THE ADMINISTRATION OF ESTATES ACT, 1925.

(15 Geo. 5, c. 23.)

An Act to consolidate Enactments relating to the Administration of the Estates of Deceased Persons. [772] [9th April, 1925.]

This Act came into operation on January 1, 1926 (see s. 58 (2), p. 362, *post*). It extends to England and Wales only (s. 58 (3), p. 362, *post*). Save as otherwise expressly provided (see s. 8, p. 313, *post*, and generally in Part III, p. 323, *post*), the Act does not apply in any case where the death occurred before the commencement of the Act (see s. 54, p. 356, *post*). In the notes to this Act, P. R.=Personal Representative, L. P. A.=Law of Property Act, A. E. A.=Administration of Estates Act, T. A.=Trustee Act, L. T. A.=Land Transfer Act, and S. C. of J.=Supreme Court of Judicature.

PART I.

Devolution of Real Estate.

1. Devolution of real estate on personal representative.—(1) Real estate to which a deceased person was entitled for an interest not ceasing on his death shall on his death, and notwithstanding any testamentary disposition thereof, devolve from time to time on the personal representative of the deceased, in like manner as before the commencement of this Act chattels real devolved on the personal representative from time to time of a deceased person. [773]

This sub-section, with s. 3 (1) and (2), p. 309, *post*, substantially re-enacts s. 1 (1) and (2) of the Land Transfer Act, 1897 (c. 65) (repealed as regards deaths after 1925 by the Law of Property (Amendment) Act, 1924 (c. 5), s. 1, 1st Sched., Vol. 15, title Real Property), and also, as to trust and mortgage estates, the first part of s. 30 (1) of the Conveyancing Act, 1881 (c. 41) (repealed, as to deaths after 1925, by the Law of Property Act, 1925 (c. 20), s. 207, 7th Sched. *ibid.*). Under s. 176 of the last-named Act entailed interests disposed of by will devolve on personal representatives (hereinafter referred to under the initials P. R.). Land which was copyhold before 1926 is now enfranchised and devolves as freehold; see L. P. A. 1922 (c. 16), s. 128 (1) (2), and 12th Sched. para. (1) (*a*) (*d*) (Vol. 3, title Copyholds, pp. 633, 660, 661).

The real estate devolving under this sub-section and the personal estate of a deceased person are assets for payment of his debts to the extent of his beneficial interest therein (see ss. 32, 55 (1) (xix), pp. 323, 359, *post*). As to the administration of assets, see ss. 34, 35, pp. 328, 330, *post*. As to assent by the P. R. to the vesting of property in the person next entitled, see s. 36, p. 332, *post*.

"*Interest not ceasing on his death.*"—This phrase is explained by s. 3 (3) (4) and (5), p. 310, *post*. It does not appear that sub-s. (4) of that section affords anything more than an instance of the meaning of the phrase, which is generally understood to be "an interest of which the deceased was competent to dispose by will at his death" (cf. Finance Act, 1894 (c. 30), s. 2 (1) (*a*) (*b*), title Estate and other Death Duties, p. 121, *ante*). Thus the beneficial equitable interest of a tenant for life will not devolve on his personal representatives and will not be assets for payment of his debts. The legal estate will so devolve as a trust estate (see s. 3 (1) (ii), p. 309, *post*), for it is not an interest ceasing on death (*In the Estates of Gibbings*, [1928] P. 28; *Re Bridgett and Hayes' Contract*, [1928] Ch. 163). As to the special representatives on whom in some circumstances it will devolve, see ss. 22–24, pp. 314–316, *post*, and the Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 162, p. 372, *post*.

Other interests ceasing on death are: (i) The interest of one of two or more joint tenants where others survive (s. 3 (4), p. 310, *post*); see, as to joint tenancy, L. P. A. 1925 (c. 20), s. 36 (Vol. 15, title Real Property); (ii) an entailed interest not disposed of by will (*ibid.* s. 176); (iii) the interest of a corporator sole (*ibid.* s. 180, and s. 3 (5), p. 310, *post*).

The P. R. is made a trustee for the persons beneficially entitled under an intestacy (s. 49 (b), p. 352, *post*). This will be an express trust within the rule laid down in *Toates* v. *Toates*, [1926] 2 K. B. 30.

With regard to persons entitled under a will his fiduciary capacity is left to be inferred from s. 2 (3) (b), p. 309, *post*, and the will itself.

Real estate is defined in s. 3 (1), p. 309, *post*. It does not include money to arise from a trust for sale or secured or charged on land (*ibid.*).

"*Entitled.*"—An entailed interest is included (see s. 3 (2)).

(2) The personal representatives for the time being of a deceased person are deemed in law his heirs and assigns within the meaning of all trusts and powers. [774]

This sub-section re-enacts the last part of s. 30 (1) of the Conveyancing Act, 1881 (c. 41) (repealed; see note to sub-s. (1), p. 306, *ante*).

Having regard to s. 18 (1) of the Trustee Act, 1925 (c. 19), Vol. 20, title TRUSTS AND TRUSTEES), it would appear that this sub-section only applies where the deceased was the sole or sole surviving trustee, unless he were a donee of a power without being a trustee. Cf. sub-s. (2) of that section, which corresponds to this sub-section.

The conception of a body of trustees holding the status of a quasi corporation in which the property and powers devolve on the members of the body for the time being has been gradually evolved. Thus before 1882 powers given to trustees devolved only on those in some way pointed out by the creator of the power as proper persons to exercise it (*Re Crunden and Meux*, [1909] 1 Ch. 690): *e.g.* if the heirs of the trustees were mentioned the heir of the survivor could sell (*Re Morton and Hallett* (1880), 15 Ch. D. 143), and if the assigns, his devisee (*Hall* v. *May* (1857), 3 K. & J. 585).

After the Conveyancing Act, 1881 (c. 41), it would seem that if the heirs were mentioned the P. R. of the last survivor might have sold, but not if the powers were given to A. and B. without mentioning their heirs (*Re Crunden and Meux*, [1909] 1 Ch. 690).

Since the Conveyancing Act, 1911 (c. 37), s. 8, now the Trustee Act, 1925 (c. 19), s. 18 (2), the P. R. of the survivor can sell if the powers are given to trustees jointly (Vol. 20, title TRUSTS AND TRUSTEES).

The position of the P. R. of the last surviving trustee is that they cannot be compelled to act as trustees of their testator's trust (*Re Benett*, [1906] 1 Ch. 216); but if they accept the trusts they become trustees (*Re Waidanis*, [1908] 1 Ch. 123), but may be ousted by the appointment of new trustees under a power (*Re Routledge*, [1909] 1 Ch. 280, or may themselves appoint new trustees (cf. *Re Howarth*, [1909] W. N. 30).

(3) The personal representatives shall be the representative of the deceased in regard to his real estate to which he was entitled for an interest not ceasing on his death as well as in regard to his personal estate. [775]

The real estate becomes assets for payment of debts (see s. 32, p. 323, *post*).

"Interest not ceasing on his death" (see note to sub-s. (1), *ante*).

2. Application to real estate of law affecting chattels real.—(1) Subject to the provisions of this Act, all enactments and rules of law, and all jurisdiction of any court with respect to the appointment of administrators or to probate or letters of administration, or to dealings before probate in the case of chattels real, and with respect to costs and other matters in the administration of personal estate, in force before the commencement of this Act, and all powers, duties, rights, equities, obligations, and liabilities of a personal representative in force at the commencement of this Act with respect to chattels real, shall apply and attach to the personal representative and shall have effect with respect to real estate vested in him, and in particular all such powers of disposition and dealing as were before the commencement of this Act exercisable as respects chattels real by the survivor or survivors of two or more personal representatives, as well as by a single personal representative, or by all the personal representatives together, shall be exercisable by the personal representatives or representative of the deceased with respect to his real estate. [776]

This sub-section replaces with amendments the Land Transfer Act, 1897 (c. 65), s. 2 (2) (Vol. 15, title REAL PROPERTY) (repealed as to deaths occurring after 1925; see note to s. 1 (1), *supra*). The effect of Part I. of that Act is that P. Rs. represent the deceased with regard to the whole of his estate, except interests ceasing on his death, real and personal estate being placed on the same footing. The words of the latter part of the sub-section are taken from s. 30 (1) of the Conveyancing Act, 1881 (c. 41) (similarly repealed; see note to s. 1 (1), *supra*, and Vol. 15, title REAL PROPERTY).

The sub-section does little more than to declare the principle. The former common law powers of sale, etc. (see Halsbury's Laws of England, Vol. 14, pp. 296 *et seq.*) have now as regards the estates of intestates been superseded by the trust for sale introduced by ss. 33 and 39 (i) (ii) (iii), pp. 324, 338, *post*, and in fact nearly all powers, duties, rights, etc., of a P. R. are specifically dealt with in this Act and the Trustee Act, 1925

(c. 19) (Vol. 20, title TRUSTS AND TRUSTEES), where "trustee" includes personal representatives where the context so admits (see s. 68 (17) of that Act). The jurisdiction with respect to probate matters now in force is that conferred by s. 20 of the Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), Vol. 4, title COURTS, p. 154. Other such "enactments" now in force are ss. 150–175 of that Act, pp. 367 *et seq.*, *post*. These sections (see notes thereto) superseded the law in force at the commencement of the Act. As to costs, see R. S. C. Ord. 65.

Joint and several powers.—Before 1926 personal representatives had several powers over personalty, chattels real (*Simpson* v. *Gutteridge* (1816), 1 Madd. 609; *Cole* v. *Miles* (1852), 10 Hare, 179), and trust and mortgage estates in realty (Conveyancing Act, 1881 (c. 41), s. 30 (1) repealed as to deaths occurring after 1925 (see note to s. 1 (1), p. 306, *ante*)). "Real estate" in this part of the Act includes chattels real and trust and mortgage estates (see s. 3 (1), p. 309, *post*). P. Rs. therefore have no several powers to convey these properties.

Dealings before probate.—An executor derives his title from the will and not from probate, he can therefore institute an action before probate, but he cannot obtain judgment until probate has been granted because the production of the probate is the only way in which by the rules of court he is allowed to prove his title. An administrator, on the other hand, derives title solely under his grant, and cannot therefore institute an action as administrator before he gets his grant (*Meyappa Chetty* v. *Supramanian Chetty*, [1916] 1 A. C. 603, *per* LORD PARKER, at pp. 608–9). In the case of an executor proceedings may be stayed till probate (*Tarn* v. *Commercial Bank of Sydney* (1884), 12 Q. B. D. 294).

In equity (though not at law) an intending administrator may commence proceedings, and it is sufficient if he procure a grant of administration before the hearing (*Fell* v. *Lutwidge* (1740), 2 Atk. 120).

The capacity in which the P. R. sues must be stated in the indorsement of claim on the writ (R. S. C. Ord. 3, r. 4).

An executor may get in the estate and give receipts before probate, though he cannot compel payment (*Re Stevens*, [1897] 1 Ch. 422, *per* NORTH, J., at p. 430, *affd.*, [1898] 1 Ch. 162). No action lies for neglect to take out probate (*ibid. per* VAUGHAN WILLIAMS, L.J.).

Under the L. T. A. 1897 (c. 65), a P. R. could sell surface and minerals separately without leave of the Court under the Trustee Act, 1893 (c. 53) (*Re Chaplin and Staffs. Potteries Waterworks Co's. Contract* [1922] 2 Ch. 824). The judgments of SCRUTTON and YOUNGER, L.JJ., in that case may usefully be consulted as to the powers of a P. R. As to partition, see *Re Kemnal and Still's Contract*, [1923] 1 Ch. 293.

As to the powers of a P. R. generally see ss. 32–43, pp. 323 *et seq.*, *post*, and notes thereto.

As to protection of purchasers, see s. 36 (6) (7) (8), p. 335, *post*.

(2) Where as respects real estate there are two or more personal representatives, a conveyance of real estate devolving under this Part of this Act shall not, save as otherwise provided as respects trust estates including settled land, be made without the concurrence therein of all such representatives or an order of the court, but where probate is granted to one or some of two or more persons named as executors, whether or not power is reserved to the other or others to prove, any conveyance of the real estate may be made by the proving executor or executors for the time being, without an order of the court, and shall be as effectual as if all the persons named as executors had concurred therein. [777]

This sub-section re-enacts the last part of the Land Transfer Act, 1897 (c. 65), s. 2 (2) (repealed as to deaths occurring after 1925; see note to s. 1 (1), p. 306, *ante*), and the Conveyancing Act, 1911 (c. 37), s. 12 (repealed as to deaths occurring after 1925 similarly to the Conveyancing Act, 1881 (c. 14); see note to s. 1 (1), p. 306, *ante*). Subject to s. 24, p. 316, *post*, it removes the several power of personal representatives to convey chattels real and trust and mortgage estates which they had before 1925 (see note to sub-s. (1) of this section, *ante*); these interests being included in the definition of real estate in s. 3 (1), p. 309, *post*. "Conveyance" is defined by s. 55 (1) (iii), p. 356, *post*. And see the Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 155, p. 370, *post*.

Since this Act one of two or more executors who have proved cannot contract to make a lease and an attempt to do so is invalid (*Johnson* v. *Clarke*, [1928] Ch. 847).

As to the powers of a sole and sole surviving personal representative, see Trustee Act, 1925 (c. 19), ss. 18, 68 (17) (Vol. 20, title TRUSTS AND TRUSTEES); Law of Property Act, 1925 (c. 20), s. 27 (2), as amended (Vol. 15, title REAL PROPERTY). The provision as to conveyance by proving executors alone falls within the rule laid down by s. 8, p. 313, *post*, and applies whether the testator died before or after the commencement of the Act (see s. 8 (2)).

(3) Without prejudice to the rights and powers of a personal representative, the appointment of a personal representative in regard to real estate shall not, save as hereinafter provided, affect—

(*a*) any rule as to marshalling or as to administration of assets;

(*b*) the beneficial interest in real estate under any testamentary disposition;

(*c*) any mode of dealing with any beneficial interest in real estate, or the proceeds of sale thereof;

(*d*) the right of any person claiming to be interested in the real estate to take proceedings for the protection or recovery thereof against any person other than the personal representative. [778]

As to the rules of marshalling, see Halsbury's Laws of England, Vol. 13, pp. 144–146. As to administration of assets, see ss. 34, 35, pp. 328, 330, *post*.

3. Interpretation of Part I.—(1) In this Part of this Act "real estate" includes—

(i) Chattels real, and land in possession, remainder, or reversion, and every interest in or over land to which a deceased person was entitled at the time of his death; and

(ii) Real estate held on trust (including settled land) or by way of mortgage or security, but not money to arise under a trust for sale of land, nor money secured or charged on land. [779]

The whole of this section is new.

For the definition of "real estate" see s. 55 (1) (xix), p. 359, *post*. The special definition in s. 52, p. 355, *post*, does not apply here.

"Land" is defined by s. 55 (1) (xxiv), p. 360, *post*, by reference to S. L. A. 1925 (c. 18), s. 117 (1) (ix); and "settled land," *ibid.* ss. 2, 3, and 117 (1) (xxiv), (Vol. 17, title SETTLEMENTS). As to the vesting of settled land on the death of a tenant for life, see note to s. 1 (1), p. 306, *ante*.

The expression "chattels real" includes leases for years, and options incident to a lease, *e.g.* an option for the lessee to purchase (*Re Adams and Kensington Vestry* (1884), 27 Ch. D. 394), if exercisable within the limits of perpetuity (*Woodall* v. *Clifton*, [1905] 2 Ch. 257); a tenancy from year to year (*Doe* v. *Porter* (1789), 3 T. R. 13); and a rentcharge arising out of a term of years (*Re Fraser*, [1904] 1 Ch. 726).

As to para (ii), see *Re Price*, [1928] 1 Ch. 579, at p. 589.

As to renunciation in a case where settled land becomes vested in persons other than the trustees of the settlement, see s. 23, p. 315, *post*.

The devolution of trust estates will take place under this section, together with s. 1, p. 306, *ante*.

In the case of a mortgage the mortgage term seems to be included in sub-s. (ii), and all the proving P. Rs. must therefore join in an assignment, but the mortgage debt is a chose in action and excluded. The mortgage debt could therefore, it seems, be dealt with by one executor, who by giving a receipt for the mortgage money might, apparently, determine the term (see L. P. A. 1925 (c. 20), ss. 115, 116, Vol. 15, title REAL PROPERTY).

(2) A testator shall be deemed to have been entitled at his death to any interest in real estate passing under any gift contained in his will which operates as an appointment under a general power to appoint by will, or operates under the testamentary power conferred by statute to dispose of an entailed interest. [780]

The interests here mentioned, being interests not ceasing on death, devolve on the personal representatives of the deceased (s. 1 (1), p. 306, *ante*), and are assets for the payment of his debts (see s. 32, p. 323, *post*; *Beyfus* v. *Lawley*, [1903] A. C. 411). A similar result will occur in the case of similar interests in personalty (see s. 32). Entailed interests in personalty may now be created (see L. P. A. 1925 (c. 20), s. 130 (1) (3), Vol. 15, title REAL PROPERTY).

Before this Act property mentioned in this sub-section did not devolve on the executor as such within the meaning of the Finance Act, 1894 (c. 20), s. 9, so that estate duty was a first charge on the property (*O'Grady* v. *Wilmot*, [1910] 2 A. C. 231), but the P. R. will now be liable to pay the duty (see L. P. A. 1925 (c. 20), s. 16, Vol. 15, title REAL PROPERTY), but it must be repaid to them.

S. 27 of the Wills Act, 1837 (c. 26) (Vol. 20, title WILLS), provides in effect that a general devise or bequest includes property over which the testator had a general power of appointment. Property of which a person has a power of appointment is not the property of that person (*Re Armstrong, Ex p. Gilchrist* (1886), 17 Q. B. D. 521;

Tremayne v. *Rashleigh*, [1908] 1 Ch. 681; *Re Mathieson*, [1927] 1 Ch. 283); unappointed property will not devolve on the personal representatives of the donee of the power of appointment. As to what is a general power of appointment, see Halsbury's Laws of England, Vol. 23, p. 4.

"Testamentary power conferred by statute": see L. P. A. 1925 (c. 20), s. 176 (Vol. 15, title REAL PROPERTY).

(3) An entailed interest of a deceased person shall (unless disposed of under the testamentary power conferred by statute) be deemed an interest ceasing on his death, but any further or other interest of the deceased in the same property in remainder or reversion which is capable of being disposed of by his will shall not be deemed to be an interest so ceasing. [781]

"Unless disposed of," etc.: see L. P. A. 1925 (c. 20), s. 176 (Vol. 15, title REAL PROPERTY).

"Ceasing on his death": see note to s. 1 (1), p. 306, *ante*.

(4) The interest of a deceased person under a joint tenancy where another tenant survives the deceased is an interest ceasing on his death. [782]

"An interest ceasing on his death": see note to s. 1 (1), p. 306, *ante*. Such an interest will devolve on the survivors or survivor of the joint tenants. A survivor of joint tenants who is solely and beneficially interested will, it is submitted, be no longer affected by any of the incidents of joint tenancy; cf. L. P. A. 1925 (c. 20), s. 36 (2) (3), as amended (Vol. 15, title REAL PROPERTY), the effect of which will be that estates vested in trustees and mortgagees as joint tenants cannot be severed and must pass to the survivors.

Severance of a joint tenancy must be made *inter vivos* and cannot be effected by will (2 Blackstone Com. 186). Severance may be effected by an agreement implied by the execution of mutual wills (*In the Estate of Heys*, [1914] P. 192).

(5) On the death of a corporator sole his interest in the corporation's real and personal estate shall be deemed to be an interest ceasing on his death and shall devolve to his successor.

This subsection applies on the demise of the Crown as respects all property, real and personal, vested in the Crown as a corporation sole. [783]

Cf. L. P. A. 1925 (c. 20), s. 180 (1), Vol. 15, title REAL PROPERTY.

PART II.

EXECUTORS AND ADMINISTRATORS.

General Provisions.

[*S. 4 rep. by Supreme Court of Judicature (Consolidation) Act*, 1925 (*c.* 49), *s.* 226, *and Sched.* 6, *and re-enacted by* ibid. *s.* 159; *see p.* 371, *post.*]

5. Cesser of right of executor to prove.—Where a person appointed executor by a will—

(i) survives the testator but dies without having taken out probate of the will; or

(ii) is cited to take out probate of the will and does not appear to the citation; or

(iii) renounces probate of the will;

his rights in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his real and personal estate shall devolve and be committed in like manner as if that person had not been appointed executor. [784]

This section replaces by clause (iii) the Court of Probate Acts, 1857 (c. 77), s. 79, p. 292, *ante*, and by clauses (i) and (ii), 1858 (c. 95), s. 16, p. 293, *ante* (repealed as to deaths occurring after 1925 by ss. 56, 58 (2) and 2nd Sched., Pt. I of this Act, pp. 361, 362, and 366, *post*). The section is nothing but an indication of the effect of the circumstances mentioned on the rights of a person appointed executor, so far as it concerns himself; it is not to be inferred that such a person, surviving the testator and not cited, may by mere inactivity or by failure to execute an effective renunciation, affect the rights and liabilities of proving executors and persons dealing with them. So far as they are concerned it is immaterial whether the person appointed executor had died, has failed to appear to citation, has renounced, or has merely remained inactive; to them the only material question is whether such a person has proved. See s. 8, p. 313, *post*, and s. 2 (2), p. 308, *ante*.

"*Cited to take out probate.*"—As to citations, generally, see Halsbury's Laws of England, Vol. 14, pp. 155–6; Tristram and Coote's Probate Practice, 16th Edn., pp. 350 *et seq.* The phrase does not include citations to propound and prove a will in solemn form (see Halsbury's Laws of England, Vol. 14, pp. 174–5); non-appearance to such a citation is no bar to subsequent acceptance of probate (*Bewsher* v. *Williams* (1861), 3 Sw. & Tr. 62).

Renunciation.—The person appointed executor cannot renounce (*a*) after he has proved the will (*Graham* v. *Keble* (1813), 2 Dow. 17); or (*b*) as to part only of the estate, he must accept or refuse all (*Doyle* v. *Blake* (1804), 2 Sch. & Lef. 231). As to the effect of withdrawal of a renunciation, see s. 6, *post*.

The proving executors and persons dealing with them are not concerned with the question whether a person appointed executor has renounced or not (see above and ss. 8, p. 313, *post*, and 2 (2), p. 308, *ante*).

Renunciation need not be under seal. It is usually made in a prescribed form. It is not a conveyance but disclaimer is (see L. P. A. 1925 (c. 20), s. 205 (1) (ii), Vol. 15, title REAL PROPERTY), and therefore disclaimer must be by deed (*ibid.* s. 52).

No one can be compelled to accept probate (*Doyle* v. *Blake* (1804), 2 Sch. & Lef. 231). "I think no action would lie for neglect to take out probate . . . and I think that plaintiff's only remedy is by citing the executor in the Probate Division" (VAUGHAN WILLIAMS, L.J., in *Re Stevens Cooke* v. *Stevens*, [1898] 1 Ch. 162, at p. 177). If, however, a person appointed executor intermeddles with the estate and refuses to take out probate he may be cited to do so (for form, see Tristram and Coote's Probate Practice, 16th Edn, p. 984), and if he fail to appear to the citation he will be peremptorily ordered to do so (*Mordaunt* v. *Clarke* (1868), L. R. 1 P. & D. 592; *In the Goods of Lister* (1894), 70 L. T. 812). If all the persons appointed executors fail to prove, it will be necessary to obtain a grant of administration with the will annexed; as to which, see Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 166, p. 374, *post*.

6. Withdrawal of renunciation.—(1) Where an executor who has renounced probate has been permitted, whether before or after the commencement of this Act, to withdraw the renunciation and prove the will, the probate shall take effect and be deemed always to have taken effect without prejudice to the previous acts and dealings of and notices to any other personal representative who has previously proved the will or taken out letters of administration, and a memorandum of the subsequent probate shall be endorsed on the original probate or letters of administration.

(2) This section applies whether the testator died before or after the commencement of this Act. [785]

As to the circumstances in which an executor who has renounced will be permitted to withdraw his renunciation, see Halsbury's Laws of England, Vol. 14, p. 144; English and Empire Digest, Vol. 23, pp. 56 *et seq.*; Tristram and Coote's Probate Practice, 16th Edn., p. 274. A renunciation may be withdrawn before it is filed (*In the Goods of Morant* (1874), L. R. 3 P. & D. 151). Afterwards the leave of the Court is necessary (*Melville* v. *Ancketill* (1909), 25 T. L. R. 655). Withdrawal will not be allowed on arbitrary grounds; some benefit to the estate or the beneficiaries must be indicated (see *In the Goods of Gill* (1873), L. R. 3 P. & D. 113), *e.g.* when one of two executors had renounced and the other absconded the renouncing executor was permitted to withdraw his renunciation and take probate (*In the Goods of Stiles*, [1898] P. 12), and where a bankrupt's estate was administered by the Official Receiver, who desired to withdraw, and the debts were paid, the widow and children who had renounced were permitted to withdraw the renunciation (*In the Goods of Thacker*, [1900] P. 15).

As to the practice, see Non-Contentions Probate Rules, r. 112.

7. Executor of executor represents original testator.—(1) An executor of a sole or last surviving executor of a testator is the executor of that testator.

This provision shall not apply to an executor who does not prove the will of his testator, and, in the case of an executor who on his death leaves surviving him some other executor of his testator who afterwards proves the will of that testator, it shall cease to apply on such probate being granted. [786]

The origin of this section will be found in the statute (1351–2), 25 Edw. 3, st. 5, c. 5, p. 268, *ante* (repealed so far as concerns deaths occurring after 1925; see ss. 56, 58 (2), 2nd Sched., Pt. I, pp. 361, 362, and 365, *post*).

The provision as to the case of an executor who on his death leaves surviving him some other executor who afterwards proves refers to the position arising where of two persons, A. and B., appointed executors, B. proves, power being reserved to A., and A. afterwards proves, or A. renounces, B. then proves, and A. subsequently withdraws his renunciation (see s. 6, p. 311, *ante*, and note thereto) and proves; in no other case could the existence of a sole or sole surviving executor and probate by another person appointed executor be included in the same set of circumstances. See s. 5, p. 310, *ante*.

By s. 55 (1) (xi), p. 358, *post*, "executor" includes a person deemed to be appointed executor as respects settled land (see s. 22, p. 314, *post*).

(2) So long as the chain of such representation is unbroken, the last executor in the chain is the executor of every preceding testator. [787]

If probate be granted to one of two executors, power being reserved to the other to prove, and the proving executor dies and the non-proving executor is cited and fails to appear, the chain of executorship is continued in the executor of the deceased executor without a fresh grant (*In the Goods of Reid*, [1896] P. 129.)

Attorney.—A grant to the attorney of an executor does not break the chain, and the executor's representative can continue the administration of the estate of the executor's testatrix after his death without a fresh grant (*In the Goods of Murguia* (1884), 9 P. D. 236).

As to power of the P. R., with the consent of the Court and notice to the beneficiaries to transfer the estate to the Public Trustee for administration, see Public Trustee Act, 1906 (c. 55), s. 6 (2), Vol. 20, title TRUSTS AND TRUSTEES. And as to power of the Court to appoint a judicial trustee and displace the P. R., Judicial Trustees Act, 1896 (c. 35), s. 1 (1) and (2), Vol. 20, title TRUSTS AND TRUSTEES.

And as to power to appoint additional P. R., see Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 160 (2), p. 371, *post*, and s. 23 (2) of this Act, p. 315, *post*.

(3) The chain of such representation is broken by—

(*a*) an intestacy; or

(*b*) the failure of a testator to appoint an executor; or

(*c*) the failure to obtain probate of a will;

but is not broken by a temporary grant of administration if probate is subsequently granted. [788]

"Intestacy" *semble* must mean a total intestacy, and does not include partial intestacy where an executor is appointed and proves, as in s. 55 (1) (vi), p. 357, *post*.

The chain is broken by the appointment of an administrator with the will annexed of an executor (*In the Goods of Bridger* (1878), 4 P. D. 77), or of an ordinary administrator (*Barber* v. *Walker* (1867), 15 W. R. 728).

Failure to obtain probate.—"Failure" plainly means failure on the part of the persons appointed executors. Thus, if B., the executor of A., dies before distribution, having appointed C. and D. to be his executors, and D. proves, C. having failed to prove, the chain of representation will not be broken; see sub-s. (1), *ante*. No one can be compelled to accept probate; see note to s. 5, p. 311, *ante*. A person appointed to be the executor of an executor cannot accept the executorship of his testator and refuse the executorship of his testator's testator (*In the Goods of Perry* (1840), 2 Curt. 655).

Temporary grant.—See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 45), ss. 163–165, pp. 373, 374, *post*.

(4) Every person in the chain of representation to a testator—

(*a*) has the same rights in respect of the real and personal estate of that testator as the original executor would have had if living; and

(*b*) is, to the extent to which the estate whether real or personal of that testator has come to his hands, answerable as if he were an original executor. [789]

8. Right of proving executors to exercise powers.—(1) Where probate is granted to one or some of two or more persons named as executors, whether or not power is reserved to the others or other to prove, all the powers which are by law conferred on the personal representative may be exercised by the proving executor or executors for the time being and shall be as effectual as if all the persons named as executors had concurred therein.

(2) This section applies whether the testator died before or after the commencement of this Act. [790]

It will be noted that this section applies no matter when the death of the testator occurred (sub-s. (2)).

Under s. 2 (2), p. 308, *ante*, all the proving executors must concur in a conveyance of real estate including leaseholds.

Where more than two executors have been appointed by a testator who died before the Act, and some only have proved, power being reserved to the others, and the executors are also trustees for sale and are proposing to sell real estate, it is sometimes difficult to determine whether the executors have or have not by their conduct assented to the property vesting in themselves as trustees, and if the non-proving executors have not disclaimed whether, if such be the case, the latter ought to be asked to concur. In these cases it is useful to remember that there may be disclaimer by conduct, and that conduct which amounts to a disclaimer of the office of trustee also amounts to a disclaimer of the legal estate (*Re Birchall* (1889), 40 Ch. D. 436). It is thought that the same question will arise where the testator died after 1925, notwithstanding s. 36 (4) (p. 334, *post*), which requires assents in such a case to be in writing. An assent in writing is only required to *pass* a legal estate, and the legal estate being already in the executors, who are also the trustees, no passing of the legal estate is required, and the assent may therefore be implied as before the Act. See however *Re Verburgh*, [1928] W. N. 208, where the P. R. had given an undertaking to vest the estate in trustees.

The Law of Property Act, 1925 (c. 20), s. 27 (2) (Vol. 15, title REAL PROPERTY), preserves the right of a sole P. R. to give receipts for capital money.

9. Vesting of estate of intestate between death and grant of administration.—Where a person dies intestate, his real and personal estate, until administration is granted in respect thereof, shall vest in the Probate Judge in the same manner and to the same extent as formerly in the case of personal estate it vested in the ordinary. [791]

"*Intestate*," in this section, *semble*, means "without having appointed an executor or having appointed an executor whose rights in respect of the executorship have wholly ceased." The definition given in s. 55 (1) (vi), p. 357, *post*, is not exhaustive.

