W. H. Manning
with Justice Deffell.
with the author's compts
Feb, 28 June
1849

THE ECCLESIASTICAL PRACTICE,

WITH

STANDING RULES AND NOTES THEREON.

W. H Manning

THE

ECCLESIASTICAL PRACTICE,

WITH

STANDING RULES AND NOTES THEREON,

FORMS OF PROCEDURE,

AND WITH

Appendix of Acts and Reports of Cases.

By T. W. GARRETT,

REGISTRAR OF PROBATES.

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PREFACE.

The only Book of Practice, which contained the Standing Rules of the Supreme Court, in its ecclesiastical jurisdiction, having been for many years out of print, and many of the rules comprised therein having become obsolete, it has occurred to the Author to prepare a work which should contain the Standing Rules, the principal forms of ecclesiastical procedure, and a collection of the principal cases decided in our Courts upon points relating to ecclesiastical practice.

In the present work the Author has extended his design, and, in addition to the subjects hereinbefore mentioned, has added notes on the practice, shewing in their order all the steps to be taken in every proceeding in the Ecclesiastical Court, and has at the same time pointed out in what respects the present recognised practice of the Ecclesiastical Court differs from that laid down in the Standing Rules, and where in the opinion of the Author any of those rules has become obsolete, and superseded by a course of practice more in consonance with modern ideas of legal procedure.

These rules of practice, the Author trusts, will be of advantage to the members of the profession, who have been for a long time dependent upon tradition for the practice of the Ecclesiastical Court, but who will now be able at a glance to find out all the steps necessary to be taken in any matter arising in that Court.

The forms given are the most approved in use in this colony.

Although most of the cases set out in Appendix B. are to be found in the Reports, yet the Author has thought it would be for the convenience of the profession to embody in one small volume the whole of the decided cases upon practical procedure in the Ecclesiastical Court.

The Author presents this book to the profession with the utmost diffidence, but with the hope that it may in some degree serve to supply a long felt want.

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LIST OF FORMS.

CONSTITUTION OF THE COURT.

The Ecclesiastical Jurisdiction was, by the Act 4 Geo. IV. c. 96, s. 10, made to depend entirely on the terms and limitations of the Royal Charter. It is provided for in the following terms :—

XIV. And whereas in the said Act of Parliament it is enacted, that the said Courts shall have cognizance of all pleas, civil, criminal, or mixed; and the jurisdiction of the said Courts in all such cases is thereby settled and ascertained; and it is thereby enacted, that the said Courts shall be Courts of *Ecclesiastical Jurisdiction*, and shall have full power and authority to administer and execute, within New South Wales and Van Diemen's Land, and the dependencies thereof, such ecclesiastical jurisdiction and authority as shall be committed to the said Courts, by our Charter or Letters Patent: Now, We do hereby grant, ordain, establish, and appoint that the said Supreme Court of New South Wales shall be a Court of Ecclesiastical Jurisdiction, with full power to grant probates, under the seal of the said Court, of the last wills and testaments of all or any of the inhabitants of that part of the said colony, and its dependencies, situate in the island of New Holland, and of all other persons who shall die and leave personal effects within that part of the said colony; and to commit letters of administration, under the seal of the said Court, of the goods, chattels, credits, and all other effects whatsoever of the persons aforesaid who shall die *intestate*, or who shall not have named an executor resident within the colony—*(vide* In the goods of *Blackwood*, Appendix B., p. 71); or where the executor, being duly cited, shall not appear and sue forth probate, annexing the will to the said letters of administration, when

Probates and Letters of Administration.

such persons shall have left a will without naming any executor or any person for executor, who shall then be alive, and resident within the said colony, and who, being duly cited thereunto, will not appear and sue forth a probate thereof; and to sequester the goods and chattels, credits, and other effects whatsoever of such persons so dying, in cases allowed by law, as the same is and may be now used in the Diocese of London; and to demand, require, take, hear, examine, and allow, and if occasion require, to disallow and reject the accounts of them, in such manner and form as is now used, or may be used, in the said Diocese of London; and to do all other things whatsoever needful and necessary in that behalf. Provided always, and We do hereby authorise and require the said Court, in such cases as aforesaid, where letters of administration shall be committed with the will annexed, for want of an executor applying in due time to sue forth the probate, to reserve in such letters of administration full power and authority to revoke the same, and to grant probate of the said will to such executor, whenever he shall duly appear and sue forth the same. And We do hereby authorise and require the said Supreme Court of New South Wales to grant and commit such letters of administration to any one or more of the lawful next of kin of such person so dying as aforesaid, and being then resident within the jurisdiction of the said Court, and being of the age of twenty-one years; and in case no such person shall then be residing within the jurisdiction of the said Court, or being duly cited shall not appear and pray the same to the Registrar of the said Court, or to such person or persons, whether creditor or creditors or not of the deceased person as the Court shall see fit. Provided always, that probates of wills and letters of administration, to be granted by the said Court, shall be limited to such money, goods, chattels, and effects as the deceased person shall be entitled to within that part of the said colony situate within the island of New Holland.

To whom Letters of Administration to be granted.

Proviso.

Administrators to give bond.

XV. And We do hereby further enjoin and require that every person to whom such letters of administration shall be committed, shall, before the granting thereof, give sufficient security by bond, to be entered into to Us, our heirs, and successors, for

the payment of a competent sum of money with one, two, or more able sureties, respect being had in the sum therein to be contained, and in the ability of the sureties to the value of the estates, credits, and effects of the deceased; which bond shall be deposited in the said Court, among the records thereof, and there safely kept, and a copy thereof shall be also recorded among the proceedings of the said Court.* And the condition of the said bond shall be to the following effect:—That if the above bounden administrator of the goods, chattels, and effects of the deceased, do make, or cause to be made, a true and perfect inventory of all and singular the goods, credits, and effects of the said deceased, which have or shall come to the hands, possession, or knowledge of him, the said administrator, or to the hands or possession of any other person or persons for him; and the same so made, do exhibit, or cause to be exhibited, into the said Court, at or before a day therein to be specified:—and the same goods, chattels, credits, and effects, and all other the goods, chattels, credits, and effects of the deceased at the time of his death (or which at any time afterwards shall come to the hands or possession of such administrator, or to the hands or possession of any other person or persons for him), shall well and truly administer according to law; and further, shall make, or cause to be made, a true and just account of his said administration, at or before a time therein to be specified; and afterwards, from time to time, as he shall be lawfully required. And all the rest and residue of the said goods, chattels, credits, and effects, which shall be found from time to time remaining upon the said administration accounts (the same being first examined and allowed of by the said Court), shall and do pay and dispose of in a due course of administration, or in such manner as the said Court shall direct; then this obligation to be void and of non-effect, or else to be and remain in full force and virtue.

*Not now requisite.

Form of bond, *vide* Form No. 15, p. 26.

XVI. And in case it shall be necessary to put the said bond in suit for the sake of obtaining the effect thereof, for the benefit of such person or persons as shall appear to the said Court to be interested therein (such person or persons from time to time giving satisfactory security for paying all such costs as shall arise from the said suit, or any part thereof), such person or

Suing on the bond.

persons shall, by order of the said Court, be allowed to sue the same in the name of the Attorney-General for the time being of the said colony; and the said bond shall not be sued in any other manner. And We do hereby authorise and empower the said Court to order that the said bond shall be put in suit, in the name of the said Attorney-General.

Passing accounts of executors and administrators.

XVII. And We do further will, order, and require, that the said Court shall fix certain periods, when all persons, to whom probates of wills and letters of administration shall be granted by the said Court, shall, from time to time, until the effects of the deceased person shall be fully administered, pass their accounts relating thereto before the said Court; and in case the effects of the deceased shall not be fully administered within the time for that purpose to be fixed by the said Court, then (or at any earlier time, if the said Court shall see fit so to direct), the person or persons to whom such probate or administration shall be granted, shall pay, deposit, and dispose of, the balance of money, belonging to the estate of the deceased, then in his, her, or their hands, and all money which shall afterwards come into his, her, or their hands, and also all precious stones, jewels, bonds, bills, and securities, belonging to the estate of the deceased, in such manner, and unto such persons as the said Court shall direct, for safe custody. And We require that the said Court shall, from time to time, make such order as shall be just, for the due administration of such assets, and for the payment or remittance thereof, or any part thereof, as occasion shall require, to or for the use of any person or persons, whether resident or not resident in the said Colony and its Dependencies, who may be entitled thereto, or any part thereot, as creditors, legatees, or next-of-kin, or by any other right or title whatsoever.

Commission allowed.

And We further order and direct, that it shall be lawful for the said Court to allow to any executor, or administrator, of the effects of any deceased person (except as herein mentioned), such commission or percentage, out of the assets as shall be just and reasonable for their pains and trouble therein. Provided always that no allowance whatever shall be made for the pains and trouble of any executor, or administrator, who shall *neglect to pass his accounts*, (*a*) at such time, or to dispose of any money, goods,

(*a*) *Re Cullen deceased*, Appendix B. p. 75.

chattels, or securities, with which he shall be chargeable, in such manner, as in pursuance of any general or special rule, or order of the said Court, shall be requisite. And moreover, every such executor or administrator, so neglecting to pass his accounts, or dispose of any such money, goods, chattels, or securities, with which he shall be chargeable, shall be charged with *interest*, at the rate then current within the said colony, for such sum and sums of money, as, from time to time, shall have been in his hands, whether he shall or shall not make interest thereof.

NOTE.—If an executor or administrator has not filed his accounts within the time limited by the Rules (viz., fifteen months from the date of grant), and can shew to the satisfaction of the Court, that it is through some oversight or unforeseen circumstance, and that there has been no "wilful neglect" (vide *Re Cullen, deceased,* Appendix p. 75); the Court may make an order "*nunc pro tunc*" extending the time to file the accounts from the due date until the actual date of filing the same. This course of procedure was instituted by the Chief Justice, and is now followed.

STANDING RULES.

Ecclesiastical Jurisdiction.

The Ecclesiastical Jurisdiction of the Court is conferred, under the authority of the statute, by the Charter, s. 14; by which the power of granting probates and letters of administration is given. The succeeding clauses provide for the taking of bonds from administrators, the suing of parties for breaches thereof, and the passing of the accounts of executors and administrators, to whom, thereupon, a percentage (it is declared) may be allowed.

For the administration of this branch of the Court's jurisdiction, the following rules have been established, of which the greater part were made in the year 1838.

Application for probate.

All applications for Probate of wills, or Letters of administration may be made in vacation by petition to the Judges, or in term by motion, at the option of the applicant.

NOTE.—This rule was practically repealed in the year 1881, when the late Primary Judge instituted the following practice:—"When the gross value of the estate of a deceased person amounted to 500*l.* or more, applications for probates or letters of administration must be made in Court (*i.e.*, by counsel); when the value of the estate was under 500*l.*, but over 100*l.*, in Chambers (*i.e.* by either counsel or proctor); and when under 100*l.*, by petition to the Judges in term or out.

Form No. 10A p. 22.

Affidavits on application for probate.

Applications for probates of wills shall be supported by an affidavit, setting forth the death of the party, the time of his

Forms No. 1 to 7 inclusive to be used on application for probate, pp. 16 to 20.

decease, that he has left a will, and the date thereof, the names of the executor or executors, and the subscribing witnesses thereto; and, if such will be signed by the mark of the testator only, then an affidavit of the due execution shall also be made, by one or more of the subscribing witnesses thereto; and every such affidavit shall be filed, together with the usual oath of the executor or executors, before probate of the will shall be issued.

NOTE.—"Although this rule requires no affidavit of due execution of the will, except where the testator was a marksman, the Court invariably required one since the introduction of the *Wills Act*, 1 Vic. c. 26, to shew that the witnesses were, as required by s. 9, both present 'at the same time.' But in the case of *Walsh*, decided (*vide* Appendix B., p. 74), the Full Court held that no affidavit of due execution was necessary for the purposes of probate, where the attestation clause of the will was in due form, and the terms of the *Wills Act* apparently complied with. Of course where the deceased was a marksman, an affidavit of due execution is still required, containing the clause that the will was read over and explained to the testator prior to execution, and that he appeared perfectly to understand the contents thereof."

Administration to widow or next of kin. For ordinary administration forms, Nos. 11 to 18 can be used, pp. 24-27.

Applications for letters of administration to the widow, or the next of kin of any deceased person, shall be supported by an affidavit setting forth the death of the party, that he died intestate, leaving personal property in the colony, (*a*) the time of his decease, what relations or next of kin he left surviving him, so far as the same can be set forth, and that the party making such application is the widow, or next of kin, of such deceased person, and entitled by law, as she or he believes, to such administration.

Application by creditor.

Form of citation, No. 4, p. 31.

In all cases where a creditor shall intend to apply for letters of administration, he shall (previous to such application) issue a citation, calling upon the widow and next of kin of the deceased person, to appear before the Court on a day therein to be named, to shew cause why administration of the goods of the said deceased should not be granted to such creditor; and the citation shall not be made returnable, in less than fourteen days from the issuing thereof, and shall be three several times published in two public newspapers of Sydney; and the said creditor shall, before the return of the said citation, go before the Registrar and prove his debt; and the said Registrar is

(*a*) See Reg. Gen., 7th Sept., 1883, as to persons dying leaving real estate only. *Post*, page 14.

hereby directed to enquire into the same, and certify to the Court whether such debt is due or not; and no administration shall be granted to such creditor, unless (in addition to the affidavit before required, so far as the particulars required to be stated therein shall be applicable), such certificate, together with an affidavit of the due publication of the citation, and that no caveat has been entered, be exhibited in support of the application.

Form of certificate, No. 26, p. 32.

But now, an advertisement is required in all cases. No administration to any intestate's effects, or probate of any will, will hereafter be granted to any person, except after the expiration of fourteen days after the publication of an advertisement by him (or some proctor on his behalf) in the *Government Gazette*, of his intention to apply for the same. (Reg. Gen., 31st Aug., 1843).

Notice of intention to apply. Forms Nos. 1 and 11, pp. 16 and 24.

Before any letters of administration shall issue, the person to whom the same shall be granted shall cause to be filed, with his administration bond, a separate affidavit of justification of each of his sureties, in the form now used for the justification of bail in actions at law; or as near thereto as the circumstances of the case will allow.

Justification of sureties.

Form No. 16, p. 27.

In all cases where the executors of any will shall neglect or refuse to bring into Court such will, and take out probate of the same, or renounce the execution thereof, *a citation* may issue as of course, after the expiration of *six weeks* from the death of the Testator, at the instance of any party interested in such will, directed to such executors, calling upon them to bring in such will, and take out probate of the same, or renounce the due execution thereof, upon filing an affidavit setting forth the death of the testator, the existence of his will, that the parties against whom such citation is sought to be issued are appointed executors to such will, and that they have neglected or refused to prove the same.

Executors neglecting to prove will.

Form No. 27, p. 32.

Every person, to whom probate or letters of administration shall hereafter be granted, shall, within six calendar months next following, exhibit and cause to be filed in the office of the Registrar and Prothonotary a full, true, and perfect inventory of the goods, chattels, and credits of the deceased; and shall, within

Inventories and accounts to be filed.

fifteen calendar months after having obtained such probate or administration, cause to be made and filed in the same office, a full, true, and just account of his administration (*a*), which account shall be passed before the Court, or in vacation before one of the Judges, at such time or times as shall be thereafter appointed for that purpose; (*b*) and the Registrar shall, upon the taking of the executor's oath (in case of probate), and upon the taking of the administrator's bond (in case of administration), cause a copy of this rule, with a copy of so much of the Charter as relates to the passing of accounts by executors and administrators, to be given to the party taking such oath or entering into such bond, for his information and guidance.

On the first day of every term, the Registrar shall report, in writing to the Court, the names of all the parties who shall, since the commencement of the preceding term, have complied or omitted to comply with the said rule *(c)*. Provided always, that further time for the filing of any inventory or account, under these rules or any of them, may be obtained by order of a Judge, on application for that purpose (and sufficient cause being shewn), through the said Registrar.

Accounts how passed.

As soon as conveniently may be after the filing of any such account as aforesaid, the Registrar shall cause public notice thereof to be given in the *Government Gazette;* and that all parties having claims on the estate, or being otherwise interested therein, may come in before him at his office, at or before a certain time (to be specified in such notice), and inspect the said account, and (if they shall think fit) object thereto; and if, at or before that time any exception shall be taken to such account, the same shall be enquired into and disposed of, and such order or orders, from time to time, for that purpose, be made in the matter, as a Judge shall direct; but if no such objection be made, the account shall or may be passed, upon the oath of the executor or administrator alone, at any time after the expiration of the

Form No. 28, p. 35, and for practice *vide* page 33.

(*a*) Accounts are now passed before the Chief Judge in Equity at all times.

(*b*) This portion of rule never complied with, as it would be impossible to do so.

(*c*) The late Chief Justice, Sir James Martin directed that the practice contained in this rule should be discontinued.

time limited by the said notice, with such allowances and commission, as the Judge auditing the same shall think reasonable.

Disposal of Balances.

Upon any such account as aforesaid being so passed, the balance (if any) remaining upon the same, in the hands of the executor or administrator, not being immediately required for the purposes of the estate, shall be paid into the hands of the said Registrar, and by him into the savings bank, to the credit of the said estate: to remain there invested, in like manner as moneys standing there to the credit of the Collector of Intestates' Estates, and subject to the like rules.

Obsolete.

Suing on administration bonds.

In every case of neglect to comply with the preceding rules, or any of them, the administration bond of the party failing may be put in suit, as provided by the Royal Charter, if the Court shall, on the receipt of the Registrar's report, think fit so to order *(a)*.

Contentious Business

The following are the standing rules respecting the initiation and conduct of suits in relation to wills and administrations :—

Caveats.

All caveats against applications for probates of wills, or letters of administration, shall be entered by a duly authorised proctor of the Court; who shall at the same time file with the Registrar his authority for entering the same, together with an undertaking, (signed either by the party entering such caveat, or by such proctor), to appear to any suit that may be instituted by the party applying for such probate or administration; and no further citation shall be necessary to compel the appearance of the party to such suit.

Form of caveat No. 32, p. 43.

