THE SASKATCHEWAN SURROGATE COURTS.

IV.

ADDITIONAL POWERS GRANTED TO SOME OF THE PROBATE COURTS

The additional powers granted to the colonial Probate Courts by the Local Legislatures have not made them more superior than they were before. No doubt their importance has thereby been increased. In the same manner the District Courts of our Province, which are undoubtedly inferior Courts, just as inferior as their prototypes, the English County Courts, have been invested from time to time by the Legislature with powers and jurisdiction which are generally exercised by Superior Courts only. The following statutes, among others, show it quite clearly:

1. Married women's property Act, C. 153, R.S.S. 1920.

Under that Act the District Court Judges have concurrent jurisdiction with the King's Bench Judges, at the applicant's option, irrespective of the value of the property in dispute, in the matter of any question between husband and wife as to the title to or possession of any property, personal or real.

2. Welfare of Children Act, C. 60 of 1927.

The District Court Judge may adjudge a party to be the father of a child, and make an order of filiation providing for the child's maintenance and education. Although I would not venture to say that such a statement would generally apply in jurisdictions administered by the common law of England, I am quite certain that, in civil law countries, no inferior Court is permitted to adjudicate on the civil status of persons.

3. Controverted municipal elections Act, C. 91, R.S.S. 1920.

Under sec. 19, the District Court Judge may, upon the hearing of a "notice of motion in the nature of a *quo warranto*," try the following issues: The legality of the election of a member of the council, whether the person declared elected thereat was duly elected, and whether a member has forfeited his seat or has become disqualified since his election, or has resigned his seat; and if the Judge decides that the election is invalid, he may order the respondent to be removed and declare that another person has been elected (Section 31). The Judge's order "shall have the same force and effect as a Writ of mandamus formerly had in the like case" (Sec. 33).

4. School Act, C. 110, R.S.S. 1920.

Under Section 124, a District Court Judge may issue a summons calling upon a school trustee to show cause why he should not be removed from office, and, on the hearing, the Judge may order that he be removed from office.

There may be found in the Saskatchewan Statutes, several other instances where superior Court powers are conferred upon the District Court Judges. Perhaps the best illustration of such cases is furnished by Sec. 46 of the Small Debt Recovery Act, C. 60 R.S.S. 1920. That statute practically gives the District Court Judges jurisdiction in *certiorari,* which has always been considered as an exclusive attribute of the Superior Courts.

Looking into the Nova Scotia Probate Act, C. 217. R.S. N.S. 1923, and into the Ontario Surrogate Courts Act, C. 62. R.S.O. 1914, I find that these two provinces have given to their local Probate Courts certain powers which are not generally exercised by Courts of that description and which the Probate Court of England did not possess. To begin with they did not, as England did under its Act of 1857, entrust the non-contentious business, or most of it, to district registrars, the unimportant contentious business to the County Court Judges and the important contentious business to one Judge only for the whole country. They divided their respective territories into counties or districts and appointed for each such territorial division a Probate or Surrogate Judge. That Judge's duty is to take care of all the business, contentious or not; he does in his county or district all the work which, under the English Act of 1857, was allotted to the Judge of probate and to the County Courts. He also exercises all the jurisdiction which this last mentioned Act had given to the Registrar; and the portion of these last mentioned officials' work which consisted of ministerial and clerical duties devolves upon the Probate or Surrogate Court Clerk. In these respects the two provincial Acts are somewhat similar. Moreover, they both confer upon the provincial Courts the ordinary jurisdiction in "probate matters," such as was exercised by the English Court of Probate. But, in addition to this however, the following jurisdiction was given by each province to its local Court:

1. Removal of executors or administrators.

Sec. 60 of the Ontario Act gives to the Surrogate Court the like authority for the removal of an executor or administrator and

to appoint some other proper person to act in his place as is possessed by the Supreme Court, provided the entire estate does not exceed $1000.00.

I notice that under Sec. 66, if, in the case of an administrator's security having become insufficient or inadequate, the additional security ordered by the Judge is not furnished, the grant of administration may be revoked. Revocation of administration is ordered, generally speaking, when it had been granted to a person without sufficient interest in the estate; want of interest is the proper ground, or the subsequent discovery of a will. I submit that the failure to furnish the required additional security is properly a ground, not for the revocation of the letters, but for the removal of the administrator.

Moreover, sec. 26 of the Infants Act, C. 153, R.S.O. 1914, gives to the Surrogate Courts the power to appoint guardians, who are removable by the Supreme Court or by the Surrogate Court for the same causes for which trustees are removable (Sec. 29).

In Nova Scotia, the Probate Court has jurisdiction and power under Sec. 12 (d): "to appoint guardians, and to take the accounts of such guardians, under the Chapter entitled *'Of Guardians and Wards'*". Under Secs. 31 and 32, if an executor who has been wasting the estate does not obey an order to give security, or if he resides beyond the jurisdiction of the Court and neglects to settle or administer the estate, or fails to comply with an order to pay into a bank the money remaining in his hands, the Court of Probate may remove him and appoint a new one in his place; and if an administrator has left the province without any intention of returning, or is wasting the estate, or is insolvent or of unsound mind or otherwise incapacitated, or has failed to comply with an order to pay into a bank the monies remaining in his hands, the Court of Probate may, after having cited him to appear and account, remove him on a summary application made by a surety or any person interested.

Neither the Court of Probate of England nor the Probate Division, nor the Surrogate Courts of Saskatchewan had or have any such powers of appointment of guardians or of removal of trustees.

2. Creditors' claims and settlement of the Estate.

Under sec. 43 of the Nova Scotia Act, the Court may, after the issue of a citation, "allow or disallow any of the claims, or any part thereof respectively, and may direct such investigation of

all or any of the claims, and require such further particulars, information or evidence relating thereto as is deemed just."

Under Sec. 63 *et seq.*, all persons interested, including creditors, may be cited to attend the adjudication of the claims of creditors or other persons. the taking of the accounts and the distribution of the estate. Any person interested may attend and contest the settlement, as well as any unpaid claim; and the Court of Probate is given, in the settlement of the accounts of executors and administrators, or in any matters pertaining thereto, the powers which are enjoyed by the Supreme Court. The allowance of the accounts and the final settlement of the estate by the Court are conclusive evidence against all persons served:

(a) that the items in such accounts for monies paid to creditors, to legatees, to the next of kin and for necessary expenses, are correct;

(b) that such executor or administrator has been charged all the interest for monies received by him and embraced in his account for which he was legally accountable;

(c) that the monies stated in such account as collected were all that were collectable on the debts mentioned in such account at the time of the allowance thereof.

In the estate of *C. McDonald,*[1] it was decided that "the Court of Probate have all the power of the Court of Chancery to enable them to settle the accounts of an intestate."

With regard to the creditors' claims, I notice that under sec. 69 of the Ontario Act, when "a claim or demand" is made against the estate, the personal representative may notify a claimant that he contests the claim, whereupon the claimant may apply to the Judge of the Surrogate Court for an order allowing his claim. If the claim amounts to $800.00, or more, the Judge will direct the claimant to bring an action in the Supreme Court; if it is more than $100.00 and less than $800.00, he will hear and determine the claim himself; if it amounts to $100.00 or less, the issue shall be tried by a Division Court, if it is otherwise within the jurisdiction of that Court, unless the parties consent to the trial of the issue by the Surrogate Court.

In 1906, a few years before that sec. 69 was enacted, an administrator had applied for an appointment to pass his accounts, stating at the same time that a certain claim had been presented

[1] (1853) 1 James 342.

which he had disallowed. The Surrogate Court Judge gave an appointment and directed also that the claimant come in and prove his claim, or be barred. On appeal, Meredith, C.J., said:

> There is nothing to indicate, and we think it is improbable that the Legislature intended, that the power should be given in a proceeding of that kind to call in the creditors of the estate and adjudicate upon their claims and practically to administer the estate. If the Legislature had intended any such thing, one would have expected that entirely different language would have been used, and we are clearly of opinion that such an inquiry was beyond the powers of the surrogate Judge.[2]

It is to be noted also that a claim based upon an alleged donatio mortis causa is not a "claim" or "demand" within the meaning of that section, according to *Re Graham.*[3]

Our Trustee Act, S. 61, C. 75 R.S.S. 1920, contains a provision drawn along the lines of said sec 69.