"*Probate Judge*": see s. 55 (1) (xv), p. 359, *post*.

"*Ordinary*."—For the meaning of the word, see 2 Co. Inst. 398. For an account of the former jurisdiction of the ordinary, see 2 Bl. Comm. 494 *et seq* (*Dyke* v. *Walford* (1848), 5 Moo. P. C. C. 434; *Manning* v. *Napp* (1692), 1 Salk. 37).

[*Ss.* 10–14 *rep. by the Supreme Court of Judicature* (*Consolidation*) *Act*, 1925 (*c.* 49), *s.* 226, *and Sched.* 6. *S.* 10 *is replaced by* ibid. *s.* 162, *p.* 372, post; *s.* 11 *by* ibid. *s.* 167 (7), *p.* 375, post; *s.* 12 *by* ibid. *s.* 160, *p.* 371, post; *s.* 13 *by* ibid. *s.* 155, *p.* 370, post; *and s.* 14 *by* ibid. *s.* 161, *p.* 372, post.]

15. Executor not to act while administration is in force.—Where administration has been granted in respect of any real or personal estate of a deceased person, no person shall have power to bring any action or otherwise act as executor of the deceased person in respect of the estate comprised in or affected by the grant until the grant has been recalled or revoked. [792]

This section reproduces and extends to real estate s. 75 of the Court of Probate Act, 1857 (c. 77), p. 291, *ante* (repealed as to deaths occurring after 1925; s. 56 and 2nd Sched., Pt. I, pp. 361 and 366, *post*).

As to revocation of grants, see Tristram and Coote's Probate Practice, 16th Edn., pp. 285 *et seq.* (practice, pp. 291 *et seq.*); Halsbury's Laws of England, Vol. 14, pp. 213 *et seq.* As to the validity of acts done before revocation, see s. 27 (2), p. 320, *post*.

[*S.* 16 *rep. by the Supreme Court of Judicature (Consolidation) Act*, 1925 (*c.* 49), *s.* 226, *and Sched.* 6, *and replaced by* ibid. *s.* 163, *p.* 373, post.]

17. Continuance of legal proceedings after revocation of temporary administration.—If, while any legal proceeding is pending in any court by or against an administrator to whom a temporary administration has been granted, that administration is revoked, that court may order that the proceeding be continued by or against the new personal representative in like manner as if the same had been originally commenced by or against him, but subject to such conditions and variations, if any, as that court directs. [793]

This section reproduces s. 76 of the Court of Probate Act, 1857 (c. 77), p. 292, *ante* (repealed as mentioned in note thereto).

As to revocation of grants, see note to s. 15, p. 313, *ante*.

[*Ss.* 18–20 *rep. by the Supreme Court of Judicature (Consolidation) Act*, 1925 (*c.* 49), *s.* 226, *and Sched.* 6; *s.* 18 *is replaced by* ibid. *s.* 164 (*p.* 373, post); *s.* 19 *by* ibid. *s.* 166 (*p.* 374, post); *and s.* 20 *by* ibid. *s.* 165 (*p.* 374, post).]

21. Rights and liabilities of administrator.—Every person to whom administration of the real and personal estate of a deceased person is granted, shall, subject to the limitations contained in the grant, have the same rights and liabilities and be accountable in like manner as if he were the executor of the deceased. [794]

This section reproduces Stat. (1357), 31 Edw. 3, stat. 1, c. 11 (repealed by the Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 226 and Sched. 6, Vol. 4, title COURTS, pp. 201, 207; The Statute of Distribution, 1670 (c. 10), s. 1, Vol. 5, title DESCENT AND DISTRIBUTION, p. 115; and A. E. A. 1798 (c. 87), s. 7, p. 283, *ante*).

Though the administrator has the same "rights" as an executor he is not quite in the same position; *e.g.* his appointment breaks the chain of representation (s. 7, p. 311, *ante*).

Special Provisions as to Settled Land.

22. Special executors as respects settled land.—(1) A testator may appoint, and in default of such express appointment shall be deemed to have appointed, as his special executors in regard to settled land, the persons, if any, who are at his death the trustees of the settlement thereof, and probate may be granted to such trustees specially limited to the settled land.

In this subsection "settled land" means land vested in the testator which was settled previously to his death and not by his will.

(2) A testator may appoint other persons either with or without such trustees as aforesaid or any of them to be his general executors in regard to his other property and assets. [795]

The law of this group of sections is in an unsatisfactory and possibly unsettled state. It seems reasonable to infer that this section is intended to provide that the legal estate of a tenant for life, or person having the powers of a tenant for life, which is a trust estate and is not assets for payment of debts, shall, on the death of the tenant for life, pass, not to the general personal representatives, who are not concerned with it, but to the trustees of the settlement, who plainly are; in other words, substantially to assimilate the position to the position arising on the death of one of several trustees holding as joint tenants. Such an end, however, whether it was desired or not, has not in the event been achieved.

It seems that this section does not apply to cases where the settlement "comes to an end" on the death of the tenant for life: see Settled Land Act, 1925 (c. 18), s. 3 (Vol. 17, title SETTLEMENTS), and *Re Bridgett and Hayes' Contract*, [1928] Ch. 163, but where the tenant for life has re-settled the land in *his* will the section does apply (*Re Taylor (deceased)*, (1929), 167 L. T. Jo. 401.

In such cases, and perhaps if there are no trustees of the settlement, it appears that the interest of the tenant for life will devolve on his general representatives under the general law (ss. 1 (1), 3 (1) (ii), pp. 306, 309, *ante*). But the existence of a family charge may keep the settlement on foot.

"*Trustees of the settlement*" does not mean only the persons mentioned in s. 30 (1) of the Settled Land Act, 1925 (c. 18) (Vol. 17, title SETTLEMENTS); the P. R. of a person creating a settlement by will or by dying intestate are included under s. 30 (3) of that Act (*In the Estates of Gibbings*, [1928] P. 28). The intestacy of a tenant for life of settled land within the meaning of this section is provided for by the Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 162 (1), and proviso, p. 372, *post*.

23. Provisions where, as respects settled land, representation is not granted to the trustees of the settlement.—(1) Where settled land becomes vested in a personal representative, not being a trustee of the settlement, upon trust to convey the land to or assent to the vesting thereof in the tenant for life or statutory owner in order to give effect to a settlement created before the death of the deceased and not by his will, or would, on the grant of representation to him, have become so vested, such representative may—

(*a*) before representation has been granted, renounce his office in regard only to such settled land without renouncing it in regard to other property;

(*b*) after representation has been granted, apply to the court for revocation of the grant in regard to the settled land without applying in regard to other property. [796]

This section may not apply where the settlement ceases on the death of the testator within the meaning of the dicta in *Re Bridgett and Hayes' Contract*, [1928] Ch. 163 (see note to last section).

"*Trustee of the settlement*," *semble*, has the same meaning as in s. 22; see note thereto, *ante*. This section seems to be directed to the position arising when no trustees of the settlement exist at the date of the death of the tenant for life. S. 22, p. 314, *ante*, does not apply in such a case (see the words "if any" in that section), and the estate passes to the general personal representatives under the general law (ss. 1 (1), 3 (1) (ii), pp. 306, 309, *ante*); this section gives effect to the principle to be deduced from s. 22, *ante*, and provides machinery for transferring the estate to special executors, separating the settled land from the general estate.

If trustees of the settlement exist but refuse to take a grant, then it would seem on principle that the persons deemed to have been appointed executors having failed to prove, an administrator with the will annexed should be appointed in respect of the settled land, but in fact, it is submitted that the general executors would be entitled to a general grant: see Non-Contentious Probate Rules, r. 118. On the appointment of new trustees they could apply for a grant under sub-s. (2), *post* (but see the note to s. 22, p. 314, *ante*).

(2) Whether such renunciation or revocation is made or not, the trustees of the settlement, or any person beneficially interested thereunder, may apply to the High Court for an order appointing a special or additional personal representative in respect of the settled land, and a special or additional personal representative, if and when appointed under the order, shall be in the same position as if representation had originally been granted to him alone in place of the original personal representative, if any, or to him jointly with the original personal representative, as the case may be, limited to the settled land, but without prejudice to the previous acts and dealings, if any, of the personal representative originally constituted or the effect of notices given to such personal representative. [797]

See note to sub-s. (1), *ante*.

(3) The court may make such order as aforesaid subject to such security, if any, being given by or on behalf of the special or additional personal representative, as the court may direct, and shall, unless the court considers that special considerations apply, appoint such persons as may be necessary to secure that the persons to act as representatives

in respect of the settled land shall, if willing to act, be the same persons as are the trustees of the settlement, and an office copy of the order when made shall be furnished to the Principal Probate Registry for entry, and a memorandum of the order shall be endorsed on the probate or administration. [798]

The security is fixed by the Registrar; see President's Direction, dated July 31, 1928; [1928], W. N. 225).

(4) The person applying for the appointment of a special or additional personal representative shall give notice of the application to the Principal Probate Registry in the manner prescribed. [799]

See note to sub-s. (3), *ante*.

(5) Rules of court may be made for prescribing for all matters required for giving effect to the provisions of this section, and in particular—

(*a*) for notice of any application being given to the proper officer;

(*b*) for production of orders, probates, and administration to the registry;

(*c*) for the endorsement on a probate or administration of a memorandum of an order, subject or not to any exceptions;

(*d*) for the manner in which the costs are to be borne;

(*e*) for protecting purchasers and trustees and other persons in a fiduciary position, dealing in good faith with or giving notices to a personal representative before notice of any order has been endorsed on the probate or administration or a pending action has been registered in respect of the proceedings. [800]

See President's Direction, dated July 31, 1928, [1928] W. N. 225.

24. Power for special personal representatives to dispose of settled land.—(1) The special personal representatives may dispose of the settled land without the concurrence of the general personal representatives, who may likewise dispose of the other property and assets of the deceased without the concurrence of the special personal representatives.

(2) In this section the expression "special personal representatives" means the representatives appointed to act for the purposes of settled land and includes any original personal representative who is to act with an additional personal representative for those purposes. [801]

See ss. 22 and 23, pp. 314, 315, *ante*, and notes thereto. Cf. also s. 2 (2), p. 308, *ante*.

As to the statutory powers of sale, etc., conferred on personal representatives, see, generally, s. 39, p. 338, *post*. Where a testator appointed special executors of land abroad and also general executors, the latter could make a title to land in this country without joining the special executors (*Re Cohen's Exors. & L. C. C.* [1902] 1 Ch. 187).

Duties, Rights, and Obligations.

25. Duty of personal representative as to inventory.—The personal representative of a deceased person shall, when lawfully required so to do, exhibit on oath in the court, a true and perfect inventory and account of the real and personal estate of the deceased, and the court

shall have power as heretofore to require personal representatives to bring in inventories. [802]

This section reproduces stat. (1529), 21 Hen. 8, c. 5, s. 2, p. 272, *ante*, but is extended to real estate and a P. R. generally, and by abolishing any absolute obligation to furnish an inventory and account, whether demanded or not, which may have been imposed by that Act, gives effect to the long-established rule (see *Phillips* v. *Bignall* (1811), 1 Phillim. 239, at p. 240) that an inventory or account need only be furnished on lawful demand.

26. Rights of action by and against personal representative.—(1) For any debt (including arrears of rent) due to a deceased person, and for any injury to or right in respect of his personal estate in his lifetime, his personal representative shall have the same right of action as the deceased would have had if alive. [803]

The statute (1285), 13 Edw. 1, stat. 1, c. 23, p. 267, *ante*, gave to executors a writ of account; this was extended to executors of executors by the statute (1351–2), 25 Edw. 3, stat. 5, c. 5, p. 268, *ante*. These statutes were repealed as respects deaths occurring after 1925 (ss. 56, 58 (2), 2nd Sched., Pt. I, pp. 361, 362, and 365, *post*).

Debt.—Originally, the right to sue for debts due to the deceased belonged to the heir (Bracton, p. 407 b); a writ of debt for and against executors was upheld by the King's court early in the reign of Edward I. (see Pollock and Maitland, History of English Law, 2nd Edn., Vol. 2; administrators were given the action by the statute (1281), 31 Edw. 3, stat. 1, c. 11 (repealed by the Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 226, and Sched. 6 (Vol. 4, title COURTS, pp. 201, 207). As to right of executor to sue co-maker of promissory note to testator see *Jenkins* v. *Jenkins*, [1928] 2 H. B. 501.

Rent includes rentcharge (ss. 55 (1) (xxi), p. 359, *post*). As respects rentcharges the sub-section reproduces the first part of stat. (1540), 32 Hen. 8, c. 37, s. 1, p. 274, *ante* (similarly repealed). As to distress, see sub-ss. (3) and (4), pp. 318, 319, *post*.

Injury to personal estate.—The common law rule is *actio personalis moritur cum persona*. The statute (1330), 4 Edw. 3, c. 7, p. 267, *ante*, gave to executors an action for trespass to personal property. The action was given to executors of executors by stat. (1351–2), 25 Edw. 3, stat. 5, c. 5, p. 268, *ante*; to administrators by equitable construction (see *Tharpe* v. *Stallwood* (1843), 12 L. J. C. P. 241). All these statutes (which are repealed as to deaths occurring after 1925; see ss. 56, 58 (2), 2nd Sched., Pt. I., pp. 361, 362 and 365, *post*) were "held to extend to all torts except those relating to the testator's freehold" [see now sub-s. (2), p. 318, *post*], "and those where the injury done is of a personal nature" (BRAMWELL, L.J., in *Twycross* v. *Grant* (1878), 4 C. P. D. 40, at p. 45).

Included under the rule *actio personalis, etc.*, are "all actions for injuries merely personal" (LORD ELLENBOROUGH in *Chamberlain* v. *Williamson* (1814), 2 M. & S. 408, at p. 415). "Executors and administrators are the representatives of the temporal property . . . of the deceased, but not of their wrongs, except where those wrongs operate to the temporal injury of their personal estate" (*ibid.*). The principle confirmed by this sub-section has been explained as follows: "If the *persona mortua* be the claimant his executor cannot obtain any benefit for his estate by acquiring damages which would have been given only as compensation to the living man for injury to his body or his character. And this rule applies equally whether the claim arises in respect of some tortious injury or in respect of a breach of contract, such as that of a railway company to carry carefully or of a surgeon to perform an operation skilfully. But if the tort or the breach of contract occasion damage to the dead man's property, the executor can recover damages, limited to compensation for this special loss" (PHILLIMORE, L.J., in *Quirk* v. *Thomas*, [1916] 1 K. B. 516, at p. 530). Thus in an action by an executor against a railway company for breach of contract to use due care in carrying the testator damages were recovered for medical expenses and loss through incapacity to attend business, but not for mental distress, loss of health, etc. (*Bradshaw* v. *Lancashire and Yorkshire Rly. Co.* (1875), L. R. 10 C. P. 189).

On the other hand, in an action by an executor for negligent running-down by a railway company (there being no contract) it was held that no compensation was recoverable (*Pulling* v. *Great Eastern Railway Co.* (1882), 9 Q. B. D. 110; see also *London* v. *London Road Car Co.* (1888), 4 T. L. R. 448); *Bradshaw's case* (*supra*) being distinguished as an action on contract. It may be doubted whether that was an effective distinction; it is difficult to see why depreciation of personal estate directly consequent on personal injury arising from negligence should be less an injury to personal estate than such depreciation arising from breach of contract.

This sub-section is more explicit than the Stat. (1330) 4 Edw. 3, c. 7, p. 267, *ante*, and it may well be that an action by a P. R. will now lie in all cases where injury to personal estate is the direct consequence of personal injury. For the rules as to remoteness of damage, see Halsbury's Laws of England, Vol. 10, pp. 318 *et seq.* Actions by personal representatives in respect of the following injuries (*inter alia*) were supported before 1926; detinue (*Russel and Prat's Case* (1590), 4 Leon. 44); slander of title (*Halchard* v. *Mège* (1887), 18 Q. B. D. 771); infringement of copyright (*Burnett* v. *Chetwood* (1720), 2 Mer. 441, note; and see *Macmillan & Co.* v. *Dent*, [1907] 1 Ch. 107); infringement of trade mark (*Hine* v. *Last* (1846), 7 L. T. (O. S.) 41; *Oakey* v. *Dalton* (1887), 35 Ch. D. 700).

An action under the Employers' Liability Act, 1880 (c. 42), Vol. 11, title MASTER AND SERVANT), where the employer has died must be commenced within twelve months from the date of the accident, notice having been given within six weeks of the accident, unless reasonable excuse be shown for failure to give notice; see s. 4 of that Act.

Right in respect of personal estate includes the right to enforce all contractual obligations. Subject to certain exceptions which are now obsolete "the rule [*actio personalis moritur cum personâ*] was never extended to such personal actions as were founded upon any obligation, contract, debt, covenant, or any other duty to be performed" (1 Wms. Saunders (1871 Edn.) 240). As to damages for breach of contract causing no injury to personal estate, see above. It also includes the right to demand performance of a statutory duty (*Peebles* v. *Oswaldtwistle U. D. C.*, [1896] 2 Q. B. 159), including the duty to pay compensation arising under the Workmen's Compensation Acts (Vol. 11, title MASTER AND SERVANT) (*Darlington* v. *Roscoe*, [1907] 1 K. B. 219; *United Collieries, Ltd.* v. *Simpson*, [1909] A. C. 383).

"*In his lifetime.*"—Personal representatives may also sue on causes of action accruing to the estate of the deceased after his death (see Halsbury's Laws of England, Vol. 14, p. 229; English and Empire Digest, Vol. 23, pp. 299 *et seq*). It should be borne in mind that contract based on personal considerations are (subject to agreement) discharged by operation of law on the death of either party (see Halsbury's Laws of England, Vol. 14, p. 225, note (*m*); English and Empire Digest, Vol. 23, pp. 289–290, Vol. 12, pp. 593–594). Money due at the death is, however, plainly recoverable: see *Stubbs* v. *Holywell Railway Co.* (1867), L. R. 2 Ex. 311.

As to the power of personal representatives to exercise options or powers of selection given to the deceased, see English and Empire Digest, Vol. 23, pp. 294–295; see also *Re Goodwin*, [1924] 2 Ch. 26.

An action does not become abated by reason of the death of any party if the cause of action survives (R. S. C. Ord. 17, r. 1). Personal representatives may obtain an order to carry on proceedings under Ord. 17, r. 4. As to execution by personal representatives, see R. S. C. Ord. 42, r. 23.

The running of time (under the Statutes of Limitation) against the right to bring an action is not suspended by reason of the death of either party (see Halsbury's Laws of England, Vol. 14, p. 228, Vol. 19, p. 54).

(2) The personal representative of a deceased person may maintain for any injury committed to the real estate of the deceased within six months before his death any action which the deceased could have maintained, but the action must be brought within one year after his death, and any damages recovered in the action shall be part of the personal estate of the deceased. [804]

This sub-section reproduces the first part of s. 2 of the Civil Procedure Act, 1833 (c. 42), p. 283, *ante* (repealed as to deaths occurring after 1925; see ss. 56, 58 (2), 2nd Sched., Pt. I., pp. 361, 362, and 366, *post*).

"Real estate" includes chattels real: see s. 55 (1) (xix), p. 359, *post*.

This sub-section is an exception to the rule that personal representatives are not the representatives of the wrongs of the deceased (see note to sub-s. (1), p. 317, *ante*). The rights given by it are unconnected with the rights incident to the ownership of the land itself; for more than sixty years after the passing of the Civil Procedure Act (*supra*) the personal representatives had no estate in the land; it would seem therefore that if the land is settled land (see s. 22, p. 314, *ante*) the action should be brought by the general executors.

Where the injury is a continuing injury commencing six months or more before the death, *semble*, the damages are limited to the damages sustained within six months before the death (see *Jones* v. *Simes* (1890), 43 Ch. D. 607; *Jenks* v. *Viscount Clifden*, [1897] 1 Ch. 694).

Where fixtures are taken from real estate separate actions lie for injury to real estate and conversion (see *Clarke* v. *Holford* (1848), 2 Car. & Kir. 540), and the fact that the injury to real estate was not committed, or an action for it cannot be brought within the limited time, is no bar to an action in trover (see *e.g. Martin* v. *Porter* (1839), 5 M. & W. 351).

(3) A personal representative may distrain for arrears of a rentcharge due or accruing to the deceased in his lifetime on the land affected or charged therewith, so long as the land remains in the possession of the person liable to pay the rentcharge or of the persons deriving title under him, and in like manner as the deceased might have done had he been living. [805]

This sub-section reproduces the latter part of stat. (1540), 32 Hen. 8, c. 37, s. 1, p. 274, *ante* (repealed as respects deaths occurring after 1925; ss. 56, 58 (2), 2nd Sched., Pt. I, pp. 361, 362, and 365, *post*).

As to action for arrears, see sub-s. (1), p. 317, *ante*.

Rentcharge includes a fee farm rent (s. 55 (1) (xxi), p. 359, *post*).

"*So long . . . deriving title,*" etc.—*I.e.* so long as an inchoate or complete title under the Limitation Acts has not arisen. As to what constitutes dispossession and discontinuance of possession, see Real Property Limitation Act, 1833 (c. 27), s. 3 (Vol. 10, title LIMITATION OF ACTIONS).

"*In like manner . . . had been living.*"—See Law of Property Act, 1925 (c. 20), s. 121 (1) (7) (Vol. 15, title REAL PROPERTY).

(4) A personal representative may distrain upon land for arrears of rent due or accruing to the deceased in like manner as the deceased might have done had he been living.

Such arrears may be distrained for after the termination of the lease or tenancy as if the term or interest had not determined, if the distress is made—

(*a*) within six months after the termination of the lease or tenancy;

(*b*) during the continuance of the possession of the lessee or tenant from whom the arrears were due.

The statutory enactments relating to distress for rent apply to any distress made pursuant to this subsection. [806]

This sub-section reproduces the Civil Procedure Act, 1833 (c. 42), ss. 37, 38, p. 284, *ante* (repealed as to deaths occurring after 1925; see ss. 56, 58 (2), 2nd Sched., Pt. I, pp. 361, 362, and 366, *post*).

Rent does not include rentcharge (see sub-s. (3), *ante*).

As to action for arrears, see sub-s. (1), *ante*.

After the determination of the lease, etc.—These provisions should no doubt be construed by reference to the Landlord and Tenant Act, 1709 (c. 18), ss. 6, 7 (Vol. 10, title LANDLORD AND TENANT). And see the L. P. A. 1925 (c. 20), s. 141 (Vol. 15, title REAL PROPERTY).

Statutory Enactments.—See Vol. 10, title LANDLORD AND TENANT.

(5) An action may be maintained against the personal representative of a deceased person for any wrong committed by the deceased within six months before his death to another person in respect of his property, real or personal, but the action shall be brought within six months after the personal representative of the deceased has taken out representation.

Any damages recovered in the proceedings shall be payable as a simple contract debt incurred by the deceased. [807]

This sub-section reproduces the latter part of s. 2 of the Civil Procedure Act, 1833 (c. 42), p. 283, *ante* (repealed as mentioned in last note). Cf. sub-s. (1), p. 317, *ante*.

At common law "the only cases in which, apart from questions of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person, who has done the act, are those in which property, or the proceeds or value of property, belonging to another, have been appropriated by the deceased person and added to his own estate or moneys. But . . . where there is nothing among the assets of the deceased that in law or in equity belongs to the plaintiff [or represents the proceeds or value of property so belonging] and the damages which have been done to him are unliquidated and uncertain, the executors of a wrongdoer cannot be sued merely because it was worth the wrongdoer's while to commit the act which is complained of; and an indirect benefit may have been reaped thereby" (BOWEN and COTTON, L.JJ., in *Phillips* v. *Homfray* (1883), 24 Ch. D. 439, at pp. 454–455). The words in brackets are intended to be a paraphrase of a passage in the judgment at p. 457.

Accordingly actions for deceit and, in general, for omission to perform a duty, if not arising out of contract nor being in the nature of a trust, cannot be brought against the estates of deceased persons at common law (see, generally, English and Empire Digest, Vol. 24, pp. 646 *et seq.*; Halsbury's Laws of England, Vol. 14, pp. 312 *et seq.*).

"If, however, the action be for breach of contract, the cause of action apparently survives against the executor, whatever may have been the nature of the injury caused by the breach of contract, whether it be an injury to the living man's person or his property" (PHILLIMORE, L.J., in *Quirk* v. *Thomas*, [1916] 1 K. B. 516, at p. 531). As to implied contracts, see Halsbury's Laws of England, Vol. 14, p. 310. Liability for breach of trusts, express or other, always survives (see Halsbury's Laws of England, Vol. 14, p. 312; English and Empire Digest, Vol. 24, pp. 629 *et seq.*, 650). As regards solicitors, see English and Empire Digest, Vol. 24, p. 636. For express provision as to the liability for *devastavit* of the estates of deceased personal representatives, see s. 29, p. 321, *post*.

This sub-section supplements the common law by providing remedies, limited as to time, for certain wrongs not having the effect referred to in the passage quoted above; examples are: Obstruction of light (*Jenks* v. *Viscount Clifden*, [1897] 1 Ch. 694);

fouling of water (*Kirk* v. *Todd* (1882), 21 Ch. D. 484). As regards waste, see English and Empire Digest, Vol. 24, pp. 633 *et seq.*; Halsbury's Laws of England, Vol. 14, p. 311. It is conceived that since tenants for life hold the land as trustees (sec Settled Land Act, 1925 (c. 18), s. 5 (1) (*b*), Vol. 17, title SETTLEMENTS), their estates would be liable under the common law for the waste committed in their lifetime, for which they would have been liable if living, whether property had accrued to their estate or not (cf. *Re Field*, [1925] Ch. 636); and in any case under the principle "*qui sentit commodum sentire debet et onus et transit terra cum onere*" the estate of a deceased tenant for life is liable in equity for breach of an obligation to keep in repair imposed by the settlement and the limitations as to time prescribed by this sub-section do not apply (*Jay* v. *Jay*, [1924] 1 K. B. 826). See also Settled Land Act, 1925 (c. 18), s. 88 (5) (Vol. 17, title SETTLEMENTS).

Wrong, semble, means *damnum* and *injuria* (cf. s. 2 of the Civil Procedure Act, 1833 (c. 42), p. 283, *ante*, which this sub-section replaces; "*wrong committed by him*," etc., "*so as such injury shall have been committed within six calendar months*," etc.). Accordingly it was held under that section that injury accruing from day to day until the death consequent on a wrong committed at more than six months before the death gave a cause of action surviving to executors (*Jenks* v. *Viscount Clifden*, [1897] 1 Ch. 694). Damages were limited to the damages sustained within the six months. The six months limitation applies notwithstanding an action was commenced against the deceased during his lifetime (*Kirk* v. *Todd* (1882), 21 Ch. D. 484).

Property includes a thing in action (s. 55 (1) (xvii), p. 359, *post*).

For principles and cases generally before 1926, see Halsbury's Laws of England, Vol. 14, pp. 305–314; English and Empire Digest, Vol. 24, pp. 614–651.

(6) Nothing in this section affects any right of action conferred by the Fatal Accidents Act, 1846, as amended by any subsequent enactment. [808]

The Fatal Accidents Act, 1846 (c. 93), generally known as Lord Campbell's Act, as amended, enables actions for injury causing death to be brought, in the first place by personal representatives, for the benefit of relatives of the deceased. It has been amended by the Fatal Accidents Act, 1864 (c. 95), and the Fatal Accidents (Damages) Act, 1908 (c. 7). For all three Acts, see Vol. 12, title NEGLIGENCE.

27. Protection of persons acting on probate or administration.—(1) Every person making or permitting to be made any payment or disposition in good faith under a representation shall be indemnified and protected in so doing, notwithstanding any defect or circumstance whatsoever affecting the validity of the representation.

(2) Where a representation is revoked, all payments and dispositions made in good faith to a personal representative under the representation before the revocation thereof are a valid discharge to the person making the same; and the personal representative who acted under the revoked representation may retain and reimburse himself in respect of any payments or dispositions made by him which the person to whom representation is afterwards granted might have properly made. [809]

This section reproduces in sub-s. (1) the Court of Probate Act, 1857 (c. 77), s. 78, p. 292, *ante*, and in sub-s. (2), s. 77 of that Act (both sections are repealed as to deaths occurring after 1925 by ss. 56, 58 (2), Sched. 2, Pt. I, pp. 361, 362, 366, *post*).

Representation means probate of a will and administration; s. 55 (1) (xx), p. 359, *post*.

Disposition (substituted for "transfer" in the former Act) includes conveyance; s. 55 (1) (iii), p. 356, *post*; the section therefore extends to real estate. Cf. further as to rights of purchasers, s. 37, p. 337, *post*. In sub-s. (2) the words "and dispositions" after "payment" are new.

28. Liability of person fraudulently obtaining or retaining estate of deceased.—If any person, to the defrauding of creditors or without full valuable consideration, obtains, receives or holds any real or personal estate of a deceased person or effects the release of any debt or liability due to the estate of the deceased, he shall be charged as executor in his own wrong to the extent of the real and personal estate received or coming to his hands, or the debt or liability released, after deducting—

(*a*) any debt for valuable consideration and without fraud due to him from the deceased person at the time of his death; and

(*b*) any payment made by him which might properly be made by a personal representative. [810]

This section is based on the stat. (1601) 43 Eliz. c. 8, p. 276, *ante* (repealed as to deaths occurring after 1925; ss. 56, 58 (2), 2nd Sched., Part I, pp. 361, 362, and 366, *post*. That statute referred to the case of a person's renouncing a right to letters of administration and procuring a grant to some person of mean estate, then obtaining the estate (including debts) into his own hands voluntarily or for insufficient consideration or obtaining releases from the administrator of debts owing to the deceased by him. This section affords increased protection to creditors and beneficiaries, but, on the other hand, by removing the conditions (grants to persons of mean estate, etc), formerly precedent to the existence of the remedy, and the consequent limitations as to the class of person against whom it was available (*i.e.* persons receiving from administrators and consequently not executors in their own wrong under the general law) may give to every person, including an executor in his own wrong, who comes within the wording of the section a right of retainer. This right executors in their own wrong did not formerly have (see Halsbury's Laws of England, Vol. 14, p. 151, notes (*p*), (*q*)), and it may be doubtful whether the inference from this section is sufficient to change the rule to the disadvantage of other creditors.

Executor in his own wrong.—See, generally, Halsbury's Laws of England, Vol. 14, pp. 147–151, and the English and Empire Digest, Vol. 23, p. 70.

Full valuable consideration, semble, means "without such valuable consideration as shall amount fully or nearly to the value of the property obtained or debts released;" cf. the stat. (1601) 43 Eliz. c. 8, p. 276, *ante*. It seems, however, that an innocent purchaser from a personal representative will be secure although the consideration were not full; see Trustee Act, 1925 (c. 19), ss. 13 (2), 68 (17), Vol. 20, title TRUSTS AND TRUSTEES.