Form of authority No 34, p. 44.

Form of undertaking No. 33, p. 43.

Suits how commenced.

In all cases where a caveat shall have been entered, the party applying for probate or letters of administration shall, by his duly authorised proctor (such authority being first duly filed with the Registrar), enter with the Registrar a brief statement of the nature and grounds of his suit, and the names of the parties against whom it is intended to be commenced; together with a brief schedule, particularising all written documents on which he founds or supports his claim; and the filing thereof shall be the commencement of the suit; and a copy of such statement, together with attested copies (duly examined, certified, and signed by the proctor) of all such written documents as

Form No. 35, p. 44.

(*a*) For procedure under this rule see *post*, page 46.

aforesaid, shall be served within four days after the filing thereof, upon the proctor of the party entering the caveat.

When defendant must appear.

If the defendant resides in Sydney, or within eight miles thereof, he shall have four days after such service, exclusive of the day of service, to appear to such suit; and if he resides above eight miles (and not exceeding twenty-five miles), six days; or if above twenty-five miles (and not exceeding fifty miles), eight days; if above fifty (and not exceeding one hundred), ten days; and if above one hundred miles, fourteen days.

When plaintiff may proceed *ex parte*.

If a defendant, duly served as aforesaid, shall not appear as stipulated in the foregoing rule, by his duly authorised proctor, to defend the suit, then his caveat shall be considered as abandoned, and the plaintiff shall be at liberty (upon filing with the Registrar an affidavit of the due service of the statement, and attested copies of all written documents as before required), to examine witnesses if necessary, and enter his cause for hearing, so as to obtain a sentence *ex parte*.

Admission or denial of claim.

When the defendant shall appear, he shall be bound to enter with the Registrar, within eight days after the time limited for appearance, an admission or denial of the plaintiff's claim, as contained in the statement filed; together with a brief statement of the points of law, or matters of fact, or both, on which he rests his defence; and shall also enter therewith a brief schedule of all written documents on which he relies in support of his defence; and at the same time hand over to the plaintiff's proctor an attested copy of such defence and schedule, together with attested copies of all the written documents contained therein, if demanded; whereupon issue shall be deemed joined between the parties.

Setting down.

When issue is thus joined, either party on giving eight days' notice to the other, may set down the cause for hearing before one of the Judges, on any Friday during term; and both parties shall be at liberty to subpœna their witnesses, for the day on which the cause is set down to be heard, in the same manner as in a trial at law.

NOTE.—The following is the practice at present in vogue:—"After the statement of defence is filed, the plaintiff takes out a Chamber summons before the Chief Judge in Equity, to settle the issues to be tried, and to fix the time and mode of trial, and whether with or without a jury, as the parties may agree

upon between themselves, or in case of disagreement, as the Court shall direct. All causes are now set down for trial on a day fixed by the Chief Judge in Equity."

Postponing Hearing.

The practice prescribed by the rule for regulating proceedings at law shall be observed, when either party shall apply to postpone the hearing; and such affidavit as therein mentioned shall be required, whenever an application is made to postpone the hearing on account of the absence of a material witness; and the same course as prescribed by the rules for regulating proceedings at law, shall also be observed in all cases where it is necessary to examine any witness under a commission or *de bene esse.*

Parties making default.

If in any stage of the suit, the plaintiff shall make default in duly proceeding, then the defendant, having entered a note of such default with the Registrar, shall thereupon be absolved from the suit, and entitled to all such costs as he may have incurred by the proceedings; and the plaintiff shall be compelled to pay all such costs, before he be allowed to institute any new suit; and the defendant shall be at liberty to recover the same in like manner as at law; but if the defendant make any such default, then the plaintiff, after having duly entered the same with the Registrar, shall be at liberty to proceed *ex parte.*

Proceeding at Hearing.

On the day of hearing, the Registrar shall bring into Court all entries, minutes, and documents in his possession, relative to the suit, and the parties shall proceed at such hearing in the same manner as at a trial at law; save that the evidence of each witness shall be taken down in writing by the Registrar, and repeated in open Court to the witnesses respectively giving the same; and shall be filed of record with the other proceedings in the cause, together with copies of all documents and papers, which have been produced and given in evidence at such hearing; and after the case shall have been gone through by both parties, the Judge shall then, or at such other time as he shall appoint, proceed to declare his sentence, and adjudication of costs, in open Court; all which shall be duly minuted and entered with the other proceedings in the cause, by the Registrar.

Matters referred to Registrar.

In case of an interlocutory Sentence, referring any matter to the Registrar, an early day shall be appointed by him, on application of either party, for the parties to attend him; and such appointment, being duly signified to the other parties respectively, shall be sufficient warrant for the said Registrar to proceed without any further notice, and to continue such proceedings "*de die in diem*," or at such other brief intervals as the said Registrar may deem expedient, until he shall have completed his investigation; and in all cases where (in consequence of any such reference) it shall be necessary for the Registrar to examine any parties, claimants, or witnesses, he shall be at liberty at his discretion to examine them, or any of them, either upon written interrogatories, or *viva voce*, or in both modes, as the nature of the case may require; the evidence upon such examination being taken down at the time by the Registrar (or his clerk in his presence) and preserved, in order that the same may be used by the Court if necessary; and the said Registrar shall issue the like subpœna as at law, for the attendance before him of any witness he may require, at the expense of the party on whose behalf such witness shall be required.

Re-hearing.

When the Sentence pronounced by the Judge shall be in itself or in its nature definitive, it shall be open for any party dissatisfied therewith to file with the Registrar, within four days after such Sentence shall have been pronounced, exclusive of that day, a notice of his intention to move by way of Appeal, for rehearing of the said cause before the Full Court, such notice to set forth, in a brief and compendious manner, the day on which such cause was heard, the name of the Judge who heard the same, and the grounds upon which such motion is intended to be made. And the said party shall, within the like time, deliver to the Judge who heard the cause a copy of such notice, accompanied with a request to bring his notes to Court, on the day appointed for hearing such motion. And the Registrar shall cause such notice, and the evidence taken in the said cause, to be produced in Court at the hearing of the said motion. And at the said hearing, the party filing such notice shall begin, the party shewing cause shall follow, and the party in support of the motion

shall reply. And if the party shall neglect to file such notice, within the time and in the manner hereby directed, then the sentence may be carried into execution, without any rule or other notice for such purpose; Provided always, that no new matter shall be urged, new documents filed, or new evidence gone into, unless the Court shall expressly require the same for its own satisfaction; or it shall appear that evidence, ready to be adduced on either side, has been improperly excluded.

Execution of sentence.

In the event of no Appeal being entered from any Sentence, or when any definitive sentence shall be given on any Appeal, the same shall be carried into execution in the same manner as any judgment at law.

Fees.

The like fees shall be allowed to the proctors of this Court, for instructions, special petitions, affidavits, and pleadings, and for drawing and copying any pleading, or document, and for attendance thereon, as shall be allowed for business done on the Equity side of this Court, and that the proper officers of the Court do tax and allow all bills of costs accordingly.

Sale, &c., of Real Estate under Act 26 Vic. No. 20.

In pursuance of the authority vested in us by the "Real Estate of Intestates Distribution Act of 1862," to make rules from time to time for the ordinary guidance of administrators in relation to real estate administered as personal estate, either by inserting the same in letters of administration, or promulgating the same in like manner with other general rules affecting the practice of the Court. We do order and direct that administrators of intestate estates shall not be at liberty to make sale of any real estate in their hands under letters of administration, or to grant leases thereof for more than one year, or from year to year, without having first obtained the order of a Judge of the Court under the third section of the said Act. Provided that the Judge granting administration in any case may, upon special grounds then set forth, make order as to the letting, management or sale of the real estate concurrently with such grant of administration. Provided also that the Judge, making any such order, whether concurrently with the grant of administration or otherwise, shall require security to be given for the due and proper application and administration of the proceeds of the real estate, under administrations as to him shall seem fit. All letters of

For memorandum and procedure under this rule, *vide* p.37

Proviso.

Proviso.

administration of the estates of intestates shall be expressed to be subject to restriction as to the sale or letting of the intestate's real estate, or to special authorisation in respect thereof, as the case may be, in accordance with the preceding rule. (*Reg. Gen.*, 2*nd Feb.*, 1883.)

Administration where Real Estate only.

In pursuance of the authority vested in us by the "Real Estate of Intestates Distribution Act of 1862," to make rules from time to time for the ordinary guidance of administrators in relation to real estate administered as personal estate; and also to make such other special orders as to us may seem fit and in pursuance of any other authority vested in us: We do order and direct that whenever on application for letters of administration it shall appear that the deceased person has died intestate, in respect of any real estate and without leaving any personal estate, such letters of administration may be granted to such person as would be entitled thereto, in case the person so dying intestate had died leaving personal estate. (*Reg. Gen.*, 7th Sep., 1883.)

CASES NOT PROVIDED FOR IN STANDING RULES.

The four following paragraphs refer to cases, which are not specially provided for in the Standing Rules, and the procedure laid down therein is based upon decisions of this Court, and generally speaking follows that pursued in England :—

Administration with will annexed. Form of grant No. 21, p. 29. Form of affidavit of administrator, C.T.A. No. 22, p. 29.

When a testator makes a will, and either appoints no executor therein, or the executor named renounces the probate thereof, or dies, or becomes incapable to act before taking out probate, the Court then appoints some one to act as administrator, generally the person taking the greatest interest under the will (*e.g.*), the universal legatee or the residuary legatee.

In the estate of Martin, 30th April, 1844, where probate of the testator's will was granted in England, the Judges held that they could not grant probate here, but that the proper course is to grant administration with the exemplification of the will annexed, and that to this, the agent of the executors (or agents, if the power of attorney be to more than one agent), will be entitled as of course. But in such case, as in all others where administration is granted, security must be given; this being a condition

with which (see Charter of Justice, sec. xv.) the Court has no power to dispense.

Where there are several executors appointed by a will, and they do not all prove in first instance, leave is reserved, in original grant of probate, to the others to come in and prove if they shall think fit (*i.e.*, of course if they do not renounce); on coming in they obtain what is called a grant of *double probate*. To obtain this they are required to give ordinary notice in *Government Gazette*, file affidavit of publication and no caveat, and an affidavit of executor, as in ordinary cases of probate (form No. 3), with an office copy of the will annexed thereto, and on the application being granted by the Court, the grant is either endorsed on the original probate, or a fresh one issued. The Stamp Commissioner requires that the ordinary stamp affidavits should also be filed.

Double probate.

Form of grant No. 8, p. 20.

If an administrator of an intestate estate dies, without having fully administered the estate of the deceased, the Court will grant administration of the estate, so left unadministered, to the next of kin of the original intestate. This grant is called "*Administration de bonis non administratis.*" The ordinary affidavits used in a case of simple administration, with the exception of that of death (which is not required), are used on this application, and the original letters of administration are brought in, and left in the Registry. Of course grants of this nature are issued in cases other than those of intestacy; for instance, where an executor takes out probate, and dies without having fully administered the estate of his testator, and does not appoint an executor, the Court will then grant administration *de bonis non, cum testamento annexo*, to the person taking the greatest interest in the estate of the original deceased.

Administration *de bonis non*.

Form of grant No. 20, p. 28.

Administration *durante minore ætate* is granted where an intestate dies, leaving all his next of kin under age, and therefore incapable of taking administration. The Court then grants administration to the guardian of the next of kin, limited till one of such next of kin attains the age of twenty-one years. "With respect to the appointment of guardian a distinction exists in the Court of Probate between an infant and a minor. The former is so denominated if under seven years of age, the latter from seven

Administration *durante minore ætate*.

Form of grant No. 19, p. 28

to twenty-one. The Court *ex officio* assigns a guardian to an infant; the minor himself may nominate his guardian, who is then admitted in that character by the Judge, but if the minor makes an improper choice, the Court will control it. According to the practice of the Prerogative Court, the guardianship was granted to the next of kin of the child, unless sufficient objection to him was shewn." *Williams on Executors*, 8th edition, pp. 488, 489.

For form of election see No. 23, p. 30.

PRACTICE TO BE OBSERVED ON APPLYING FOR PROBATES, OR LETTERS OF ADMINISTRATION.

On receipt of instructions to apply for probate, or letters of administration, insert notice in *Government Gazette* in terms of instructions; prepare affidavits, &c., in support thereof, to be sworn before a commissioner for affidavits only (*a*), after the expiration of the notice (14 days), or as soon thereafter as papers ready; attend at probate office, search for caveat, and if none filed, leave papers and engrossment with Registrar for approval; attend subsequently to see if papers approved; and if so, deliver same to counsel, with brief for motion in Court on sitting day. If application granted, attend at stamp office on receipt of notice to pay duty, and on following day, at Probate Office to receive parchment completed.

(No. 1.)

NOTICE IN GAZETTE.

In the Supreme Court of New South Wales.

Ecclesiastical Jurisdiction.

In the will of late of in the colony of New South Wales deceased.

Notice is hereby given that after the expiration of fourteen days from the publication hereof in the New South Wales Government Gazette application will be made to this Honourable Court in its Ecclesiastical Jurisdiction that probate of the last will and testament of the abovenamed deceased who died on the day of 18 may be granted to the executors in the said will named.

Dated this day of A.D. 18 .

Proctor for the said executor

Sydney.

(*a*) *In the Goods of Stubbs.*—On an application for administration in this estate, it appeared that the affidavits in support thereof had been sworn before a Justice of the Peace. The Chief Justice, to whom the application was made, pointed out that the Court could not receive these documents as affidavits, as under

(No. 2.)

AFFIDAVIT OF PUBLICATION AND NO CAVEAT.

In the Supreme Court of New South Wales.

Ecclesiastical Jurisdiction.

In the will of late of in the colony of New South Wales deceased.

On this day of in the year of Our Lord one thousand eight hundred and eighty of in the colony of New South Wales being duly sworn maketh oath and saith as follows:—

1. A true copy of the notice hereunto annexed marked "A" was inserted in the Government Gazette of New South Wales of date the day of last past.

2. I have searched in the proper office of the Supreme Court, and I find that no caveat has been entered against the granting of the said probate.

Sworn by the deponent the day first abovementioned at Sydney before me

A Commissioner for Affidavits.

(No. 3.)

AFFIDAVIT OF EXECUTOR.

In the Supreme Court of New South Wales.

Ecclesiastical Jurisdiction.

In the will of late of in the colony of New South Wales deceased.

On the day of in the year one thousand eight hundred and eighty of in the colony aforesaid being duly sworn maketh oath and saith as follows:—

1. The abovenamed deceased departed this life at in the colony aforesaid on or about the day of in the year one thousand eight hundred and eighty having first duly made and published his last will and testament in writing dated the day of in the year one thousand eight hundred and eighty whereby he appointed me this deponent sole executor (or as the case may be) thereof.

2. (*b*) The document produced and shewn to me at the time of swearing this my affidavit and marked with the letter "A" is I believe the last will and testament of the abovenamed deceased and the attesting witnesses thereto are and

3. The said deceased had whilst living and at the time of his death goods chattels credits and effects within the colony of New South Wales.

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the Act 37 Vic. No. 10, Justices of the Peace are only empowered to take affidavits in matters pending in the Courts, and his Honor held that applications for probates and letters of administration were not matters *pending* in the meaning of the Act.

(*b*) Clause 2. of *affidavit* is required since the decision of the Court in *The Will of Walsh* (*vide* Appendix B., p. 74), that no affidavit of attesting witness is necessary where attestation clause is in terms of the *Wills Act*, thus identifying the document sought to be proved as the last will.

4. I will pay all the just debts and legacies of the said deceased so far as the goods chattels credits and effects of the said deceased will extend and the law bind me and I will exhibit a true full and perfect inventory of all and singular the goods chattels credits and effects of the said deceased together with a just and true account of my administration thereof unto the Registry of the Supreme Court when I shall be lawfully called thereunto.

5. The said goods chattels credits and effects are under the value of

Sworn &c. &c.

(No. 4.)

AFFIDAVIT OF DEATH.

In the Supreme Court of New South Wales.

Ecclesiastical Jurisdiction.

In the will of late of in the Colony of New South Wales deceased.

On this day of in the year one thousand eight hundred and eighty in the colony of New South Wales being duly sworn maketh oath and saith as follows :—

1. The said deceased departed this life at aforesaid on the day of in the year one thousand eight hundred and eighty

2. I knew and was well acquainted with the abovenamed deceased in his lifetime and I saw his dead body after his decease that is to say on the day of one thousand eight hundred and eighty .

3. I am not interested in the estate of the said deceased .

Sworn by the deponent the day first abovementioned at before me

Commissioner for Affidavits.

(No. 5.)

AFFIDAVIT OF ATTESTING WITNESS.

In the Supreme Court of New South Wales.

Ecclesiastical Jurisdiction.

In the will of late of in the colony of New South Wales deceased.

On the day of in the year one thousand eight hundred and eighty in the colony of New South Wales being duly sworn maketh oath and saith as follows :—

1. The document hereunto annexed and marked with the letter "A" purporting to be the last will and testament of the abovenamed late of aforesaid deceased was duly executed by the said by signing name at the foot or end thereof as the same now appears thereon in lifetime as and for last will and testament on the day of one thousand eight hundred and eighty in the presence of myself this deponent and present at the same time and we at request in presence and in the presence of each other subscribed our names thereunto as witnesses.

2. That the signatures are respectively of the proper handwriting of myself this deponent and of the said .

*a*3. Prior to the execution of the said will by the deceased the same was read over and explained to him and he appeared perfectly to understand the nature and contents thereof.

Sworn by the deponent the first day abovementioned at before me.

Commissioner for Affidavits.

(No. 6.)

STAMP AFFIDAVIT.

New South Wales to wit.

In the will [or in the goods] of late of in the colony aforesaid deceased.

On the day of one thousand eight hundred and eighty being duly sworn maketh oath and saith as follows:—

1. I am the party making application for the purpose of obtaining probate of the will [or letters of administration of the goods chattels credits and effects] of the abovenamed deceased.

2. The estate and effects of the said deceased, of which administration is sought to be obtained as shewn in the annexed inventory after deducting the debts due and owing by the deceased are under the value of to the best of knowledge and belief.