The Saskatchewan Surrogate Courts have no such wide jurisdiction as to creditors' claims as are possessed by the Nova Scotia Court, neither the above described limited one which is exercised in Ontario. All they can do is to bar a secured claim when the creditor has failed to value it under the provisions of Surrogate Rule 45. However, their powers in this respect are no more limited than were those of the English Court of Probate.

3. ACCOUNTING.

And as for the accounting, Ontario Surrogate rule 36 provides that executors and administrators, as well as trustees under a will and guardians of infants may voluntarily pass their accounts before the Surrogate Courts, or may be called upon to do so on the application of any person interested therein. In the last mentioned case the applicant takes out a citation order which may be granted *ex parte.*[4] Once the accounts have been passed and approved by the Judge, should the executor or administrator be subsequently required to pass his accounts in the Supreme Court, such Judge's approval shall be binding upon all the parties who appeared or were served, except in the case of mistake or fraud.

It might be interesting here, in view of the fact that our Statute has borrowed a great deal from the surrogate law of Ontario, to trace from the beginning the different steps which this last mentioned Province went through before reaching the stage where its

[2] *In re MacIntyre,* 11 O.L.R. 136 at p. 139.
[3] 25 O.L.R. 5.
[4] (Widdifield, p. 463).

legislation now stands in respect of the accountings in the Surrogate Courts.

In 1901 the case of *Cunnington* v. *Cunnington*[5] was decided by the Court of Appeal of Ontario. The executors of an executor had brought into the Surrogate Court an account of their testator's dealings with the assets of the original testator's estate, treating in the account as cash a certain note. In an issue in the High Court where the property in the note and the right to its proceeds were in issue between the said executors and the surviving executor of the original testator, it was held that the approval of the account by the Surrogate Court was a binding adjudication.

But, in 1904, a Divisional Court consisting of Boyd, C., and Meredith and Idington, J.J., decided, Meredith, J., dissenting, in *Re Russell*[6] that an Ontario Surrogate Court has no jurisdiction to try the following issue raised on an accounting: the residuary legatees contended that a certain sum should have been included in the inventory, and the testator's widow, who was one of the executors, claimed that the said sum had been given to her by the testator in his lifetime. Shortly afterwards, in 1906, the Legislature of Ontario adopted the following subsec. to sec. 72 of the Ontario Surrogate Courts Act, which is now sec. 71 (3) of that Act:

> The Judge, on passing the accounts of an executor, administrator or such a trustee, shall have jurisdiction to enter into and make full inquiry and accounting of and concerning the whole property which the deceased was possessed of or entitled to, and the administration and disbursement thereof in as full and ample a manner as may be done in the Master's Office under an administration order, and, for such purpose, may take evidence and decide all disputed matters arising in such accounting, subject to an appeal under section 34.

Saskatchewan has no such provision and one might be tempted to conclude that we should be guided by the decision in the *Russell* case; but, in 1906, Sir William Meredith, C.J.C.P., later C.J.O., referring to the said sec. 72 and the said subsec. enacted the year before, said *In re MacIntyre*[7]:

> The reason for the passing of the statute was, no doubt, the decision of the majority of the Court in *Re Russell*, in which case a much narrower construction was given to the section of the Surrogate Act which we are considering, than according to the practice which had prevailed it was supposed to bear.

[5] 2 O.L.R. 511.
[6] 8 O.L.R. 481 at p. 492.
[7] 11 O.L.R. 136 at p. 138.

It was held in that case that it was not open in the Surrogate Court to inquire whether the executrix was chargeable with a sum of $500, which, as alleged, constituted a debt due by her to the deceased at the time of his death.

It was sought in the Surrogate Court to make her answerable for that as so much come to her hands, and the conclusion to which the majority of the Court came was that there was no jurisdiction to do that; that as the executrix had not charged herself and had not brought the item into her account, it was not open to be investigated.

The object of the legislation of last session was undoubtedly, we think, to make it clear that what had been understood to be the jurisdiction of the surrogate Judge before that decision was within his power, and therefore to enable him to enter into any question which it was necessary for him to deal with in order to determine how much the personal representative had received or ought to have received and to be charged with, and to credit him with what he properly had paid, so as to ascertain the balance with which he was chargeable.

Mr. Justice Meredith's dissenting judgment in the *Russell* case (*supra*) provides interesting reading, not only because his opinion finally prevailed in Ontario, but also because of the clear and convincing manner in which he has treated the whole subject. He tells us that sec. 71 (1) of the Ontario Statute, of which our said sec. 67 is a copy, was introduced in Ontario with a view to discourage the passing of executors' and administrators' accounts in Chancery. The following extract from his judgment is quite in point here:

It is true that by legislation the Court of Probate in England was deprived of the power to maintain actions for legacies or for the distribution of the residues of estates, and that, following such legislation, a similar restriction has been applied to the Surrogate Courts of this Province, thus largely removing occasion for taking accounts in these Courts, but they have not been deprived of the power to enforce the exhibiting of inventories and the passing of accounts; on the contrary, the powers of the Surrogate Courts have been much enlarged, as shall presently be shewn.

But, notwithstanding the powers of the Ecclesiastical Courts and the taking of the accounts there, the aggressive Court of Chancery was in the habit of undertaking the administration of the estates of deceased persons . . . and the practice was so general at one time in this Province that an accounting in the Surrogate Court was almost an unheard of procedure. The enormous amount thus wasted in law costs in administration and partition matters—generally grossly disproportionate to the amount at stake—became so scandalous that the Court itself took steps, by orders of Court, simplifying the proceedings and providing for a commission in lieu of costs, to remedy the evil. The relief was far from ample; but ample relief subsequently came in the passing of the Devolution of Estates Act, and of the rules of the Surrogate Courts establishing and making plain the practice as to exhibiting inventories and accounting in those Courts—in terms conferring upon them

the powers which the Masters in Chancery had; which relief was made more effectual by the amendment to the Surrogate Courts Act making binding the accounts taken in those Courts, if subsequently required to be passed in the High Court, upon all persons notified of the proceedings or present or represented thereat, and upon anyone claiming under any such person, except so far as mistake or fraud could be shewn.

The result has been entirely satisfactory; it is quite in accord with the trend of legislation for years past, which has been towards increasing the jurisdiction of the inferior Courts, and reducing the costs of, and simplifying and localising, legal proceedings; and has reduced the rush to the Court of Chancery with all sorts of administration and partition matters, until now there is probably not one where there were fifty or one hundred such cases before: vastly to the relief of the intelligent litigant who would sooner give up a just claim or objection than get into Chancery over it, with the certainty of the sum in dispute, even if several hundreds of dollars in amount, being eaten up in "costs out of the estate."

In Wilson and Toronto General Trusts,[8] Sir William Meredith, C.J.C.P., said that the acts of the Surrogate Judge in passing accounts were those of the Court and not of the Judge as *persona designata*, and that they were so treated in *Cunnington* v. *Cunnington* (*supra*) and *In re Williams*.[9] He added:

> The accounts to be dealt with are spoken of in sec. 72 of the Surrogate Courts Act as accounts filed in the Surrogate Court, and the approval of the Judge referred to in the section must mean, I think, the approval of the Judge sitting as the Court—that is, of the Court.

It is to be noted that, in Ontario, the Surrogate Judge's determination appears to be assimilated to a Master's report under a reference directed by the Supreme Court (sec. 71), which report may be appealed from in the same manner as any other Master's report; in Saskatchewan, the Surrogate Judge, on the passing of accounts, follows the practice governing the King's Bench in such cases (rule 48). He generally orders a reference to the clerk of his Court, whose certificate is subsequently presented to the Surrogate Judge on an application to have it approved, discharged or varied.