29. Liability of estate of personal representative.—Where a person as personal representative of a deceased person (including an executor in his own wrong) wastes or converts to his own use any part of the real or personal estate of the deceased, and dies, his personal representative shall to the extent of the available assets of the defaulter be liable and chargeable in respect of such waste or conversion in the same manner as the defaulter would have been if living. [811]

This section reproduces with an extension as regards real estate the stats. (1678) 30 Car. 2, c. 7 (p. 278, *ante*), and (1692) 4 Will. and Mar. c. 24, s. 12 (p. 280, *ante*) (both repealed as to deaths occurring after 1925; ss. 56, 58 (2), 2nd Sched., Part I, pp. 361, 362, and 366, *post*).

At common law an executor of an executor could not be charged with a *devastavit* made by the executor of the first testator because it was a personal wrong only (see note to s. 26 (1), p. 317, *ante*; *Sir Brian Tucke's Case* (1590), 3 Leon. 241; see comment in *Phillips* v. *Homfray* (1883), 24 Ch. D. 439 at p. 458). The statutes above mentioned were described as referring to "every case where the executor in his lifetime was in any way guilty of any act which amounts in law to a *devastavit*, such as exhausting the assets by payment of debts of an inferior degree before those of a superior, and the like" (1 Wms. Saunders (1871 Edn.), p. 255; approved, *Coward* v. *Gregory* (1866), L. R. 2 C. P. 153, at p. 173).

Acts of conversion would, apart from this section, be within the operation of s. 26 (5), p. 319, *ante* (see note thereto).

Executor in his own wrong.—See note to s. 28, *ante*.

If living.—See, generally, Halsbury's Laws of England, Vol. 14, pp. 316 *et seq.*; English and Empire Digest, Vol. 24, pp. 658 *et seq.*; and as to relief indemnity, etc. to personal representatives, see Trustee Act, 1925 (c. 19), ss. 61, 62, Vol. 20, title TRUSTS AND TRUSTEES.

As to cases on this section or the provisions which it replaces, see note to the Act of 1678, p. 278, *ante*. See English and Empire Digest, Vol. 24, p. 667.

30. Provisions applicable where administration granted to nominee of the Crown.—(1) Where the administration of the real and personal estate of any deceased person is granted to a nominee of the Crown (whether the Treasury Solicitor, or a person nominated by the Treasury Solicitor, or any other person), any legal proceeding by or against that nominee for the recovery of the real or personal estate, or any part or share thereof, shall be of the same character, and be instituted and

carried on in the same manner, and be subject to the same rules of law and equity (including, except as otherwise provided by this Act, the rules of limitation under the statutes of limitation or otherwise), in all respects as if the administration had been granted to such nominee as one of the persons interested under this Act in the estate of the deceased. [812]

This sub-section reproduces the Intestates Estates Act, 1884 (c. 71), s. 2, Vol. 5, title DESCENT AND DISTRIBUTION, p. 122 (repealed as to deaths occurring after 1925; ss. 56, 58 (2), 2nd Sched., Part I, pp. 361, 362, and 366, *post*) with an extension to real estate. Where the Crown has an interest in undisposed-of residue (see s. 46 (1) (vi), p. 347, *post*) the Court has power to grant letters of administration to it (*Stote* v. *Tyndall* (*King's Proctor*) (1757), 2 Lee, 394, and see Non-Contentious Probate Rules, 1925, r. 120 (Tristram and Coote's Probate Practice, 16th edn., p. 799)).

By the Treasury Solicitor Act, 1876 (c. 18), s. 2, Vol. 3, title CONSTITUTIONAL LAW, p. 395, where the Crown nominates the Treasury Solicitor, administration may be granted to him or his nominee. See similarly as to the title of the Crown in right of the Duchy of Lancaster, the Duchy of Lancaster Act, 1920 (c. 51), s. 3 (3) (*ibid.* p. 565).

Treasury Solicitor includes the solicitor to the Duchy of Lancaster *except as otherwise provided*; s. 57 (1), p. 361, *post*.

Limitation.—See, generally, Vol. 10, title LIMITATION OF ACTIONS.

Semble, an action to recover the personal estate of an intestate from a personal representative which before 1926 was subject to a limitation of twenty years under the Law of Property Amendment Act, 1860 (c. 38), s. 13 (repealed) is now governed by the Trustee Act, 1888 (c. 59), s. 8, Vol. 20, title TRUSTS AND TRUSTEES. As to the personal representatives of an intestate holding the estate on "trusts," see s. 46 (1), p. 346, *post*.

(2) An information or other proceeding on the part of His Majesty shall not be filed or instituted, and a petition of right shall not be presented, in respect of the real or personal estate of any deceased person or any part or share thereof, or any claim thereon, except within the same time and subject to the same rules of law and equity within and subject to which a proceeding for the like purposes might be instituted by or against a subject. [813]

This sub-section reproduces s. 3 of the Intestates Estates Act, 1884 (c. 71), Vol. 5, title DESCENT AND DISTRIBUTION, p. 122 (repealed as mentioned in note to sub-s. (1), *ante*), with an extension to real estate. The section applies, *e.g.* when property has been wrongfully transferred to the Crown by an administrator, as in *Re Mason*, [1928] 1 Ch. 385.

Information, petition of right.—See, generally, Halsbury's Laws of England, Vol. 10, pp. 1 *et seq.*, Crown Suits, etc. Act, 1865 (c. 104), Petition of Right Act, 1860 (c. 34), Vol. 5, title CROWN PRACTICE, pp. 55, 47.

Time.—See, generally, Vol. 10, title LIMITATION OF ACTIONS; *Re Robinson*, [1911] 1 Ch. 502; *Re Mason*, *supra*.

(3) The Treasury Solicitor shall not be required, when applying for or obtaining administration of the estate of a deceased person for the use or benefit of His Majesty, to deliver, nor shall the Probate, Divorce and Admiralty Division of the High Court or the Commissioners of Inland Revenue be entitled to receive in connexion with any such application or grant of administration, any affidavit, statutory declaration, account, certificate, or other statement verified on oath; but the Treasury Solicitor shall deliver and the said Division and Commissioners respectively shall accept, in lieu thereof, an account or particulars of the estate of the deceased signed by or on behalf of the Treasury Solicitor. [814]

As to bonds, see Treasury Solicitor Act, 1876 (c. 18), s. 2, Vol. 3, title CONSTITUTIONAL LAW, p. 395; Duchy of Lancaster Act, 1920 (c. 51), s. 3 (3) (*ibid.* p. 565), Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 167 (6), p. 375, *post*.

(4) References in sections two, four, six and seven of the Treasury Solicitor Act, 1876, and in subsection (3) of section three of the Duchy of Lancaster Act, 1920, to "personal estate" shall include real estate. [815]

See note to sub-s. (1), *ante*.

31. Power to make rules.—Provision may be made by rules of court for giving effect to the provisions of this Part of this Act so far as relates to real estate and in particular for adapting the procedure and practice on the grant of letters of administration to the case of real estate. [816]

See Non-Contentious Probate Rules, 1925 (set out on pp. 797 *et seq.* of Tristram and Coote's Probate Practice, 16th edn.), whereby certain of the Principal Registry Rules, 1862, and District Registry Rules are revoked and others substituted and new rules added.

In some cases the old rules remain as to deaths before 1926.

Certain new forms are substituted by the Third Schedule to those Rules.

PART III.

ADMINISTRATION OF ASSETS.

32. Real and personal estate of deceased are assets for payment of debts.—(1) The real and personal estate, whether legal or equitable, of a deceased person, to the extent of his beneficial interest therein, and the real and personal estate of which a deceased person in pursuance of any general power (including the statutory power to dispose of entailed interests) disposes by his will, are assets for payment of his debts (whether by specialty or simple contract) and liabilities, and any disposition by will inconsistent with this enactment is void as against the creditors, and the court shall, if necessary, administer the property for the purpose of the payment of the debts and liabilities.

This sub-section takes effect without prejudice to the rights of incumbrancers. [817]

This section substantially re-enacts the following enactments repealed as to cases where the death occurred after 1925: stat. (1285) 13 Edw. 1, St. 1, c. 19 (ordinary chargeable to pay intestates debts), p. 267, *ante;* (1357) 31 Edw. 3, st. 1, c. 11 (administration on intestacy), repealed by the Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), ss. 226, 227 (2), and Sched. 6; Stat. of Frauds 1677 (29 Car. 2, c. 3), ss. 10 and 11, p. 277, *ante;* A. E. A. 1833 (c. 104) (liability of real estate), p. 284, *ante;* A. E. A. 1869 (c. 46), Hinde Palmer's Act (abolition of priority of specialty creditors, p. 299, *ante;* L. T. A. 1897 (c. 65), s. 2 (3) (repealed by L. P. A. 1922 (c. 16), as amended by L. P. A. 1924 (c. 5)).

The definition of real and personal estate in s. 52, p. 355, *post*, only applies to Part IV of the Act, and so does not apply here. Real estate means real estate including chattels real, which devolves on the P.R. under Part I, so that in addition to chattels real it includes land in possession, reversion or remainder, and every interest in or over land to which a deceased person was entitled at his death, s. 3 (1), p. 309, *ante*, also an interest in real estate appointed by will under a general power, s. 3 (2), p. 309, *ante*, and an entailed interest disposed of by will, s. 3 (3), p. 310, *ante*, L. P. A. 1925 (c. 20), s. 176, Vol. 15, title REAL PROPERTY. A power, whether general or special, now operates only in equity, *ibid.* s. 1 (7).

Assets are "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 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 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 said to be assets in the hands of the executor or administrator to make him chargeable to a creditor or legatee," Touchstone, 496. Assets include increases accruing to the estate as in case of a renewed lease (*James* v. *Dean* (1805), 11 Ves. 392; *Randall* v. *Russell* (1817), 3 Mer. 190; and cases collected in the English and Empire Digest, Vol. 23, pp. 284 *et seq.*). The stock of the testator's business, carried on by the P.R. subject to the P.R.'s right to indemnity forms part of the assets (*Re Evans* (1887), 34 Ch. D. 597).

These were legal assets, but there was also a class of assets which the claimant could only reach by the assistance of a court of equity and called "equitable assets," though the distinction did not turn on whether the interests were legal or equitable. See the question discussed in *O'Grady* v. *Wilmot*, [1916] 2 A. C. 231, p. 254. There was formerly an important distinction between the two in that, as regards creditors, legal assets were distributable according to the priorities in which the several debts ranked at law or by statute, while equitable assets were applied in satisfaction of all creditors *pari passu*. The distinction has now been abolished by this section, and s. 34, p. 328, *post*.

Of the various preferences afforded by different statutes for Crown and certain

other debts, rates, etc., it is probable that those given by the Bankruptcy Act, 1914 (c. 59), s. 33, alone remain, see Vol. 1, title BANKRUPTCY, p. 638.

"*Whether by specialty or simple contract.*"—Hinde Palmer's Act (A. E. A. 1869 (c. 46), p. 299, *ante*) placed both these classes of debts on an equal footing, but did not deprive the executor of his administrative right to pay his testator's debts in any order he pleased, notwithstanding that the result might be to leave a specialty creditor unpaid (*Re Samson*, [1906] 2 Ch. 584, and see note to s. 34 (2), p. 328, *post*).

Creditors may follow property notwithstanding an assent or conveyance by the P.R., and the court is given power to assist them for this purpose, see s. 38, p. 337, *post*.

"*Assets for payment of his debts and liabilities.*"—This only assists creditors not legatees. Pecuniary legatees have, however, some protection under s. 33 (2), p. 325, *post*, and see Sched. I, Part II, p. 363, *post*. The section does not create a charge, but it has been applied to enlarge a gift in a will of "moneys." See *Re Mellor*, [1929] 1 Ch. 446; *Re Gates*, [1929] W. N. 169.

Under the A. E. A. 1833 (c. 104), p. 284, *ante*, neither corpus nor rents and profits of the real estate were liable to creditors until a judgment had been obtained, hence the court declined to order payment of proceeds of sale to the credit of an administration action before judgment, or to restrain the devisees from applying for the same (*Re Moon*, [1907] 2 Ch. 304), and a tenant for life who was also sole P.R. who had paid the testator's debts out of her own money and taken no steps for thirty years to recover them out of the real estate was held barred by the Real Property Limitation Act, 1874, s. 10 (Vol. 10, title LIMITATION OF ACTIONS), from afterwards recovering them (*Re Welsh*, [1916] 1 Ch. 375).

(2) If any person to whom any such beneficial interest devolves, or is given, or in whom any such interest vests, disposes thereof in good faith before an action is brought or process is sued out against him, he shall be personally liable for the value of the interest so disposed of by him, but that interest shall not be liable to be taken in execution in the action or under the process. [818]

This sub-section in effect re-enacts the Debts Recovery Act, 1830 (c. 47), ss. 6, 8, Vol. 15, title REAL PROPERTY.

For the protection of a person claiming under a *bonâ fide* alienation by a devisee, see *Re Atkinson*, [1908] 2 Ch. 307; it does not extend to alienation from old to new trustees (*Coope* v. *Creswell* (1866), 2 Ch. App. 112).

Disposition includes a conveyance and a devise bequest or appointment by will, see s. 55 (1) (iii), p. 356, *post*.

S. 38, p. 337, *post*, giving a right to follow property notwithstanding an assent by the P.R. does not apply to property in the hands of a purchaser, who may take in good faith though he knows of the debt (*British Mutual Investment Co.* v. *Smart* (1875), 10 Ch. App. 567).

The liability under the Act is to creditors, and is such that on alienation the debts of the testator become the debts of the devisee to the extent of the land alienated (*Re Hedgely* (1886), 34 Ch. D. 379); see also the judgment in *Re Illidge* (1884), 27 Ch. D. 478 (retainer by heir or devisee of specialty debt); *Walters* v. *Walters* (1881), 18 Ch. D. 182.

33. Trust for sale.—(1) On the death of a person intestate as to any real or personal estate, such estate shall be held by his personal representatives—

(*a*) as to the real estate upon trust to sell the same; and

(*b*) as to the personal estate upon trust to call in sell and convert into money such part thereof as may not consist of money,

with power to postpone such sale and conversion for such a period as the personal representatives, without being liable to account, may think proper, and so that any reversionary interest be not sold until it falls into possession, unless the personal representatives see special reason for sale, and so also that, unless required for purposes of administration owing to want of other assets, personal chattels be not sold except for special reason. [819]

This section is new. It applies to intestacies (including partial intestacies, s. 55 (1) (vi), p. 357, *post*) the provisions commonly inserted in wills devising land on trust for sale.

Trust for sale.—The provisions of the L. P. A. 1925 (c. 20), ss. 23–33 apply, see Vol. 15, title REAL PROPERTY.

Getting in the intestate's debts.—The Trustee Act, 1925 (c. 19), s. 15 (*e*), Vol. 20, title TRUSTS AND TRUSTEES, allows a P.R. to give time for payment of debts, but

it may be doubtful how far it will be wise for him to rely on this provision. Having regard to the tendency of the courts to cut down the value of statutory indemnities, it is conceivable that, notwithstanding the provision that he is not to be responsible for loss thereby occasioned, the provision might be confined to such cases as *Clack* v. *Holland* (1854), 19 Beav. 262, where LORD ROMILLY said that where it was the duty of an executor to obtain payment of a sum of money he was exonerated though he had taken no steps at all, provided it appears that if he had done so they would have been, or there was reasonable ground for believing they would have been, ineffectual. Even in such a case the onus lay on the P.R. to prove that if he had taken proper measures they would have failed (*Stiles* v. *Guy* (1848), 16 Sim. 230).

The P.R. will do well therefore to consider the cases under the old law in which the executor was held liable for loss if he neglected to get in his testator's debts. See the English and Empire Digest, Vol. 23, pp. 321 *et seq.* Thus, if by his delay he allowed the debtor to protect himself under the Statutes of Limitation the P.R. was guilty of a *devastavit* (HOLT, C.J., in *Hayward* v. *Kinsey* (1701), 12 Mod. Rep. 573). Or, if he merely applied for payment of the debt, but took no legal action for its recovery, though it did not appear whether or not the debt was recoverable (*Lowson* v. *Copeland* (1787), 3 Bro. C. C. 156).

Where the P.R. allowed the debt to remain outstanding for three years, and the debtor became bankrupt, the P.R. was liable (*Powell* v. *Evans* (1801), 5 Ves. 839; *A.-G.* v. *Higham* (1843), 2 Y. & C. Ch. Cas. 634), and so with arrears of rent (*Tebbs* v. *Carpenter* (1816), 1 Madd. 290), or leaving money for more than a year with a banker who failed (*Johnson* v. *Newton* (1853), 11 Hare, 160, 168).

The *primâ facie* rule is that the P.R. should get in the assets within a year (*Grayburn* v. *Clarkson* (1868), L. R. 3 Ch. 605; *Sculthorpe* v. *Tipper* (1871), L. R. 13 Eq. 232), but particular circumstances must govern the case, and a reasonable discretion will be allowed (*Hughes* v. *Empson* (1856), 22 Beav. 181), though in that case the P.Rs. were held liable for not selling Crystal Palace shares which were at a premium at the death, and subsequently fell to a discount, and had to make good the value at the end of twelve months from the death. But where property is of an uncertain and speculative character and the P.R. has exercised an honest discretion as to the time of selling, he ought not to be made responsible for loss through not having sold within the twelve months (*Marsden* v. *Kent* (1877), 5 Ch. D. 598, and see *Buxton* v. *Buxton* (1835), 1 My. & Cr. 80; *East* v. *East* (1846), 5 Hare, 343).

And where the P.R. is given an absolute discretion to postpone conversion he is not bound to convert within the year (*Re Norrington* (1879), 13 Ch. D. 654). The same rule is applicable where the debtor is a co-executor (*Mucklow* v. *Fuller* (1821), Jac. 198; *Styles* v. *Guy* (1849), 1 Mac. & G. 422).

Where the money of the deceased is out on mortgage and the P.R. has power to invest on mortgage rather different considerations apply, there being no rule that trustees retaining a security authorised by their trust are liable to make good a loss arising through a fall in value of the security if they have acted honestly and prudently and in the belief that they have taken the best course for all interested. To render them liable something in the nature of wilful default, including want of ordinary prudence, must be proved (*Re Chapman, Cocks* v. *Chapman*, [1896] 2 Ch. 763), where the duties of the P.R. as to calling in mortgage debts are discussed; and cf. *Re Medland* (1889), 41 Ch. D. 476).

"Personal chattels" are defined in s. 55 (1) (x), p. 358, *post*. The expression includes carriages, horses, furniture, and other articles there mentioned of household or personal use other than chattels used for business purposes. The section extends to personal chattels the respect with which LORD ELDON treated heirlooms settled by will in *Clarke* v. *Lord Ormonde* (1821), Jac. 108 (see p. 114), a respect of which in many cases they will hardly be worthy.

Tenant for life.—Under the old law the persons interested beneficially in the real and personal estate of intestates (except as regards real estate in the case of tenancy by the curtesy or in dower) took absolute interests, but the present Act creates life interests in surviving spouses, and the question of the rights of such a tenant for life in the case of wasting properties or reversionary interests may arise. The Act does not contain the income clause usual in wills, defining the tenant for life's interest, but income is dealt with in sub-s. (5), p. 327, *post*, in the note to which the question is discussed.

P.Rs. becoming trustees.—This section has imposed duties on P.Rs. under which they become trustees when the estate has been fully administered. This section does not draw a distinction between trusts arising before and after the commencement of the Act. In these circumstances the old law applies and determines the time when the P.R. ceases to be such, and become trustees for sale. At the moment when that event happens they may make a vesting assent under s. 36, p. 332, *post*, purporting to vest the property in themselves as trustees, which will be evidence of their having concluded the administration, and their intention to hold as trustees. If a vacancy occurs before that event happens, they ought to apply to the Probate Court for the appointment of another P.R. (*Re Yerburgh*, [1928] W. N. 208, and see *Re Trollope's Will*, [1927] 1 Ch. 596).

On conclusion of the administration the P.R. is not *functus officio*, but may appoint trustees in his place (*Re Pitt* (1928), 44 T. L. R. 371).

(2) Out of the net money to arise from the sale and conversion of such real and personal estate (after payment of costs), and out of the

ready money of the deceased (so far as not disposed of by his will, if any), the personal representative shall pay all such funeral, testamentary and administration expenses, debts and other liabilities as are properly payable thereout having regard to the rules of administration contained in this Part of this Act, and out of the residue of the said money the personal representative shall set aside a fund sufficient to provide for any pecuniary legacies bequeathed by the will (if any) of the deceased. [820]

This clause, with slight modifications follows the customary clause in wills containing a trust for conversion (see the Encyclopædia of Forms and Precedents, 2nd Edn. Vol. 18, p. 509, clause 7).

Funeral expenses.—The first duty of the P.R. is the funeral of the deceased. Executors are entitled to possession of the body, but there is no property in a dead body, and directions by will as to its disposal cannot be enforced (*Williams* v. *Williams* (1882), 20 Ch. D. 659). After some doubt it was held in *R.* v. *Price* (1884), 12 Q. B. D. 247, that cremation was not illegal, and this is now regulated by the Cremation Act, 1902 (c. 8), Vol. 2, title BURIAL AND CREMATION, and regulations made thereunder. As to anatomical examination, see Anatomy Acts, 1832 (c. 75) and 1871 (c. 16), Vol. 11, title MEDICINE AND PHARMACY. Funeral expenses according to the degree and quality of the deceased are to be allowed out of the goods of the deceased before any debt or duty whatsoever (Coke, 3 Inst. 202).

Testamentary and administration expenses.—This section applies to a partial intestacy, sub-s. (7), p. 328, *post*, and s. 49, p. 352, *post*.

In the Intestate Estates Act, 1890 (c. 29), Vol. 5, title DESCENT AND DISTRIBUTION, p. 124 (which only applied where the deceased died wholly intestate), the expression testamentary expenses was held to mean administration expenses, though strictly an intestate can have no testamentary expenses (*Re Twigg's Estate*, [1892] 1 Ch. 579).

In the case of a testator there is no distinction between executorship expenses and testamentary expenses as regards the matters which the phrase includes (*Sharp* v. *Lush* (1879), 10 Ch. D. 468), where the phrase was held to include the costs of obtaining advice of solicitors and counsel as to distribution of the estate; costs of administration action; funeral expenses; expenses of protecting specific legacies, *e.g.* warehousing furniture and rent of testator's leasehold residence accruing after his death.

The expression also includes costs of obtaining probate or administration, including costs of opposing a will and estate duty on personalty (*Re Clemow*, [1900] 2 Ch. 182; *Re Treasure*, [1900] 2 Ch. 648).

The administrator's costs of an administration action are payable in priority to those of other parties (*Re Griffith*, [1904] 1 Ch. 807).

Testamentary expenses have been held not to include costs incurred in opposing probate of a will ordered to be paid by the Probate Division (*Re Prince*, [1898] 2 Ch. 225), nor estate duty payable in respect of realty (*Re Sharman*, [1901] 2 Ch. 280), nor in respect of property appointed under a general power (*O'Grady* v. *Wilmot*, [1916] 2 A. C. 231), but by L. P. A. 1925 (c. 20), s. 16, Vol. 15, title REAL PROPERTY, the P.R. is now accountable for all death duties in respect of land vested in him by any statute, *e.g.* s. 1, p. 306, *ante*.

"*Debts.*"—As to the right of retainer, see note to s. 34, p. 328, *post*. An executor paying the testator's debt out of his own money must be allowed it afterwards out of money coming to him from the estate, whether or not he had assets in hand at the time (*Re Jones*, [1914] 1 Ch. 742), but he may be barred if he make no effort to repay himself (*Re Welch*, [1916] 1 Ch. 375).

The P.R. may pay a statute-barred debt (*Norton* v. *Frecker* (1737), 1 Atk. 524 n., but not against the wish of his co-executor after it has been declared to be barred in an administration action (*Midgley* v. *Midgley*, [1893] 3 Ch. 282), or if it is unenforceable under the Statute of Frauds (*Re Rownson* (1885), 29 Ch. D. 358). As to his right to prefer creditors, see note to s. 34, p. 328, *post*.

Liabilities.—As to the P.R.'s protection against rent and covenants under a lease, see Trustee Act, 1925 (c. 19), s. 26, Vol. 20, title TRUSTS AND TRUSTEES. As to his power to protect himself against liabilities of which he has no notice by means of advertisements, see *ibid.* s. 27.

"*Rules of administration.*"—See s. 34, p. 328, *post*, and Sched. 1, p. 362, *post*.

Pecuniary legacies are defined in s. 55 (1) (ix), p. 357, *post*. For power to appropriate, see s. 41, p. 340, *post*. It has been held that in a case of a contingent legacy a P.R. who sets aside and invests a reasonable sum to answer it may distribute the estate and will not be personally liable for depreciation of the investment, but apart from s. 41, he cannot appropriate a fund to answer such investment in exoneration of the estate (*Re Hall*, [1903] 2 Ch. 226).

(3) During the minority of any beneficiary or the subsistence of any life interest and pending the distribution of the whole or any part of the estate of the deceased, the personal representatives may invest the residue of the said money, or so much thereof as may not have been distributed, in any investments for the time being authorised by statute

for the investment of trust money, with power, at the discretion of the personal representatives, to change such investments for others of a like nature. [821]

"*During the minority.*"—For powers of management during minority, see s. 39, p. 338, *post*, and for power to appoint trustees of infants' property, s. 42, p. 343, *post*.

"*Any life interest.*"—Apart from any life interest under a will, where the intestacy is only partial, this must refer to the life interest of a surviving spouse of the deceased, see ss. 46 and 48, pp. 346, 351, *post*.

"*Investments authorised by statute.*"—See Trustee Act, 1925 (c. 19), ss. 1–11, Vol. 20, title TRUSTS AND TRUSTEES, which also gives power to vary investments, *ibid.* s. 1 (1).

(4) The residue of the said money and any investments for the time being representing the same, including (but without prejudice to the trust for sale) any part of the estate of the deceased which may be retained unsold and is not required for the administration purposes aforesaid, is in this Act referred to as "the residuary estate of the intestate." [822]

"*The residue.*"—This must refer back to sub-s. (2), p. 325, *ante*, and mean the residue after payment of debts and liabilities and setting aside the fund therein referred to for providing for pecuniary legacies bequeathed by the will, if any.

As to the persons entitled to the residuary real and personal estate of an intestate, see s. 46, p. 346, *post*, or as to a lunatic, s. 51 (2), p. 354, *post*, and an infant entitled in fee simple who dies unmarried, s. 51 (3), p. 354, *post*.

(5) The income (including net rents and profits of real estate and chattels real after payment of rates, taxes, rent, costs of insurance, repairs and other outgoings properly attributable to income) of so much of the real and personal estate of the deceased as may not be disposed of by his will, if any, or may not be required for the administration purposes aforesaid, may, however such estate is invested, as from the death of the deceased, be treated and applied as income, and for that purpose any necessary apportionment may be made between tenant for life and remainderman. [823]

"*The income.*"—The real and leasehold estate being held on trust for sale, the L. P. A. 1925 (c. 20), s. 28 (2) (Vol. 15, title REAL PROPERTY), will apply, and the net rents after discharging the outgoings there referred to will not be subject to the rule in *Howe* v. *Earl Dartmouth* (1802), 7 Ves. 137, but will belong to the tenant for life (*Re Brooker*, [1926] W. N. 93).

As to the personalty the words, "may, however such estate is invested, be treated and applied as income," seem to include the analogous rule applied in *Brown* v. *Gellatly* (1867), L. R. 2 Ch. 751; *Wentworth* v. *Wentworth*, [1900] A. C. 163, p. 171; *Re Beech*, [1920] 1 Ch. 40, and cases there mentioned, under which unauthorised investments were valued and the tenant for life was only entitled to interest at 4 per cent. on the value (*Re Trollope's Will Trusts*, [1927] 1 Ch. 596, 604). To the extent of the intestacy but no further, the tenant for life will therefore take the whole income of the personalty (see *Re Chaytor*, [1905] 1 Ch. 233; *Re Inman*, [1915] 1 Ch. 187).

The section does not, however, contain any provision analogous to that part of the usual "income" clause in wills which provides that "no reversionary or other property shall be treated as producing income" and if the estate includes reversionary property the question arises whether the tenant for life is entitled to interest on the value of reversionary property if retained as in *Rowlls* v. *Bebb*, [1900] 2 Ch. 107, where, however, it was held that the trustees had never exercised any discretion as to its retention and that it ought to have been sold.

As to how far the old rule under which the court apportioned the cost of repairs between capital and income (*Re Hotchkys* (1886), 32 Ch. D. 408; *Re Courtier* (1886), 34 Ch. D. 136) still applies, see *Re Gray*, [1897] 1 Ch. 242; *Re Robins*, [1928] 1 Ch. 721; *Re Smith*, [1929] W. N. 173.

"*As may not be required for the administrative purposes aforesaid.*"—These words together with the reference to apportionment seem to import the rule in *Allhusen* v. *Whittell* (1867), L. R. 4 Eq. 295, under which the income of property required for such purposes is treated as capital; and see *Re Wills*, [1915] 1 Ch. 769, where a direction by a testator that the income from his estate however invested should be treated as income (which is similar to that in this sub-section) was held not to displace the rule, but in *Re McEuen*, [1913] 2 Ch. 704, where capital sums in respect of duties, etc., were paid at intervals after the testator's death, though a similar method was in fact adopted in that case it was suggested that this was not the only method available, and that extremely elaborate and minute calculations need not be gone through in every case, (*per* SARGANT, J., *ibid.* at p. 716).

A P.R. is not bound to distribute the estate before the expiration of a year from the death (s. 44, p. 345, *post*).

As to income tax, see *Re Oldham*, [1927] W. N. 113.

(6) Nothing in this section affects the rights of any creditor of the deceased or the rights of the Crown in respect of death duties. [824]

The rights of creditors are provided for in s. 32, p. 323, *ante*, and Sched. 1, Part I, para. 2, p. 362, *post* (insolvent estates).

The Crown is bound as regards deaths after 1925, see s. 57, p. 361, *post*. As to death duties, see L. P. A. 1925 (c. 20), ss. 16–18, Vol. 15, title REAL PROPERTY. The effect of the above provisions seems to be that while the precedence of Crown debts is gone in the case of deaths after the commencement of the Act, that of death duties remains. See *Re Morris*, [1927] W. N. 146.

(7) Where the deceased leaves a will, this section has effect subject to the provisions contained in the will. [825]

This sub-section means that the section applies only so far as the estate is not disposed of by will. Hence in the application of the income from unauthorised investments, although under the intestacy the rule in *Howe* v. *Earl Dartmouth* (1802), 7 Ves. 137, will be excluded, yet so far as they are dealt with by the will the rule will apply as under the old law (*Re Trollope's Will Trusts*, [1927] 1 Ch. 596, 604). See also as to this section *Re Petty*, [1929] 1 Ch. 726.

34. Administration of assets.—(1) Where the estate of a deceased person is insolvent, his real and personal estate shall be administered in accordance with the rules set out in Part I. of the First Schedule to this Act. [826]

Cf. the Judicature Act, 1875 (c. 77), s. 10 (which applied to administration by the court), p. 301, *ante*, repealed by this Act, s. 56, p. 361, *post*, and Sched. 2, p. 366, *post*.

