The Advocates' Quarterly

OFFPRINT

LOCUS OF TITLE IN AN UNADMINISTERED ESTATE AND THE LAW OF ASSENT†

*Albert H. Oosterhoff**

Table of Contents

1. Introduction 42
2. Locus of Title in an Unadministered Estate 43
2.1 Generally 43
2.2 Residuary Estate 44
2.3 Intestate Estates 47
2.4 Devises and Specific Gifts 48
2.5 Nature of the Beneficiary's Right 49
2.5.1 To Residue and on Intestacies 49
(a) An "Interest"? 49
(b) After Administration is Complete 51
(c) A Chose in Action 52
2.5.2 To Devises and Specific Gifts 55
2.6 Summary 56
2.7 Effect of Statutory Trust 56
Excursus 58
3. The Law of Assent 64
3.1 Generally 64
3.2 Alternatives to Assent 64
3.2.1 Transfer to Beneficiaries 64
3.2.2 Appropriation 64
3.3 Formalities of Assents 65
3.3.1 Generally 65
3.3.2 Real Property 66
3.3.3 Other Property 66
3.3.4 Implied Assents 66
3.4 Who Assents 72
3.4.1 Generally 72
3.4.2 Executor Is Compellable 72
3.4.3 Assent by One Executor 73
3.5 Operation of an Assent 75
3.6 Assent Not Retractable 76
3.7 Effect of Assent 76
3.7.1 Perfects Beneficiary's Interest 76
3.7.2 Relation Back 77
(a) Specific Gifts 77
(b) Gifts of Residue 78

† This article is a slightly altered version of a paper presented at The Law Society of Upper Canada 20th Annual Estates and Trusts Summit, Day 1, 16 October 2017.

* Professor Emeritus, Western University, and Counsel to WEL Partners, Toronto.

4. Conclusion 79

1. Introduction

The law of assent is not well known in Canada. This is somewhat surprising, as there are a fair number of Canadian cases that refer to and rely on it. One comes across it more often in English case law and in the law of other common law countries and the jurisprudence from those countries has been helpful in preparing this article. In addition, my task was made much easier because I was able to rely on a fine monograph on the subject[1] and on an excellent article[2] and I acknowledge my debt to both of these resources.[3]

An assent is a statement or act of a personal representative[4] by which he indicates that certain property that forms part of the assets of the estate is not, or is no longer needed to discharge the estate's debts, funeral expenses, or general pecuniary legacies. The effect of the assent is to release the property to the beneficiary to whom it was left in the will.[5] This suggests, therefore, that until the assent is given, the beneficiary's title is incomplete. And this is indeed so. For the personal representative holds the complete, unfragmented title to the estate to permit him properly to administer it. Thus, the beneficiaries do not have access to the property the testator left to them in her will

1. W.J. Williams, *The Law Relating to Assent* (London: Butterworth & Co. (Publishers) Ltd., 1947) ("Williams, *Assent*").
2. Joel Nitikman, "The forgotten law of assent" (2012), 18 Trusts & Trustees, No. 7, 672. ("Nitikman").
3. Another helpful resource is *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate*, 20th ed. by John Ross Martyn and Nicholas Caddick, general eds. (London: Thomson Reuters/Sweet & Maxwell, 2013) ("Williams, *Executors*"), Chapter 81. See also Francis Barlow et al., *Williams on Wills*, 10th ed. (London: LexisNexis, 2014) ("Williams, *Wills*") §§1.8, 38.16. I do cover the law of assent in my Trusts and Wills texts, but only in an introductory way. See *Oosterhoff on Trusts: Text, Commentary and Materials*, 8th ed. by A.H. Oosterhoff, Robert Chambers and Mitchell McInnes (Toronto: Thomson Reuters/Carswell, 2014) ("Oosterhoff, *Trusts*"), §2.6; and see also §1.7.3; *Oosterhoff on Wills*, 8th ed. by Albert H. Oosterhoff, C. David Freedman, Mitchell McInnes, and Adam Parachin (Toronto: Thomson Reuters/Carswell, 2016) ("Oosterhoff, *Wills*"), §14.4.2.
4. I use the term *personal representative* in preference to the term *estate trustee* that was adopted in Ontario in the 1990s, because much of the case law derives from other jurisdictions and, indeed, consists of older Ontario cases. However, I also use the terms *executor* and *administrator* when appropriate, since the cases do so as well.
5. See Williams, *Executors*, *supra*, footnote 3, §81.01; Williams, *Assent*, *supra*, footnote 1, p. 1; Nitikman, *supra*, footnote 2, pp. 672-73; *Jemma Trust Company Ltd. v. Kippax Beaumont Lewis*, [2005] EWCA Civ 248 (C.A.) at para. 119.

until the personal representative gives his assent or transfers the property to them.

Although this principle is well known, I think it wise to examine it first, before discussing the law of assent in detail, because the two are very much interrelated.