Sworn by the deponent on the day first abovementioned at before me.

A Commissioner for Affidavits.

A full inventory shewing the particulars and value of the estate the testator or intestate died possessed of on the one page and the debts due and owing by the deceased on the other page (see Form below) must accompany this affidavit.

INVENTORY REFERRED TO IN THE PRECEDING AFFIDAVIT.

Full particulars and value of the estate and effects of the deceased.		Full particulars of the debts due and owing by the deceased.		
Particulars.	Value. £ s. d.	*Date of Debt.	Particulars.	Amount. £ s. d.
If no Real Estate—the same to be so stated.				
Total assets				
Deduct total debts...				
Net value on which duty is chargeable.			Total Debts ...	

(*a*) If the testator were a marksman. *Insert date when debt contracted.

(No. 7.)

PROBATE.

In the Supreme Court of New South Wales.

Ecclesiastical Jurisdiction.

No.

Be it known unto all men by these presents That on the day of one thousand eight hundred and eighty Probate of the last will and testament of late of in the colony of New South Wales deceased (a true copy whereof is hereunto annexed) was and is hereby granted to the sole executor [or as the case may be] in the said will named. He having been first duly sworn that he will pay all the just debts and legacies of the said deceased so far as the goods chattels credits and effects of the said deceased will extend and the law shall bind him and that he will otherwise well and faithfully administer the said goods chattels credits and effects according to law and that he will exhibit a true full and perfect inventory of all and singular the goods chattels credits and effects of the said deceased together with a just and true account of his administration thereof unto the Registry of this Honourable Court when he shall be lawfully called thereunto and lastly that he believes the said goods chattels credits and effects do not amount in value to the sum of

Testator died day of A.D. 188 .

Personal estate sworn under £ .

Dated at Sydney this day of in the year of our Lord one thousand eight hundred and eighty

Registrar of Probates.

Extracted by

Proctor for executor

(No. 8.)

DOUBLE PROBATE.

In the Supreme Court of New South Wales.

Ecclesiastical Jurisdiction.

Be it known unto all men by these presents that on the day of one thousand eight hundred and eighty Probate of the last will and testament of late of in the colony of New South Wales deceased was granted to one of the executors in the said will named with leave reserved to the other executor therein named to come in and prove the same when he should be so advised. *Be it therefore further known* that on the day of one thousand eight hundred and Probate of the last will and testament of the above-named deceased (a true copy whereof is hereunto annexed) was pursuant to such leave reserved as aforesaid granted to the said the other executor in the said will named he having been first duly sworn that he will pay all the just debts and legacies of the said deceased so far as the goods chattels credits and effects of the said deceased will extend and the law bind him and that he will otherwise well and faithfully administer the said goods chattels credits and effects according to law and that he will exhibit a true full and perfect inventory of all and singular the goods chattels credits and effects of the said deceased together with a just and true account of

his administration thereof into the Registry of this Honourable Court when he shall be lawfully called thereunto. And lastly that he believes the said goods chattels credits and effects do not amount in value to the sum of

Dated at Sydney this day of in the year one thousand eight hundred and

Registrar of Probates.

Extracted by
Proctor for executor

(No. 9.)

EXEMPLIFICATION OF PROBATE.

In the Supreme Court of New South Wales.

Ecclesiastical Jurisdiction.

We Sir Frederick Darley Knight Chief Justice William Charles Windeyer Esquire Sir Joseph George Long Innes Knight Matthew Henry Stephen William Owen George Hibbert Deffell and William John Foster Esquires Puisne Judges of the Supreme Court of New South Wales to which Court all matters concerning the granting of probates and letters of administration within the colony of New South Wales are by law committed send greeting: We hereby make known to you that on searching the Registry of the said Court in the archives thereof there kept we have found that on the day of before the said Supreme Court probate of the last will and testament of late of in the colony aforesaid deceased was by the said Court there then committed to of in the colony aforesaid the sole executor named in and appointed by the said will he having been first duly sworn well and truly to administer the goods chattels credits and effects of the said deceased and pay the lawful debts and legacies of the said deceased and to make a true and perfect inventory of all and singular the goods chattels credits and effects and exhibit the same into the Registry of the said Court and also to render a just and true account thereof when lawfully required so to do which will follow in these words to wit

[Copy Will.]

In testimony whereof we the said Chief Justice and Puisne Judges of this Court have caused these letters testimonial to issue forth and be corroborated by affixing thereto the seal of the said Supreme Court of New South Wales this day of in the year one thousand eight hundred and eighty

Registrar of Probates.

(No. 10.)

RENUNCIATION.

In the Supreme Court of New South Wales.

Ecclesiastical Jurisdiction.

Whereas late of in the colony of New South Wales deceased died on the day of 188 and whereas he made and duly

executed his last will and testament bearing date the day of 188 and thereof appointed executor.

Now I the said do hereby declare that I have not intermeddled in the personal estate and effects of the said deceased and will not hereafter intermeddle therein with intent to defraud creditors and I do hereby expressly renounce all my right and title to the probate and execution of the said will of the personal estate and effects of the said deceased and I hereby appoint of my proctor to file or cause to be filed this renunciation for me in the proper office of this Honourable Court.

In witness whereof I have hereunto set my hand and seal this day of 188 (L.S.)

Signed sealed and delivered by the said in the presence of

Witness.

(No. 10A.)

PETITION.

(To be used on application for probate and letters of administration where the gross amount of the estate does not exceed £100.)

In the Supreme Court of New South Wales.

Ecclesiastical Jurisdiction.

In the of late of in the colony of New South Wales deceased

To their Honors the Chief Justice and the Puisne Judges of this Honourable Court

The humble petition of in the colony of New South Wales the executor named in the last will and testament of the abovenamed deceased (or in case of intestacy the and next of kin of the said deceased) sheweth:—

1.—That late of in the colony aforesaid deceased departed this life on the day of last having first duly made and published his last will and testament bearing date the day of in the year one thousand eight hundred and (or intestate)

2.—That your petitioner is the sole executor in the said will named (or the and next of kin of the said deceased or as the case may be)

3.—That the said deceased was at the time of his death possessed of goods chattels credits and effects within the colony of New South Wales

4.—That your petitioner has caused notice of his intention to apply for probate of the said last will and testament (or letters of administration) to be published in the *Government Gazette* of the said colony and no caveat has been entered herein

Your petitioner therefore humbly prays that probate of the said last will and testament (or letters of administration may be granted to him as such as aforesaid and your petitioner will ever pray &c

Dated this day of in the year one thousand eight hundred and

Proctor for the

ADMINISTRATION.

The practice to be observed on applying for letters of administration in an ordinary intestacy, is similar to that given under the head of probate; but the following few remarks, as to the several persons entitled to a grant of letters of administration, and as to the amount of penalty in the bond to be entered into prior to obtaining such letters, may be found useful to the profession.

Who entitled to Administration.

Under the Charter of Justice, section XIV., "The Court was authorised to grant and commit letters of administration to any one or more of the lawful next of kin, &c." The practice followed in the Ecclesiastical Court here, prior to the 3rd June, 1886, was to grant letters of administration as a matter of course to the widow, or the husband (as the case might be), of an intestate, without reference to the next of kin, thus following the practice in force in the English Courts. But on the above date, on an application in the intestate estate of "Wm. Vivers, deceased" (*vide* Appendix B., p. 77), the late Primary Judge, Sir William *Manning* granted administration to the eldest daughter of the deceased, in preference to the widow, holding that if any of the next of kin applied for administration the Court was bound, under the above section of the Charter of Justice, to grant it to such next of kin. The practice followed since the decision is to grant administration to the widow, if the children of deceased are under age, or if of age, they consent to the application, or do not appear on citation;—and the same principle will apply to next of kin other than children, provided they be entitled in distribution. Of course, if the next of kin reside out of the jurisdiction, the widow will obtain grant without consent or citation.

The above principle will also apply in the case of a husband applying for administration of his deceased wife's estate; even though the estate consists of personalty, and the husband is entitled to the whole thereof, he will have to obtain the consent of, or cite, the next of kin (if of age), before the Court can grant him administration.

Penalty of Bond.

Section XV. of the Charter of Justice requires "that the bond should be entered into for the payment of a competent sum of

money, with one, two, or more able sureties, &c., &c." If the estate of an intestate consists of personalty only, a bond for double the gross amount of the estate is generally required; where the estate consists of both realty and personalty, and a power of sale over the real estate is obtained, the bond is then also required for double the amount of the whole estate, but less the secured debts (if any). But if a power of sale be not required, the Court will be satisfied with a bond for double the personal estate only, if greater than unsecured debts, but if less, then for double the amount of the unsecured debts. The above practice does not apply in the case of an administrator being solely entitled to the estate; in such a case the Court will accept a nominal bond, merely enough to cover the debts of the deceased; and also in cases of persons acting under a power of attorney from the next of kin out of the jurisdiction, the bond will be fixed (in the discretion of the Court) at a nominal amount.

Rule hereon, *ante*, p. 13.

The Court cannot dispense with the bond in any case, but may accept one surety only.

In respect to the form No. 18 (*post*, page 27), Letters of Administration, the following note should be attended to:—

If the deceased left real estate, and the Court on the application for administration grants the administrator a full power of sale, insert the following words after the grant, "with full power to let, sell and manage the real estate of the said deceased, and". If the power of sale be coupled with any conditions as to the payment of the money to arise from sale, &c., endorse order on the letters and file copy.

If no power of sale is applied for, or if applied for, refused, insert the following proviso at the end of the letters:—"Provided that no sale of the real estate of the said deceased or any lease thereof for more than one year or from year to year shall be made or granted by the said administrat without an order of a Judge of the Court being first obtained authorising the same under the 3rd section of the Act 26 Vic. No. 20."

The following forms will be necessary on applications for letters of administration—

(No. 11.)

NOTICE IN GAZETTE.

In the Supreme Court of New South Wales.
Ecclesiastical Jurisdiction.
In the estate goods chattels credits and effects of in the colony

of New South Wales deceased intestate.

Notice is hereby given that after the expiration of fourteen days from the publication hereof in the New South Wales Government Gazette application will be made to the Supreme Court of New South Wales in its Ecclesiastical Jurisdiction that letters of administration of all and singular the estate goods chattels credits and effects of late of in the colony of New South Wales deceased intestate (who died on the day of A.D. 18) may be granted to of in the colony aforesaid the (widow or next of kin as the case may be) of the said deceased.

Dated at Sydney this day of in the year one thousand eight hundred and .

Proctor for the said .

(No. 12.)

AFFIDAVIT OF PUBLICATION AND NO CAVEAT.

Same as No. 2. On application for Probate..

(No. 13.)

AFFIDAVIT OF ADMINISTRATION.

In the Supreme Court of New South Wales.

Ecclesiastical Jurisdiction.

In the goods chattels credits and effects of late of in the colony of New South Wales deceased intestate.

"Real estate" before "goods" throughout (if any).

On the day of in the year one thousand eight hundred and eighty in the colony of New South Wales being duly sworn maketh oath and saith as follows :—

1. I am the (*a*) of the said deceased.

2. The said deceased departed this life on or about the day of one thousand eight hundred and eighty intestate (*b*), having at the time of death goods chattels credits and effects in the colony of New South Wales and leaving me this deponent (*c*) and (*d*) only next of kin surviving.

3. I will well and truly administer the goods chattels credits and effects of the said deceased and pay just debts so far as the same will thereunto extend and the law charge me and I will make a full true and perfect inventory of all and every the goods chattels credits and effects of the said deceased and exhibit the same together with a just and true account of my administration into the Registry of the Supreme Court of New South Wales when I shall lawfully be called thereunto. And I believe the said goods chattels credits and effects of the said deceased are under the value of (*e*)

4. The deceased had no real estate at the time of his death.

Insert par. 4 if no real estate.

Sworn by the deponent the first day above-mentioned at before me

Commissioner for Affidavits.

(*a*) State relationship.

(*b*) Bachelor, or widower without issue, or as the case may be, so as to clear off all prior rights (if any).

(*c*) Relation to deceased.

(*d*) Set out next of kin surviving at death of deceased, unless applicant is the only person originally entitled in distribution.

(*e*) Gross value of assets.

(No. 14.)

AFFIDAVIT OF DEATH.

Same as No. 4. On application for Probate.

(No. 15.)

ADMINISTRATION BOND.

Know all men by these presents that we of in the colony of New South Wales of in the colony aforesaid and of in the colony aforesaid are jointly and severally held and firmly bound unto Her Majesty the Queen her heirs and successors in the sum of pounds of lawful British money to be paid to Her said Majesty her heirs and successors for the due payment whereof we bind ourselves and each and every of us and for the whole our heirs executors administrators and assigns by these presents.

Dated this day of in the year of our Lord one thousand eight hundred and eighty .

The conditions of the above written bond or obligation are such that if the above bounden the intended administrat of all and singular the (*a*) goods chattels credits and effects of late of in the colony aforesaid do make or cause to be made a true and perfect inventory of all and singular the goods chattels credits and effects of the said deceased which have or shall come to the hands possession or knowledge of the said or into the hands possession or knowledge of any person or persons for and the same so made exhibit or cause to be exhibited into the Registry of the said Supreme Court of New South Wales within six months from the date of the grant of letters of administration herein and the same goods chattels credits and effects of the said deceased and all other the goods chattels credits and effects of the said deceased at the time of death or which at any time hereafter shall come into the hands or possession of the said as such administrat or into the hands or possession of any other person or persons for shall well and truly administer according to law. And further shall make or cause to be made a true and perfect account of administration within fifteen months from the date of the grant of letters of administration as aforesaid and afterwards from time to time as shall be lawfully required. And all the rest and residue of the said goods chattels credits and effects which shall be found from time to time remaining upon the said administration account (the same being first examined and allowed by the said Court) shall and do pay and dispose of in a due course of administration or in such a manner as the said Court shall direct. Then the above written bond or obligation to be void and of no effect otherwise to be and remain in full force and virtue.

(*a*) Insert the words "Real estate" (if any) (*ib.*) all the way through.

Signed sealed and delivered by the above bounden in the presence of L.S.

Signed sealed and delivered by the above bounden in the presence of L.S.

Signed sealed and delivered by the above bounden in the presence of L.S.

(No. 16.)

AFFIDAVIT OF JUSTIFICATION.

In the Supreme Court of New South Wales.
Ecclesiastical Jurisdiction.

In the (*a*) goods chattels credits and effects of late of in the colony of New South Wales deceased intestate

(*a*) Insert the words "Real Estate" (if any)

On the day of in the year one thousand eight hundred and eighty in the colony of New South Wales being duly sworn maketh oath and saith as follows:—

1.—I am a householder residing at

2.—I am one of the bondsmen or sureties for the administrat of the goods chattels credits and effects of the above-named deceased.

3.—I am possessed of property to the value of over and above all my just debts and over and above every sum for which I am now bail or surety in any matter action or proceeding civil or criminal

4.—My property to the amount of aforesaid consists of (*b*)

(b) State nature of property, and where situate.

Sworn by the deponent the first day above-mentioned at

Before me

Commissioner for Affidavits

(No. 17.)

Same as No. 6. On application for Probate.

(No. 18.)

LETTERS OF ADMINISTRATION.

In the Supreme Court of New South Wales.
Ecclesiastical Jurisdiction.

No.

Be it known unto all men by these presents that on the day of one thousand eight hundred and eighty administration of all and singular the estate goods chattels cre lits and effects of late of in the colony of New South Wales deceased intestate was and is hereby granted to the widow (or as the case may be) of the said deceased with full power to ask demand sue for recover and receive whatsoever debts and credits which whilst living and at the time of his death did in anywise belong to the estate of the said deceased she having been first sworn that she will well and truly administer the said estate goods chattels credits and effects and pay the lawful debts of the said deceased so far as the said estate goods chattels credits and effects shall extend and the law bind her and also will exhibit unto this Honourable Court a full true and perfect inventory of the said estate goods chattels credits and effects together with a just and true account of her administration thereof when she shall be lawfully called thereunto and that she believes the said estate goods chattels credits and effects do not amount in value to the sum of

Intestate died day of 188 .

Estate sworn under £ .

Dated at Sydney this day of in the year of our Lord one thousand eight hundred and eighty

Extracted by

Proctor for administratrix

Registrar

(No. 19.)

LETTERS OF ADMINISTRATION "DURANTE MINORE ÆTATE."

In the Supreme Court of New South Wales.

Ecclesiastical Jurisdiction.

No.

Be it known unto all men by these presents that on the day of one thousand eight hundred and administration of all and singular the estate goods chattels credits and effects of late of

Intestate died day of 18 .

in the colony of New South Wales deceased intestate was and is hereby granted to the duly elected (or appointed as the case may be) curator and guardian of and minors (or infants) the and next of kin of the said deceased limited until one of such shall attain the age of twenty-one years with full power to ask demand sue for recover and receive whatsoever debts and credits which whilst living and at the time of his death did in anywise belong to the estate of the said deceased having been first sworn that will well and truly administer the said estate goods chattels credits and effects and pay the lawful debts of the said deceased so far as the said estate goods chattels credits and effects will extend and the law bind And also will exhibit unto this Honourable Court a full true and perfect inventory of the said estate goods chattels credits and effects together with a just and true account of administration thereof when shall be lawfully called thereunto and that believes the estate goods chattels credits and effects of the said deceased do not amount in value to the sum of

Estate and effects sworn under £

Dated at Sydney this day of in the year of our Lord one thousand eight hundred and

Extracted by

Proctor for guardian

Registrar

(No. 20.)

LETTERS OF ADMINISTRATION "DE BONIS NON."

In the Supreme Court of New South Wales.

Ecclesiastical Jurisdiction.

No.