This section aims at applying similar rules to the administration of insolvent estates in and out of court and presents the same problems (*Re Pink*, [1927] 1 Ch. 237, 241). See, also, Sched. 1, p. 362, *post*.

Solvency or insolvency is a question of fact (*Re Pink*, *ante*) and an inquiry may be directed to ascertain this, and the Court has directed a debt due from a creditor to the estate to be paid to a separate account until it be ascertained whether or not the mutual credits rule will be applicable (*Re Smith* (1883), 22 Ch. D. 586).

In determining whether an estate is insolvent the costs of administration must be taken into account (*Re Leng*, [1895] 1 Ch. 652), and any annuity to which the estate is liable (*Re Pink*, [1927] 1 Ch. 237). Annuities may be valued and the value treated as a debt against the estate (*Re Bridges* (1881), 17 Ch. D. 342; *Re Pink*, *ante*).

An estate insolvent at the date of judgment afterwards realised enough to pay the principal on all the debts, but not the interest allowed by the court, and it was decided that the payment of interest must follow the law of bankruptcy, not of the Chancery Division (*Re Whitaker*, [1904] 1 Ch. 299).

The object of s. 10 of the Judicature Act, 1875 (c. 77), see p. 301, *ante*, was to vary the rights of parties not to enlarge the assets of the estate (*Re Count D'Epineuil* (1882), 20 Ch. D. 217).

As to the effect of the rules for administering an insolvent estate, see notes to Sched. 1, Part 1, p. 362, *post*.

(2) The right of retainer of a personal representative and his right to prefer creditors may be exercised in respect of all assets of the deceased, but the right of retainer shall only apply to debts owing to the personal representative in his own right whether solely or jointly with another person.

Subject as aforesaid, nothing in this Act affects the right of retainer of a personal representative, or his right to prefer creditors. [827]

This sub-section is new.

Retainer.—The right of a P.R. to retain a debt due to him from the estate of the testator or intestate in priority to all creditors of equal degree is a legal right arising from his incapacity to sue himself (*Woodward* v. *Lord Darcy* (1558), 1 Plowd. 184; *Re Jones* (1885), 31 Ch. D. 440; *Wilson* v. *Coxwell* (1883), 23 Ch. D. 764).

It was not favoured by the Courts of Equity, and did not extend to equitable assets (*Anon.* (1681), 2 Cas. in Ch. 54; *Re Baker* (1890), 44 Ch. D. 272), nor to a trustee of an estate devised to him for payment of debts (*Bain* v. *Sadler* (1871), L. R. 12 Eq. 571), nor to real estate made equitable assets by the A. E. A. 1833 (c. 104), p. 284, *ante* (*Walters* v. *Walters* (1881), 18 Ch. D. 182), nor to the proceeds of sale of real estate vested in A. P. R. by the Land Transfer Act, 1897 (c. 65) (*Re Williams*, [1904] 1 Ch. 52).

As, however, no distinction is now made between legal and equitable assets, and the right may be exercised " in respect of all assets of the deceased," these cases would seem not to apply where the death occurs after 1925.

The right applies to debts only recoverable in equity (*Re Morris* (1874), 10 Ch. App. 68), and applies in all cases where the P.R. might sue on the one hand and be sued on the other (*Plumer* v. *Marchant* (1763), 3 Burr. 1384).

The right attaches only to a fund of which the P.R. has actual or constructive possession (*Pulman* v. *Meadows*; [1901] 1 Ch. 233). Thus it does not extend to money paid into court after the death of the P.R. (*Re Compton* (1885), 30 Ch. D. 15) or got in by a receiver (*Re Harrison* (1886), 32 Ch. D. 395; and see *Re Jones* (1885), 31 Ch. D. 440), but ordinarily the right is not barred by an administration action (*Re Barrett* (1889), 43 Ch. D. 70), or by payment into court or to a receiver (*Re Giles*, [1896] 1 Ch. 956).

If the debt due to the P.R. exceeds the value of the assets he is not bound to realise them, and may retain them in specie (*Re Gilbert*, [1898] 1 Q. B. 282). See, generally, the cases collected in the English and Empire Digest, Vol. 23, pp. 370 *et seq.*

The executor of a last surviving executor might retain a debt due to his testator (*Thomson* v. *Grant* (1823), 1 Russ. 540 n.), and also his own debt (*Burge* v. *Brutton* (1843), 2 Hare, 373); but the P.R. of an executor who does not represent the original testator may not retain against the estate of the latter (*Re Compton* (1885), 30 Ch. D. 15), unless the right attached in the lifetime of the deceased executor (*ibid*).

A statute-barred debt may be retained (*Lowis* v. *Rumney* (1867), L. R. 4 Eq. 451), but not a debt which is not enforceable for non-compliance with the Statute of Frauds (*Re Rownson* (1885), 29 Ch. D. 358).

One of several P.R.'s may retain his own debt (*Kent* v. *Pickering* (1837), 2 Keen 1), or a debt due to him jointly with another (*Re Stewart* (1880), 16 Ch. D. 368). But he cannot retain a debt due to a trustee for him (*Re Hayward*, [1901] 1 Ch. 221) or to his trustee in bankruptcy (*Wilson* v. *Wilson*, [1911] 1 K. B. 327).

Retainer by trustee.—Formerly a P.R. who was a trustee for others could retain a debt due to him from the deceased testator or intestate; see *Re Hubback* (1885), 29 Ch. D. 934; *Sander* v. *Heathfield* (1874), L. R. 19 Eq. 21, and other cases given in the English and Empire Digest, Vol. 23, p. 380.

The section now limits the right of retainer to debts owing to the P.R. in his own right, solely or jointly, with another, and the question what is meant by this limitation is one of some difficulty. The expression " in his own right " has received judicial consideration in connection with the holding of shares for the qualification of a director. In that connection it does not mean holding beneficially, JESSEL, M.R. considering that the company could not look behind their own register as to the beneficial interest (*Pulbrook* v. *Richmond Mining Co.* (1878), 9 Ch. D. 610).

In a later case, COTTON, L.J. dissented from this view, but LINDLEY, L.J. said that that conventional meaning had been acted on so long that he was not prepared to disturb it (*Bainbridge* v. *Smith* (1889), 41 Ch. D. 462). And when the matter was again discussed, LORD HERSCHELL, C. agreed with LINDLEY, L.J. (*Cooper* v. *Griffin*, [1892] 1 Q. B. 740). But where the holder had become bankrupt and the shares were claimed by his trustee in bankruptcy, it was held that, though still registered, he no longer held the shares in his own right as to do so he must hold the shares so that the company might safely deal with him as owner, which after the trustee's claim they could not do (*Sutton* v. *English Co.*, [1902] 2 Ch. 502), and in a case where a man was registered as " F., liquidator of the H. Co." he was held not to be the holder of those shares in his own right (*Boschoek Proprietary Co.* v. *Fuke*, [1906] 1 Ch. 148).

Possibly *Sutton* v. *English Co.* (*ubi supra*), may afford some indication of the meaning of the expression here, and a person entitled to the debt in his own right means a person entitled to give an absolute discharge for it, if it were payable by a third party, and one with whom such third party might safely deal. This view seems the more probable as it would be continuing the previous law and while on the one hand a P.R. entitled to a debt from the testators estate, but who had become bankrupt and whose debt had vested in his trustee in bankruptcy, could not retain as in *Wilson* v. *Wilson*, [1911] 1 K. B. 327, nor could a P.R. retain a debt vested in a trustee for him as in *Re Hayward*, [1901] 1 Ch. 221, yet, on the other hand, if as trustee, either alone or with others, he was entitled to a debt for which he or they could give a discharge, the right of retainer would remain. The question, however, must remain doubtful till pronounced on by authority.

An analogy to the liquidator case (*Boschoek Proprietary Co.* v. *Fuke*, [1906] 1 Ch. 148) may be found in the case under the old law, where on a grant or administration to an attorney of the person entitled to the grant, the attorney was not allowed to retain in respect of a debt due to his principal (*Re Richards*, [1901] 2 Ch. 399, where a grant to a person described as a bank manager did not enable him to retain a debt due to the bank by which he was employed).

This section does not affect the right of a P.R. to set off a legacy against a debt to the estate owed by the legatee (*Turner* v. *Turner*, [1911] 1 Ch. 716). Such a right is properly called a right of retainer (*Re Savage*, [1918] 2 Ch. 146). And for a case where executors had paid under a contract of surety entered into by their testator, and were entitled to be allowed the amount paid notwithstanding the bankruptcy of the legatee, see *Re Melton*, [1918] 1 Ch. 37, overruling *Re Binns*, [1896] 2 Ch. 584.

See, generally, as to the right of retainer, Halsbury's Laws of England, Vol. 14,

pp. 256 *et seq.* and the cases collected in the English and Empire Digest, Vol. 23, pp. 370, 383.

His right to prefer creditors.—This is the right of the personal representative among creditors of equal degree to pay one in preference to another (*Lyttleton* v. *Cross* (1824), 3 B. & C. 317, 322) and see *Hepworth* v. *Heslop* (1849), 6 Hare, 561. When specialty debts had precedence over simple contract debts, it did not enable a P.R. to prefer a common to a specialty creditor (*Re Hankey*, [1899] 1 Ch. 541). It has been noted above that death duties still have preference, and it is conceived that the payment of duties must still take preference over the P.R.'s right to prefer creditors.

The right to prefer cannot be exercised after judgment in an administration action (*Mitchelson* v. *Piper* (1836), 8 Sim. 64; *George* v. *George* (1865), 35 Beav. 350); but the personal representative is entitled to stand in the place of a creditor whom he has paid (*Jones* v. *Jukes* (1794), 2 Ves. 518); and, since the Judicature Act, 1873 (c. 66), the payment of a creditor by a P.R., though he have notice of an action by another creditor, whether in the King's Bench or Chancery Division, if made before judgment, is good (*Re Radcliffe* (1878), 7 Ch. D. 733; *Vibart* v. *Coles* (1890), 24 Q. B. D. 364).

Where assets are reversionary or have not been got in, and the P.R. pays a debt out of his own money, he must be allowed it in full out of assets afterwards coming to him (*Re Jones*, [1914] 1 Ch. 742). And as to the right of the P.R. to transfer assets in specie to a creditor in discharge of his debt, see *ibid.* and *Earl Vane* v. *Rigden* (1870), L. R. 5 Ch. 663.

Generally, as to the right to prefer, see Halsbury's Laws of England, Vol. 14, pp. 254–255, and the English and Empire Digest, Vol. 23, pp. 366 *et seq.*

(3) Where the estate of a deceased person is solvent his real and personal estate shall, subject to rules of court and the provisions hereinafter contained as to charges on property of the deceased, and to the provisions, if any, contained in his will, be applicable towards the discharge of the funeral, testamentary and administration expenses, debts and liabilities payable thereout in the order mentioned in Part II. of the First Schedule to this Act. [828]

See notes to sub-s. (1), p. 328, *ante*.

Charges on property.—See s. 35, *post*.

Rules of Court include Probate Rules, see s. 55 (1) (xvi), and (xxii), pp. 359, 360, *post*.

See, generally, notes to Sched. 1, Part II, p. 363, *post*, which in effect prescribes the order in which, if the assets are not sufficient to carry out the testators intentions, the several dispositions are to abate.

The testator may by his will vary the order of abatement, the application of the schedule being subject to the provisions, if any, contained in his will (*Re Petty*, [1929] 1 Ch. 736).

As to the devolution of beneficial interests on intestacy, see ss. 45–52, pp. 345–355, *post*.

The fact that under this section the real and personal estate are both applicable for the discharge of administration expenses, debts and liabilities does not extend the meaning of words required to pass real estate by will, and so the words "the residue of money" which before the Act would not pass real estate forming part of a residuary estate will not do so now (*Re Emerson*, [1929] 1 Ch. 128).

A lapsed share of residue is properly described as undisposed of by will, and is now the primary fund for payment of administration expenses, debts and legacies (*Re Lamb*, [1929] 1 Ch. 722). In that case, however, there was a mere charge of debts and legacies, and nothing to alter their incidence. But if the testator creates a mixed fund for payment of debts and legacies and then bequeathes shares in the residue, there is no residue till the debts and legacies are paid and a lapsed share only bears its rateable proportion (*Re Petty*, [1929] 1 Ch. 726). See also *Re Atkinson*, [1929] W. N. 189.

35. Charges on property of deceased to be paid primarily out of the property charged.—(1) Where a person dies possessed of, or entitled to, or, under a general power of appointment (including the statutory power to dispose of entailed interests) by his will disposes of, an interest in property, which at the time of his death is charged with the payment of money, whether by way of legal mortgage, equitable charge or otherwise (including a lien for unpaid purchase money), and the deceased has not by will deed or other document signified a contrary or other intention, the interest so charged, shall as between the different persons claiming through the deceased, be primarily liable for the payment of the charge; and every part of the said interest, according to its value, shall bear a proportionate part of the charge on the whole thereof. [829]

This section replaces with some amendments the Real Estate Charges Act, 1854 (Locke King's Act) (c. 113), and its amending Acts of 1867 (c. 69) and 1877 (c. 34), see pp. 286, 298, and 302, *ante*.

The object of Locke King's Act was to make land subject to mortgages or charges passing under a will or descending on intestacy, primarily liable for the discharge of such mortgages or charges unless the testator had signified a contrary intention.

The object of the amendments effected by this section is to extend those provisions to all property whether real or personal, including entailed interests disposed of under the L. P. A. 1925 (c. 20), s. 176 (Vol. 15, title REAL PROPERTY, and property appointed under a general power of appointment. Locke King's Act applied to next-of-kin taking chattels real under an intestacy (*Re Fraser*, [1904] 1 Ch. 726), and to the Crown taking personalty in default of next-of-kin (*Dacre* v. *Patrickson* (1860), 1 Dr. & Sm. 182).

The Act did not and presumably this section does not impose any personal liability on the devisee of the mortgaged property (*Syer* v. *Gladstone* (1885), 30 Ch. D. 614), so that where a house subject to a mortgage for more than its value and furniture were devised and bequeathed on trust for tenants for life, the latter were entitled to the use of the furniture without keeping down the interest on the mortgage, the gifts being treated as distinct (*ibid.*). But if the mortgaged property is given together with other property the devisee must take or disclaim the property as a whole subject (in exoneration of the personalty) to the aggregate charges (*Re Baron Kensington*, [1902] 1 Ch. 203).

A person to whom an option to purchase property at a fixed price was given, was not a devisee within Locke King's Act (*Re Wilson*, [1908] 1 Ch. 839).

Property subject to the section.—Land settled on trust for sale coming to the testator as personalty was not within Locke King's Act (*Lewis* v. *Lewis* (1871), L. R. 13 Eq. 218), discussed in *Re Bennett*, [1899] 1 Ch. 316, neither was personal estate (*Re Bourne*, [1893] 1 Ch. 188), but such interests would be within this section in cases of deaths after 1925.

Leaseholds though not within the original Act (*Re Wormsley's Estates* (1877), 4 Ch. D. 665), came within it by the Amendment Act of 1877 (c. 34), p. 302, *ante* (*Re Kershaw* (1888), 37 Ch. D. 674), as did a rentcharge charged on leaseholds (*Re Fraser*, [1904] 1 Ch. 726). The Act also applied where real and personal estate were directed to be converted and the proceeds applied as a mixed fund (*Elliott* v. *Dearsley* (1880), 16 Ch. D. 322). Before this Act a mortgage debt would, if necessary, have been apportioned (*Gall* v. *Fenwick* (1874), 22 W. R. 211).

Where part of mortgaged land is devised to one and the residue to another, the devisees will contribute rateably (*Re Newmarch* (1878), 9 Ch. D. 12, and see *Leonino* v. *Leonino* (1879), 10 Ch. D. 460; *Re Major*, [1914] 1 Ch. 278).

Charges within the section.—The charges to which the section applies include a charge for estate duty under the Finance Act, 1894 (c. 30), s. 2 (1), title ESTATE AND OTHER DEATH DUTIES, p. 121 (*Re Bowerman*, [1908] 2 Ch. 340). A charge on lands taken in execution under a writ of elegit (*Re Anthony*, [1892] 1 Ch. 450, but not where the lands belonged to a tenant in tail in possession (*Re Anthony*, [1893] 3 Ch. 498)); a charge under the Public Health Act, 1875 (c. 55), Vol. 13, title PUBLIC HEALTH, after notice of apportionment (*Re Hesketh* (1900), 45 Sol. Jo. 11); a mortgage by deposit of deeds (*Pembrooke* v. *Friend* (1860), 1 J. & H. 132; *Davis* v. *Davis* (1876), 24 W. R. 962), though only a collateral security (*Coleby* v. *Coleby* (1866), L. R. 2 Eq. 803); a covenant to pay an annuity with a charge on the land (*Re Sharland* (1896), 74 L. T. 664 (as to whether where two estates are charged with one debt one of them is collateral or they must contribute rateably, see *Re Athill* (1880), 16 Ch. D. 211)); a lien for unpaid purchase money (*Harding* v. *Harding* (1872), L. R. 13 Eq. 493; *Re Fraser*, [1904] 1 Ch. 726); or under a building agreement (*Re Kidd*, [1894] 3 Ch. 558); but if the contract was subsisting at the testator's death and afterwards rescinded, the devisees were only entitled to the price of the estate less the purchase money (*Re Cockcroft* (1883), 24 Ch. D. 94).

As to calls on shares not fully paid, specifically bequeathed, the general rule was that calls made before the testator's death were payable out of his estate, calls made after his death being borne by the specific legatee (*Armstrong* v. *Burnet* (1855), 20 Beav. 424; *Addams* v. *Ferick* (1859), 26 Beav. 384; *Day* v. *Day* (1860), 1 Dr. & Sm. 261; *Re Box* (1863), 1 H. & M. 552), unless the company's regulations created no charge on the shares, in which case, see *Re Dunlop* (1882), 21 Ch. D. 583. If the company has a lien on the shares in case of the testator's death after 1925, the specific legatee would probably be liable whenever the call was made.

With regard to charges by way of suretyship, a mortgage to secure the debt of a firm of which the testator was a partner was not within the Act if the firm were solvent and able to pay the debt (*Re Ritson*, [1899] 1 Ch. 128), and so also if the testator was a mere surety and the principal debtor pays the debt after the testator's death, but if the testator is also interested as principal, the Act applies (*Re Hawkes*, [1912] 2 Ch. 251).

General charge.—A general charge on the testator's real estate in aid of his personalty was not within Locke King's Act (*Hepworth* v. *Hill* (1862), 30 Beav. 476).

In the case of deaths after 1925 it may, no doubt, often be a question of the construction of the will, how such general charges are intended to be borne. Apart from some particular intention to be gathered from the will, the words of the section do not appear to alter the law so as to subject specifically disposed-of property to a proportionate share of such a charge created by the will itself, and not previously subsisting. The section must be read with Sched. 1, p. 362, *post*.

As to a contrary intention, see sub-s. (2), p. 332, *post*, and note thereto.

See, generally, the English and Empire Digest, Vol. 23, pp. 487–489.

(2) Such contrary or other intention shall not be deemed to be signified—

(*a*) by a general direction for the payment of debts or of all the debts of the testator out of his personal estate, or his residuary real and personal estate, or his residuary real estate; or

(*b*) by a charge of debts upon any such estate;

unless such intention is further signified by words expressly or by necessary implication referring to all or some part of the charge. [830]

This sub-section substantially reproduces the corresponding provision of the Real Estates Charges Acts, 1867 (c. 69), and 1877 (c. 34), pp. 298, 302, *ante*.

Contrary intention.—The contrary intention may be found in the will or mortgage or other deeds (*Re Campbell*, [1893] 2 Ch. 206).

To constitute a contrary intention there must be a direction applying to the mortgage debts in such terms as distinctly and unmistakeably refer to them (*Nelson* v. *Page* (1869), L. R. 7 Eq. 25, *per* GIFFARD, V.C. at p. 28). See also, however, *Re Nicholson*, [1923] W. N. 251 (notice to pay off mortgage).

A direction to pay debts, except a mortgage on particular property, shows that other mortgages are to be paid off out of residue, and is a contrary intention sufficient to take the case out of the Act (*Re Valpy*, [1906] 1 Ch. 531), and a gift of residue subject to payment of the testator's trade debts, where before his death he had deposited the title deeds of his real estate with his bankers to secure a trade account was held to show a contrary intention so that the devisee of the estate was entitled to have it exonerated from the bankers' lien (*Re Fleck* (1888), 37 Ch. D. 677).

And where the testator charged his property used in trade with his trade debts, and his residue with all other debts, and the trade debts included a vendor's lien and would have included mortgage debts, it was held that other debts charged on the residue also included mortgage debts (*Re Nevill* (1890), 59 L. J. Ch. 511).

But a direction to discharge mortgages out of residue does not extend to the discharge of a vendor's lien for unpaid purchase money, on property contracted to be purchased, but unpaid at the testator's death (*Re Beirnstein*, [1925] Ch. 12).

If a special fund (not being one of those mentioned in this sub-section) is provided for payment of debts this operates as a contrary intention within the meaning of this sub-section, so as to exonerate a personalty fund which was subject to a mortgage from the primary liability to discharge it, but the fund is only exonerated to the extent that the special fund is available, and so far as it is inadequate the mortgaged property remains liable (*Re Fegan*, [1928] Ch. 45).

And so under Locke King's Act, where a mortgage secured on Whiteacre was to be paid out of the proceeds of sale of Blackacre, the direction only exonerated Whiteacre to the extent of those proceeds and did not enable the devisees to come on the general personal estate for the deficiency (*Re Birch*, [1909] 1 Ch. 787, see also *Rodhouse* v. *Mold* (1865), 35 L. J. Ch. 67). LORD ROMILLY'S view, if and so far as it is to the contrary, expressed in *Allen* v. *Allen* (1862), 30 Beav. 395 to 403, would probably not now be followed.

See the English and Empire Digest, Vol. 25, pp. 489 *et seq.*

(3) Nothing in this section affects the right of a person entitled to the charge to obtain payment or satisfaction thereof either out of the other assets of the deceased or otherwise. [831]

If the deceased was personally liable to payment of the charge, his real and personal estate are assets, see s. 32, p. 323, *ante*.

36. Effect of assent or conveyance by personal representative.—(1) A personal representative may assent to the vesting, in any person who (whether by devise, bequest, devolution, appropriation or otherwise) may be entitled thereto, either beneficially or as a trustee or personal representative, of any estate or interest in real estate to which the testator or intestate was entitled or over which he exercised a general power of appointment by his will, including the statutory power to dispose of entailed interests, and which devolved upon the personal representative. [832]

The whole of this section is new. It applies to real estate, including chattels real (s. 55 (1) (xix), p. 359, *post*, or any interest therein whether the deceased died before 1926 or afterwards (sub-s. (12), p 336, *post*).

P.R. includes special representatives (s. 22, p. 314, *ante*), who are deemed to have been appointed executors in respect of settled land, s. 55 (1) (xi), p. 358, *post*.

As to vesting assents relating to settled land, see the S. L. A. 1925 (c. 18), ss. 7 and 8 (4), Vol. 17, title SETTLEMENTS, and as to the form of a vesting assent to vest settled land in the tenant for life, see *ibid.* Sched. 1, Form 5, and the Encyclopædia of Forms and Precedents, 2nd Edn. Vol. 16, p. 356.

The personal representatives may and should execute a vesting assent to themselves as trustees (*Re Verburgh*, [1928] W. N. 208), but see note to s. 8, p. 313, *ante*.

Devolution.—This will be if the deceased died before 1926 under the Inheritance Act, 1833 (c. 106), Vol. 5, title DESCENT AND DISTRIBUTION, p. 118, or in the case of personalty (*e.g.* proceeds of sale), the Statute of Distribution, 1670, (c. 10) (*ibid.*), and if he died after 1925 under ss. 46 and 47, pp. 346, 348, *post*.

Appropriation may be made under a special power or under s. 41, p. 340, *post*, which applies whether the deceased died before or after the commencement of the Act (s. 41 (9)).

Mortgages.—Real estate as defined in the Act, s. 55 (1) (xix), p. 359, *post*, and s. 3 (1) (ii), p. 309, *ante*, includes real estate held by way of mortgage or security, but not money secured or charged on land. It seems that a mortgage debt is an interest in land (*Re Watts* (1885), 29 Ch. D. 947; *Miller* v. *Collins*, [1896] 1 Ch. 573), but perhaps a mere charge may not be, see *Franks* v. *Bollans* (1868), L. R. 3 Ch. 717), *per* PAGE-WOOD, L.J., probably depending on the nature of the charge. It therefore seems that a mortgage debt and the term for securing the same might be the subject of an assent, but till this is settled it will be safer to transfer them in the ordinary way or in the form given in L. P. A. 1925 (c. 20), Sched. 3, Vol. 15, title REAL PROPERTY.

The person in whose favour the assent can be made must be entitled beneficially or as trustee or P.R. This leaves it doubtful whether it could be made in favour of a mortgagee or assignee of a beneficiary, and in such cases a conveyance in the ordinary form will be safer than an assent. An assent, however, is conclusive in favour of a purchaser for value to whomsoever it may be given (see sub-s. (7), p. 335, *post*). Under the old law where leaseholds were bequeathed to one for life with remainders over the assent of the P.R. to the life estates was an assent to the bequest in remainder (*Stevenson* v. *Liverpool Corporation* (1874), L. R. 10 Q. B. 81; and see *Wise* v. *Whitburn*, [1924] 1 Ch. 460); but if the P.R. were himself the tenant for life it was often difficult to ascertain whether or not the P.R. had assented, mere entry on the property being referable either to his interest as P.R. or as tenant for life, see *Doe* v. *Sturges* (1816), 7 Taunt. 217; *A.-G.* v. *Potter* (1842), 5 Beav. 164, where entry was considered not to amount to an assent, and *Trail* v. *Bull* (1844), 1 Coll. 352; *affd.* 1853, 22 L. J. Ch. 1082, where it did so and amounted to an assent to the gifts in remainder.

The practice under this Act will be different in these respects (1) the assent must name the person in whose favour it is given and the legal estate will be vested in the tenant for life on the trusts of the settlement if such there be, and (2) no assent will be operative unless made in writing (sub-s. (4), p. 334, *post*). But see the notes to s. 8, p. 313, *ante*. As to the obligation of the P.R. to convey or assent in favour of a person absolutely entitled, etc., see S. L. A. 1925 (c. 18), s. 7 (5), Vol. 17, title SETTLEMENTS.

As to chattels bequeathed in succession, see *Richards* v. *Browne* (1837), 3 Bing. N. C. 493, and *Re Swan*, [1915] 1 Ch. 829. In such a case the tenant for life appears to be a trustee for the remainderman, see the question discussed by SARGANT, J., in the latter case at p. 833.

(2) The assent shall operate to vest in that person the estate or interest to which the assent relates, and, unless a contrary intention appears, the assent shall relate back to the death of the deceased. **[833]**

This sub-section re-states the old law as to the relation back of assents by a P.R.

The effect of relation back is to perfect the legatee's or devisee's title to intermediate accruals, *e.g.* rent. See *Saunder's Case* (1600), 5 Co. Rep. 12b; *Re West*, [1909] 2 Ch. 180. Referring to the effect of the executors assent, Lord Haldane said, "The office of executor remains with its powers attached, but the office which he had originally in the chattels which devolved upon him, and over which these powers extended does not necessarily remain. So soon as he has assented (and this he may do informally, and the assent may be inferred from his conduct), the dispositions of the will become operative and then the beneficiaries have vested in them the property in those chattels. The transfer is made not by the mere force of the assent of the executor, but by virtue of the dispositions of the will which have become operative because of this assent" (*Attenborough* v. *Solomon*, [1913] A. C. 76, 83.

A gift of residue stands for some purposes on a different footing from other testamentary gifts, for until the claims against the testators estate for administrative expenses, debts, duties and legacies have been satisfied there is no residue (*Lord Sudeley* v. *A.-G.*, [1897] A. C. 11); so that a charity, legatees of a share of residue, were not entitled to repayment of income tax paid by the executors during administration (*Barnardo's Homes* v. *Income Tax Special Commissioners*, [1921] 2 A. C. 1).

The assent is a conveyance, but need not be by deed (L. P. A. 1925 (c. 20), s. 52 (2)

(*a*), Vol. 15, title REAL PROPERTY). On an appointment of new trustees of a settlement on trust for sale created by will, appointments of new trustees of the conveyance (*i.e.* the assent) and of the will should be made by separate documents (Trustee Act, 1925 (c. 19), s. 35 (1), Vol. 20, title TRUSTS AND TRUSTEES). But there is no penalty if separate documents are not employed.

(3) The statutory covenants implied by a person being expressed to convey as personal representative, may be implied in an assent in like manner as in a conveyance by deed. [834]

For the implied statutory covenants by a person expressed to convey as a P.R. see L. P. A. 1925 (c. 20), s. 76 (1) (F), and Sched. 2, Part 6 (Vol. 15, title REAL PROPERTY).

(4) An assent to the vesting of a legal estate shall be in writing, signed by the personal representative, and shall name the person in whose favour it is given and shall operate to vest in that person the legal estate to which it relates; and an assent not in writing or not in favour of a named person shall not be effectual to pass a legal estate. [835]

This sub-section relates to the vesting of legal estates, *i.e.* estates charges and interests in or over land which are by statute authorised to subsist or to be created at law. (See s. 55 (1) (vii), p. 357, *post*, and L. P. A. 1925 (c. 20), s. 1, Vol. 15, title REAL PROPERTY.) Equitable interests and personalty (other than chattels real) will therefore remain subject to the old law, under which the assent of the P.R. might be implied from his conduct. But see the note to s. 8, p. 313, *ante*.

Writing includes printing, lithography, photography and other modes of representing or reproducing words in a visible form, see the Interpretation Act, 1889 (c. 63), s. 20, Vol. 18, title STATUTES.

As it may conceivably form a root of title, it is desirable that the assent should describe the property. See L. P. A. 1925 (c. 20), Sched. 5, Forms 8 and 9 (Vol. 15, title REAL PROPERTY), but a devisee cannot require an assent to describe the property in more precise terms than those comprised in the will or insist on a conveyance (*Re Pix*, [1901] W. N. 165); but if it is for giving effect to a settlement or conveying settled land to a tenant for life or statutory owner it must contain the particulars required in vesting deeds by the S. L. A. 1925 (c. 18), s. 5, Vol. 17, title SETTLEMENTS.

In respect of property other than legal estates or interests in land the old law remains.

The assent of the P.R. was necessary to perfect the title to a legacy given by the will. Hence before the assent the P.R. may sue the legatee if he have possession (*Mead* v. *Orrery* (1745), 3 Atk. 239), but after assent the legatee may sue the P.R. (*Doe* v. *Guy* (1802), 3 East, 120; *Williams* v. *Lee* (1745), 3 Atk. 223; *Kemp* v. *Inland Revenue Commissioners*, [1905] 1 K. B. 581).

On assent the legacy ceases to belong to the testator's estate, and the cost of transfer must be borne by the legatee (*Re Grosvenor*, [1916] 2 Ch. 375), and where a will gave a legacy of shares to A. and the personal representative assented to the legacy and transferred the shares to him, but afterwards a codicil was discovered which revoked the legacy to A. and gave it to B. on revocation of the probate and grant of a new probate including the codicil by reason of the original assent B. could recover the legacy and mesne profits from A. (*Re West*, [1909] 2 Ch. 180), and see sub-s. (9), p. 336, *post*, and s. 38, p. 337, *post*.