2. Locus of Title in an Unadministered Estate

2.1 Generally

Beneficiaries under a trust enjoy full beneficial ownership of the trust property given to them. They are the owners in equity. Hence, they can deal with it, be taxed on it, and will have to account for it in a division of family assets or an equalization claim on a breakdown of a marriage.[6]

The right of a beneficiary under an unadministered estate is quite different. An estate is not a trust, although personal representatives are treated for some purposes and to some extent as trustees.[7] Indeed, s. 1 of the Ontario *Trustee Act*[8] defines "trust" as including "the duties incident to the office of the personal representative of a deceased person" and "trustee" as having "a corresponding meaning". But the purpose of that is mainly to make the provisions of the Act applicable also to personal representatives, unless they are expressly made inapplicable. Consequently, as I shall discuss below, residuary beneficiaries under an unadministered estate do not have a property interest in the residue and specific beneficiaries have only an inchoate interest in the assets given them in the will.[9]

Until the estate is fully administered, a beneficiary is therefore not entitled to claim possession of property left her by the testator, because the personal representative has the full unbifurcated title to all of the assets. This principle is discussed in many leading cases. I shall discuss some of them briefly, but draw attention to the fact that these cases did not originate the principle. It has long been the rule that the executor acquired the whole interest in the testator's personal property.[10] But the executor did not acquire the title to the

6. See *Archer-Shee v. Baker*, [1927] A.C. 844 (U.K. H.L.); *Archer-Shee v. Garland*, [1931] A.C. 212 (H.L.); *Minister of National Revenue v. Trans-Canada Investment Corp.* (1955), [1956] S.C.R. 49, [1955] 5 D.L.R. 576, [1955] C.T.C. 275 (S.C.C.); *Brinkos v. Brinkos* (1989), 60 D.L.R. (4th) 556, 34 E.T.R. 55, 69 O.R. (2d) 225 (Ont. C.A.), additional reasons (1989), 61 D.L.R. (4th) 766 and 768, 69 O.R. (2d) 798 and 800, 17 A.C.W.S. (3d) 926.
7. Williams, *Wills*, *supra*, footnote 3, §1.8.
8. R.S.O. 1990, c. T.23.
9. See §§ 2.2 and 2.4, respectively; and see also §§2.5.1 and 2.5.2, *infra*.
10. See Williams, *Wills*, *supra*, footnote 3, §25.18; *Waters' Law of Trusts in*

real property in England until a statute in 1897 provided that the testator's real property also devolved upon the executor.[11] Similar legislation had earlier been enacted in Canada, as discussed below.[12] Four of the leading cases were conveniently summarized in *Re Hemming; Raymond Saul & Co. v. Jolyon Holden.*[13] I shall discuss these four cases in particular, since they are often discussed and followed in later cases. Most of the cases concern the residuary estate, but I shall demonstrate that the principle also applies to devises, bequests and legacies.

2.2 Residuary Estate

The first case is *Lord Sudeley v. Attorney-General.*[14] The testator owned mortgages on real estate in New Zealand. He left his widow one-quarter of the residue of his estate. The executors and the widow were domiciled in England The widow died while her husband's estate was still being administered. The English tax authorities claimed that she had only a personal remedy against the English executors to have the English estate properly administered and that therefore she had to pay probate duty on her one-quarter interest. The widow's executors claimed that she actually owned a one-quarter interest in the New Zealand mortgages and that she was not liable for probate duty on that interest, since the mortgages were foreign property. But the House of Lords held that she was not entitled to claim the assets until the estate was administered and thus the claim of the tax authorities succeeded. More specifically, the House held that until the residue was ascertained, she had no right *in specie* to any particular assets at all. I shall revisit this part of the judgment below.[15]

The second case is *Dr. Barnardo's Homes National Incorporated Association v. Commissioners for Special Purposes of the Income Tax Acts.*[16] The testator had left the residue to a charity. While the estate was being administered, the executors received income on certain

Canada, 4th ed. by Donovan W.M. Waters, Mark R. Gillen and Lionel Smith (Toronto: Thomson Reuters/Carswell, 2012) ("Waters"), pp. 47ff.

11. *Land Transfer Act 1897*, 60 & 61 Vict., c. 65, s. 1. This section was re-enacted as s. 1 of the *Administration of Estates Act 1925* (15 & 16 Geo. 5). c. 23. In England, before the 1897 Act, the testator's real property descended directly to the heir-at-law, or passed by will to a devisee.
12. In §2.7, *infra.*
13. [2008] EWHC 2731 (Ch), [2009] Ch. 313 ("*Hemming*"), usually cited as *Raymond Saul & Co. v. Jolyon Holden.*
14. (1896), [1897] A.C. 11, [1896] 1 Q.B. 354 (U.K. H.L.) ("*Sudeley*").
15. See §2.5.1(a), *infra.*
16. [1921] 2 A.C. 1, 37 T.L.R. 54 (U.K. H.L.) ("*Barnardo*").

investments. The tax on those investments had been deducted by the payors. The charity claimed repayment of the tax, as a charity may do in the United Kingdom if it is entitled to the property. However, the House of Lords applied *Sudeley* and held that until the estate was administered, the residue was not ascertained and the investments and the income were the property of the executors.[17] Lord Atkinson said:[18]

> The case of *Lord Sudeley v. Attorney-General* . . . conclusively established that until the claims against the testator's estate for debts, legacies, testamentary expenses, etc., have been satisfied, the residue does not come into actual existence. It is a non-existent thing until that event has occurred. The probability that there will be a residue is not enough. It must be actually ascertained.

