt in such a sense that the personal property was the primary fund for the payment of it, had applied in his own business a portion of the personal estate which was by the will directed to be invested, and which, although large, was not equal in amount to the charge in his favour on the realty, and his co-executor, though aware of such application, had not taken any steps to prevent the same:—Held, that they were both equally liable to account for the whole of the principal sum and interest with rests. *Re Crowter, Crowter* v. *Hinman*, 10 O. R. 159, distinguished. *Archer* v. *Severn*, 13 O. R. 316.

Waste by Co-executor.—Where an executor saw the estate wasted from time to time by his co-executrix and an agent she had appointed, and took no steps to prevent the same, he was charged with the loss. *Sovereign* v. *Sovereign*, 15 Chy. 559.

Co-executors.—When a will gives to the testamentary executors the most ample powers of administration, with the right to divide, sell, compound, borrow, sign and endorse notes, they may give to one another a power of attorney for the carrying out of the provisions of the will and for the management of the estate; and the payment of promissory notes signed by one of their number, discounted at a bank and paid by the estate, cannot be recalled by the other executors on the ground of error, even when the excutor who obtained the discount used the proceeds for his personal affairs. *Gratton* v. *Banque Hochelaga* (1911), 17 R. L. n. s. 516.

The power of an executor to compromise a claim against the estate of his testator is a power under the common law, and may, in a proper case, be exercised where the person making the claim is a co-executor; but the question in each case is one which should properly be brought before the court. *Houghton, In re; Hawley* v. *Blake*, 73 L. J. Ch. 317; (1904) 1 Ch. 622; 90 L. T. 252; 52 W. R. 505; 20 T. L. R. 276.

Limited Company—Trustee.—A limited company may be a trustee, and may hold trust property in joint tenancy with a natural person as co-trustee. *Thompson's Settlement Trusts, In re; Thompson* v. *Alexander*, 74 L. J. Ch. 133; (1905) 1 Ch. 229; 91 L. T. 835; 21 T. L. R. 86.

Misappropriation of Assets.—Where an executor has misappropriated the assets of his testator and becomes a bankrupt, the court has jurisdiction to restrain him from further acting as executor or interfering with the testator's estate. And where there is a co-executor willing to act it is not necessary to appoint a receiver. *Bowen* v. *Phillips*, 66 L. J. Ch. 165; (1897) 1 Ch. 174; 75 L. T. 628; 45 W. R. 286; 4 Manson, 370.

Indemnity against Co-trustee.—A trustee (or his estate) is liable to contribute a rateable proportion of any loss suffered upon an unauthorized investment made with his knowledge by his co-trustee, although as between third parties and the first-named there is no liability to pay the loss or any part of it. *Jackson* v. *Dickinson*, 72 L. J. Ch. 761; (1903) 1 Ch. 947; 88 L. T. 507.

Active Trustee—Liability.—A trustee who is an active participator in a breach of trust, and is not proved to have participated merely in consequence of the advice and control of a co-trustee, who is a solicitor, cannot obtain indemnity for the consequences of the breach of trust from the co-trustee. *Head* v. *Gould*, 47 L. J. Ch. 480; (1898) 2 Ch. 250; 78 L. T. 739; 46 W. R. 597.

PART IV.

REMEDIES FOR EXECUTORS AND ADMINISTRATORS.

CHAPTER I.

(1) Executors as trustees.

Executor as Trustee.

It will have been noticed in the preceding pages that many statements have been made and statutes quoted affecting trustees. How far the position of an executor is that of a trustee may be gathered from the following authorities:

After all the debts of an estate are paid, and after the lapse of years from the testator's death, there is a sufficient presumption that one of the several executors and trustees dealing with assets is so dealing qua trustee and not as executor, to shift the burden of proof.
Cumming v. *Landed Credit Co.*, 22 S. C. R. 246.

Where the same persons are executors and trustees under a will, they do not lose their powers as such executors and become mere trustees, when all the testator's known debts are paid, or by mere lapse of time.
Ewart v. *Gordon*, 13 Chy. 40.
Cameron v. *Campbell*, 7 A. R. 361.
Huggins v. *Law*, 14 A. R. at p. 401.

Exercise of quasi-judicial functions (valuing).
Kerr v. *Kerr*, 8 O. R. 484.

Section 70 of the Surrogate Courts Act, R. S. O. 1914, ch. 62, is as follows:—

70. An executor who is also a trustee under the will may be required to account for his trusteeship in the same manner as he may be required to account in respect of his executorship.

Position of Trustee.

The position of trustee will be hereafter not so dangerous if the statutes hereunder quoted are liberally applied. The elements of honesty, reasonableness and good faith will be absolutely required in order to invoke their protection.

Sections 36, 37, 38, and 39 of The Trustee Act are as follows:—

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.

Imp. Act, 56-57 Vict., c. 53, s. 45.

(2) This section shall apply notwithstanding that the beneficiary is a married woman entitled for her separate use and restrained from anticipation.

37. If in any proceeding affecting a trustee or trust property it appears to the court that a trustee, or that any person who may be held to be fiduciarily responsible as 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.

Imp. Act, 59-60 Vict., c. 35, s. 3.

38.—(1) Where any money or securities belonging to a trust are in the hands or under the control of or are vested in a sole trustee or several trustees and it is the desire of such trustee or of the majority of such trustees to pay the money into, or to deposit the securities in court, the Supreme Court on an ex parte application in Chambers may order the payment into, or deposit in court to be made by the sole trustee, or by the majority of the trustees without the concurrence of the other or others if such concurrence cannot be obtained.

Imp. Act, 56-57 Vict. c. 53, s. 42.

(2) Where on the passing of the final accounts of a personal representative, guardian or trustee by the Judge of a Surrogate Court, there is found to be in the hands of such personal representative, guardian or trustee any money belonging to an infant, or to a lunatic or person of unsound mind, or to a person whose address is unknown, it shall be the duty of such personal representative, guardian or trustee, to pay the money into the Supreme Court to the credit of the person who is entitled to it.

(3) A certified copy of the order or report of the Judge shall be left with the Accountant when the money is paid in, and the person paying it in shall be entitled to deduct $5 for his costs.

(4) If an infant is entitled to the money and the date when he will attain his majority does not appear on the face of the order an affidavit stating when he will attain his majority shall be left with the Accountant when the money is paid in, unless the affidavit is dispensed with by the fiat of a Judge of the Supreme Court and notice of the payment into Court shall be served upon the Official Guardian.

(5) Where any such money, or securities, are deposited with a banker, or broker, or other depositary, the court may order payment, or delivery thereof to the majority of the trustees for the purpose of payment into, or deposit in court, and every transfer, payment, and delivery, made in pursuance of such order, shall be valid and take effect as if the same had been made on the authority, or by the act, of all the persons entitled to the money and securities, so transferred, paid, or delivered.

Imp. Act, 56-57 Vict., c. 53, s. 42.

(6) Any person with whom trust money or securities have been deposited or to whose hands trust money or securities have come, where the trustee has been absent from Ontario for a year and is not likely to return at an early date, or in the event of the trustee's death, or where the trustee in Ontario cannot give an acquittance of the money or securities, may make an application similar to that authorized by sub-section 1.

(7) Where an infant, lunatic, or person of unsound mind, is entitled to any money payable in discharge of any land or personal estate, conveyed, assigned, or transferred, under this Act, the person by whom such money is payable may pay the same into the Supreme Court in trust in any cause then depending concerning such money, or, if there is no such cause, to the cerdit of such infant, lunatic, or person of unsound mind.

Imp. Act., 13-14 Vict., c. 60, s. 48.

(8) The certificate or receipt of the proper officer shall be a sufficient discharge for the money, or securities, so paid into, or deposited in court.

(9) Money or securities ordered to be paid into, or deposited in court, shall, subject to Rules of Court, be dealt with according to the order of the court.

39.—(1) Subject to Rules of Court the following procedure shall be observed:—

On an application to pay money into or to deposit securities in court under this Act, the applicant shall file an affidavit entitled in the Supreme Court. "In the matter of (specifying shortly the trust and the instrument creating it)," which affidavit shall set forth:—

(a) The deponent's name and address.
(b) The amount and description of the money or securities in question.
(c) A statement whether the estate or succession duty (if chargeable) or any part thereof has been paid.
(d) The names and addresses, as far as known to the deponent, of all persons interested in, or entitled to the money or securities in question; and to the best of his knowledge and belief whether or not such persons are under any disability, by reason of infancy, or unsoundness of mind.
(e) His submission to answer all such questions relating to the application of the money and securities in question as the court or a Judge thereof may make or direct.
(f) The place where he is to be served with any petition, notice, or other proceeding, relating to the money or securities in question.
(g) A concise statement of the reason why the application is made and of the material facts.

(2) Every order made on such application shall direct the applicant forthwith to give notice thereof, by registered post, to the several persons who are as stated in his affidavit interested in, or entitled to the money or securities paid into, or deposited in court, except such as are infants, lunatics, or persons of unsound mind, for whom notice shall be given to the Official Guardian.

(3) It shall be the duty of the Official Guardian, whenever practicable, forthwith to communicate to the parents, guardians, or committee of any person, on whose behalf he may be so notified, the contents of such order.

(4) The notice of an order may be in the following form:

IN THE SUPREME COURT OF ONTARIO.

In the matter of (specifying trusts, etc., as in the affidavit). Take notice that pursuant to the order of the court dated the day of I have paid into court to the credit of the above mentioned matter $ (or I have deposited in court to the credit of the above mentioned matter the following securities (specifying them) in which money (or securities) you appear to be interested as (stating shortly how e.g., as legatee under the will of A. B.)

Dated this day of , 19 .

Signature of applicant, in person,
or by his solicitor.

(5) Notice of all applications respecting money or securities paid into, or deposited in, court under this Act shall be served on the trustee, and the persons directed to be notified of such payment or deposit, unless such service is dispensed with by the court.

RELIEF FROM CONSEQUENCE OF BREACH—EVIDENCE.

The provisions of the Ontario Statutes, relieving trustees from the consequences of technical breaches of trust who have acted "honestly and reasonably," do not render competent as evidence the opinion of bankers or other financial men, as to whether the trustee has so acted in the course he has taken, or omitted to take, in respect to 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.

Semble, such kind of opinion evidence may be given where the opinion is shewn to have been prevalent in the neighbourhood, and to be concurrent with the transaction.

Smith v. *Mason*, 1 O. L. R. 594.

(2) PETITIONS FOR ADVICE.

Trustees have a further privilege that they are at liberty to apply to the Court for advice under the following statutory authority:

66.—(1) A trustee, guardian or personal representative may, without the institution of an action, apply to the Supreme Court in the manner prescribed by Rules of Court, for the opinion, advice, or direction of the Court on any question respecting the management or administration of the trust property or the assets of his ward or his testator or intestate.

Imp. Act, 22-23 Vict., c. 35, s. 30.

(2) The trustee, guardian, or personal representative, acting upon the opinion, advice or direction given, shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee, guardian, or personal representative, in the subject matter of the application, unless he has been guilty of some fraud, wilful concealment or misrepresentation in obtaining such opinion, advice or direction.

The courts have limited their action under this section very much. The following statement appears to indicate how far an applicant may expect assistance:—

In Re Lorrenz' Settlement, 1 Dr. & Sm. 401, Vice-Chancellor Kindersley says. "My understanding of that section of the Act is, that it was intended by the Legislature that the court should have the power to advise a trustee or executor as to the management and administration of the trust property in the manner which will be most for the advantage of the parties beneficially interested, and not to decide any question affecting the rights of those parties inter se, otherwise the effect would be that a deed or will involving the most difficult questions, and relating to property to an amount however large, might be construed, and most important rights of parties decided by a single Judge, without any

power of appeal whatever. This, I am satisfied the legislature never intended—It is true, that in some cases the Court has (unadvisedly, as I think), upon a petition under this section, given its opinion on questions affecting the rights of parties. But I believe that the Judges generally now consider that it ought not to be done."

As the advice, if given, is necessarily applicable only to the state of facts presented, if there has been any misstatement, or slip, however, innocent, the opinion or advice will be no protection.

Re Barrington's Settlement, 1 J. & H. 142.

The originating notices referred to in the last quoted judgment are as follows: They will be extensively acted upon.

600. The executors or administrators of a deceased person or any of them, and the trustees under any deed or instrument or any of them, or any person claiming to be interested in the relief sought as creditor, devisee, legatee, next-of-kin or heir-at-law of a deceased person, or as cestui que trust under the trusts of any deed or instrument, or as claiming by assignment or otherwise under any such creditor or other person as aforesaid, may apply by originating notice for the determination without an administration of the estate or trust of any of the following questions or matters:

(a) Any question affecting the rights or interests of the person claiming to be creditor, devisee, legatee, next-of-kin or heir-at-law, or cestui que trust.
(b) The ascertainment of any class of creditors. legatees, devisees, next-of-kin, or others.
(c) The furnishing of any particular accounts by the executors or administrators or trustees and the vouching (where necessary) of such accounts.
(d) The payment into court of any money in the hands of the executors or administrators or trustees.
(e) Directing the executors or administrators or trustees to do or abstain from doing any particular act in their character as such executors or administrators or trustees.
(f) The approval of any sale, purchase, compromise or other transaction.
(g) The opinion, advice or direction of a Judge pursuant to the Trustee Act.
(h) The determination of any question arising in the administration of the estate or trust.
(i) The fixing of the compensation of any executor, administrator or trustee.

601.—(1) The persons to be served with notice under the next preceding Rule in the first instance shall be as follows:—

1. Where the notice is served by an executor or administrator or trustee,

(a) For the determination of any question under clauses (a), (e). (f), (g), (h), or (i), the persons or one of the persons whose rights or interests are sought to be affected.
(b) For the determination of any question under clause (b) any member or alleged member of the class.
(c) For the determination of any question under clause (c), any person interested in taking such accounts.

(d) For the determination of any question under clause (d), any person interested in such money.

(e) If there are more than one executor or administrator or trustee, and they do not all concur in the service of the notice, those who do not concur.

2. Where the notice is served by any person other than the executors, administrators or trustees, it shall be served upon the said executors, administrators or trustees.

(1) The Judge may direct such other persons to be served as he may deem proper.

604. Where the rights of any person depend upon the construction of any deed, will or other instrument, he may apply by originating notice, upon notice to all persons concerned, to have his rights declared and determined.

607. Service of an originating notice shall not interfere with or control any power or discretion vested in any executor, administrator or trustee, except so far as such interference or control may necessarily be involved in the particular relief sought.

215.—(2) Unless leave is given there shall be at least 7 days between the service of an originating notice and the day for hearing.

212. Motions for partition or administration may be made before a Judge in Chambers or the local Judge of the county where the land (or if more than one parcel, any parcel) is situate or the testator or intestate died.

608. Any person claiming to be a creditor, or a specific, pecuniary, or residuary legatee, or the next of kin, or one of the next of kin, or the heir, or a devisee interested under the will of a deceased person may apply by originating notice for the administration of the estate, real or personal, of such deceased person.

609. A judgment for the administration of an estate in which an infant is interested shall not be made unless the infant is made a party defendant and notice is given to the Official Guardian.

610. An executor or administrator may, upon summary application, obtain a judgment for administration.

611.—(1) Where judgment for administration is granted the Master to whom the matter is referred shall proceed to administer the estate in the most expeditious and least expensive manner, and in doing so shall, without special direction, take:—

(a) An account of the personal estate of the deceased, in the pleadings mentioned, come to the hands of his executors (or administrators).

(b) An account of his debts.

(c) An account of his funeral expenses.

(d) An account of the said testator's legacies.

(e) An inquiry as to what parts, if any, of the real and personal estate are outstanding or disposed of.

(f) An inquiry as to what real estate the deceased was seised of, or entitled to, at the time of his death.

(g) An inquiry as to what incumbrances affect the real estate.

(h) An account of the rents and profits of the real estate received by any party since the death.

(i) An account of what is due to such of the incumbrancers as shall consent to sale in respect of their incumbrances.

(j) An inquiry as to what are the priorities of such last mentioned incumbrances.

(2) The Master shall, under any such reference, have power to deal with both real and personal estate, including the power to give all necessary directions for its realization, and shall finally wind up all matters

connected with the estate, without any further directions, and without any separate, interim, or interlocutory reports or orders, except where the special circumstances of the case absolutely call therefor.

(3) All money realized from the estate shall forthwith be paid into court, and no money shall be distributed or paid out for costs or otherwise, without an order of a Judge, and on the application for an order for distribution, the Judge may review, amend, or refer back the report, or make such other order as may seem just.

612. It shall not be obligatory on the Court to pronounce or make a judgment or order for the administration of any trust or of the estate of any deceased person, if the questions between the parties can be properly determined without such judgment or order.

613. In any action or proceeding for the administration or execution of trusts by a creditor or beneficiary under a will, intestacy or instrument of trust, where no accounts or insufficient accounts have been rendered, the court may, instead of pronouncing judgment for administration:—

(a) Order that the executors, administrators or trustees, shall render to the plaintiff or applicant a proper statement of their accounts, with an intimation that if it is not done they may be made to pay the costs of the proceedings, and may direct the action or proceeding to be stayed or to stand over in the meantime, as may seem just.

(b) Where necessary, to prevent proceedings by other creditors, or by beneficiaries, make the usual judgment for administration, with a provision that no proceedings are to be taken thereunder without the leave of the court.

614. Special directions touching the carriage or execution of the judgment may be given as may be deemed expedient; and in case of applications by two or more persons, or classes of persons, judgment may be granted to one or more of the claimants as seem just; the carriage of the judgment may be subsequently given to other persons interested.

653. In actions or proceedings for administration, or partition, or administration and partition, unless otherwise ordered by a Judge, instead of the costs being allowed according to the tariff, each person properly represented by a solicitor, and entitled to costs out of the estate—other than creditors not parties to the action or proceeding—shall be entitled to his actual disbursements in the action or proceeding, not including counsel fees, and there shall be allowed for the other costs of the suit payable out of the estate, a commission on the amount realized, or on the value of the property partitioned, which commission shall be apportioned among the persons entitled to costs, as may seem just. Such commission shall be as follows:

On the first $500, 20 per cent.

On every additional $100 over $500 and up to $1,500, 5 per cent.

On every additional $100 over $1,500 and up to $4,000, 3 per cent.

On every additional $1,000 over $4,000 and up to $10,000, 2½ per cent.

On every additional $1,000 over $10,000, 1 per cent.; and such remuneration shall be in lieu of all fees, whether between party and party or between solicitor and client.

(2) Where an order or judgment in any such action or proceeding by any form of words directs that the costs thereof be taxed, it shall be taken to mean the allowance of commission and disbursements, in accordance with subsection 1, unless it is otherwise expressly provided.

STATUTES OF LIMITATION.

The general position of a trustee has been further fortified by the extension of the Statutes of Limitation to cover the case of trusts. The statutory authorities are as follows:

WHEN RIGHT OF ACTION DEVOLVES TO ADMINISTRATOR.

8. For the purposes of this Act, an administrator claiming the estate or interest of the deceased person of whose property he has been appointed administrator, shall be deemed to claim as if there had been no interval of the time between the death of such deceased person and the grant of the letters of administration.

Imp. Act, 3-4 W. IV. c. 27, s. 6.

LIMITATION IN CASE OF MONEY CHARGED UPON LAND AND LEGACIES.

24.—(1) No action shall be brought to recover out of any land or rent any sum of money secured by any mortgage or lien, or otherwise charged upon or payable out of such land or rent, or to recover any legacy, whether it is or is not charged upon land, but within ten years next after a present right to receive the same accrued to some person capable of giving a discharge for, or release of the same, unless in the meantime some part of the principal money or some interest thereon has been paid, or some acknowledgment in writing of the right thereto signed by the person by whom the same is payable, or his agent has been given to the person entitled thereto or his agent; and in such case no action shall be brought but within ten years after such payment or acknowledgment, or the last payments or acknowledgments if more than one, was made or given.

Imp. Acts 3-4 W. IV. ch. 27, s. 40, 37-38 Vict. ch. 57, s. 8.

CASE OF EXECUTION AGAINST LAND.

(2) Notwithstanding the provisions of subsection 1, a lien or charge created by the placing of an execution or other process against land in the hands of the sheriff, or other officer to whom it is directed, shall remain in force so long as such execution or other process remains in the hands of such sheriff or officer for execution and is kept alive by renewal or otherwise.

TIME FOR RECOVERING CHARGES AND ARREARS OF INTEREST NOT TO BE ENLARGED BY EXPRESS TRUSTS FOR RAISING SAME.

25. No action shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent, and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable or so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust.

Imp. Act, 37-38 Vict. c. 57, s. 10.

As dower comes within possible claims against an estate. Sections 26 *et seq.* should be noticed. They are as follows:—

LIMITATION OF ACTION OF DOWER.

26. Subject to the provisions of section 24, no action of dower shall be brought but within ten years from the death of the husband of the dowress, notwithstanding any disability of the dowress or of any person claiming under her.

TIME FROM WHICH RIGHT TO BRING ACTION OF DOWER TO BE COMPUTED.

27. Where a dowress has, after the death of her husband, actual possession of the land of which she is dowable, either alone or with an heir or devisee of, or a person claiming by devolution from her husband, the period of ten years within which her action of dower is to be brought shall be computed from the time when such possession of the dowress ceased.

MAXIMUM OF ARREARS OF DOWER RECOVERABLE.

28. No arrears of dower, nor any damages on account of such arrears, shall be recovered or obtained by any action for a longer period than six years next before the commencement of such action.

Imp. Act, 3-4 W. IV. c. 27, s. 41.

As to trusts and trustees the limitations are as follows:—

46. This part shall apply to a trust created by an instrument or an Act of this Legislature heretofore or hereafter executed or passed.

INTERPRETATION "TRUSTEE."

47.—(1) In this section "trustee" shall include an executor, an administrator and a trustee whose trust arises by construction or implication of law as well as an express trustee, and shall also include a joint trustee.

APPLICATION OF STATUTE OF LIMITATIONS TO CERTAIN ACTIONS AGAINST TRUSTEES.

(2) In an action against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property or the proceeds thereof, still retained by the trustee or previously received by the trustee and converted to his use, the following provisions shall apply:—

(a) All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action if the trustee or person claiming through him had not been a trustee or person claiming through a trustee.

(b) If the action is brought to recover money or other property, and is one to which no existing statute of limitations applies, the trustee or person claiming through him shall be entitled to the benefit of, and be at liberty to plead, the lapse of time as a bar to such action in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received; but so nevertheless that the statute shall run against a married woman entitled in possession for her separate use, whether with or without restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary becomes an interest in possession.

Imp. Act, 51-52 Vict. c. 59, s. 3.

EFFECT OF JUDGMENT UPON RIGHTS OF BENEFICIARIES.

(3) No beneficiary, as against whom there would be a good defence by virtue of this section, shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought the action and this section had been pleaded.

OPERATION OF SECTION.

(4) This section shall apply only to actions commenced after the first day of January, 1892, and shall not deprive any executor or administrator of any right or defence to which he is entitled under any existing statute of limitations.

WHEN RIGHT ACCRUES IN CASE OF EXPRESS TRUST.

48.—(1) Where any land or rent is vested in a trustee upon any express trust, the right of the cestui que trust or any person claiming through him to bring an action against the trustee or any person claiming through him to recover such land or rent, shall be deemed to have first

accrued, according to the meaning of this Act, at and not before the time at which such land or rent has been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him.

Imp. Act, 3-4 W. IV. c. 27, s. 25.

CLAIM OF CESTUI QUE TRUST AGAINST TRUSTEE.

(2) Subject to the provisions of the next preceding section no claim of a cestui que trust against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any statute of limitations.

LIMITATION OF ACTIONS—TRUSTEE ACT, S. 32.

Held, that, although the appointment of executors to carry out the alternative provisions of the will never took effect, the persons named as executors having obtained probate, became trustees for the persons entitled upon an intestacy; payments made by them to those who would have been beneficially entitled if the alternative provisions had taken effect were breaches of trust; but the Statute of Limitations was a bar to a recovery in respect of any of those breaches which occurred more than six years before the action was brought: R. S. O. 1897, c. 129, s. 32.

Held, moreover, that the executors were entitled, under Ontario Statutes, 1899, c. 15 (See ante page 445), to be relieved from personal liability for all breaches of trust committed by them, they having acted honestly and reasonably, in view of the facts that the construction of the will was doubtful, and that the trial Judge took the same view of its effect as they did, and that for eleven years everybody interested in the estate acquiesced in that view.

Henning v. *Maclean*, 2 O. L. R. 169.

A testator by his will devised land to his son James, subject to the payment of an annuity to his widow for her life, after the expiration of a lease given by the testator; and directed his executors to apply the rent derived from the land so devised in payment of an incumbrance thereon, "so that my son may have the said property, at the expiration of the said lease, free from all incumbrance"; and he then directed that his son James should pay one-half of the sums thereinafter bequeathed to each of his daughters, as soon as his son Daniel should attain the age of twenty-one; and to the latter he devised other land, and directed him also to pay one-half of the bequests to the daughters. Then followed the bequests to his daughters with names and amounts, to be paid to them in equal shares by his sons James and Daniel on the latter attaining the age of twenty-one. The will was entirely silent as to the debts of the testator.

James adopted the devise to him, took possession of the land, and dealt with it as his property for many years.

