THE DEVOLUTION OF ESTATES ACT.

A decision was rendered in a recent case relating to this Act which has not, in the writer's opinion, received the attention it deserves.

The case was *Re Shier*,[1] decided by Honourable Mr. Justice Middleton, on 8th June, 1922.

It was a considered decision, the learned Judge stating in his judgment, that having regard to the importance of the question involved, he had thought it best to consult with the Chief Justice of Ontario (whose views were found to coincide with his own) before pronouncing judgment.

The facts of the case were, that the Master of Titles had ruled that by reason of section 21, sub-section 4 (L) of the Devolution of Estates Act, it is not competent to an executor or administrator, to convey land which forms part of the assets of the estate to a beneficiary without first obtaining an Order of a Supreme Court Judge.

Mr. Justice Middleton in his judgment upheld the view of the learned Master of Titles.

The full significance of this judgment has not, the writer believes, been adequately appreciated by personal representatives generally, or by the profession, and the public at large.

In point of fact its consequences are, in the writer's opinion, so serious as to almost warrant the term " devastating."

Let us consider for a moment what those consequences are:

1. When it is borne in mind that by the effect of the Act the legal estate in the real assets shifts to the beneficiaries at the expiration of three years from the death of the testator, or intestate, it will be seen that an executor, or administrator, can *never* (according to this decision) give a conveyance of the realty to a beneficiary, without first obtaining the direction of a Judge of the Supreme Court of Ontario.

One possible exception exists to this statement, viz., that the decision would not apply to the case of an executor or administrator who had retained the legal estate in the real assets in himself, or brought the same back to himself, after the expiry of the said three years by registration of what is generally known as a " belated caution." This exception is practically negligible, as it comparatively seldom occurs.

[1] (1922) 52 O.L.R. 464.

2. It must be borne in mind that ever since the passing of the Act (1886) executors and administrators have been conveying the real assets freely to beneficiaries, without any thought of having recourse to the Court for permission so to do. What follows? Simply that in every such case the title to the land is invalidated by the decision.

It should be observed, moreover (and the writer speaks not without very considerable evidence in so remarking) that the decision in question is being largely, if not entirely, ignored by personal representatives (not excluding Trust Companies) throughout the Province.

What is the meaning of that? Simply that an immense amount of trouble and expense is being laid up for unfortunate owners in the not distant future.

The writer believes that the practice since the passing of the Act, and prior to the decision in question, and largely at present in vogue, is for the executor or administrator, to give the conveyance when he believes that the estate has been fully administered, and that the proper time has arrived, without troubling the Court about the matter at all.

The argument seems to be: If all parties are satisfied that the conveyance should be given, why trouble the Court about the matter —who else is concerned besides the personal representative and the beneficiary?

This is an extremely short-sighted, not to say dangerous, policy. What happens? The purchaser or beneficiary, after the transaction, goes on enjoying his land in happy confidence—until he decides to sell it. Then what happens? Simply that among the requisitions on title put forth by the prudent purchaser's solicitor, is found one to the effect that the deed in question in invalid, as not having been given pursuant to a direction of a Judge of the Supreme Court.

The purchaser, or beneficiary, then suffers a rude awakening from his fancied security, and finds that he is obliged, at that late date, to go to the trouble and expense of applying to the Court for an order (*nunc pro tunc*) approving the deed.

The result of the decision in question then is as follows:—

(*a*) Scores, doubtless hundreds, probably thousands of titles to land in Ontario have been invalidated thereby. (We are confining ourselves, of course, to the matter of the paper title).

(*b*) Unlimited numbers of titles are in a fair way to share the same fate as long as the decision stands.

(*c*) If the decision is obeyed very considerable trouble and expense (generally wholly unnecessary) is added to the administration of every estate where a conveyance of the realty to the beneficiary is required.

Undoubtedly if the decision is correct something should be done about it, in the interest of the public, even if legislative action becomes necessary to right the situation.