On assent the P.R. becomes a trustee for those beneficially entitled (*Re Yerburgh*, [1928] W. N. 208; *Dix* v. *Burford* (1854), 19 Beav. 409; *Attenborough* v. *Solomon*, [1913] A. C. 85).

The same rule applies to a bequest to the personal representative himself (Toller 345. The assent may be given by a person named as executor, though he die before proving the will (Wentw. Off. Ex. 14th Edn. 82), and by one of several executors (*Townson* v. *Tickell* (1819), 3 B. & Ald. 31). The assent may be express or implied, and is generally a question of fact (*Elliott* v. *Elliott* (1841), 9 M. & W. 23 at p. 27; *Wise* v. *Whilburn*, [1924] 1 Ch. 460).

Transfer of possession to the legatee was usually sufficient; or a definite act, *e.g.* paying the income in accordance with the bequest (*Paramour* v. *Yardley* (1579), 2 Plowd. 539), but if the P.R. was himself legatee, something more than mere possession would be required (*Doe* v. *Sturges* (1816), 7 Taunt. 223, and now that the P.R. may give possession before assenting (s. 43, p. 344, *post*) it will be more difficult than before to rely on mere possession.

Shall not be effectual to pass a legal estate.—See note to s. 8, p. 313, *ante*. When the executors and trustees are the same persons they must execute an assent in writing, though it may not strictly be required to "pass a legal estate;" see on this subject *Re Yerburgh*, [1928] W. N. 208. *per* ROMER, J.

(5) Any person in whose favour an assent or conveyance of a legal estate is made by a personal representative may require that notice

of the assent or conveyance be written or endorsed on or permanently annexed to the probate or letters of administration, at the cost of the estate of the deceased, and that the probate or letters of administration be produced, at the like cost, to prove that the notice has been placed thereon or annexed thereto. [836]

The effect of this sub-section is to make the Probate or Letters of Administration a document of title, and therefore they should be included in an acknowledgment for production of documents retained by a vendor. As this section applies to assents and conveyances made after the commencement of the Act, whenever the testator or intestate died (see sub-s. (12), p. 336, *post*), it seems that probates or letters of administration should be included in an acknowledgment upon any sale unless the administration of the real estate was completed before 1926.

(6) A statement in writing by a personal representative that he has not given or made an assent or conveyance in respect of a legal estate, shall, in favour of a purchaser, but without prejudice to any previous disposition made in favour of another purchaser deriving title mediately or immediately under the personal representative, be sufficient evidence that an assent or conveyance has not been given or made in respect of the legal estate to which the statement relates, unless notice of a previous assent or conveyance affecting that estate has been placed on or annexed to the probate or administration.

A conveyance by a personal representative of a legal estate to a purchaser accepted on the faith of such a statement shall (without prejudice as aforesaid and unless notice of a previous assent or conveyance affecting that estate has been placed on or annexed to the probate or administration) operate to transfer or create the legal estate expressed to be conveyed in like manner as if no previous assent or conveyance had been made by the personal representative.

A personal representative making a false statement, in regard to any such matter, shall be liable in like manner as if the statement had been contained in a statutory declaration. [837]

A covenant implied under the L. P. A. 1925 (c. 20), s. 76 (1) (F), Sched. 2, Part VI (Vol. 15, title REAL PROPERTY), by reason of the P.R. conveying as "personal representative" or "trustee" would not, it is thought, be a statement such as is referred to in this sub-section.

The effect of this sub-section is that a statement in writing by a P.R. that he has not given or made any assent or conveyance in respect of a legal estate, is conclusive evidence in favour of a purchaser, that no such assent or conveyance has been given or made since December 31, 1925. See sub-s. (12), p. 336, *post*.

(7) An assent or conveyance by a personal representative in respect of a legal estate shall, in favour of a purchaser, unless notice of a previous assent or conveyance affecting that legal estate has been placed on or annexed to the probate or administration, be taken as sufficient evidence that the person in whose favour the assent or conveyance is given or made is the person entitled to have the legal estate conveyed to him, and upon the proper trusts, if any, but shall not otherwise prejudicially affect the claim of any person rightfully entitled to the estate vested or conveyed or any charge thereon. [838]

The object of this sub-section appears to be to strengthen the value of the assent as a root of title, so that a purchaser is not concerned to see that the assent is made to the right person. He should, however, see that notice of the assent is indorsed on the probate or letters of administration, see sub-s. (6), *ante*.

(8) A conveyance of a legal estate by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral, and testamentary

or administration expenses, duties, and legacies of the deceased have been discharged or provided for. [839]

For "conveyance" "legal estate" and "purchaser," see definitions in s. 55 (1), p. 356, *post*.

Before the Act it was held that where all the debts of the testator had been paid a sale by the P.R. would not be forced on a purchaser with notice of this (*Re Verrell's Contract*, [1903] 1 Ch. 65).

The rule was that in the case of freeholds charged with debts where the P.R. was selling after twenty years, the purchaser must inquire as to debts (*Re Tanqueray-Willaume and Landau* (1882), 20 Ch. D. 465), but in the case of pure personalty or leaseholds there was no limit of time within which the P.R. could make a title (*Re Whistler* (1887), 35 Ch. D. 561; *Re Venn and Furze's Contract*, [1894] 2 Ch. 101).

This sub-section goes beyond these cases, and validates the sale though the purchaser knows there are no debts.

It should be noted that this sub-section applies only to legal estates, and is only for the protection of a purchaser. It does not affect the liability of a P.R. who sells where there are no debts or there is no administrative purpose to justify him in selling.

(9) An assent or conveyance given or made by a personal representative shall not, except in favour of a purchaser of a legal estate, prejudice the right of the personal representative or any other person to recover the estate or interest to which the assent or conveyance relates, or to be indemnified out of such estate or interest against any duties, debt, or liability to which such estate or interest would have been subject if there had not been any assent or conveyance. [840]

See, also, s. 38, p. 337, *post*.

The right to recover might arise if debts of which the P.R. had no notice when he gave the assent, should be claimed, even if possession had been given (*Doe* v. *Guy* (1802), 3 East, 120).

But, generally, the assent once given was irrevocable, even although the legatee was a debtor to the estate, see *Ballard* v. *Marsden* (1880), 14 Ch. D. 374.

(10) A personal representative may, as a condition of giving an assent or making a conveyance, require security for the discharge of any such duties, debt, or liability, but shall not be entitled to postpone the giving of an assent merely by reason of the subsistence of any such duties, debt or liability if reasonable arrangements have been made for discharging the same; and an assent may be given subject to any legal estate or charge by way of legal mortgage. [841]

It will, as a matter of convenience, usually be wise to arrange for the clearing of family charges before the assent is given.

Cf. the Land Transfer Act, 1897 (c. 65), s. 3 (1) (now repealed) permitted an assent subject to a charge for the payment of any money which the P.Rs. were liable to pay, and where such a charge was given in an assent to a devisee, a purchaser from the devisee was not entitled to an indemnity against any claim that might thereafter be made (*Re Cary and Lott's Contract*, [1901] 2 Ch. 463).

(11) This section shall not operate to impose any stamp duty in respect of an assent, and in this section "purchaser" means a purchaser for money or money's worth. [842]

See the S. L. A. 1925 (c. 18), s. 14 (2), Vol. 17, title SETTLEMENTS. An assent under the Land Transfer Act, 1897 (c. 65), (now repealed) under hand only and not under seal was not liable to duty as a conveyance (*Kemp* v. *Inland Revenue Commissioners*, [1905] 1 K. B. 581).

This section making the assent operate as a conveyance (see sub-s. (2), p. 333, *ante*) might, but for this sub-section have made it liable to stamp duty.

If an assent is given under seal it must be stamped as a deed.

(12) This section applies to assents and conveyances made after the commencement of this Act, whether the testator or intestate died before or after such commencement. [843]

It will be noticed that sub-ss. (4)–(8) are of much narrower application than sub-ss. (1)–(3), and (9), (12). While sub-ss. (1)–(3) apply to any estate or interest in real estate, sub-ss. (4)–(8) are restricted to legal estates only, while sub-ss. (9)–(12) seem to apply to assents to property of any description.

37. Validity of conveyance not affected by revocation of representation.—(1) All conveyances of any interest in real or personal estate made to a purchaser either before or after the commencement of this Act by a person to whom probate or letters of administration have been granted are valid, notwithstanding any subsequent revocation or variation, either before or after the commencement of this Act, of the probate or administration. [844]

"Conveyance" includes an assent, s. 55 (1) (iii), p. 356, *post*.

Where a widow to whom administration had been granted on the erroneous assumption that the deceased had died intestate, sold part of his real estate, and on the discovery of a will the letters of administration were recalled and probate granted to the executors, the C. A. overruling ASTBURY, J., and several previous cases (*Graysbrook* v. *Fox* (1565), 1 Plowd. 275; *Abraham* v. *Conyngham* (1676), 1 Freem. K. B. 445; and *Ellis* v. *Ellis*, [1905] 1 Ch. 613), held that the purchaser had a good title, on the ground that the grant of administration was not void *ab initio*, and if it were void the purchaser was protected by the Conveyancing Act, 1881 (c. 41), s. 70 (now the L. P. A. 1925 (c. 20), s. 204, Vol. 15, title REAL PROPERTY), see *Hewson* v. *Shelley*, [1914] 2 Ch. 13, and *Re Bridgett and Hayes' Contract*, [1928] Ch. 163.

(2) This section takes effect without prejudice to any order of the court made before the commencement of this Act, and applies whether the testator or intestate died before or after such commencement. [845]

The exception only applies to an order actually made before the commencement of the Act. This sub-section gives effect to the decision in *Hewson* v. *Shelley*, [1914] 2 Ch. 13 C. A., which overruled *Ellis* v. *Ellis*, [1905] 1 Ch. 613, and some earlier cases. See Halsbury's Laws of England, Vol. 14, p. 215, and the English and Empire Digest, Vol. 23, p. 249.

38. Right to follow property and powers of the court in relation thereto.—(1) An assent or conveyance by a personal representative to a person other than a purchaser does not prejudice the rights of any person to follow the property to which the assent or conveyance relates, or any property representing the same, into the hands of the person in whom it is vested by the assent or conveyance, or of any other person (not being a purchaser) who may have received the same or in whom it may be vested. [846]

See also, s. 36 (9), p. 336, *ante*, and the note thereto. The distinction between that provision and this section is a little difficult to follow. S. 36 (9), however, especially mentions the indemnity of the P.R. out of the property itself, while this section extends the remedy to property representing that to which an assent or conveyance relates, and enables the property to be followed into the hands of a transferee other than a purchaser, as to whom, see also sub-s. (3), p. 338, *post*.

The refunding of legacies in equity arose in this way. The Statute of Distribution 1670 (c. 10), s. 5, Vol. 5, title DESCENT AND DISTRIBUTION, p. 116, required any person to whom any distribution or bond should be allotted to give bond to refund in case debts should thereafter appear. And so originally the courts required the legatee to give to the executors security to refund if debts should appear (*Chamberlain* v. *Chamberlain* (1675), 1 Ch. Cas. 257). Later the courts ceased to require this (*Anon.* (1738), 1 Atk. 491), and then allowed the creditor to follow the assets in the hands of legatees as well as of executors (*March* v. *Russell* (1837), 3 My. & Cr. 31, p. 42).

And so where the P.R. had administered and paid over the residue a creditor could compel payment of his debt from the residuary legatee, without joining the executor (*Hunter* v. *Young* (1879), 4 Ex. D. 256, and see *Jervis* v. *Wolferstan* (1874), L. R. 18 Eq. 18). If after advertising a P.R. has fully administered and assented to a legacy which he has retained, his liability *qua* executor is gone (*Clegg* v. *Rowland* (1866), L. R. 3 Eq. 368); and for an instance where a puisne mortgagee who had been foreclosed was allowed to recover from the mortgagor's residuary legatees and devisees, see *Worthington* v. *Abbott*, [1910] 1 Ch. 588. But ordinarily creditors cannot follow assets, and the alienee from the executor is protected (*Whale* v. *Booth* (1785), 4 T. R. 625 n.), and see *Spackman* v. *Timbrell* (1837), 8 Sim. 253, p. 260, where leaseholds of the testator settled by the executor on his marriage were protected.

(2) Notwithstanding any such assent or conveyance the court may, on the application of any creditor or other person interested,—

(*a*) order a sale, exchange, mortgage, charge, lease, payment, transfer or other transaction to be carried out which the court considers requisite for the purpose of giving effect to the rights of the persons interested;

(*b*) declare that the person, not being a purchaser, in whom the property is vested is a trustee for those purposes;

(*c*) give directions respecting the preparation and execution of any conveyance or other instrument or as to any other matter required for giving effect to the order;

(*d*) make any vesting order, or appoint a person to convey in accordance with the provisions of the Trustee Act, 1925. [847]

As to vesting orders, see the Trustee Act, 1925 (c. 19), ss. 44–49 and 51–53 (Vol. 20, title TRUSTS AND TRUSTEES). As to declaring an estate owner a trustee, see *ibid.* s. 47, and appointing a person to convey, see *ibid.* ss. 50, 53.

(3) This section does not prejudice the rights of a purchaser or a person deriving title under him, but applies whether the testator or intestate died before or after the commencement of this Act. [848]

39. Powers of management.—(1) In dealing with the real and personal estate of the deceased his personal representatives shall, for purposes of administration, or during a minority of any beneficiary or the subsistence of any life interest, or until the period of distribution arrives, have—

(i) the same powers and discretions, including power to raise money by mortgage or charge (whether or not by deposit of documents), as a personal representative had before the commencement of this Act, with respect to personal estate vested in him, and such power of raising money by mortgage may in the case of land be exercised by way of legal mortgage; and

(ii) all the powers, discretions and duties conferred or imposed by law on trustees holding land upon an effectual trust for sale (including power to overreach equitable interests and powers as if the same affected the proceeds of sale); and

(iii) all the powers conferred by statute on trustees for sale, and so that every contract entered into by a personal representative shall be binding on and be enforceable against and by the personal representative for the time being of the deceased, and may be carried into effect, or be varied or rescinded by him, and, in the case of a contract entered into by a predecessor, as if it had been entered into by himself. [849]

This section is new. It must be read with s. 2, p. 307, *ante*.

Cf. the L. P. Amendment Act, 1859 (c. 35), s. 17 (repealed by Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 226, and this Act as to persons dying after 1925), which relieved purchasers from enquiring whether the powers of trustees of estates charged with payment of debts or of execution had been properly exercised.

Cf. the powers of S. L. A. trustees for management of land during minorities (S. L. A. 1925 (c. 18), s. 102, Vol. 17, title SETTLEMENTS), and see *Re Gray*, [1927] 1 Ch. 242.

Personal representatives includes special representatives, s. 55 (1) (xi), p. 358, *post*, but in this section it does not include trustees in the ordinary sense, even where the P.R.s themselves become trustees on assent (*Re Trollope*, [1927] 1 Ch. 596).

This section applies in four cases :—

(1) *For purposes of administration.*

(2) *During the minority of a beneficiary.*—In the case of settled land, the S. L. A. trustees may require the land to be vested in them, or the P.R. will act under their directions (see the S. L. A. 1925 (c. 18), s. 26 (2), Vol. 17, title SETTLEMENTS), and on a sale the purchase money will be paid to or by the direction of the trustees; but a purchaser dealing with the P.R. may pay to him, and is not concerned to see that he pays the trustees, *ibid.*

(3) *During the subsistence of a life interest.*—"Life interest" is not defined, but the expression "tenant for life" (see s. 55 (1) (xxiv), p. 360, *post*) has the same meaning as in the S. L. A. 1925 (c. 18), which (s. 117 (1) (xxviii)) includes a person having the powers of a tenant for life (see s. 20). See Vol. 17, title SETTLEMENTS. It is therefore possible, but not certain, that the expression may mean "during the subsistence of a settlement," which would include the highly artificial settlement where there is a tenant in fee simple subject to subsisting charges (*ibid.* s. 20 (1) (ix)) or a married woman restrained from anticipation (*ibid.* s. 20 (1) (x)).

Under an intestacy a life interest may arise where there is a surviving spouse, see s. 46 (1) (i), p. 346, *post*.

(4) *Until the period of distribution.*—This will include the second and third cases, and also a case where distribution is to take place at a later age than twenty-one. In such cases the property will usually have been given to trustees, and unless the trustees have compelled an assent to themselves, which they will probably not do till they know the estate is cleared, this provision has the curious effect of ousting the trustees.

The explanation of these introductory cases in this sub-section is to be found in s. 33, p. 324, *ante*, which for certain purposes constitutes the P.R. a trustee with certain powers.

As soon as the P.R. have administered the estate of the testator and assented, the "period of distribution" has arrived for the purposes of this section, and the section has no application to a case where the residue of the personal estate (other than leaseholds) is held by the trustees (even though they are the same persons as the P.R.) upon trust for sale with power to postpone conversion, and there is a tenant for life. The application of this section is confined to the duties of the P.R. either in the ordinary course of administration or under s. 33, p. 324, *ante* (*Re Trollope's Will Trusts*, [1927] 1 Ch. 596, 604). It results from this that the income from unauthorised investments when retained is subject to a rule analogous to that in *Howe* v. *Earl Dartmouth* (1802), 7 Ves. 137.

Where P.R.s selling land erroneously stated that they were selling land as trustees for sale, but were able to make a title under this section, the purchaser was compelled to carry out the contract (*Re Spencer and Hauser's Contract*, [1928] Ch. 598).

"The same powers," etc.—The P.R. had an absolute power of disposition, including power to pledge, see notes to s. 2 (1), p. 307, *ante*, and s. 38 (1), p. 337, *ante*, and *Attenborough* v. *Solomon*, [1913] A. C. 76, and *Attenborough* v. *Solomon*, [1911] 2 Ch. 159, *per* JOYCE, J., at p. 164.

The powers conferred by statute on trustees for sale are contained in the L. P. A. 1925 (c. 20), ss. 23–33 (Vol. 15, title REAL PROPERTY), and by s. 33 these are expressly made applicable to a P.R. This provision seems therefore scarcely to be required, especially in view of sub-s. (iii), p. 339, *post*. It is not quite clear what limitation is intended to be placed on the trust for sale by prefacing it by the word "effectual," but perhaps it is intended to refer to the "immediate binding" trust for sale referred to in the definition in the L. P. A. 1925 (c. 20), s. 205 (1) (xxix). Cf. *Re Leigh's Settled Estates* (*No.* 2), [1927] 2 Ch. 13; *Re Parker*, [1928] Ch. 247.

Sub.-s. (ii) confers the powers held by trustees holding land on trust for sale; but this does not operate to make the L. P. A. 1925 (c 20), s. 28, Vol. 15, title REAL PROPERTY, applicable to pure personalty (*Re Trollope's Will Trusts*, [1927] 1 Ch. 596). The word "duties" means duties in the strict sense and does not import statutory trusts relating to a different subject matter (*ibid.*).

Sub-s. (iii) confers the powers of trustees holding any property on trust for sale. In this case the limitation of the word "effectual" is not inserted. There is probably little difference between "imposed by law" in sub-s. (ii) and "conferred by statute" in sub-s. (iii).

As to the latter part of sub-s. (iii), cf. s. 37, p. 337, *ante*.

(2) Nothing in this section shall affect the right of any person to require an assent or conveyance to be made. [850]

See also, s. 43 (2), p. 344, *post*.

On giving an assent the powers of the P.R. under this section will cease (*Re Trollope's Will Trusts*, [1927] 1 Ch. 596).

(3) This section applies whether the testator or intestate died before or after the commencement of this Act. [851]

For this section to apply the property must be vested in the P.R.s in that capacity. If it had become vested in them in some other capacity, *e.g.* as statutory owners, they could not exercise the powers conferred by this section.

This section applies in four cases :—

(1) *For purposes of administration.*

(2) *During the minority of a beneficiary.*—In the case of settled land, the S. L. A. trustees may require the land to be vested in them, or the P.R. will act under their directions (see the S. L. A. 1925 (c. 18), s. 26 (2), Vol. 17, title SETTLEMENTS), and on a sale the purchase money will be paid to or by the direction of the trustees; but a purchaser dealing with the P.R. may pay to him, and is not concerned to see that he pays the trustees, *ibid.*

(3) *During the subsistence of a life interest.*—"Life interest" is not defined, but the expression "tenant for life" (see s. 55 (1) (xxiv), p. 360, *post*) has the same meaning as in the S. L. A. 1925 (c. 18), which (s. 117 (1) (xxviii)) includes a person having the powers of a tenant for life (see s. 20). See Vol. 17, title SETTLEMENTS. It is therefore possible, but not certain, that the expression may mean "during the subsistence of a settlement," which would include the highly artificial settlement where there is a tenant in fee simple subject to subsisting charges (*ibid.* s. 20 (1) (ix)) or a married woman restrained from anticipation (*ibid.* s. 20 (1) (x)).

Under an intestacy a life interest may arise where there is a surviving spouse, see s. 46 (1) (i), p. 346, *post.*

(4) *Until the period of distribution.*—This will include the second and third cases, and also a case where distribution is to take place at a later age than twenty-one. In such cases the property will usually have been given to trustees, and unless the trustees have compelled an assent to themselves, which they will probably not do till they know the estate is cleared, this provision has the curious effect of ousting the trustees.

The explanation of these introductory cases in this sub-section is to be found in s. 33, p. 324, *ante*, which for certain purposes constitutes the P.R. a trustee with certain powers.

As soon as the P.R. have administered the estate of the testator and assented, the "period of distribution" has arrived for the purposes of this section, and the section has no application to a case where the residue of the personal estate (other than leaseholds) is held by the trustees (even though they are the same persons as the P.R.) upon trust for sale with power to postpone conversion, and there is a tenant for life. The application of this section is confined to the duties of the P.R. either in the ordinary course of administration or under s. 33, p. 324, *ante* (*Re Trollope's Will Trusts*, [1927] 1 Ch. 596, 604). It results from this that the income from unauthorised investments when retained is subject to a rule analogous to that in *Howe* v. *Earl Dartmouth* (1802), 7 Ves. 137.

Where P.R.s selling land erroneously stated that they were selling land as trustees for sale, but were able to make a title under this section, the purchaser was compelled to carry out the contract (*Re Spencer and Hauser's Contract*, [1928] Ch. 598).

"*The same powers*," *etc.*—The P.R. had an absolute power of disposition, including power to pledge, see notes to s. 2 (1), p. 307, *ante*, and s. 38 (1), p. 337, *ante*, and *Attenborough* v. *Solomon*, [1913] A. C. 76, and *Attenborough* v. *Solomon*, [1911] 2 Ch. 159, *per* JOYCE, J., at p. 164.

The powers conferred by statute on trustees for sale are contained in the L. P. A. 1925 (c. 20), ss. 23–33 (Vol. 15, title REAL PROPERTY), and by s. 33 these are expressly made applicable to a P.R. This provision seems therefore scarcely to be required, especially in view of sub-s. (iii), p. 339, *post*. It is not quite clear what limitation is intended to be placed on the trust for sale by prefacing it by the word "effectual," but perhaps it is intended to refer to the "immediate binding" trust for sale referred to in the definition in the L. P. A. 1925 (c. 20), s. 205 (1) (xxix). Cf. *Re Leigh's Settled Estates* (*No.* 2), [1927] 2 Ch. 13; *Re Parker*, [1928] Ch. 247.

Sub.-s. (ii) confers the powers held by trustees holding land on trust for sale; but this does not operate to make the L. P. A. 1925 (c 20), s. 28, Vol. 15, title REAL PROPERTY, applicable to pure personalty (*Re Trollope's Will Trusts*, [1927] 1 Ch. 596). The word "duties" means duties in the strict sense and does not import statutory trusts relating to a different subject matter (*ibid.*).

Sub-s. (iii) confers the powers of trustees holding any property on trust for sale. In this case the limitation of the word "effectual" is not inserted. There is probably little difference between "imposed by law" in sub-s. (ii) and "conferred by statute" in sub-s. (iii).

As to the latter part of sub-s. (iii), cf. s. 37, p. 337, *ante*.

(2) Nothing in this section shall affect the right of any person to require an assent or conveyance to be made. [850]

See also, s. 43 (2), p. 344, *post*.

On giving an assent the powers of the P.R. under this section will cease (*Re Trollope's Will Trusts*, [1927] 1 Ch. 596).

(3) This section applies whether the testator or intestate died before or after the commencement of this Act. [851]

For this section to apply the property must be vested in the P.R.s in that capacity. If it had become vested in them in some other capacity, *e.g.* as statutory owners, they could not exercise the powers conferred by this section.

40. Powers of personal representative for raising money, etc.—(1) For giving effect to beneficial interests the personal representative may limit or demise land for a term of years absolute, with or without impeachment for waste, to trustees on usual trusts for raising or securing any principal sum and the interest thereon for which the land, or any part thereof, is liable, and may limit or grant a rentcharge for giving effect to any annual or periodical sum for which the land or the income thereof or any part thereof is liable.

(2) This section applies whether the testator or intestate died before or after the commencement of this Act. [852]

The object of this section appears to be to facilitate the raising of money for family charges, and the like. Thus the term might be limited to trustees for the purpose of raising portions, or the £1000 to which a surviving spouse is entitled under s. 46 (1) (i), p. 346, *post*, may require to be raised.

The section could not be made use of for raising debts or duties (nor perhaps would it be required for those purposes) because it is to be used for giving effect to beneficial interests.

If this be so, "the usual trusts" probably means the trusts that have usually been declared of portions terms, and this seems the more likely because it has been customary in the past when giving a tenant for life or other person power to limit a term for portions to empower him to do so "with or without impeachment of waste upon the usual trusts for raising the principal and annual sums," etc., words which this section rather closely follows. But see the Encyclopædia of Forms and Precedents, 2nd Edn. Vol. 18, p. 605 n.

For a case where trustees were authorised to postpone raising portions so long as the tenant for life paid an increased amount of interest on the portions sum, see *Re Sandys*, [1916] 1 Ch. 511.

41. Powers of personal representative as to appropriation.—(1) The personal representative may appropriate any part of the real or personal estate, including things in action, of the deceased in the actual condition or state of investment thereof at the time of appropriation in or towards satisfaction of any legacy bequeathed by the deceased, or of any other interest or share in his property, whether settled or not, as to the personal representative may seem just and reasonable, according to the respective rights of the persons interested in the property of the deceased:

Provided that—

(i) an appropriation shall not be made under this section so as to affect prejudicially any specific devise or bequest;

(ii) an appropriation of property, whether or not being an investment authorised by law or by the will, if any, of the deceased for the investment of money subject to the trust, shall not (save as herein-after mentioned) be made under this section except with the following consents:—

(*a*) when made for the benefit of a person absolutely and beneficially entitled in possession, the consent of that person;

(*b*) when made in respect of any settled legacy share or interest, the consent of either the trustee thereof, if any (not being also the personal representative), or the person who may for the time being be entitled to the income:

If the person whose consent is so required as aforesaid is an infant or a lunatic or defective, the consent shall be given on his behalf by his parents or parent, testamentary or other guardian, committee or receiver, or if, in the case

of an infant, there is no such parent or guardian, by the court on the application of his next friend;

(iii) no consent (save of such trustee as aforesaid) shall be required on behalf of a person who may come into existence after the time of appropriation, or who cannot be found or ascertained at that time;

(iv) if no committee or receiver of a lunatic or defective has been appointed, then, if the appropriation is of an investment authorised by law or by the will, if any, of the deceased for the investment of money subject to the trust, no consent shall be required on behalf of the lunatic or defective;

(v) if, independently of the personal representative, there is no trustee of a settled legacy share or interest, and no person of full age and capacity entitled to the income thereof, no consent shall be required to an appropriation in respect of such legacy share or interest, provided that the appropriation is of an investment authorised as aforesaid. [853]

This section is new.

The Land Transfer Act, 1897 (c. 65), s. 4 (now repealed), contained a similar provision, but a reference to valuation "in accordance with the prescribed provisions" practically rendered it inoperative, no rules being made under the section. It was held, however, that that section did not, in cases where there was a trust for sale and conversion, take away from executors and trustees the power of appropriation which existed before that Act (*Re Beverly*, [1901] 1 Ch. 681).

In connexion with this section the power to partition land held on trust for sale given by the L. P. A. 1925 (c. 20), s. 28, Vol. 15, title REAL PROPERTY, should be considered; that power is exerciseable by the P.R. see s. 39, p. 338, *ante*.

Appropriation of specific property in discharge of a legacy was regarded as of the nature of a sale to the legatee (*Re Beverly*, [1901] 1 Ch. 681), and a residuary legatee had power to accept such an appropriation from executors in his favour in accord and satisfaction of his share or part thereof (*Re Lepine*, [1892] 1 Ch. 210), and so the executor could appropriate specific assets to a residuary legatee in advance of final division, though there was no corresponding appropriation in respect of other shares which were settled (*Re Richardson*, [1896] 1 Ch. 512); and where a residuary fund was settled by will upon trust for several persons and their families the trustees had the like power of appropriation (*Re Nickels*, [1898] 1 Ch. 630). But, unless great care was taken in valuing the property, P.R.s or trustees ran a considerable risk in making such appropriations, see note to sub-s. (3), p. 342, *post*.

When property is vested in trustees on trust for conversion with power to postpone and to hold the proceeds in trust for several persons, it appears sometimes a difficult question whether, when some of the interests have vested, those who have attained a vested interest can override the power of postponement and require the property to be realised and their shares paid or appropriated and transferred to them. In *Re Marshall*, [1914] 1 Ch. 192, it was held by the C. A. that they could do so, while in *Re Kipping*, [1914] 1 Ch. 62, the C. A. held that they could not. Annuitants are not entitled as a matter of right to insist on conversion (*Re Parry* (1889), 42 Ch. D. 570).

Where the legacy was contingent and the intermediate interest was not given, an executor had no power to appropriate (*Re Hall*, [1903] 2 Ch. 226), nor would the court in such circumstances direct appropriation (*Webber* v. *Webber* (1823), 1 Sim. & St. 311). Having regard to the view taken by the courts as above stated, namely, that appropriation by arrangement with the legatee is of the nature of a sale, it seems desirable in framing wills to exclude the requirement of consent in order to avoid possible claims for stamp duty, see the Statutory Will Forms, Form 6, in the Encyclopædia of Forms and Precedents, 2nd Edn., Vol. 18, p. 785.

There was, however, no power to appropriate and invest an infant's vested legacy in trustee securities and distribute the remainder, save at the risk of the P.R. The only way this could be done was by payment into court under the Trustee Act, 1893 (c. 53), s. 42 (now the Trustee Act, 1925 (c. 19), s. 63, Vol. 20, title TRUSTS AND TRUSTEES (*Re Salomons*, [1920] 1 Ch. 290; *Re Salaman*, [1907] 2 Ch. 46).