Held, that the one-half of the legacies to the daughters was charged upon the lands devised to James.

Held, that the latter part of s. 20 of R. S. O. c. 129, (now s. 46 of R. S. O. 1914, c. 121), applies to wills coming into operation after as well as before the 18th September, 1865.

Held, lastly, that s. 9, c. 129, did not apply; because the money was not money payable upon an express or implied trust, or for a limited purpose, within the meaning of the section. *Grey* v. *Richmond*, 22 O. R. 256.

Section 9 is included in section 26 of R. S. O. 1914, c. 121.

Responsibility for Costs Incurred by Mistake of Executor—Even in England it will be seen that there was no rule requiring the payment of costs of executors or trustees out of the estate or fund. And the cases in the English courts as to the protection to be given to executors should, in my humble judgment, be read with caution as applicable to cases in Ontario. There the executor has no right to compensation, he takes upon himself an onerous duty, and is unpaid; here, on the contrary, he is paid a reasonable sum for his compensation, and his services are not rendered gratuitously. In case of any difficulty the courts are always ready to relieve an executor, and there are many companies willing and anxious to administer any estate. One who accepts the position of executor must understand that if he omits to act prudently, he must suffer the consequences, as any other person would. *Willison* v. *Gourlay*, 10 O. W. R. 853.

Bill of Costs for Services to Testator — Taxation — Application by Residuary Legatee—Rule 938.—Under Rule 938, for an order requiring defendants, administrators with the will annexed, to take proceedings to obtain an order for the delivery and taxation of the bill of costs, charges and disbursements of a firm of solicitors who acted for the testator in the matter of an arbitration between him and the corporation of the city of Toronto. There were no assets in the hands of defendants and they declined to proceed for a taxation unless under the direction of the Court and on being indemnified against costs.

The facts disclosed on this application warrant the giving of leave on the terms of the plaintiff indemnifying the defendants against the costs of and incidental to the proceedings and paying the costs of this application, and leave will be granted on these terms. The defendants will have the right to take the proceedings if they desire to do so, and they may be such as are indicated in the notice of motion, or such proceedings as may be advised for obtaining from the solicitors an account of the moneys received by them on behalf of the testator, and payment of any balance which may be found to be due by them as the result of the accounting. See *Barker* v. *Birch*, 1 DeG. & S. at p. 381; *Harrison* v. *Richards*, L. R. 1 Ch. 473; *Yeatman* v. *Yeatman*, 7 Ch. D. 210, *Foley* v. *Trusts and Guarantee Co.* (1902), 1 O. W. R. 526.

Solicitor's Costs.—*Re Morrison*, 13 O. W. R. 767, determines that the provisions of the tariff govern solicitor's costs. *Re Griffin*, 21 O. W. R. 466.

Executor Substituted for Plaintiff Deceased.— Although the person named as plaintiff in the writ of summons was in fact dead at the time of the issue of writ of which the solicitor was ignorant an order was made substituting the executor of the deceased person as plaintiff (B.C.). *Rakha Ram* v. *R. T. Tinn*, 19 W. L. R. 529.

STATUTE OF LIMITATIONS.

Held, that mere physical weakness, however great, without proof of mental incapacity, is not sufficient to render invalid an acknowledgment of debt by a testator; that the Statute of Limitations does not bar the claim of an executor against the estate of his testator; and that an executor is not justified in keeping an estate open and unadministered in order to obtain interest upon a claim against it. *Emes* v. *Emes*, 11 Chy. 325.

Persons having a reversionary interest in a trust fund may bring an action to compel the trustee to make good money lost owing to his

negligence, and the Trustee Limitation Act does not run against them from the time of the loss, but only from the time their reversionary interest becomes an interest in possession. *Stewart* v. *Snyder*, 20 C. L. T. 351; 27 A. R. 423.

Nova Scotia Probate Act, sec. 119.—An executor or administrator, who has filed in the Probate Court a petition for the settlement of his account, and has formally cited the creditors and others interested to appear, etc., at such settlement, is, in respect of the claims of the parties so cited, in the position of a plaintiff and not a defendant; and, consequently is not bound to file an appearance to all or any of such claims. 2. It is not necessary, under the Nova Scotia Probate Act, for an executor or administrator in proceeding finally to settle his account, to file or deliver a written plea setting up the Statute of Limitations to any claim coming up for adjudication. Semble, that if such written plea were necessary under section 119 of the Act, the executor would be allowed to amend his proceedings by filing such plea in the hearing of his final account. *Re Gidney & Armstrong* (N. S. 1912), 11 E. L. R. 57.

Acknowledgment.—An acknowledgment of indebtedness by letter written after the creditor's decease by the defendant to the person who is entitled to take out letters of administration to the creditor's estate, and who does, after the receipt of the letter, take out such letters, is a sufficient acknowledgment within the Statute of Limitations. *Robinson* v. *Burrill*, 22 A. R. 356.

Statute of Limitations.—The Statute of Limitations is no bar to an action by a principal against his agent in respect of moneys remitted to the agent for an express purpose and retained by him, where such agent is either in the position of an express trustee or guilty of fraudulent concealment in his accounts. *North American Land and Timber Co.* v. *Watkins*, 73 L. J. Ch. 626; (1904), 2 Ch. 233; 91 L. T. 425; 20 T. L. R. 642. —C. A. affirming, 52 W. R. 360.

Statute of Limitations.—In an action to recover a legacy the period of limitation is twelve years from the death of the testator, not from the expiration of one year after his death. *Waddell* v. *Harshaw* (1905), 1 Ir. R. 416.

Statute of Limitations.—The Law of Property Amendment Act, 1860, which, by virtue of section 13, begins to act as a statute of limitations when "a present right to receive" personal estate of any person dying intestate "shall have accrued to some person capable of giving a discharge for or release of the same," postulates not only a capability of giving a discharge, but a right to receive the legacy capable of being established by proceedings at law. A claim, therefore, to recover a fund is not barred by the statute, although made long after the twenty years thereby provided, where the person to be sued is a co-executor of the person having the "present right" to sue, such latter person being unable to recover possession of the funds from his co-executor into his own hands by an action. *Pardoe, In re; McLaughlin* v. *Penny*, 75 L. J. Ch. 161; (1906), 1 Ch. 265; 94 L. T. 88; 54 W. R. 210. Reversed on facts, 75 L. J. Ch. 748; (1906), 2 Ch. 340; 95 L. T. 512.

Limitations of Actions.—As all the alleged acts of negligence or breaches of trust charged against the widow occurred more than six years before action, s. 32 (1) (b) of the Trustee Act, R. S. O. 1897, c. 129, was a good defence. *In re Bowden, Andrew* v. *Cooper*, 45 Ch. D. 447, followed. *Gardner* v. *Perry*, 23 C. L. T. 295; 6 O. L. R. 269; 2 O. W. R. 681.

Trustee Ceasing to be Executor.—Held, the defendants had ceased to be executors and had become trustees and therefore section 8 of the Real Property Limitation Act, 1874, did not apply to the claim, but it came within section 8 of the Trustee Act, 1888, and the trustees not having retained or converted the property to their own use were protected by that section. *Timmis, In re; Nixon* v. *Smith*, 71 L. J. Ch. 118; (1902), 1 Ch. 176; 85 L. T. 672; 50 W. R. 164.

Administrator of Escheated Estate—Action for Account against Deceased's Trustee. — Held, that notwithstanding *Attorney-General* v. *Mercer*, 5 S. C. R. 538, the plaintiffs' right to an account as administrator of D.'s estate was not affected by the alleged invalidity of the grant to them of the escheated estate, and neither the cestuis que trust named in the grant from the Crown, nor the Attorney-General for the Dominion, were necessary parties:—Held, also, that the Statute of Limitations was no bar to the action. *Simpson* v. *Corbett*, 5 O. R. 377; 10 A. R. 32.

LIMITATION OF ACTIONS.

Acknowledgment in Writing—Agent of Executor.—The executor of the will of one of the joint makers of a promissory note proved the will after the debt on the note as against the testator or his estate had become barred by the Statute of Limitations. The will directed that all the testator's just debts should be paid by his executors as soon as possible after his death. The executor, who lived out of Ontario, executed a power of attorney to the other joint maker of the note, who was primarily liable on it, and against whom it had been kept alive by payments, to enable him in Ontario "to do all things which might be legally requisite for the due proving and carrying out of the provisions" of the will—the executor having at this time no knowledge of the note:—Held, that a letter written by the surviving maker shortly after the execution of the power of attorney, even if in its terms sufficient, was not such an acknowledgment, within R. S. O. 1897 c. 146, s. 1, as would revive the liability; for there was no trust created by the will for the payments of debts, nor was there any legal obligation on the part of the executor to pay statute-barred debts, and the surviving maker was not an agent "duly authorized" to exercise the discretion which an executor has to pay such debts. Three years later the executor wrote to the holder of the note to the effect that the holder ought to look to the surviving maker for payment, as he was now doing well:—Held, that this was not such a recognition as amounted to a promise or undertaking to pay. *King* v. *Rogers*, 31 O. R. 573.

Notice to Claimants—Limitation of Actions.—A notice by executors that "all parties indebted to the estate of the late (testator) are required to settle their indebtedness" by a named date, and that "parties having claims against said estate are also required to file same by said date," is not a sufficient notice within s. 38 of R. S. O. 1897 c. 129, to protect the executors from liability for claims not brought to their knowledge until after the estate had been distributed by them. Their liability in this respect extends to claims against their testator for money lost owing to a breach of duty by him as trustee. Persons having a reversionary interest in a trust fund may bring an action to compel the trustee to make good money lost owing to his negligence and the Trustee Limitation Act, R. S. O. 1897 c. 119, s. 32, does not run against them from the time of the loss but only from the time their reversionary interest becomes an interest in possession. Judgment below, 30 O. R. 110, affirmed. After judgment had been given in the court below against the executors in this case, the act for the Relief of Trustees, 62 Vict. c. 15 (O.) was passed:—Held, that, assuming the Act to apply to such a case, it did not relieve the executors, for they could not be held to have acted reasonably when they failed to follow the plain statutory directions as to notice to creditors and claimants. *Stewart* v. *Snyder*, 27 A. R. 423.

Notice Disputing Claim.—Before the commencement of an action against the purchasers one of them died, and on the plaintiff notifying the administrator of his claim, he was served with a notice under s. 35 of R. S. O. 1897 c. 129, the Trustee Act, disputing it. An action was afterwards brought against such administrator, but, on it appearing that he was then dead, and that an administrator de bonis non had been appointed, an order was obtained amending the writ by substituting as defendant such last named administrator, upon whom the writ was served more than six months after the service of the notice:—Held, that the proceedings against the defendant must be deemed to have commenced only

on the service of the writ on him, and this being more than six months from the service of the notice, the plaintiff's action was barred. *Gooderham* v. *Moore*, 31 O. R. 86.

Suit by Executor in Representative Capacity—An executor has the option to sue in his representative character on contracts made with himself, and where the money, when recovered, would be assets.—2. While there are some distinctions between set-off and counterclaim, as to both the rule applies that in order to give effect to them they must be recoverable claims to the same extent as if they were being sued on primarily.—Semble, since the modification of the old rule of procedure (*Hill* v. *Wilson* (1873), L. R. 8 Ch. 888; *In re Finch* (1883), 23 Ch. D. 267), that in order to sustain a claim against the estate of a deceased person there must be corroborative evidence of some kind to support it, if a trial Judge so charges the jury it would be misdirection. *Ayer* v. *Kelly* (1913), 12 E. L. R. 564.

Attachment of Debts—Judgment for Costs only—Rule 935—Parties—Assignee of Judgment—Amount Attached Unascertained—Residuary Legatee and Executor — Administration—Receiver—Equitable Execution.—An order may be made attaching the amount, if any, coming to a judgment debtor as residuary legatee under a will, although it is undetermined whether anything, and, if anything, how much is due to him.—Upon an inquiry as to whether anything is due to a judgment debtor as residuary legatee, where he also has the character of executor the legatees and creditors ought to be before the court; and the way to bring them before the court is by administration proceedings.—Quære, whether the assignee of the judgment would be entitled to administration.—The assignee of a judgment appointed receiver by way of equitable execution to receive whatever interest the judgment debtor might have as residuary legatee. *McLean* v. *Bruce*, 14 P. R. 190.

Originating Summons—Practice — Concurrent Jurisdiction with Probate Court—Con. Stat. of N. B. (1903) c. 161, s. 2.—*Kennedy* v. *Slater*, 9 E. L. R. Vol. IX. 34.

Will—Statute of Limitations—Possession—Adverse.—Where a man knew of a will he must be assumed to have taken the land under the trusts of the same, and his possession is not adverse. *Kent* v. *Kent* (1891), 22 O. R. 445, followed. *Burch* v. *Flummerfelt* (1909), 14 O. W. R. 929.

CHAPTER II.

MATTERS AFFECTING PROCEDURE.

The following rules of practice are selected as applying particularly to executors and administrators.

71. A claim by or against an executor or administrator may be joined with a claim by or against him personally, provided the last mentioned claim is alleged to have arisen with reference to the estate represented by him in the action.

74.—(1) Trustees, executors, and administrators may sue and be sued on behalf of, or as representing, the property or estate of which they are trustees or representatives, without joining any of the persons beneficially interested, and shall represent them; but the court may at any time order any of them to be made parties in addition to, or in lieu of, the previous parties.

(2) This Rule shall apply to an action to enforce a security by foreclosure or otherwise.

(Note.—As to parties to foreclosure actions where no personal representative. See 10 Edw. VII. ch. 56, sec. 10.)

79. A residuary legatee, or next of kin, may have a judgment for the administration of the personal estate of a deceased person without serving the other residuary legatees or next of kin.

80. A legatee interested in a legacy charged upon real estate, or a person interested in the proceeds of real estate directed to be sold, may have a judgment for the administration of the estate of a deceased person without serving any other legatee or person interested in the proceeds.

81. A residuary devisee, or heir, may have the like judgment, without serving any other residuary devisee, or heir.

82. One cestui que trust, under an instrument, may have a judgment for the execution of the trusts of the instrument, without serving the other cestuis que trustent.

84. An executor, administrator, or trustee, may obtain a judgment against any one legatee, next of kin or cestui que trust, for the administration of the estate or the execution of the trusts.

88. In administration proceedings no person other than the executor or administrator shall, unless by leave, be entitled to appear on the claim of any person against the estate of the deceased.

90. Where it appears that a deceased person who was interested in the matters in question has no personal representative, the Court may either proceed in the absence of any person representing his estate or may appoint some person to represent the estate for all the purposes of the action or other proceeding, on such notice as may seem proper, notwithstanding that the estate in question may have a substantial interest in the matters, or that there may be active duties to be performed by the person so appointed, or that he may represent interests adverse to the plaintiff, or that administration of the estate whereof representation is sought is claimed; and the order so made and any orders consequent thereon, shall bind the estate of such deceased person, in the same manner as if a duly appointed personal representative of such person had been a party to the action or proceeding.

207. The following applications shall be disposed of in Chambers:

1. For the sale, lease or mortgaging of the estates of infants.
2. As to the custody, guardianship, maintenance, and advancement of infants.
3. For administration or partition without action.
14. Originating motions under Rule 600, clauses (c), (d), (f) and (i).

DEATH OF ONE OF JOINT OBLIGEES.

Where one of two joint obligees, covenantees or partners dies, the action on the contract must be brought in the name of the survivor, and the executor or administrator of the deceased cannot be joined nor can he sue separately.

SURVIVING PARTNER.

Though the right of a deceased partner devolves on his executor, yet the remedy survives to his companion, who alone must enforce the right by action, and will be liable, on recovery, to account to the executor or administrator for the share of the deceased.

Hall v. *Huffam*, 2 Lev. 118.

SURVIVAL OF LEGAL INTERESTS.

Where two have the legal interest in the performance of a contract, though the benefit be only to one of them, the remedy survives upon the death of the latter, and the executor or administrator of the deceased cannot be made a party or sue separately.

See *Gildersleeve* v. *Balfour*, 15 P. R. 293, referred to, ante page 154.

LAST SURVIVOR OF JOINT CONTRACTORS.

Where a contract is made jointly with several persons, and they all die, the executor or administrator of the survivor alone can sue, and the personal representatives of those who die before him cannot be joined.

SEVERAL INTERESTS.

But if the interest of the covenantees is several, and one of them dies, his executor may maintain a separate action on the covenant, notwithstanding the other covenantee be living.

If the interest be several it makes no difference that the language of the covenant is joint. Wherever the interest of the covenantees is joined the rule of survivorship is applied.

JOINT OWNERSHIP OF PROPERTY INJURED.

If one or more of several parties jointly interested in property, at the time an injury was committed, is dead, the action must be in the name of the survivor, and the executor or administrator of the deceased cannot be joined, nor can he be sued separately.

SEVERAL EXECUTORS.

If there are several executors or administrators they must all join in bringing actions, though some are within the age of seventeen years, or have not proved the will.

Brookes v. *Stroud*, 1 Salk. 3.

Where, however, one executor of several has alone proved the will, he may sue without making the other executors parties, although they have not renounced. If one of several executors, who have all proved the will, sue alone, the defendant may apply to the Court for an order that the other executor or executors may be joined as co-plaintiffs.

SALE BY ONE EXECUTOR.

If one executor, of several, alone, sell goods of the testator, he alone may maintain an action for the price, not naming himself executor. So, if goods be taken out of the possession of one of several executors, he may sue alone to recover them. And, generally, if one executor alone contracts on his own account alone, he must sue alone on such contract, notwithstanding the money recovered will be assets.

Heath v. *Chilton*, 12 M. & W. 632.

EVIDENCE OF VESTING OF PROPERTY.

Although the executor derives his title from the will by which he is appointed, and not from the probate of the will, yet it is the probate alone which authenticates his right, and the probate, or something tantamount thereto, is the only legitimate evidence of property being vested in an executor, or of, the executor's appointment.

Hamilton v. *Aston*, 1 Carr. & Kirw. 679.

TITLE OF ADMINISTRATOR.

The title of an administrator may be proved by the production of the letters of administration, or of a certificate or exemplification thereof granted by the Surrogate Court.

Kempton v. *Cross*, Cas. temp. Hardw. 108.

JOINT MORTGAGEES.

Where a mortgage is made to several persons jointly they are tenants in common of the mortgage money, and the representatives of such of them as may be dead are necessary parties, with the survivor, to a suit for foreclosure or redemption.

Vickers v. *Cowell*, 1 Beav. 529.

ONE EXECUTOR MAY SUE ANOTHER.

One executor may sue another. If one of the executors of a mortgage be himself the mortgagor, the remedy sought by the co-executors should not be for a foreclosure but for a sale.

Lucas v. *Seale*, 2 Atk. 56.

RESTRAINING PROCEEDINGS IN FOREIGN ACTIONS.

The court will, after a decree made in an ordinary administration suit, restrain proceedings in a foreign country for the administration of the personal estate, and of the real estate as well, unless it can be shown that the party instituting the suit can carry on proceedings as to the landed estate without proceeding as to the personal estate.

Hope v. *Carnegie*, 1 L. R. 320.

FOREIGN CREDITORS SUING IN ONTARIO.

No suit can be brought against any executor or administrator in his official capacity in the court of any country, but that from which he derives his authority to act by virtue of the probate or letters of administration there granted to him. Therefore, if a foreign creditor wishes a suit to be brought in Ontario in order to reach the effects of a deceased testator or intestate situate in Ontario it will be necessary before the suit can be maintained, notwithstanding an executor or administrator has been appointed abroad, that an Ontario personal representative should also be duly constituted by grant from the proper Court here, for the foreign executor or administrator is not liable to be sued in his official character in this country.

Flood v. *Patterson*, 29 Beav. 295.

ACTION FOR LEGACY OR SHARE.

An action at law for a legacy or for a distributive share of an intestate's property could not be maintained against the personal representative, although he might have expressly promised to pay; but after the assent by an executor to a specific legacy, he is clearly liable at law to an action by the legatee, because the interest in any specific thing bequeathed vests at law in the legatee upon the assent of the executor.

PLEADING DENIAL OF EXECUTORSHIP.

If a defendant intends to deny his being executor or administrator, he must plead such denial specially, otherwise he will admit his representative character.

ONUS OF PROOF.

On the trial of an issue joined on this plea, the onus of proof is on the plaintiff, who has to prove the affirmative of the proposition. The plea does not deny the cause of action, but only that the defendant is one of the representatives of the testator or intestate.

EXPRESS PROMISE REQUIRED.

The mere existence of a debt owing by the testator or intestate is not evidence of a promise to pay by the executor or ad-

ministrator as executor or administrator. Hence, as against an executor or administrator, an acknowledgment merely by him of the debt's existence is not sufficient to take the case out of the statute. There must be an express promise.

Tullock v. *Dunn*, Ryan & M. 417.

R. S. O. 1914, c. 75, ss. 55 (1), 56 and 57, are as follows:—

PROMISE BY WORDS ONLY.

55. (1) No acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract whereby to take out of the operation of this part, any case falling within its provisions, respecting actions:—

(*a*) Of account and upon the case.

(*b*) On simple contract, or of debt grounded upon any lending or contract without specialty, and

(*c*) Of debts for arrears of rent;

or to deprive any party of the benefit thereof, unless such acknowledgment or promise is made or contained by or in some writing, signed by the party chargeable thereby, or by his agent duly authorized to make such acknowledgment or promise.

CASE OF TWO OR MORE JOINT CONTRACTORS, OBLIGORS, COVENANTORS OR EXECUTORS.

56. Where there are two or more joint debtors, or joint contractors, or joint obligors or covenantors or executors, or administrators of any debtor or contractor, no such debtor, joint contractor, joint obligors or covenantors or executor or administrator shall lose the benefit of this Act, so as to be chargeable in respect, or by reason only of any written acknowledgment or promise made and signed, or by reason of any payment of any principal or interest made by any other or others of them.

JUDGMENT WHERE PLAINTIFF IS BARRED AS TO ONE OR MORE DEFENDANTS BUT NOT AS TO ALL.

57. In actions commenced against two or more such joint debtors, joint contractors, executors or administrators, if it appears at the trial or otherwise that the plaintiff, though barred by this Act, as to one or more of such joint debtors, joint contractors, or executors, or administrators, is nevertheless entitled to recover against any other or others of the defendants by virtue of a new acknowledgment, promise, or payment, judgment shall be given for the plaintiff as to the defendant or defendants against whom he recovers, and for the other defendant or defendants against the plaintiff.

An express promise to pay made to a third party may enure to the benefit of an administrator de bonis non with the will annexed, though at the time of such promise he had not obtained letters of administration.

Beard v. *Ketchum*, 6 U. C. R. 470.

SET-OFF BY EXECUTOR.

A defendant sued as executor or administrator cannot set off a debt due to himself personally, nor, if sued for his own debt, can he set off what is due to him as executor or administrator, because the debts sued for and intended to be set off must be mutual and due in the same right.

Gale v. *Luttrell*, 1 Younge & Jerv. 180.

PLEA OF TENDER.

Whenever a tender with tout temp prist is pleaded by an executor or administrator he must allege that his testator or in-intestate was at all times from the time of making the promise to the time of his death, ready to pay, and that he, the defendant, has at all times since the death of his testator or intestate, been ready to pay.

Clements v. *Reynolds*, Sayer 18.

With a defence of tender before action, money must be paid into Court. C. R. 309.

PLENE ADMINISTRAVIT.

If the executor or administrator has not assets to satisfy the debt upon which an action is brought against him, he must plead plene administravit or plene administravit præter. For a judgment against an executor or administrator is conclusive upon him that he has assets to satisfy such judgment. But if the executor plead either a general or special plene administravit, it is now held that he is liable only to the amount of assets proved to be in his hands. The essential part of the plea of plene administravit is that the "said defendant has no goods which were of the said A. B. (the testator) at the time of his death in the hands of the said defendant as executor to be administered or had at the commencement of the suit or ever since."

PLEA OF RETAINER.

An executor or administrator might formerly either plead a retainer for a debt due to him from the deceased, or give it in evidence under a plea of plene administravit. So he may either plead or show in evidence under that plea that he retains assets to a certain amount for the expenses of the funeral, or of taking out administration or to reimburse himself for payments made out of his own pocket in discharge of debts of the estate before the commencement of the suit.

Bull. N. P. 140.

REPLICATION OF FRAUDULENT JUDGMENT.

Where an executor pleads that he has no assets ultra a judgment which in truth was recovered against him upon an unjust or fictitious debt, a plaintiff may reply that the judgment was had and obtained by fraud and covin between the executor and the creditor. So the plaintiff may reply that the judgment was kept on foot by covin to defraud the creditors.

ONUS OF PROOF OF ASSETS.

If an executor or administrator pleads plene administravit, and the plaintiff replies that the defendant had assets at the com-

mencement of the suit, whereupon issue is joined, the burden of proof lies upon the plaintiff, who must prove that assets existed or ought to have existed in the hands of the defendant at the time of the writ sued out.

Webster v. *Blackman*, 2 F. & F. 490.

INVENTORY MAY BE GIVEN.

In order to prove assets the plaintiff may give in evidence the inventory exhibited by the defendant in the Surrogate Court, and after the inventory is put in it is for the defendant to discharge himself of the items.

Giles v. *Dyson*, 1 Stark. N. P. C. 32.