Effect of Surrogate Court's Approval of the Accounts.

The effect of a Surrogate Court Judge's approval of an executor's accounts was determined by the Court of Appeal of Ontario in 1906, in *Gibson* v. *Gardner*.[10] In that case the executor's (de-

[8] (1906) 13 O.L.R. 82 at p. 88.
[9] 27 O.R. 405.
[10] 13 O.L.R. 521 at p. 525.

fendant's) accounts had been passed by the Surrogate Judge and, subsequently, the plaintiff brought an action in the High Court, who made an order for the removal of the executor and for the passing of the accounts. The Master in Ordinary, to whom the accounts had been referred, certified that he had adopted the result of the accounting held before the Judge of the Surrogate Court. He held that the Surrogate Judge's approval was binding on the plaintiff in the High Court proceedings. He said:

> The statute gives effect to the old maxim of law: *"Nemo debet bis vexari pro unâ et eâdem causâ;"* and the proceedings in the Surrogate Court and in this Court are for "the same cause of action," namely, the accounting by the defendant executor of his dealings with the estate mentioned in the order.

The said order of the High Court for the passing of the accounts had been made by consent, and although the plaintiff contended that by reason of such consent sec. 72 (which is the same as our said sec. 67) could not be invoked by the executor, the Master said:

> The effect of this section is to limit the jurisdiction of the High Court in taking and passing executor's accounts; and being worded:
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> "shall be binding"
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> must be classed as an imperative enactment, and also, I think must be held to be incorporated into the consent judgment and therefore limiting the jurisdiction of the Court in taking the accounts referred.

The Master's ruling was sustained by Boyd, C., and, subsequently, by the Court of Appeal consisting of Moss, C.J.O., Osler, Garrow, Maclaren and Meredith, JJ.A. It was stated by Meredith, J.A., that the Surrogate Court proceedings were of a judicial character altogether, and that the result of such proceedings was a judgment which was binding, to the extent provided for in the Surrogate Courts Act, in just the same manner as the judgment of any other Court in matters within its jurisdiction. He said at p. 530:

> And I can see no reason why . . . the Master should not—and indeed why he is not bound to—give effect to the enactment in question in so far as it affects any part of the accounting; in short, I agree with him entirely in his ruling as to his power and duty in this respect, which was not based upon any notion that the adjudication in the Surrogate Court was merely a statement and settlement of accounts between the parties. And, if this were not so, it would be the duty of the Court to interpose and to prevent a second accounting at the cost of the estate. The enactment in question was passed for the prevention of just such things. Legislation and orders of Court became necessary, and were passed, for the prevention of the waste of estates in avoidable administration and partition proceedings.

In Re Wilson:[11] this was the case of a beneficiary applying to a Surrogate Judge to re-open the accounts as approved by him. Sir William Meredith, C.J., said at page 608 that it was necessary for the applicant to show either fraud and imposition practised upon the Court, or that the Surrogate Judge had certified something by mistake upon which he had not passed. He also stated that it is only so far as mistake or fraud is shewn, and not where mistake or fraud is shewn, that the binding effect of the approval is taken away. He said:

> It is unnecessary to determine whether, if this exception to the binding nature of the accounts had not been contained in the section, and the order approving the accounts were to be treated as a judgment or decision of the Surrogate Court, upon the case made by the appellant, as to the two matters as to which she has succeeded in shewing that the accounts were incorrect, she would be entitled to have the accounts taken *de novo*, but, as at present advised, I do not think that she would be entitled to that relief, but only to have the accounts corrected in those respects in which it is shewn that they are incorrect. The principle applicable to the opening of an ordinary stated account, and the consequences of such an account being opened, do not, I think, apply to an account taken by the Court in the presence of the parties, where the persons to whom the accounting is being made are brought before the Court for the purpose of enabling them to challenge, if they will, the correctness of the account.

It results from the above that the Surrogate Judge's approval of the accounts is a judicial determination which is binding upon everybody, except that it is open to any of the parties to prove that it has been obtained by fraud or mistake; and, if such proof is made, the binding effect of the said approval will be taken away but so far only as such mistake or fraud has been shewn.

The intention of the Legislature of giving to the Surrogate Courts the exercise of full power and jurisdiction in matters relating to executors' and administrators' accountings, no matter how large the value of the estate may be, is further evidenced, in my opinion, by its omission to include such matters with those which may be removed to the King's Bench under sec. 33 of the Surrogate Courts Act. The said sec. 33 gives to a justice of the Kings' Bench the right to remove into that Court, on the application of any of the parties, any cause or proceeding in a Surrogate Court in which, (1) any contention arises as to the grant of probate or of administration, or (2) a disputed question is raised relating to matters and causes testamentary. provided, in all cases, that the value of the

[11] (1906) 15 O.L.R. 596 at p. 616.

estate be in excess of $5,000.00. Sub-sec. 3 of sec. 2 of the Act states that "matters and causes testamentary" includes all matters and causes relating to the grant and revocation of probate of wills or letters of administration; it does not, in my opinion, apply to accountings.

In *Shaw* v. *Tackaberry*,[12] an executor was sued in the Supreme Court for an account of the profits made by him and his sister, a co-defendant, upon the sale of a house, and also for an account of monies of the estate applied on account of a large claim alleged to be due to him by the estate. The defendant had previously passed his accounts in the Surrogate Court. The Appellate Division found that the executor had given credit to the estate in the Surrogate Court accounting for $2,200.00 for the sale of the house, and that he had not disclosed the true situation. It held that the representing to the Surrogate Court that $2,200.00 had been received as the sale price of the house was either a mistake or fraud on the part of the defendant, and that the Surrogate Court's approval of that item was not binding. But as to the payment made by the executor to himself on account of his alleged claim against the estate, Riddell, J., said:

> It was necessary for the Surrogate Court Judge to go into an extended enquiry into the dealings between the deceased and the executor for years; and he did so, adjudicating upon the defendant's claim. This adjudication the plaintiff attacks. . . . The appeal is based on the case of *Re Russell* (*supra*), in which it was decided that the Surrogate Court Judge could not determine whether a certain specific sum of money alleged to belong to the estate claimed by the widow, the executrix, was an asset of the estate.
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> After this decision the law was amended by (1905) 5 Edw. VII. ch. 14; and under that statute a Divisional Court, Sir William Meredith, C.J.C.P. (now C.J.O.), writing the judgment, decided in *In re MacIntyre* (*supra*), that the Surrogate Court Judge has not the power to compel a creditor to prove his claim in the Surrogate Court and to allow it or bar it. But the Court also decides that, if an executor has in good faith paid the claim of a creditor, the Surrogate Court Judge has jurisdiction to consider the propriety of that payment, and to allow or disallow the item in the accounts. There can be no difference between a payment to another creditor and a retainer by the executor to pay his own claim.
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> I think, therefore, that the learned Chief Justice of the King's Bench is right in this matter, and the appeal should be dismissed.

[12] (1913) 29 O.L.R. 490 at p. 495; 15 D.L.R. 475 at p. 480.

DIFFERENCES BETWEEN SASKATCHEWAN AND ONTARIO ACTS AS TO ACCOUNTING.

I think I may conclude that our jurisdiction in respect of the passing of accounts is about similar to the one which was, in 1906, and still is exercised in Ontario, subject, however, to the following differences:

A. Our Rule 45 states that every executor and administrator shall file his accounts within two years or within such further time as a Judge may allow, but it does not state, like Ontario rule 36, that he may be called upon to do so on the application of any interested person. I believe, however, that our Surrogate Courts, who have inherited the powers and jurisdiction of the English Court of Probate, may, as well as the latter, cite an executor or administrator to bring his accounts and file an inventory, and, upon his failure to do so, order an attachment to be issued against him. That the said Probate Court had such power is shown by *Baker* v. *Baker*.[13]

B. Sec. 66 of the Ontario Act enables the Judge to revoke the grant of administration in case of failure to furnish the additional security required by him. There is no such provison in our Act.