Be it known unto all men by these presents that on the day of in the year one thousand eight hundred and eighty letters of administration of all and singular the estate goods chattels credits and effects of late of

Intestate died day of 18 .

deceased intestate were committed and granted to the widow of the said deceased who after taking such administration upon her intermeddled in the estate goods chattels credits and effects of the said deceased and afterwards died to wit on the day of in the year one thousand eight hundred and leaving part thereof unadministered Be it therefore further known that on the day of in the year one thousand eight hundred and letters of administration of the said estate goods chattels credits and effects so left unadministered were and are hereby committed and granted to of the eldest son (or as the case may be) of the said deceased he having been first duly sworn well and truly to administer the said estate goods chattels credits and effects of the said deceased and to pay his just

and lawful debts so far as the said goods chattels credits and effects will thereunto extend and the law bind him And also to exhibit unto the Registry of this Honourable Court a full true and perfect inventory of all and singular the said goods chattels credits and effects of the said deceased together with a just and true account of his administration thereof when he shall be lawfully called thereunto and that he believes the estate goods chattels credits and effects of the said deceased so left unadministered do not exceed in value the sum of pounds Estate sworn under £

Dated at Sydney this day of in the year one thousand eight hundred and

Registrar

(No. 21.)

LETTERS OF ADMINISTRATION WITH WILL ANNEXED.

In the Supreme Court of New South Wales.

Ecclesiastical Jurisdiction.

No.

Be it known unto all men by these presents that on the day of in the year one thousand eight hundred and letters of administration (with the will annexed) of all and singular the goods chattels credits and effects of of in the colony of New South Wales deceased were and are hereby committed and granted to of in the colony aforesaid the sole legatee (or as the case may be) in the said will named there being no executor named in the said will (or the executor therein named having duly renounced probate thereof) having been first sworn that will well and truly pay all the just debts and legacies of the said deceased so far as the said goods chattels credits and effects will extend and the aw bind and that will otherwise well and faithfully administer the said goods chattels credits and effects according to law and that will exhibit a true full and perfect inventory of all and singular the goods chattels credits and effects of the said deceased together with a just and true account of his administration thereof unto the Registry of this Honourable Court when shall be lawfully called thereunto and lastly that believes the said goods chattels credits and effects do not amount in value to the sum of pounds Testator died day of 18 .

Personal estate sworn under £ .

Dated at Sydney this day of in the year one thousand eight hundred and

Extracted by

Proctor for administrator

Registrar of Probates

Copy will (endorsed).

(No. 22.)

The following form of affidavit of administrator is necessary on applying for administration with will annexed :—

Title &c.

On this &c.

1.—The above-named deceased departed this life on the day of in the year one thousand eight hundred and having first duly made and executed his last will and testament bearing date the day of in

the year one thousand eight hundred and but did not name an executor (or executrix) therein (or whereby he appointed executor thereof the said the executor therein named has duly renounced probate of the said will)

2.—I am the sole (or residuary or as the case may be) legatee in the said will named

3.—The document produced and shewn to me at the time of swearing this my affidavit and marked with the letter "A" is I believe the last will and testament of the abovenamed deceased and the attesting witnesses thereto are and

4.—The said deceased had whilst living and at the time of his death goods chattels credits and effects within the colony of New South Wales

5.—I will pay all the just debts and legacies of the said deceased so far as the goods chattels credits and effects of the said deceased will extend and the law bind me and I will exhibit a true full and perfect inventory of all and singular the goods chattels credits and effects of the said deceased together with a just and true account of my administration thereof unto the Registry of the Supreme Court when I shall be lawfully called thereunto

6.—The said goods chattels credits and effects are under the value of

Sworn &c. &c

(No. 23.)

ELECTION BY MINORS OF A GUARDIAN.

In the Supreme Court of New South Wales.

Ecclesiastical Jurisdiction.

In the estate goods chattels credits and effects of late of in the colony of New South Wales deceased intestate

Whereas late of departed this life on or about the day of 18 at aforesaid intestate a widower (or as the case may be) leaving and his natural and lawful and only children the said being a minor of the age of twelve years and the said an infant of the age of six years only

Now I the said do hereby make choice of and elect my lawful maternal uncle (or as the case may be) and one of my next of kin to be my curator and guardian for the purpose of his obtaining letters of administration of the estate goods chattels credits and effects of the said deceased to be granted to him for the use and benefit of me and the said an infant and limited until one of us shall attain the age of twenty-one years and I hereby appoint my proctor to file or cause to be filed this my election in the proper office of the said Supreme Court

In witness whereof I have hereunto set my hand and seal this day of in the year one thousand eight hundred and

L.S.

Signed sealed and delivered by the said in the presence of

Witness

ADMINISTRATION BY A CREDITOR.

Practice.

On receipt of instructions, to apply on behalf of a creditor, for administration of the estate of a deceased intestate, prepare affidavit setting forth the death of the party, that he died on a certain date intestate, leaving a widow or next of kin within the jurisdiction of the Court (if neither, the Curator of Intestate Estates is the proper person to administer the estate), and that the applicant is a creditor of the deceased and holds no security for his debt. Attend at Probate Office with this affidavit, citation, and præcipe for citation.* The Registrar will sign citation, and fix date for return of same; file affidavit and præcipe; insert the citation three times in two public newspapers of Sydney (as per rule, *ante*, page 6); also insert in *Gazette* notice of intention to apply for administration. Attend before the Prothonotary *before* the return day fixed in citation, and prove your debt by affidavit, obtain the certificate of debt,* stating the amount due, from that officer. After the time limited for appearance in citation has expired, search at Probate Office for appearance, and if none entered, lodge with Registrar usual affidavits, bond, &c., together with certificate of debt, and affidavit of publication of citation in newspapers as above, and proceed as in ordinary case of administration.

(Forms Nos. 24 and 25.)

(Form No. 26)

Where deceased left a will and appointed executors citation (as per Form No. 27) will be applicable.

(Form No. 27)

(No. 24.)

CITATION IN CASE OF INTESTACY.

In the Supreme Court of New South Wales.

Ecclesiastical Jurisdiction.

Victoria by the grace of God of the United Kingdom of Great Britain and Ireland Queen Defender of the Faith &c.

To the widow and next of kin of late of in the colony of New South Wales deceased intestate

Greeting—Whereas it appears by an affidavit of of in the said colony sworn on the day of one thousand eight hundred and eighty and filed in the Registry of our Supreme Court that late of in the said colony deceased died on the day of one thousand eight hundred and eighty at aforesaid intestate. And whereas it further appears by the said affidavit that the said is a creditor of the said deceased Now this is to command you and each of you to appear personally or by your respective proctors before our said

Court at Chancery Square King-street Sydney on or before the day of next at ten o'clock in the forenoon then and there to accept or refuse the burden of letters of administration of the estate goods chattels credits and effects of the said deceased thereof otherwise to shew good and sufficient cause (if you or either of you know any) why letters of administration of all and singular the estate goods chattels credits and effects of the said deceased should not be granted and committed to the said the creditor aforesaid and take notice that in default of your so appearing and accepting such letters of administration as aforesaid the Judge of our said Court will proceed to grant letters of administration of the goods chattels credits and effects of the said deceased to the said your absence notwithstanding.

Witness the Honorable Sir Frederick Darley Knight Chief Justice of the Supreme Court this day of in the fifty year of our reign in the year one thousand eight hundred and eighty .

L.S.

Proctor for the said creditor. Registrar.

(No. 25.)

PRÆCIPE FOR CITATION.

In the estate goods chattels credits and effects of late of deceased intestate.

Præcipe for writ of citation on behalf of a creditor of deceased.

Dated day of 18 .

Returnable day of 18 .

proctor for

Creditor of deceased.

(No. 26.)

CERTIFICATE OF DEBT.

In the Supreme Court of New South Wales.

Ecclesiastical Jurisdiction.

In the estate and effects of late of in the colony of New South Wales deceased intestate.

I Frederick Chapman the Prothonotary of the Supreme Court of New South Wales having in pursuance of the rule of the said Court requiring me so to do enquired into the matter of the debt due by the abovenamed deceased to of in the said colony do hereby certify to this Honourable Court and to all whom it may concern that I find the sum of was and still is due to the said

Dated at Sydney this day of A.D. 188

Prothonotary.

(No. 27.)

CITATION TO BRING IN WILL.

In the Supreme Court of New South Wales.

Ecclesiastical Jurisdiction.

Victoria by the grace of God of the United Kingdom of Great Britain and Ireland Queen Defender of the Faith &c.

To of in the colony of New South Wales and of in the said colony the executors named in the last known will and testament of in the colony aforesaid deceased to the residuary legatee if any to the widow if any and next of kin.

Whereas it appears by an affidavit of a creditor (or as the case may be *vide* marginal note) of the abovenamed deceased sworn on the day of one thousand eight hundred and eighty and filed in the Registry of our Honourable Court that the abovenamed deceased died on or about the day of one thousand eight hundred and eighty leaving personal estate and effects within the colony of New South Wales and having first duly executed his last will and testament whereby the abovenamed and were appointed executors *Now this is to command you* the said executors to appear personally or by your proctor duly constituted before our said Court at the Court House Chancery Square Sydney on the day of next after you shall have been served with this citation if it be a Court day or if not on the Court day then next following at the hour of ten o'clock in the forenoon and there to abide if occasion shall require during the sitting of the said Court then and there to bring into and leave in the Registry of our said Court the true last will and testament of the said deceased and to accept or refuse the burden of the probate and execution thereof. *And we also command you* the residuary legatee if any under the will of the said deceased and you the said widow if any of the said deceased and next of kin of the said deceased to appear at the same place and at the same time and in the same manner to accept or refuse the burden of the letters of administration with will annexed and execution thereof otherwise to shew good and sufficient cause if you or either or any of you have or know any cause why letters of administration with the will annexed of all and singular the real and personal estate of the said deceased should not be committed or granted according to law to the said a creditor of the said deceased and further to do and receive as unto law and justice shall appertain under pain of the law and contempt thereof at the instance of the said a creditor of the said deceased and what you shall do or cause to be done in the premises you shall duly certify unto our said Court together with these presents.

This citation can be issued at the instance of any person interested under the will, or in the estate of the deceased.

Witness the Honourable Sir Frederick Darley Knight the Chief Justice of our said Supreme Court at Sydney this day of in the fifty year of our reign in the year of our Lord one thousand eight hundred and eighty .

L.S.

, proctor for the said creditor. Registrar.

ACCOUNTS.

Practice on passing accounts.

Attend at Probate office, with accounts prepared in ordinary Dr. and Cr. form, verified by the oath of the executor or administrator, and notice that accounts filed (*a*) to be signed by the Form No. 28

Registrar, who will fix time to pass the same (usually 14 days). Insert notice in the *Gazette*. On day fixed in notice, attend the Registrar, with affidavit of publication of notice and no objections, and vouchers for all the disbursements shewn on the accounts. The Registrar then examines and allows the same,
Form No. 29. and if correct, gives his certificate (*b*) thereof, and also of the amount on which (if the accounts be filed within the time limited by the rules) the executor or administrator is entitled to commission. The accounts are then set down for passing on the first motion day before the Court; if so passed, attend at the office of
Form No. 30. the Registrar, who will sign order (*c*) passing same, of which order file a copy. As the practice, until recently, has been for an executor to obtain commission on the realisation of real estate, it might not be out of place to state here, that an executor is only entitled to commission on the realisation of the personal estate of the testator, all dealings with the real estate being performed by him in the character of trustee. All items in connection with real estate, should be excluded from the accounts of an executor. The duties of an executor end and those of a trustee begin when the personal estate of the deceased is realised, and the debts of the deceased, the funeral, and testamentary expenses, and the legacies mentioned in the will are paid, and the balance (if any) invested in the terms of the trusts of the will. It might be added that an executor is entitled to commission on the income from investments made by the testator until they mature, and on the capital, at maturity, but that he is not entitled to commission on the interest of investments made by himself as such executor.

IN THE WILL OF MARTIN GERRITY.

April 3, 1889. In this matter Mr. Justice *Owen* decided that an executor was entitled to a commission on the proceeds of both the real and personal estate of the deceased, where, by the will of deceased, the real estate was directed to be sold for the purpose of payment of the debts and legacies mentioned in the will, the proceeds thereof thus becoming equitable assets, and his Honor was of opinion that under the Charter of Justice an executor was entitled to a commission out of the equitable as well as the legal assets of the deceased coming to his hands as executor.

(No. 28.)

NOTICE THAT ACCOUNTS FILED.

In the Supreme Court of New South Wales.

Ecclesiastical Jurisdiction.

In the of late of in the colony of New South Wales deceased.

Notice is hereby given that the accounts in the above estate have this day been filed in my office Supreme Court-house King-street Sydney and all persons having any claim on the said estate or being otherwise interested therein are hereby required to come in before me at my said office on or before the day of next at o'clock in the forenoon and inspect the same and if they shall think fit object thereto otherwise if the said accounts be not objected to the same will be examined by me and passed according to law.

Dated this day of in the year one thousand eight hundred and .

Registrar.

Proctor for the :

(No. 29.)

Title &c. CERTIFICATE ON PASSING ACCOUNTS.

I hereby certify that I have this day been attended by the Proctor for the of the deceased and I have examined the accounts of the said and the vouchers and necessary papers in support thereof and I hereby also certify that the said accounts appear to me to be correct and that the said accounts were filed within the time limited by the rules of this Honourable Court (or order dated) and the said is (or are) entitled to a commission on the sum of .

Dated this day of A.D. 188 .

Registrar.

(No. 30.)

Title &c. ORDER PASSING ACCOUNTS.

The day of in the year one thousand eight hundred and .

Upon hearing Mr. of counsel for the of the estate and effects of the abovenamed deceased and upon reading the accounts of the said filed herein and the affidavit of the said verifying the same and in support of this application and the certificate of the Registrar of Probates of this Court it is ordered that the said accounts be passed and that the said be allowed a commission at the rate of per centum on the sum of being the amount of assets collected in the said estate for pains and trouble herein and that the costs of this application be assessed at the sum of guineas.

By the Court

(L.S.)

Registrar.

NOTICE TO CREDITORS UNDER TRUST PROPERTY ACT.

Section 29 of the *Trust Property Act,* 26 Victoria No. 12, under which the above notice is given, is in the following words :—

"Where an executor or administrator shall have given such or the like notices as in the opinion of the Court in which such executor or administrator is sought to be charged would have been given by the Supreme Court in its Equitable Jurisdiction (*a*) in an administration suit for creditors and others to send in to the executor or administrator their claims against the estate of the testator or intestate such executor or administrator shall at the expiration of the time named in the said notices or the last of the said notices for sending in such claims be at liberty to distribute the assets of the testator or intestate or any part thereof amongst the parties entitled thereto having regard to the claims of which such executor or administrator has then notice and shall not be liable for the assets or any part thereof so distributed to any person of whose claim such executor or administrator shall not have had notice at the time of distribution of the said assets or a part thereof as the case may be but nothing in this Act contained shall prejudice the right of any creditor or claimant to follow the assets or any part thereof into the hands of any person who may have received the same respectively."

NOTE.—*(a)* The time allowed by the Equity Court in such cases is usually six weeks, and the notice to send in claims is published in the *Gazette* and local papers.

(No. 31.)

FORM OF NOTICE.

In the late of in the colony of New South Wales deceased.

Notice is hereby given that all creditors and other persons having any debt or claim upon or affecting the estate of the above-named deceased who died on or about the day of 18 and letters of administration of whose estate (or probate of whose will) was granted by the Supreme Court of New South Wales in its Ecclesiastical Jurisdiction on the day of 18 to of the of the said deceased (or named in the said will) are hereby required to send in particulars of their claims to the said or to the undersigned Proctor on or before the day of at the expiration of which time the said will proceed to distribute the assets of the said deceased among the

persons entitled thereto having regard to the debts and claims only of which shall then have had notice, and the said will not be liable for the assets so distributed to any person of whose debt or claim shall not have had notice at the time of such distribution.

Dated this day of 18 .

Proctor for the said .

MOTIONS FOR SALE, &c., OF REAL ESTATE OF AN INTESTATE.

On reference to the Rule of Court (*ante*, p. 13), made under the provisions of the Act 26 Victoria No. 20, it will be seen that an administrator cannot sell or lease the real estate of a deceased intestate for more than one year, or from year to year, without the order of a Judge of the Court being first obtained authorising the same.

The late Primary Judge, Sir W. *Manning*, in announcing this general rule, said that the importance of this rule from the application it will have to numberless cases, and from the very great amount of real estate which will come under its protection, rendered it desirable that he should cause a memorandum to be filed in Court recording the reasons for which it was passed, and explanatory of its intended operation.

Memorandum.

Much difficulty has arisen as to security by and on behalf of administrators in respect of real estate passing to them under the Act 26 Victoria Number 20. That Act directs that "all land which by the operation of the law relating to real property then in force would upon the death of the owner intestate in respect of such land pass to his heir-at-law, shall instead thereof pass to and become vested in his personal representatives in like manner as was then the case with chattel real property," and that "such lands shall be included by the administrator in his inventory and account, and shall (except as therein provided for the exclusion of widows and husbands otherwise than in respect of dower or tenancy by the curtesy) be disposable in like manner as other personal assets." But the Act makes no direct provision as to security for due administration, and therefore the question

whether any and what security could be demanded rested, before the passing of this rule, upon the Imperial Act, 4 George IV. cap. 96, under which this Court exercises the general power to grant administrations. But here arose doubts and difficulties. The last-mentioned Act provides in its fifteenth section for security by bonds, with one, two, or more able sureties, but it certainly did not anticipate subsequent local legislation wholly at variance with the ancient and then subsisting principles of English law as to the devolution of land in cases of intestacy, and therefore cannot have intended to provide for securities in respect of real estate. Hence it is by no means clear that the enactments of the 15th section of the Act of 4th George IV. are applicable to land passing under 26 Victoria No. 20.