ADMISSION OF EXECUTOR.

An admission by the defendant that the debt is a just debt, or a promise to pay it as soon as he can, is not evidence to charge him with assets, for such an admission must be understood with a reasonable intendment, and the executor could not mean to pledge himself to commit a devastavit.

PROOFS OF CLAIM REQUIRED.

In addition to the proof of assets it will be necessary for the plaintiff, in an action of assumpsit, to prove the amount of the debt, otherwise he shall recover but nominal damages, for the plea only admits a debt, but not the amount, but where a specific debt is demanded, as in an action of debt, if the defendant pleads plene administravit without pleading also nunquan indebitatus, there the debt is admitted by the plea, and need not be proved.

Saunderson v. *Nicholls*, 1 Show. 81.

DEFENCE OF EXECUTOR.

In answer to the proof of assets the executor or administrator may show that he has exhausted the assets by discharging other demands on the estate, or he may show that he has disbursed the assets in the expenses of the funeral, or of probate or administration, or in the reasonable charges of collecting the debts of the deceased. He may show that he has retained money in his hands to pay for the expenses of administration to which he has made himself liable, without proving that he has paid them.

Gillies v. *Smither*, 2 Stark. N. P. C. 528.

REPLY BY PLAINTIFF.

Where the executor shows payments made by him to the extent of the assets proved by the plaintiff to have come to his hands, the plaintiff may show, in answer, that the funds so applied did not come to the defendant as executor, but were handed

to him in trust to pay the testator's debts, and were not part of the assets first proved to have come into his hands.

Marston v. *Downes*, 1 Adol. & Ell. 31.

DEBTS PAID PENDENTE LITE.

If the defendant has applied the assets in payment of debts since the commencement of the suit, he must plead that matter specially.

LACHES OF CREDITOR.

If, in the distribution of assets a creditor misleads an executor, either by laches or express authority, so as thereby to induce him to pursue a course he would not otherwise have pursued, the creditor is precluded from complaining of an insufficiency of assets.

Jewsbury v. *Mummery*, L. R. 8 C. P. 56.

COSTS OF EXECUTORS NOT PRIVILEGED.

Executors and administrators, when defendants, have no privilege as to costs, on the contrary, they are liable to pay them de bonis propriis if there are no assets. Therefore, an executor or administrator ought not to plead general defences without a good reason; for if the plaintiff succeeds the executor will be liable to pay the costs out of his own pocket, although the plea was not false to his knowledge, but, as in ordinary cases, an executor or administrator defendant will be entitled to the general costs, although he may have pleaded a general defence and failed on it, provided he has pleaded any one defence that goes to the whole cause of action, and succeeded on it.

See *Smith* v. *Williamson*, 13 P. R. 126, and see ante page 418.

JUDGMENT OF ASSETS QUANDO.

In an action against an executor or administrator, if the defendant pleads plene administravit, and it cannot be proved that he has assets in hand, the plaintiff may sign judgment immediately of assets quando acciderint, or as it used to be called sometimes, judgment of assets in futuro. This judgment is either interlocutory or final, according to the nature of the action.

INTERLOCUTORY JUDGMENT.

If it be only interlocutory there must be a writ of enquiry, or other proceeding to complete it.

RESULT OF JUDGMENT OF ASSETS QUANDO.

By taking judgment of assets quando the plaintiff admits that the defendant has fully administered to that time. Accordingly, the terms of the judgment are that the plaintiff has recovered his debt to be levied of the goods of the testator which

shall thereafter come to the hands of the executor. In subsequent proceedings on this judgment, proof of the executor's receiving assets is always confined to a period subsequent to the judgment.

I think that under the Judicature Act, and having regard to the change in the law making all debts of deceased persons in case of a deficiency of assets payable *pari passu*, the proper judgment in all actions in the High Court against executors or administrators, when there is a recovery of money, and assets are not admitted is the judgment which was always pronounced in Chancery in such cases, namely, a judgment for payment in due course of administration, or, in other words, a judgment for the administration of the estate.

McKibbon v. *Feegan*, 21 A. R. 95. Per Cur.

LIABILITY OF EXECUTOR FOR COSTS.

When an executor or administrator pleads plene administravit, or judgments, etc., outstanding, and plene administravit præter, and the plaintiff takes judgment of assets quando, the executor or administrator is not liable to costs de bonis propriis, but though an executor or administrator is not personally liable to pay the costs, judgment may be well entered for them to be recovered de bonis testatoris quando acciderint.

Cox v. *Peacock*, 4 Dowl. 134.

MODES OF ENFORCING JUDGMENT AGAINST EXECUTOR DE BONIS TESTATORIS.

There were formerly two modes of enforcing a judgment obtained against an executor de bonis testatoris.

1. By fieri facias or scire fieri enquiry.

2. By an action of debt on the judgment suggesting a devastavit.

If the sheriff returns, as he may do if he pleases, not only nulla bona, but also a devastavit to a fieri facias de bonis testatoris sued out on a judgment obtained against an executor, the plaintiff, according to the ancient practice, sued out execution immediately against the defendant by capias ad satisf., or fieri facias de bonis propriis, and so he may at this day.

The sheriff runs no risk by returning a devastavit for the judgment, and no assets to be found will be sufficient evidence of a devastavit in an action against him for a false return.

Rock v. *Leighton*, cited 3 T. R. 692.

RETURN BY SHERIFF.

If the sheriff returned nulla bona generally, without also returning a devastavit, the ancient course was to issue a special writ for the sheriff to enquire by a jury whether the defendant had wasted any of the goods of the deceased.

SCIRE FIERE ENQUIRY.

If a devastavit were found and returned by the sheriff a scire facias issued by the defendant to show cause why the plain-

tiff should not have execution de bonis propriis, to which scire facias the defendant might appear and plead. Subsequently the enquiry and scire facias were made in one writ, which was called a scire fieri enquiry. The most usual mode to proceed was by an action of debt on the judgment, suggesting a devastavit, because the plaintiff was formerly not entitled to costs unless the executor appeared and pleaded to the scire facias.

Now in all writs of scire facias the plaintiff obtains judgment on an award of execution, recovers his costs of suit upon a judgment by default as in other cases.

DEFENCE OF EXECUTOR.

The executor cannot plead plene administravit to the scire fieri enquiry, because the judgment against him is conclusive that he had assets to satisfy it. Neither can he, upon the taking of the inquisition, give in evidence the want of assets. He may prove that he had not wasted the goods of the testator; he was ready to give them to the sheriff, so that it was the sheriff's fault that he did not make the debt out of them.

2 Bingh. N. C. 180, 181.

ACTION OF DEBT ON JUDGMENT SUGGESTING DEVASTAVIT.

The foundation of the action of debt on the judgment suggesting a devastavit is the judgment obtained against the executor, which is conclusive upon him to show that he has assets to satisfy such judgment. If, therefore, upon a fieri facias de bonis testatoris on a judgment obtained against an executor either no goods can be found which were the testator's, or not sufficient to satisfy the demand, or which is the same thing, if the executor will not expose them to the execution, that is evidence of a devastavit, and, therefore, it is very reasonable that the executor should become personally liable and chargeable de bonis propriis. The most usual course is first to sue out a fieri facias upon the judgment, and upon the sheriff's return of nulla bona to bring the action, and state the judgment, the writ and the return in the statement of claim. On the trial the record of the judgment, the fieri facias and the return will be sufficient evidence to prove the case. The executor becomes personally liable and chargeable de bonis propriis.

DEFENCE OF EXECUTOR.

The executor may defend, and set up that he did not waste, and under this defence he may give in evidence that there were goods of the testator which might have been taken in execution, and that he showed them to the sheriff. But the executor cannot

set up the defence of plene administravit, or any other defence which rests upon want of assets. Such a defence would be contrary to what is admitted upon the judgment. If the truth were that he had no assets, he should have set it up as a defence to the original action, and having neglected to do so he cannot be permitted to say so afterwards, at all events without a special application to the Court.

DEATH OF JUDGMENT CREDITOR.

If a man obtains judgment against an executor, and dies, his executor may bring an action upon the judgment against the executor suggesting a devastavit, for such an action is brought against the same person against whom the judgment was had, and by that judgment assets were admitted.

ACTION AGAINST REPRESENTATIVE OF EXECUTOR.

So, on the other hand, if a judgment was had against an executor, who afterwards dies, an action may, since 30 Chas. II. c. 7, extended and made perpetual by 4 & 5 Wm. & M. c. 34, be brought against his executor or administrator upon the judgment suggesting a devastavit by the first executor, and the judgment is as conclusive upon the representative of the executor as it is upon the executor himself. No action of debt, suggesting a devastavit by the executor, lies against him upon a judgment obtained against his testator, because that is no admission of assets by the executor; therefore, in such cases, it is necessary to revive the judgment against the executor to make him a party to it.

DEATH OF TESTATOR AFTER EXECUTION.

If the testator died after execution was sued out, the writ may be still executed on his goods in the hands of his executors without taking any further proceedings, but if a defendant dies after final judgment, and before execution, the plaintiff must revive the judgment before he proceeds.

DEATH OF LESSEE OF LANDS.

Where the lessee of lands dies before the expiration of the term, and his executor or administrator continues in possession during the remainder, distress may be taken for rent due for the whole term, the executor or administrator cannot plead plene administravit in answer; so the distress may be taken by virtue of 8 Anne c. 14, ss. 6 and 7, within six months after the administration of the tenancy if the executor or administrator continues in possession.

EQUITABLE DEMANDS.

An executor or administrator is liable in his representative character to all equitable demands with regard to property which existed against the deceased at the time of his death.

ADMINISTRATION OF COURT OF EQUITY.

Again, executors and administrators were in almost every respect considered, in Courts of Equity, as trustees. Upon this principle those courts exercised a jurisdiction over them in the administration of assets, by compelling them in the due execution of their trust to apply the property to the payment of debts and legacies, and of surplus according to the will, or in case of intestacy, according to the Statute of Distributions.

ACCOUNT COMPELLED.

Therefore a court of equity would make an order for payment of an intestate's personal estate, or for the distribution of an intestate's personal estate, and would compel an executor or administrator in the same manner as it does an express trustee, to discover and set forth an account of the assets, and of his application of them.

Even in a case where the testator directed that the executor should not be compelled by law to declare the amount of a residue bequeathed to him, the court directed an account against him.

Massey v. *Massey*, 2 Johns. & H. 728.

SUIT BY SINGLE CREDITOR IN EQUITY.

A single creditor may sue in equity for his demand out of the personal assets, but a person entitled to a share of money, which is due as a debt from the testator, cannot maintain a bill for his own share, unless he sues on behalf of himself and of other parties interested in the debt, or makes those persons parties to the suit.

Alexander v. *Mullins*, 2 Russ. & M. 568.

A Court of Equity always allowed a creditor to sue on behalf of himself and the other creditors of the deceased, and has thereupon directed a general account of the estate and debts to be taken against the executor or administrator, or where assets were admitted, and the debt admitted for proof, has made an immediate decree for payment.

Woodgate v. *Field*, 2 Hare. 211.

LEGATEES OR DISTRIBUTEES.

Although the court entertains suits by creditors, legatees, and parties entitled in distribution on behalf of themselves and all others, and to exonerate the executor or administrator for

payment of assets pursuant to its decree, yet it is not to be understood that such a decree is absolutely binding upon the absent creditors, legatees or distributees who have had no opportunity of proving their claims, and have been guilty of no laches, so that they are entitled to no redress, but are to be deemed concluded. On the contrary, although they have no remedy against the executor or administrator, yet they have a right to assert their claim against the creditors, legatees or distributees who have received it.

EXECUTORS MAY BE SUED FOR DEBTS AT ONCE.

Although an executor has a year allowed him in equity to pay legacies, yet that does not extend to debts, but he is liable to be sued the moment after the testator's death.

Nicholls v. *Judson*, 2 Atk. 301.

ALL EXECUTORS MUST BE SUED.

The general rule is that if there are several executors or administrators, the must all be sued, though some of them be infants; therefore, a person cannot, either as creditor or residuary legatee, maintain a suit in equity against one co-executor only; but it is only necessary to sue so many of the executors or administrators as have acted.

PERSONAL REPRESENTATIVE REQUIRED.

An estate cannot be administered in the court of equity in the absence of a personal representative; therefore, if the statements in the case demonstrate that the court cannot give the plaintiff the relief which he asks without an administration of the estate, there must be a personal representative of it before the court.

Ambler v. *Lindsay*, 3 C. D. 198.

EXECUTOR DE SON TORT.

If the estate is to be administered, an executor de son tort being before the court will not dispense with the presence of a regular representative. He is only treated as executor for the purpose of being charged, not for any other purpose.

Rayner v. *Koehler*, L. R. 14 Eq. 262.

ADMINISTRATION AD LITEM.

Where there is no personal representative, but a special representative limited to the subject of the suit has been appointed by the court, the estate of the deceased is properly represented in the suit; inasmuch as the executor or administrator is the trustee and proper representative of all persons interested in the personal estate, and has the duty cast on him of protecting it

against improper demands, it is not necessary or proper to join either a pecuniary or residuary legatee or the next of kin as a party to an action against the executor or administrator for an account of the personal estate, however interested such persons may be to test the demand which has occasioned the suit.

ACTIONS ON BEHALF OF ESTATE.

Persons who have possessed themselves of the property of the deceased, or debtors to the estate generally, cannot be made parties to an action against the executor, for regularly there can be no suit against the debtor, but by the executor who has the right both at law and in equity. If he even release and is solvent neither a creditor nor a residuary legatee can bring any bill against that debtor.

Staunton v. *Carron Co.*, 11 Beav. 146.

COLLUSION.

The court will interfere if there is some special cause, as collusion or insolvency; then the action may be brought against the debtor and the executor. In the case of surviving partners of the deceased they may be made parties with the executor.

Saunders v. *Druce*, 3 Drewr. 140.

CESTUIS QUE TRUST WHEN NECESSARY.

Although one of two executors or trustees may sue the other executor or trustee without making the cestuis que trust parties to the suit, yet where such cestuis que trust have participated in the breach of trust they are necessary parties.

Jesse v. *Bennett*, 6 De G. M. & G. 609.

EQUITY BOUND BY STATUTE OF LIMITATIONS.

Although suits in equity are not within the words of the Statute of Limitations, 21 Jas. I., c. 16, yet they are within the spirit and meaning of it, and, therefore upon all legal demands courts of equity were bound to yield obedience to its provisions.

Flood v. *Patterson*, 29 Beav. 293.

EFFECT OF TRUST OR CHARGE ON REAL ESTATE.

Generally speaking, the Statute of Limitations did not run against the trust, accordingly a trust or charge created by will upon the real estate for the payment of debts prevented the statute from running against such debts as were not barred in the testator's lifetime, though such a trust did not revive a debt on which the statute had taken effect before the will came into operation, namely, before the testator's death.

O'Connor v. *Haslem*, 5 H. of L. C. 170.

ON PERSONAL ESTATE.

But a trust or charge by will on the personal estate did not at all prevent the operation of the statute, for the law vested the personal estate of the deceased in his executors or administrators as a fund for the payment of his debts, and he could not by his will create a special trust for that purpose, and consequently such a trust had no legal operation.

Evans v. *Tweedy*, 1 Beav. 55.

PRESUMPTION OF PAYMENT.

In a case where the statute was pleaded in bar to a legacy, demanded due 20 years before Lord Nottingham held that the legacy was not barred by the statute, nor ever had been so; though before the Limitations of Actions Act no statute could be pleaded to a legacy, yet presumption of payment from permitting the assets to be distributed without claiming the legacy was a good ground of defence by way of answer. Although, generally speaking, long lapse of time might lead to the presumption of payment, yet that presumption was liable to be rebutted by circumstances.

Ravenscroft v. *Frisby*, 1 Coll. 16, 23.

LIABILITY FOR COSTS OF ADMINISTRATION.

In a suit against an executor or administrator, other than a suit for a general administration of the assets, the liability to costs will, generally speaking, be governed by the ordinary rule which throws them on the unsuccessful party. Accordingly, if the executor or administrator is sued in equity by a creditor for the debt of a deceased, and the creditor succeeds in establishing his demands, the court will direct the payment of the amount due to the creditor together with his costs out of the assets. The executor, however, will not be decreed to pay the costs if the assets are insufficient to pay both debt and costs.

COSTS AS BETWEEN SOLICITOR AND CLIENT.

Where a suit is instituted either by creditors or residuary legatees for a general administration of assets, so that the whole estate of the deceased is necessarily taken from the hands of the personal representative and distributed under the direction of the court, his costs of suit as between solicitor and client are, generally speaking, provided for. Even where the assets are insufficient to pay the creditors of the deceased, these costs continue the first charge on the estate. But even if the suit was occasioned by the ignorance or unreasonable caution, or by the misbehaviour or the negligence of the executor or administrator, his costs of the suit, or of so much of the suit as was occasioned by such miscarriage, will not be allowed; whilst in cases marked by fraud,

evasion or neglect of duty, the court will not merely refuse to allow the executor his costs out of the assets, but will order him to pay the costs of the suit, or of so much of the suit as is attributable to the breach of duty on his part.

COSTS OF PLAINTIFF.

After the costs of the executor or administrator are satisfied, the next claim on the fund is that of the plaintiff in the suit for his costs incurred in it.

Thompson v. *Clive*, 11 Beav. 475.

FUND INSUFFICIENT TO PAY PLAINTIFF HIS COSTS.

The principle in creditors' suits is that where the suit is properly instituted, and the fund to be administered is insufficient to pay the plaintiff his costs, those who have come in and received a benefit under the decree must contribute to make good that loss which the plaintiff has made good on behalf of all the creditors. One consequence of this right of the plaintiff to his costs appears to be that if the executor or administrator after judgment makes payment of a debt with a view to be reimbursed out of the fund in court, his right to be reimbursed must be postponed to the payment of the plaintiff's costs, that is, he must run the risk of the funds not being sufficient to pay the costs and also to reimburse him.

Jackson v. *Woolley*, 12 Sim. 16, 17.

COSTS OF CREDITOR.

A creditor coming in and establishing his debt is entitled to such costs as shall be fixed by the court.

OF NEXT OF KIN.

Next of kin, who are not parties, are allowed the same costs as if the plaintiffs had brought them regularly before the court as parties; therefore, if they would, as parties, have been entitled to their costs of proceedings in the Master's office for the purpose of making out their claim and their costs of appearing on further directions, but not otherwise, they shall also be allowed these costs on taxation.

Fenton v. *Wells*, 7 C. D. 35.

PLAINTIFF MAY BE ORDERED TO PAY COSTS.

In a creditor's suit, if it turns out that there are no assets applicable to the plaintiff's debt, the plaintiff will be ordered to pay the costs.

Fuller v. *Green*, 24 Beav. 217.

FUNDS TO BE PAID INTO COURT.

The court will, immediately upon admission of assets by an executor or administrator, order so much as he admits to have

in his hands to be paid into court, though it was formerly thought necessary for the plaintiff to show that the executor or administrator had abused his trust, or that the fund was in danger from his insolvent circumstances.

Blake v. *Blake*, 2 Scho. & Lef. 26.

ADMISSION.

The court, in making an order of this kind, adheres strictly to the rule of acting on the admission only, and will refuse to proceed upon its knowledge derived from any other source.

Scott v. *Wheeler*, 12 Beav. 366.

Money admitted by the executor to be in the hands of his partner, is in his own hands for the purpose of being ordered to be paid into court.

CREDITS ALLOWED.

Where the executor admits that a certain amount of assets has come to his possession, he may discharge himself from the payment of it into court wholly or partially, by taking credit for sums which he shows a right to retain for his own debt due from the testator, or to have allowed him on any just grounds, or which are undisputed.

Nokes v. *Seppings*, 2 Phill. 19.

RETAINER OF FUNDS.

The executors retained in their hands a sum of $1,100 to meet claims against the estate, and were not called upon to pay it into court:—Held, that the amount retained was not unreasonable, and that the executors were not chargeable with interest in respect of it.

Thompson v. *Fairbairn*, 11 P. R. 333.

VERIFICATION OF PAYMENTS.

Where an executor admits that he has received a certain sum belonging to the testator's estate, but adds that he has made payments, the amount of which he does not specify, the court will allow him to verify the amount of his payments by affidavit, and order him, on motion, to pay the balance into court. But when there is a sufficient admission by the executor of assets once come to his hands, he cannot relieve himself from paying them into court by showing any unauthorized application of them, or any investment or disposition of them which in substance amounts to a breach of his duty as executor.

Lord v. *Purchase*, 17 Beav. 171.

INSOLVENCY OF EXECUTOR.

If there is no danger of the property being lost from the executor being insolvent or otherwise, a reasonable time will be

allowed for bringing funds into court, a longer time being allowed when the money is in a foreign country; and if the assets appear to have been invested on an improper security, time will be allowed which may, in a proper case, be extended from time to time to enable the executor to realize the security.

Score v. *Ford*, 7 Beav. 333.

EVIDENCE ON APPLICATION.

In fixing the day for payment time will be allowed for the trustee, if he desires it, to show that no reason exists for calling the money into court. The relief of a motion of this kind will be confined to the payment of money into court. The plaintiffs must be solely entitled or have some interest jointly with others as to entitle them on behalf of themselves and of those others to have the fund secured.

Score v. *Ford*, ut sup.

LIEN FOR COSTS.

An executor having been ordered to pay money into court is not thereby deprived of his lien on the fund for his costs.

Blenkinsop v. *Foster*, 3 Y. & Coll. 207.

DISPOSITION OF ESTATE DOCUMENTS.

The general rule as to papers and writings is that an executor representing an estate should deposit them for the benefit of the parties interested in the office of the clerk of records and writs, unless there are other purposes which require that he should retain them in his own hands.

Freeman v. *Fairlie*, 3 Meriv. 30.

ACCOUNTS.

It is the bounden duty of an executor to keep clear and distinct accounts of the property which he is bound to administer. If, therefore, he chose to mix the accounts with those of his own trading concerns, he cannot thereby protect himself from producing the original books in which any part of these accounts may be inserted.

ACCOUNTS, ESTOPPED BY RENDERING.

Taylor v. *Magrath*, 10 O. R. 669.

McGregor v. *Gaulin*, 4 U. C. R. 378, considered and distinguished.

LOAN OF FUNDS TO FIRM.

As between an executor bound to produce and his partners in trade, if the partners have permitted him to mix the accounts, they cannot afterwards object to the production.

In a case where the executor has admitted having lent to the house part of the trust property, and that they have been dealing with it, there is no doubt that production can be enforced.

IMMEDIATE JUDGMENT.

If a plaintiff's demand be uncontested or proved, and the executor admits assets, the plaintiff is entitled to immediate payment without taking the accounts.

Woodgate v. *Field*, 2 Hare. 211.

ADMISSION OF ASSETS CANNOT BE RETRACTED.

An admission of assets for the payment of a legacy is an admission of assets for the purpose of the suit, and extends to costs if the court thinks fit to give them.

Hewes v. *Hewes*, 4 Sim. 1.

CONVERSION OF ESTATE OF EXECUTOR.

If it is charged that the executor has rendered himself personally liable to pay the plaintiff's debt or legacy by an admission of assets made before suit, or by any other means, and the plea can sustain this allegation, he will entitle himself to a decree for payment at once. An admission of assets by an executor or administrator can never be retracted in a court of equity, unless a case of mistake be most clearly established.

Roberts v. *Roberts*, *cited* 1 Bro. C. C. 487.

If an executor changes the nature of the testator's estate, the general rule is that this is a conversion, and as money has no earmark it cannot be followed; but the executor by such transaction has made himself liable to a devastavit for which the party injured must seek satisfaction out of the executor's own effects. But if an executor for the benefit of a testator's estate, invests part of it in the funds, or transfers money from one stock to another, this is not a conversion, but it may still be followed as much as if it had continued in the same condition as at the testator's death.

Waite v. *Whorwood*, 2 Atk. 159.

DEBT WHEN CONSIDERED DUE.

In case of an executor committing a devastavit, and a decree for payment of the amount, the debt is considered as due from the time of the devastavit, and not from the date of the decree.

ORDER FOR ADMINISTRATION AD LITEM.

In framing an order under Con. Rule 90, appointing an administrator ad litem, it is not sufficient that the order state "it is ordered that A. be and he is hereby appointed administrator ad litem to the estate of B."; the order is really a grant of administration, and should contain the particulars mentioned in rule 48 of the surrogate rules: and if such is the fact, should also state that the administration is of the real and personal estate.

Cameron v. *Phillips*, 13 P. R. 141.

A. makes a note payable to B. or order; B. endorses to C., who endorses to D.; D., the holder, dies, leaving B. one of the executors. The executors of D. sue C. Held, that D., having made B. his executor, B. was discharged, and that there was no remedy against the subsequent endorser.

Jenkins v. *McKenzie*, 6 U. C. R. 544.

Section 12 of the Evidence Act (R. S. O. 1914, c. 76), provides as follows:—

IN ACTIONS BY OR AGAINST REPRESENTATIVES OF A DECEASED PERSON, THE EVIDENCE OF THE OPPOSITE PARTY MUST BE CORROBORATED.

12. In an action by or against the heirs, next of kin, executors, administrators, or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment, or decision on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.

EFFECT OF JUDGMENT AGAINST EXECUTORS.