The third case is *Commissioner of Stamp Duties (Queensland) v. Livingston.*[19] Mr. Livingston and his wife were domiciled in New South Wales, but he also owned properties in Queensland. By his will he left one-third of the residue of his estate to his wife. She remarried and was then known as Mrs. Coulson. However, while her former husband's estate was still being administered, she died intestate, still domiciled in New South Wales. The Queensland tax authorities levied stamp and succession duties on her administrator with respect to her share of Livingston's Queensland assets. The Privy Council applied *Sudeley* and held that Mrs. Coulson did not own any of her husband's assets beneficially. Consequently, Queensland was not successful in levying duties against her.

Viscount Radcliffe, who delivered the Board's opinion, said:[20]

> When Mrs. Coulson died she had the interest of a residuary legatee in the testator's unadministered estate. The nature of that interest has been conclusively defined by decisions of long-established authority, and its definition no doubt depends upon the peculiar status which the law accorded to an executor for the purposes of carrying out his duties of administration. There were special rules which long prevailed about the devolution of freehold land and its liability for the debts of a deceased, but subject to the working of these rules whatever property came to the executor *virtute officii*[21] came to him in full ownership, without distinction between legal and equitable interests. The whole property was his. He held it for the purpose of carrying out the functions and duties of administration, not for his own benefit; and these duties would be

17. *Supra*, p. 8, *per* Viscount Finlay; p. 10, *per* Viscount Cave.
18. *Supra*, p. 11.
19. (1964), [1965] A.C. 694, [1964] 3 All E.R. 692 (Australia P.C.) ("*Livingston*").
20. *Supra*, pp. 707-708 A.C.
21. *I.e.*, by virtue of his office.

enforced upon him by the Court of Chancery, if application had to be made for that purpose by a creditor or beneficiary interested in the estate. Certainly, therefore, he was in a fiduciary position with regard to the assets that came to him in the right of his office, and for certain purposes and in some aspects he was treated by the court as a trustee. "An executor," said Kay J. in *In re Marsden*,[22] "is personally liable in equity for all breaches of the ordinary trusts which in Courts of Equity are considered to arise from his office." He is a trustee "in this sense".

It may not be possible to state exhaustively what those trusts are at any one moment. Essentially, they are trusts to preserve the assets, to deal properly with them, and to apply them in a due course of administration for the benefit of those interested according to that course, creditors, the death duty authorities, legatees of various sorts, and the residuary beneficiaries. They might just as well have been termed "duties in respect of the assets" as trusts. What equity did not do was to recognise or create for residuary legatees a beneficial interest in the assets in the executor's hands during the course of administration. Conceivably, this could have been done, in the sense that the assets, whatever they might be from time to time, could have been treated as a present, though fluctuating, trust fund held for the benefit of all those interested in the estate according to the measure of their respective interests. But it never was done. It would have been a clumsy and unsatisfactory device from a practical point of view; and, indeed, it would have been in plain conflict with the basic conception of equity that to impose the fetters of a trust upon property, with the resulting creation of equitable interests in that property, there had to be specific subjects identifiable as the trust fund. An unadministered estate was incapable of satisfying this requirement. The assets as a whole were in the hands of the executor, his property; and until administration was complete no one was in a position to say what items of property would need to be realised for the purposes of that administration or of what the residue, when ascertained, would consist or what its value would be. Even in modern economies, when the ready marketability of many forms of property can almost be assumed, valuation and realisation are very far from being interchangeable terms.

At the date of Mrs. Coulson's death, therefore, there was no trust fund consisting of Mr. Livingston's residuary estate in which she could be said to have any beneficial interest, because no trust had as yet come into existence to affect the assets of his estate. The relation of her estate to his was . . . that . . . Mr. Livingston's property in Queensland, real or personal, was vested in his executors in full right, and no beneficial property interest in any item of it belonged to Mrs. Coulson at the date of her death.

22. (1884), 26 Ch. D. 783 (Ch. D.) at 789.

The fourth case is *Marshall v. Kerr*.[23] The testator died domiciled in Jersey. He left one-half of the residue of his estate to his daughter, Mrs. Kerr, who was domiciled in England. Before the estate was fully administered, Mrs. Kerr and the executor, which was domiciled in Jersey, entered into a family settlement under which she settled her share of the residue. She was one of the beneficiaries. The United Kingdom tax authorities assessed her husband[24] for capital payments made to her. This was possible if she was the settlor under the family settlement, rather than her father, since she was a United Kingdom domiciliary. The House of Lords held, relying on *Livingston*, that Mrs. Kerr became entitled on her father's death to a chose in action to have her father's estate duly administered and concluded that she settled the chose in action in the family settlement. Consequently her husband was liable for the tax.

There are also many Canadian cases that have applied some or all of the above cases and have reached similar conclusions.[25]

2.3 Intestate Estates

These principles also apply to intestacies. The issue arose in *Mulligan v. Hughes*.[26] The testator bequeathed all the money she possessed at her death to her three adult children from her first marriage and left the residue of her estate to her husband and named him her executor and trustee. Her "money" consisted of approximately $115,000. However, she was also a statutory beneficiary under her sister's intestate estate in the amount of $86,000. But the sister's estate was not yet administered when the testator died. Thus, the testator did not have any legal or equitable interest in specific assets of her sister's estate, but only a chose in action to have her sister's estate duly administered. Although that chose in action was transmissible on the testator's death to her executor, it was not a property right to specific assets and could therefore not form part of the specific bequest to her children. Instead, once the sister's estate