C. Sec. 68 of the Ontario Act: The Judge may direct the bond to be delivered up to be cancelled where the administrator has passed his accounts and paid into court or distributed all the propert of the deceased. Our Act contains no provision of that kind.

D. Our Act does not contain any provision similar to sec. 67 of the Ontario Act whereby the Judge may allow other security in substitution for that furnished in the first place by the surety for the administrator, and on the substituted security being furnished, the discharge of the surety.

E. Ontario rule 36 provides for accountings in the Surrogate Court by guardians of infants. The Saskatchewan Surrogate Courts have no jurisdiction in guardianship matters.

F. Neither the Ontario Statute nor ours contain any express provision authorizing the Surrogate Court Judges, when passing accounts and approving thereof, to order at the same time the discharge of the executor or administrator. *In re Denton*,[14] MacDonald, J., said: "I am of the opinion that a Surrogate Court

[13] (1860) 29 L.J.P. 138.
[14] (1926) 3 W.W.R. 186 at p. 190.

Judge has no power to make an order releasing executors 'from their executorship.'" But the Ontario Statute (sec. 68) authorizes the Surrogate Court Judge to order, after the passing of the accounts, the administrator's bond to be delivered up to be cancelled; so that if, in that province, the Judge cannot discharge the administrator, he may at least discharge his sureties. There is no provision in our Act corresponding to that one. But under the Saskatchewan (sec. 67) as well as the Ontario (sec. 71) Statutes, if an executor or administrator is required to pass his accounts in the King's Bench or the Supreme Court, a previous approval of such accounts by the Surrogate Court Judge will be binding upon any person who was notified of the accounting proceedings in the Surrogate Court, or was present or represented thereat, except in case of mistake or fraud. Consequently, it does not matter much whether the executors and administrators, whose accounts have been passed and approved of by the Surrogate Court Judge, either in Saskatchewan or in Ontario, may or may not get their discharge from him, because the Statute of each province says that his approval of the accounts will be *res judicata* for the King's Bench or the Supreme Court, as the case may be. The executor or administrator applying for a final order on the accounting should be satisfied to get the Surrogate Judge's approval of the accounts; the effect of such approval is determined by the Statutes and is sufficient for the applicant's purpose.

G. In Ontario the accounts are passed before the Judge in Chambers (rule 36), who has jurisdiction to make full enquiry and accounting of and concerning the whole of the deceased's property in as full and ample manner as may be done in the Master's office under an administration order (sec. 71); and an appeal lies from his determination in like manner as from the report of a Master under a reference directed by the Supreme Court (sec. 34). The practice on such appeals is the same as on an appeal from a Master's report.[15]

No such reference to a Master is found in the Saskatchewan statutes or rules. The Judge refers the accounts to the clerk, whose certificate is subsequently confirmed, discharged or varied by the Judge upon an application made to him for that purpose. Rule 48 states that the practice shall be similar to that followed upon the taking of accounts in the King's Bench, so far as the same is applicable.

[15] (Widdifield, p. 426).

4.—Distribution by the Courts—Insolvent Estates

Under the Nova Scotia Act the Court may order the surplus assets to be distributed among the persons entitled thereto (sec. 74); and the Court may hear evidence and determine who are the persons entitled to participate and the shares which they are respectively entitled to receive (sec. 75). The Court of Probate may also order the real property of the testator or intestate to be divided, or to be sold and the proceeds thereof to be divided (sec. 78).

It may also declare that an estate is insolvent, grant a stay of proceedings against such insolvent estate and provide for its settlement and distribution (sec. 97 and 98).

No such jurisdiction was exercised by the ecclesiastical Courts, and neither the English Court of Probate nor the Probate Division ever possessed it. Ontario and Saskatchewan are also without jurisdiction in this respect.

In Estate McKay,[16] the Supreme Court considered secs. 13 and 18 of the Court of Probate Act in force at the time. Sec. 13 enacted that if the deceased's personal property was insufficient for the payment of the debts and legacies, or the costs and expenses, the Court of Probate could grant a license for selling or mortgaging the real estate; and sec. 18 stated that the undevised real property was to be first sold, mortgaged or leased, unless it appeared from the will that a different arrangement was intended by the testator. The same legislation is still in force in Nova Scotia. Captain McKay had died in 1826, leaving a will which was void in so far as it purported to devise real estate, but which contained a number of pecuniary legacies. The personal assets were short by about 3000 pounds of the amount required to meet the deficiency of the legacies, and an application was made to the Probate Judge for license to sell the testator's real estate. The Probate Judge refused to grant the license. On appeal to the Supreme Court, Young, C.J., said that the personal estate is the fund out of which legacies are primarily payable, and that a testator has the absolute disposition of his estate, real and personal; that Captain McKay's avowed objects were defeated, in respect to the real estate by an improper execution of the will, and with regard to the pecuniary legacies by the insufficiency of the personal estate, but that his intention, which was clear, must prevail for the protection of the heir. He added that the will, being inoperative against the heir by means of a direct devise. could not deprive him of his land indirectly by means of a license for the sale

[16] (1861) 5 N.S.R. 131.

of these same lands to pay pecuniary legacies. Referring to the sale of the real estate to pay the debts and legacies, he said at p. 141:

> That they are put on the same footing in the 13th and 18th sections of our law proves only the absence of due thought in preparing both sections, and the absolute necessity of separating the consideration of the two according to their several natures. Neither section has been the object of judicial inquiry in this Court, and we must derive their meaning chiefly from the decisions of the Courts in Massachusetts.
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> It was assumed at the argument that the discretion of the *Judge of Probate* in the 13th section was limited to his granting a license for the sale of the whole, or only a part of the estate, and it is one of the grounds of appeal that the Judge, in refusing to grant a license at all, acted in direct violation of the law, and infringed upon the rights of the executors. But it is obvious that the Judge has much a larger discretion that would appear at first sight, and while he must exercise it, of course, wisely, and subject to appeal, he has still the power which he has used in this decree.

Bliss, J., approved of the view taken by the Hants County Probate Judge; he said at p. 144:

> The Provincial Act, 32 Geo. 2, ch. 11, sec. 19, recognizing this liability, only pointed out a new mode in the settlement of the estates of deceased persons, by which the real estate might be sold for that purpose; that is, it provided for the granting of a license for the sale of such real estate, instead of compelling parties to resort to the ordinary tribunals of law to effect that purpose. In like manner, as I conceive, with respect to the sale of real estate for the payment of legacies, the statute was intended merely to provide a more expeditious and less expensive way of making it applicable for that purpose, whenever it was then already liable under the law for the payment of legacies. . . . This seems to me the whole object and effect of the two sections (13 and 18) of this statute, and we shall satisfy the whole language and requirements of these by this construction, as was said by Jackson, J., *Ex parte Winslow*[17] in reference to the statute of Massachusetts, which was similar in this respect to our own.

These quotations show the origin of the Nova Scotia Probate Court's jurisdiction on the subject and give an illustration of the manner in which it is exercised. Of course, we have nothing similar to that here. The said sec. 13 was enacted in Massachusetts in 1696 and also in 1720. These two laws are the foundation of the Nova Scotia Act of 1758 above referred to. The application had, under the Act, to be made to the General Assembly, whose jurisdiction in this respect was transferred to the Governor and Council two years later, and, finally, to the Probate Judges. And as for the said sec. 18, Nova Scotia borrowed it in 1842 from Massachusetts.

[17] 14 Mass. Rep. 422.