A judgment against executors is only prima facie evidence of its being for a debt due by the testator, and the parties interested in the real estate are at liberty to disprove it.

In an action by a judgment creditor on a judgment recovered on a promissory note discounted by him, which note was received by the executors for the sale of personal property of the testator, and indorsed "without recourse" to the plaintiff.

Held, that the indorsement of the note by the executors would not make it a debt of the testator in the hands of the indorsee.

Held, also, that the effect of the Devolution of Estates Act and amendments, acted upon by the registration of a caution under the sanction of a county court judge, after the twelve months had expired, was to place lands of a testator again under the power of his executors so that they could sell them to satisfy debts; and that the expression "in the hands" of executors, as applied to property of the testator, is satisfied if it is under their control or saleable at their instance; and that the operation of a devise of lands is only postponed for the purposes of administration, and the estate does not pass through the medium of the executors, but by the operation of the devise.

Janson v. *Clyde*, 31 O. R. 579.
Judgment against executors, effect of.
Re Hague, Traders Bank v. *Murray*, 13 O. R. 727.

Section 10 of the Devolution of Estates Act is as follows:—

10.—(1) Where there is no legal personal representative of a deceased mortgagor of freehold property it shall be sufficient for the purposes of an action for the foreclosure of the equity of redemption in, or for the sale of, such property that the person beneficially entitled under the last will

and testament, if any, of the deceased mortgagor, or under the provisions of this Act, to such property or the proceeds thereof be made defendant to such action, and it shall not be necessary that a legal personal representative of the deceased mortgagor be appointed or be made a defendant thereto unless it shall be otherwise ordered by the court in which the action is brought or by a Judge thereof; but if during the pendency of such action the equity of redemption devolves upon and becomes vested in a legal personal representative of the mortgagor he shall be made a party to the action.

(2) In sub-section 1 the word "mortgagor" shall include the assignee of a mortgagor and any person entitled to or interested in the equity of redemption.

In a mortgage action for foreclosure, although it may be that since the Devolution of Estates Act, as a matter of title, the record is complete with the general administrator of the deceased owner of the equity of redemption as the sole defendant; yet, as a matter of procedure, the infant children of the deceased are proper parties, and as such should appear as original defendants, unless some good reason exists for excluding them.

Keen v. *Codd*, 14 P. R. 182.

Mortgage Action Parties.

A mortgage action against the surviving husband and infant children of the mortgagor, who died intestate in February, 1892, was begun before the lapse of a year from the death:—

Held, that the plaintiff was entitled after the lapse of a year, to judgment for the enforcement of her mortgage, without having a personal representative of the mortgagor before the court, no administrator having been appointed and no caution registered under the Devolution of Estates Act.

Ramus v. *Dow*, 15 P. R. 219.

ADMINISTRATION AD LITEM.

It is competent to the court, on a proper case being made, to appoint or dispense with an administrator ad litem, and then to direct an account, but to justify such an order it should appear not only in general terms that the estate was small but a statement shewing the nature and amount of the personal estate ought to be produced and verified. *Re Colton, Fisher* v. *Colton*, 8 P. R. 542.

It is not intended by Con. Rule 311 that the business of the Surrogate Court should in a large measure be transferred to the High Court the intention is, to provide for necessities arising in the progress of an action, where representation of an estate is required in the action, and there has not been carelessness or negligence on the part of the person who may require the appointment to be made. Under the circumstances of this case an application for the appointment of an administrator ad litem was refused. *Re Chambliss*, 12 P. R. 649, distinguished. *Meir* v. *Wilson*, 13 P. R. 33.

When a suit is pending in the Court of King's Bench to set aside a will, that court has exclusive power, under sec. 23 of the King's Bench Act and ss. 18 and 39 of the Surrogate Courts Act, R. S. M. 1902, c. 41, to appoint an administrator pendente lite, and such power may, under Rule 449 of the King's Bench Act, be exercised by a Judge in Chambers. *Tellier* v. *Schilemans*, 5 W. L. R. 261, 16 Man. L. R. 430.

To entitle a suitor to have an administrator pendente lite of an estate appointed, a case of necessity must be made out. *Horrell* v. *Witts*, L. R. 1 P. & D. 103, followed. If such case of necessity is shewn as to a portion of the estate only, an appointment limited to such portion should be made. *Tellier* v. *Schilemans*, 5 W. L. R. 467, 17 Man. L. R. 303.

Administrators pendente lite had received a large amount of money which they wished to invest at higher rates of interest than could be obtained from chartered banks, as the litigation was liable to be somewhat prolonged:—Held, that this was a proper case in which to apply for a direction under the Trustee Act, and that there was no difference in principle between the position of the applicants with regard to the money in their hands, and that of an executor or trustee under the Trustee Investment Act; and the order asked for was made. *Re Mackey*, 23 C. L. T. 115, 2 O. W. R. 230, 689.

Motion to appoint an administrator ad litem for the purposes of an action not yet begun. Held, that the court had no jurisdiction unless expressly conferred by statute to appoint an administrator ad litem to defend an action not yet begun. Con. Rule 195 does not apply. Dicta, the appointment of a trustee under the Trustee Act suggested as the proper procedure. *Re Hoover & Nunn* (1911), 19 O. W. R. 418, 2 O. W. N. 1215.

Held, that the court has no power, where the administration of an intestate's estate forms the subject of the suit, to appoint a representative under R. S. O. 1877 c. 49, s. 9, as the intestate is not a party interested in the matters in question in the suit within the meaning of that section. *Hughes* v. *Hughes*, 6 A. R. 373.

The only living issue and heir-at-law of an intestate brought this action to set aside, on the ground of undue influence, a transfer of property made by the intestate to the defendant; and now applied for an order under Rule 194 or 195, appointing him administrator or administrator ad litem of the deceased:—Held, that the order could not be made under Rule 194, for the reasons given in *Hughes* v. *Hughes*, 6 A. R. 373, 380, nor under Rule 195, which was not applicable to a case of a plaintiff who without right or title has commenced an action, and then seeks to legalize his illegal act by an order of the court. *Fairfield* v. *Ross*, 22 C. L. T. 413, 4 O. L. R. 534, 1 O. W. R. 631.

Devolution of Estates Act.—Rule 311, though in existence, as s. 11 of 48 Vict. c. 13 (O), before the passing of the Devolution of Estates Act, may be applied as to realty falling under the operation of that Act. If it appears that there is no personalty, or personalty of such trifling amount as will not suffice to answer the claims made in respect of the deceased's real estate in respect of which litigation has been brought or is impending, administration ad litem may be granted under the rule, limited to the real estate in question. An application for the appointment of an administrator ad litem is properly made before action. *Re Williams and McKinnon*, 14 P. R. 338.

Form of Order.—In framing an order under Con. Rule 311 appointing an administrator ad litem it is not sufficient that the order state "it is ordered that A. be and he is hereby appointed administrator ad litem to the estate of B.;" the order is really a grant of administration and should contain the particulars mentioned in Rule 48 of the surrogate rules; and if such is the fact, should also, in view of R. S. O. 1887, c. 50, s. 58, state that the administration is of the real and personal estate. *Cameron* v. *Phillips*, (No. 2), 13 P. R. 141.

Issuing Execution.—An administrator pendente lite has no power to issue execution where the executors have proved the will. *Haldane* v. *Beatty*, 13 C. L. J. 200.

Mortgage Action.—In a mortgage action in which a foreclosure only was sought it was stated that the lands were not equal in value to the mortgage debt. The mortgagor being dead and having left no estate whatever except the equity of redemption sought to be foreclosed, the executor named in the will of the mortgagor, which had not been offered

for probate, was appointed administrator ad litem without security, under Con. Rule 311. *Cameron* v. *Phillips*, 13 P. R. 78.

Substantial Interest.—The court will not appoint an administrator ad litem of a deceased party to the suit where the deceased had a substantial interest in the suit. The suit must be revived. *Bank of Montreal* v. *Wallace*, 1 Ch. Ch. 261.

R. S. O. 1897 c. 129, s. 11, providing that in case any deceased person has committed a wrong to another in respect to his person or his real or personal property, the person so wronged may maintain an action against the administrators or executors of the person who committed the wrong, does not give authority to maintain an action against one who is an administrator ad litem merely, but only against an administrator in the ordinary sense of the term, that is, a general administrator clothed with full power to collect the assets, pay the debts, and divide the estate. Therefore, for this reason, apart from others, the appointment of an administrator ad litem should be refused in this action, which was brought against five persons for malicious prosecution one of whom had died pending the action, and whose widow and children refused to administer to the estate. *Hunter* v. *Boyd*, 22 Occ. N. 50, 3 O. L. R. 183, 1 O. W. R. 79, 2 O. W. R. 724, 1055.

CORROBORATION.

Claims against Estate of Deceased.—There is no rule that the court must necessarily reject a claim against a deceased person's estate merely because it is supported only by the uncorroborated evidence of the claimant. Such uncorroborated evidence should be examined with care, and even with suspicion, but if in the result it convinces the court that the claim should be allowed, the court should allow the claim. *Hodgson, In re; Beckett* v. *Ramsdale*, 31 Ch. D. 183, followed; *Finch, In re; Finch* v. *Finch*, 23 Ch. D. 267, dissented from. *Rawlinson* v. *Scholes*, 79 L. T. 350.

There is no absolute rule as to corroboration being necessary in the case of a claim against the estate of a deceased person. *Griffin, In re; Griffin* v. *Griffin*, 79 L. T. 442.

Loan by Deceased.—A claim of repayment to one deceased must be corroborated, and where the payments are wholly unconnected, corroboration of an item here and there is not a corroboration of the whole account. *Thompson* v. *Coulter*, 34 S. C. R. 261; *Cook* v. *Grant*, 32 U. C. C. P. 511, and *Re Ross*, 29 Grant 385, referred to. *Little* v. *Hyslop* (1912), 23 O. W. R. 247; 4 O. W. N. 285.

Corroboration, what Requisite—The direct testimony of a second witness is unnecessary; the corroboration may be afforded by circumstances: *McDonald* v. *McDonald*, 33 S. C. R. 145.

The expressions used by the learned Judges of the Court of Appeal in *In re Finch*, 23 Ch. D. 267, appear to me applicable under this statute. Jessel, M. R., there said: "As I understand, corroboration is some testimony proving a material point in the testimony which is to be corroborated. It must not be testimony corroborating something else—something not material." And Lindley, L.J., said: "Evidence which is consistent with two views does not seem to me to be corroborative of either." *Thompson* v. *Coulter*, 3 O. W. R. 82.

Upon a claim in an administration action by a tenant against the estate of his deceased landlord for a balance due to him in respect of alleged advances, and for goods supplied, the books of the tenant, in which the transactions were set out, and cheques made by him in favour of and endorsed by the landlord, were held to be sufficient corroboration of his evidence, although the cheques did not show on their face whether they had been given on account of rent or in respect of advances. *In re Jelly, Union Trust Co.* v. *Gamon*, 6 O. L. R. 481.

Mr. Vigeon's lecture on Executorship Accounts, which appears on the following pages, was included in the First Edition of this work. On applying to him for permission to reprint it, and to be informed whether changes were necessary, I received the following letter which speaks for itself:—

Toronto, Ont., 23rd March, 1914.

R. E. Kingsford, Esq.,
Toronto.

Dear Sir:—

I have reviewed the Specimen Accounts in your "Executors and Administrators," ed. 1900, and cannot improve upon them.

Thanking you for the opportunity of amplyfying or amending same if thought necessary.

I am,
Yours sincerely,
HARRY VIGEON.

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EXTRACTS FROM

A LECTURE ON EXECUTORSHIP ACCOUNTS

BY

MR. HARRY VIGEON, F.C.A.

President of the Institute of Chartered Accountants.

I will assume for my purpose this evening, that probate has been granted before the accountant has been called in.

It will be found, perhaps, that few books have been kept by the executors—possibly only a cash book—showing actual receipts and payments—so as to have some record of the transactions; but no ledger containing an account of the estate, which they (the executors) have to deal with, or in which the entries from the cash book have been classified, so as to show the necessary particulars required to make up the residue account; and also bank pass book, cheque book, and a batch of papers and receipts amongst which will doubtless be found a solicitor's bill. The latter is usually one of the most useful documents in the parcel, as a perusal of it will invariably give you a history of the transactions of the trust, and throw much light on entries and matters which you will presently have to deal with.

Then comes the question, what books are necessary to be kept, so as to show a clear and concise account of the estate which has come into the hands of the executors, and the manner in which it has been dealt with; and what is the best method to adopt so as to present it in a clear, pithy and simple form, at once to meet the requirements of the residuary account, and be such that executors—who are not professional accountants—may be able to refer to and understand for themselves, without having to ask constantly for explanations.

It seems to me that this is what is required, and the simpler the accounts are kept the better, whether we are dealing with trust or any other accounts, provided they contain all that is necessary to attain the object for which they are designed.

The books required are two in number, cash book and ledger, both combining the journal features of full details.

The advantage of dispensing with a journal is that it is particularly desirable, in these accounts, that the ledger should contain the fullest particulars of all the entries, so that the effect of the various transactions may readily be traced, without having recourse to any other book.

It is an advantage to be able to see in the most concise form possible all the transactions of the estate, and if the ledger and the cash book can be made to show, with a little extra detail, the particulars usually given in the journal, I think it advisable. It saves at least one book of reference, and gives every particular required without having to be constantly turning to the journal.

In some cases the word journal would fully describe the first of these, although it will be found convenient to keep it in the form of a cash book, as executors rarely keep cash in hand if they are wise, most of their receipts being paid direct into the bank, and most of their payments being made by cheque, which means crediting the account on which the receipt is derived and debiting the bank, or debiting the account on which the payment is made, and crediting the bank, as the case may be.

In the first place it will be found convenient to raise the accounts in draft, as in the process of your work you are sure to meet with items

requiring explanation before you can decide to what account they should be placed, or what proportion may be capital or what income; and if you do not find it necessary, as you proceed, to make alterations and corrections in entries which you may have already made, you will indeed be fortunate in having a trust committed to your care, in which the information in your possession is unusually complete and straightforward. For this purpose two ordinary cheap books, with card or paper backs—both ruled alike, namely, in the form of an ordinary cash book, with double cash columns—will be found most convenient, one for the cash book, and the other for the ledger. This form will be found very suitable for the ledger, as it will afford you ample room to detail full descriptive particulars of the entries, which in trust books is indispensible, as well as separate cash columns for income and capital. The latter, in the case of investments and personal accounts of settled legacies, enables the capital and income to be dealt with separately in one account, and so obviates the necessity of having two accounts, and secures the convenience of having the whole matter, in respect of an investment or settled legacy, before you at one opening.

Having obtained these books, you will find it of great service and a saving of much time and trouble afterwards if you carefully peruse the will, and enter a short abstract of its provisions and dispositions on the fly leaf of one of them, in addition to such particulars as the date of the will, date of death, date of grant of probate, at what amount sworn, the names and addresses of the executors and trustees; and where there are legatees, under age—not coming into the full benefit of their legacies until they have attained their majority—the dates of their respective births, so that in case of a long trust, in which in all probability you will be entrusted with an annual audit of the accounts, you may not lose sight of these matters, but have all the information required readily at hand, without time after time having to wade through the legal phraseology of these somewhat lengthy documents, which must of necessity be the case where some course of this description is not adopted, as no professional man, in the multiplicity of business which passes through his hands, can reasonably expect to commit to memory from year to year the variety of provisions contained in all the wills regulating his trusts.

When you have done this, and carefully read through the batch of papers to which I have alluded, you will find yourself tolerably well acquainted with the leading points of the matter in hand, have a very fair idea of the framework of your task, and be ready to commence raising the necessary entries for the basis of your accounts.

You first ascertain if the various items of the estate returned in the form for probate are accurate, and in case any difference should arise in consequence of information which lapse of time may have revealed, or from any other cause, you make a note of it.

You then commence your cash book and ledger with entries of the personal estate, first crediting capital, and debiting the various accounts of which it is composed in such order as you propose to open them in the ledger, capital account being the first.

When the ledger entries, setting forth the personal estate have been made, and posted to the respective accounts in the order referred to, you will then have got a fair start, and the capital account will show the total personal estate of which the testator died possessed. If this agrees with the amount sworn to for probate, or at any rate does not exceed it to such an extent as to render the executors liable to payment for further duty, well; but if, on the contrary, it exceeds the amount so much as to show that insufficient duty has been paid, you should at once communicate with your client, in order that he may give you definite instruction thereon.

Having so far proceeded, it is then necessary to complete the capital account by making the entries through the ledger of real estate, and any other estate not included in the above.

Here it may be pointed out that by recent enactments of the legislature the executors or trustees are required to deal with the whole of the estate, whether real or personal. A separate account should be opened with each parcel of real estate, and on the opposite folio an account of the encumbrance (if any) existing against it.

The whole transaction relating to that particular item of capital can then be seen at a glance, *i.e.*, the parcel of real estate; the encumbrance on same; the revenue derivable from the rental, lease or use of the property; the cost of carrying the mortgage.

And although the real estate may be specifically devised, it is always well to pass it through the books by debiting real estate and crediting capital, and when you appropriate the estate, debit capital and credit the devisee by a transfer from real estate account, which will close the transaction. By adopting this course the books will show the disposition of the whole estate of which the testator died possessed, whether personal or real.

I now assume that the whole estate, real and personal, of which the testator died possessed, has been entered with full descriptive particulars in the cash book and ledger, and that the values inserted are either the amounts actually realized or vouched by valuations, and certificates of competent authorities; that the entries have been duly classified and posted to accounts opened in the ledger with each investment in the order I have indicated, and that all the entries of capital, as distinct from income, have been entered in the outer or capital column in the ledger, and those of income in the inner or income column. I assume that the date which has been affixed to these entries is the date of the death, and that all rents and income due and accrued at death have been apportioned, as if accruing from day to day, and treated as part of the capital estate, in accordance with the law; and that the books now contain an account of the whole of the assets of the testator, and show exactly the estate which the executors have to deal with.

The next thing to be proceeded with is the dealing with the estate, which, of course, comprises the transactions of the executors, and as it consists entirely of receipts and payments, it will appear in the form of a cash account, the entries being made in the order of date in which the transactions are effected.

The first entry will be the cash in the house, brought from the previous ledger entries, then following, on the debit or receipt side, will come sums received in payment of book debts, proceeds of shares and other investments realized, also rents, dividends, interest, etc., received, which are income and cheques drawn on the bank, which in reality are receipts from the bank, of moneys drawn out to discharge payments, and will be balanced by corresponding entries on the credit or payment side. On the credit side will appear all payments and disbursements made by the executors in discharge of debts due by deceased, funeral and testamentary expenses, duties and payments into bank, etc.

Vouchers should be produced for all these payments, and where they contain items incurred previous to death, as well as those incurred subsequently, such items should be carefully separated and classified, so as to insure their ultimate entry in the right account.

The payments will be found to comprise:

1. Probate and administration, which includes fees payable on the grant of probate.
2. Funeral expenses, which includes coffin, hearse and carriages, interment fees, gravestone and monument, family mourning, etc.
3. Executorship expenses, including valuation fees, law costs, accountants' charges, travelling expenses, cheque books and the numerous expenses incident to the execution of the trusts.
4. Debts on simple contract, comprising debts owing by the testator, rent, taxes, wages, etc.
5. Debts on mortgages (if any) with interest due at death.
6. Debts on bonds and other securities, etc.
7. Pecuniary legacies.

Accounts should be opened in the ledger under these headings, following those already opened, and the various payments previously and correctly classified in the cash book, duly posted to them respectively.

In posting the various entries from the cash book to the ledger, I would here observe that care must be taken to post all sums received on account of income, such as dividends on shares, interest on mortgages, rents on properties, etc., to the respective accounts opened with these investments in the ledger, in the inner or income column, as well as all

payments for repairs, insurance, etc., that may be made on account of the properties, which, with very few exceptions, are chargeable against income.

It will now be necessary to make closing entries, transferring the several accounts under the head of payments, already referred to, viz., probate duty, funeral expenses, executorship expenses, debts, etc., etc., to the debit of capital account. It will also be necessary to transfer to the debit of this account any deficiency that may have arisen in the realization of investments, etc., or property previously taken at valuations, as well as to place to the credit of the same account any excess that may have been realized over and above such valuation.

When all these entries have been made a balance should be struck and brought down, which, in the event of all the debts having been paid, liabilities discharged or provided for, and assets realized, will be the net amount of estate applicable to legacies and bequests. In the cases where there is still a portion of the estate unrealized and debts outstanding, a reserve should be made, equal to the amount at which such items have been valued in the accounts, and may be carried forward as a balance only to be divided when realized. In the event also of an annuity for life being bequeathed, either a sum should be separately invested to produce the amount of such annuity, or if paid out of the income of the estate a sufficient portion of the capital should be reserved out of the residue to cover it before division. Matters of this description, and any special matter of the nature of a contingent liability which often happens, having been duly provided for, so as to protect the executors from parting with any estate not absolutely ascertained by realization, you may proceed to apply the balance as directed by the Will.

First will come pecuniary legacies, if any, for which any entry should be made through the ledger, debiting capital, and crediting legatee in a separate account, which account or accounts, will be closed when the actual payments are made, by posting the cash to the debit.

When the pecuniary and specific bequests have been duly provided for the balance will be the residue of capital.

It now remains to close those accounts relating to income, which are the sums placed to the credit of the various investments for dividends, interest, rents, etc., less the proportion accrued at death, which has been already posted to the debit in the first entries made in the ledger of testator's estate at death.

The balance is transferred by debiting these accounts respectively, and crediting income account.

The books now contain in a concise form all the information requisite to complete the residuary account, and the schedules required to accompany it, and it will be well to make out a statement of affairs showing such particulars along with the schedules as will enable the beneficiaries to clearly understand the disposition of the estate thus far.

It will be necessary to show what property has been converted into money, and the date of such conversion, as separate columns are provided for money received and property converted into money, and for the value of property not converted into money. In the latter case the value of the property at the time the account is rendered is required, and inventories and proper valuations must be produced, so that care must be taken to ascertain whether any variation has arisen since the accounts were opened, and to adjust them accordingly. The shares not converted into money are to be valued at the average price of the day on which the account is dated, and if there be shares in many companies, it may be convenient to insert the total amount or value in this account, and annex a schedule of the particular shares. When the various amounts are entered in the account under the respective headings therein required, the total of the first column, in which all property converted into money has been entered, is carried out into column No. 2 and cast up with it, the total being the total property.

We now come to the deductions for payments, which include probate duty, funeral expenses, executorship expenses, debts under three distinct headings, viz., simple contract debts, mortgage ditto, and those on bonds and other securities, and then pecuniary legacies. A schedule of the debts signed by the executor or administrator is to be annexed, and the particulars of any other lawful payments, and of the funds and other securities

purchased and inserted, with the date of such purchase. These deductions are entered in an inner column and the total carried out, and deducted from the total property, leaving the net amount of property to be carried forward to the next page of the account, in which must be inserted and added the accumulations of interest, dividends, rents, etc., from the date of death to date of account, classified in the manner therein described. From this total should be deducted payments out of interest on mortgages, bonds, legacies, etc., payment on account of annuities and other payments (if any), comprising expenses incurred in the management of the trust estate, and chargeable against income, and a balance again shown. Then any deduction from residue should be taken, including debts still due from the estate (if any) and money retained to pay outstanding legacies.

When the account has been carefully drawn in the manner described a balance will be the net residue.

The illustration herewith given is an estate simple in its workings, and of small value, but the principles before described are therein set out in account form.

The opening account in the ledger is the estate capital account, and its credits are all the property of which the testator died possessed, treated at its ascertained value, and including the income or revenue accrued on investments made up to the date of the testator's death.

The total of these credits forms the corpus of the estate. Separate ledger accounts are opened with each investment, also an income (perhaps a bank account), and a personal account with each beneficiary.

These separate accounts will give in full detail the particulars of each asset.

When the whole of the funeral and testamentary expenses have been paid, and the debts of the deceased and executorship expenses settled these accounts will be closed by transferring the totals to the debit of the estate's capital account.

After the efflux of time as settled by the will, and the legacies have been paid, the residuary legacies will be apportioned to those entitled to a share according to their several legatees.

The accountant or executor should be careful to reserve sufficient to pay costs of distribution and any shortages in annuities before closing the estate among the residuary legatees.

DEBTS OF DECEASED OR TESTATOR.

MEMO.—Though including such sums as would have been legally demandable from the testator had he lived, still it is well to remember that subscriptions to charitable and religious objects do not come under this head.

Funeral expenses must be only such as are reasonable, according to deceased's station in life, and do not warrant the cost of mourning for relatives or servants, or of anything in the shape of an elaborate monument.

Remember at all times the danger from residuary legatees.

The executor should not pay household expenses for any longer period than is absolutely necessary to enable the survivors of the family to make arrangements to carry on for themselves.

NOTE.—Take care of the capital and let the income take care of itself, and if in any matter like apportionment you act so as to give capital the benefit, you will at any rate be on the safe side, for, remember that the greatest difficulty is experienced in recovering money one has paid by way of income to the life tenant.

Pay all legacies as soon as the state of the capital account permits.

It is not necessary, often it is unadvisable, to put a value in the books upon any asset not actually turned into money.