23. (1994), [1995] 1 A.C. 148, [1994] 3 All E.R. 106 (H.L.) ("*Marshall*").
24. In the United Kingdom the husband is assessed for any income tax liability of his wife.
25. See, *e.g.*, *Fitzgerald v. Minister of National Revenue*, [1949] S.C.R. 453, [1949] 3 D.L.R. 497, 1949 CarswellNat 40 (S.C.C.); *Bickle v. Minister of National Revenue*, [1966] S.C.R. 479, 58 D.L.R. (2d) 194, 1966 CarswellNat 272 (S.C.C.); *Re Leslie*, [1954] O.W.N. 472, 1954 CarswellOnt 232 (Ont. H.C.); *Gennaro v. Gennaro* (1994), 111 D.L.R. (4th) 379, 2 R.F.L. (4th) 179, 1994 CarswellOnt 373 (Ont. U.F.C.), in particular my Annotation of that case in the R.F.L.
26. 2007 SKQB 123, 31 E.T.R. (3d) 157, 296 Sask. R. 1 (Sask. Q.B.).

was administered, the testator's interest in that estate would pass to her husband under the residuary clause in her will.[27]

2.4 Devises and Specific Gifts

For a long time it was doubted that these principles applied also to devises and specific gifts. For example, although the point did not have to be decided in *Kavanagh v. Best*,[28] Gibson J. expressed the view that they did not, since the beneficiary knows from the outset what the asset to which she becomes entitled is and does not have to wait until administration is complete to determine that. However, in *Re Hayes' Will Trusts*[29] Ungoed-Thomas J. stated in *dictum* that no estate beneficiary has a beneficial interest in the assets under administration. And this is surely right, since the subject matter of specific and general gifts is also subject to being used to pay liabilities of the estate, though only after the residue is exhausted. Viscount Radcliffe seems to suggest the same thing when he says in *Livingston*, speaking of the whole estate and all interests in it, that an estate cannot be a trust, since there would not be "specific subjects identifiable as the trust fund".[30] Lord Browne-Wilkinson may have been of the same view when, in *Marshall*, admittedly a case involving a gift of residue, he stated:[31]

> A legatee's right is to have the estate duly administered by the personal representatives in accordance with law. *But during the period of administration the legatee has no legal or equitable interest in the assets comprised in the estate.*

Williams, Mortimer and Sunnucks[32] express the same view when they state that personal representatives are responsible for the satisfaction of the deceased's debts out of the whole estate and should therefore not distribute any of the assets until the debts have been paid or adequately secured. Other writers agree with this view.[33] In an early New South Wales case Jacobs J. also took this view when he said:[34]

27. For other cases to the same effect, see *Ogilvie-Five Roses Sales Ltd. v. Hawkins* (1979), 4 E.T.R. 163, 8 R.P.R. 244, 9 Alta. L.R. (2d) 271 (Alta. T.D.); *Farrell v. Farrell* (1983), 16 E.T.R. 163 (Nfld. T.D.); *Mugford v. Mugford* (1992), 49 E.T.R. 229, 326 A.P.R. 136, 103 Nfld. & P.E.I.R. 136 (Nfld. C.A.).
28. [1971] N.I. 89.
29. [1971] 1 W.L.R. 758 at 765, [1971] 2 All E.R. 341 (Ch. D.).
30. *Livingston*, *supra*, footnote 19, p. 708 A.C., and see the second paragraph of the quotation *supra*, at footnote 20.
31. *Marshall*, *supra*, footnote 23, p. 165 A.C., emphasis supplied.
32. Williams, *Executors*, *supra*, footnote 3, §81-01.

> Of course, in the case of a specific legacy or a general bequest the beneficiary takes under the will. However, he does not take absolutely and immediately because the subject matter of the legacy may be required by the executor for the purpose of administration, particularly for the payment of the testator's debts.

Nitikman makes the point more emphatically, when he maintains that no title vests in a specific beneficiary on the testator's death. She has only a right to compel the personal representative to administer the estate and to receive the property when the personal representative assents to gift.[35]

When it is said that a specific beneficiary takes under the will, or as older cases often said, the beneficiary is "in under the will", it means that the beneficiary's title comes from the will and not from any transfer from the personal representative. However, an assent will be necessary to perfect the interest.[36]

In *Official Receiver in Bankruptcy v. Schultz*[37] the Australian High Court also concluded that the personal representative acquires full title to all the estate's assets, including assets included in a specific bequest, for the purpose of properly administering the estate. And this view was followed in a very helpful case on the law of assent that I shall return to later,[38] *Seah Teong Kang v. Seah Yong Chwan.*[39]

2.5 Nature of the Beneficiary's Right

2.5.1 To Residue and on Intestacies

(a) An "Interest"?

There is a remaining issue that arises from all of this, namely, what exactly does a residuary beneficiary under an unadministered estate have? Admittedly, she does not have the legal or equitable title to whatever property the will gave her, but she does have something. What is it? The cases often do not describe her right with great precision. Some call it an "interest". Thus, for example in *Sudeley* Lord Herschell said about the widow's right:[40]

33. See, *e.g.*, Williams, *Wills*, *supra*, footnote 3, §1.8; Jill E. Martin, *Hanbury & Martin Modern Equity*, 19th ed. (London: Sweet & Maxwell, 2012), §2-020; Nitikman, *supra*, footnote 2, at 680.
34. *Bryen v. Reus*, [1961] S.R. (N.S.W.) 396 at 399.
35. Nitikman, *supra*, footnote 2, p. 680.
36. Williams, *Wills*, *supra*, footnote 3, §25.18.
37. (1990), 170 C.L.R. 306 at 312.
38. In §3.3.4, *infra*.
39. [2015] SGCA 48 (C.A.) ("*Seah Teong Kang*"), paras. 21 and 22.
40. *Supra*, footnote 14, at p. 19, emphasis supplied.