Another case, *In re Estate of John Simpson,*[18] throws some light on the exercise of the special powers possessed by the Probate Courts of Nova Scotia. The Simpson estate had been finally settled in 1860 by a decree of a Judge of Probate. In 1863 the Commissioners appointed to partition the land allotted their respective shares to the several heirs, but stated that the heirs claimed a piece of land adjoining a marsh lot deeded by the deceased to his son John Simpson and that they were not prepared to point out the bounds of such claim. The partition was confirmed by the Court in 1863, but that piece of land thus clamed by the heirs and by John Simpson remained undivided. In 1873, the Judge of Probate was asked by the heirs to partition that undivided piece of land. John Simpson claimed the land under a deed from the deceased executed in 1846; the heirs alleged fraud, and also that the premises were not included in the said deed. The Court considered that the estate having been settled in 1860, and the administrators discharged, there was no longer any necessity that the jurisdiction of the Judge of Probate should be invoked for the partition of the residue; that it could not be contended that this was a continuation of the former proceedings, as, with the final decree for the settlement of the estate, the power and jurisdiction of the Judge of Probate over any unsold and undivided portion of the real estate of the intestate had ceased. In the course of his reasons for judgment, James, J., said at p. 360:

> The executor or administrator had no power at common law to interfere with the real estate further than that authorized by the terms of the will itself, the heir being the only party interested in it. But the tendency of the law, more especially in the colonies, has been and still is in the direction of gradually breaking down the distinction between real and personal estate; and this object, which still remains as the battle ground of the two great parties of the State in England, has been nearly accomplished by the legislation, if not more enlightened, at least more suited to our own circumstances, on this side of the Atlantic. In this spirit great powers have been given by Statute to the Probate Courts, and they are not only authorized to partition the land among the heirs, but to order it to be leased, mortgaged or sold for the payment of debts. Indeed, for the purpose of settling estates, they are expressly invested with all the extensive powers of the principal Courts of equity, including, as has been already held by the Judges in equity in this case, the power of trying in their little offices in the county towns, without a jury, the title to real estate. The conferring of these extensive powers has arisen from the necessity of the case, as the great majority of the estates to be settled are small and could not afford the expense of having every question respecting them adjudicated upon in the Superior Courts. But it is only so far as these powers are necessary to be exercised in the balancing, arrang-

[18] (1878) N.S.R. 357.

ing and settling of the various and often complicated questions arising between the claimants on estates, that they were called into operation or are suffered to exist. It never was the intention of the statutes which have been passed from time to time, conferring these extensive powers, that they should be exercised except as subsidiary to the main object for which the Acts were passed, namely, the creation of a convenient Court in every county for the settlement in a cheap and summary manner of all questions arising in the settlement of estates of deceased persons.

The legislation in this province commenced in the first year (1790) in which we had a Legislature. The Act 32 Geo. II. c. 11 (1 P.L. 12), was entitled "An Act respecting Wills, legacies and executors and the settlement of the Estates of deceased persons." It was founded, as it appears by a note of the editor, on the laws of the other colonies and especially of the colony of Massachusetts Bay; and it contains the provisions for the partition of land substantially as they now stand in the Revised Statutes. In all this time, it has never been held or contended that the large powers thus conferred on the Probate Court were to be exercised, except to the extent and for the purpose indicated by the title of the original Act.

5. Action for Legacies or for Distribution.

The Surrogate Courts of Ontario and Saskatchewan have no jurisdiction in such actions. The Probate Division has not, and the Probate Court of England had not that jurisdiction.

We have already seen that the Nova Scotia Statute provides for the settlement and distribution of Estates. I will refer to two more cases.

Estate A. McDonald,[19] is a case where a testator gave some land and chattels to his widow and directed the executors to dispose of the rest of the chattels "as I shall hereafter instruct them to do". He never instructed them. The widow claimed one-third before the Probate Judge, relying on sec. 19 of the Probate Act in force at the time, which enacted that "all such estate, real or personal, as is not devised in a will, shall be distributed as if the testator had died intestate." Young, Q.C., contended that this was a devise to executors upon a trust which could be considered only by a Court of Equity, which alone has the power of compelling the fulfilment of a trust. The Probate Court had refused the widow's application; on appeal, the Supreme Court decided that the residue should be distributed among the next of kin. Bliss, J., said:

> The effect of this clause (19) is to give to the Court of Probate that jurisdiction over any undevised portion of the estate which it has where there is an intestacy as to the whole estate, and to prevent the necessity of resorting to a Court of Equity to obtain a distribution in such case, where the

[19] (1853) 2 N.S.R. 123 at p. 135.

only necessity before for resorting to it sprung from the doctrine that the executor took his residue as trustee. And I think it may fairly be taken to have been the object and intention of the Legislature to give this jurisdiction to the Court of Probate wherever there was not such a devise as required a different distribution to be made than that which is given by the statute. The Court of Probate, it must be recollected, has with us an enlarged jurisdiction of an equitable character; as for instance, by the 11th section of this same statute, it is empowered to set off a share of the estate to a posthumous child, though the whole estate has been disposed of by will, and such disposition must be necessarily affected thereby. I think, therefore, that this 19th clause ought to be interpreted largely, so that wherever any part of an estate is to be distributed according to the statute, there this Court shall have jurisdiction to do it.

The other case is a recent one *Estate L. Brent*.[20] I will quote at length from it because it gives an excellent illustration of the exercise by a Probate Court of a special jurisdiction which is not to be found in the Probate Acts of 1858 and 1859, and is not possessed by our Surrogate Courts, not even by the Probate Division of the High Court of England.

Three residuary legatees had assigned their interest to the executor, and the Probate Judge, being of the opinion that he had no jurisdiction to adjudicate as to the validity of the assignment, ignored it altogether and decreed distribution among the residuary legatees. On appeal, Harris, C.J., said:

The questions raised on the appeal are:

1. As to whether or not on the settlement of the estate the Probate Court had jurisdiction to determine the validity of the assignment in question, and

2. Assuming that the Court had not jurisdiction, whether the learned judge should not have stayed the proceedings until the validity of the assignment was determined.

We were referred on the argument to decisions of the Courts in Massachusetts and New York, in which it had been held that the Probate Courts in these States had not jurisdiction to decide such a question. As our Probate Act was originally based on the statutes of Massachusetts, it was contended that these decisions should be followed here.

There are three sections in our Probate Act which I think conclude the matter. I quote them in full:

"67. In the settlement of the accounts of executors or administrators, or in any matter pertaining thereto, the Court shall have the same power which is enjoyed by the Supreme Court.

"71. The court may order the surplus assets remaining after the settlement of the account of an executor or administrator to be distributed among the persons entitled thereto.

[20] (1920) 53 N.S.R. 420 at p. 422.

"72. If there is a contest the Court shall hear evidence and determine who are the persons properly entitled to participate in such surplus assets and the shares which they are respectively entitled to receive.

Section 67 was passed more than sixty years ago and originally conferred upon the Court of Probate the same power in the settlement of the accounts of executors as was enjoyed by the Court of Chancery.

The present reading is the same except that the words "Court of Chancery" were replaced by the words "Supreme Court" after the passing of the Judicature Act.

So far as I am able to find, no such power has ever been possessed by the Probate Court either in Massachusetts or in New York. The section of the Probate Act of Massachusetts to which our attention has been called reads as follows:

"Section 5. The Probate Court shall have jurisdiction in equity, concurrent with the Supreme Judicial Court and with the Superior Court, of all cases and matters relative to the administration of the estates of deceased persons, to wills or to trusts which are created by will or other written instrument. Such jurisdiction may be exercised upon petition according to the usual course of the proceedings in the Probate Court."

It will be seen that the Massachusetts statute conferring equity jurisdiction on the Probate Court is restricted to "cases and matters relative to the administration of the estates of deceased persons, to wills or to trusts which are created by will or other written instrument."

On the other hand, our Probate Act confers such power, "in the settlement of the accounts of executors or administrators or in any matter pertaining thereto."

It is obvious from an examination of the American cases cited that they turn upon the absence of equity powers in the Court of Probate to deal with the matter in question. In the Nova Scotia Act, the power is expressly given and clearly covers the power to deal with the validity of the assignment.

The learned Judge also pointed out that *In re Randall*,[21] decided that where the Court had no jurisdiction to determine the validity of the assignment the proceedings should be stayed to enable its validity to be determined in the proper Court.