CODICIL.—A codicil is an additional will, in no way revoking the will of which it is an addendum, but varying its provisions by way of making changes. Should the codicil give a legacy to one who is mentioned in the will, then, unless specifically stated as being an addition to the former bequest, then a question arises as to its being "in addition to" or "instead of" the legacy in the will.

NOTES FOR STUDENTS.

A very frequent error is to charge executors' expenses to income account. This is wrong, such expenses may be carried to income as have been actually incurred on account of income.

The object sought in obtaining probate of the will is that the executor may have a complete and legal title conferred upon him to collect, get, realize, or deal with the property of the deceased in accordance with the provisions of the will.

Regarding the payment of interest on legacies, the executor may pay the legacy within twelve months of the death of the deceased, but is not compelled to do so. He is not to pay interest for any time within the twelve months, although during that time he may have received interest. But if he has assets he is to pay interest from the end of the twelve months, whether the assets have been productive or not.

The aim of my paper is to impress the general form of trust accounts on students of accounts, the details of heavier trusts will follow in every case the lines before outlined.

Work up your draft accounts upon loose sheets of foolscap properly paged.

An accrued rent or a dividend is as much an asset as a trade book debt, and should be brought into account in the same way as in commercial accounts.

Ledger accounts ruled with two money columns, one for principal, the other for income items, are useful when taking off statements.

The gift of an annuity out of the general estate, or out of a particular fund, creates a charge on the corpus, and all payments of the annuity must be satisfied in full before anything can go over.

In the case of bank stocks, the market quotation for the same as given out by the Stock Exchange, is made up of the market price of the shares, plus the accrued interest to the date of quotation. So that when making up the corpus of an estate, among the items of which are bank stock, you must remember that the accrued interest on such shares is already included in the quoted market price.

This does not apply to debentures.

SPECIMEN ACCOUNTS OF AN ESTATE.

Re William Child, Deceased.

SUMMARY.

Testator William Child died 19th March, 1896.

Will dated 17th March, 1896.

Estate left in trust to his executors to pay therefrom his debts, funeral and testamentary expenses and legacies to beneficiaries mentioned in his will.

Directs a payment of $10,000 to his widow, Lucy Child.

Bequeaths the household furniture, stable and house to his widow absolutely.

Directs the balance of his estate to be invested in specified securities, and the income derivable therefrom to be divided equally between his wife and two sons.

Directs that on the death of his widow the investments are to be realized and the amount divided equally between his surviving children.

The widow survived her husband one year.

The trustees left investments as they received them.

In this case no duties were payable under Succession Duties Act.

SCHEDULE OF CORPUS, 19th MARCH, 1896.

Cash in house	$ 115 00
Cash in bank	24,800 00
House, furniture and other contents, stable; specifically bequeathed to widow; valued for probate	20,000 00
Sundry debtors	800 00
Accrued interest on G. T. R. debentures	250 00
Accrued interest on Imperial Bank stock, say	720 00
Mortgage of John Jones	4,000 00
Accrued interest on same	60 00
Promissory note William Smith	1,250 00
Accrued interest on same	15 00
Life Assurance Policy	10,000 00
G. T. R. debentures	11,500 00
Imperial Bank stock	16,000 00

			$ c.
1896.			
April 30..	To Funeral Expenses, transfer..............	Fo. 11	300 00
"	" Sundry Debts, "	" 12	1,500 00
July 31..	" Legacies, "	" 13	10,000 00
"	" Special Bequests, "	" 13	20,000 00
1897.			
April 14..	" Executorship Expenses..................	" 14	500 00
"	" Testamentary "	" 11	300 00
"	" John Child, half share residue	" 19	28,970 00
"	" Wm. Child, " "	" 20	28,970 00
			90,540 00

		FOLIO.	CAPITAL.	INCOME.	BANK.
1896.			$ c.	$ c.	$ c.
Mar. 19	To cash in house at death........	1	115 00	....	115 00
	" Cash in Bank at death........	1	24,800 00	....	24,800 00
May 31	" John Jones, interest..........	8	60 00	40 00	100 00
June 5	" Debts, W. Speight............	5	250 00	....	....
" 5	" " S. Cartright..........	5	300 00	....	550 00
July 3	" " J. Smith..............	5	50 00	....	50 00
" 3	" " Imperial Bank	7	720 00	80 00	800 00
" 8	" Canada Life Assurance Co....	10	10,000 00	....	10,000 00
" 13	" William Smith, loan..........	9	1,250 00	....	1,250 00
" 13	" William Smith, interest......	9	45 00	16 00	61 00
" 31	" L. Moore, debt............	5	100 00	....	100 00
Aug. 9	" Geo. May, debt...............	5	100 00	....	100 00
" 31	" G. T. R. debentures..........	6	250 00	500 00	750 00
Nov. 30	" John Jones, interest..........	8	....	100 00	100 00
1897.					
Jan. 1	" Imperial Bank, dividend......	7	....	400 00	400 00
Mar. 1	" G. T. R., dividend............	6	....	750 00	750 00
			38,040 00	1,886 00	39,926 00
1897.					
Mar. 19	To balance brought down........		25,440 00	386 00	25,826 00
April 14	" Proceeds from sale of Imperial Bank stock..............	7	16,000 00	....	16,000 00
	" Proceeds from sale of G. T. R. debentures................	6	12,500 00	....	12,500 00
	" John Jones, interest to date...	8	....	51 00	51 00
			53,940 00	437 00	54,377 00

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Date	Particulars		Fo.	$ c.
1896.				
Mar. 19..	By Cash in house at death..................		Fo. 3	115 00
	" Imperial Bank on current account.........		" 3	24,800 00
	" Special bequest to Widow; House, Furniture, Stable..........................		" 4	20,000 00
	" Debts due to testator:			
	" William Speight................	$250 00		
	" L. Moore.........................	100 00		
	" Samuel Cartright................	300 00		
	" Joseph Smith.....................	50 00		
	" George May	100 00	" 5	800 00
	" Accrued interest, G. T. R. Debentures....		" 6	250 00
	" " Bank Stock............		" 7	720 00
	" Mortgage, John Jones....................		" 8	4,000 00
	" Accrued interest on same.................		" 8	60 00
	" Promissory note, William Smith..........		" 9	1,250 00
	" Accrued interest on same.................		" 9	45 00
1897.	" Life Assurance Policy		" 10	10,000 00
April 14..	" Debentures, G. T. R......................		" 6	12,500 00
	" Imperial Bank Stock....................		" 7	16,000 00
				90,540 00

ACCOUNT. CONTRA. CR. 3.

Date		Particulars	Folio.	Capital.	Income.	Bank.
1896.				$ c.	$ c.	$ c.
April	22	By Testamentary Expenses—Probate, etc..................	11	300 00	....	300 00
		" Funeral Expenses, Bury & Co.	11	100 00	....	100 00
		" " "	11	200 00	....	200 00
May	9	" Debts of S. Wren............	12	1,000 00	....	1,000 00
"	23	" " T. Brown...........	12	500 00	....	500 00
July	31	" Legacies, Widow of Testator..	13	10,000 00	....	10,000 00
Aug.	8	" Executorship Expenses, Solicitor and Accountant's fees..	14	500 00	....	500 00
Dec.	10	" Lucy Child on account income	15	....	500 00	500 00
"	10	" John Child "	16	....	500 00	500 00
"	10	" William Child "	17	....	500 00	500 00
				12,600 00	1,500 00	14,100 00
1897.						
Mar.	19	" Balance carried down........		25,440 00	386 00	25,826 00
				38,040 00	1,886 00	39,926 00
1897.						
Mar.	20	By Lucy Child, balance income ..	15	....	128 67	128 67
"	20	" John Child, "	16	....	128 67	128 67
"	20	" William Child, "	17	....	128 67	128 67
April	14	" Exe'trs Lucy Child, ⅓ of income	15	....	17 00	17 00
"	14	" John Child, "	16	....	17 00	17 00
"	14	" William Child, "	17	....	17 00	17 00
"	14	" John Child, balance of share of residue................	19	24,970 00	....	24,970 00
"	14	" William Child, share of residue	20	28,970 00	....	28,970 00
				53,940 00	437 00	54,377 00

8. **JOHN JONES**

Dr.			Capital.	Income.
1896.			$ c.	$ c.
Mar. 19..	To Estate Capital Account—			
	Amount advanced on Mortgage of Freehold house, 36 Chancery Lane, at 5% per annum..	Fo. 1	4,000 00	
" 19..	To Estate Capital Account—			
	Proportion of interest due on mortgage to date............	" 1	60 00	
May 31..	To Income Account—			
	Balance of half year's interest..	" 18	....	40 00
Nov. 30..	To Income Account—half year's interest.	" 18	....	100 00
1897. April 14..	To Income Account—Interest to date	" 18	....	51 00
			4,060 00	191 00

6. **GRAND TRUNK**

Dr.			Capital.	Income.
	The Investment is $12,500 6% Debenture Stock.		$ c.	$ c.
1896. Mar. 19..	To Estate Capital Account........	Fo. 1	12,500 00	
" ..	" " proportion of half year's dividend to date	" 1	250 00	
Aug. 31..	To Income Account balance of ½ year's interest on Debentures	" 18	....	500 00
April 14..	" Income Account ½ year's interest	" 18	....	750 00
			12,750 00	1,250 00

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MORTGAGE ACCOUNT. 8.

			Capital.	Income. Cr.
1896.			$ c.	$ c.
Mar. 31..	By Cash..........................	Fo. 3	60 00	40 00
Nov. 31..	" "	" 3	....	100 00
1896. April 14..	" "	" 3	....	51 00
" 14..	" John Child, transfer of Mortgage as per agreement in part payment of his share of Residue.......................	" 9	4,000 00	
			4,060 00	191 00

R. R. DEBENTURES. 6.

			Capital.	Income. Cr.
1896.			$ c.	$ c.
Aug. 31..	By Cash..........................	Fo. 3	250 00	500 00
1897. Mar. 1..	....	" 3		750 00
April 14..	....	" 3	12,500 00	
			12,750 00	1,250 00

WILLIAM

Dr.			Capital.	Income.
1896.			$ c.	$ c.
Mar. 19..	To Estate Capital Account—Loan on promissory note at 6% per annum....................	Fo. 1	1,250 00	
" 19..	To Estate Capital Account—Interest due on same to date.......	" 1	45 00	
July 13..	To Income Account balance of Interest to date.............	" 18		16 00
			1,295 00	16 00

7.

IMPERIAL

Dr.			Capital.	Income.
	The Investment is 80 Shares of Imperial Bank Stock		$ c.	$ c.
1896. Mar. 19..	To Capital Account................	Fo. 1	16,000 00	
" 19..	To Estate Capital Account proportion of dividend to date...	" 1	720 00	
June 30..	To Income Account balance of ½ year's dividend on stock......	" 18		80 00
1897. Jan. 1..	To Income Acct., ½ year's interest	" 18		400 00
			16,720 00	480 00

18.

INCOME

Dr.			
1896.			$ c.
Mar. 19..	To Lucy Child, Income Account, ⅓ of income..	Fo. 15	628 67
" 19..	" John Child " "	" 16	628 67
" 19..	" William Child " "	" 17	628 66
			1,886 00
1897. April 14..	To Executors Lucy Child, Income Account to date....................................	" 15	17 00
" 14..	" John Child, Income Account to date.......	" 16	17 00
" 14..	" William Child " "	" 17	17 00
			51 00

SMITH — 9.

			CAPITAL.	INCOME. CR.
1896.			$ c.	$ c.
July 13..	By Cash....	Fo. 3	1,295 00	16 00
			1,295 00	16 00

BANK. — 7.

			CAPITAL.	INCOME. CR.
1896.			$ c.	$ c.
June 30..	By Cash..................... ..	Fo. 3	720 00	80 00
1896.				
Jan. 1..	"	" 3		400 00
April 14..	"	" 3	16,000 00	
			16,720 00	480 00

ACCOUNT. — 18.

			CR.
1896.			$ c.
May 31..	By John Jones, Balance of half-year's interest on loan, $4,000.00.	Fo. 8	40 00
June 30..	" Imperial Bank, Balance of half-year's dividend on stock........	" 7	80 00
July 13..	" William Smith, Balance of interest on loan on B.R...........................	" 9	16 00
Aug. 31..	" G. T. R., Balance of interest on debentures	" 3	500 00
Nov. 30..	" John Jones, half year's interest...........	" 8	100 00
	" Imperial Bank " "	" 7	400 00
	" G. T. R., " "	" 6	750 00
			1,886 00
1897.			
April 14..	" John Jones, interest on mortgage to date..	" 3	51 00
			51 00

4. HOUSE FURNITURE, &c. Dr. Capital. Cr.

			$ c.	$ c.
1896. Mar. 19..	To Estate Capital Account as per Probate, etc.	Fo. 1	20,000 00	
1896. Mar. 18..	By Legacies—for House, etc., Specifically bequeathed..	" 13		20,000 00

10. CANADA LIFE ASSURANCE CO. Capital.

			$ c.	$ c.
1896. Mar. 19..	To Estate Capital Account—proceeds of policy on the life of testator	Fo. 1	10,000 00	
July 8..	By Cash—Amount of Policy paid.	" 3		10,000 00

12. SUNDRY CREDITORS.

			Capital. $ c.	Income. $ c.
1896. Mar. 19..	By Estate Capital Account	Fo. 1		1,500 00
May 9..	To Cash S. Wren	" 3	10,000 00	
" 23..	" T. Brown	" 3	500 00	

13. BEQUESTS AND LEGACIES.

			Capital.	
			$ c.	$ c.
1896. Sept. 30..	To House, Furniture, Stable specifically bequeathed to widow...	Fo. 4	20,000 00	
1896. July 31..	To Lucy Child—widow	" 3	10,000 00	
	By Estate Capital Account transfer	" 1		30,000 00

14. EXECUTORSHIP EXPENSES.

			$ c.	$ c.
1896. Aug. 8..	To Cash, Lindley & Co., solicitors, and H. Quill, accountant	Fo. 3	500 00	
1897. Mar. 19..	By Estate Capital Account	" 1		500 00

5. SUNDRY DEBTORS. Capital.

Date		Fo.		Dr. $ c.	Cr. $ c.
1896.					
Mar. 19..	To Estate Capital Account for Sundry debts owing to Testator at Death..................	Fo.	1		
	W. Speight............. ..	"	1	250 00	
	L. Moore	"	1	100 00	
	Samuel Cartright..........	"	1	300 00	
	I. Smith....................	"	1	50 00	
	George May................	"	1	100 00	
June 5..	By Cash W. Speight............	"	3	....	250 00
" 5..	" " S. Cartright..	"	3	....	300 00
	" " I. Smith................	"	3	....	50 00
July 31..	" " L. Moore..............	"	3	....	100 00
Aug. 9..	" " G. May.................	"	3	....	100 00
				800 00	800 00

11. TESTAMENTARY AND FUNERAL EXPENSES.

Date		Fo.		$ c.	$ c.
1896.					
April 22..	To Cash Bigwig & Co. for Probate and Law expenses attending thereto	Fo.	3	300 00	
	To Cash Bury & Co............ .	"	3	100 00	
	" " Spark & Son............	"	3	200 00	
1897.					
Mar. 31..	By Estate Capital account transfer	"	1	....	300 00
	" " " " "	"	1	....	300 00
				600 00	600 00

12. LUCY CHILD—Income Account.

Date		Fo.		Dr. $ c.	Cr. $ c.
1896.					
Dec. 10..	To cash on account of income ...	Fo.	3	500 00	
1897					
Mar. 20..	" " balance of income........	"	3	128 67	
" "..	By Income Account, ⅓ of income year ending this date.........	"	18	....	628 67
1897.					
April 14..	To Cash on account of income....	"	3	17 00	
	By Income Account per Executors ⅓ of amount..................	"	18	....	17 00

16. JOHN CHILD—Income Account. Dr. Cr.

			$ c.	$ c.
1896. Dec. 10..	To Cash on account of income....	Fo. 3	500 00	
1897. Mar. 20..	" " balance of income........	" 3	128 67	
" " ..	By Income Account, ⅓ of income year ending this date	" 18	....	628 67
1897. April 14..	To Cash on account of income....	" 3	17 00	
" " ..	By Income Account, ⅓ of amount..	" 18	....	17 00

17. WILLIAM CHILD—Income Account.

			$ c.	$ c.
1896. Dec. 10..	To Cash on account of income....	Fo. 3	500 00	
1897. Mar. 20..	" " balance of income........	" 3	128 67	
" " ..	By Income Account, ⅓ of income year ending this date	" 18	....	628 67
1897. April 14..	To Cash on account of income....	" 3	17 00	
" " ..	By Income Account, ⅓ of amount	" 18	....	17 00

19. JOHN CHILD—(Share of Residue Account.)

			$ c.	$ c.
1897. April 14..	To John Jones (Mortgage Account) transfer as per agreement of $4,000.00 Mortgage in part payment of share of Residue..	Fo. 8	4,000 00	
April 14..	To Cash balance of Residue......	" 3	24,970 00	
	By Estate Capital Account, ½ share of Residue at this date..	" 1	....	28,970 00
			28,970 00	28,970 00

20. WILLIAM CHILD—(Share of Residue Account.)

			$ c.	$ c.
1897. April 14..	To Cash Share of Residue........	Fo. 3	28,970 00	
" 14..	By Estate Capital Account for ½ share of Residue at this date..	" 1	....	28,970 00
			28,970 00	28,970 00

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APPENDIX I.

COLONIAL PROBATES ACT.

20th May, 1892.

An Act to provide for the Recognition in the United Kingdom of Probates and Letters of Administration granted in British Possessions.

1. Her Majesty the Queen may, on being satisfied that the Legislature of any British possession, has made adequate provision for the recognition in that possession of Probates and Letters of Administration granted by the courts of the United Kingdom, direct by Order-in-Council that the Act shall, subject to any exceptions and modifications specified in the order, apply to that possession, and thereupon, while the order is in force, this Act shall apply accordingly.

2. (1) Where a Court of Probate in a British possession to which this Act applies has granted probate or letters of administration in respect of the estate of a deceased person, the probate or letters so granted may, on being produced to, and a copy thereof deposited with a court of Probate in the United Kingdom, be sealed with the seal of that court, and thereupon, shall be of the like force and effect, and have the same operation in the United Kingdom, as if granted by that court.

(2) Provided, that the Court shall, before sealing a probate or letters of administration under this section, be satisfied—

(*a*) that probate duty has been paid in respect of so much (if any) of the estate as is liable to probate duty in the United Kingdom; and

(*b*) in the case of letters of administration, that security has been given in a sum sufficient in amount to cover the property (if any) in the United Kingdom to which the letters of administration relate; and may require such evidence, if any, as it thinks fit as to the domicile of the deceased person.

(3) The court may also, if it thinks fit, on the application of any creditor, required before sealing,, that adequate security be given for the payment of debts due from the estate to creditors residing in the United Kingdom.

(4) For the purposes of this section, a duplicate of any probate or letters of administration sealed with the seal of the Court granting the same, or a copy thereof certified as correct by or under the authority of the Court granting the same, shall have the same effect as the original.

(5) Rules of Court may be made for regulating the procedure and practice, including fees and costs, in courts of the United Kingdom, on and incidental to an application for sealing a probate or letters of administration granted in a British possession to which this Act applies. Such rules shall, as far as they relate to probate duty, be made with the consent of the Treasurer, and subject to any exceptions and modifications made by such rules, the enactments for the time being in force in relation to probate duty (including the penal provisions thereof) shall apply as if the person who applies for sealing under this section were a person applying for probate or letters of administration.

3. This Act shall extend to authorize the sealing in the United Kingdom of any probate or letters of administration granted by a British Court in a foreign country, in like manner as it authorizes the sealing of a probate or letters of administration granted in a British possession to which this Act applies, and the provisions of this Act shall apply accordingly with the necessary modifications.

4. (1) Every Order-in-Council made under this Act shall be laid before both Houses of Parliament, as soon as may be after it is made, and shall be published under the authority of Her Majesty's Stationery Office.

(2) Her Majesty the Queen in Council may revoke or alter any Order-in-Council previously made under this Act.

(3) Where it appears to Her Majesty in Council that the legislature of part of a British possession has power to make the provision requisite for bringing this Act into operation in that part, it shall be lawful for Her Majesty to direct by Order-in-Council that this Act shall apply to that part as if it were a separate British possession, and thereupon, while the order is in force, this Act shall apply accordingly.

5. This Act, when applied by an Order-in-Council to a British possession, shall, subject to the provisions of the order, apply to probates and letters or administration granted in that possession either before or after the passing of this Act.

6. In this Act—

The expression "court of probate" means any court of authority by whatever name designated, having jurisdiction in matters of probate, and in Scotland means the Sheriff Court of the county of Edinburgh.

The expressions "probate" and "letters of administration" include confirmation in Scotland, and any instrument having in a British possession the same effect which under English law is given to probate and letters of administration respectively.

The expression "probate duty" includes any duty payable on the value of the estate and effects for which probate or letters of administration is or are granted.

The expression "British Court in a foreign country," means any British Court having jurisdiction out of the Queen's dominions in pursuance of an Order-in-Council, whether made under any Act or otherwise.

7. This Act may be cited as the Colonial Probates Act, 1892.

APPENDIX II.

CROWN ADMINISTRATION ACT.

R. S. O. 1914, CH. 73.

An Act respecting the administration by the Crown of Estates of Intestates.

1. This Act may be cited as The Crown Administration of Estates Act.

2. Where the Lieutenant-Governor, by a warrant under his privy seal, directs the Attorney-General of Ontario to obtain letters of administration general or limited of the estate of any person dying intestate, or intestate as to some part of his estate, where, in respect of the interest of His Majesty, the administration may be rightfully granted to his nominee, any

competent court, upon application, in pursuance of the warrant, may grant administration to the Attorney-General for the use and benefit of His Majesty.

3. Where any person dies in Ontario intestate as aforesaid, and without leaving any known relative living within Ontario, or any known relative who can be readily communicated with, living elsewhere, the Lieutenant-Governor may by warrant under his privy seal direct the Attorney-General to obtain letters of administration, general or limited, of the estate of such person; and any competent court upon application in pursuance of the warrant may grant administration to the Attorney-General for the use and benefit of His Majesty or of such persons as may ultimately appear to be entitled thereto.

4. The administration so granted, and the office of administrator under the grant, with all the estates, rights, duties and liabilities of such administrator, shall, upon the death, resignation, or removal of the Attorney-General for the time being, devolve upon and become vested and continue in the succeeding Attorney-General, by virtue of his appointment, and so in perpetual succession, without any further grant of administration or any assignment or transfer of the estates of the administrator; and all actions, and other proceedings by or against the Attorney-General for the time being, as such administrator at the time of his death, resignation, or removal, shall continue, and may be proceeded with, by, in favour of, and against the succeeding Attorney-General; saving always, the effect of every limitation in duration or otherwise under the terms of the grant of such administration, and saving to every court having jurisdiction in this behalf all such right and authority to revoke or repeal such administration as the court would have had during the continuance of a like administration granted to a nominee of His Majesty if this Act had not been passed.

5. It shall not be necessary for the Attorney-General to give security for the due administration of the estate, but he shall have all the rights and powers of and be subject to all the liabilities and duties imposed on an administrator.

6. Where administration is granted to the Attorney-General, the Lieutenant-Governor in Council may direct the sale, by auction or private sale, of any real estate or interest therein in Ontario to which the intestate died entitled; and the Attorney-General shall thereupon be authorized to sell in accordance with the directions of the Order in Council the whole, or any part of such real estate or interest, and to convey the same to the purchaser; and every conveyance by the Attorney-General shall be as valid and effectual as if the deceased were alive at the time of the making thereof, and had executed the same.

7. Where subsequently to the grant of administration it is alleged or ascertained that the deceased has relatives or did not die intestate, the Attorney-General, subject to the direction of the Lieutenant-Governor in Council, may exercise all or any of the powers by this Act conferred until some person is appointed by a court of competent jurisdiction to deal with the estate of the deceased; and notwithstanding such appointment, any sale made in pursuance of this Act may be completed by the execution by the Attorney-General of a conveyance; and until the revocation of the letters granted, the Attorney-General may exercise fully all the powers vested in him as administrator.

8. Where administration is granted under the provisions of this Act, the Attorney-General may apply to the Supreme Court for an order for the making of such inquiries as may be necessary to determine whether or not His Majesty is entitled to any portion of the estate of the deceased by reason of the deceased having died intestate and without heirs or next of kin, or otherwise; and any judgment pronounced upon such inquiry shall, unless reversed on appeal, be final and conclusive.

9. Where a person dies in possession of or entitled to real estate in Ontario, intestate as to such real estate without any known heirs, the

Attorney-General without obtaining letters of administration may bring an action, either in his own name, on behalf of His Majesty, or in the name of His Majesty, to recover possession of such real estate and shall be entitled to judgment and to recover possession, unless the person claiming adversely shews that the deceased did not die intestate, as to such real estate, or that he left heirs, or that he or some other person is entitled to such real estate.

10. Where a person has died or dies intestate in Ontario and administration has been or may be hereafter granted to some person not one of the next of kin, and it is doubtful whether the intestate left any next of kin him surviving, or there are no known next of kin resident in Ontario, the Attorney-General may apply to the Supreme Court for an order requiring the administrator to account for his dealings with the estate, and may question in such proceedings the validity of any release or settlement with any alleged next of kin, and any competent Court may revoke such administration, and grant administration to the Attorney-General.