The consequence of the doubts, or rather of an assumption that the enactments of 4 George IV. did not apply, was, that for a long series of years after the passing of our Act, 26 Victoria No. 20, the surety bonds taken in administrations were confined to the value of the personal estate, and that the due administration of the real estate was left wholly without protection in that, or any other direct legal form. Lately, however, that is, since the passing of a *Stamp Act*, the affidavits of the value of the intestates' general estates required for probate duty, appear to have been adopted as the basis on which the bonds of administrators and their sureties were required, and the bonds have consequently been made to include the value of the realty. At the time when no security for the real estate was required, I objected, as an individual Judge, on that ground, to sign letters of administration, when, as occasionally occurred, they were brought to me in the absence of the Primary Judge. But during my own recent tenure of the Primary Ecclesiastical Jurisdiction, security has customarily given as above stated, and I have therefore not had the same difficulty. I have, however, been pressed with the doubt whether such security was legally demandable in respect of real estate in the absence of some such rule of Court as is now promulgated, and I have also observed that much inconvenience and some inadequacy of protection has been occasioned by, or was consistent with, this later practice. The inconvenience is this, that the real estates of intestates have sometimes been very

large, and that bondsmen have consequently been very difficult to obtain, and when obtained, have, as I learn, sometimes required and have received a heavy commission for their responsibility. At the same time, I saw that real estate did not so imperatively require the protecting of a bond with sureties, as is the case with personalty, because it is less readily convertible into money and less susceptible of being made away with, without the knowledge of, or without attracting the attention of the persons beneficially interested. The practice of committing the real estate to an administrator without restriction on the one hand, and of requiring from him security by bond in the sureties on the other hand, is the more inconvenient from the fact that the person entitled to administration may take a very limited interest in the real estate—as in the case of a widow in respect of dower, or a husband in respect of a tenancy by the curtesy. Then, further, there is, or may be, an occasional inadequacy of protection, by reason of the greater fluctuations in this country in the values of real estate than of personalty. At present, as I have said, the basis taken is the value shewn in the affidavit for stamp duty.

This precise fact has only very recently come under my attention, and is altogether wrong, because the subject matter for protection is that which contemporaneously passes by the grant of administration, whereas the value adopted for stamp duty has regard to the time of the intestate's death, at which time it may have been less than at the later, and perhaps much later, time when administration is applied for. So far, however, as that objection goes, the Court has the remedy in its own hands, by requiring the affidavit to state the value at the time of administration, and this remedy must certainly be applied. But that is not all; the value of the land may, and has often been known to increase greatly, and even manifold, after the time of administration, and the consequence in such cases necessarily is that bonds based on the value at the time of administration would prove a very inadequate protection against mal-administration, or misappropriation.

The inconvenience of having to give security for double the value of a large real estate has been occasionally met by me, on

my own authority, by a special dispensation with security, so far as the real estate was concerned, on condition that the letters of administration should be accepted, subject to a restriction against dealing with the land otherwise than upon a Judge's order, under the third section of the Act 26 Victoria No. 20; but this could scarcely be insisted upon with judicial propriety, as a matter of ordinary practice, unless sanctioned by a general rule of the Court. Besides, it does not meet the other difficulties of the case, such as the possible eventual inadequacy of the security in point of amount, and the further possibility of the bonds proving to be valueless.

The third section of the Act 26 Victoria No. 20, provides some protection for individual cases by enabling "any person beneficially interested" to apply to a Judge "to order and direct the course of proceeding to be taken in regard to the sale, letting, and management of the land, and as to the expediency and mode of partition," and other incidental matters; but this is only a protection to those who are competent to watch their own interests, and who are vigilant; and as this protection thus depends upon the activity of the parties interested, it may not, and has not, protected "infants" from spoliation during their non-age. Having regard to all the difficulties referred to, it has seemed to me that the better course would be for the Judges to promulgate a general rule under section 5 of the Act, which enacts that "It shall be lawful for the Supreme Court from time to time to make general rules for the ordinary guidance of administrators in relation to real estate administered as personal estate either by inserting the same in letters of administration or promulgating the same in like manner with other general rules affecting the practice of the Court." And it has also appeared to me desirable, that the rules should be made with a cumulation of both the alternatives, as to the mode of making them, that is to say, by an ordinary general promulgation to declare the principle and rule for general guidance and control, and by an insertion of the restrictions in the letters of administration themselves, for the better warning of all persons dealing with administrators under them.

The difficulties arising out of the present law and practice of the Court have necessarily come more under my attention than under that of other Judges, who have not sat as Primary Judges; and as they pressed themselves very seriously on my mind, it became my peculiar province to bring the whole matter under the attention of my colleagues and to suggest the remedy. This I accordingly did, and their Honors have joined me in passing the rule I have to-day announced. This rule was passed under the 5th section of the Act 26 Victoria No. 20, and is supported by the 3rd section, the principle of which it follows. It may, I think, also be referred to an inherent right in the Court to determine the conditions on which it will commit the rights of others to the charge of an administrator. By the Act of the Court he becomes a trustee, under 26 Victoria No. 20, of the intestate's land, for the benefit of the persons or person entitled to it by way of distribution, or exclusively as the case may be; and it is therefore fitting that the Court should set a guard over him, and control the otherwise excessive powers which he would possess. Under the rule as framed, no administrator will be able to deal with the real estate without a Judge's order or directions, except to a very limited extent; but such orders may either be made concurrently with the grant of administration or upon subsequent applications from time to time to a Judge, who would ordinarily be the Primary Judge. Probably, it would be found convenient in many cases to offer security for the real estate in the first instance, and to apply at the same time for enlarged or even plenary powers of dealing with the land. But in many other cases the alternative course may prove at once more convenient to the administrator and more beneficial to the parties interested; and, not improbably, the costs of moving the Court, in those cases, will be small in contrast with the difficulty and occasional expense of obtaining and paying sureties, according to the present practice. The orders or directions of the Judge may either be general as to the whole estate, or limited as to portions of it, or to particular dealings with it. Under them, the security required may be apportioned to the possibilities of mal-administration, which the rule or order may leave open in each particular case; and whilst in some cases it may be required in the ordinary form

of bonds, with sureties, there may be others in which the nature of the order may exclude all necessity for substantial security on the part of the administrator, or in which the Judge may see his way to impose terms or conditions, which will of themselves constitute a sufficient protection.

The foregoing memorandum sets out very fully the reasons for making, and the nature and effect of the rule; but the following few hints as to the practice in obtaining the order of the Court may be useful:—All orders for the sale of real estate of an intestate are made on affidavit filed in support thereof, which affidavit should clearly set out the parties entitled in distribution, the extent of the land required to be sold, the present market value of the same, and the purposes for which the order is required, whether for distribution, payment of the debts of the deceased, or the maintenance of infants entitled in distribution; of course if all the parties entitled in distribution be of age, and their consent (verified) be filed, that will be sufficient for the Court to make an order upon. If an order to lease the real estate of an intestate for more than one year be required, the affidavit in support must set out fully the value of the property, the proposed rental, and the terms and conditions of the lease.

CONTESTED SUITS.

Upon entering a caveat against the grant of either probate or letters of administration, the proctor entering such must at the
Form No. 32. same time file an authority (signed by the person on whose
Form No. 34. behalf the caveat is entered), and an undertaking (signed either
Form No. 33. by himself or the person on whose behalf he is acting), to appear to any suit, that may be instituted by the person applying for probate or letters of administration.

There is no necessity to serve notice of caveat. The proctor for the person applying for probate or letters of administration, upon ascertaining that a caveat has been entered, files in the Probate Office, without delay, a statement of the nature and
Form No. 35. grounds of his suit (and this is the commencement of the suit, the applicant for probate or letters of administration being the plaintiff and the caveator the defendant), and serves the proctor

for the defendant, within four days from the filing thereof, with a copy of such statement, and also attested copies (*certified by proctor*) of all documents (to be particularised in a schedule appended to such statement) on which the plaintiff grounds his case.

The defendant, according to the distance from Sydney at which he resides, has certain times fixed for his appearance to the suit (see Rule, *ante*, p. 10). If he appear he must, within eight days after the time limited for appearance, file his statement of defence or responsive allegation *(a)* (the form of which is based entirely on the facts of the case and the law applicable to them) and at the same time serves the plaintiff's proctor with a copy of his statement and schedule thereto, and, if required, attested copies of all documents particularised in such schedule.

(a) For heading of ordinary form, No. 36.

Issues are then settled on Chamber summons (*b*) by the Chief Judge in Equity, who also at the same time fixes the time and mode of trial.

(b) Form No. 37.

Rules (*ante*, pp. 11, 12, 13) explain the practice to be followed at the hearing.

If the defendant do not appear to the plaintiff's statement, the plaintiff, on affidavit of service being filed, may proceed to obtain a sentence *ex parte*.

(No. 32.)

CAVEAT.

In the will of late of in the colony of New South Wales deceased.

Let nothing be done in the application of and for probate of the will of the abovenamed deceased unknown to of the Proctor for of in the colony aforesaid of the said deceased.

Dated this day of 18 .

(Signature of Proctor.)

Proctor for

(No. 33.)

UNDERTAKING TO APPEAR.

In the will &c. &c.

I undertake to appear to any suit or action that may be instituted by and for probate of the will of the abovenamed deceased or on their behalf.

Dated this day of 18

(Signature of Proctor.)

(No. 34.)

AUTHORITY.

In the Supreme Court of New South Wales.

Ecclesiastical Jurisdiction.

In the will of late of in the colony of New South Wales deceased.

Whereas the above-named departed this life on or about the day of last past. Now know all men by these presents that I of in the colony aforesaid the of the said deceased for divers good causes and considerations me thereunto moving have appointed and do hereby nominate and appoint of aforesaid gentleman one of the proctors of the Supreme Court of New South Wales or in his absence any other proctor of the said Court to be my true and lawful proctor for me and in my name to appear before the said Court and to exhibit this my proxy and pray and procure the same to be admitted and for me and in my name and in virtue thereof to enter a caveat against probate of the will of the said deceased being granted to and and to sign and file in the said Court an undertaking for me to appear to any suit that may be instituted in the said Court by the said and for probate to them of the said will of the said deceased and to do whatever may be needful and lawful for procuring a definite sentence or final decree in any such suit. I hereby grant unto my said proctor full power and authority to appoint one or more substitute or substitutes for the above purpose and what my said proctor his substitute or substitutes or either of them shall fully do or cause to be done in or about the premises in my behalf I do hereby promise to ratify allow and confirm. In witness whereof I have hereunto set my hand this day of in the year one thousand eight hundred and

Signed, &c.

Witness.

(No. 35.)

PLAINTIFF'S STATEMENT

In Disputed Will Case.

In the Supreme Court of New South Wales.

Ecclesiastical Jurisdiction.

Between plaintiff and defendant.

The statement of the nature and grounds of the suit of the abovenamed plaintiff

1. late of in the colony of New South Wales was at the time of his death possessed of goods chattels credits and effects in the said colony.

2. That on the day of 188 the said being of sound and disposing mind memory and understanding duly made and executed his last will and testament which said will was duly signed and attested as by

law required and he thereby appointed the abovenamed plaintiff sole executor thereof as in and by the said will when produced will appear.

3. That on the day of 18 the said departed this life at in the colony aforesaid without having altered or revoked his said will.

4. That on the day of 18 the plaintiff by his duly authorised proctor caused to be inserted in the New South Wales Government *Gazette* notice of his intention to apply to this Honourable Court in its Ecclesiastical Jurisdiction for probate of the said will and on or about the day of 18 the abovenamed defendant by his proctor entered a caveat against such probate being granted to the said plaintiff.

5. The plaintiff nevertheless alleges that such probate of the said will ought to be granted to him as such executor as aforesaid together with the costs of and incidental to this suit.

6. The schedule hereunder written contains a list and particulars of all documents on which the plaintiff relies in support of his claim to such probate.

Dated at Sydney this day of in the year one thousand eight hundred and .

Proctor for plaintiff.

SCHEDULE.

1. The will of the abovenamed deceased dated the day of 188
2. Affidavit of attesting witness to the due execution of the above will sworn the day of 18 .
3. Notice of the above-named plaintiff to apply for probate published in the *Government Gazette* dated the day of 18 .
4. Caveat entered by the abovenamed defendant on the day of 18 .

(No. 36.)

STATEMENT OF DEFENDANT.

In the Supreme Court of New South Wales.

Ecclesiastical Jurisdiction.

Between plaintiff and defendant.

The allegation responsive of the abovenamed defendant to the plaintiff's statement.

[Then insert facts &c. and points of law which are applicable to the particular case in a short and concise form.]

Dated at Sydney this day of in the year 18 .

Proctor for defendant Sydney.

Schedule (if any)

(No. 37.)

SUMMONS TO SETTLE ISSUES.

In the Supreme Court of New South Wales.

Ecclesiastical Jurisdiction.

Between plaintiff and defendant.

Let the abovenamed defendants or their proctor attend before the Chief

Judge in Equity on the day of instant at ten o'clock in the forenoon at his Chambers Chancery Square King-street Sydney to shew cause why the following issues for trial in this suit should not be allowed and adopted that is to say :—

1. Whether the document dated the day of 18 propounded by the plaintiff is or was at the date thereof the last will and testament of deceased.

2. Whether at the time of signing the document of the day of 18 the said was of sound and disposing mind and capable of making a will.

3. Whether the said document was obtained by undue influence or coercion.

And also to settle the said issues in writing and to decide the time mode and place of trial.

Dated this day of A.D. 18 .

Registrar.

SUING ON ADMINISTRATION BONDS.

The following practice is to be observed on putting a bond in suit for default in filing accounts within time :—

When the accounts of an administrator are not filed within the time limited by the rules, viz., fifteen months, and if there be no order of the Court extending the time for filing such accounts, the Registrar will, at the instance of any person interested in the estate, send notices to the administrator and sureties to the bond, to file the accounts of their administration on or before a certain date. After the time specified in the notices has elapsed, if no accounts be filed, the report of the Registrar is obtained stating that fact, application is then made to the Full Court on affidavit of the facts and the report as above, for leave to put the bond in suit in the name of the Attorney-General. If the Court make the usual order that the bond be put in suit, on the applicant giving security for costs, such security will have to be approved of by the Crown Solicitor. Then proceedings are taken as in an ordinary action at law, with the exception that an information, signed by the Attorney-General, for the time being, is filed in lieu of a declaration.

The application for leave to put the bond in suit may be made *ex parte*: *Re Dillon,* deceased (1 Knox and Linklater 132).

APPENDIX "A."

Act 3 Vic. No. 5, adopting 7 Will. IV. and 1 Vic., c. 26.

Act 7 Will. IV. and 1 Vic., c. 26—The Wills Act.

Statutes of Distribution from Watkins on Conveyancing, 8th Ed., p. 432. } 22 and 23 Charles II., c. 10; 1 James II., c. 17, s. 7.

Real Estate of Intestates Distribution—26 Vic. No. 20.

Sections 48, 49, 51, 53, 55 of the Stamp Duties Act, 44 Vic. No. 3. } 44 Vic. No. 3.

And the schedule to the Amending Act, 50 Vic. No. 10. } 50 Vic. No. 10.

WILLS (ADOPTING) ACT.

3 Vic. No. 5. An Act adopting a certain Act of Parliament, intituled, "An Act for the amendment of the laws with respect to Wills," in the administration of justice in New South Wales, in like manner as other laws of England are applied therein. (6th August, 1839.)

Preamble 7 W. IV. and 1 Vic., c. 26.

Whereas, a certain Act of Parliament was passed in the year one thousand eight hundred and thirty-seven, intituled, "An Act for the amendment of the laws with respect to Wills;" and whereas it is expedient to adopt and apply the said recited Act of Parliament in the administration of justice in New South Wales: Be it therefore enacted by His Excellency the Governor of New South Wales, with the advice and consent of the Legislative Council thereof, that the said recited Act of Parliament shall be and the same is hereby adopted and directed to be applied in the administration of justice in the said colony and its dependencies, from and after the time hereinafter mentioned, in like manner as other laws of England are therein applied.

Adopted and applied in the administration of justice in New South Wales.

Commencement of Act.

2. And whereas it is expedient that the said recited Act of Parliament should not commence or take effect in the colony of New South Wales until the first day of January next ensuing. Be it enacted, that the said recited Act of Parliament shall not commence or take effect in the colony aforesaid before the first day of January, one thousand eight hundred and forty, and that every clause and provision in the said recited Act shall, on, from, and after the said day of January have only the same effect in the colony of New South Wales as the same have had in Her Majesty's Kingdom of England, from and after the first day of January, one thousand eight hundred and thirty-eight.

7 W. IV. and 1 Vic. cap. 26. An Act for the amendment of the laws with respect to Wills. (3rd July, 1837.)

Meaning of certain words in this Act.

Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords, spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows, that is to say, the word "will" shall extend to a testament, and to a codicil, and to an appointment by will or by writing in the nature of a will in exercise of a power, and also to a disposition by will and testament or devise of the custody and tuition of any child, by virtue of an Act passed in the twelfth year of the reign of King Charles the Second intituled "an Act for taking away the Court of Wards and Liveries, and Tenures in capite, and by Knights service, and Purveyance, and for settling a Revenue upon His Majesty in lieu thereof," or by virtue of an Act passed in the Parliament of Ireland in the fourteenth and fifteenth years of the reign of King Charles the Second, intituled "An Act for taking away the Court of Wards and Liveries, and Tenures in capite and by Knights service," and to any other testamentary disposition; and the words "real estate" shall extend to manors, advowsons, messuages, lands, tithes, rents, and hereditaments whether freehold, customary freehold, tenant right, customary or copyhold, or

Will

12 Car. 11, c. 24.

14 and 15 Car. 11 (I.)

Real estate.

ny other tenure, and whether corporeal, incorporeal, or personal, and to any undivided share thereof, and to any estate, right, or interest (other than a chattel interest) therein: and the words "personal estate" shall extend to leasehold estates and other chattels real, and also to moneys, shares of Government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever, which by law devolves upon the executor or administrator, and to any share of interest therein: and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing: and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

Personal estate.

Number.

Gender.