The Court decided that the question of the validity of the assignment, whether it was a mere security for money, and, if so, the matter of finding the amount due thereon, were all questions properly arising in the settlement of the accounts, and that the Probate Court had jurisdiction therein under the said Section 67.[22]

The Probate Courts of Nova Scotia, as well as those of New Brunswick, being, in the opinion of the eminent Judges whose opinions I have quoted, "superior", a close study of their powers and jurisdiction was quite in place here. We should bear in mind,

[21] 152 N.Y. 508.

[22] See also: *Estate Oliver Simpson*, 12 N.S.R 357; *Estate Wheelock*, 33 N.S.R. 357; *Re Ives*, 19 N.S.R. 108.

however, that the fact that they have been granted some extraordinary powers which belong generally to superior Courts only does not, alone and by itself, make them superior, any more than the vesting of the District Courts with King Bench's powers in a number of cases has changed the classification of the said District Courts and put them in the "superior" category. Having dwelt somewhat at length on the Nova Scotia Probate Courts, we will now turn our attention to those of New Brunswick.

New Brunswick Statute.

Looking at the New Brunswick Probate Act, I find that "The passing and allowing of any account of a trustee as herein provided shall, subject to appeal to the Supreme Court as in other cases under this Chapter, have the same force and effect as if the accounts had been passed and allowed by the Supreme Court in Equity." The heir, next-of-kin, or legatee may sue for distribution. If, from a deficiency of personal estate to pay the debts and costs of administration, it becomes necessary to apply the real estate therefor, the Judge may make an order licensing the executor or administrator to sell or lease the same. He may make an order licensing the sale of real estate, authorising a lease of land for twenty-one years, or the sale of land, on a creditor's application; he may order the payment of a legacy charged on land, or, in default, the sale of the land as a Court of Equity could do in a like case. If an infant's estate does not exceed $5,000.00, the Judge may appoint a guardian of his person and estate; he may order an allowance to the infant out of the income of the estate, or, if the income be insufficient for the purpose, then out of any available proceeds of such estate, for the maintenance and education of such infant. He may cancel the appointment of a guardian and appoint a new one in his place. He may remove executors, administrators and trustees. But the Act preserves to the Supreme Court in Equity the jurisdiction which, but for the above provisions, it would have in the case of any executor, administrator, trustee or person, or which it has by virtue of any Act or law. Although the Probate Court has, in certain matters, concurrent jurisdiction with the Supreme Court in Equity, the latter may stay the exercise or further exercise by the Probate Court of such concurrent powers.

In *Daly* v. *Brown*,[23] the testator had deposited money in bank in the joint names of himself and a daughter with power in either to draw against it. The Probate Court held, on accounting pro-

[23] [1907] 39 S.C.R. 122, 127.

ceedings, that the monies remained the testator's property and did not pass to the daughter on his death. The said testator's executor had sold to his wife property of the estate for $800.00. The Probate Judge found that the property was worth $1,800.00 and ordered that the executor account for the difference. These decisions were affirmed by the Supreme Court of New Brunswick, and also by the Supreme Court of Canada. Davies, J. (later Chief Justice of Canada), said:

A careful reading of "The Probate Courts Act" of New Brunswick . . . satisfies me that the Probate Courts of that Province have been invested with co-ordinate and concurrent jurisdiction with the Courts of equity over "all the estates of deceased persons in the Province," and as well over the accounts of executors and administrators as such and the distribution of the personal estate of the deceased, as over their accounts as trustees under the will and "over the administration of the trust estate." . . . These concurrent powers are carefully guarded so as to protect all interests concerned. In the first place an appeal is given by section 115, as *of right* to the Supreme Court of the Province from any *final order or decree* of the Judge and when allowed by the Supreme Court or a Judge thereof from *any decision* of the Judge of probate, whether a final order or decree or otherwise.

Secondly, the Supreme Court in Equity or a Judge thereof has power, section 77, in cases where, "concurrent or like jurisdiction," has been given to the Court of Probate, to assume exclusive jurisdiction and to stay the exercise of such concurrent powers by the Probate Court or Judge taking such powers to itself alone.

Section 58 declares that the passing and allowing of any account of a trust as provided in the Act shall subject to appeal *have the same force and effect as if the accounts had been passed and allowed by the Supreme Court of Equity.*

The Court of Probate of New Brunswick possessed these powers as long ago as in 1845, as shown in *Harrison* v. *Morehouse*.[24] A creditor had sued the estate on a note signed by the deceased, and the administratrix produced her accounting before the Probate Court. Chipman, C.J., said:

A very important question arises in this case as to the effect to be given to the proceedings before the Surrogate; and after a careful consideration of the Act of Assembly, 3 Vict. c. 61, entitled "An Act in amendment of the laws relating to wills, legacies, executors and administrators and for the settlement and distribution of the estates of intestates," we are of opinion, that so far as regards the account of the executor the decision of the Surrogate on all matters properly within his cognizance (except where otherwise specially declared) must be deemed final and conclusive, subject to the appeal given by the act to the Court of Chancery; and it will follow of course that the decision of the Court of Chancery on appeal from the Surrogate must be held binding

[24] (1845) 4 N.B.R. 584 at p. 588.

on the Courts of Law in any action brought by creditors against the executor or administrator. . . . In England, as we well know, it has long been customary to settle contested estates under the direction of the Court of Chancery, a bill being filed for that purpose by the executor or creditor; and that Court while it protects the executor from suits at law will compel him to get in and apply the assets upon equitable principles among the creditors: this entails considerable expense upon an estate. The Legislature of this Province has made provision for the settlement of the estates of deceased persons under the direction of the Surrogate Courts, subject to an appeal to the Court of Chancery: the direct and immediate interference of Chancery is not however taken away, nor is the right to bring actions at law against the executor or administrator suspended or limited. . . . It is evident that under the view taken by the plaintiff's counsel, the point in issue under the notice provided for in the thirty-fourth section of the Act 3 Vict. c. 61, would in every separate action brought against the executor involve the whole accounts and transactions of the estate, and lead to almost interminable investigation before a jury; and as the verdict in one case would not be binding on another, different juries, especially where inferences are to be drawn, might arrive at different conclusions, and all might differ from, if they were not controlled by that of the Surrogate Court. To what purpose also, it might be asked, is all the machinery of Surrogate Courts, the expense of investigating claims and accounts, the right of creditors and others to appear and object, and the appellate jurisdiction of the Chancery, if the orders and allowances so made are not to be binding, but everything is to be opened and reopened in each successive suit at law brought to trial.

Doe v. *Robinson*,[25] furnishes another illustration of the exercise by the Probate Court of its special powers. The plaintiff claimed under a deed from an heir, and the defendant claimed under a deed from the administratrix given by her pursuant to a sale under a licence from the Probate Court to sell for the payment of the deceased's debts. The verdict for the defendant was sustained. Carter, C.J., said:

The licence was also put in evidence, dated Sept. 5, 1857, and the petition to the Surrogate, setting out debts due by the estate, and a deficiency of personal assets. To do away with the effect of this deed, evidence was tendered by the plaintiff's counsel, to show that at the time the petition was made to the Judge of Probates, there were no debts due from the estate. It was not objected that the notice to the parties interested, required by *section* 35 of the 1 *Rev. Stat.*, c. 136, was not given; and no question arises on this point. When notice has been given, and a petition, setting out the matters required by the Act, has been presented, the Surrogate Court has an original jurisdiction to determine the matters to which that petition relates, subject to the appeal given by *section* 46 of the same Act; but it appears to us, that the decision of that Court, on matters so brought within its jurisdiction, cannot be questioned in any other way. In the absence of any proof

[25] (1861) 10 N.B.R. 134 at p. 137.

to the contrary, we should think the license of the Judge of Probate to sell, and the deed of the administrator, with the affidavit endorsed, in conformity with the provision of *section* 42, would be sufficient to vest in the grantee of such deed, the title which the testator or intestate had at the time of his death; but we do not say that such deed might be met, by evidence that no notice of the application to the Judges of Probates had been given,—a point which does not now arise; or, if the petition did not show debts due from the estate,—that no such debts existed.