(2) Any property duly appropriated under the powers conferred bythis section shall thereafter be treated as an authorised investment, and may be retained or dealt with accordingly. [854]

The court frequently directed appropriation (see *Ferrard* v. *Prentice* (1755), Amb. 273; *Johnson* v. *Mills* (1749), 1 Ves. Sen. 282; *Green* v. *Piggott* (1781), 1 Bro. C. C. 103), and though in one case LORD ELDON had expressed a contrary view (*Sitwell* v.

Bernard (1801), 6 Ves. 520, p. 543), it became settled that where an appropriation had been made by the court all parties were bound, and the parties to whom the appropriation had been made took the fund appropriated with the benefit of any increase in value, and the burden of any depreciation (*Burgess* v. *Robinson* (1817), 3 Mer. 7; *Rock* v. *Hardman* (1819), 4 Mad. 253).

The same was the case where trustees had made a valid appropriation (*Re Nickels*, [1898] 1 Ch. 630).

Where the property is subject to a trust for sale it remains subject to it, if retained, notwithstanding appropriation (sub-s. (6), *post*).

(3) For the purposes of such appropriation, the personal representative may ascertain and fix the value of the respective parts of the real and personal estate and the liabilities of the deceased as he may think fit, and shall for that purpose employ a duly qualified valuer in any case where such employment may be necessary; and may make any conveyance (including an assent) which may be requisite for giving effect to the appropriation. [855]

The value of the property appropriated will be taken as at the date of appropriation (*Re Charteris*, [1917] 2 Ch. 379; *Re Wragg*, [1919] 2 Ch. 58).

It is thought that this valuation should never be omitted on an appropriation.

A trust estate divisible between a settled share and a person absolutely entitled consisted of a mortgage and investments. While the interest on the mortgage was being regularly paid and before anything had occurred to suggest that the security was in jeopardy, the trustee appropriated the mortgage to the settled share and distributed the investments, but no valuation of the security was then made. The money was called in about two years later, and found to be irrecoverable, and the trustee was held liable and was refused relief (*Re Brookes*, [1914] 1 Ch. 558). It may be noted that the trustee had acted within his powers and the appropriation was valid, and his only mistake was in omitting to have a fresh valuation made before appropriating. If *Re Brookes* is good law, therefore, the fact that the P.R. is given by sub-s. (1), p. 340, *ante*, ample power to appropriate will not save him if he omits to have a valuation made.

(4) An appropriation made pursuant to this section shall bind all persons interested in the property of the deceased whose consent is not hereby made requisite. [856]

"Pursuant to this section," *i.e.* in exercise of the discretion given by sub-s. (1), p. 340, *ante*, and with the consents (unless dispensed with or waived) required by the proviso to that sub-section.

(5) The personal representative shall, in making the appropriation, have regard to the rights of any person who may thereafter come into existence, or who cannot be found or ascertained at the time of appropriation, and of any other person whose consent is not required by this section. [857]

Cf. R. S. C. Ord. 16, r. 32 (*a*) and (*b*), under which the court may appoint persons to represent absent parties in proceedings for construction and other like cases.

(6) This section does not prejudice any other power of appropriation conferred by law or by the will (if any) of the deceased, and takes effect with any extended powers conferred by the will (if any) of the deceased, and where an appropriation is made under this section, in respect of a settled legacy, share or interest, the property appropriated shall remain subject to all trusts for sale and powers of leasing, disposition, and management or varying investments which would have been applicable thereto or to the legacy, share or interest in respect of which the appropriation is made, if no such appropriation had been made. [858]

See note to sub-s. (1), p. 341, *ante*.

Cf. L. P. A. 1925 (c. 20), s. 28 (3), (4), Vol. 15, title REAL PROPERTY, and see the Trustee Act, 1925 (c. 19), ss. 15, 22, Vol. 20, title TRUSTS AND TRUSTEES.

(7) If after any real estate has been appropriated in purported exercise of the powers conferred by this section, the person to whom it was conveyed disposes of it or any interest therein, then, in favour of a purchaser, the appropriation shall be deemed to have been made in accordance with the requirements of this section and after all requisite consents, if any, had been given. [859]

(8) In this section, a settled legacy, share or interest includes any legacy, share or interest to which a person is not absolutely entitled in possession at the date of the appropriation, also an annuity, and 'purchaser" means a purchaser for money or money's worth. [860]

"Purchaser" also includes a lessee or mortgagee, see s. 55 (1) (xviii), p. 359, *post*.

"*An annuity.*"—In setting aside a fund to answer an annuity (or for purposes of abatement) it must be on the basis of an investment in Consols (*Re Hollins*, [1918] 1 Ch. 503). KEKEWICH, J., considered that the powers given to trustees to invest in trustee securities did not alter this rule, but that possibly if this was desired the object might be effectual, after the sum of Consols had been set aside, by means of the power of varying investments (*Re Owthwaite*, [1891] 3 Ch. 494); see now the Trustee Act, 1925 (c. 19), s. 1, Vol. 20, title TRUSTS AND TRUSTEES.

As to annuities generally, see Halsbury's Laws of England, Vol. 24, p. 468, and as to whether charged on capital or income, *ibid.* p. 491.

Generally rentcharges and jointures are charged on capital. An annuity is included in the term "pecuniary legacy," s. 55 (1) (ix), p. 357, *post*, and as such takes precedence of the residue, Sched. 1, Part II, p. 363, *post*.

If the estate is insufficient for payment in full, annuities abate with general legacies (*Miller* v. *Huddlestone* (1851), 3 Mac. & G. 513).

In valuing for purposes of abatement some time after the death of the testator the valuation is made according to the events which have happened, only future interests of such of the annuitants as are living being reckoned, and sums received by annuitants in the past are not brought into hotchpot (*Re Metcalf*, [1903] 2 Ch. 424), though annuity arrears are to be added (*Re Wilkins* (1884), 27 Ch. D. 703; cf. *Re West*, [1921] 1 Ch. 533).

Where annuities are charged on capital as well as income, and the capital has for a time to be resorted to on the income exceeding the annuities by the dropping of some of them, the tenant for life cannot be required to replace the capital out of surplus income (*Re Croxon*, [1915] 2 Ch. 290).

(9) This section applies whether the deceased died intestate or not, and whether before or after the commencement of this Act, and extends to property over which a testator exercises a general power of appointment, including the statutory power to dispose of entailed interests, and authorises the setting apart of a fund to answer an annuity by means of the income of that fund or otherwise. [861]

42. Power to appoint trustees of infants' property.—(1) Where an infant is absolutely entitled under the will or on the intestacy of a person dying before or after the commencement of this Act (in this subsection called "the deceased") to a devise or legacy, or to the residue of the estate of the deceased, or any share therein, and such devise, legacy, residue or share is not under the will, if any, of the deceased, devised or bequeathed to trustees for the infant, the personal representatives of the deceased may appoint a trust corporation or two or more individuals not exceeding four (whether or not including the personal representatives or one or more of the personal representatives), to be the trustee or trustees of such devise, legacy, residue or share for the infant, and to be trustees of any land devised or any land being or forming part of such residue or share for the purposes of the Settled Land Act, 1925, and of the statutory provisions relating to the management of land during a minority, and may execute or do any assurance or thing requisite for vesting such devise, legacy, residue or share in the trustee or trustees so appointed.

On such appointment the personal representatives, as such, shall be discharged from all further liability in respect of such devise, legacy,

residue, or share, and the same may be retained in its existing condition or state of investment, or may be converted into money, and such money may be invested in any authorised investment.

(2) Where a personal representative has before the commencement of this Act retained or sold any such devise, legacy, residue or share, and invested the same or the proceeds thereof in any investments in which he was authorised to invest money subject to the trust, then, subject to any order of the court made before such commencement, he shall not be deemed to have incurred any liability on that account, or by reason of not having paid or transferred the money or property into court. [862]

" Residuary estate " of an intestate is defined in s. 33 (4), p. 327, *ante*. " Residue of the estate of the deceased " must have a similar meaning.

Where an intestate left a widow and two infant children it was held that the section was not applicable because (1) under s. 46, p. 346, *post*, the widow took a life interest in one half of the residuary estate; and (2) under s. 47, p. 348, *post*, the infants were only contingently entitled on attaining twenty-one or marriage (*Re Yerburgh*, [1928] W. N. 208). In fact, the only case where the section is applicable, in case of intestacy, seems to be on the marriage of an infant beneficiary, or in the case of collaterals.

Under a will, if there are no other persons who are S. L. A. trustees, the P. R.s are such trustees until others are appointed (S. L. A. 1925 (c. 18), s. 30 (3), Vol. 17, title SETTLEMENTS).

The P. R. may appoint others to be S. L. A. trustees either under that section or under this section if applicable.

43. Obligations of personal representative as to giving possession of land and powers of the court.—(1) A personal representative, before giving an assent or making a conveyance in favour of any person entitled, may permit that person to take possession of the land, and such possession shall not prejudicially affect the right of the personal representative to take or resume possession nor his power to convey the land as if he were in possession thereof, but subject to the interest of any lessee, tenant or occupier in possession or in actual occupation of the land.

(2) Any person who as against the personal representative claims possession of real estate, or the appointment of a receiver thereof, or a conveyance thereof, or an assent to the vesting thereof, or to be registered as proprietor thereof under the Land Registration Act, 1925, may apply to the court for directions with reference thereto, and the court may make such vesting or other order as may be deemed proper, and the provisions of the Trustee Act, 1925, relating to vesting orders and to the appointment of a person to convey, shall apply.

(3) This section applies whether the testator or intestate died before or after the commencement of this Act. [863]

This section is new.

Notwithstanding the marginal note it appears to be permissive and not obligatory.

It should be remembered that except as to land (freeholds and leaseholds) an assent to a legacy need not be in writing and may be implied. See note to s. 8, p. 313, and 36 (4) p. 334, *ante*, and note that delivery of possession is an act from which assent has frequently been implied (Halsbury's Laws of England, Vol. 14, p. 265; English and Empire Digest, Vol. 23, pp. 390 *et seq.*)

If the estate is not cleared the P. R. should, if he desires to give possession to a legatee before assenting, be very careful to retain evidence that it was so understood by both parties, and that the transfer of possession was not to constitute an assent.

There is less objection to giving possession in the case of land because assent in this case must after 1925 be in writing (s. 36 (4), p. 334, *ante*).

" *Provisions of the Trustee Act*, 1925."—See ss. 44–51 of that Act, Vol. 20, title TRUSTS AND TRUSTEES.

44. Power to postpone distribution.—Subject to the foregoing provisions of this Act, a personal representative is not bound to distribute the estate of the deceased before the expiration of one year from the death. **[864]**

This section replaces the first part of the Statute of Distribution, 1670 (c. 10), s. 5 (repealed as to deaths after 1925, see ss. 56, 58 and Sched. 2, Pt. I, *post*). See Vol. 5, title DESCENT AND DISTRIBUTION, p. 116.

It seems an open question whether it includes real estate. In favour of the view that it does not do so the following reasons may be suggested: (1) It uses the expression "estate" of the deceased which is the same word used in s. 3 of the Statute of Distribution, 1670 (c. 10), a statute which only related to personalty. (2) The real estate of an intestate is, by s. 33 (p. 324, *ante*), vested in the P. R. on trust for sale with power to postpone, and it is probable that it was not desired to cut down that discretion to one year. (3) The distributable property is not the real estate, but the proceeds of its conversion, unless the P. R. exercise his powers of appropriation under s. 41, p. 340, *ante*. (4) S. 36 (10), p. 336, *ante*, seems to support this contention. As against this may be set ss. 1 and 2 (pp. 306, 307, *ante*), which vest the real estate in the P. R. and the provisions of ss. 45–47 (*post*), which assimilate so far as practicable the devolution of real and personal estate, so that both may be included in the estate.

As the section is to take effect "subject to the foregoing provisions" it is unlikely that the question will be of practical importance.

The P. R. is not compellable to pay a legacy before the end of the year even though the testator direct it to be paid "as soon as convenient" (*Benson* v. *Maude* (1821), 6 Madd. 15), or within six months (*Brooke* v. *Lewis* (1822), 6 Mad. 358).

But an executor is not bound to wait twelve months before he hands over or pays a legacy (*Re Palmer*, [1916] 2 Ch. 391, *per* PICKFORD, L.J., at p. 401). It is a matter of convenience (*Angerstein* v. *Martin* (1823), T. & Russ., at p. 241; *Garthshore* v. *Chalie* (1804), 10 Ves. 1). In some cases it may be more convenient to hand over or (what is the equivalent) appropriate the legacy, for from that time it ceases to be part of the estate and is at the risk of the legatee (see NEVILLE, J., in *Re Palmer* (*supra*)).

Trustees having sufficient power may be justified in delaying the raising of a legacy beyond the year, but neither this nor the delay of the executors' year will affect the vesting of the property (*Re Charteris*, [1917] 2 Ch. 379, and cf. *Re Trollope's Will Trusts*, [1927] 1 Ch. 598, 605).

PART IV.

DISTRIBUTION OF RESIDUARY ESTATE.

45. Abolition of descent to heir, curtesy, dower and escheat.—(1) With regard to the real estate and personal inheritance of every person dying after the commencement of this Act, there shall be abolished—

(*a*) All existing modes rules and canons of descent, and of devolution by special occupancy or otherwise, of real estate, or of a personal inheritance, whether operating by the general law or by the custom of gavelkind or borough english or by any other custom of any county, locality, or manor, or otherwise howsoever; and

(*b*) Tenancy by the curtesy and every other estate and interest of a husband in real estate as to which his wife dies intestate, whether arising under the general law or by custom or otherwise; and

(*c*) Dower and freebench and every other estate and interest of a wife in real estate as to which her husband dies intestate, whether arising under the general law or by custom or otherwise: Provided that where a right (if any) to freebench or other like right has attached before the commencement of this Act which cannot be barred by a testamentary or other disposition made by the husband, such right shall, unless released, remain in force as an equitable interest; and

(*d*) Escheat to the Crown or the Duchy of Lancaster or the Duke of Cornwall or to a mesne lord for want of heirs. **[865]**

This section is new.

So far as concerns the real and personal estate of a person who dies after 1925, it wipes out all previous methods and rules as to descent and devolution except

(i) In case of an entailed interest (sub-s. (2), *post*).

(ii) Descent or devolution from a lunatic or defective living on the 1st January, 1926, who dies without having recovered testamentary capacity (s. 51 (2), p. 354, *post*).

" Real and personal estate " are specifically defined for this part of the Act in s. 52, p. 355, *post*.

" Personal inheritance " : the expression is unusual. Probably the class of property meant is that referred to by CHITTY, J., in *Re Rivett Carnack Will* (1885), 30 Ch. D. 136, at p. 141, where he said : " It occurred to me during the argument whether a purely personal annuity granted to a man and his heirs general, or to a man and the heirs of his body, would be within the [Settled Land] Act. The question is of little or no practical importance, because the grant of such an annuity at the present date rarely if ever occurs ; and I certainly have never seen or heard of a settlement annexing personal chattels to any such annuity. I leave the question for decision if ever it should be raised—but with the following observations. Such an annuity is not within the statute *De Donis*, and consequently where it is limited to a man and the heirs of his body, he takes a fee simple conditional which becomes absolute on the birth of issue. And in such a case the grantee can alienate the annuity, as appears from the case of *Earl of Stafford* v. *Buckley* (1750), 2 Ves. Sen. 170, and the case of *Turner* v. *Turner* (1783), 1 Bro. C. C. 316, at p. 325. For such a case, or for the case of a grant to heirs general (to which the power of alienation is of course incident) there was no need of a statute conferring powers of sale and the like."

Cf. also *Countess of Holdernesse* v. *Mayor of Carmarthen* (1784), 1 Bro. C. C. 377.

As to descent and devolution of the property of persons dying before 1926, see Vol. 5, title DESCENT AND DEVOLUTION ; Halsbury's Laws of England, Vol. 11, pp. 4 *et seq.* ; English and Empire Digest, Vol. 18, pp. 1 *et seq.*

Tenancy by the Curtesy will remain with regard to entailed interests (sub-s. (2), *post*), and possibly under s. 51 (2), p. 354, *post*, and so will dower (*ibid.*).

Though the real and personal estate now constitute as it were one fund for the payment of funeral and testamentary expenses and legacies, yet a distinction remains, and the words " residue of money " in a will only pass personal and not real estate (*Re Emerson*, [1929] 1 Ch. 128 ; *Re Gates*, [1929] W. N. 169) ; but see *Re Mellar Porter* v. *Hindsley*, [1929] 1 Ch. 446.

(2) Nothing in this section affects the descent or devolution of an entailed interest. [866]

See also s. 51 (4), p. 355, *post*.

By s. 55 (1) (xxiv), p. 360, *post*, " entailed interest " has the same meaning as in the L. P. A. 1925 (c. 20), s. 130 (1), Vol. 15, title REAL PROPERTY. The expression therefore means an interest in tail or in tail male or in tail female, or in tail special. Such an interest may be created by way of trust in any property real or personal (*ibid.*). The expression includes an estate tail created before 1926 (*ibid.* s. 130 (7)), but such an estate devolves only as an equitable interest (*ibid.* s. 130 (4)).

As to entailed estates generally see Halsbury's Laws of England, Vol. 24, pp. 241 *et seq.*

46. Succession to real and personal estate on intestacy.—(1) The residuary estate of an intestate shall be distributed in the manner or be held on the trusts mentioned in this section, namely :—

(i) If the intestate leaves a husband or wife (with or without issue) the surviving husband or wife shall take the personal chattels absolutely, and in addition the residuary estate of the intestate (other than the personal chattels) shall stand charged with the payment of a net sum of one thousand pounds, free of death duties and costs, to the surviving husband or wife with interest thereon from the date of the death at the rate of five pounds per cent. per annum until paid or appropriated, and, subject to providing for that sum and the interest thereon, the residuary estate (other than the personal chattels) shall be held—

(*a*) If the intestate leaves no issue, upon trust for the surviving husband or wife during his or her life ;

(*b*) If the intestate leaves issue, upon trust, as to one half, for the surviving husband or wife during his or her life, and, subject to such life interest, on the statutory trusts for the issue of the intestate ; and, as to the other

half, on the statutory trusts for the issue of the intestate, but if those trusts fail or determine in the lifetime of a surviving husband or wife of the intestate, then upon trust for the surviving husband or wife during the residue of his or her life;

(ii) If the intestate leaves issue but no husband or wife, the residuary estate of the intestate shall be held on the statutory trusts for the issue of the intestate;

(iii) If the intestate leaves no issue but both parents, then, subject to the interests of a surviving husband or wife, the residuary estate of the intestate shall be held in trust for the father and mother in equal shares absolutely;

(iv) If the intestate leaves no issue but one parent, then, subject to the interests of a surviving husband or wife, the residuary estate of the intestate shall be held in trust for the surviving father or mother absolutely;

(v) If the intestate leaves no issue or parent, then, subject to the interests of a surviving husband or wife, the residuary estate of the intestate shall be held in trust for the following persons living at the death of the intestate, and in the following order and manner, namely:—

First, on the statutory trusts for the brothers and sisters of the whole blood of the intestate; but if no person takes an absolutely vested interest under such trusts; then

Secondly, on the statutory trusts for the brothers and sisters of the half blood of the intestate; but if no person takes an absolutely vested interest under such trusts; then

Thirdly, for the grandparents of the intestate and, if more than one survive the intestate, in equal shares; but if there is no member of this class; then

Fourthly, on the statutory trusts for the uncles and aunts of the intestate (being brothers or sisters of the whole blood of a parent of the intestate); but if no person takes an absolutely vested interest under such trusts; then

Fifthly, on the statutory trusts for the uncles and aunts of the intestate (being brothers or sisters of the half blood of a parent of the intestate); but if no person takes an absolutely vested interest under such trusts; then

Sixthly, for the surviving husband or wife of the intestate absolutely;

(vi) In default of any person taking an absolute interest under the foregoing provisions, the residuary estate of the intestate shall belong to the Crown or to the Duchy of Lancaster or to the Duke of Cornwall for the time being, as the case may be, as bona vacantia, and in lieu of any right to escheat.

The Crown or the said Duchy or the said Duke may (without prejudice to the powers reserved by section nine of the Civil List Act, 1910, or any other powers), out of the whole or any part of the property devolving on them respectively, provide, in accordance with the existing practice, for dependants, whether kindred or not, of the intestate, and other persons for whom the intestate might reasonably have been expected to make provision.

(2) A husband and wife shall for all purposes of distribution or division under the foregoing provisions of this section be treated as two persons. [867]

This section is new.

It provides a wholly new method of succession to real and personal estate on intestacy. Provision is made for the conversion of real estate under s. 33, p. 324, *ante*, and the proceeds of the real estate and the personal estate devolve together. The distinction between real and personal estate is retained for the purpose of death duties (*Re Emerson*, [1929] 1 Ch. 128), and remains for the construction of wills (*ibid.*).

"*Real and personal estate.*"—This is specially defined for the purpose of this part of the Act, see s. 52, p. 355, *post*.

"The residuary estate," is defined in s. 33 (4), p. 327, *ante*, but as to a lunatic, see s. 51 (2), p. 358, *post*, and an infant dying unmarried entitled under a settlement or will, s. 51 (3). It is conceived that the real estate being held on trust for sale under s. 33, p. 324, *ante*, this section does not create a settlement within the meaning of the S. L. A. 1925 (c. 18), see s. 1 (7), Vol. 17, title SETTLEMENTS.

"*Personal chattels.*"—See s. 55 (1) (x), p. 358, *post*. They may be appropriated under s. 41, p. 340, *ante*, or sold under s. 33, p. 324, *ante*, or infants contingently entitled may be allowed to use them (s. 47 (1) (iv), p. 350, *post*.

"*Husband or wife.*"—*Query* whether this includes a divorced husband or wife. It would not do so if the intestate had re-married (*Re Williams*, [1929] W. N. 70).

"Issue" means, in effect, issue who attain an absolutely vested interest (s. 47 (2) (*c*), p. 351, *post*), *i.e.* who attain twenty-one or marry (s. 47 (1), *post*). The word includes children and issue of any child (*ibid.*); it is therefore not confined to children, but seems, subject as above stated, to include all descendants.

"*Statutory trusts for the issue.*"—See *s.* 47 (1), *post*.

Statutory trusts for relatives other than issue (s. 47 (3), p. 351, *post*.

Issue means legitimate issue, but persons legitimated by the subsequent marriage of their parents by the Legitimacy Act, 1926 (c. 60) (Vol. 2, title BASTARDY), are by s. 3 of that Act entitled to take any interest.

(*a*) in the estate of an intestate dying after the date of legitimation,
(*b*) under any disposition coming into operation after that date,
(*c*) by descent under an entailed interest created after that date,

as if they had been legitimate (see also *ibid.* s. 5).

Under s. 9. of that Act an illegitimate child may succeed under the intestacy of his mother if she leaves no legitimate issue.

"*Charged with the payment of £1000 and interest.*"—This is raisable under s. 48 (2) (*a*), p. 351, *post*. The interest is charged on the capital, and not on the income of the residue (*Re Saunders* (1929), 45 T. L. R. 283). As to improvements on intestacy of husband, see *Re Smith, Vincent* v. *Smith*, [1929] W. N. 173.

The life interest of a surviving spouse may be capitalised and raised under s. 48 (2) (*b*).

Power to raise death duties is given by L. P. A. 1925 (c. 20), s. 16 (3) (Vol. 15, title REAL PROPERTY).

"Leaves issue" means leaves issue who attain a vested interest (s. 47 (2), p. 350, *post*).

"*Subject to the interests of a surviving husband or wife.*"—*I.e.* the £1000 personal chattels and life interest in the residue mentioned in sub-s. 1 (i) (*a*).

In considering the interests to be taken by children or issue of the intestate the effect of s. 47 (1) (iii), p. 349, *post*, as to bringing into hotchpot sums advanced to or settled on children, and of s. 49, p. 352, *post*, as to bringing into hotchpot interests taken under the will by issue of a partial intestate must be considered.

As to the right of the Crown to personal estate as *bona vacantia*, see the English and Empire Digest, Vol. 18, pp. 32 *et seq.*, and *Re Jones, Johnson* v. *A.-G.*, [1925] Ch. 340. Cf. s. 49, p. 352, *post*, and the notes thereto.

With regard to the waiver of the right, see Crown Lands Acts, 1819 (c. 94), and 1825 (c. 17) (Vol. 3, title CONSTITUTIONAL LAW, pp. 218, 220).

For the Civil List Act, 1910 (c. 28), see *ibid.*, p. 211.

For the meaning of "dependants," cf. the Workman's Compensation Act, 1923 (c. 42), Vol. 11, title MASTER AND SERVANT, and the English and Empire Digest, Vol. 34, pp. 246 *et seq.*

Sub-s. (2) is intended to exclude the old rule stated in Littleton, s. 291: "If an estate be made of land to a husband and wife, and to a third person, in this case the husband and wife have in law in their right but the moiety." See Halsbury's Laws of England, Vol. 16, pp. 354–355.

In dispositions after 1925 husband and wife are to be treated as two persons (L. P. A. 1925 (c. 20), s. 37, Vol. 15, title REAL PROPERTY). This sub-s. enacts the like rule in case of devolution.

47. Statutory trusts in favour of issue and other classes of relatives of intestate.—(1) Where under this Part of this Act the residuary estate of an intestate, or any part thereof, is directed to be held on the statutory trusts for the issue of the intestate, the same shall be held upon the following trusts, namely :— [868]

This is new.

"*Is directed.*"—See s. 46 (1) (i) (*b*) and (ii), pp. 346, 347, *ante*.

For the statutory trusts see L. P. A. 1925 (c. 20), s. 35 (Vol. 15, title REAL PROPERTY). Under the rule laid down in *Toates* v. *Toates*, [1926] 2 K. B. 30, the statutory trusts are express trusts.

(i) In trust, in equal shares if more than one, for all or any the children or child of the intestate, living at the death of the intestate, who attain the age of twenty-one years or marry under that age, and for all or any of the issue living at the death of the intestate who attain the age of twenty-one years or marry under that age of any child of the intestate who predeceases the intestate, such issue to take through all degrees, according to their stocks, in equal shares if more than one, the share which their parent would have taken if living at the death of the intestate, and so that no issue shall take whose parent is living at the death of the intestate and so capable of taking; [869]

Children and issue of deceased children take, the latter taking the share their parent would have taken if surviving.

Marriage of an infant before the death of the intestate would satisfy this condition. Thus, where the condition of marriage with consent was required, marriage with the consent of the testator during his lifetime satisfied the condition (*Tweedale* v. *Tweedale* (1878), 7 Ch. D. 633; *Re Park*, [1910] 2 Ch. 322).

(ii) The statutory power of advancement, and the statutory provisions which relate to maintenance and accumulation of surplus income, shall apply, but when an infant marries such infant shall be entitled to give valid receipts for the income of the infant's share or interest; [870]

As to maintenance, see Trustee Act, 1925 (c. 19), s. 31 (Vol. 20, title TRUSTS AND TRUSTEES), and as to advancement, see *ibid.* s. 32.

For the power of a married infant to give receipts for accumulation, see *ibid.* s 31 (2), and to give receipts for income, L. P. A. 1925 (c. 20), s. 21 (Vol. 15, title REAL PROPERTY). There is no power for an infant to give receipts for capital other than accumulations. If the P. R. desires to distribute the estate an infant's share of capital will have to be paid into Court unless it can be dealt with under s. 41 (1) (ii) (*b*), p. 340, *ante*.

(iii) Where the property held on the statutory trusts for issue is divisible into shares, then any money or property which, by way of advancement or on the marriage of a child of the intestate, has been paid to such child by the intestate or settled by the intestate for the benefit of such child (including any life or less interest and including property covenanted to be paid or settled) shall, subject to any contrary intention expressed or appearing from the circumstances of the case, be taken as being so paid or settled in or towards satisfaction of the share of such child or the share which such child would have taken if living at the death of the intestate, and shall be brought into account, at a valuation (the value to be reckoned as at the death of the intestate), in accordance with the requirements of the personal representatives; [871]

This provision takes the place of the advancement portion of the Statute of Distribution, 1670 (c. 10), s. 3 (repealed as to deaths after 1925 by this Act, see s. 56 and 2nd Sched., pp. 361 and 365, *post*), with which it should be compared. See Vol. 5, title DESCENT AND DISTRIBUTION, p. 115.

The provision in brackets (as to the life interest, etc.), and that as to valuation are new.

As to the statutory trusts, see L. P. A., 1925 (c. 20), s. 35.

As to issue of a partial intestate bringing into account beneficial interests acquired under the will, see s. 49, p. 352, *post*.

For the statutory power of advancement, see the Trustee Act, 1925 (c. 19), s. 32, Vol. 20, title TRUSTS AND TRUSTEES.

The provision as to bringing into account advancements under the Statute of Distribution (*supra*) did not apply to advancements by the mother (*Holt* v. *Frederick* (1728), 2 P. Wms. 356), but it is conceived that this provision would apply to advancements by the mother if she were the intestate whose estate was being distributed.

A debt of the parent to the testator need not be brought into account (*Re Binns*, [1929] 1 Ch. 677).

If upon the marriage of a son a settlement had been made on such son for life and afterwards upon his wife and the issue of the marriage, under the Statute of Distribution, the whole sum and not merely the life interest had to be brought into account (*Weyland* v. *Weyland* (1742), 2 Atk. 635). The problem arises whether the introduction of the words " (including any life or less interest) " have made any difference to this rule.

It is suggested that it will not affect the old rule. What is to be brought into account is the money or property advanced or settled, and that is to include certain things, namely, any life interest and property covenanted to be settled. This does not seem to diminish the property to be brought into account, but rather to extend it at least in the case of the property covenanted to be settled. The object of the reference to the life or less interest is not quite obvious, but possibly it may contemplate the case of an interest *pur autre vie* having been settled. It might also apply in case of partial intestacy to a legacy or settlement for life which was thereafter to fall into residue or the estate of the deceased as in *Re Lambert*, [1897] 2 Ch. 169.

It may be noted that this provision only relates to children's shares and that remoter issue are not directly mentioned, but it also relates to shares which children would have taken if living and as remoter issue in effect take by substitution they will have to bring into account any property for which their parent if living would have had to account.

As to what amounts to a release of a debt which might otherwise have been treated as an advancement and the effect of appointing the debtor as executor, see *Strong* v. *Bird* (1874), L. R. 18 Eq. 315; *Re Pink*, [1912] 2 Ch. 528; *Re Goff* (1914), 111 L. T. 34; and as to bringing into account money covenanted to be settled under a hotchpot clause, *Wheeler* v. *Humphreys*, [1898] A. C. 506.

Interest on advances.—For the purpose of bringing advances into account interest on them is to be reckoned at 4 per cent. per annum (*Re Davy*, [1908] 1 Ch. 61), where the shares are immediately distributable as from the death of the deceased, *ibid. Re Poyser*, [1908] 1 Ch. 828; *Re Cooke*, [1916] 1 Ch. 480); and where the advances are made after the death, *e.g.* under a covenant to settle, from the date of those advances (*Re Whiteford*, [1903] 1 Ch. 889); and where distribution is postponed owing to a life tenancy, not till the period of distribution (*Re Willoughby*, [1911] 2 Ch. 581). *Aliter* as to debts carrying interest (*Re Young*, [1914] 1 Ch. 976; *Re Hargreaves*, [1903] W. N. 24, 28, the actual interest earned was taken, and this was accepted as being practically 4 per cent., but this has not been followed (*Re Poyser*, [1908] 1 Ch. 828; *Re Tod*, [1916] 1 Ch. 567), and 3 per cent. was taken in *Re Lambert*, [1897] 2 Ch. 169, and *Re Whiteford*, [1903] 1 Ch. 889. Generally as to advancement, see Halsbury's Laws of England, Vol. 11, pp. 20–23.