2. And be it further enacted, that an Act passed in the thirty-second year of the reign of King Henry the Eighth, intituled, "The Act of Wills, Wards, and Primer Seisins," whereby a man may devise two parts of his land; and also an Act passed in the thirty-fourth and thirty-fifth years of the reign of the said King Henry the Eighth, intituled, "The Bill concerning the explanation of Wills," and also an Act passed in the Parliament of Ireland in the tenth year of the reign of King Charles the First, intituled, "An Act how lands, tenements, &c, may be disposed by Will or otherwise, and concerning Wards and Primer Seisins;" and also so much of an Act passed in the twenty-ninth year of the reign of King Charles the Second, intituled, "An Act for the prevention of Frauds and Perjuries;" and of an Act passed in the Parliament of Ireland in the seventh year of the reign of King William the Third, intituled, "An Act for the prevention of Frauds and Perjuries," as relates to devises or bequests of lands or tenements, or to the revocation or alteration of any devise in writing of any lands or tenements, or hereditaments, or any clause thereof, or to the devise of any estate *pur autre vie*, or to any such estate being assets or to nuncupative wills, or to the repeal, altering, or changing of any will in writing concerning any goods or chattels or personal estate, or any clause, devise or bequest therein; and also so much of an Act passed in the fourth and fifth years of the reign of Queen Anne, intituled, "An Act for the amendment of the law and the better advancement of Justice," and of an Act passed in the Parliament of Ireland in the sixth year of the reign of Queen Anne, intituled, "An Act for the amendment of the law and the better advancement of Justice," as relates to witnesses to nuncupative wills; and also so much of an Act passed in the fourteenth year of the reign of King George the Second, intituled, "An Act to amend the law concerning Common Recoveries, and to explain and amend an Act made in the twenty-ninth year of the reign of King Charles the Second, intituled, 'An Act for prevention of Frauds and Perjuries,'" as relates to estates, *pur autre vie;* and also an Act passed in the twenty-fifth year of the reign of King George the Second, intituled, "An Act for avoiding and putting an end to certain doubts and questions relating to the attestation of Wills and Codicils concerning Real Estates in that part of Great Britain called England, and in His Majesty's olonies and Plantations in America," except so far as relates to His Majesty's Colonies and Plantations in America; and also an Act passed in the Parliament of Ireland in the same twenty-fifth year of the reign of King George the

Repeal of the statutes 32 H. VIII. c. 1, and 34 and 35 H. VIII. c. 5.

10 Car. 1, sess. 2, c. 2 (I.)

29 Car. II, c. 3, ss. 5, 6, 12, 19 to 22.

7 W. III, c 12 (I.)

4 and 5 Anne, c. 16, s. 14.

6 Anne, c. 10 (I.)

14 G. II, c. 20, s. 9.

25 G. II, c. 6 (except as to colonies.)

25 G. II, c. 11 (I.)

Second, intituled, "An Act for the avoiding and putting an end to certain doubts and questions relating to the attestation of Wills and Codicils concerning Real Estates," and also an Act passed in the fifty-fifth year of the reign of King George the Third, intituled, "An Act to remove certain difficulties in the disposition of Copyhold Estates by Will," shall be and the same are hereby repealed, except so far as the same Acts, or any of them respectively, relate to any wills or estates *pur autre vie* to which this Act does not extend.

55 G. 111, c. 192.

All property may be disposed of by will.

3. And be it further enacted, that it shall be lawful for every person to devise, bequeath, or dispose of by his will, executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which, if not so devised, bequeathed, or disposed of, would devolve upon the heir-at-law, or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator; and that the power hereby given shall extend to all real estate of the nature of customary freehold or tenant right, or customary or copyhold notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled as heir, devisee, or otherwise to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will if this Act had not been made, or notwithstanding that the same, in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or any other special custom, could not have been disposed of by will according to the power contained in this Act, if this Act had not been made: and also to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or incorporeal hereditament; and also to all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created, or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests, and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will.

As to the fees and fines payable by devisees of customary and copyhold estates.

4. Provided always and be it further enacted, that where any real estate of the nature of customary freehold or tenant right, or customary or copyhold, might by the custom of the manor of which the same is holden have been surrendered to the use of a will, and the testator shall not have surrendered the same to the use of his will, no person entitled or claiming to be entitled thereto by virtue of such will, shall be entitled to be admitted, except upon payment of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of the surrendering of such real estate to the use of the will, or in respect of presenting, registering, or enrolling such surrender, if the same real estate had been

surrendered to the use of the will of such testator: Provided also, that where the testator was entitled to have been admitted to such real estate, and might, if he had been admitted thereto, have surrendered the same to the use of his will, and shall not have been admitted thereto, no person entitled or claiming to be entitled to such real estate in consequence of such will shall be entitled to be admitted to the same real estate by virtue thereof, except on payment of all such stamp duties, fees, fine, and sums of money as would have been lawfully due and payable in respect of the admittance of such testator to such r l estate, and also of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of surrendering such real estate to the use of the will, or of presenting, registering, or enrolling such surrender, had the testator been duly admitted to such real estate, and afterwards surrendered the same to the use of his will; all which stamp duties, fees, fine, or sums of money due as aforesaid shall be paid in addition to the stamp duties, fees, fine, or sums of money due or payable on the admittance of such person so entitled or claiming to be entitled to the same real estate as aforesaid.

Wills of customary freeholds and copyholds to be entered on the Court rolls and the lord to be entitled to the same fine, &c., when such estates are not now devisable, as he would have been from the heir.

5. And be it further enacted, that when any real estate of the nature of customary freehold or tenant right, or customary or copyhold, shall be disposed of by will, the lord of the manor or reputed manor of which such real estate is holden, or his steward, or the deputy of such steward, shall cause the will by which such disposition shall be made, or so much thereof as shall contain the disposition of such real estate, to be entered on the Court rolls of such manor or reputed manor; and when any trusts are declared by the will of such real estate, it shall not be necessary to enter the declaration of such trusts, but it will be sufficient to state in the entry on the Court rolls that such real estate is subject to the trusts declared by such will; and when any such real estate could not have been disposed of by will if this Act had not been made, the same fine, heriot, dues, duties, and services shall be paid and rendered by the devisee as would have been due from the customary heir in case of the descent of the same real estate, and the lord shall as against the devisee of such estate have the same remedy for recovering and enforcing such fine, heriot, dues, duties, and services as he is now entitled to for recovering and enforcing the same from or against the customary heir in case of a descent.

Estates *pur autre vie*.

6. And be it further enacted, that if no disposition by will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee-simple; and in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal, or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this Act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate.

No will of a minor valid.

7. And be it further enacted, that no will made by any person under the age of twenty-one years shall be valid.

Nor of a *feme covert*.

8. Provided also, and be it further enacted, that no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of this Act.

Every will to be in writing and signed in the presence of two witnesses.

9. And be it further enacted, that no will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned; (that is to say), it shall be signed at the foot or end thereof by the testator or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

Appointments by will to be executed like other wills, &c.

10. And be it further enacted, that no appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required, and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.

Soldiers' and mariners' wills excepted.

11. Provided always and be it further enacted, that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act.

Act not to affect provisions of 11 G. IV, and 1 W. IV, c. 20, with respect to wills of petty officers, &c.

12. And be it further enacted, that this Act shall not prejudice or affect any of the provisions contained in an Act passed in the eleventh year of the reign of His Majesty King George the Fourth, and the first year of the reign of His late Majesty King William the Fourth, intituled "An Act to amend and consolidate the laws relating to the pay of the Royal Navy," respecting the wills of petty officers and seamen in the Royal Navy, and non-commissioned officers of marines, and marines, so far as relates to their wages, pay, prize money, bounty money, and allowances, or other moneys payable in respect of services in Her Majesty's navy.

Publication not to be requisite.

13. And be it further enacted, that every will executed in manner hereinbefore required shall be valid without any other publication thereof.

Will not void by incompetency of witness.

14. And be it further enacted, that if any person who shall attest the execution of a will shall at the time of the execution thereof, or at any time afterwards, be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid.

Gifts to an attesting witness to be void.

15. And be it further enacted, that if any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such persons attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person, or wife, or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will,

16. And be it further enacted, that in case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor whose debt is so charged, shall attest the execution of such will, such creditor notwithstanding such charge shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof. Creditor attesting to be admitted a witness.

17. And be it further enacted, that no person shall on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof. Executor to be admitted a witness.

18. And be it further enacted, that every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the statute of distributions). Will to be revoked by marriage.

19. And be it further enacted, that no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances. No will to be revoked by presumption.

20. And be it further enacted, that no will or codicil or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same. In what cases wills may be revoked.

21. And be it further enacted, that no obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid, or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin, or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will. No alteration in a will shall have any effect unless executed as a will.

22. And be it further enacted, that no will or codicil, or any part thereof which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and shewing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shewn. How revoked will shall be revived.

23. And be it further enacted, that no conveyance or other act made or done subsequently to the execution of a will, of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as When a devise not to be rendered inoperative, &c.

aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death.

A will to speak from the death of the testator.

24. And be it further enacted, that every will shall be construed with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

What a residuary devise shall include.

25. And be it further enacted, that unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised, or intended to be comprised, in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will.

What a general devise shall include.

26. And be it further enacted, that a devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a customary copyhold, or leasehold estate if the testator had no freehold estate which could be described by it, shall be construed to include the customary copyhold, and leasehold estates of the testator, or his customary, copyhold, and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will.

What a general gift shall include.

27. And be it further enacted, that a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.

How a devise without words of limitation shall be construed.

28. And be it further enacted, that where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee-simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will.

How the words, "die without issue," or "die without leaving issue," or "have no issue," shall be construed.

29. And be it further enacted, that in any devise or bequest of real or personal estate the words, "die without issue," or "die without leaving issue," or "have no issue," or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the

lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of an estate tail to such person or issue or otherwise: Provided that this Act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue, who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue.

No devise to trustees or executors, except, &c., shall pass a chattel interest.

30. And be it further enacted, that where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee-simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication.

Trustees under an unlimited devise, &c., to take the fee.

31. And be it further enacted, that where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee-simple, or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied.

Devises of estates tail shall not lapse.

32. And be it further enacted, that where any person to whom any real estate shall be devised for an estate tail, or an estate in *quasi* entail, shall die in the lifetime of the testator, leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

Gifts to children or other issue who leave issue living at the testator's death shall not lapse.

33. And be it further enacted, that where any person, being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

To what wills and estates this Act shall not extend.

34. And be it further enacted, that this Act shall not extend to any will made before the first day of January, one thousand eight hundred and thirty-eight, and that every will re-executed or re-published, or revived by any codicil, shall for the purposes of this Act be deemed to have been made at the time at which the same shall be so re-executed, re-published, or revived; and that this Act shall not extend to any estate *pur autre vie* of any person who shall die before the first day of January, one thousand eight hundred and thirty-eight.

Not to Scotland

35. And be it further enacted, that this Act shall not extend to Scotland.

Act may be amended.

36. And be it enacted, that this Act may be amended, altered, or repealed by any Act or Acts to be passed in this present Session of Parliament.

17 Vic. No. 5. An Act to amend the law with respect to the Execution of Wills. (Assented to, 4th July, 1853.)

Whereas, the law with respect to the execution of wills requires further amendment: Be it therefore enacted by His Excellency the Governor of New South Wales, with the advice and consent of the Legislative Council thereof, as follows:—

1 Vic. c. 26.

1. Where, by an Act passed in the first year of the reign of Her Majesty Queen Victoria, intituled, "An Act for the amendment of the laws with respect to Wills," which said Act was adopted in New South Wales by an Act of Council passed in the third year of the same reign numbered five, it is enacted, that no will shall be valid unless it be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction. Every will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within the said enactment, as explained by this Act, if the signature shall be so placed at or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will; and no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature shall be placed among the words of the testimonium clause or the clause of attestation, or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after, or under, or beside, the names or one of the names of the subscribing witnesses, or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will, whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature; and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature under the said Act or this Act shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made.

When signature to a will shall be deemed valid.

Act to extend to certain wills already made.

2. The provisions of this Act shall extend and be applied to every will already made, where administration or probate has not already been granted or ordered in consequence of the defective execution of such will, or where the property, being other than personalty, has not been possessed or enjoyed by some person claiming to be entitled thereto in consequence of the defective execution of such will, or the right thereto shall not have been decided to be in some other person than the

person claiming under the will in consequence of the defective execution of such will.

3. This Act shall be read and construed according to the definitions and interpretations contained in the said Act of the first year of the reign of Her Majesty Queen Victoria, and as if this Act had been incorporated with the same and had formed part thereof. Interpretation clause.

STATUTES OF DISTRIBUTIONS.

22 & 23 Charles II. c. 10. 1 James II. c. 17, s. 7.

An Act for the better settling of Intestates.

The following is the effect of the Statutes of Distributions, as given in *Watkins on Conveyancing*, 8th Ed., p. 432.

It should be observed, in the first place, that the above statute does not extend to the estate of a married woman, so that the husband takes the whole of her personal effects, he being entitled by the Common Law to administer to his deceased wife.

If the intestate leaves a widow and children, the widow takes one-third, and the children take the remaining two-thirds equally. Widow and children.

If he leaves a widow and no children, she takes a moiety, and the next of kin the other moiety as after-mentioned. Widow.

If he leaves no widow, the entirety is distributed among his children equally; and if he leaves but one child it devolves upon such only child. Children.

If some of the children of the intestate died in his lifetime leaving children, such children or their lineal representatives *in infinitum* take *per stirpes* equally. Children and the representatives of children.

If all the children of the intestate die in his lifetime leaving children, such children, or if all of such children die in the lifetime of the intestate leaving children, then all such grandchildren take equally *per capita*, claiming in their own right and not by representation. Grandchildren.

If all the children of the intestate die, after his decease, but before distribution is made, their shares vest at the decease of the intestate, and their lineal representatives *in infinitum* take *per stirpes* equally. Vesting of distributive shares

Where distribution is made among the children of the intestate, such children (excepting the heir-at-law) must bring into hotchpot any advancement made by the intestate in his life-time. Hotchpot.

The lineal descendants of the intestate *in infinitum* are preferred to all descendants or collaterals. Lineal descendants.

If the intestate leaves neither widow, child, nor descendant of child, the next of kin are entitled; that is, the father if living takes the whole, but if dead the mother, brothers and sisters of the intestate take equally, the children of deceased brothers and sisters standing *in loco parentis*. Neither wife, child, nor descendant of child.

But this right of representation, being among collaterals, extends no farther than to the children of the brothers and sisters of the intestate; thus, a sister's son excludes a brother's grandson, and an uncle the son of a deceased aunt. Representation among collaterals.

Mother. If there be neither brother nor sister, nor the child of a brother or sister, the mother takes the whole.

Brothers and sisters, and descendants of brothers and sisters. But a mother-in-law takes nothing. If there be no mother, the brothers and sisters take equally; and the children of a deceased brother or sister stand *in loco parentis*.

Kindred next after brothers' and sisters' representatives. If there be neither mother, brother, sister, nor children representing a brother or sister, distribution is made, without preference, among those who are next in degree of kindred to the intestate, according to civil law.

Paternal and maternal relations. Paternal and maternal relations in equal degree take together.

Grandfather, &c. If there be neither mother, brother, sister, nor children representing a brother or sister, the grandfather, or, if he is dead, the grandmother, takes, they being preferred before the children of a deceased brother or sister, claiming in their own right and not as representatives.

Great-grandfather, &c. Next the grandfather, the great-grandfather (or, if he is dead, the great-grandmother), uncles, aunts, nephews, and nieces claiming in their own right, take together, as being in equal degree.

Great-great-grandfather, &c If there be none entitled in this degree, then the great-great-grandfather (or if he is dead, the great-great-grandmother), great-uncle, first cousin (or uncle's son), and great-nephew (or brother's grandson) take together, being equal in degree.

Distribution. Distribution is not to be made until twelve months after the decease of the intestate.

REAL ESTATE OF INTESTATES DISTRIBUTION.

26 Vic. No. 20.

An Act to alter the succession to Real Estate in cases of Intestacy. Reserved 20th December, 1862. Assent proclaimed, 21st July, 1863.

Whereas it is expedient to alter the law relating to the succession to real estate in cases of intestacy: Be it therefore, &c., &c.:—

Intestate land not heritable, but to pass as personalty. 1. From and after the passing of this Act all land which, by the operation of the law relating to real property now in force, would upon the death of the owner intestate in respect of such land pass to his heir-at-law, shall instead thereof pass to and become vested in his personal representatives, in like manner as is now the case with chattel real property.

Land to be included in inventory, &c. 2. Lands held in trust or by way of mortgage, passing under this Act, shall be subject to the same trusts and equities as the same would have been subject to if they had descended to the heir, and all other lands so passing shall be included by the administrator in his inventory and account, and be disposable in like manner as other personal assets, without distinction as to order of application, for payment of debts or otherwise. Provided that nothing herein contained shall give to any husband on the death of his wife intestate any greater interest in the real estate of his wife, or in the produce thereof upon sale, than a tenancy for life by the curtesy, nor to any widow a greater interest in the real estate of her husband on his death intestate than the rights she

Curtesy and dower retained.

would otherwise have had as dowress thereon. And provided also that in case of the sale of any such real estate by virtue of this Act, provision shall be made by order of the Court or Judge for securing out of the produce of the sale such payments as shall be equivalent to the right of such husband or wife as tenan by the curtesy or dowress.

A Judge may make special order relating thereto.

3. It shall be lawful from time to time for any Judge of the Supreme Court, upon the application of the administrator or of any person beneficially interested, and after such previous notice to other parties and inquiry as he shall think fit, to order and direct the course of proceeding which shall be taken in regard to the time and mode of sale of such land—the letting and management thereof until sale—the application for maintenance or advancement or otherwise of shares of infants—the expediency and mode of effecting a partition if applied for—and generally in regard to the administration of the property for the greatest advantage of all persons interested.

Judge may order partition.

4. In any case wherein upon such inquiry the Judge shall be satisfied that a partition of the land would be advantageous to the parties interested therein, it shall be lawful for such Judge to appoint one or more arbitrators to effect such partition, and to exercise in regard thereto under his direction and control powers similar to those of Commissioners acting under a decree in equity for partition. And the report and final award of the said arbitrators, setting forth the particulars of the land allotted to each party interested, shall, when signed by them and confirmed by the order of a Judge and when also registered in the office of the Registrar-General, be effectual without the necessity of any further conveyance to vest in each allottee the land so allotted. And if such allotment be made subject to the charge of any money payable to any other party interested for equalising the partition, such charge shall take effect according to the terms and conditions in regard to time and mode of payment and otherwise which shall be expressed in such award, without the necessity of any further instrument being made or executed.

Supreme Court may frame general rules.