6. Removal to Supreme Court.

Under sec. 33 of the Ontario Act, any contested matters may be removed to the Supreme Court by order of a Judge of that Court, if it is "of such a nature and of such importance as to render it proper that the same should be disposed of by the Supreme Court", and if the deceased's property exceeds $2,000.00 in value.

We have the same provision in Saskatchewan, except that, here, no cause is to be removed unless the estate exceeds $5,000.00 in value. The two following Ontario cases bear on that subject.[26]

In the first case, I find the following :

> Where a fair case of difficulty is made out so that there will be a real contest, the case should be removed, if the amount of the estate brings the case within the statute. There is one reason which has its influence in my own mind, as it has on the minds of some of my brethren. If the case is removed, the opinion of the highest Provincial Court may be taken; while, if the matter remain in the Surrogate Court, this cannot be done.

In the second case the plaintiff had applied to the Surrogate Court for probate of a paper writing purporting to be her late husband's will, and the deceased's sister opposed the propounded will on the ground of mental incapacity of the deceased. Meredith, C.J.C.P., said:

> So that a very real question as to the validity of the will is involved in this case, a question upon which the right to about $30,000.00 worth of property depends; and so obviously, under ordinary circumstances a case for a superior, not an inferior, Court.
>
> And, besides that, the case is one which, no matter what the result of this appeal might be, the defendant could bring into the Supreme Court, under its statute-conferred jurisdiction, "to try the validity of last wills and testaments, whether the same respect real or personal estate, and whether probate of the will has been granted or not."

The Nova Scotia Act does not contain any clause concerning such removal. One may ask:—For what reason did Ontario enact such

[26] *Pattison* v. *Elliott* [1912] 4 D.L.R. 330; *Newcombe* v. *Evans* [1916] 31 D.L.R. 315 at p. 316.

a clause, which was not to be found at the time, at least in so far as I know, in any other part of British North America? I submit that when, in 1858, Ontario enacted that legislation relating to the removal, its Supreme Court had no jurisdiction whatever in probate matters, except the limited one conferred upon it concurrently with the Surrogate Courts in 1849 in connection with the determination of the validity of wills. The removal legislation had the effect of giving to the litigants the privilege of having their issues tried in the Supreme Court in all important cases where they felt that they would get better satisfaction in that Court than in the Surrogate Court. In resorting to the Supreme Court, "the opinion of the highest provincial may be taken; while, if the matter remained in the Surrogate Court, this cannot be done," as Riddell, J., said in *Pattison* v. *Elliott* (*supra*). The removal legislation of 1858 thus gave to the Supreme Court a jurisdiction in probate matters which it did not possess at all (except as to the determination of the validity of wills); and the jurisdiction thus given amounts to practically a concurrent jurisdiction with the Surrogate Courts with this qualification that the removal takes place only if one of the litigants asks for it. Such legislation is not necessary in Nova Scotia, where the concurrent jurisdiction of the Supreme Court and the Probate Court is recognized by Statute: see *Re De Blois*,[27] where Sir Charles Townshend, Chief Justice of the Supreme Court of Nova Scotia, said: "I think there can be no doubt . . . that the jurisdiction of this Court is concurrent with the Court of Probate, in the administration of estates." Neither was it necessary, I submit, in Saskatchewan, where the King's Bench has the same jurisdiction as the Surrogate Courts in probate matters. But the framers of our Act, who followed closely the corresponding Act of Ontario, found it on the Statute book of that province and incorporated it into their own Act.

In so far as Saskatchewan is concerned, the removal legislation did not have the effect of conferring a new jurisdiction on the King's Bench. The jurisdiction already existed in the latter Court. The parties do not have to commence the proceedings in the Surrogate Court; they may resort to the King's Bench in the first instance. But once the proceedings have been started in a surrogate Court, it is open to any party, in certain cases, to apply to have them removed to the King's Bench. This last mentioned Court will, after the removal, exercise a jurisdiction which was already one of its attributes

[27] 8 D.L.R. 68 at p. 69.

in common with the Surrogate Courts. But the removal is not obligatory on the parties; it is left entirely to the discretion of both or either of them. If both are willing to stay in the Surrogate Court, there is no law in existence to prevent them from doing so. If one desires to go to the more important Court, he will be allowed to do so in some cases. The whole thing amounts to this:—The King's Bench and the Surrogate Courts have a similar and concurrent jurisdiction in probate matters, but if one party prefers that the case be tried in the King's Bench, the other party will have to follow him there, provided a certain state of affairs is shown to exist. No Court exercises a concurrent jurisdiction with the Probate Division, and, in Nova Scotia, once a proceeding has started in the Probate Court, it must stay there, although the parties were free to institute them in the Supreme Court in the first instance. The fact remains, however, that the Saskatchewan Surrogate Courts are "superior" in the sense that the English Court of Probate was, and the Nova Scotia Court of Probate is, "superior," because an unlimited jurisdiction in Probate matters is actually vested in them, even though the same jurisdiction exists concurrently in the King's Bench, and even though that concurrent authority, namely the King's Bench, is given the preference when one of the litigants, or both, demand that the case be heard by it. The transfer to the King's Bench is not caused by a lack of power in the Surrogate Court; it is merely accidental, or contingent, depending, as it does, on the desire of one of the litigants, or both. That the King's Bench should have the priority in the exercise of the concurrent jurisdiction is only natural; and that the litigants be given, in important cases, the privilege (which they may or may not see fit to exercise) of resorting to its high authority in preference to the Surrogate Courts, is also quite in order. The King's Bench is a Court of universal jurisdiction; it combines all the powers of the King's Bench, Chancery and Probate, Divorce and Admiralty Divisions, and is, absolutely and in the full sense of the word, a Superior Court.

7. Power to Make Rules of Court and Tariff of Costs.

Under sec. 79 of the Ontario Surrogate Courts Act, the Board of County Judges prescribes a tariff, and also makes the rules of Court; but such tariff and rules will be approved, disallowed or amended by the Judges of the Supreme Court.

In Saskatchewan, the Judges of the King's Bench deal exclusively with the Surrogate rules and tariff.

8. Appeals.

In Ontario, all appeals are to the Appellate Division of the Supreme Court,[28] in like manner as appeals from a County Court, except the appeals from orders made on the passing of accounts or on the determination of creditors' claims, which follow the practice of an appeal from a Master's report.

In Saskatchewan, all appeals, without exception, lie to a Judge of the King's Bench sitting in Chambers.

If a defendant is dissatisfied with the decision of a District Court to the effect that he owes the plaintiff a grocery bill of $51.00, he will appeal to the Court of Appeal,—being the only Court he can appeal to,—and the five Judges of that Court, the highest in the Province, will finally determine that question for him. Let us take now another extreme case, the one of a Surrogate Court which has decided, after a trial with or without a jury, that A. a deceased whose estate amounts to millions of dollars, has died intestate; that B, his alleged wife, was never married to him; that C was his lawful wife, but that, having left her husband and lived in adultery after leaving him, she takes no part in his estate; that D, who claims to be the deceased's son, is an illegitimate child; that E is the deceased's only child and sole heir at law; and that the whole estate goes to E, who shall get the letters of administration. The judgment will be binding upon all the parties to the proceedings, until it is reversed or modified by the Appeal Court. The persons adversely affected by it: B, whose alleged marriage is now deemed to have never taken place; C, who has been adjudged an adulterer, and D, who has been declared to be an illegitimate son, must abide by that judgment and follow its consequences, one of which is to bar them from taking any share in the estate or in its administration, unless and until they obtain a different decision from the appellate Court. The appellate Court, in such a case, is a Justice of the King's Bench sitting in Chambers.