Valuation.—The provision as to valuation should be noticed. See also the power to value in the Trustee Act, 1925 (c. 19), s. 22 (3) (Vol. 20, title TRUSTS AND TRUSTEES), which may also be relied on for this purpose as it applies for the purpose of giving effect to any statute.

(iv) The personal representatives may permit any infant contingently interested to have the use and enjoyment of any personal chattels in such manner and subject to such conditions (if any) as the personal representatives may consider reasonable, and without being liable to account for any consequential loss. **[872]**

This is new.

" *Personal chattels.*"—See s. 55 (1) (x), p. 358, *post.*

As to power to insure, see Trustee Act, 1925 (c. 19), s. 19, Vol. 20, title TRUSTS AND TRUSTEES.

This provision will not affect the P. R.'s power of sale under s. 33 (1), p. 324, *ante*, and will take effect during the exercise of the discretionary power to postpone sale thereby given.

There seems to be no power to spend money on repairs.

(2) If the trusts in favour of the issue of the intestate fail by reason of no child or other issue attaining an absolutely vested interest—

(*a*) the residuary estate of the intestate and the income thereof and all statutory accumulations, if any, of the income thereof, or so much thereof as may not have been paid or applied under any power affecting the same, shall go, devolve and be held under the provisions of this Part of this Act as if the intestate had died without leaving issue living at the death of the intestate;

(*b*) references in this Part of this Act to the intestate " leaving no " issue " shall be construed as " leaving no issue who attain " an absolutely vested interest ";

(*c*) references in this Part of this Act to the intestate "leaving "issue" or "leaving a child or other issue" shall be construed as "leaving issue who attain an absolutely vested "interest." [873]

This is new.
"*Residuary estate.*"—See s. 33 (4), p. 327, *ante.*
Statutory accumulations are the accumulations of surplus income beyond that required for maintenance referred to in sub-s. (1) (ii), p. 349, *ante.*
One effect of this sub-section is to prevent s. 42 (power to appoint trustees of infants' property), p. 343, *ante*, applying in the case of any issue of the intestate who are infants and unmarried (*Re Verburgh*, [1928] W. N. 208).
See note to sub-s. (3), *infra.*

(3) Where under this Part of this Act the residuary estate of an intestate or any part thereof is directed to be held on the statutory trusts for any class of relatives of the intestate, other than issue of the intestate, the same shall be held on trusts corresponding to the statutory trusts for the issue of the intestate (other than the provision for bringing any money or property into account) as if such trusts (other than as aforesaid) were repeated with the substitution of references to the members or member of that class for references to the children or child of the intestate. [874]

The problem that arises under this sub-section is whether or not it causes sub-s. (2) to apply to infant collaterals. If it does then the shares of infant collaterals are contingent, if not they are vested. It seems possible that by the statutory trusts for issue, only those contained in sub-s. (1) may be intended, for sub-s. (2) only cuts down the meaning of the word "issue"; but the answer to the question is uncertain.

48. Powers of personal representative in respect of interests of surviving spouse.—(1) Where a surviving husband or wife is entitled to a life interest in the residuary estate or any part thereof the personal representative may, either with the consent of any such tenant for life (not being also the sole personal representative) or, where the tenant for life is the sole personal representative, with the leave of the court, purchase or redeem such life interest (while it is in possession) by paying the capital value thereof (reckoned according to tables selected by the personal representative) to the tenant for life or the persons deriving title under him or her and the costs of the transaction, and thereupon the residuary estate of the intestate may be dealt with or distributed free from such life interest.

(2) The personal representatives may raise—

(*a*) the net sum of one thousand pounds or any part thereof and the interest thereon payable to the surviving husband or wife of the intestate on the security of the whole or any part of the residuary estate of the intestate (other than the personal chattels), so far as that estate may be sufficient for the purpose or the said sum and interest may not have been satisfied by an appropriation under the statutory power available in that behalf; and

(*b*) in like manner the capital sum, if any, required for the purchase or redemption of the life interest of the surviving husband or wife of the intestate, or any part thereof not satisfied by the application for that purpose of any part of the residuary estate of the intestate;

and in either case the amount, if any, properly required for the payment of the costs of the transaction. [875]

This section is new. Its object is to permit an immediate distribution with the consent of the surviving spouse.

A surviving spouse is given a life interest in the whole under s. 46 (1) (i) (*a*), p. 346, *ante*, and in half the residue under *ibid.* (i) (*b*), and an absolute interest only under *ibid.* (v), sixth case.

"*Not being also the sole P. R.*"—By the S. C. of J. (Consolidation) Act, 1925 (c. 49), s. 160 (1), p. 371, *post* (formerly s. 12 of this Act) if there is a minority or a life interest, administration must be granted either to a trust corporation with or without an individual, or to not less than two individuals, and if there is only one P. R. (not being a trust corporation) the Court may appoint another or others (*ibid.* (2)). So the tenant for life will only be a sole P. R. where the other has died, and an additional P. R. can then be appointed.

"*Tables selected by the P. R.*"—The Succession Duty Act, 1853 (c. 51), title ESTATE AND OTHER DEATH DUTIES, p. 53, *ante*, contains such tables, but the P. R. may select others, such, for instance, as those for the time being used by life insurance societies.

"*The net sum of* £1000."—See s. 46 (1) (i), p. 346, *ante*.

49. Application to cases of partial intestacy.—Where any person dies leaving a will effectively disposing of part of his property, this Part of this Act shall have effect as respects the part of his property not so disposed of subject to the provisions contained in the will and subject to the following modifications :—

(*a*) The requirements as to bringing property into account shall apply to any beneficial interests acquired by any issue of the deceased under the will of the deceased, but not to beneficial interests so acquired by any other persons :

(*b*) The personal representative shall, subject to his rights and powers for the purposes of administration, be a trustee for the persons entitled under this Part of this Act in respect of the part of the estate not expressly disposed of unless it appears by the will that the personal representative is intended to take such part beneficially. [876]

The first part of this section, including sub-s. (*a*), is new. Sub-s. (*b*) re-enacts in somewhat different language and with the addition of the words "subject to his rights and powers for the purposes of administration," the Executors Act, 1830 (c. 40), s. 1 (Vol. 5, title DESCENT AND DISTRIBUTION, p. 117). That Act, however, did not have the effect of requiring advances to be brought into hotchpot in case of partial intestacy (*Re Roby*, [1907] 2 Ch. 84), it only applied where there was a bare appointment of executors so that the implication of law had to be resorted to in order to see whether the estate not otherwise disposed of vested in the executors beneficially *virtute officii* (*ibid.*). It did not apply where there was an express bequest of residue to the executor (*Williams* v. *Arkle* (1875), L. R. 7 H. L. 606). For an example of bringing into account under this section, see *Re Pulner* (1929), 67 L. J. Newsp. 273.

The question whether the executor takes beneficially is one of construction of the will. The intention must appear on the face of the will. For a case, see *Onslow* v. *Wallis* (1849), 16 Sim. 483. The cases are in favour of their taking beneficially if the gift is not to the executors as such, but by name (*Williams* v. *Arkle* (1875), L. R. 7 H. L. 606) ; and a gift to the executor at his discretion and his own disposal goes to him beneficially (*Re Howell*, [1915] 1 Ch. 241) ; but see *Re Chapman*, [1922] 2 Ch. 479, where these words coupled with a reference to charitable objects did not give him the beneficial interest. The cases are against the executors taking beneficially if prior legacies have been given them or the gift is to them as joint tenants (*Gibbs* v. *Rumsey* (1813), 2 Ves. & B. 294 ; *Re Henshaw* (1864), 34 L. J. Ch. 98), or if there is a direction that they are to retain their costs (*Saltmarsh* v. *Barrett* (1861), 3 De G. F. & J. 279), and where there is no gift to them a direction that they, their heirs, successors, etc., may apply and distribute the residue as to them may appear just (*Yeap. C. Neo* v. *Ong Cheng Neo* (1875), L. R. 6 P. C. 381). See also Halsbury's Laws of England, Vol. 14, pp. 284–285, and the English and Empire Digest, Vol. 23, pp. 468 *et seq.*

With regard to the effect of sub-s. (*b*) on the rights of the Crown, cf. s. 46 (1) (vi), p. 347, *ante*. Under the Intestates Estates Act, 1884 (c. 71) (Vol. 5, title DESCENT AND DISTRIBUTION, p. 122), if land were devised on trust to sell and pay debts, with no disposition of the residue in default of an heir, it went to the Crown (*Re Wood*, [1896] 2 Ch. 596).

But in cases not within the Act, in default of an heir of the intestate, it remained with the persons in whom the legal estate was vested (*Beale* v. *Symonds* (1853), 16 Beav. 406, and so though devised on trust for sale (*Walker* v. *Denne* (1793), 2 Ves. 170 ; *Cox* v. *Parker* (1856), 22 Beav. 168 ; *Re Lashmar*, [1891] 1 Ch. 258.

But in the case of chattels real and personalty the Crown and not the trustee was entitled on failure of next of kin (*Cradock* v. *Owen* (1854), 2 Sm. & G. 241).

Executors, however, took the undisposed of residue unless a contrary intention was shown (*Re Jones*, [1925] 1 Ch. 340), in which case it went to the Crown (*Middleton v. Spicer* (1783), 1 Bro. C. C. 201; *Re Glukman*, [1908] 1 Ch. 552). This might appear from the property being given to them on trust (*Re Chapman*, [1922] 2 Ch. 479). The distinction between claims by the Crown for *bona vacantia* and claims by next of kin being that the onus was on the Crown to show the P.R. did not take beneficially while in claims by next of kin the onus was on the P. R. to show that they did so take. In this Act the claims of the Crown and next of kin are placed apparently on a similar footing, but as the Crown will still claim as in respect of *bona vacantia* it is possible the same rule may still prevail, but it seems an open question.

50. Construction of documents.—(1) References to any Statutes of Distribution in an instrument inter vivos made or in a will coming into operation after the commencement of this Act, shall be construed as references to this Part of this Act; and references in such an instrument or will to statutory next of kin shall be construed, unless the context otherwise requires, as referring to the persons who would take beneficially on an intestacy under the foregoing provisions of this Part of this Act.

(2) Trusts declared in an instrument inter vivos made, or in a will coming into operation, before the commencement of this Act by reference to the Statutes of Distribution, shall, inless the contrary thereby appears, be construed as referring to the enactments (other than the Intestates' Estates Act, 1890) relating to the distribution of effects of intestates which were in force immediately before the commencement of this Act. [877]

This section is new.

Sub-s. (1) is intended to prevent reference, by inadvertence, to the older statutes altering the devolution here prescribed.

In preparing modern settlements or wills this act should be referred to rather than the Statutes of Distribution (though the effect will be the same) in order to prevent mistakes.

In any case where there is a chance of the Crown taking through the absence of near next of kin special care should be taken to obtain adequate instructions for the preparation of settlements or wills.

In sub-s. (2) the operation of the older Statutes of Distribution is preserved in the case of settlements by deed or will coming into operation before the Act. See *Re Sutcliffe, Sutcliffe* v. *Robertshaw*, [1929] 1 Ch. 123.

The Intestates Estates Act, 1890 (c. 29), Vol. 5, title DESCENT AND DISTRIBUTION, p. 124, is excepted because it was not regarded as one of the Statutes of Distribution (*Re Morgan*, [1920] 1 Ch. 196). It was the act which provided for the widow's £500, and did not apply to a case of partial intestacy (*Re Twiggs Estate*, [1892] 1 Ch. 579). In a trust for conversion and division between grandchildren, and in case of failure of those trusts on trusts by reference to the Statutes of Distribution the heir was not ousted of his claim to the realty (*Re Hughes*, [1916] 1 Ch. 493).

Under a gift to a class to be ascertained by reference to the Statutes of Distribution not only the persons to take, but their shares, are to be ascertained from the statutes (*Re Nightingale*, [1909] 1 Ch. 385).

51. Savings.—(1) Nothing in this Part of this Act affects the right of any person to take beneficially, by purchase, as heir either general or special. [878]

This sub-section is new.

"*By purchase.*"—*I.e.* in its technical sense, meaning by any other mode than by descent or devolution at law (Co. Litt. 18, 6). So a devisee under a will is a purchaser in this sense. A covenant to settle such future property as may be acquired "by purchase" includes a subsequently effected life policy and the moneys payable thereunder (*Re Turcan* (1888), 40 Ch. D. 5).

The object of the sub-section is probably to conform to L. P. A. 1925 (c. 20), ss. 131, 132 (Vol. 15, title REAL PROPERTY). Under s. 131 the rule in Shelley's case is abolished in the case of instruments coming into operation after 1925; so that where an estate is given to an ancestor and afterwards mediately or immediately to the heir the interest given to the heir is to operate in equity as if given by words of purchase, and the ancestor will no longer take the fee simple. By s. 132 a limitation of real or personal property in favour of the heir of a deceased person, which would have conferred an estate by purchase before the Act, is to enter a corresponding equitable interest in the property on the person who would, if the law before 1926 had remained in force, have answered the description of the heir.

(2) The foregoing provisions of this Part of this Act do not apply to any beneficial interest in real estate (not including chattels real) to which a lunatic or defective living and of full age at the commencement of this Act, and unable, by reason of his incapacity, to make a will, who thereafter dies intestate in respect of such interest without having recovered his testamentary capacity, was entitled at his death, and any such beneficial interest (not being an interest ceasing on his death) shall, without prejudice to any will of the deceased, devolve in accordance with the general law in force before the commencement of this Act applicable to freehold land, and that law shall, notwithstanding any repeal, apply to the case.

For the purposes of this subsection, a lunatic or defective who dies intestate as respects any beneficial interest in real estate shall not be deemed to have recovered his testamentary capacity unless his committee or receiver has been discharged. [879]

This sub-s. is new.

It preserves, in the case of a lunatic or defective, alive and of full age on the 1st January, 1926, the rights under the old law of his or her heir at law, tenant by the courtesy or dowress to his beneficial interest in real estate, but not chattels real (*i.e.* leaseholds). See *Re Silva* (1929), 167 L. T. Jo. 457. The legal estate will vest in his P. R. under s. 1, p. 306, *ante*.

As to the old law see Halsbury's Laws of England, Vol. 11, pp. 7 *et seq.*, and see Vol. 5, title DESCENT AND DISTRIBUTION, p. 114. The beneficial interests in personal property (including leaseholds) are not within this sub-section, and will devolve as provided in s. 46, p. 346, *ante*.

"Lunatic or defective" is defined by s. 55 (1) (viii), p. 357, *post*, under which a lunatic includes a lunatic whether so found or not and the definition is wide enough to cover cases where no committee or receiver has been appointed. The final paragraph of this sub-section can, of course, only apply where a committee or receiver has been appointed, but where there is none it is conceived that the onus will lie on the person claiming under the sub-section to prove the lunacy, and also its continuance. This final paragraph is directed merely to facilitate claims by limiting the evidence required in the cases to which it applies, and can hardly have the effect of taking away existing rights preserved by the earlier part of the sub-section.

"Defectives" are defined as persons for whose benefit a receiver has been appointed so that in this case there is no difficulty.

"Interest ceasing on death" includes, in addition to an equitable life interest, an entailed interest (s. 3 (3), p. 310, *ante*).

The Court has power under the L. P. A. 1925 (c. 20), s. 171 (Vol. 15, title REAL PROPERTY) to divert a settlement of the property of a lunatic or defective in certain cases, including the case where by reason of any change in the law of intestacy the Court is satisfied that any person might suffer an injustice if the property were allowed to devolve as undisposed of on the death intestate of the lunatic or defective. For the use that has been made of this power see note to that section.

If a lunatic or defective to which this sub-section applies dies possessed of real and personal property and leaving a surviving spouse and children, two questions may arise: (1) whether the £1000 payable to the surviving spouse or any part of it is a charge on or payable out of the realty. As to this, if the beneficial interest is to remain as before the Act it would not be subject to the £1000 but would have had to bear its proportion in case of a surviving widow of the £500 given her by the Intestates Estates Act, 1890 (c. 29) (Vol. 5, title DESCENT AND DISTRIBUTION, p. 124), if the lunatic were wholly intestate. Under that Act dower was subject to abatement (*Re Charriere*, [1896] 1 Ch. 912). (2) The other question is whether the surviving spouse would have to bring the interest taken either by the courtesy or as dower into account either against the £1000 or any life interest in the personalty. S. 47 (1) (iii), p. 349, *ante*, would not apply to such a case, and there seems no other provision requiring it, but dower would have had to bear its due proportion of the £500 (*Re Charriere*, [1896] 1 Ch. 912).

Quære: might the dowress claim (in addition to the chattels) (i) the £1000 out of the personalty; (ii) the proportion of the £500 attributable to the realty; and (iii) dower less such part of the £500 as the dower would have had to bear.

(3) Where an infant dies after the commencement of this Act without having been married, and independently of this subsection he would, at his death, have been equitably entitled under a settlement (including a will) to a vested estate in fee simple or absolute interest in freehold land, or in any property settled to devolve therewith or as freehold land, such infant shall be deemed to have had an entailed interest, and the settlement shall be construed accordingly. [880]

As the infant could not have disposed of his entailed interest (the power to dispose of an entailed interest being only conferred on a tenant in tail of full age) his entailed interest would cease on his death (s. 3 (3), p. 310, *ante*).

In case of the death of such an infant on military service leaving a will, the effect of the Wills (Soldiers and Sailors) Act, 1918 (c. 58), should be considered (see Vol. 20, title WILLS).

Settlements made under the Infant Settlements Act, 1855 (c. 43) (Vol. 9, title INFANTS, *post*) with the sanction of the Court will not affect this section because s. 2 of that Act provides that in case any disentailing assurance shall have been executed by an infant tenant in tail under the provisions of the Act and such infant afterwards dies under age the disentailing assurance is to become void (see *Re Scott*, [1891] 1 Ch. 298).

(4) This Part of this Act does not affect the devolution of an entailed interest as an equitable interest. [881]

The effect of this sub-section is that the equitable entailed interest devolves under the old law (see Vol. 5, title DESCENT AND DISTRIBUTION, p. 114). See the similar provision in s. 45 (2), p. 346, *ante*.

"*Entailed interests.*"—See L. P. A. 1925 (c. 20), ss. 130, 176 (Vol. 15, title REAL PROPERTY).

52. Interpretation of Part IV.—In this Part of this Act "real and personal estate" means every beneficial interest (including rights of entry and reverter) of the intestate in real and personal estate which (otherwise than in right of a power of appointment or of the testamentary power conferred by statute to dispose of entailed interests) he could, if of full age and capacity, have disposed of by his will. [882]

The actual expression "real and personal estate" is not used in this part of the Act except in the marginal note (printed as the headnote) to s. 46, p. 346, *ante*. The expression "residuary estate" is generally used. This is defined in s. 33 (4), p. 327, *ante*, and in s. 33 (2), p. 325, *ante*, which leads up to it, the expression "real and personal estate" is employed.

"Real estate," however, is frequently mentioned in this Part of the Act; for the general definition of "real estate" see s. 55 (1) (xix), p. 359, *post*.

"Intestate" includes a partial intestate (s. 55 (1) (vi), p. 357, *post*).

For the testamentary power to dispose of entailed interests see L. P. A. 1925 (c. 20), s. 176 (Vol. 15, title REAL PROPERTY).

PART V.

SUPPLEMENTAL.

53. General savings.—(1) Nothing in this Act shall derogate from the powers of the High Court which exist independently of this Act or alter the distribution of business between the several divisions of the High Court, or operate to transfer any jurisdiction from the High Court to any other court. [883]

As to distribution of business in the High Court see Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), ss. 56–69, Vol. 13, title PRACTICE AND PROCEDURE.

(2) Nothing in this Act shall affect any unrepealed enactment in a public general Act dispensing with probate or administration as respects personal estate not including chattels real. [884]

Probate cannot be dispensed with in the case of real estate or leaseholds as it forms part of the title.

"Dispensing with probate or administration." See Halsbury's Laws of England, Vol. 14, p. 190, and the English and Empire Digest, Vol. 23, pp. 175 *et seq.*

(3) Nothing in this Act shall—

(*a*) alter any death duty payable in respect of real estate or impose any new duty thereon:

(*b*) render any real estate liable to legacy duty or exempt it from succession duty:

(*c*) alter the incidence of any death duties. [885]

Death duties are defined in s. 55 (1) (xxiv), p. 360, *post*, by reference to the S. L. A. 1925 (c. 18), see s. 117 (1) (iii) (Vol. 17, title SETTLEMENTS). They mean estate duty, succession duty, legacy duty and every other duty leviable or payable on death.

Even under the present law there is a substantial difference between real estate and personal estate, because the duties which are payable out of the real estate are still duties which are payable out of the real estate itself, and are payable under different terms and conditions from the duties which are payable in respect of personal estate, (*per* TOMLIN, J. (*In re Emerson*, [1929] 1 Ch. 128, at p. 133). Therefore the estate duty on real estate ought not to be discharged out of the personal estate (*Re Morris*, [1927] W. N. 146).

54. Application of Act.—Save as otherwise expressly provided, this Act does not apply in any case where the death occurred before the commencement of this Act. [886]

It is otherwise expressly provided in the following cases:—
S. 8, p. 313, *ante*, proving executors may exercise powers whether testator died before or after the Act, (sub-s. (2)).
S. 36, p. 332, *ante*, applies to assents, etc., after the Act, whether the testator or intestate died before or after the Act (sub-s. (12)).
S. 37, p. 337, *ante*, validity of assent, etc., as above without prejudice to previous order of Court (see sub-s. (2)).
S. 38, p. 337, *ante*, right to follow property (see sub-s. (3)).
S. 39, p. 338, *ante*, powers of management (see sub-s. (3)).
S. 40, p. 340, *ante*, powers of P. R. to raise money (see sub-s. (2)).
S. 41, p. 340, *ante*, power of appropriation (see sub-s. (9)).
S. 42, p. 343, *ante*, power to appoint trustees of infants' property (sub-s. (1)).
S. 43, p. 344, *ante*, giving possession before assent (see sub-s. (3)).

55. Definitions.—In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them respectively, that is to say:—

(1) (i) "Administration" means, with reference to the real and personal estate of a deceased person, letters of administration, whether general or limited, or with the will annexed or otherwise: [887]

As to grants of administration see Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), ss. 159–167, pp. 371–5, *post*.
In case of settled land (*ibid.* s. 162). Where P. R. abroad, special administration (*ibid.* 164). Minor (*ibid.* s. 165). With will annexed (*ibid.* s. 166). Bonds (*ibid.* s. 167).

(ii) "Administrator" means a person to whom administration is granted: [888]

(iii) "Conveyance" includes a mortgage, charge by way of legal mortgage, lease, assent, vesting, declaration, vesting instrument, disclaimer, release and every other assurance of property or of an interest therein by any instrument, except a will, and "convey" has a corresponding meaning, and "disposition" includes a "conveyance" also a devise bequest and an appointment of property contained in a will, and "dispose of" has a corresponding meaning: [889]

This definition is similar to that in L. P. A. 1925 (c. 20), s. 205 (1) (ii) (Vol. 15, title REAL PROPERTY), except that "by way of legal mortgage" are omitted after "charge," thus making it rather wider.

(iv) "the Court" means the High Court, and also the county court, where that court has jurisdiction, and as respects

the administration of estates " court " also includes the Court of Chancery of the County Palatine of Lancaster or the Court of Chancery of the County Palatine of Durham where those courts respectively have jurisdiction : [890]

L. P. A. 1925 (c. 20), s. 203 (3) (Vol. 15, title REAL PROPERTY) has a similar definition slightly differently worded. See also Trustee Act, 1925 (c. 19), s. 67 (Vol. 20, title TRUSTS AND TRUSTEES) which corresponds with that in the L. P. A., the difference being that in this Act " court " includes the Palatine Courts of Lancaster and Durham " as respects the administration of estates."

(v) " Income " includes rents and profits : [891]

The same definition as in the L. P. A. 1925 (c. 20), s. 205 (1) (xix) (Vol. 15, title REAL PROPERTY), and the Trustee Act, 1925 (c. 19), s. 68 (10) (Vol. 20, title TRUSTS AND TRUSTEES).

(vi) " Intestate " includes a person who leaves a will but dies intestate as to some beneficial interest in his real or personal estate : [892]

" Includes." It may have a larger meaning, *e.g.* in s. 9, p. 313, *ante*, it may include the case of a testator who fails to appoint an effective executor.

(vii) " Legal estates " mean the estates charges and interests in or over land (subsisting or created at law) which are by statute authorised to subsist or to be created at law ; and " equitable interests " mean all other interests and charges in or over land or in the proceeds of sale thereof : [893]

" Authorised to subsist or be created at law," *i.e.* by the L. P. A. 1925 (c. 20), s. 1 (1) (2) (4) (5) (Vol. 15, title REAL PROPERTY).

Land is defined under sub-s. (xxiv), p. 360, *post*, by reference to the L. P. A. 1925 (c. 20), s. 205 (1) (ix) (*ibid.*).

" Equitable interests." See L. P. A. 1925 (c. 20), s. 1 (3) & (6)–(8) and 205 (1) (x) (*ibid.*).

(viii) " Lunatic " includes a lunatic whether so found or not, and in relation to a lunatic not so found ; " committee " includes a person on whom the powers of a committee are conferred under section one of the Lunacy Act, 1908 ; and " defective " includes every person affected by the provisions of section one hundred and sixteen of the Lunacy Act, 1890, as extended by section sixty-four of the Mental Deficiency Act, 1913, and for whose benefit a receiver has been appointed : [894]

The definition of lunatic in the L. P. A. 1925 (c. 20), s. 205 (1) (xiii) (Vol. 15, title REAL PROPERTY) is identical with this, except that " and " before " defective " is omitted. It will be noticed that a careful distinction is made between a " defective " in whose case a receiver must have been appointed in order that he may come within the definition, and " lunatic " which, whilst it includes the case where a committee or receiver has been appointed, may have a larger meaning, *i.e.* any insane person. This, it is conceived, where no committee or receiver has been appointed, will be a question of evidence. For the Lunacy Act, 1890 (c. 5), see Vol. 11, title LUNATICS AND PERSONS OF UNSOUND MIND ; for the Lunacy Act, 1908 (c. 47), see *ibid.* ; and for the Mental Deficiency Act, 1913 (c. 28), *ibid.*

In the S. L. A., 1925 (c. 18), Vol. 17, title SETTLEMENTS, the definition of " defective " in s. 117 (1) (xiii) (which is applied also by the Trustee Act, 1925 (c. 19), Vol. 20, title TRUSTS AND TRUSTEES) substitutes " means " for " includes," thus emphasising the distinction in the case of those Acts.

(ix) " Pecuniary legacy " includes an annuity, a general legacy, a demonstrative legacy so far as it is not discharged out of the designated property, and any other general direction by a testator for the payment of money, including all death duties free from which any devise, bequest, or payment is made to take effect : [895]

"Pecuniary legacies" are referred to in s. 33 (2), p. 325, *ante*, and Sched. 1, Pt. II. paras. 2 and 5, pp. 363, 364, *post*.

"Annuity," see s. 41 (8), p. 343, *ante*, and note thereto.

A "general legacy" is a legacy not of a particular thing or property but of something to be provided out of the general estate. The expression is usually used as opposed to a "specific legacy" which is a gift of some particular property.

A "demonstrative legacy" is a gift primarily payable out of a particular fund, but which does not fail by failure of that fund, *e.g.* a gift of money followed by a direction to pay it out of a fund (*Roberts* v. *Pocock* (1798), 4 Ves. 150). The cases on these subjects are numerous (see generally Halsbury, Vol. 14, p. 261; English and Empire Digest, Vol. 23, pp. 384 *et seq*).

"*Free from duties.*"—A legacy given free of duty is not free from duty imposed after the testator's death (*Re Snape*, [1915] 2 Ch. 179, and see *Re Palmer*, [1916] 1 Ch. 395; 2 Ch. 391; *Re Stoddart*, [1916] 2 Ch. 444. And see the English and Empire Digest, Vol. 21, pp. 35 *et seq*.).

Whether it includes legacies given by codicil, see *Byne* v. *Currey* (1834), 2 Cr. & M. 603; *Kirkpatrick* v. *Bedford* (1878), 4 App. Cas. 96; *Re Smith*, [1916] 2 Ch. 368).

If the estate is deficient duty must be added to the legacy for calculation of abatement, the duty being considered an additional legacy (*Re Turnbull*, [1905] 1 Ch. 726).

(x) "Personal chattels" mean carriages, horses, stable furniture and effects (not used for business purposes), motor cars and accessories (not used for business purposes), garden effects, domestic animals, plate, plated articles, linen, china, glass, books, pictures, prints, furniture, jewellery, articles of household or personal use or ornament, musical and scientific instruments and apparatus, wines, liquors and consumable stores, but do not include any chattels used at the death of the intestate for business purposes nor money or securities for money: [896]

Personal chattels are mentioned in s. 33 (1), p. 324, *ante*, and s. 46, p. 346, *ante*.

As to books see *Re Baroness Zouche*, [1919] 2 Ch. 178.

The expression "articles of personal use" has been held to include a motor car (*Re White*, [1916] 1 Ch. 172; and see *Petre* v. *Ferrers* (1891), 61 L. J. Ch. 426); but furniture did not pass tapestry bought with a house and part of the scheme of decoration (*Re Whaley*, [1908] 1 Ch. 615).

As to articles used for business, see *Re Seton-Smith*, [1902] 1 Ch. 717; *Le Farrant* v. *Spencer* (1748), 1 Ves. Sen. 97.

(xi) "Personal representative" means the executor, original or by representation, or administrator for the time being of a deceased person, and as regards any liability for the payment of death duties includes any person who takes possession of or intermeddles with the property of a deceased person without the authority of the personal representatives or the court, and "executor" includes a person deemed to be appointed executor as respects settled land: [897]

Liability for death duties.—The P. R. is now liable (see L. P. A. 1925 (c. 20), s. 16, Vol. 15, title REAL PROPERTY).

"Intermeddles with": (see *A.-G.* v. *New York Breweries Co.*, [1899] A. C. 62; and the English and Empire Digest, Vol. 23, pp. 77 *et seq*.

"Deemed to be appointed executor" (see s. 22, p. 314, *ante*).

(xii) "Possession" includes the receipt of rents and profits or the right to receive the same, if any: [898]

This definition is identical with that in the L. P. A. 1925 (c. 20), s. 205 (1) (xix) (Vol. 15, title REAL PROPERTY).

See s. 43, p. 344, *ante*, as to permitting possession before assent.

As to the antithesis between possession and reversion, see note to the S. L. A. 1925 (c. 18), s. 19 (Vol. 17, title SETTLEMENTS).