5. It shall be lawful for the Supreme Court from time to time to make rules for the ordinary guidance of administrators in relation to real estate administered as personal assets either by inserting the same in letters of administration or promulgating the same in like manner with other general rules affecting the practice of the Court: Provided that no such rules shall prejudice or control the effect of any special order to be made by a Judge upon such inquiry as aforesaid in any particular case; but provided further that every such special order shall be subject to control or revision by the Full Court, on appeal thereto by the administrator or any other party interested: Provided that a copy of such rules shall be laid before both Houses of Parliament within one month from the issue thereof if Parliament be then in session, or otherwise within one month after the commencement of the next ensuing session.

Same rules to apply to executors and administrators by Curator of Intestate Estates.

6. The preceding provisions shall be alike applicable to any executor to whom in case of partial intestacy land shall pass under this Act, also to the Curator of Intestate Estates and to any other person fulfilling a like duty.

7. No executor or administrator shall be required against his own consent to continue the duty of a trustee by managing the property during an enforced

Administrator's trust not to be prolonged without his own consent.

suspension of sale, but shall be entitled, upon such suspension being ordered, to relinquish his trust to such officer of the Court or other person as the Court or Judge shall appoint.

Short title. Commencement.

8. This Act shall be styled and may be cited as the "Real Estate of Intestates Distribution Act of 1862," and shall take effect from and after the first day of July, one thousand eight hundred and sixty-three.

Under the 5th section of the above Act, "*Regulæ Generales*," of 2nd February and 7th September, 1883 (*ante*, pp. 13 and 14), were promulgated.

SECTIONS OF THE STAMP DUTIES ACT, 44 VIC. NO. 3, RELATING TO DUTIES ON ESTATES OF DECEASED PERSONS.

Duties to be levied on estates of deceased persons, and penalty for not taking out probate, &c.

48. The duties to be levied, collected, and paid, as aforesaid, upon the estates of deceased persons, shall be according to the duties mentioned in the *Second Schedule to this Act*, and such duties shall be charged and chargeable upon and in respect of all estate, whether real or personal, which belonged to any testator or intestate dying after the commencement of this Act. And every person who shall take possession of, and in any manner administer any part of, such estate of any person deceased, without obtaining probate of the will or letters of administration within six calendar months after the decease of such person, or two calendar months after the termination of any suit or dispute respecting the will or the right to letters of administration (if there be any such) which shall not be ended within four calendar months after the decease of such person, shall incur a penalty not exceeding one hundred pounds, and also a further penalty of ten pounds per centum on the amount of stamp duty payable on the probate or letters of administration. And such penalties shall be recovered and enforced in manner herein provided. Provided that such penalties shall not be incurred when such estate shall not exceed two hundred pounds in value. Provided that no duty shall be charged on the taking out of any second probate or administration if the proper amount of duty has been duly paid on the first taking out the same.

Affidavit of value to be lodged by applicants for probate or letters of administration.

49. No Judge of the Supreme Court shall grant probate of the will or letters of administration of the goods, chattels, credits, and effects of any person deceased after the commencement of this Act, unless the applicant for such probate or letters shall lodge with his application an affidavit that to the best of his knowledge and belief the estate of the deceased, exclusive of what he was possessed of or entitled to as a trustee, and after deducting the debts due and owing by the said deceased, but including all the real estate and all estates for years of the deceased, are under the value of a certain sum to be therein specified. And the Prothonotary of the Supreme Court shall transmit to the Commissioner every such affidavit, together with a copy of the will or letters of administration to which it relates, under a penalty not exceeding fifty pounds

Note—This section repealed by Act 50 Vic. No. 10 and the 5th section thereof substituted—*post* pp. 62 and 63.

for any neglect therein; and upon the sum specified in such affidavit the duty shall be assessed according to the rates specified in the second schedule hereto, and such probate or letters stamped accordingly.

Duties payable out of personal estate.

51. Any duty payable under this Act by any executor or administrator shall be deemed to be a debt of the testator or intestate to Her Majesty, and shall be payable out of his personal estate. And if the personal estate be insufficient to pay such duty, the executor or administrator, or any person interested, may apply to the Supreme Court, which may order that a sufficient part of the real estate may be sold to pay the said duty. And every executor or administrator may deduct from any property devised or bequeathed to any person an amount equal to the duty thereon, calculated at the same rate as is payable upon the estate under this Act, unless the testator shall have made a different disposition as to the payment of the said duty in his will.

Deduction of duty from property devised.

Settlement of property taking effect after death of settlor.

53. Within six months after the death of any person who shall have executed a settlement containing any trust to take effect after his death, or within such further time as the Commissioner may allow, notice of such settlement shall be lodged by the trustee thereof, or by some person interested thereunder, together with a declaration specifying the property thereby settled and the value thereof, and duty shall thereupon be payable on such value at the rates specified in the second schedule hereto; and in case such notice and declaration shall not be lodged and the duty paid within six months or such further time as the Commissioner may allow, the Commissioner or any person interested may apply to the Supreme Court, which may order that a sufficient part of the property included in such settlement be sold, and the proceeds of such sale applied in payment of the duty and of the costs consequent thereon.

Duty payable on property included in conveyance for purposes of evasion.

55. Upon the death of any person who shall hereafter make any conveyance or gift of any estate with intent to evade the payment of duty under this Act such property shall be deemed part of his estate for the purposes of this Act. And the payment of the duty upon the value of such property may be enforced in the same way as if such person had bequeathed or devised the said property to the person to whom the same may have been conveyed or given. And any conveyance or gift of property which hereafter may be made to take effect upon the death of the person making the same shall be deemed to have been made with intent to evade the payment of duty under this Act. And any property being the subject matter of a *donatio mortis causa* shall upon the death of the person making such *donatio mortis causa* be deemed part of his property for the purposes of this Act. And duty shall be paid upon it, and payment of such duty may be enforced in the same way as against any other property of or to which such person shal have died, seised, possessed, or entitled.

The Schedule to the above Act, providing that the duty on all probates and letters of administration should be one per

cent., has been amended by the Schedule B to the Act 50 Victoria No. 10, which is as follows :—

SCHEDULE B.

DUTIES ON THE ESTATES OF DECEASED PERSONS.

PART I.

1. On the Probate or Letters of Administration to be granted in respect of any estate real and personal of deceased persons—

Where the value of such estate is under £5,000	...	...	1 per cent.
Where the value is £5,000 and under £12,500	...	...	2 per cent.
Where the value is £12,500 and under £25,000	...	...	3 per cent.
Where the value is £25,000 and under £50,000	...	...	4 per cent.
Where the value is £50,000 and over that amount	...	...	5 per cent.

PART II.

2. Settlement of property taking effect after death of settlor—Same duties as under Part I.

THE 5TH SECTION OF THE ACT 50 VIC. No. 10, REPEALING THE 49TH SECTION OF THE ACT 44 VIC. No. 3, *ANTE*, PAGE 60.

Affidavit of value to be lodged by applicants for probate or letters of administration in lieu of section 49 of said Act.

5. No probate of the will or letters of administration of the goods chattels and effects of any person deceased shall be granted after the commencement of this Act unless the applicant for such probate or letters shall lodge with his application an affidavit stating that to the best of his knowledge and belief the estate of the deceased exclusive of what he was possessed of or entitled to as a trustee but including all his real estate and all estates for years are under the value of a certain sum to be specified in such affidavit and shall at the same time deliver with such affidavit an inventory setting forth a full and true account of the estate of the deceased and the value thereof and all such particulars as shall be necessary or proper for enabling the Commissioner of Stamp Duties fully and correctly to ascertain the duties payable in respect of such estate. And the Prothonotary of the Supreme Court shall transmit to the Commissioner every such affidavit and inventory together with a copy of the will or letters of administration to which they relate within thirty days from the granting of any probate or letters of administration under a penalty not exceeding fifty pounds for any neglect therein and the Commissioner if satisfied with such account and inventory or with any amendment that may be made therein upon his requisition may assess the duty on the footing of such account and inventory (after deducting the debts actually due and owing by the deceased upon the sum specified in such affidavit) according to the rates set forth in the Schedule B. hereto and such probate or letters may be stamped accordingly. But if the Commissioner is dissatisfied with such account and inventory he may cause an account and inventory to be taken by any person to be appointed by

Commissioner may appoint valuator. Section 16 of 44 Vic. No. 3.

him for that purpose and he may assess the duty on the footing of such last-mentioned account and inventory subject to appeal therefrom in accordance with the provisions of section sixteen of the Principal Act and if the duty shall exceed the duty assessable according to the return made to the Commissioner and with which he shall have been dissatisfied and if there shall be no appeal against such assessment then it shall be in the discretion of the Commissioner having regard to the merits of the case to charge the whole or any part of the expenses incident to the taking of such last-mentioned account and inventory against the estate of the said deceased and to recover the same accordingly and if there shall be an appeal against such last-mentioned assessment then the payment of such expenses shall be in the discretion of the Court. Provided that no such account or inventory as last-mentioned shall be taken by such Commissioner or by any person appointed by him without the previous approval of the Colonial Treasurer for the time being. And the Commissioner may lodge with the Registrar-General a caveat against the issue of any certificate of title by transmission where the land advertised by him does not clearly appear to have been included in any affidavit or inventory lodged with the Commissioner in connection with the estate of any deceased person upon which probate or administration duty has been assessed or where the will of any deceased proprietor has not been proved in or letters of administration granted by the Supreme Court. And every such caveat shall be dealt with in all respects as if it were a caveat filed by the Registrar-General except that the Commissioner shall be considered as the caveator.

And may lodge caveat with Registrar-General.

APPENDIX B.

PRINCIPAL REPORTED CASES AFFECTING THE PRACTICE OF THE ECCLESIASTICAL COURT IN THIS COLONY.

In the will of Andrew Blake—1 S.C. Reports, N.S., p. 253.

In the will of Fullerton—6 S.C.R., p. 15, P. & D.

In the will of James Blackwood—2 S.C.R., p. 83, Eq.

In the will of Walsh—4 S.C.R., p. 1, Eq.

In the will of A. K. Cullen—1 N.S.W. Term Reports, p. 74.

Vivers v. Vivers.
In the estate of William Vivers } 2 Weekly Notes, p. 109

In the will of Henry Green
In the will of James Sands } Unreported.

IN THE WILL OF ANDREW BLAKE, DECEASED.

The testator bequeathed to each of his three executors the sum of 1000*l.* "as an acknowledgment and compensation for his trouble in executing my will." The executors proved the will, accepted the legacies bequeathed to them, and administered the trusts of the will. The estate, which consisted entirely of personalty, realised 72,995*l.* Upon passing their accounts, the executors applied for, and were allowed by the Primary Judge, commission at the rate of 2½ per cent. on the realised value of the estate.

1 S.C. Reports, N.S., p. 253.

Held, by Sir James *Martin,* C.J., and Sir W. M. *Manning,* J., *Hargrave,* J., *dissentiente,* that this was not a case in which the executors were entitled to a commission.

Andrew Blake, of Parramatta, deceased, by his will, appointed the Hon. John Blaxland, Vincent Wanostrocht Giblin, and Thomas Cadell executors, and bequeathed to each of them the sum of 1000*l.*, "as an acknowledgment and compensation for his trouble in executing my will." The executors accepted the executorship and the legacies, and probate was granted to them on the 2nd August, 1877. On the 24th June, 1878, they brought in their acounts. On the passing of the accounts, an application was made on their behalf *ex parte* for a commission on the realisation of the estate, and *Hargrave,* J., ordered that they should be allowed to retain for themselves a commission at the rate of 2*l.* 10*s.* per cent. on the sum of 72,995*l.*, the amount of assets collected in the estate, for the executors' pains and trouble, in addition to the legacies bequeathed to them by the testator. An application to set aside the order allowing the commission was made on behalf of one of the residuary legatees to *Hargrave,* J., and was dismissed. A *rule nisi* to set aside both the orders of *Hargrave,* J., was afterwards granted by the Full Court, and now came on for argument. Affidavits were filed on behalf of the executors, shewing that they had held a large number of meetings, and had generally been put to considerable trouble in administering the estate. It appeared from the accounts that over 200*l.* had been paid to a share-broker as commission on the realisation of the shares, and over 500*l.* was charged as the costs of the solicitors in the estate.

Darley in support of rule.

Davis shews cause.

Sir James Martin, C.J. I think that this case is concluded by the authorities we have been referred to, and that it must be taken to have been the intention of the testator only to award the sum of 1000*l.* as sufficient compensation to his executors for their trouble. I think that His Honor should not have given anything under the Charter of Justice.

Hargrave, J. In the course of fourteen years, I have had much trouble and anxiety in considering what remuneration is proper for gentlemen who administer an estate and pass their accounts within twelve months. Things are very different here and in England. In England people have always been only too ready to act as trustees without any commission at all, but it was not so in the colonies, and the Charter of Justice stepped in, and to prevent estates from being thrown into chancery encouraged persons to become executors and to pass their accounts in due time. Under clause 17, a discretion is given to the Judge, "it shall be lawful for the said Court." And in considering what allowance is "just and reasonable," I always look to the rapidity with which executors pass their accounts. Hitherto, only one case has come before the Court on appeal from my decision. Then the Court enlarged the amount I had allowed. I have since acted on the principle of that decision, and dealt liberally with executors who are prompt in realising their testators' estate.

Are we now to lay down the hard and fast rule, that where a legacy had been given, no commission should be allowed? Is it not quite enough that I should take all the circumstances into consideration? The will does not say the executors shall have that amount, and that amount only. It is far better to leave the amount of commission in the discretion of the Judge, when he will take any legacy into consideration as part of the circumstances.

Look at the responsibility incurred by the executors in this case. Here the estate amounts to over 72,000*l.* It is taking too much of a technical view to hold that under all circumstances the executors are to be limited to their legacies. It is said that large sums have been charged for broker's commission and attorney's costs; but it must be remembered that an executor

has no protection unless he secures the evidence of brokers and attorneys. Unless an executor surrounds himself with evidence, the estate will be dragged into chancery.

It seems to me very ungracious in persons who take such a large sum as 72,000*l.* by the bounty of the testator to object to the executors, who have realised the property to the best advantage, receiving some remuneration for their trouble. I think I was right in the order I made, and that this rule should be discharged.

Sir W. Manning, J. I am prepared to concur with his Honor the *Chief Justice* in the result. With reference to the last remark of his Honor Mr. Justice *Hargrave*, it seems that the whole of this commission will fall upon the residuary legatees, and may possibly make a very great difference to them.

I see that there is a great deal of force in the argument that executors should be allowed remuneration according to the quickness with which they pass their accounts. Here, no doubt, if the executors had taken ten years to wind up the estate, they could not have been deprived of the 1000*l.* legacies, and are they to have no more for promptly realising the assets? I should be sorry to say that in every case an executor is bound either to renounce altogether or to take a legacy (perhaps of 50*l.*), in full satisfaction of any claim for commission. I cannot altogether agree with the *Chief Justice* that the question is concluded by authority, as the decisions which have been been cited seem distinguishable ; and I wish to be understood as not holding that in every case an executor will be precluded, by accepting a legacy, from claiming any commission, however small the legacy, or however great the trouble.

But here a very large sum is bequeathed to each of the executors. 1000*l.* is a handsome legacy. And the gift is in very peculiar terms. It is given "as an acknowledgment and compensation for his trouble in executing my will." I have no doubt that at the time the executors themselves considered it very liberal remuneration, and I think that nothing more should be allowed, unless under very exceptional circumstances.

Rule absolute, without costs.

In re FULLERTON'S WILL.

6 S.C. Reports, p. 15, P. cases.

Where a legacy is left in a will to an executor, as such, whatever the words used in the will, no further commission will be allowed to him. Where an executor thinks a legacy so left to him insufficient, he may either renounce his executorship altogether, or can decline to accept the legacy and apply to the Court for commission.

The facts, so far as material, are as follow:—The testator left, by his will, amongst other legacies, 200*l.* "to my brother-in-law, Thomas Helems Moffatt, as one of my executors." T. H. Moffatt acted as executor, accepted the legacy, and in passing accounts applied for further commission, on the ground that he had been put to a great deal of trouble, and had incurred considerable expense in connection with the estate. On 26th February, 1885, the Primary Judge allowed him a sum of 100*l.*, as further compensation, in consideration of the expense and trouble he had been put to, and against this the other executor and the residuary legatee appealed, and obtained a rule *nisi*. On May 1st the motion for a rule absolute was heard.

Ralston in support of the rule.

Gordon, junr., shewed cause.