> In truth, the right she had was to require the executors of her husband to administer his estate completely, and she had an *interest* to the extent of one-fourth in what should prove to be the residuary estate of the testator.

In *909403 Ontario Ltd. v. DiMichele*, a case involving a contingent gift of residue, Gillese J.A. also used the term, when she said:[41]

> A contingent beneficial *interest* in an estate does not give rise to a property interest in any specific asset of the estate, prior to or absent an appropriation of such asset to the beneficiary by the trustee.

Viscount Radcliffe discusses criticisms of the term *interest* in *Livingston* as follows:[42]

> Criticisms of this kind arise from the fact that the terminology of our legal system has not produced a sufficient variety of words to represent the various meanings which can be conveyed by the words "interest" and "property." Thus propositions are advanced or rebutted by the employment of terms that have not in themselves a common basis of definition. For instance, there are two passages quoted by the Chief Justice in his dissenting judgment in this case which illustrate the confusion.

Viscount Radcliffe spoke specifically of the term "beneficial interest in the items" that make up the estate, used by some. He said:[43]

> If by "beneficial interest in the items" it is intended to suggest that such beneficiaries have any property right at all in any of those items, the proposition cannot be accepted as either elementary or fundamental. It is, as has been shown, contrary to the principles of equity. But, on the other hand, if the meaning is only that such beneficiaries are not without legal remedy during the course of administration to secure that the assets are properly dealt with and the rights that they hope will accrue to them in the future are safeguarded, the proposition is no doubt correct. They can be said, therefore, to have an interest in respect of the assets, or even a beneficial interest in the assets, so long as it is understood in what sense the word "interest" is used in such a context.

Later in his reasons his Lordship said:[44]

> Where, as here, the question is whether a succession arose on a death in respect of a "devolution by law of any beneficial interest in property," and the necessary limitations of the Queensland Succession Duty Act reduce that question to one whether there was a beneficial interest in

41. 2014 ONCA 261, 95 E.T.R. (3d) 169, 42 R.P.R. (5th) 171 (Ont. C.A.) at para. 104, emphasis supplied.
42. *Livingston*, *supra*, footnote 19, pp. 712-713 A.C.
43. *Supra*, at 713 A.C.
44. *Supra*, at 716 A.C.

> Queensland property belonging to her at her death, it is necessary, to use Lord Greene's words, to "discover the locality to be attributed to a right," and this requirement involves a precise analysis of the nature of the right. It is not enough for this purpose to speak of an "interest" in a general or popular sense. It is apt to recall what Lord Halsbury L.C. said on this point in his speech in the *Sudeley* case:[45]
>
> > With reference to a great many things, it would be quite true to say that she had an interest in these New Zealand mortgages – that she had a claim on them: in a loose and general way of speaking, nobody would deny that that was a fair statement. But the moment you come to give a definite effect to the particular thing to which she becomes entitled under his will, you must use strict language, and see what it is that the person is entitled to; because upon that in this case depends the solution of the question. It is idle to use such phrases as . . . that she had an 'interest' in this estate.

Thus, it is unwise to use the term "interest" with respect to the right of a residuary beneficiary in an unadministered estate, unless you qualify it. In *Hemming* the court spoke of it in these terms:[46]

> In summary, as I have indicated, the law has long recognised that a residuary legatee has an immediate "interest" of some kind in the assets that will in the future form the residuary estate of a testator. The precise nature of the interest is unclear, but at very least it must give the holder of the interest the right to receive the residue (if any) as and when ascertained.

(b) After Administration is Complete

There is a difference between the position of a residuary beneficiary before the administration is complete and after it has been completed. Williams puts it as follows:[47]

> Thus, the legatee of a share of residue has no interest in any of the property of the testator, until the residue has been ascertained . . . However, once the estate has been fully administered by the executors and the net residue ascertained, then the position is different and the residuary legatee might well have a definable interest in the property, since he is entitled to have the residue, as so ascertained, with accrued income, transferred and paid to him.

45. *Supra*, footnote 14, at p. 15.
46. *Supra*, footnote 13, para. 61.
47. Williams, *Wills*, *supra*, footnote 3, §1.8, p. 12.

Another text makes a stronger statement that is, with respect, more accurate. It points out that personal representatives are not trustees, although they are fiduciaries. And then it says:[48]

> However, once administration is complete, the representative becomes a trustee of the net residue for the persons beneficially interested.

At that point, therefore, the residuary beneficiaries acquire an equitable interest in the residue commensurate with the proportion of the residue given them by the will.

(c) A Chose in Action

The cases sometimes speak of the beneficiary's right as a chose in action. Thus, in *Livingston*, Viscount Radcliffe said:[49]

> [T]heir Lordships regard it as clearly established that Mrs. Coulson was not entitled to any beneficial interest in any property in Queensland at the date of her death. What she was entitled to in respect of her rights under her deceased husband's will was a chose in action, capable of being invoked for any purpose connected with the proper administration of his estate; and the local situation of this asset, as much under Queensland law as any other law, was in New South Wales, where the testator had been domiciled and his executors resided and which constituted the proper forum of administration of his estate.