The writer's object in this article is to suggest, with all possible deference, that possibly a different interpretation of the Act, from that enunciated by the decision in question may be the true one. The writer expresses this view, with all possible respect for the opinion of the learned and experienced Judge who rendered the decision:—

The clause of the Act in question, however, is undoubtedly ambiguous, and is, in the writer's opinion, open to more than one construction; at the same time, it is only the extreme importance of the matter that induces him to put forward the suggestion embodied herein.

Let us consider the matter on its merits.

Everyone recognizes that the object of the Devolution of Estates Act was to simplify the administration of estates by placing the real assets of the testator, or intestate, in the hands of the personal representative to be dealt with as freely, and in as untrammeled a manner as the personalty, whether for payment of debts, or for distribution among the beneficiaries.

That is plainly shown by the Act itself.[2]

The English legislation is to the same effect.[3]

It will be observed that in our Ontario Act the primary and main clauses, what may be termed the substantive clauses relating to sales and conveyances of realty by the personal representative, provide for the observance of certain restrictive conditions in certain special cases.

[2] Section 20 of the Act reads as follows:—
"Except as herein otherwise provided the personal representative of a deceasd person shall have power to dispose of and otherwise deal with the real property vested in him by virtue of this Act, with the like incidents, but subject to like rights, equities and obligations, as if the same were personal property vested in him.
See also section 3(1) and ss. 4 and 5.

[3] Section 2(3) of the English Act (1897) to establish a real representative and to amend the Land Transfer Act, 1875, reads as follows:—"In the administration of the assets of a person dying after commencement of this Act, his real estate shall be administered in the same manner, subject to the same liabilities for debt, costs and expenses and with the same incidents as if it were personal estate."

By section 21(2) for instance, it is provided that no sale of the real estate made for the purpose of distribution only, shall be valid, as respects any person beneficially entitled thereto, unless such person concurs therein; and that where a lunatic is beneficially entitled, or where there are other persons beneficially entitled whose consent to the sale cannot be obtained by reason of their place of residence being unknown, or where in the opinion of the Official Guardian it would be inconvenient to require the concurrence of such persons, the sale shall not be made except with the approval of the Official Guardian, on behalf of such lunatics, or non-concurring beneficiaries.

Provisions are also made for sales free from dower, or curtesy, section 11(1), and for the approval of the Official Guardian, where infants are concerned, section 19(1).

But nowhere among these primary and main provisions is there any such sweeping provision as that in no case shall a personal representative give a conveyance of the realty to beneficiaries without an Order of a Judge of the Supreme Court being first obtained.

Is it not almost certain that if that had been the intention of the Legislature they would have made it a main feature of the legislation, and not have relegated it to a subsidiary clause contained in the closing sections of the enactment?

The legislature tabulated the restrictions on the power of a personal representative to convey realty as above set forth, but included no general provision that no conveyance should be made without the approval of a Judge of the Supreme Court.

Then comes the following section (subsection 4 of section 21), which is the one in question:—

"Upon the application of a personal representative, or of any person beneficially entitled, the Supreme Court or a Judge thereof may, before the expiration of three years from the death of the deceased, direct the personal representative to divide or distribute the estate or any part thereof to or among the persons beneficially entitled, according to their respective rights and interests therein."

What, then, is the meaning—the true interpretation—of this last mentioned provision?

The writer's view, submitted with all possible deference, is that it was a mere emergency measure, inserted—very properly and prudently—to enable a simple and speedy recourse to the Court where difficulties arose requiring the Court's intervention.

Consider the position, bearing in mind the fact that the object of the act was to effect a great advancement in the administration of estates, both in respect of convenience and economy, by placing the

realty in the hands of the personal representative, with as full power to deal therewith as with the personalty.

Take a simple case—*A*, a widower, dies intestate leaving a few debts, a farm, certain personalty, and one son, his only issue. The executor in the course of a month or two pays the debts out of the personalty, and is ready to convey the farm to the son. What possible object could be achieved by incurring the trouble and expense of first making an application to the Court before executing the conveyance to the son?