11. Moneys realized from estates to which the Attorney-General is administrator under this Act or which he has recovered under section 9, shall be kept in a separate account in such bank or invested in such manner as the Lieutenant-Governor in Council may appoint, and all such money which has been unclaimed for ten years shall be paid into the Consolidated Revenue Fund.

12. Any person proving title to such money shall be entitled to receive the same with interest at such rate as the Lieutenant-Governor in Council may direct.

13. Any person claiming to be entitled to any such estate or to any interest therein or to any part of the proceeds thereof, may apply to the Supreme Court for a judgment or order declaring his rights in respect thereto; and the court may direct such inquiries as may be necessary to determine the same, and may finally adjudicate thereon; but no application under this section shall be entertained unless security for costs is given by the applicant if the Attorney-General demands the same.

14. The Attorney-General may deduct from the money received on account of any estate all disbursements made by him in respect to inquiries which he may have made before taking out letters of administration, as well as disbursements otherwise made by him in respect to the estate.

15.—(1) After having given the notice provided for by The Trustee Act, and notwithstanding that the ten years limited by section 11 of this Act have not elapsed, the Attorney-General may pay any money remaining in his hands unclaimed into the Consolidated Revenue Fund or may pay the same or any part thereof, or assign any personal property remaining in his hands, in accordance with any direction of the Lieutenant-Governor in Council, made under section 6 of The Escheats Act.

(2) In such case no claim shall be maintained against His Majesty or this Province, in respect of any money or personal property paid over or assigned to any person under section 6 of The Escheats Act, or under this Act; but this shall not prejudice the right of a creditor or claimant to follow such money, property or proceeds into the hands of the person who may have received the same under the authority of an Order in Council.

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APPENDIX III.

MORTMAIN ACT.

R. S. O. 1914, CH. 103.

An Act respecting Mortmain and the Disposition of Land for Charitable Uses.

1. This Act may be cited as The Mortmain and Charitable Uses Act.

2.—(1) In this Act,

(a) "Assurance" shall include a gift, conveyance, appointment, lease, transfer, settlement, mortgage, charge, incumbrance, devise, bequest and every other assurance by deed, will or other instrument; and "-Assure" and "Assuror" shall have meanings corresponding with assurance;

(b) "Will" shall include codicil;

(c) "Land" shall include tenements and hereditaments corporeal and incorporeal of whatever tenure, but not money secured on land, or other personal estate arising from or connected with land;

(d) "Full and valuable consideration" shall include such a consideration either actually paid upon or before the making of the assurance, or reserved or made payable to the vendor or any other person by way of rent, rent-charge, or other annual payment, in perpetuity, or for any term of years, or other period, with or without a right of re-entry for non-payment thereof, or partly paid and partly reserved, as aforesaid.

Imp. Acts, 51-52 Vict., c. 42, s. 10, and 54-55 Vict. c. 73, s 3.

(2) The following shall be deemed to be charitable uses within the meaning of this Act;

(a) The relief of poverty;

(b) Education;

(c) The advancement of religion; and

(d) Any purpose beneficial to the community, not falling under the foregoing heads.

Imp. Act 43 Eliz. c. 4, s. 1.

PART I.

MORTMAIN.

3. Land shall not be assured to or for the benefit of, or acquired by or on behalf of any corporation in mortmain, otherwise than under the authority of a license from His Majesty, or of a statute for the time being in force, and if any land is so assured, otherwise than as aforesaid, the land shall be forfeited to His Majesty from the date of the assurance, and His Majesty may enter on and hold the land accordingly.

Imp. Act, 51-52 Vict., c. 42, s. 1.

4. The Lieutenant-Governor in Council, if and when, and in such form as he thinks fit, may grant to any person or corporation a license to assure land in mortmain in perpetuity or otherwise, and may grant to any cor-

poration a license to acquire land in mortmain, and to hold such land in perpetuity or otherwise.

Imp. Act, 51-52 Vict., c. 42, s. 2.

5. No entry or holding by, or forfeiture to His Majesty under this part, shall merge or extinguish, or otherwise affect, any rent or service which may be due in respect of any land to His Majesty.

Imp. Act, 51-52 Vict., c. 42, s. 3.

PART II.

CHARITABLE USES.

6. Save as herein otherwise provided, every assurance other than by will, of land or personal estate to be laid out in the purchase of land to or for the benefit of any charitable use shall be void unless made,

(a) To take effect in immediate possession for such charitable use;

(b) Without any power of revocation, reservation, condition or provision for the benefit of the assuror or of any person claiming under him; and

(c) At least six months before the death of the assuror, and if of stock in the public funds by transfer thereof in the public books kept for the transfer of stock at least six months before such death;

Provided that the assurance or any instrument forming part of the same transaction may contain all or any of the following conditions, so however that they reserve the same benefits to persons claiming under the assurer as to the assuror himself, namely:

(i) The grant or reservation of a peppercorn or other nominal rent;

(ii) The grant or reservation of mines or minerals;

(iii) The grant or reservation of any easement;

(iv) Covenants or provisions as to the erection, repair, position, or description of buildings, the formation or repair of streets or roads, or as to drainage or nuisances, and covenants or provisions of the like nature for the use and enjoyment as well of the land comprised in the assurance as of any other adjacent or neighbouring land;

(v) A right of entry on non-payment of any such rent or on breach of any such covenant or provision; or

(vi) Any stipulations of the like nature for the benefit of the assuror or of any person claiming under him; and

Provided that nothing in this section contained shall apply to or affect any such assurance made for full and valuable consideration.

7.—(1) Subject to the provisions hereinafter contained, where land is assured otherwise than by will to or for the benefit of any charitable use the same shall, notwithstanding anything contained in the deed or other instrument of assurance be sold within two years from the date of the assurance or within such extended period as may be determined by the Supreme Court or a Judge thereof.

(2) If the land is not sold within the two years or within such extended period it shall vest forthwith in the Accountant of the Supreme Court and sub-section 2 of section 10 shall apply thereto.

(3) The Supreme Court or a Judge thereof if satisfied that the land so assured is required for actual occupation for the purposes of the charity and not as an investment may by order sanction the retention of such land.

PART III.

EXEMPTIONS.

8.—(1) In this section,

(a) "Public park" shall include any park, garden, or other land dedicated or to be dedicated to the recreation of the public;

(b) "School" shall mean a school, or department of a school, at which education is given in literature, art, science or mathematics;

(c) "School house" shall include the teacher's dwelling house, the playground, if any, and the offices and premises belonging to or required for a school;

(d) "Public museum" shall include buildings used, or to be used, for the preservation of a collection of paintings or other works of art, or of objects of natural history, or of mechanical, scientific or philosophical inventions, instruments, models or designs, and dedicated or to be dedicated to the recreation of the public, together with any libraries, reading rooms, laboratories and other offices and premises used or to be used in connection therewith.

Imp. Act, 51-52 Vict., c. 42, s. 6.

(2) Notwithstanding anything in this Act, land or personal estate to be laid out in the purchase of land may be assured for the following purposes, viz.:

(a) For a public park;
(b) For a public museum;
(c) For a public library;
(d) For a school or school house.

(3) Land assured for the purposes of a school or school house and not required for actual use and occupation for such purpose or the part thereof not so required shall be sold within two years from the date of the assurance or in the case of a will, from the death of the testator or such extended period as may be determined by the Supreme Court or a Judge thereof, and the provisions of sub-section 2 of section 10, and of sections 12 and 13, shall apply.

9. Sections 3 and 6 shall not apply to the following assurances:

(a) An assurance of land or personal estate to be laid out in the purchase of land, to or in trust for any incorporated university, college or school in Ontario, or for the support and maintenance of the students thereat.

(b) An assurance, otherwise than by will, to trustees on behalf of any society or body of persons, incorporated or unincorporated, associated together for religious purposes, or for the promotion of education, art, literature, science or other like purposes, of land not exceeding two acres, for the erection thereon of a building for such purposes, or any of them, or whereon a building used or intended to be used for such purposes, or any of them, has been erected.

Imp. Act, 51-52 Vict., c. 42, s. 7.

PART IV.

LANDS DEVISED BY WILL.

10.—(1) Land may be devised by will to or for the benefit of any charitable use, but, except in the cases provided for by sections 8 and 9 and except as herein otherwise provided, shall, notwithstanding anything in the will contained to the contrary, be sold within two years from the death of the testator, or such extended period as may be determined by the Supreme Court or a Judge thereof.

(2) So soon as the two years or such extended period shall have expired without the completion of the sale of the land, the land shall vest forthwith in the Accountant of the Supreme Court; and the Supreme Court shall cause the same to be sold, or the sale completed, as the case may be, with all reasonable speed by the administering trustees thereof for the time being; and for this purpose may make orders directing such trustees to proceed with the sale or completion of the sale of such land, or removing such trustees and appointing others, and may provide by any such order or otherwise for the payment of the proceeds of the sale to the trustees in trust for the charity; and for the payment of the costs and expenses incurred by them or otherwise in or connected with such sale and proceedings.

11. Any personal estate by will directed to be laid out in the purchase of land to or for the benefit of any charitable use, shall, except as hereinafter provided, be held to or for the benefit of the charitable use as though there had been no direction to lay it out in the purchase of land.

12. The Supreme Court, or a Judge thereof, if satisfied that land devised by will to or for the benefit of any chairtable use, or proposed to be purchased out of personal estate by will directed to be laid out in the purchase of land, is required for actual occupation for the purposes of the charity, and not as an investment, may by order sanction the retention or acquisition, as the case may be, of such land.

13. The jurisdiction of the Supreme Court under this Act may be exercised by a Judge in Chambers or otherwise, and in a summary manner so as to avoid all unnecessary expense.

PART V.

GIFTS AND BEQUESTS TO CERTAIN PUBLIC BODIES.

14.—(1) The Government of Ontario, a municipal corporation, a school board, a public library board or association, a public hospital board and trustees empowered to administer or hold property for charitable uses may have, take, hold and enjoy by gift, grant, devise, conveyance or bequest, real or personal property of any nature or kind and wherever situate, whether within or without Ontario, or the proceeds thereof upon the terms expressed in the gift, grant, devise, bequest or conveyance whereby the same is given, granted, devised, bequeathed or conveyed to such body.

(2) Any such body may, subject always to the provisions of the Act by or under the authority of which it exists and to any law regulating or limiting its power to contract debts, enter into an agreement for the holding, management, administration or disposition of any such property with the person giving, granting, conveying, devising or bequeathing the same to such public body upon such terms as may be agreed upon between the parties to any such gift, grant, devise, bequest or conveyance.

(3) Land so given, granted, devised, bequeathed or conveyed and not required for actual use and occupation for the purpose of the trust upon which it was given, granted, devised, conveyed or assured to such public body, shall be sold within two years from the date of the gift, grant, devise, conveyance or assurance or in the case of a will from the death of the testator or such extended period as may be determined by the Supreme Court or a Judge thereof and the provisions of sub-section 2 of section 10 and of sections 12 and 13 shall apply.

(4) This section shall apply to gifts, grants, devises, bequests and conveyances heretofore made as well as to such as may hereafter be made.

PART VI.

SUPPLEMENTAL.

15.—(1) In every case of a breach or supposed breach of any trust created for charitable purposes, or whenever the direction or order of a court shall be deemed necessary for the administration of any trust for charitable purposes, any two or more persons may present a petition to the Supreme Court stating such complaint and praying such relief as the nature of the case may require, and the court may hear such petition in a summary way, and upon such affidavits, or such other evidence as shall be produced upon such hearing, may determine the same, and make such order therein, and with respect to the costs of such application, as shall seem just; and any order so made shall be subject to appeal as if made in an action.

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(2) Every such petition shall be signed by the persons preferring the same in the presence of and shall be attested by their solicitor, and shall be submitted to and may be allowed by the Attorney-General, and such allowance shall be certified by him before any such petition shall be presented.

Imp. 52 Geo. III. c. 101, s. 1.

16. Nothing in this Act shall apply so as to limit or restrict the right possessed by any corporation under any other Act, or affects any charter or license in force at the passing of this Act enabling land to be assured or held in mortmain.

APPENDIX IV.

DEVOLUTION OF ESTATES ACT.

R. S. O. 1914, CH. 119.

1. This Act may be cited as The Devolution of Estates Act.

2. In this Act.

(a) "Lunatic" shall include an idiot and a person of unsound mind.

(b) "Personal representative" shall mean and include an executor, administrator, and an administrator with the will annexed.

DEVOLUTION TO PERSONAL REPRESENTATIVE OF DECEASED.

3.—(1) All real and personal property which is vested in any person without a right in any other person to take by survivorship shall, on his death, whether testate or intestate, and notwithstanding any testamentary disposition, devolve to and become vested in his personal representative from time to time as trustee for the persons by law beneficially entitled thereto and, subject to the payment of his debts, and so far as such property is not disposed of by deed, will, contract or other effectual disposition, the same shall be administered, dealt with and distributed as if it were personal property not so disposed of.

Imp. Act. 60-61 Vict. c. 65, s. 1.

IDEM WHERE UNDER APPOINTMENT.

(2) This section shall apply to property over which a person executes by will a general power of appointment as if it were property vested in him.

EXCEPTIONS.

(3) This section shall not apply to estates tail or to the personal property, except chattels real, of any person who, at the time of his death, is domiciled out of Ontario.

ADMINISTRATION OF REAL PROPERTY.

APPLICATION OF ENACTMENTS AS TO PROBATE, ETC., ETC. EXCEPTION.

4. The enactments and rules of law relating to the effect of probate or letters of administration as respects personal property and as respects the dealings with personal property before probate or administration and as respects the payment of costs of administration and other matters in

relation to the administration of personal estate and the powers, rights, duties and liabilities of personal representatives in respect of personal estate, shall apply to real property vesting in them, so far as the same are applicable as if that real property were personal property, save that it shall not be lawful for some or one only of several joint personal representatives without the authority of the Supreme Court or a Judge thereof to sell or transfer real property.

Imp. Act. 60-61 Vict. c. 65 (2).

Real and Personal Property Assimilated in Matters of Administration.

5. Subject to the other provisions of this Act, in the administration of the assets of a deceased person, his real property shall be administered in the same manner, subject to the same liability for debts, costs and expenses and with the same incidents as if it were personal property, but nothing in this section shall alter or affect as respects real or personal property of which the deceased has made a testamentary disposition the order in which real and personal assets are now applicable to the payment of funeral and testamentary expenses, the costs and expenses of administration, debts or legacies, or the liability of real property to be charged with the payment of legacies.

Imp. Act 60-61 Vict. c. 65, s. 2 (3).

PAYMENT OF DEBTS OUT OF RESIDUE.

Payment of Debts out of Residuary Estate

6. Subject to provisions of section 38 of The Wills Act the real and personal property of a deceased person comprised in any residuary devise or bequest shall, except so far as a contrary intention appears from his will or any codicil thereto, be applicable ratably, according to their respective values, to the payment of his debts, funeral and testamentary expenses and the cost and expenses of administration.

How Far Personal Representatives to be Deemed "Heirs."

7. When any part of the real property of a deceased person vests in his personal representative under this Act such personal representative, in the interpretation of any Act of this legislature, or in the construction of any instrument to which the deceased was a party, or under which he is interested, shall, while the estate remains in him, be deemed in law his heir, as respects such part, unless a contrary intention appears; but nothing in this section shall affect the beneficial right to any property, or the construction of words of limitation of any estate in or by any deed, will or other instrument.

MORTGAGES, TRUST ESTATES AND DOWER.

Trust Estates and Interests of Mortgagees.

8. Where an estate or interest of inheritance in real property is vested on any trust or by way of mortgage in any person solely, the same shall on his death, notwithstanding any testamentary disposition, devolve to and become vested in his executor or administrator in like manner as if the same were personal estate vesting in him and, accordingly, all the like powers for one only of several joint executors or administrators as well as for a single executor or administrator and for all the executors and administrators together to dispose of and otherwise deal with the same shall belong to the deceased's executor or administrator with all the like incidents but subject to all the like rights, equities and obligations as if the same were personal estate vesting in him, and for the purposes of this section the executor or administrator of the deceased shall be deemed in law his heirs and assigns, within the meaning of all trusts and powers.

Imp. Act 44-45 Vict. c. 41, s. 30.

SAVING AS TO DOWER AND RIGHT OF ELECTION.

9.—(1) Nothing in this Act shall take away a widow's right to dower; but a widow may by deed or instrument in writing, attested by at least one witness, elect to take her interest under this Act in her husband's undisposed of real property in lieu of all claim to dower in respect of the real property of which her husband was at any time seised, or to which at the time of his death he was beneficially entitled; and unless she so elects she shall not be entitled to share in the undisposed of real property.

IDEM.

(2) The personal representative of the deceased may, by notice in writing, require his widow to make her election, and if she fails to execute and deliver a deed or instrument of election to him within six months after the service of the notice she shall be deemed to have elected to take her dower.

WHERE WIDOW UNDER DISABILITY.

(3) Where the widow is an infant or a lunatic the right of election may be exercised on her behalf by the Official Guardian, with the approval of a Judge of the Supreme Court or by some person authorised by a Judge of a Supreme Court to exercise it; and the Official Guardian or the person so authorized may, for and in the name of the widow, give all notices and do all acts necessary or incidental to the exercise of such right.

WHO TO BE DEFENDANTS IN ACTION FOR FORECLOSURE WHERE NO PERSONAL REPRESENTATIVE OF MORTGAGOR.

10.—(1) Where there is no legal personal representative of a deceased mortgagor of freehold property it shall be sufficient, for the purposes of an action, for the foreclosure of the equity of redemption in, or for the sale of, such property that the person beneficially entitled under the last will and testament, if any, of the deceased mortgagor, or under the provisions of this Act, to such property or the proceeds thereof, be made defendant to such action, and it shall not be necessary that a legal personal representative of the deceased mortgagor be appointed or be made a defendant thereto unless it shall be otherwise ordered by the court in which the action is brought or by a Judge thereof; but if, during the pendency of such action, the equity of redemption devolves upon and becomes vested in a legal personal representative of the mortgagor he shall be made a party to the action.

"MORTGAGOR," MEANING OF.

(2) In subsection 1 the word "mortgagor" shall include the assignee of a mortgagor and any person entitled to or interested in the equity of redemption.

APPLICATION FOR ORDER ALLOWING SALE FREE OF DOWER OR CURTESY.

11.—(1) Where the personal representative desires to sell any real property devolving upon him free from curtesy or dower he may apply to a Judge of the Supreme Court, who may, in a summary way, and upon notice, to be served personally unless the Judge otherwise directs, order that the same shall be sold free from the right of the tenant by the curtesy or dowress; and in making such order regard shall be had to the interests of all parties.

EFFECT.

(2) If a sale free from such curtesy or dower is ordered all the right and interest of such tenant by the curtesy or dowress shall pass thereby; and no conveyance or release thereof to the purchaser shall be required; and the purchaser, his heirs and assigns, shall hold the real property freed and discharged from the estate or interest of such tenant by the curtesy or dowress.

PAYMENT IN SATISFACTION OF DOWER OR CURTESY.

(3) The Judge may direct the payment of such sum in gross out of the purchase money to the person entitled to the curtesy or dower as

he may deem, upon the principles applicable to life annuities, a reasonable satisfaction for such estate or interest; or may direct the payment to the person entitled of an annual sum, or of the income or interest to be derived from the purchase money or any part thereof, as he may deem just, and for that purpose may make such order for the investment or other disposition of the purchase money or any part thereof as he may deem necessary.

WIDOW'S PREFERENTIAL SHARE WHERE ESTATE DOES NOT EXCEED $1,000.

12.—(1) The real and personal property of every man dying intestate and leaving a widow but no issue shall, where the net value of such real and personal property does not exceed $1,000, belong to his widow absolutely and exclusively.

WHERE ESTATE EXCEEDS $1,000.

(2) Where the net value exceeds $1,000 the widow shall be entitled to $1,000 part thereof, absolutely and exclusively, and shall have charge thereon for such sum with interest thereon from the date of the death of the intestate at 4 per centum per annum until payment.

WIDOW'S SHARE IN REMAINDER OF ESTATE.

(3) The provision for the widow made by this section shall be in addition and without prejudice to her interest and share in the residue of the real and personal property of the intestate remaining after payment of such sum of $1,000 and interest in the same way as if such residue had been the whole of the intestate's real and personal property, and this section had not been enacted.

WHERE ESTATE CONSISTS OF REAL PROPERTY.

(4) Where the estate consists in whole or in part of real property this section shall apply only if the widow elects under section 9 to take an interest in her husband's undisposed of real property in lieu of dower.

"NET VALUE," MEANING OF.

(5) In this section "net value" shall mean the value of the real and personal property after payment of the charges thereon and the debts, funeral expenses and expenses of administration, including succession duty.

VESTING OF ESTATES AND CAUTIONS.

VESTING OF REAL ESTATE NOT DISPOSED OF WITHIN THREE YEARS. UNLESS CAUTION REGISTERED.

13.—(1) Real property not disposed of, conveyed to, divided or distributed among the persons beneficially entitled thereto, under the provisions of section 21, by the personal representative within three years after the death of the deceased shall, subject to the Land Titles Act in the case of land registered under that Act, at the expiration of that period, whether probate or letters of administration have or have not been taken, be thenceforward vested in the persons beneficially entitled thereto under the will or upon the intestacy or their assigns without any conveyance by the personal representative, unless such personal representative, if any, has registered, in the proper registry or land titles office, a caution, Form 1, under his hand, and if such caution is so registered such real property or the part thereof mentioned therein shall not be so vested for twelve months from the time of registration of such caution or of the last caution if more than one are registered.

VERIFICATION.

(2) The execution of every caution shall be verified by the affidavit of a subscribing witness in the manner prescribed by the Registry Act, or the Land Titles Act, as the case may be.

EFFECT.

(3) Where the caution specifies certain parcels of land it shall be effectual as to those parcels only.

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WITHDRAWAL OF CAUTION.

(4) The personal representative, before the expiration of the twelve months, may register a certificate, Form 2, withdrawing the caution; or withdrawing the same as to any parcel of land specified in such certificate and, upon registration of the certificate, the property or the parcel specified shall be treated as if the caution had expired.

VERIFICATION.

(5) The certificate of withdrawal shall be verified by an affidavit of a subscribing witness, Form 3.

RENEWAL OF CAUTION.

(6) Before a caution expires it may be re-registered, and so on from time to time as long as the personal representative deems it necessary, and every caution shall continue in force for twelve months from the time of its registration or re-registration.

ORDINARY RIGHTS OF EXECUTORS, ETC., PRESERVED.

14. Nothing in section 13 shall derogate from any right possessed by an executor or administrator with the will annexed under a will or under the Trustee Act or from any right possessed by a trustee under a will.

REGISTRATION OF CAUTION AFTER THREE YEARS FROM DEATH OF TESTATOR.

15.—(1) Where a personal representative has not registered a caution within the proper time after the death of the deceased, or has not re-registered a caution within the proper time, he may register or re-register the caution, as the case may be, provided he registers therewith.

(a) The affidavit of execution.

(b) A further affidavit stating that he finds or believes that it is or may be necessary for him to sell the real property of the deceased or the part thereof mentioned in the caution, under his powers and in fulfilment of his duties; and as far as they are known to him, the names of all persons beneficially interested in the real property, and whether any, and if so which of them, are infants or lunatics.

(c) The consent in writing of every adult and of the Official Guardian on behalf of every infant and lunatic whose property or interest would be affected; and an affidavit verifying such consent; or

(d) In the absence and in lieu of such consent an order of a Judge of the Supreme Court or of the County or District Court of the county or district wherein the property or some part thereof is situate, or the certificate of the Official Guardian authorizing the caution to be registered, or re-registered, which order or certificate the Judge or Official Guardian may make with or without notice on such evidence as satisfies him of the propriety of permitting the caution to be registered or re-registered; and the order or certificate to be registered shall not require verification and shall not be rendered null by any defect of form or otherwise.

APPLICATION OF THIS SECTION.

(2) This section shall extend to cases where a grant of probate of the will or of administration to the estate of the deceased may not have been made within the period after the death of the testator or intestate within which a caution is required to be registered.

EFFECT OF SUCH REGISTRATION.

(3) Where a caution is registered or re-registered, under the authority of this section, it shall have the same effect as a caution registered within the proper time after the death of the deceased and of vesting or re-vesting, as the case may be, the real property of the deceased in his personol representative, save as to persons who in the meantime have acquired rights for valuable consideration from or through any person beneficially entitled; and save also and subject to any equities of any non-consenting

person beneficially entitled, or person claiming under him, for improvements made after the time within which the personal representative might, without any consent, order or certificate, have registered or re-registered a caution, if his real property is afterwards sold by the personal representative.

SIGNATURE TO CAUTION.

(4) Where there are two or more personal representatives it shall be sufficient if any caution or the affidavit mentioned in clause (b) of subsection 1 is signed or made by one of such personal representatives.

EFFECT OF REPEALING ENACTMENT.

16. Where a caution has been registered or re-registered under the authority of any enactment repealed and not re-enacted by this Act and is still in force, such caution shall have the same effect as if such enactment had not been repealed and may be registered in the manner provided by section 13.

VACATING CAUTION.