The idea of a chose in action was developed in *Re Leigh's Will Trusts, Handyside v. Durbridge*.[50] The testator was the administrator of the intestate estate of her husband. He was the registered owner of certain corporate shares and in her will she bequeathed those shares to the defendant. However, she died before her husband's estate was fully administered. Was she able to dispose of those shares, since she did not own them at her death? Buckley J. discussed *Livingston* at some length and concluded that *Livingston* stands for the principle that beneficiaries under an unadministered estate do have a chose in action, namely, the right as against the personal representatives to have the estate properly administered. He described *Livingston* as establishing the following propositions:[51]

> (1) the entire ownership of the property comprised in the estate of a deceased person which remains unadministered is in the deceased's

48. Williams, *Executors*, *supra*, footnote 3, §81-02.
49. *Supra*, footnote 19, at 717 A.C.
50. [1970] 1 Ch. 277 ("*Leigh*").
51. *Supra*, at 281-82. I have indented and separated the four propositions for the sake of clarity. It is notable that Lord Templeman quoted the following four-point summary with approval in *Marshall*, *supra*, footnote 23, at 157-58.

legal personal representative for the purposes of administration without any differentiation between legal and equitable interests;
(2) no residuary legatee or person entitled upon the intestacy of the deceased has any proprietary interest in any particular asset comprised in the unadministered estate of the deceased;
(3) each such legatee or person so entitled is entitled to a chose in action, viz. a right to require the deceased's estate to be duly administered, whereby he can protect those rights to which he hopes to become entitled in possession in the due course of the administration of the deceased's estate;
(4) each such legatee or person so entitled has a transmissible interest in the estate, notwithstanding that it remains unadministered.

Buckley J. continued:[52]

> *This transmissible or disposable interest can, I think, only consist of the chose in action in question with such rights and interests as it carries in gremio*[53] *. . . If a person entitled to such a chose in action can transmit or assign it, such transmission or assignment must carry with it the right to receive the fruits of the chose in action when they mature.* The chose in action itself may be incapable of severance, but I can see no reason why a person entitled to such a chose in action should not so dispose of it through the medium of a trustee in such a way that the right to participate in its fruits is given to several beneficiaries either in fractional shares or by any other method of division that a trustee or the court can carry out.

The description in *Leigh* of the chose in action was not novel. Already in *Sudeley* Lord Davey noted:[54]

> What then, are the rights of the appellants? Their right, and the only right which they could enforce adversely, is to have the administration completed and the residuary estate ascertained and realised, either wholly or so far as may be necessary for the purpose, *and to have one-fourth of the proceeds paid to them.*

Similarly, in *Barnardo* Viscount Finlay said that a residuary beneficiary has "the right to have the estate properly administered *and applied for his benefit when the administration is complete*".[55]

Thus it seems clear from the cases that the right a beneficiary has under an unadministered estate is not simply a right to have the estate properly administered, for that right is coupled with the right to have the moneys left her by the will paid to her when adminis-

52. *Supra*, at 282, emphasis supplied.
53. Or more fully, *in gremio legis*, *i.e.*, in the bosom of the law. In other words, the chose is something that the law protects.
54. *Supra*, footnote 14, p. 21, emphasis supplied.
55. *Supra*, footnote 16, at p. 8, emphasis supplied.

tration is complete. And that composite right is transmissible on the beneficiary's death and in other circumstances.

In *Leigh* the transmissible interest was with respect to an intestate estate, which is like a residuary estate under a will. And, as I have shown, a number of cases, including *Livingston*[56] and *Sudeley*,[57] stand for the proposition that a residuary beneficiary also has no equitable interest in the property comprised in the assets, since the full, unfragmented title is in the personal representative until the estate is administered.

Richard Snowden Q.C., sitting as Deputy Judge of the High Court considered the issue again in a very carefully reasoned judgment in *Re Hemming*.[58] Mrs. Bertha Hemming died on 18 July 2003. She left the residue of her estate to her son, Mr. Bernard Hemming, and appointed him executor. They owned a farmhouse and a cottage as tenants in common in equal shares. Hemming was declared a bankrupt on September 24 and the second defendant, Ms. Britten, was appointed his trustee in bankruptcy effective October 14. Hemming obtained probate of his mother's will on February 17, 2004. Under the *Insolvency Act 1986*,[59] as amended, Hemming was automatically discharged from bankruptcy on 1 April 2005. The cottage was sold in May 2005. Half of the net proceeds, representing Hemming's half interest, was paid to the trustee. Hemming's solicitors at the time, Raymond Saul & Co., held the other half, representing Mrs. Hemming's half interest. They refused the trustee's request to pay that half to her and claimed that it belonged to Hemming. Their argument was that Hemming was the residuary beneficiary of his mother's estate at the time of his bankruptcy and thus he did not have any legal or equitable interest in any of the assets of the estate. He would only acquire such an interest when the estate was administered. However, the Act did not permit the trustee to claim property that a bankrupt acquires after his discharge. The trustee disagreed. Hemming died on April 12, 2007 and Jolyon Holden, the first defendant, was appointed his executor. In substance, the proceedings were carried on between Raymond Saul & Co. and the trustee.[60]

56. *Supra*, footnote 19, at p. 708.
57. *Supra*, footnote 14.
58. *Supra*, footnote 13.
59. 1986, c. 45. I have not quoted the language of the statute, which contains a very broad definition of "property". Although that definition was relevant to the decision, I did not think it essential to this discussion.
60. See further proceedings at [2008] EWHC 8565 (Ch), in which the court required the first defendant, Raymond Saul, to pay the costs of the trustee, Ms. Britten, without recourse to moneys of Hemming's mother's estate or of Hemming's estate that were held by Raymond Saul.