SIR J. MARTIN, C.J. In this case the testator bequeathed to T. H. Moffatt the sum of 200*l.*, "as one of my executors;" and on passing the accounts of the estate, his Honor the Primary Judge allowed a sum of 100*l.* to Moffatt, by way of commission, in addition to the above legacy. Against this allowance the other executor and residuary legatee have appealed. The case of *In the Will of Blake* . . . has been referred to by both sides, and the question is whether it applies to the present case. It is true that the words used in the will in that case—"as an acknowledgment and compensation for his trouble in executing my will"—are not the same as those here; but their effect is precisely similar, because when a testator bequeaths a sum of money to a person as executor, he leaves it to him in his character of executor; and if he does that, then, by necessary implication he leaves it to him in compensation for any trouble he may take as such. There is no difference in effect between the two cases, and that being so, then the question arises whether where a testator leaves money to an executor as compen-

sation for his trouble in administering an estate, any additional remuneration should be allowed beyond that amount. I am of opinion, on the authority of *In the Will of Blake*, and the cases there cited, that the commission cannot be allowed beyond the amount which testator himself has specified. It is quite optional for the executor, looking at the terms of the will, to decline to accept the remuneration offered therein, and to apply to the Court to fix his commission, or to renounce having anything to do with the will; but if he does not do so, he is bound to limit his claim to the sum indicated by the testator. That was my opinion in the case of *In the Will of Blake*, and it is my opinion still. Had the Court then arrived at a different conclusion, I should feel bound by their decision now; but the Court did nothing of the sort. *Hargrave*, J., differed from me, but Sir W. *Manning* did not. He said: "I should be sorry to say that in every case an executor is bound either to renounce altogether or take a legacy (perhaps 50*l*.) in full satisfaction of any claim to commission. I cannot altogether agree with the *Chief Justice* that the question is concluded by authority, as the decisions which have been cited seem distinguishable; and I wish to be understood as not holding that in every case an executor will be precluded, by accepting a legacy, from claiming any commission, however small the legacy, or however great the trouble." His Honor only said that he could not altogether agree with my decision, and would not pledge himself one way or the other, and so he leaves the question open. Therefore, my opinion being the one way, that of *Hargrave*, J., the other, and Sir W. *Manning* expressing no opinion one way or the other, the matter was left at large, so far as the Court is concerned. I am now of opinion that the law is correctly stated in *Williams on Executors* (page 1866, 8th ed.), in these words:—"Where, indeed, the will gives a legacy to the executor in respect of his trouble in the execution of his duty, in India, as an executor, the question no longer is what is the law in India, but what was the intention of the testator, in the expressions used by him, as applied to the law in India. And it has been holden, in such a case, that the terms of the will must be considered as a declaration of the intention of the testator that the executor

should be excluded from the commission to which the law of India would have entitled him, and that he can claim nothing more than the legacy which the testator has expressed to be a sufficient compensation for his trouble in performing the duties of executor." The authority cited for this statement is the case of *Freeman* v. *Fairlie,* which is a decision of that great Judge, Sir W. *Grant,* who said " that an executor, having such a legacy for care and trouble, is not entitled to commission." It appears to me that, in these authorities, there is no doubt whatever that in cases where remuneration is given in a will to an executor, as such, whatever the words used in the will may be, no commission should be allowed to him. I am, therefore, of opinion that his Honor the Primary Judge was in error in allowing this 100*l.* for commission, and that the rule should be made absolute.

WINDEYER, J. If I could see that the decision in the case of *In the Will of Blake* was a clear authority that an executor who took a legacy was also entitled to commission, I should, of course, feel bound by it, but I cannot see that the decision amounts to that, and I am therefore free to come to my own conclusion, which is the same as that of the *Chief Justice.* On examination of the cases, it seems to me that the point is decided by authority, and that the executor cannot claim such commission. If he thinks the legacy is insufficient remuneration, he can renounce his executorship altogether, or he can decline to accept the legacy, and apply to the Court for commission. The law thus laid down appears to me to be highly consonant with reason and justice.

Rule made absolute.

IN THE GOODS OF JAMES BLACKWOOD.

The Supreme Court has the same power to grant probate to an executor resident out of its jurisdiction as the English Ecclesiastical Courts had. 2 S.C. Reports p. 83, Equity.

Quære per *Manning*, J., whether the Court is bound to grant it.

The Ecclesiastical Jurisdiction of the Supreme Court is the same as that of the English Ecclesiastical Courts at the date of the Charter of Justice, 1823, save as it may be limited or altered by Clause XIV.

James Blackwood died in London, having by his will appointed Robert Simson and J. H. Blackwood his executors. Although they owned property in New South Wales, these executors were domiciled in Victoria. The testator had considerable property but no creditors in New South Wales. Mr. Justice *Hargrave*, Primary Judge, refused to grant probate of the original will to the executors, who thereupon brought this appeal.

C. J. *Manning*, for the executors.

SIR J. MARTIN, C.J. It is not easy to construe the fourteenth section of the Charter of Justice. In England, it is sufficiently clear that, before the *Probate Act*, probate would be granted to an executor resident out of the jurisdiction, because, in the cases to which we have been referred, it has been argued that section 73 of that Act provides that, in certain cases, where application is made by a foreign executor, the Court may refuse probate. This implies that but for that section, there would not exist power to refuse probate to such an executor. The same power that the English Ecclesiastical Courts had is given to the Supreme Court of this colony by section 14 of the Charter of Justice, except so far as they may be abridged by the terms of that section. By that section full power is given "to grant probates, under the seal of the said Court, of the last wills and testaments of all or any of the inhabitants of that part of the said colony and its dependencies situate in the island of New Holland, and of all other persons who shall die and leave personal effects within that part of the said colony." That is a general power to grant probates—as large as the power vested in the English Courts at that time; and therefore includes the power to grant probate to executors out of the jurisdiction.

Then come the words—"and to commit letters of administration . . . . of the persons aforesaid, who shall die intestate, or *who shall not have named an executor resident within the colony,* or when the executor, being duly cited, shall not appear and sue forth probate, annexing the will to the said letters of administration, when such person shall have left a will without naming any executor, or any person for executor, who shall then be alive and resident within the said colony, and who, being duly cited thereunto, will not appear and sue forth a probate thereof." The question arises whether these words limit the power of the Court in cases where the executor is not resident in the colony. I am of opinion that the words do not so limit the power. They are intended to apply to the case of an executor residing in or out of the colony, on whose behalf no application has been made for probate, and thus to provide for administering the property of the deceased, that it should not be left unguarded. But where an application is made by the executor, then probate ought to be granted to him. This view is borne out by the like words in a later paragraph to this effect, "Provided always, and we do hereby authorise and require the said Court, in such cases as aforesaid, where letters of administration shall be committed with the will annexed, for want of an executor applying in due time to sue forth the probate, to reserve in such letters of administration full power and authority to revoke the same, and to grant probate of the said will to such executor, whenever he shall duly appear and sue forth the same," so that it would seem that, if an executor did not make his application in due time, then the Court had power to issue letters of administration with the will annexed, reserving power for the executor to come in and prove. This tends to shew that the general power to grant probates to executors, wherever resident, is not limited, but that the clause provides that the estate may be protected if the executor does not apply. It seems to me that this probate ought to be granted.

Sir W. Manning, J. I am of the same opinion. The authorities cited, and the provisions of the *Probate Act,* shew that probate before that Act could always be granted to a foreign executor. The Charter of Justice must be read by the light of the law of England at the time of its passing, and therefore this

Court, by the earlier words of the section, acquired a general power to grant probate to an executor, whether resident or not resident. Power, in fact, was given to the Court to adopt the testator's wishes as to whom the administration of his estate should be confided, without regard to his residence. These words were general enough, and but for the subsequent passage there could be no doubt. Are they then controlled, limited, or contradicted by the latter? It seems to me merely to provide for the case of a resident executor not applying in due time. Even if he is resident and will not come for probate, it is as necessary that letters of administration should be issued for the protection of the testator's property as if he were out of the colony, or no executor appointed.

I should not like it to be understood that I decide that probate must be granted to an absent executor. It is not necessary to do so in this case; it may be that the Court has an option. Suppose that there were a number of debts due to creditors in the colony, the Court might well hesitate to grant probate to an executor subject only to a foreign jurisdiction. This decision leaves the question open whether the exercise of this power is discretionary or not.

Probate granted.

IN THE WILL OF WALSH.

4 S.C. Reports, p. 1 Equity.

Where the attestation clause of a will is in the usual form, or in such a form as to shew that the will was executed with the ceremonies prescribed by the *Wills Act*, probate may be granted without an affidavit by an attesting witness as to the will having been duly executed.

In this respect the English practice is henceforth to be followed by the upreme Court of New South Wales in its Ecclesiastical Jurisdiction.

(*a*) Primary Judge being absent from the colony.

This was an original application made to the Full Court (*a*) by the executrix of the will of Wm. H. Walsh for its admission to probate. The will was executed in England, where the attesting witnesses resided, and the executrix, who was resident in this colony, had not received from England any affidavit by either of the attesting witnesses as to the due execution of the will, but the attestation clause was in the usual form. She now applied, without any such affidavit, for a grant of probate.

W. Gregory Walker for the executrix—

The rule in force in this colony requiring such an affidavit is an innovation introduced by *Hargrave*, J. I submit that it may be dispensed with. In England we should clearly be entitled to probate on our present materials. The chance of a probate being granted in error through the abrogation of the rule is but slight, and any such error could be rectified by the executor being cited to prove in solemn form.

The COURT (SIR J. MARTIN, C.J., WINDEYER, J., and SIR GEO. INNES, J.) : You may take a grant.

Walker : May the profession understand that for the future the colonial practice in this respect is to be assimilated to the English practice ?

The COURT : Yes.

In the Will of A. K. Cullen, deceased.

An application by the executors under the above will for commission on accounts passed. Probate was granted on August 14, 1879; accounts were filed on June 9, 1881, and passed on November 15, 1881.

N.S.W. Term Reports, Vol. I., p. 74.

The Charter of Justice, section 17, provides that "the said Court shall fix certain periods, when all persons to whom probates of wills and letters of administration shall be granted by the said Court, shall from time to time, until the effects of the deceased person shall be fully administered, pass their accounts relating thereto before the said Court. . . . and it shall be lawful for the said Court to allow to any executor or administrator of the effects of any deceased person such commission or percentage out of their assets as shall be just and reasonable for their pains and trouble therein. Provided always that no allowance whatever shall be made for the pains and trouble of any executor or administrator who shall *neglect* to pass his accounts at such time. . . . as in pursuance of any general or special rule or order of the said Court shall be requisite. And, moreover, every such executor or administrator so neglecting to pass his accounts shall be charged with interest at the rate then current, for such sum or sums of money as, from time to time, shall have been in his hands. The Regulæ Generales of June 17, 1845, No. 2, ordered that executors who had obtained probate should file their accounts within fifteen calendar months after obtaining such probate.

The affidavit shewed that the executors had not complied with this rule because they were under the impression that "accounts" meant "complete accounts"; and, under the circumstances of the case, it had been impossible to do this.

Manning, J. I do not feel any difficulty in this matter, since there does not appear to have been such "neglect" as is contemplated by the 17th section. The 17th section empowers the Court to allow commission to any executor, but the proviso follows that no allowance shall be made him if he "neglect" to pass his accounts within a certain time. It is clear, in this case, that the accounts were not passed within the time fixed by the

rule; but the question is whether there was "neglect" to pass them so as to bring him within the proviso, depriving him of his right to commission. The concluding words of the section shew that the "neglect" contemplated must be wilful in its nature, as it is treated as highly penal. The affidavit discloses no such "neglect" as this. Commission may be allowed.

Application granted.

VIVERS *v.* VIVERS. May 13, 1886.

Motion for administration of the estate of William Vivers, to Anna Maria Salway Vivers, widow of the deceased. 2 Weekly Notes, p. 109.

Motion for administration of the same estate to George Arthur, son-in-law of deceased.

It was arranged that the two motions should be heard together.

Knox, for Mrs. Vivers.

Darley, Q.C., and *O'Connor,* for the defendants, in support of second motion.

Harris, for James Wilson, administrator *pendente lite.*

Knox, in support of the first motion. There is no reason why the Court should not give administration to the widow. It cannot be given to Arthur, as he is not next of kin (Charter of Justice, Cl. XIV.) The Court can only grant administration to a stranger where the next of kin will not administer. The widow represents not only her own interest, but also those of five infant sons. The general rule is that the grant will go in accordance with the preponderance of interest. There are very few cases in which the widow has been passed over: *Williams on Executors,* Part 1, Bk. V, c. II. s. 1 (7th Ed., Vol. 1, p. 436). None of the exceptions are like this. *In the goods of Ihler* (L.R. 3 P. & D. 50). There Sir J. *Hannen* said (p. 51), "I am disposed to think that there is no sufficient reason why the widow should be passed over, inasmuch as she has not done anything by which her honesty can be called in question."

THE PRIMARY JUDGE. That is a dictum: but the decision only was that the widow should be heard. The ground of objection was cruelty to the deceased husband. Here the charge of cruelty was contradicted. A quarrel might be got up in order to obtain control of the property. As to undue influence, the defendants (the daughters) had acquiesced in the verdict that there was on undue influence on the part of Mrs. Vivers.

Darley, Q.C., for the defendants. The law in this colony stands on a different footing to the law of England. In England the Ordinary has power under the Statutes of Administration (31 Edw. III. c. 2, and 21 Henry VIII. c. 5), to grant administration to the widow, or the next of kin, or to both. But the

Charter of Justice here only authorises administration to the next of kin. The widow is not mentioned. Man and wife are not next of kin. Therefore if the Court has not power to grant letters to Mr. Arthur as next of kin, they cannot be granted under the Charter of Justice to Mrs. Vivers. The term next of kin means the nearest blood relations (*Brown on Probate,* 240.) Mrs. Arthur is the person most entitled to administration, as she is the eldest daughter, and has, in fact, been a mother to her sisters, affording them a home when they were driven from their father's house. (He was stopped on that point.)

If the Court will not grant administration to Mr. Arthur, I will ask for an adjournment in order that an application may be made on behalf of Mrs. Arthur. When administration is granted to a married woman, her husband is responsible.

THE PRIMARY JUDGE. Have the next of kin been cited?

No. I admit we are not yet in a position to ask for administration.

Knox in reply. We have not overlooked the distinction between the English statute and the Colonial law. The Charter of Justice was drawn up with reference to the usual practice. The Court here has invariably granted administration to the widow, acting on the rule that the administration follows the interest.

THE PRIMARY JUDGE. I will not grant administration to the widow, but she may have her costs out of the estate. As to Mr. Arthur, there has not been sufficient citation. His costs must be paid out of the estate. All costs to be as between solicitor and client, and to be paid by the administrator *pendente lite.*

On a subsequent day (June 3), administration was granted to Mrs. Arthur, subject to the consent of all the next of kin being obtained.

IN THE WILL OF HENRY GREEN.

Henry Green died on the 3rd November, 1888, having duly made and executed his last will and testament, dated the 17th October, 1888; but made no specific appointment of executor; the dispositive portion of the will is in the following words :— "I give and bequeath all my real and personal estate whatsoever and wheresoever unto my wife, Rebecca Green." On these words application was made to Mr. Justice *Owen* for probate according to the tenor of the said will to be granted to Rebecca Green. 18 Feb., 1889

Held, that the applicant was not executrix according to the tenor. Administration with the will annexed granted.

His Honor gave the following judgment in this matter :—

This is an application for probate of the will of Henry Green to Rebecca Green, as executrix according to the tenor. The will is in the following terms :—"I give and bequeath all my real and personal estate, whatsoever and wheresoever, unto my wife, Rebecca Green." Mr. Digby referred me to the case of Ramsay's will in 2 Weekly Notes, 66, in which Sir William *Manning* granted probate to an executor according to the tenor of a will in the following terms :—"I, J. R., do hereby bequeath to my brother, R. R., all my right, title, and interest in N. Station, to be carried on and managed as heretofore." The practice in England is stated by Sir C. *Cresswell* (in the goods of Oliphant, 1 S.W. and Jr. 525) to be that the universal legatee must take administration with the will annexed, and is not entitled to probate as executor according to the tenor. To be entitled to the executorship, the person named in the will ought expressly or constructively to be charged with the performance of some of the duties of administration. It is not enough that he is given all the property as legatee. In *Williams on Executors,* p. 243, it is laid down :—"His appointment may either be express or constructive, in which case he is usually called executor, according to the tenor; for although no executor be expressly nominated in the will by the word executor, yet, if by any word or circumlocution the testator recommend or commit to one or more the charge and office, or the rights which appertain to an executor, it amounts to as much as the ordaining

or constituting him or them to be executors." (See Fry's case, 1 Hagg 80; Montgomery's case 5, notes of case 99.) In Ramsay's will the words "to be carried on and managed as heretofore" may have been considered by Sir William *Manning* to have implied the powers and duties of executor. The report of the case does not state the reasons of the Judge. If so, the case is in accordance with the usual practice. If not, as Oliphant's case was not cited, and there is no note that the Judge's attention was drawn to the universal practice, I do not feel bound to follow it. I have ascertained from the Registrar that the practice in this Court has been the same as in England, unless the case of Ramsay's will be an exception, but I think, as I have stated, that that case is reconcilable with the established practice. It is most desirable that there should be a uniform practice clearly established and invariably adopted. I must therefore refuse probate, and grant to Mrs. Green administration with the will annexed.

IN THE WILL OF JAMES SANDS.

18 Mar., 1889.

James Sands died on the 17th January, 1889, having duly made and executed his last will and testament dated the 13th January, 1889, whereby he appointed the Rev. Andrew Gardiner sole executor. After bequeathing a legacy of 300*l.* to one Susan Bourke, he left the residue of his estate to his five children, all minors. The executor having duly renounced probate, application was now made to his Honor Mr. Justice *Owen* for administration with will annexed, to the Permanent Trustee Company, on an authority signed by the minors, as required by the 2nd section of the *Permanent Trustee Company Act.*

Held, that the minors can give the authority required by the Act in the same manner as a minor can appoint a guardian.

Administration with will annexed *durante minore ætate* granted.

His Honor delivered judgment in this matter as follows:—This is an application for a grant of letters of administration, with the will annexed, to the Permanent Trustee Company. The testator by his will bequeathed a legacy of 300*l.* to one Susan Bourke, and left the residue of his estate among his five children, and appointed the Rev. Andrew Gardiner the executor of his will. The executor duly renounced probate. The children are all minors, the eldest being 20 years of age and the youngest 13, and they have all signed what purports to be an authority to the Permanent Trustee Company, to apply for administration as required by the 2nd section of the *Permanent Trustee Company of New South Wales, Limited, Act.* That section enables the company to apply for administration, with the will annexed, when authorised by the person entitled to obtain such administration. The Act 21 Henry VIII., c. 5, only applies to cases of intestacy or refusal to appoint an executor; the case, therefore, of an executor renouncing probate was outside the Act, and, strictly speaking, there is no person entitled to administration, in the sense of being able to compel the grant of administration to him, and the Court in such cases exercises its own discretion in determining to whom the grant shall be made. Usually it is granted to the person most interested under the will, and in this case the Court would have granted it to the eldest son if he had

been of age; but, being under age, the question has arisen whether he can authorise the company to apply for administration. I am of opinion that he can. A minor between the age of 7 and 21 can appoint a guardian, to whom the Court may grant administration, and I can see no difference in principle between appointing a guardian and authorising the company to apply. The Court is not bound to grant administration to the company by reason of such authority, any more than the Court is bound to grant administration to a guardian, but for the purpose of the Act I am of opinion that a minor can give the necessary authority. I therefore grant the administration with the will annexed of James Sands to the Permanent Trustee Company *durante minore ætate.*