17. Any person beneficially entitled to any real property affected by the registration or re-registration of a caution may apply to a Judge of the Supreme Court to vacate such registration or re-registration, and the Judge, if satisfied that the vesting of any such real property in such person or of any property of the deceased in any other of the persons beneficially entitled ought not to be delayed, may order that such registration or re-registration be vacated as to such property; and every caution, the registration or re-registration of which is so vacated, shall thereafter cease to operate.

LAND VESTING IN TWO OR MORE PERSONS.

18. Where real property becomes vested under this Act in two or more persons beneficially entitled under this Act, they shall take as tenants in common in proportion to their respective rights, unless in the case of a devise they take otherwise under the provisions of the will of the deceased.

POWERS OF PERSONAL REPRESENTATIVE.

SALES WHERE INFANTS INTERESTED.

19.—(1) Where an infant is interested in real property which but for this Act would not devolve on the personal representative, no sale or conveyance shall be valid under this Act without the written approval of the Official Guardian appointed under the Judicature Act, or, in the absence of such consent or approval, without an order of a Judge of the Supreme Court.

LOCAL GUARDIAN IN OUTER COUNTIES.

(2) The Supreme Court may appoint the Local Judge of any county or district or the Local Master therein, as Local Guardian of Infants, in such county or district during the pleasure of the court, with authority to give such written approval instead of the Official Guardian; and the Official Guardian and Local Guardian shall be subject to such rules as the Supreme Court may make in regard to their authority and duties under this Act.

POWER OF PERSONAL REPRESENTATIVE OVER REAL PROPERTY.

20. Except as herein otherwise provided, the personal representative of a deceased person shall have power to dispose of and otherwise deal with the real property vested in him by virtue of this Act, with the like incidents, but subject to the like rights, equities, and obligations, as if the same were personal property vested in him.

POWERS OF EXECUTORS AND ADMINISTRATORS AS TO SELLING AND CONVEYING REAL ESTATE.

21.—(1) The powers of sale conferred by this Act on a personal representative may be exercised for the purpose not only of paying debts,

but also of distributing or dividing the estate among the persons beneficially entitled thereto, whether there are or are not debts, and in no case shall it be necessary that the persons beneficially entitled shall concur in any such sale except where it is made for the purpose of distribution only.

CONCURRENCE OF HEIRS AND DEVISEES. PROVISO AS TO LUNATICS AND NON-CONCURRING HEIRS AND DEVISEES.

(2) No sale of any such real property made for the purpose of distribution only shall be valid as respects any person beneficially entitled thereto unless he concurs therein; but where a lunatic is beneficially entitled or where there are other persons beneficially entitled whose consent to the sale is not obtained by reason of their place of residence being unknown or where in the opinion of the Official Guardian it would be inconvenient to require the concurrence of such persons, he may, upon proof satisfactory to him that such sale is in the interest and to the advantage of the estate of such deceased person and the persons beneficially interested therein, approve such sale on behalf of such lunatic and non-concurring persons, and any such sale made with the written approval of the Official Guardian shall be valid and binding upon such lunatic and non-concurring persons; and for this purpose the Official Guardian shall have the same powers and duties as he had in the case of infants; and provided also that in any case the Supreme Court or a Judge thereof may dispense with the concurrence of the persons beneficially entitled or any or either of them.

POWERS OF EXECUTORS AND ADMINISTRATORS AS TO DIVIDING ESTATE AMONG PERSONS ENTITLED.

(3) The personal representative shall also have power, with the concurrence of the adult persons beneficially entitled thereto, and with the written approval of the Official Guardian on behalf of infants or lunatics, if any, so entitled, to convey, divide or distribute the estate of the deceased person or any part thereof among the persons beneficially entitled thereto according to their respective shares and interests therein.

DISTRIBUTION BY ORDER OF COURT WITHIN THREE YEARS FROM DEATH.

(4) Upon the application of the personal representative or of any person beneficially entitled the Supreme Court of a Judge thereof may before the expiration of three years from the death of the deceased, direct the personal representative to divide or distribute the estate or any part thereof to or among the persons beneficially entitled according to their respective rights and interests therein.

EXERCISE OF POWER OF DIVISION WITHOUT CONCURRENCE.

(5) The power of division conferred by subsection 3 may also be exercised, although all the persons beneficially interested do not concur, with the written approval of the Official Guardian, which may be given under the same conditions and with the like effect as in the case of a sale under subsection 2.

WHERE LUNATIC BENEFICIALLY ENTITLED.

(6) Where the Inspector of Prisons and Public Charities is the Statutory Committee under the provisions of The Hospitals for the Insane Act of a lunatic beneficially entitled, it shall be the duty of the Official Guardian to notify the Inspector of any sale to which he has consented and he may, by leave of the Supreme Court or a Judge thereof, pay to the Inspector the share of such lunatic or such part thereof as the court or Judge may direct.

SECTIONS 20 AND 21 NOT TO APPLY TO ADMINISTRATORS OF PERSONAL ESTATE ONLY. PROVISION AS TO EXECUTOR WHO HAS NOT OBTAINED PROBATE.

(7) Section 20 and this section shall not apply to an administrator where the letters of administration are limited to the personal property, exclusive of the real property, and shall not derogate from any right possessed by a personal representative independently of this Act, but an

executor shall not exercise the powers conferred by this section until he has obtained probate of the will unless with the approval of the Supreme Court or a Judge thereof.

EFFECT OF ACCEPTING SHARE OF PURCHASE MONEY.

22. The acceptance by an adult of his share of the purchase money in the case of a sale by a personal representative which has been made without the written approval of the Official Guardian, where such approval is required, shall be a confirmation of the sale as to him.

PROTECTION OF BONA FIDE PURCHASERS FROM PERSONAL REPRESENTATIVES.

23. A person purchasing in good faith and for value real property from the personal representative in manner authorized by this Act shall be entitled to hold the same freed and discharged from any debts or liabilities of the deceased owner, except such as are specifically charged thereon otherwise than by his will, and from all claims of the persons beneficially entitled thereto, and shall not be bound to see to the application of the purchase money.

PROTECTION OF BONA FIDE PURCHASERS FROM BENEFICIARY.

24.—(1) A person purchasing real property in good faith and for value from a person beneficially entitled, to whom it has been conveyed by the personal representative, by leave of the Supreme Court or a Judge thereof, shall be entitled to hold the same freed and discharged from any debts and liabilities of the deceased owner, except such as are specifically charged thereon otherwise than by his will; but nothing in this section shall affect the rights of creditors as against the personal representative personally, or as against any person beneficially entitled to whom real property of a deceased owner has been conveyed by the personal representative.

EXTENT TO WHICH REAL PROPERTY REMAINS LIABLE TO DEBTS AND PERSONAL LIABILITY OF BENEFICIARY.

(2) Real property which becomes vested in the person beneficially entitled thereto, under section 13, shall continue to be liable to answer the debts of the deceased owner so long as it remains vested in such person, or in any person claiming under him, not being a purchaser in good faith and for valuable consideration, as it would have been if it had remained vested in the personal representatives, and in the event of a sale thereof in good faith and for value by such person beneficially entitled, he shall be personally liable for such debts to the extent of the proceeds of such real property.

POWERS OF PERSONAL REPRESENTATIVE AS TO LEASING AND MORTGAGING.

25.—(1) The powers of a personal representative under this Act shall include:

(a) Power to lease from year to year while the real property remains vested in him.

(b) Power with the approval of the Supreme Court or a Judge thereof to lease for a longer term.

(c) Power to mortgage for the payment of debts.

APPROVAL OF OFFICIAL GUARDIAN.

(2) The written approval of the Official Guardian to mortgaging shall be required where it would be required if the real property were being sold.

RIGHTS OF PURCHASER IN GOOD FAITH AGAINST CLAIMS OF CREDITORS.

26.—(1) A purchaser in good faith and for value of real property of a deceased owner which has become vested under the provisions of section 13 in a person beneficially entitled thereto, shall be entitled to hold it freed and discharged from the claims of creditors of the deceased owner except such of them of which he had notice at the time of his purchase.

LIABILITY OF PERSONAL REPRESENTATIVE.

(2) Nothing in subsection 1 shall affect the right of the creditor against the personal representative personally where he has permitted the

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real property to become vested in the person beneficially entitled to the prejudice of the creditor or against the person beneficially entitled.

DISTRIBUTION OF ESTATE.

EFFECT OF ILLEGITIMACY.

27.—(1) An illegitimate child or relative shall not share under any of the provisions of this Act.

IDEM.

(2) A person born out of matrimony shall not become legitimate by the subsequent marriage of his parents.

ADVANCEMENT.

CASES OF CHILDREN WHO HAVE BEEN ADVANCED BY SETTLEMENT, ETC.

28.—(1) If any child of an intestate has been advanced by him by settlement or portion of real or personal property, or both, and the same has been so expressed by the intestate in writing, or so acknowledged in writing by the child, the value thereof shall be reckoned, for the purposes of this section only, as part of the real and personal property of such intestate to be distributed under the provisions of this Act; and if such advancement is equal to or greater than the amount of the share which such child would be entitled to receive of the real and personal property of the deceased, as so reckoned, then such child and his descendants shall be excluded from any share in the real and personal property of the intestate.

IF SUCH ADVANCEMENT BE NOT EQUAL.

(2) If such advancement is less than such share such child and his descendants shall be entitled to so much only of the real and personal property as is sufficient to make all the shares of the children in such real and personal property and advancement to be equal, as nearly as can be estimated.

VALUE OF PROPERTY ADVANCED, HOW ESTIMATED.

(3) The value of any real or personal property so advanced shall be deemed to be that, if any, which has been acknowledged by the child by an instrument in writing; otherwise such value shall be estimated according to the value of the property when given.

EDUCATION, ETC., NOT ADVANCEMENT.

(4) The maintaining or educating, or the giving of money to a child without a view to a portion or settlement in life shall not be deemed an advancement within the meaning of this Act.

INTESTATE MARRIED WOMEN.

DISTRIBUTION OF PROPERTY OF MARRIED WOMAN DYING INTESTATE.

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 pre-deceased her.

SAVING AS TO HUSBAND'S INTEREST IN PROPERTY OF WIFE.

(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 is 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.

DISTRIBUTION OF PERSONALTY.

DISTRIBUTION OF PERSONAL ESTATE.

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 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 representations admitted among collaterals after brothers' and sisters' 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.

CHILDREN SHARE WITH MOTHER.

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.

DISTRIBUTION NOT TO BE MADE FOR ONE YEAR.

32. Subject to provisions of section 55 of The Trustees Act, no such distribution shall be made until after one year from the death of the intestate, and every person to whom in distribution a share shall be allotted shall, if any debt owing by the intestate shall be afterwards sued for and recovered or otherwise duly made to appear, refund and pay back to the personal representative his ratable part of that debt and of the costs of suit and charges of the personal representative by reason of such debt out of the part or share so allotted to him, thereby to enable the personal representative to pay and satisfy such debt, and shall give bond with sufficient sureties that he will do so.

GENERAL PROVISIONS.

RULES OF PROCEDURE.

33.—(1) The Official Guardian may, with the approval of the Lieutenant-Governor in Council, or of the Judges of the Supreme Court, make Rules regulating the practice and procedure to be followed in all proceedings under this Act, in which his privity, consent or approval is required, and may frame a tariff of the fees to be allowed and paid to solicitors for services rendered in such proceedings.

PUBLICATION.

(2) Such Rules and tariff when so approved shall be published in the Ontario Gazette, and shall thereupon have the force of law; and the same shall be laid before the Assembly at the next session after the publication thereof.

APPOINTMENT OF DEPUTY OFFICIAL GUARDIAN PRO TEM.

(3) The Lieutenant-Governor in Council may appoint a Deputy pro tempore of the Official Guardian for the purposes of this Act who shall have all the powers of the Official Guardian for such purposes.

AFFIDAVITS.

34. Affidavits may be used in próceedings taken under this Act.

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FORM 1.

(Section 13.)

THE DEVOLUTION OF ESTATES ACT.

I, executor of (or administrator, with the will annexed of, or administrator of) , who died on or about the day 19 , certify that it may be necessary for me under my powers and in fulfilment of my duty as executor (or administrator) to sell the real property of the said or part thereof (or the caution may specify any particular part or parcel) and of this all persons concerned are hereby required to take notice.

FORM 2.

(Section 13.)

THE DEVOLUTION OF ESTATES ACT.

I, , executor (or administrator) of hereby withdraw the caution heretofore registered with respect to the real property of (or as the case may be).

FORM 3.

(Section 13.)

THE DEVOLUTION OF ESTATES ACT.

I, , of, etc., make oath and say I am well acquainted with named in the above certificate, that I was present and did see the said certificate signed by the said ; that I am a subscribing witness to the said certificate and I believe the said is the person who registered the caution referred to in the said certificate.

Sworn, etc.

APPENDIX V.

SUCCESSION DUTY ACT.

R. S. O. 1914, CH. 24, AS AMENDED BY CH. 10 ONTARIO STATUTES 1914 (4 GEORGE V.).

Sections 9 and 10 of Chapter 10 of Ontario Statutes 1914, are as follows. They are inserted here as in any consolidation of the Succession Duty Act they will properly be included in such consolidation.

DECLARATION AS TO APPLICATION OF ACT.

9. Except as to the rate of duty and as to the liability for duty of any property transferred inter vivos the Succession Duty Act as amended by this Act shall be deemed to be and to declare the law relating to

succession duty since the first day of July, 1892, save as to any action or reference heretofore determined in any court, or as to any estate upon which the duty has been fully paid and satisfied.

COMMISSION OF ENQUIRY.

10. (1) Where the treasurer deems it desirable he may appoint a commissioner or commissioners to make an enquiry as to any property transferred inter vivos or wrongfully omitted from any inventory filed, and to make to him a report of the property comprised in such transfer or so wrongfully omitted, the fair market value of the same, and such other matters as may be referred.

POWERS UNDER REV. STAT., C. 18.

(2) For such purpose the commissioner or commissioners shall have all the powers which may be conferred upon a commissioner under The Public Inquiries Act, and in addition thereto may require production of any books, papers or other writings or documents of any corporation in which the deceased at any time held shares, bonds, debentures or other securities, or of any corporation to which property was transferred by the deceased, and may appoint an auditor or other competent person to make such inspection and report as he may deem necessary for the purpose of more fully ascertaining the property so transferred or omitted and the market value thereof.

The Revised Statute as altered and amended in Session of 1914 now follows:

1. SHORT TITLE.

This Act may be cited as "The Succession Duty Act."

INTERPRETATION.

2. IN THIS ACT.

"Aggregate value."

(a) "Aggregate value" shall mean the fair market value of the property after the debts, encumbrances and other allowances authorized by section 4 are deducted therefrom, and for the purposes of determining the aggregate value and the rate of duty payable the value of property situate out of Ontario shall be included.

"Beneficial Interest." "Dutiable value."

(b) "Beneficial interest" and "dutiable value" shall mean the fair market value of the property after the debts, encumbrances, and other allowances and exemptions authorized by this Act are deducted therefrom.

"Child."

(c) "Child" shall include any lawful child of the deceased or any lineal descendant of such child born in lawful wedlock or any person adopted while under the age of twelve years by the deceased as his child or any infant to whom the deceased for not less than five years immediately preceding his death stood in loco parentis or any lineal descendant of such adopted child or infant as aforesaid born in lawful wedlock.

"Executor."

(d) "Executor" shall include administrator.

"Interest in Expectancy."

(e) "Interest in expectancy" shall include an estate, income or interest in remainder or reversion and any other future interest whether vested or contingent but shall not include a reversion expectant on the determination of a lease.

"Passing on the Death."

(f) "Passing on the death" shall mean passing either immediately on the death or after an interval, either certainly, or contingently, and either originally or by way of substitutive limitation, whether the deceased was at the time of his death domiciled in Ontario or elsewhere.

"Property."

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(g) "Property" shall include real and personal property of every description and every estate and interest therein capable of being devised or bequeathed by will or of passing on the death of the owner to his heirs or personal representatives.

"Treasurer."

(h) "Treasurer" shall mean the Treasurer of Ontario.

WHAT DISPOSITIONS AND DEVOLUTIONS OF PROPERTY SHALL CONFER SUCCESSIONS.

3. Every past or future disposition of property by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death happening after the first day of July, 1892, whether the death has heretofore or shall hereafter happen, of any person domiciled in Ontario, either immediately or after any interval, either certainly or contingently, and either originally, or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person so domiciled to any other person in possession or expectancy shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a "succession," and the term "successor" shall denote the person so entitled.

ALLOWANCES MADE IN COMPUTING DUTIABLE VALUE.

4. In determining the dutiable value of property or the value of beneficial interest in property the fair market value shall be taken as at the date of the death of the deceased, and allowance shall be made for reasonable funeral expenses, debts and encumbrances and Surrogate Court fees (not including solicitor's charges); and any debt or encumbrance for which an allowance is made shall be deducted from the value of the land or other subject of property liable thereto; but an allowance shall not be made:—

No Allowance to be Made for Certain Debts and Expenses or Administration.

(a) For any debts incurred by the deceased or encumbrances created by a disposition made by him unless such debts or encumbrances were created bona fide for full consideration in money or money's worth wholly for the deceased's own use and benefit and to take effect out of his estate; nor

(b) For any debt in respect whereof there is a right to reimbursement from any other estate or person unless such reimbursement cannot be obtained; nor

(c) More than once for the same debt or encumbrance charged upon different portions of the estate; nor

(d) Save as aforesaid, for the expense of the administration of the estate or the execution of any trust created by the will of the deceased or by any instrument made by him in his lifetime.

ALLOWANCE IN RESPECT OF DUTY PAID ELSEWHERE.

5. Where in respect of any succession in Ontario any estate, legacy or succession duty is payable in any part of the British Dominions other than Ontario, or in a foreign country by the law of that country, in respect of which no allowance of duty is made under section 9, and the Treasurer is satisfied that by reason of such succession any duty is payable there in respect of it, he may allow the amount of that duty to be deducted from the value of the succession in Ontario.

Section 6 of chapter 24 of the Revised Statutes is repealed and the following substituted:

NO DUTY SHALL BE LEVIABLE—EXEMPTION FROM SUCCESSION DUTY.

(a) On any estate the aggregate value of which does not exceed $10,000.

(b) On property passing by will, intestacy or otherwise to or for the benefit of the grandfather, grandmother, father, mother,

husband, wife, child, daughter-in-law or son-in-law of the deceased where the aggregate value of the property of the deceased does not exceed $50,000.

(c) Where the whole value of any property passing to any one person does not exceed $500.

(d) On property devised or bequeathed for religious, charitable or educational purposes to be carried out in Ontario or by a corporation or a person resident in Ontario or on the amount of any unpaid subscription for any like purpose made by any person in his lifetime to any corporation or person mentioned in this subsection for which his estate is liable.

(e) On any bond, debenture or debenture stock issued by a corporation having its head office in Ontario, transferable on a register at any place out of Ontario and which is owned by a person not domiciled at the time of his death in Ontario.

PROPERTY SUBJECT TO DUTY.

7. (1) The following property as well as all other property subject to succession duty upon a succession shall be subject to duty at the rates hereinafter imposed.

Sub-section 1 of section 7 is printed as amended by section 3 of Chapter 10, Ont. Stat. 1914.

Property in Ontario.

(a) All property situate in Ontario and any income therefrom passing on the death of any person, whether the deceased was at the time of his death domiciled in Ontario or elsewhere.

Local situs of specialty.

(b) Debts and sums of money due and owing from persons in Ontario to any deceased person at the time of his death on obligation or other specialty shall be property of the deceased situate in Ontario, without regard to the place where the obligation or specialty shall be at the time of the death of the deceased.

Property deemed to pass on the death.

(2) Property passing on the death of the deceased shall be deemed to include for all purposes of this Act the following property:—

Property transferred in contemplation of death.

(a) Any property, or income therefrom voluntarily transferred by deed, grant, bargain, sale or gift made in general contemplation of the death of the grantor, bargainor, vendor, or donor, and with or without regard to the imminence of such death, or made or intended to take effect in possession or enjoyment after such death to any person in trust or otherwise, or the effect of which is that any person becomes beneficially entitled in possession or expectancy to such property or income.

Subsection (a) is printed as amended by section 4 of Chapter 10, Ont. Stat. 1914.

Donationes mortis causa and gifts inter vivos.

(b) Any property taken as a donatio mortis causa, or taken under a disposition operating or purporting to operate as an immediate gift inter vivos whether by way of transfer, delivery, declaration of trust or otherwise, made since the first day of July, 1892, or taken under any gift whenever made, of which property actual and bona fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor, or of any benefit to him whether voluntary or by contract or otherwise, except as hereinafter mentioned.

Printed as substituted by section 5 of Chapter 10 Ont. Stat. 1914, for subsection (b) of Revised Statute.

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Property vested jointly with interest to survivor.

(c) Any property which a person having been absolutely entitled thereto, has caused, or may cause to be transferred to, or vested in himself, and any other person jointly, whether by disposition or otherwise, so that the beneficial interest therein, or in some part thereof, passes or accrues by survivorship on his death to such other person, including also any purchase or investment effected by the person who was absolutely entitled to the property either by himself alone or in concert, or by arrangement with any other person.

Property passing under settlement, etc.

(d) Any property, passing under any past or future settlement, including any trust, whether expressed in writing or otherwise, and if contained in a deed or other instrument effecting the settlement, whether such deed or other instrument was made for valuable consideration or not as between the settlor and any other person, made by deed or other instrument not taking effect as a will, whereby an interest in such property or the proceeds of sale thereof for life, or any other period determinable by reference to death, is reserved, either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself, the right by the exercise of any power to restore to himself, or to reclaim the absolute interest in such property, or the proceeds of sale thereof, or to otherwise resettle the same or any part thereof.

Annuities, insurance, etc.

(e) Any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased.

Policies of insurance.

(f) Money received under a policy of insurance effected by any person on his life, where the policy is wholly kept up by him for the benefit of any existing or future donee, whether nominee or assignee, or for any person who may become a donee, or a part of such money in proportion to the premiums paid by him, where the policy is partially kept up by him for such benefit.

Property over which decedent had power of disposal.

(g) Any property of which the person dying was at the time of his death competent to dispose; and a person shall be deemed competent to dispose of property if he has such an estate or interest therein or such general power as would, if he were sui juris, enable him to dispose of the property as he thinks fit, whether the power is exercisable by instrument inter vivos or by will or both, including the powers exercisable by a tenant in tail whether in possession or not, but exclusive of any power exercisable in a fiduciary capacity under a disposition not made by himself or as mortgagee. A disposition taking effect out of the interest of the person so dying shall be deemed to have been made by him whether concurrence of any other person was or was not required. Money which a person has a general power to charge on property shall be deemed to be property of which he has the power to dispose.

Dower and curtesy.

(h) Any estate in dower or by the curtesy in any land of the person so dying of which the wife or husband of the deceased becomes entitled on the decease of such person.

Subsection (3) is printed as substituted by section 6 of Chapter 10 of Ont. Stat. 1914, for subsection (3) as printed in the Revised Statute.

EXCEPTIONS AS TO CERTAIN GIFTS INTER VIVOS.

(3) Notwithstanding anything herein contained, no duty shall be payable in respect of any property

TO CHILD OR PARENT TO $20,000.

(a) Given absolutely more than three years before the death of the donor to a child, son-in-law or daughter-in-law, or to the father or mother of the donor which does not exceed in the case of any one person the sum of $20,000 in value or amount;

ORDINARY EXPENDITURE.

(b) Given by the donor where the gift is proved to have been absolute and to have taken effect in the lifetime of the donor and to have been part of his ordinary and normal expenditure and to have been reasonable, having regard to the amount of his income and the circumstances under which the gift was made.

Of which property actual and bona fide possession and enjoyment shall have been assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor or of any benefit to him, whether voluntary or by contract or otherwise.

EXCEPTIONS.

Nor in respect of property.

GIFTS UP TO $500.

(c) Given by the donor in his lifetime and not exceeding in value the sum of $500 in the case of any one donee, or

TRANSFER FOR GOOD CONSIDERATION.

(d) Actually and bona fide transferred for a consideration in money or money's worth paid to the transferor for his own use and benefit, except to the extent, if any, to which the value of the property transferred exceeds that of the consideration so paid.

Section 8 is printed as substituted by section 7 of Chapter 10 of Ontario Acts 1914 for section 8 of the Revised Statutes.

AMOUNT OF DUTY.

8. Subject to the exceptions mentioned in sections 6 and 7 there shall be levied and paid for the purpose of raising a revenue for Provincial purposes in respect of any succession, or on property passing on the death according to the dutiable value, the following duties over and above the fees paid under The Surrogate Courts Act.

WHERE PROPERTY PASSES TO GRANDPARENTS, ETC., AND EXCEEDS $50,000.