The judge concluded that the composite right Hemming had to have his mother's estate properly administered and to have the residue paid to him vested in his trustee in bankruptcy and did not revest in him when he was discharged until his bankruptcy debts and costs had been paid. Further, the trustee could assert the right against Mrs. Hemming's executors.

2.5.2 To Devises and Specific Gifts

As I discussed above,[61] the rule that the personal representative has full title to all of the estate's assets applies also to devises, specific gifts, and general legacies, for the personal representatives may have to apply the assets comprised in those gifts to the payment of the estate's debts, although these assets have priority for that purpose over those that comprise the residuary estate. Nonetheless, the law treats the beneficiaries of such gifts differently from residuary beneficiaries. The cases state that a specific beneficiary "takes under the will"[62] and therefore has greater rights than a residuary beneficiary. Thus, Williams states that although a personal representative is not *per se* a trustee:[63]

> For some purposes . . . a specific legatee or specific devisee has an equitable interest in the property from the date of the testator's death. This is consistent with the rule that specific legacies and devises carry income from the death of the testator and, conversely, that the legatee or devisee is responsible for any expenses incurred in storing or preserving the property from the date of the death.

But the authors continue:[64]

> However, at best, the specific legatee or devisee has a defeasible interest, since the asset might be required for the purposes of administration. It can thus be argued that, at least for some purposes . . . the legatee or devisee has, during the period of administration, only a chose in action to have the deceased's estate properly administered.

Rand J. expressed the same view in *Fitzgerald v. M.N.R.*[65] when he said:

> At common law a legatee could not bring an action against an executor before at least the executor assented to the legacy; and *a fortiori*[66] that rule is applicable where the bequest is residual and unascertained.

61. In §2.4.
62. See, *e.g.*, *Bryen v. Reus*, *supra*, footnote 34, at 399.
63. Williams, *Wills*, *supra*, footnote 3, §1.8, internal citations omitted.
64. *Ibid.*
65. *Supra*, footnote 25, para. 4.

The right of a specific beneficiary or devisee is sometimes also described as inchoate. Thus, for example, in an older but well-regarded text the author said:[67]

> The bequest of a legacy, whether it be general or specific, transfers only an inchoate property to the legatee; to render it complete and perfect the assent of the executor is required.

Thus, specific beneficiaries and devisees do have broader rights than residuary beneficiaries, but they cannot access the property left to them for the time being.

2.6 Summary

It seems appropriate to summarize the discussion thus far.

It is accepted law that residuary beneficiaries under an unadministered estate do not have a property interest in the residue. But they do have a chose in action to compel the personal representative to administer the estate properly and to pay or transfer to them their shares of the net residue. This principle applies also to intestacies. Residuary beneficiaries are said not to have any property interest in the residue until it is ascertained and the personal representative assents to the gifts of residue.

It is now clear that specific beneficiaries are also not entitled to possession of the property left to them, for the personal representative may have to use that property also for the payment of debts. It is only when the personal representative determines that the property comprised in the gifts is not necessary for that purpose and he assents to the gifts that the beneficiaries are entitled to possession. However, the cases and commentaries are ambivalent about what the specific beneficiaries have before the assent. Some say they have no property interest. Others say that they do, but it is inchoate until the assent. Still others say that they have a property interest, but it is defeasible and will be defeated if the property is necessary to pay the debts. It is unfortunate that the law is unclear on this point. It is to be hoped that an appellate court will clarify this issue.

2.7 Effect of Statutory Trust

Although it is accepted law that that the personal representative holds the unfragmented title to the property while the estate is

66. *I.e.*, with stronger reason.
67. Toller, *Law of Executors*, 6th ed. (1827), p. 306 ("Toller"), quoted in Williams, *Assent*, *supra*, footnote 1, pp. 2 and 21. To the same effect, see Williams, *Executors*, *supra*, footnote 3, §§81-01, 81-03.

unadministered, the question arises: What is the effect of the statutory trust contained in s. 2(1) of Ontario's *Estates Administration Act*?[68] The section reads:

> 2. (1) All real and personal property that is vested in a person without a right in any other person to take by survivorship, on the person's death, whether testate or intestate and despite any testamentary disposition, devolves to and becomes vested in his or her personal representative from time to time *as trustee* for the persons by law beneficially entitled thereto, and, subject to the payment of the person's debts and so far as such property is not disposed of by deed, will, contract or other effectual disposition, it shall be administered, dealt with and distributed as if it were personal property not so disposed of.

The question was raised by Waters who, in discussing the principle of *Livingston*, said: "*Sed quaere* how far the Privy Council decision is compatible with the trust created by s. 2(1)."[69] But does s. 2(1) really mean that personal representatives are trustees for all purposes and that the beneficiaries have the beneficial ownership in the property left to them?