Such an appeal will give to B, C and D the decision of a Justice of the King's Bench on issues which have been previously determined by a Judge of the Surrogate Court, with or without a jury. And no matter how beneficial the relief given by the high authority of a Justice of the King's Bench may be to the parties, they will feel that the determination is far from being conclusive, and that there is still a Court of Appeal who may give to the whole matter quite a different solution. But they cannot resort to that Court without

[28] (*Widdifield*, pp. 421 and 422).

passing first through the King's Bench Chambers. They are less favoured than the other litigant above mentioned, the one who lost a $51.00 suit for groceries bought by him, and who may seek his remedy in the Court of Appeal without any Chambers proceedings intervening in the meanwhile.

The appellant from the Surrogate Court judgment suffers from this additional disadvantage: while the District Court litigants have thirty days within which they may file their notice of appeal, he must himself proceed within fifteen days (Sec. 35 of the Surrogate Courtrs Act).

A Justice of the King's Bench is not bound by the decisions of any of the other six members of that Court. On a question of law which has not been settled yet by the Court of Appeal, but which has already been adjudicated upon by any one, or by all, of the six other members of his Court, he may consider it his duty to disagree with them. It follows that when he sits as a Court of Appeal and hears appeals from Surrogate Courts judgments, he will give to the litigants his own opinion, and not necessarily the opinion of the Court of the King's Bench as a whole. Such litigants are not in the same position as the appellant from a District Court, who is getting a decision from the Court of Appeal; they get only the opinion of one of the seven judges of the King's Bench. Another appellant in a similar case might possibly get a different decision from another judge of the King's Bench. It is as if appellants from Surrogate Courts had seven appellate Courts available to them, instead of one.

Conclusion.

Our Legislature has seen fit in 1907 to establish Surrogate Courts in this Province and to give them the powers and jurisdiction which were then possessed by the Supreme Court, that is to say, the power and jurisdiction which the old Probate Court of England was vested with from 1858 to 1875. That Probate Court exercised its special jurisdiction, which Parliament had assigned to it, to the exclusion of all other Courts. It had, within the limits of its attributions, all the powers it needed for the proper discharge of its duties. There was no hindrance, no interference by any other Court, as long as the Probate Court did not go beyond the powers which it possessed. The Divorce Court, also created in 1857, had similar powers and jurisdiction on another branch of the law. Our Surrogate Courts have not, however, the same freedom of action as the old Probate Court had. The Probate Acts of 1857 and 1858, and our Surrogate

Courts Act, resemble each other closely, and confer to the Courts therein mentioned a jurisdiction which is practically the same in both countries; but the powers transferred to our Courts have been somewhat narrowed down, or rather curtailed and diminished. For instance, a contested case may, under certain circumstances, be taken away from them and transferred to the King's Bench. No such legislation existed in England during all the lifetime of the Court of Probate, and it is unknown in Nova Scotia and New Brunswick. The introduction into Saskatchewan of that disposition of the Ontario law had the effect of creating the impression that the Surrogate Courts are more or less dependencies of the King's Bench. Some appear to think that the remedy which the Surrogate Courts give is sufficient for those who content themselves with it, but that the real forum for any contentious proceeding in probate matters is the King's Bench. An application was once made to a Surrogate Court for an order staying an executor's accounting on the ground that the applicant, who had himself initiated the Surrogate Court proceedings had just started an action in the King's Bench against the executor for an accounting and also for other remedies in respect to which the Surrogate Court was incompetent but the granting of which depended on the result of the accounting. It was strenuously contended that the executor had to account in the King's Bench and that all the trouble and expense he had already gone through in the Surrogate accounting were of no avail. There is no doubt that the impression exists in some quarters that the King's Bench is the only Court that will dispense a complete and fully efficient remedy in contentious probate proceedings as well as in accountings. As a matter of fact, contentious proceedings are not common in Surrogate Courts. Those Courts are kept busy with non-contentious proceedings, with applications for administration and for probate in common form, and also accountings; but litigants who wish to prove a will in solemn form, or to revoke letters probate or letters of administration, or to test the validity of wills, resort generally to the King's Bench. It follows that the very purpose for which the Legislature created the Surrogate Courts is partially defeated. The additional fact that all appeals from Surrogate Court decisions, whether such decisions be given in Chambers or in Court, with or without a jury, lie to a Justice of the King's Bench, tends to encourage the feeling that the King's Bench is the proper Court one should resort to in contentious Surrogate proceedings. Each of the seven Justices of that Court is a Court of Appeal for all the

Surrogate Courts, and as any one of those seven Judges is free, on a question of law, to differ from any other, the litigant cannot escape the conclusion that the determination which he will get from a Surrogate Court must necessarily be an unsatisfactory one, because it is liable to be reversed by any one Justice of the King's Bench who, in doing so, may possibly act contrarily to the opinions already expressed on a similar question by some of the others, or even by all the others. Under such circumstances, the litigant will most likely think it more advantageous for him to obtain in the first instance a determination from a King's Bench Justice, from which he will be at liberty to appeal directly to the highest Court in the Province. I submit, with great respect, that the Surrogate Courts should be given, without any mitigation or curtailment, the powers and standing which the Probate Court of England had. They would thus be in a position to fulfill the purpose for which they were created, i.e., the relieving of the King's Bench of that part of its duties which relates to the determination of probate matters. And in the accomplishment of that object they should be given a free hand. There should be no removal to the King's Bench; appeals from their decisions should lie to the Court of Appeal; and they should make themselves the rules which regulate their own practice. They are,—in my opinion at least,—superior Courts, and any feature or characteristic of inferiority which may be found in the statutes or rules governing them should be removed, with the result that they will be undoubtedly "superior," and treated as such, in the same manner and subject to the same qualifications as the Divorce Court created in 1857[29] the Court of Admiralty under the Admiralty Court Act of 1861,[30] and the Probate Court which came into existence in 1857 (sec. 8 of the Probate Act of 1857) were superior, and as the Court of the County Palatine of Lancaster,[31] is superior. Such changes are necessary to the dignity and prestige of the Surrogate Courts, in order that they be enabled to accomplish properly the objects for which they were created.

Moreover the procedure and practice in contentious matters are somewhat vague and uncertain. My suggestion is that the English Probate rules be adopted here in so far as they may be conveniently applicable. We would thus have the full benefit of the English precedents. The rich treasure of the English decisions bearing on probate law and practice should be available to us in its entirety.

[29] *Foster* v. *Foster*, 32 L.J.Q.B. 312.
[30] *James* v *The London and South-Western Railways*, 41 L.J. Ex. 82, 186.
[31] *Alison's Trusts*, 47 L.J. Ch. 755.

Finally, we should adopt the Nova Scotia laws relating to guardians; to the removal of executors and administrators; to creditors' claims and the settlement of estates; to distribution, and to the settlement of accounts of executors and administrators. The Probate Courts of Nova Scotia appear to have all the powers of the Supreme Court in such cases. Such powers were not possessed by the Probate Court of England, and are not exercised now by the Probate Division, but they have been conferred upon the Nova Scotia Probate Courts, in the words of James, J., in the *Simpson* case (*supra*): "From the necessity of the case, as the great majority of the estates to be settled are small and could not afford the expense of having every question respecting them adjudicated upon in the Supreme Courts." And, a little further on, the learned Judge referred to "the main objects for which the Acts were passed, namely, the creation of a convenient Court in every county for the settlement of estates of deceased persons."

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LAW AND HUMAN PROGRESS.—The cultivation of the highest objects of existence, science, art and religion, is possible only under conditions which the law alone can bring about. To the extent that law operates to further these conditions it levels the road upon which science, art and religion celebrate their triumphal march.

What is in truth a wrong not infrequently stubbornly appears with the form of a right. But wrongs and suffering are the soil upon which the flower of the law blossoms. If not in this day and generation, in another; for man is a temporal and limited being, and is not the measure of things.—*W. M. Hendren.*

LEISURE READING FOR LAWYERS.—It is certain that a lawyer must abandon himself now and then to the lure of fiction. He will not read all the novels—even all the good ones; he will probably not read many. He must select. Let him, then, select those which will mean something to him as a lawyer, will have a special interest for one of that elect profession with all its traditions and its memories, its secrets of the craft.—*J. H. Wigmore.*