(xiii) "Prescribed" means prescribed by rules of court or by probate rules made pursuant to this Act: [899]

As to Probate Rules see sub-s. (xvi), p. 359, *post*. Rules of Court, sub-s. (xxii), p. 360, *post*.

(xiv) "Probate" means the probate of a will: [900]

This definition seems to define the thing in terms of itself. A "probate" is a copy of the will, by which the executor is appointed, certified by the seal of the Court. The word "Probate" is also used as meaning the process by which an executor of a will obtains the sanction of the Court to act. The definition, of course, covers both meanings of the word.

(xv) "Probate judge" means the President of the Probate, Divorce and Admiralty Division of the High Court: [901]

As to the legal estate vesting in the Probate Judge before grant of administration see s. 9, p. 313, *ante*.

(xvi) "Probate rules" mean rules and orders made by the Probate Judge for regulating the procedure and practice of the High Court in regard to non-contentious or common form probate business: [902]

See Non-contentious Probate Rules, 1862, and 1925 (set out in Tristram and Coate's Probate Practice, 16th Edn., p. 769; (*Druce* v. *Young*, [1890] P. 84, 101.

(xvii) "Property" includes a thing in action and any interest in real or personal property: [903]

The definition in L. P. A. 1925 (c. 20), s. 205 (1) (xx) (Vol. 15, title REAL PROPERTY) is identical, except that "a thing in action" is substituted for "any thing in action." The definition in the Trustee Act, 1925 (c. 19), s. 68 (11) is somewhat more extensive (Vol. 20, title TRUSTS AND TRUSTEES).

(xviii) "Purchaser" means a lessee, mortgagee or other person who in good faith acquires an interest in property for valuable consideration, also an intending purchaser and "valuable consideration" includes marriage, but does not include a nominal consideration in money: [904]

See definition in L. P. A. 1925 (c. 20), s. 205 (1) (xxi), which is more elaborate (see Vol. 15, title REAL PROPERTY).

(xix) "Real estate" save as provided in Part IV. of this Act means real estate, including chattels real, which by virtue of Part I. of this Act devolves on the personal representative of a deceased person: [905]

"As provided in Pt. IV." *I.e.* by s. 52, p. 355, *ante*. See note to that section. For the purpose of Pt. I. "real estate" is defined in s. 3 (1), p. 309, *ante*.

(xx) "Representation" means the probate of a will and administration, and the expression "taking out representation" refers to the obtaining of the probate of a will or of the grant of administration: [906]

See, generally, Pt. II., pp. 310 *et seq.*

(xxi) "Rent" includes a rent service or a rentcharge, or other rent, toll, duty, or annual or periodical payment in money or money's worth, issuing out of or charged upon land, but does not include mortgage interest; and "rentcharge" includes a fee farm rent: [907]

This is similar (with the omission of "reserved or" before "issuing") to the first half of the definition in L. P. A. 1925 (c. 20), s. 205 (1) (xxiii) (Vol. 15, title REAL PROPERTY).

(xxii) "Rules of Court" include, in relation to non-contentious or common form probate business, probater ules: [908]

See Non-contentious Probate Rules, 1862 and 1925 (set out in Tristram and Coote's Probate Practice, 16th Edn., p. 769); and Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 100 (Vol. 13, title PRACTICE AND PROCEDURE), giving power to make these rules.

(xxiii) "Securities" include stocks, funds, or shares: [909]

This is identical with the L. P. A. 1925 (c. 20), s. 205 (1) (xxv) (Vol. 15, title REAL PROPERTY), and the first part of the Trustee Act, 1925 (c. 19), s. 68 (13) (Vol. 20, title TRUSTS AND TRUSTEES) which goes on to make reference to payments into Court.

(xxiv) "Tenant for life," "statutory owner," "land," "settled land," "settlement," "trustees of the settlement," "term of years absolute," "death duties," and "legal mortgage," have the same meanings as in the Settled Land Act, 1925, and "entailed interest" and "charge by way of legal mortgage" have the same meanings as in the Law of Property Act, 1925: [910]

"Tenant for life" (see S. L. A. 1925 (c. 18), ss. 19 and 117 (1) (xxviii)).
"Statutory owner" (see *ibid.* ss. 23, 26, 117 (1) (xxvi)).
"Land" (see *ibid.* s. 117 (1) (ix)).
"Settled land" (see *ibid.* ss. 2, 3, 117 (1) (xxiv)).
"Settlement" (see *ibid.* ss. 1, 3, 117 (1) (xxiv)).
"Trustees of the settlement" (see *ibid.* ss. 30 to 34, 117 (1) (xxiv)).
"Term of years absolute" (see *ibid.* s. 117 (1) (xxix)).
"Death duties" (see *ibid.* s. 117 (1) (iii)).
"Legal mortgage" (see *ibid.* s. 117 (1) (xi); also L. P. A. 1925 (c. 20), s. 85 *et seq.*).
"Entailed interest" (L. P. A. 1925 (c. 20), s. 130 (1) and (7)).
"Charge by way of legal mortgage" (see *ibid.* s. 87; cf. L. R. A. 1925 (c. 21), s. 3 (i)).
For the S. L. A. 1925 (c. 18), see Vol. 17, title SETTLEMENTS. For the L. P. A. 1925 (c. 20), and the L. R. A. 1925 (c. 21), see Vol. 15, title REAL PROPERTY.

(xxv) "Treasury solicitor" means the solicitor for the affairs of His Majesty's Treasury, and includes the solicitor for the affairs of the Duchy of Lancaster: [911]

See s. 30, p. 321, *ante*. The Treasury Solicitor was constituted under Treasury Solicitors Act, 1876 (c. 18), ss. 1, 2, as a corporation sole with power to take grants of administration on nomination by royal warrant (Vol. 3, title CONSTITUTIONAL LAW, p. 395). The Treasury Solicitor is a Trust Corporation under the L. P. (Amendment) Act, 1926 (c. 11), s. 3 (Vol. 15, title REAL PROPERTY).

(xxvi) "Trust corporation" means the public trustee or a corporation either appointed by the court in any particular case to be a trustee or entitled by rules made under subsection (3) of section four of the Public Trustee Act, 1906, to act as custodian trustee: [912]

This definition is the same as that in the L. P. A. 1925 (c. 20), s. 205 (1) (xxviii) (Vol. 15, title REAL PROPERTY), and in the Trustee Act, 1925 (c. 19), s. 68 (18) (Vol. 20, title TRUSTS AND TRUSTEES). Cf. the Public Trustee Act, 1906 (c. 55), s. 4 (3) (*ibid.*), and the Public Trustee Rules 1926. The definition is extended by the L. P. (Amendment) Act, 1926 (c. 11), s. 3 (1) (Vol. 15, title REAL PROPERTY) to include (*inter alia*) the Treasury Solicitor, the Official Solicitor, a trustee in bankruptcy, a trustee under a deed of arrangement, and certain authorities prescribed by the Lord Chancellor in relation to charitable, ecclesiastical and public trusts.

(xxvii) "Trust for sale," in relation to land, means an immediate binding trust for sale, whether or not exercisable at the request or with the consent of any person, and with or without a power at discretion to postpone the sale; and "power to postpone a sale" means power to postpone in the exercise of a discretion: [913]

Cf. the definition in the L. P. A. 1925 (c. 20), s. 205 (1) (xxix) (Vol. 15, title REAL PROPERTY), and in the Trustee Act, 1925 (c. 19), s. 68 (19) (Vol. 20, title TRUSTS AND TRUSTEES).

See note to s. 39 (1) (ii), p. 338, *ante*; and the S. L. A. 1925 (c. 18), s. 1 (7) (Vol. 17, title SETTLEMENTS).

See the L. P. A. 1925 (c. 20), s. 25 (*ubi supra*).

(xxviii) "Will" includes codicil. [914]

(2) References to a child or issue living at the death of any person include a child or issue en ventre sa mere at the death. [915]

The rule of law is that for the purpose of conferring a benefit on a child *en ventre sa mère* at a particular future time, it will be included in the expression children living *or born* at that time. The question was considered in *Villar* v. *Gilbey*, [1907] A. C. 139, and the earlier cases are there cited and need not be referred to here; and see *Re Griffiths' Settlement* [1911] 1 Ch. 246.

It has even been extended to a gift to nieces "born previously to the date of" the will so as to include a niece then *en ventre* and born afterwards (*Re Salaman*, [1908] 1 Ch. 4).

A child *en ventre* was supposed to be born at the time mentioned; if, supposing he had then been born, he would have been illegitimate he would not have been admitted, though his parents married before his birth (*Re Corlass* (1875), 1 Ch. D. 460). Possibly this rule may be affected by the Legitimacy Act, 1926 (c. 60), Vol. 2, title BASTARDY.

(3) References to the estate of a deceased person include property over which the deceased exercises a general power of appointment (including the statutory power to dispose of entailed interests) by his will. [916]

See s. 3 (2), p. 309, *ante*, and note thereto.

Property over which the deceased exercised a general power of appointment by will did not pass to the executor as such, and consequently estate duty thereon was a first charge on the property (*O'Grady* v. *Wilmot*, [1916] 2 A. C. 231), but the executor is now accountable (L. P. A. 1925 (c. 20), s. 16, Vol. 15, title REAL PROPERTY).

Entailed interests are defined in *ibid.* s. 130 (1) (7), and the power to dispose of the same by will is given by *ibid.* s. 176.

56. Repeal.—The Acts mentioned in the Second Schedule to this Act are hereby repealed to the extent specified in the third column of that Schedule, but as respects the Acts mentioned in Part I. of that Schedule only so far as they apply to deaths occurring after the commencement of this Act. [917]

The Bankruptcy Act, 1914 (c. 59), s. 130 (Vol. 1, title BANKRUPTCY, p. 689), which dealt with the administration in bankruptcy of an insolvent estate and is repealed by the 2nd Schedule, p. 366, *post*, has been restored by the Expiring Laws Act, 1925 (c. 76), s. 1 (2), and continued permanently in force. The section deals with the mode of administration only, and not with the subject-matter to be administered (*Hasluck* v. *Clark*, [1899] 1 Q. B. 699). It does not prevent an execution creditor of the deceased retaining the benefit of an execution not completed before the administration order (*ibid.*), nor if the deceased was adjudicated bankrupt has such an order the effect of a second adjudication, so as to divest the estate of the trustee in bankruptcy in favour of the Official Receiver under the order (*Re Sarjeant*, [1923] 2 Ch. 302).

57. Application to Crown.—(1) The provisions of this Act bind the Crown and the Duchy of Lancaster, and the Duke of Cornwall for the time being, as respects the estates of persons dying after the commencement of this Act, but not so as to affect the time within which proceedings for the recovery of real or personal estate vesting in or devolving on His Majesty in right of His Crown, or His Duchy of Lancaster, or on the Duke of Cornwall, may be instituted. [918]

Cf. s. 45 (1) (*d*), p. 345, *ante*, and s. 30 (2), p. 322, *ante*.

(2) Nothing in this Act in any manner affects or alters the descent or devolution of any property for the time being vested in His Majesty

either in right of the Crown or of the Duchy of Lancaster or of any property for the time being belonging to the Duchy of Cornwall. [919]

"*Descent or devolution.*"—See s. 3 (5), p. 310, *ante*, and cf. the L. P. A. 1925 (c. 20), s. 180 (1) (Vol. 15, title REAL PROPERTY).

58. Short title, commencement and extent.—(1) This Act may be cited as the Administration of Estates Act, 1925.

(2) This Act shall come into operation on the first day of January, nineteen hundred and twenty-six.

(3) This Act extends to England and Wales only. [920]

SCHEDULES.

FIRST SCHEDULE. Sect. 34.

PART I.

RULES AS TO PAYMENT OF DEBTS WHERE THE ESTATE IS INSOLVENT.

1. The funeral, testamentary, and administration expenses have priority. [921]

This part of the schedule applies where the estate is insolvent (see s. 34 (1), p. 328, *ante*, and note thereto)

The funeral expenses come first, before even a claim of a trustee in bankruptcy *Re Walter*, [1929] 1 Ch. 147): and cf. Bankruptcy Act, 1914 (c. 59), s. 130 (6), Vol. 1, title BANKRUPTCY, p. 691. According to JESSEL, M.R., an executor with assets is liable to pay them though he did not order the funeral and never received assets sufficient to pay them (*Sharp* v. *Lush* (1879), 10 Ch. D. 468, at p. 472; and see *Williams* v. *Williams* (1882), 20 Ch. D. 659).

"*Testamentary and administration expenses.*"—See note to s. 34, p. 328, *ante*, and *Re Clemow*, [1900] 2 Ch. 182; *Re Hadley*, [1909] 1 Ch. 20, C. A. Real estate bears its own duty (*Re Sharman*, [1901] 2 Ch. 280), and so does appointed property (*O'Grady* v. *Wilmot*, [1916] 2 A. C. 231).

2. Subject as aforesaid, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable and as to the valuation of annuities and future and contingent liabilities respectively, and as to the priorities of debts and liabilities as may be in force for the time being under the law of bankruptcy with respect to the assets of persons adjudged bankrupt. [922]

For the rules in bankruptcy, see Bankruptcy Act, 1914 (c. 59), s. 130 (Vol. 1, title BANKRUPTCY, p. 689), repealed by this Act (Sched. 2, Pt. I., p. 366, *post*), but revived by the Expiring Laws Act, 1925 (c. 76), s. 1 (2) and Sched. 1, Pt. II. (Vol. 18, title STATUTES). See s. 56, p. 361, *ante*, and note thereto.

This paragraph reproduces in effect the first part of the now repealed Judicature Act, 1875 (c. 77), s. 10 (see p. 301, and note, *ante*), omitting "as to the respective rights of secured and unsecured creditors," and substituting "as to the priorities of debts and liabilities."

One effect of s. 10 of that Act was to introduce into the administration of the estates of deceased insolvents by the Chancery Division the rule in bankruptcy that voluntary creditors are to be paid *pari passu* with creditors for value (see *Re Whitaker*, [1901] 1 Ch. 9).

Another difference between administration in chancery and in bankruptcy was that in chancery a secured creditor might prove for his full debt and also realise his security, whereas in bankruptcy he had to value or realise his security and prove for the deficiency (*Mason* v. *Bogg* (1837), 2 My. & Cr. 443), but he may adjust the value if it alters (*Re McMurdo*, [1902] 2 Ch. 684).

It has been held that under the Judicature Act, 1875 (c. 77), s. 10, that the bankruptcy rules as to (1) rights of secured and unsecured creditors, (2) provability of debts and liabilities, (3) the valuation of annuities and future contingent liabilities, and no other rules prevailed in Chancery (*Re Withernsea Brickworks* (1880), 16 Ch. D. 337).

As to retainer, see s. 34 (2), p. 328, *ante*.

The executor's right of retainer was not affected by s. 10 of the Judicature Act, 1875 (*Lee* v. *Nuttall* (1879), 12 Ch. D. 61), though he was not a secured creditor in respect of that right, nor was a judgment creditor (*Re Maggi* (1882), 20 Ch. D. 545); but see *Re Hobson* (1886), 33 Ch. D. 493, where land had been delivered under an elegit. The Married Women's Property Act, 1882 (c. 75), s. 3, Vol. 9, title HUSBAND AND

WIFE, postponed the claim of a wife as creditor of her husband to other creditors, but this did not affect the right of retainer of a widow who was his P. R. (*Re Ambler*, [1905] 1 Ch. 697), but she could not retain against a judgment creditor who sued her and recovered judgment, for she ought in his action either to have pleaded retainer or *plene administravit* (*Re Marvin*, [1905] 2 Ch. 490).

For priorities in payment of debts, see Bankruptcy Act, 1914 (c. 59), s. 33 (Vol. 1, title BANKRUPTCY, p. 638), and notes thereto. Strictly preferential payments are as follows :—

(*a*) One year's rates and taxes.
(*b*) Clerks' and servants' wages.
(*c*) Labourers' wages.
(*d*) Workmen's compensation.

The following are postponed to other debts (*ibid.* sub-s. (9)) :—

(*a*) Loans at interest varying with partnership profits; Partnership Act, 1890 (c. 39), s. 3 (Vol. 12, title PARTNERSHIP).

(*b*) Claims by wife for money lent to her husband (see *Re Leng*, [1895] 1 Ch. 652 ; *Re Ambler*, [1905] 1 Ch. 697), or by husband for money lent to wife (Bankruptcy Act, 1914 (c. 59), s. 36 (1) and (2), Vol. 1, title BANKRUPTCY, p. 642).

PART II.

ORDER OF APPLICATION OF ASSETS WHERE THE ESTATE IS SOLVENT.

1. Property of the deceased undisposed of by will, subject to the retention thereout of a fund sufficient to meet any pecuniary legacies. [923]

The order of application of assets here prescribed is by s. 34 (3), p. 330, *ante*, to have effect (*a*) subject to rules of Court ; (*b*) subject to the provisions as to charges on property (see s. 35, p. 330, *ante*); and (*c*) subject to the will which may vary the order of application (para. 8, p. 364, *post*). See, generally, the English and Empire Digest, Vol. 23, pp. 473 *et seq.*

"*Undisposed of by will.*"—Before this Act "residue" being considered to be what remained after payment of funeral and administration expenses, debts and legacies, a share of residue, whether undisposed of by lapse or because the legatee was incapable of taking, bore only its proportion of these charges (*Skrymsher* v. *Northcote* (1818), 1 Swan, 566 ; *Trethewy* v. *Helyar* (1876), 4 Ch. D. 53 ; *Fenton* v. *Wills* (1877), 7 Ch. D. 33 ; *Blann* v. *Bell* (1877), 7 Ch. D. 382). If there is a mere charge of debts and legacies and nothing to alter their incidence, it appears that this rule is now altered and these words mean "not effectually disposed of" by the will, the suggestion that they meant "not attempted to be so disposed of" being rejected; and a lapsed share of residue will bear these charges in relief of the other shares (*Re Lamb*, [1929] 1 Ch. 722). But if the testator has created a mixed fund for payment of debts, etc., there is no undisposed-of residue till these are ascertained, and the debts, etc., must be borne by the mixed fund rateably (*Re Petty*, [1929] 1 Ch. 726).

As to lapsed legacies, see *Re Whitrod*, [1926] Ch. 118.

"*Pecuniary legacies.*"—See s. 55 (1) (ix), p. 357, *ante*.

2. Property of the deceased not specifically devised or bequeathed but included (either by a specific or general description) in a residuary gift, subject to the retention out of such property of a fund sufficient to meet any pecuniary legacies, so far as not provided for as aforesaid. [924]

"*Property of the deceased.*"—See s. 55 (1) (xvii), p. 359, *ante*, but property appointed under a power and entailed interests, being dealt with in para. 7, p. 364, *post*, would appear to be excluded. See, however, *Williams* v. *Williams*, [1900] 1 Ch. 152, where it was held that in case of a power exercised by a general bequest in a will the property appointed was included in and passed by the bequest according to the terms of the will, and not as if a separate execution of the power was read into the will, and it was not therefore necessarily postponed, as a fund liable for payment of debts, to other assets of the testator. This may still prevail and be treated as a variation of the order of application under para. 8, p. 364, *post*.

A share of residue subject to a secret trust has been treated as in the same position as a specific legacy (*Re Maddock*, [1902] 2 Ch. 220.) Before this Act a devise of lands whether specifically described or residuary was considered specific (*Lancefield* v. *Iggulden* (1874), 10 Ch. App. 136). This para. seems to alter this rule as regards a residuary devise.

3. Property of the deceased specifically appropriated or devised or bequeathed (either by a specific or general description) for the payment of debts. [925]

Thus property specifically appropriated for payment of debts will not be taken till undisposed-of property and residue are exhausted. But the appropriation may be in a form as to vary this order (see para. 8, p. 364, *post*).

See, generally, on this subject, Halsbury's Laws of England, Vol. 14, p. 292.

Before the Act a specific fund of personalty charged with payment of debts and legacies was primarily liable in exoneration of the residue, whether disposed of (*Browne* v. *Groombridge* (1819), 4 Madd. 495) or not (*Milnes* v. *Slater* (1803), 8 Ves. 295; *Re Grainger*, [1900] 2 Ch. 775; and see *Trott* v. *Buchanan* (1885), 28 Ch. D. 446). But in some cases (presumably on the construction of the will) undisposed-of residue has been held primarily liable, *e.g. Holford* v. *Wood* (1798), 4 Ves. 76; *Howse* v. *Chapman* (1799), 4 Ves. 542. See English and Empire Digest, Vol. 23, p. 480.

4. Property of the deceased charged with, or devised or bequeathed (either by a specific or general description) subject to a charge for the payment of debts. [926]

This seems to be in accordance with the rule previously in force under which if the personalty was exhausted legatees could come on the real estate charged with payment of debts whether expressly or by inference (*Foster* v. *Cook* (1791), 3 Bro. C. C. 347; *Re Salt* [1895], 2 Ch. 203; *Re Roberts*, [1902] 2 Ch. 834); and cf. *Re Kempster*, [1906] 1 Ch. 446, where it was held that the Land Transfer Act, 1897 (c. 65) (Vol. 15, title REAL PROPERTY) made no difference; *Re Bate* (1890), 43 Ch. D. 600, has not been followed. See English and Empire Digest, Vol. 23, p. 528.

But they could not come upon land not charged with debts (*Forrester* v. *Lord Leigh* (1753), Amb. 171).

5. The fund, if any, retained to meet pecuniary legacies. [927]

Pecuniary legacies (defined s. 55 (1) (ix), p. 357, *ante*) will be paid *pari passu* or abate rateably, as has always been the case.

They will now take precedence of a residuary devise of land, though formerly if the personalty was insufficient pecuniary legatees had no right to make the residuary devisee contribute to payment of debts (*Collins* v. *Lewis* (1869), L. R. 8 Eq. 708; *Dugdale* v. *Dugdale* (1872), L. R. 14 Eq. 234; *Farquharson* v. *Floyer* (1876), 3 Ch. D. 109).

6. Property specifically devised or bequeathed, rateably according to value. [928]

A gift of a debt to the debtor is specific (*Re Wedmore*, [1907] 2 Ch. 277).

As to a residuary devise of land being no longer specific, see note to para. 2.

An enumeration of specific things in a residuary bequest does not make them specific (*Re Green* (1888), 40 Ch. D. 610), nor a direction that certain funds are to fall into residue (*Re Lyne's Estate* (1869), L. R. 8 Eq. 482).

7. Property appointed by will under a general power, including the statutory power to dispose of entailed interests, rateably according to value. [929]

This preserves the old rule as to property expressly appointed by will which was also applicable to appointments by deed (*Fleming* v. *Buchanan* (1853), 3 Deg. M. & G. 976; *Hawthorn* v. *Shedden* (1856), 3 Sm. & G. 293, p. 305; *Petre* v. *Petre* (1851), 14 Beav. 197; and see *Re Seabrook*, [1911] 1 Ch. 151).

The appointed fund was general assets though appointed to a single creditor pursuant to a covenant (*Beyfus* v. *Lawley*, [1903] A. C. 411; and see Married Women's Property Act, 1882 (c. 75), s. 4 (Vol. 9, title HUSBAND AND WIFE), which makes property appointed by the will of a married woman assets as her separate estate (*Re Ann*, [1894] 1 Ch. 549; *Re Hughes*, [1898] 1 Ch. 529).

It is immaterial that the appointment fails (*Re Hodgson*, [1899] 1 Ch. 666).

As to power to dispose of entailed interests by will, see L. P. A. 1925 (c. 20), s. 176 (Vol. 15, title REAL PROPERTY).

8. The following provisions shall also apply—

(*a*) The order of application may be varied by the will of the deceased.

(*b*) This part of this Schedule does not affect the liability of land to answer the death duty imposed thereon in exoneration of other assets. [930]

Where the testator creates a mixed fund for the payment of testamentary expenses, etc., the expenses and debts are not thrown primarily on a lapsed share (*Re Petty*, [1929] 1 Ch. 726); *aliter* where there is a mere direction to pay debts (*Re Lamb*, [1929] 1 Ch. 722).

See also *Re Atkinson*, [1929] W. N. 189.

As to death duties, see s. 33 (6), p. 328, *ante*, and s. 53 (3) (c), p. 356, *ante*, and notes thereto.

SECOND SCHEDULE. Sect. 56.

ENACTMENTS REPEALED.

PART I.

REPEALS NOT AFFECTING CASES WHERE THE DEATH OCCURRED BEFORE THE COMMENCEMENT OF THIS ACT.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
13 Edw. 1 (*Stat. Westm. sec.*) c. 19.	The ordinary chargeable to pay the debts of an intestate.	The whole chapter.
13 Edw. 1 (*Stat. Westm. sec.*) c. 23.	Writ of accompt for executors – –	The whole chapter.
13 Edw. 1 (*Stat. Westm. sec.*) c. 34.	Dower forfeited by elopement with adulterer.	From "and if a wife "willingly leave her "husband" to "in "which case she shall "be restored to her "action."
25 Edw. 1, c. 7 –	Widow; her marriage estate; quarantine; estovers; dower; remarriage.	The whole chapter.
25 Edw. 1, c. 18	The King's tenant, his debtor – –	From "and the residue" to "reasonable parts."
Statute (*temp. incert.*).	Statute concerning tenants by the Curtesy of England.	The whole statute.
Statute Prerogativa Regis (*temp. incert.*) c. 18.	Customs of Gloucester and Kent –	From "Nevertheless it is "used" to the end of the chapter.
4 Edw. 3, c. 7 –	Executors shall have an action of trespass for a wrong done to their testator.	The whole chapter.
25 Edw. 3, st. 5, c. 5.	Executors of executors shall have the same rights and duties as the first executors.	The whole chapter.
31 Edw. 3, st. 1, c. 11.	The ordinary shall commit administration upon an intestacy. The administrators shall have the same rights and charges as executors.	The whole chapter.
21 Hen. 8, c. 4 –	An Acte conc̃ninge Executors of Laste Willes and Testamentꝭ.	The whole Act.
21 Hen. 8, c. 5 –	An Acte conc̃ninge Fynes & sōmes of Moneye to be taken by the Ministers of Busshops and other Ordinaries of Holye Churche for the p̄bate of Testamtꝭ.	The whole Act.
32 Hen. 8, c. 37 –	For recoving of Arrerag̃ by Executors and Administrators.	Sections one, two and three.
1 Edw. 6, c. 12 –	An Acte for the repeale of certaine statutes concerninge treasons, felonyes, &c.	Section sixteen.
5 & 6 Edw. 6, c. 11.	An Acte for the punyshment of divs̃e treasons.	Section eleven.
5 & 6 Edw. 6, c. 12.	An Acte for the declaracō̃n of a statute made for the marriage of Priestꝭ and for the legittimacō̃n of their children.	Section two.
43 Eliz. c. 8 –	An Acte against fraudulent administracō̃n of intestates goodes.	The whole Act.
12 Chas. 2, c. 24	An Acte taking away the Court of Wards and Liveries and Tenures in Capite and by Knights Service and Purveyance and for settling a Revenue upon His Majesty in Lieu thereof.	Section seven from "tenures in franke al- "moigne" to "nor to "take away."
22 & 23 Chas. 2, c. 10.	The Statute of Distribution – –	The whole Act.
29 Chas. 2, c. 3 –	The Statute of Frauds – – –	Sections ten, eleven, twenty-three, twenty-four, so far as unrepealed.

SECOND SCHEDULE—*continued.*

Session and Chapter.	Title or Short Title.	Extent of Repeal.
30 Chas. 2, c. 7 –	An Act to enable creditors to recover their debts of the executors and administrators of executors in their own wrong.	The whole Act.
1 Jas. 2, c. 17 –	An Act for reviveing and continuance of severall Acts of Parlyament therein mentioned.	The whole Act.
4 Will. & Mar. c. 24.	An Act for reviving, &c tinuing and explaining several laws therein mentioned that are expired and neare expiring.	Section twelve.
38 Geo. 3, c. 87	The Administration of Estates Act, 1798.	The whole Act.
11 Geo. 4, & 1 Will. 4, c. 40.	The Executors Act, 1830 – –	The whole Act.
11 Geo. 4 & 1 Will. 4, c. 47.	The Debts Recovery Act, 1830 –	The whole Act.
3 & 4 Will. 4, c. 27.	The Real Property Limitation Act, 1833.	Section forty-one.
3 & 4 Will. 4, c. 42.	The Civil Procedure Act, 1833 –	Sections two, thirty-seven and thirty-eight.
3 & 4 Will. 4, c. 74.	The Fines and Recoveries Act, 1833 –	In section twenty-seven the words "no woman "in respect of her "dower and"
3 & 4 Will. 4, c. 104.	The Administration of Estates Act, 1833.	The whole Act.
3 & 4 Will 4, c. 105.	The Dower Act, 1833 – – –	The whole Act.
2 & 3 Vict. c. 60	The Debts Recovery Act, 1839 –	The whole Act.
11 & 12 Vict. c. 87.	The Debts Recovery Act, 1848 –	The whole Act.
17 & 18 Vict. c. 113.	The Real Estate Charges Act, 1854 –	The whole Act.
20 & 21 Vict. c. 77.	The Court of Probate Act, 1857 –	Sections seventy to eighty.
21 & 22 Vict. c. 95.	The Court of Probate Act, 1858 –	Sections sixteen, eighteen, nineteen, twenty-one, and twenty-two.
22 & 23 Vict. c. 35.	The Law of Property Amendment Act, 1859.	Sections fourteen to eighteen.
30 & 31 Vict. c. 69.	The Real Estate Charges Act, 1867 –	The whole Act.
32 & 33 Vict. c. 46.	The Administration of Estates Act, 1869.	The whole Act.
38 & 39 Vict. c. 77.	The Supreme Court of Judicature Act, 1875.	Section ten.
40 & 41 Vict. c. 34.	The Real Estate Charges Act, 1877 –	The whole Act.
47 & 48 Vict. c. 71.	The Intestates Estates Act, 1884 –	The whole Act.
53 & 54 Vict. c. 29.	The Intestates Estates Act, 1890 –	The whole Act.
4 & 5 Geo. 5, c. 59.	The Bankruptcy Act, 1914 – –	Section one hundred and thirty.

[931]

The Bankruptcy Act, 1914 (c. 59), s. 130, was re-enacted by the Expiring Laws Act, 1925 (c. 76), s. 1 (2), and Sched. 1, Part II. (Vol. 18, title STATUTES), and continued permanently in force.

SECOND SCHEDULE—*continued.*

PART II.

REPEALS APPLYING WHERE THE DEATH OCCURRED BEFORE OR AFTER THE COMMENCEMENT OF THIS ACT.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
10 & 11 Geo. 5, c. 81.	The Administration of Justice Act, 1920.	Section seventeen.
12 & 13 Geo. 5, c. 16.	The Law of Property Act, 1922 –	Subsection (7) of section one hundred and ten; Part VIII. except section one hundred and fifty-two; and Part IX. except subsection (13) of section one hundred and fifty-six; and sub-paragraphs (2) and (3) of paragraph five of the Sixth Schedule.
15 Geo. 5, c. 5 –	The Law of Property (Amendment) Act, 1924.	Section seven and the Seventh Schedule.