(1) Where the aggregate value of the property exceeds $50,000, and any property passes in manner hereinbefore mentioned, either in whole or in part to or for the benefit of the grandfather, grandmother, father, mother, husband, wife, child, son-in-law or daughter-in-law of the deceased, the same or so much thereof as so passes shall be subject to a duty at the rate and on the scale as follows:—

Where the aggregate value

(a) Exceeds $ 50,000 and does not exceed $ 75,000, 1½ per cent.
(b) Exceeds $ 75,000 and does not exceed $100,000, 3 per cent.
(c) Exceeds $100,000 and does not exceed $150,000, 4½ per cent.
(d) Exceeds $150,000 and does not exceed $300,000, 5½ per cent.
(e) Exceeds $300,000 and does not exceed $500,000, 6½ per cent.
(f) Exceeds $500,000 and does not exceed $750,000, 7½ per cent.
(g) Exceeds $750,000 and does not exceed $1,000,000, 8½ per cent
(h) Exceeds $1,000,000, 10 per cent.

ADDITIONAL DUTY WHERE SHARE EXCEEDS $100,000.

(2) Where the aggregate value of the property exceeds $100,000 and the value of the property passing in manner hereinbefore mentioned to any one of the persons mentioned in the next preceding subsection exceeds the amount hereinafter mentioned, a further duty shall be paid on the amount so passing in addition to the rates in the next preceding subsection mentioned as follows:—

Where the whole amount so passing to one person

(a) Exceeds $100,000 and does not exceed $200,000, 1 per cent.
(b) Exceeds $200,000 and does not exceed $400,000, 1½ per cent.
(c) Exceeds $400,000 and does not exceed $600,000, 2 per cent.
(d) Exceeds $600,000 and does not exceed $800,000, 2½ per cent.
(e) Exceeds $800,000 and does not exceed $1,000,000, 3 per cent.
(f) Exceeds $1,000,000 and does not exceed $1,200,000, 4 per cent.
(g) Exceeds $1,200,000, 5 per cent.

RATE OF DUTY WHERE PROPERTY PASSES TO CERTAIN RELATIVES.

(3) Where the aggregate value of the property exceeds $10,000 and any property passes in manner hereinbefore mentioned, either in whole or in part to or for the benefit of any lineal ancestor of the deceased, except the grandfather, grandmother, father and mother, or to any brother or sister of the deceased or to any descendant of such brother or sister or to a brother or sister of the father or mother of the deceased or to any descendant of such last mentioned brother or sister, the same or so much thereof as so passes shall be subject to a duty at the rate and on the scale as follows:—

Where the aggregate value

(a) Exceeds $10,000 and does not exceed $ 50,000, 5 per cent.
(b) Exceeds $50,000 and does not exceed $100,000, 10 per cent.
(c) Exceeds $100,000, 12½ per cent.

ADDITIONAL DUTY WHERE SHARE EXCEEDS $50,000.

(4) Where the aggregate value of the property exceeds $50,000 and the value of the property passing in manner hereinbefore mentioned to any one of the persons mentioned in the next preceding subsection, except the grandfather, grandmother, father and mother, exceeds the amount hereinafter mentioned, a further duty shall be paid on the amount so passing in addition to the duty in the next preceding subsection mentioned as follows:—

Where the whole amount so passing to one person

(a) Exceeds $ 50,000 and does not exceed $100,000, 1 per cent.
(b) Exceeds $100,000 and does not exceed $150,000, 1½ per cent.
(c) Exceeds $150,000 and does not exceed $200,000, 2 per cent.
(d) Exceeds $200,000 and does not exceed $250,000, 2½ per cent.
(e) Exceeds $250,000 and does not exceed $300,000, 3 per cent.
(f) Exceeds $300,000 and does not exceed $350,000, 3½ per cent.
(g) Exceeds $350,000 and does not exceed $400,000, 4 per cent.
(h) Exceeds $400,000 and does not exceed $450,000, 4½ per cent.
(i) Exceeds $450,000, 5 per cent.

ADDITIONAL DUTY, HOW FIXED WHERE DECEASED DIES DOMICILED OUT OF ONTARIO.

(5) The additional duty provided for by subsections 2 and 4 shall be payable on the property in Ontario, where the deceased dies domiciled elsewhere than in Ontario, but for the purpose of fixing the rate of such duty the beneficial interest in property out of Ontario passing to the successor or other person on the same death shall be added to the value of the property in Ontario, and nothing in this Act shall be construed to impose any duty, directly or otherwise, on property out of Ontario owned by any deceased person so domiciled.

RATE WHERE PROPERTY PASSES TO OTHER PERSONS.

(6) Where the aggregate value of the property exceeds $10,000 and any property passes in manner hereinbefore mentioned, either in whole or in part to or for the benefit of any person in any other degree of collateral consanguinity to the deceased than is above mentioned or to or from the benefit of any stranger in blood to the deceased, the same or so much thereof as so passes shall be subject to a duty at the rate and on the scale as follows:—

Where the aggregate value

(a) Exceeds $10,000 and does not exceed $50,000, 10 per cent.
(b) Exceeds $50,000 and does not exceed $1,000,000, 15 per cent.
(c) Exceeds $1,000,000, 20 per cent.

ALLOWANCE FOR DUTY PAID ELSEWHERE ON SAME DEATH. PROVISO.

9. Where the Treasurer is satisfied that in any part of the British Dominions other than Ontario, or in any foreign counry to which this section applies, any estate, legacy or succession duty is paid by reason of the succession in Ontario, an allowance for the duty so paid shall be made from the amount payable to this Province with respect to the same property; provided that any such allowance shall be made only as to such part of the British Dominions or as to such foreign country to which the Lieutenant-Governor in Council shall have extended the provisions of this section. Provided also that the Lieutenant-Governor in Council may revoke any Order in Council made under this section.

FOREIGN EXECUTORS, ETC., NOT TO TRANSFER STOCK UNTIL DUTY PAID.

10. No foreign executor shall assign or transfer any bond, debenture, stock or share of any bank or other corporation whatsoever, having its head office in Ontario, standing in the name of the deceased person, or in trust for him, until the duty, if any, is paid or security is given as required by section 11, and any such bank or corporation allowing a transfer of any debenture, bond, stock or share contrary to this section shall be liable for such duty.

EXECUTORS, ETC., TO FILE INVENTORY AND BONDS FOR PAYMENT OF DUTY.

Sub-secs. 1-3 of section 11 are printed as substituted by section 11 of Chapter 10 Ontario Acts 1914, for sub-secs. 1-3 of section 10 of Revised Statute.

FILING INVENTORY, ETC., LIABILITY OF HEIR, ETC.

11.—(1) Every heir, legatee, donee or other successor and every person to whom property passes for any beneficial interest in possession or in expectancy shall be liable for the duty upon so much of the property as so passes to him, and shall within six months after the death of the deceased or such later time as may be allowed by the Treasurer make and file with the Registrar of the Surrogate Court of the county or district in which the deceased had a fixed place of abode or in which the property or any part thereof is situate a full, true and correct statement under oath showing:—

(a) A full inventory in detail of all the property of the deceased person and the fair market value thereof on the date of his death;
(b) The several persons to whom the same passes, their places of residence and the degrees of relationship, if any, in which they stand to the deceased.

WHERE ONE FILES STATEMENT OTHERS TO BE RELIEVED.

(2) Where any one of the persons mentioned in subsection 1 has made and filed the statement required by that subsection, the Treasurer may dispense with the making of the statement by any other of them.

DUTY AND LIABILITY OF EXECUTORS, ETC.

(3) Before the issue of letters probate or letters of administration to the estate of a deceased person a statement under oath similar to

that required by subsection 1 shall be made by the executor or administrator applying therefor and filed with the Surrogate Registrar of the county or district in which the application is made, and if the duty has not been paid by the successors or security to the satisfaction of the Treasurer given, the applicant shall in consideration of the grant applied for being made furnish a bond in a penal sum to be fixed by the Treasurer, executed by himself and two sureties, to be approved by the Registrar, conditioned for the due performance of his duty under this Act as to accounting for the succession duty to His Majesty for which the property of the deceased is chargeable in default of payment being made by the persons liable therefor.

ACCEPTING LUMP SUM AS SECURITY.

(3)—(a) The Treasurer may accept a sufficient sum as security for the due payment of any duty in lieu of or in addition to any other security, and he may in such case allow to the depositor interest thereon at a rate not exceeding three per cent. per annum upon so much thereof as from time to time exceeds the amount of duty which has become payable under this Act.

Property not disclosed on application for probate, etc.

(4) If at any time it shall be discovered that any property was not disclosed upon the grant of letters probate or of administration, or the filing of the account, the person acting in the administration of such property, and the person, who is liable for the duty payable under this Act shall pay to the treasurer the amount which, with the duty, if any, previously payable or paid on such property, shall be sufficient to cover the duty chargeable according to the true value thereof at the rates fixed by this Act, together with interest thereon, and shall at the same time pay to the treasurer as a penalty a further duty of twenty-five per cent. of the duty chargeable on the value of the property not disclosed, and shall also, within two months after the discovery of the omission, deliver to the Surrogate Registrar an affidavit on account setting forth the property so not disclosed, and the value thereof, in default of which he shall incur a penalty of $10 for each day during which the default continues.

Subsection 1 of section 12 is printed as amended by section 12 of Chapter 10 Ontario Acts 1914.

PROCEEDINGS WHEN TREASURER NOT SATISFIED WITH VALUATION.

12.—(1) In case the treasurer is not satisfied with the value of any property as sworn to or with the correctness of any inventory, the Surrogate Judge of the county in which the property or any part thereof. subject to duty is situate shall, at the instance of the treasurer and upon such notice by personal or substitutional service to the executor or such interested parties as he by order directs, enquire into the correctness of the inventory, and as to the value so sworn to and value any property improperly omitted, fix and settle the amounts of the debts and other allowances and exemptions, and assess the cash value of every annuity, term of years, life estate, income or other estate, and of every interest in expectancy as provided by this Act, and shall at the time and place mentioned in the notice or any other time and place named by him value all property at the fair market value, and hear and determine all questions relative to the liability of property, the amount of duty and the successor and other persons liable therefor.

Powers of Judge.

(2) The Surrogate Judge shall have all the powers of a Judge of the County Court at the trial of any action and the power to compel discovery, the production of books, papers and documents and he may with the consent of the Official Guardian appoint for the purposes of this Act a guardian of any infant who has no guardian.

Enforcement of Judgment.

(3) The judgment of the Surrogate Judge shall have the like force and effect and be enforceable in the same manner as a judgment of the County Court.

Judge May Direct Appraisement of Property by Sheriff.

(4) In lieu of or in addition to evidence of valuation of property the Surrogate Judge may in the first instance or at any time before judgment, and at the request of the Treasurer, shall issue a direction to the Sheriff of the county where any property is situate in respect to which duty is payable, or to some other competent person, to make an appraisement of the property mentioned in the inventory or any part thereof, or of any property wrongfully omitted.

Appraisement at Fair Market Value.

(5) When so directed the sheriff shall forthwith appraise the property mentioned in the inventory, or any part thereof, as directed by the Surrogate Judge, or any property wrongfully omitted, at its fair market value at the date of the death, or at the time provided in section 16, as the case may be, and make a report in writing to the Surrogate Judge of his appraisement and of such other facts as he may deem proper.

Sheriff's Fees.

(6) The Sheriff shall be paid the following fees for services performed under this Act:—

$1 for every hour up to five hours;
$2 for every hour in important or difficult cases;
In no case to exceed $10 per diem;
His actual and necessary travelling expenses.

VALUATION OF ANNUITIES AND LIMITED ESTATES.

13. The value of every annuity, term of years, life estate, income or other estate and of every interest in expectancy, in respect of which duty is payable under this Act, shall for the purposes of this Act be determined by the rule, methods and standards of mortality and of value which are employed by the Superintendent of Insurance in ascertaining the value of policies of life insurance and annuities for the determination of the liabilities of life insurance companies, save that the rate of interest to be taken for all purposes of computation under this section shall be four per cent. per annum; and the Superintendent of Insurance shall on the application of any Surrogate Judge determine the value of any annuity, term of years, life estate, income or other estate or of any interest in expectancy upon the facts contained in any such application and certify the same to the Surrogate Judge and his certificate shall be conclusive as to the matters dealt with therein.

APPEAL FROM SURROGATE JUDGE. PROVISO.

14.—(1) The treasurer, or any other person interested, may within thirty days from the date of the judgment of the Surrogate Judge appeal to a Divisional Court, whose decision shall be final, but no appeal shall lie unless that portion of the property or of the debts and other allowances and exemptions in respect of which such appeal is taken, or all combined, exceeds in value or amount $10,000 according to such judgment.

(2) The costs of all such proceedings shall be in the discretion of the Court or Judge and shall be on the County Court scale, except the costs of an appeal, which shall be according to the tariff applicable to proceedings in the Supreme Court.

DUTY PAYABLE WITHIN EIGHTEEN MONTHS FROM DEATH OF DECEASED. PROVISO.

15.—(1) The duty imposed by this Act, unless otherwise herein provided, shall be due at the death of the deceased, and payable within eighteen months thereafter, and if the same, or any part thereof, is paid within that period, no interest shall be charged or collected thereon, but if not so paid, interest at the rate of five per centum per annum from the death of the deceased shall be charged and collected upon the amount remaining from time to time unpaid, and such duty or so much thereof as remains unpaid, with interest thereon, shall

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be and remain a lien upon the property in respect of which it is payable until paid. Provided that the duty chargeable upon any legacy given by way of annuity, whether for life or otherwise, may be paid in four equal consecutive annual instalments, the first of which shall be paid before the falling due of the first year's annuity and each of the three others within the same period in each of the next succeeding three years, and for non-payment when due interest shall be collected from the date of the maturity of each instalment until paid, and if the annuitant dies before the expiration of the four years, payment only of the instalments which became due before his death shall be required.

Extension of Time by Order-in-Council.

(a) The Lieutenant-Governor in Council, upon proof to his satisfaction that payment of the duty within the time limited by this subsection would be unduly onerous, may extent the time for the payment to such date and upon such terms as may be deemed proper.

Interest Allowed for Prepayment.

(b) For payment before the time provided for in this section the Treasurer may allow to the person accountable for the duty, interest at a rate not exceeding three per centum per annum upon the amount so paid.

TIME FOR PAYMENT OF DUTY WHERE INCOME ACCUMULATED.

(2) Where the whole or any part of the income or interest of any property is directed to be accumulated for any period for the benefit of any person or persons or class to whom or to any of whom at the expiration of such period such property passes, or income, or interest, becomes payable, such property shall be deemed for the purpose of this Act an interest in possession, passing at the death of the deceased, and the duty thereon shall be payable within eighteen months thereafter.

Where person has general power of appointment.

(3) Property passing upon the death in respect to which any person is given such a general power to appoint, as is mentioned in clause (g) of subsection 2 of section 7 shall be liable to duty and the duty thereon shall be payable in the same manner and at the same time as if the property itself had been given to the donee of the power.

Certificate of discharge to be given by Provincial Treasurer.

(4) When the duty or any part thereof has been paid or secured to the satisfaction of the Treasurer he shall, if required by the person accounting for the duty, give a certificate to that effect which shall discharge from any further claim for such duty the property mentioned in the certificate; provided the Treasurer shall not be bound to grant such certificate until the expiration of one year from the death of the deceased.

Certificate not a discharge in case of fraud, etc. Except as a bona fide purchaser.

(5) Such certificate shall not discharge any person or property from the duty in case of fraud or failure to disclose material facts, and shall not affect the rate of duty payable in respect of any property afterwards shown to have passed on the death, and the duty in respect of such property shall be at such rate as would be payable if the value thereof were added to the value of the property, in respect of which duty has been already accounted for; provided that a certificate purporting to be a discharge of the whole duty payable in respect of any property included in the certificate shall exonerate from duty property in the hands of a bona fide purchaser for valuable consideration without notice.

Time for Payment of Duty on Interest in Expectancy.

16.—(1). Where the dutiable property includes any interest in expectancy the duty on such interest may be paid within the eighteen months limited by subsection 1 of section 15, and when so paid the duty shall be on the value of such interest ascertained as provided herein as at the death of the deceased.

Payment after time limited.

(2) With the consent in writing of the treasurer, the duty may be paid after the time so limited and before such interest comes into possession; but if consent is given the duty shall then be on a value not less in any event than the value of such interest in expectancy ascertained as provided herein as at the date when the duty is paid; and no deduction shall be made by reason of duty paid or payable on any prior estate, income or interest.

Payment forthwith when interest in expectancy falls into possession.

(3) The duty on any interest in expectancy, if not sooner paid, shall be payable forthwith when such interest comes into possession, in which case the duty shall be on the value ascertained as provided herein as at the date of coming into possession, and no deduction shall be made by reason of duty paid or payable on any prior estate, income or interest; and if such duty is not so paid, interest at the rate of five per cent. shall be charged and collected thereon from the date when such interest in expectancy came into possession.

Where no person presently beneficially entitled.

(4) Subject to the provisions of subsection 2 of section 15, where any property so passes that no person is beneficially entitled to the present enjoyment of the income or any part thereof for any term of years, or other period, whether certain or uncertain, the duty shall be payable on the present value of such income or part thereof for such term or period computed as provided by section 13 and shall be payable within eighteen months after the death of the deceased.

Commutation of duty.

(5) Notwithstanding that duty may not be payable under this section until the time when the right of possession or actual enjoyment accrues, an executor or person who has the custody or control of the property, may, with the consent of the treasurer, commute the duty which would or might, but for the commutation, become payable in respect of such interest in expectancy, for a certain sum to be presently payable, and for determining that sum the treasurer shall cause a present value to be set upon such duty, regard being had to the contingencies affecting the liability to, and the rate and amount of such duty and interest; and on the receipt of such sum the Treasurer shall give a certificate of discharge from such duty.

Interest in expectancy to be charged with duty paid.

(6) Where the duty on any interest in expectancy has been commuted and paid under the provisions of this section before such interest in expectancy falls into possession the duty so paid shall be charged on such interest in expectancy, and shall be repaid with interest at the rate of four per cent. per annum to the person, who has paid the same by the person entitled to such interest in expectancy at the time when such interest comes into possession.

Composition by treasurer for duty payable in certain cases.

(7) Where it appears to the Treasuer, that, by reason of the number of deaths on which property has passed or of the complicated or contingent nature of the interests of different persons in property passing on the death, it is difficult to ascertain exactly the rate or amount of duty payable in respect of any property or any interest therein, or so to ascertain the same without undue expense in proportion to the value of the property or interest, the treasurer on the application of

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any person accountable for any duty thereon, and upon his furnishing all the information in his power respecting the amount of the property and the several interests therein, and other circumstances of the case, may, by way of composition for all or any duty payable in respect of the property or interest and the various interests therein or any of them, assess such sum on the value of the property or interest, as having regard to the circumstances appears proper and may accept payment of the sum so assessed in full discharge of all claims for duty in respect of such property or interest and shall give a certificate of discharge accordingly.

EXTENSION OF TIME FOR PAYMENT OF DUTY.

17. Upon the application of any person liable for the payment of the duty the Surrogate Judge may from time to time, on notice to the Treasurer, and for just cause shown make upon such terms as he may deem proper an order extending the time fixed by this Act for payment thereof for any period, and the aggregate not exceeding one year, or with the consent of the Treasurer for a longer period, but unless the Judge otherwise orders the duty shall nevertheless bear interest at the rate of five per centum per annum from the day upon which such duty might have been paid without interest.

Printed as substituted by section 13 of Ontario Act 1914, for section 18 of Revised Statute.

NON-PERSONAL LIABILITY OF EXECUTORS NOT TO TRANSFER PROPERTY UNTIL DUTY PAID.

18.—(1) No executor or trustee shall in the first instance be personally liable to pay the duty on any property to which any legatee, donee or other successor is beneficially entitled, but an executor trustee or other person in whom any interest in any property so passing to any legatee, donee or other successor, or the management thereof is at any time vested, shall not transfer such property to the person so entitled without deducting therefrom the duty for which such successor is liable, and any executor, trustee or other person who transfers such property without deducting the duty therefrom shall pay to the Treasurer the amount of such duty in respect of such property and interest thereon, together with an additional rate of fifty per cent., of the duty payable in respect of such property, and such combined amounts shall be recoverable against the executor, trustee or other person so chargeable.

MONEY RETAINED BY EXECUTOR TO BE PAID OVER TO TREASURER.

(2) Every sum of money retained by an executor or trustee or paid into his hands of the duty on any property shall be paid by him forthwith to the Treasurer or as he may direct.

(3) Such executor and trustee shall, for the purpose of the collection and payment of any duty which under the provisions of this Act it is his duty to collect and pay over to the Treasurer, be deemed to be an officer for the collection thereof within the meaning of the Public Revenue Act.

REFUNDING DUTY UPON SUBSEQUENT PAYMENT OF DEBTS.

19. Where any debts shall be proven against the estate of a deceased person, after the payment of legacies or distribution of property from which the duty has been deducted, or upon which it has been paid, and a refund is made by the legatee, devisee, heir or next of kin, a proportion of the duty so paid shall be repaid to him by the executor, if such duty has not been paid to the Treasurer, or by the Treasurer if it has been so paid.

FEES OF JUDGES AND REGISTRARS.

20. The Judges and Registrars of the several Surrogate Courts and solicitors practising therein shall be entitled to take for the performance

of duties and services under this Act, similar fees to those payable to them for the like services under and by virtue of the Surrogate Courts Act and the Surrogate Court rules.

RECOVERY OF SUCCESSION DUTIES BY ACTION.

21.—(1) Any duty payable under this Act shall be recoverable with full costs as a debt due to His Majesty from any person liable therefor by action in or on summary application to any court of competent jurisdiction.

Matters to be determined by Supreme Court in action.

(2) The Supreme Court shall also have jurisdiction to determine what property is liable to duty under this Act, the amount of such duty and the time or times when the same is payable, and may itself or through any referee exercise any of the powers conferred upon any officer or person by the said sections.

ACTION MAY BE BROUGHT BEFORE TIME FOR PAYMENT OF DUTY.

(3) An action may be brought for any of the purposes in this Act mentioned, notwithstanding the time for the payment of the duty has not arrived, subject to the discretion of the court as to costs.

PRODUCTION OF DOCUMENTS, EXAMINATION OF WITNESSES, ETC.

(4) In every such action His Majesty's Attorney-General shall have the same right, either before or after the trial, to require the production of documents, to examine parties or witnesses, or to take such other proceedings in aid of the action as a plaintiff has in an ordinary action.

CAUTION.

22. Where duty is claimed in respect of any land, or money secured by mortgage, or charge upon land, the Treasurer may cause to be registered in the proper registry office, or in the proper office of land titles, if the land is registered under the Land Titles Act, a caution claiming duty in respect of such land, mortgage, or charge by reason of the death of the deceased, and the land, mortgage or charge, shall upon such registration be subject to the lien of the Crown for duty, but nothing herein contained shall affect the rights of the Crown to a lien independently of the caution.

LIEUTENANT-GOVERNOR IN COUNCIL MAY MAKE REGULATIONS.

23. The Lieutenant-Governor in Council may make rules and regulations for carrying into effect the provisions of this Act, and such rules and regulations shall be laid before the Assembly forthwith, if in session at the date of such rules and regulations, and if not then in session such rules and regulations shall be laid before the Assembly within the first seven days of the session next after the same are made.

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APPENDIX VI.

SCHEDULE A.

Fees Payable to the Crown.

Under Surrogate Courts Act.

1.

On proceedings in the offices of Registrars.

	$ c.
On every application for probate, administration, or guardianship (including notice thereof to Surrogate Clerk, but not postage)..	0 50
On certificate of Surrogate Clerk, upon such application (including transmission to Registrar, but not postage)...................	0 50
On every instrument or process with seal of Court................	0 50
Entry and notification of caveat, not including postage............	0 50
On every grant of probate or administration, as follows, viz.:	
Where the property devolving does not exceed $1,000..........	0 50
For every additional $1,000 or fraction thereof.............	0 50
On every final judgment in contentious or disputed cases..........	1 00
On deposit of a will for safe custody	0 50

2.

On proceedings in the office of the Surrogate Clerk.

The following fees shall be payable notwithstanding anything contained in section 73 of this Act, or in section 155 of the Ontario Insurance Act:—

	$ c.
On every search for grant of probate, administration, guardianship, or other matter in Clerk's office (other than searches on application of Registrars)	0 50
On every certificate of search or extract......................... (If exceeding three folios, 10 cents for each additional folio.)	1 00
On every certificate respecting other application or caveat, where the necessary search does not extend beyond three years.......... (Where the necessary search extends beyond three years, 10 cents additional for every year beyond three years.)	0 50
On every certificate, where the whole estate does not exceed in value $400; or where the estate consists of insurance money only, not exceeding $400	0 30
On every other certificate issued by the Clerk....................	0 50
On every order made on application to a Judge of the High Court Division and transmission of same, exclusive of postage	0 80
On entry of every appeal	1 00
On every judgment on appeal and transmission, exclusive of postage.	3 00
On entry of caveat	0 50
On every judgment or order on appeal...........................	2 50

SCHEDULE B.

Fees Payable to Judge.

	$ c.
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 or appointment	0 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 of the accounts to be audited does not exceed $1,000 .... per hour, but not to exceed $2 on any day.	1 00
On every audit where such total exceeds $1,000, but is under $10,000 per hour, but not to exceed $5 on any day.	1 00
On every audit where such total is or exceeds $10,000, but is under $50,000 .... per hour, but not to exceed $6 on any day.	1 50
On every audit where such total is or exceeds $50,000............ per hour, but not to exceed $10 on any day.	2 00

For every day's sitting in contentious or disputed cases, similar fees to those allowed in cases of audit.

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