Is it conceivable that a legislature which had devised this salutary piece of ameliorating legislation, and which keeps repeating that the object of the Act is to enable the personal representative "to deal with and distribute" real assets in the same manner as though they were personalty, should, by way of "*finis coronat opus*," put such a dreadful handicap on the implementing of their scheme, place in fact such a grievous spoke in the wheel of their own coach. It seems almost inconceivable that any legislature could be so crassly stupid.

Curiously enough this very point profoundly impressed the learned Judge, who expressed himself in relation to it as follows:—

"It may be that the situation is awkward, and the procedure is cumbersome, but this is no novelty when an attempt is made by a benevolent legislature to reform any law which has been found for many years to be entirely satisfactory."

What, then, is the meaning of the clause in question?

The writer submits, as has been said, that it is simply a clause introduced to meet emergencies, to provide a ready and comparatively inexpensive means of seeking the direction of the Court (without the issue of a writ) in any case where difficulty arises between the parties interested.

The writer's view is, that the intention of the Legislature was that the subsection in question should be understood and construed as though it had been followed by a clause to the following effect: "Nothing in the preceding subsection shall be construed as circumscribing, or in any way affecting the full power which is invested in the personal representative by this Act of conveying the real assets to the beneficiaries at such time, or times, as the personal representative thinks fit.

Cases may easily occur where differences arise between the personal representative and the beneficiaries; the beneficiaries, for instance, believing they are entitled to receive a conveyance, while the personal representative thinks otherwise, or the personal repre-

sentative himself having doubts whether the time has arrived when he should make the conveyance. In such cases either the personal representative, or the beneficiaries may, under this clause, apply in a summary way to the Court for a "direction" that the conveyance be made.

And that brings us to another point. It will be observed that the provision is that the application may be made to the Court for a "direction" that the personal representative execute the conveyance, etc. A "direction" is something of a peremptory nature, very much akin to an "order." It is defined by the dictionaries as an "order, command, instruction."

It will be observed that in the judgment in question the following passage occurs:—

"If the three years is not long enough in any particular case, the period of liquidation may be extended under the provisions of the Act. If the period is found to be too long, then the remedy is an application under sec. 21, subsec. 4. If the personal repersentatives do not desire to hold the property or any person beneficially entitled thinks it unnecessary that they should hold the property for the period named, an application may be made to a Judge of the Supreme Court for an order directing *or permitting* an earlier distribution. Upon this application the Court will require evidence to be produced showing that it is unnecessary that the property should be longer retained by the personal representatives for the due administration of the estate. Upon *permission* or direction to convey being given, the executors must then convey, and, by sec. 24, subsec. 1, the beneficiary to whom the property is conveyed can confer a good title free from all risk of the property being required for the debts of the testator or intestate as the case may be, leaving the beneficiary who has received the proceeds answerable to the creditor to the extent of the value of the estate."

The italics in this quotation are the writer's.

It will be observed that no such word as "permit" occurs in the Act. The application to the Court is to be for an order "directing" (not "permitting") the conveyance to be made. Had the word "permit" been used there would be an end to the question under discussion.

The very fact that the word "permit" was not used is, it is submitted, a strong argument in support of the writer's view. Why was it not used? It was a very obvious word to express the legislature's meaning, if that meaning really were as indicated by the decision in question.

The writer submits that it was not used because there was in the view of the legislature no occasion for the Court to "permit" the personal representative to make the conveyance. If he was willing to do so there was nothing to prevent him.

It was only in case of unwillingness on his part that the Court's "direction" need be obtained.

The very omission therefore from the Act of the word "permit" would seem to constitute a cogent argument in support of the writer's view.

We would only further remark that if the writer's view is, by any chance, the correct one, it would mean an immense boon to the thousands of owners of Ontario land whose titles are at present invalidated by the decision in question, though, of course, before relief were afforded legislative action would be necessary.

F. P. BETTS,

London, Ont.

THE LEAGUE AND CHINA.—So far from the Chinese trouble showing the weakness of the League, the really striking fact is that international war, which the League was meant to remedy, has practically disappeared from the world; all the recent troubles—in China, Syria, Morocco, and elsewhere—have been domestic in character, and have gone on just because they did not come into the sphere of the League.—Sir Gilbert Murray in *The London Times*.