The answer is no. And this will become apparent when we consider the origin of the provision. At common law a deceased person's personal property passed to his personal representative. However, the deceased's real property descended directly upon his heir-at-law, or vested in his devisee. This changed in the second half of the 19th century in Canada. In 1886, Ontario enacted the *Devolution of Estates Act*,[70] and s. 4(1) of that Act vested both the personal and real property in the deceased's personal representative. Other provinces enacted similar legislation. The legislation did not call personal representatives trustees initially. This happened in England with the enactment of the *Land Transfer Act 1897*.[71] As

68. R.S.O. 1990, c. E.22, emphasis supplied. For the sake of convenience I shall refer only to the Ontario statute. However, for similar legislation, see: *Administration of Estates Act*, S.S. 1998, c. A-4.1, Part XI, s. 50.3; *Chattels Real Act*, R.S.N.L. 1990, c. C-11, s. 2; *Devolution of Estates Act*, R.S.N.B. 1973, c. D-9, s. 3; *Devolution of Real Property Act*, R.S.A. 2000, c. D-12, ss. 2, 3; R.S.N.W.T. 1988, c. D-5, ss. 3-4; R.S.N.W.T. (Nu.) 1988, c. D-5, ss. 3-4; R.S.Y. 2002, c. 57, ss. 2-3; *Law of Property Act*, C.C.S.M., c. L90, s. 17.3(1)-(5); *Probate Act*, S.N.S. 2000, c. 31, ss. 44-47; R.S.P.E.I. 1988, c. P-21, ss. 103-4; *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13, s. 162.

69. Waters, *supra*, footnote 10, p. 48, note 17, and see also p. 52, note 37, where the authors say of the language of s. 2(1): "This may say no more than that the personal representative must account to those who are beneficially entitled to the estate. It need not have any reference to trusteeship in the sense of a capacity to exercise statutory trustee powers".

70. S.O. 1886, c. 22.

71. *Supra*, footnote 11.

already mentioned, s. 1 of this Act also provided that thereafter on a person's death, her real estate devolved upon her personal representatives, notwithstanding any testamentary disposition. But s. 2(1) went on to provide that the personal representatives "shall hold the real estate *as trustees* for the persons by law beneficially entitled thereto". This statutory trust was then adopted in the Canadian jurisdictions. It happened in Ontario in 1910, when the revised *Devolution of Estates Act* incorporated it.[72]

But was the purpose of this legislation to create a true trust? I submit that it was not. Rather, one of its purposes was to make the interests of the deceased's beneficiaries equitable, so that they would no longer be subject to artificial destruction by the common law remainder rules. The anfractuosity of the law of common law remainders is legendary, partly because the rules originate in feudal law and they are therefore foreign to many of us. Nonetheless, we should examine the rules to understand how they form the background to s. 2(1). But because this area of the law is so abstruse, it is best to do so in an excursus.

Excursus

The reader may recall that the common law remainder rules required, *inter alia*, that there be no gap in seisin between successive interests. If there was, a subsequent interest would fail. Thus, for example, if a person transferred land "to A for life, with remainder to B at age 30", B's interest was contingent. If B attained age 30 while A was still living there would by no problem, for B's interest vested at that point and the seisin could shift automatically to B on A's death. But if A died while B had not yet reached the age of 30, the seisin could not pass to B, so B's contingent interest failed. It was destroyed artificially by the rules. Of course, B's interest could also fail naturally, *i.e.*, by his death under age 30.

But the common law remainder rules did not apply to equitable interests. Thus, when uses came to be enforced in the 13th century, the feoffee to uses held the legal title, but the beneficiary held the beneficial title. Hence, if a feoffor granted land "to X to the use of A for life and then to the use of B in fee at age 30", the interests of A and B were equitable and B's interest could no longer be destroyed artificially if A died before B reached age 30. The legal title was held by X and only X was subject to those pernicious rules, but they were not broken at law. Of course,

72. S.O. 1910, c. 56, s. 3(1).

equity would probably raise a resulting use in favour of the feoffor for the period of time between A's death and B reaching age 30.

But then Henry VIII prevailed upon a reluctant Parliament to enact the *Statute of Uses*,[73] because the employment of uses caused Henry to lose much revenue. The Statute "executed the use" by giving the legal title to the *cestui que use*.[74] That meant that contingent interests, such as B's in the above examples, were suddenly again exposed to the common law remainder rules. Fortunately, conveyancers quickly found ways around the Statute to preserve the use and the equitable interests it created. They did this by a strict interpretation of the Statute and by devices such as the "use upon a use", as in a grant "to X and his heirs to the use of A and his heirs, to the use of B and his heirs at age 30". The courts held that the Statute executed only the first use,[75] thereby getting rid of X and leaving A with the legal title and B the equitable title. In due course, the second use came to be called a trust. So B's interest could again not be destroyed artificially.

In 1540 Parliament enacted the *Statute of Wills*.[76] It permitted a person to devise all of his land held in socage tenure and two-thirds of his land held in knight's service "at his free will and pleasure". Military tenures were later abolished and turned into socage tenure.[77] The quoted phrase was interpreted to mean that everyone then had full testamentary power over freehold land, without the need for uses.[78] Contingent interests under wills and under uses then came to be called "executory interests".

However, the courts developed another pernicious rule, called the rule in *Purefoy v. Rogers*.[79] It provided that if a limitation in a will or in a grant containing successive uses, could possibly comply with the legal remainder rules, the limitation had to be

73. 1535 (27 Hen. VIII), c. 10.
74. A term then in use, and still occasionally encountered in cases and texts, for *beneficiary*.
75. *Sambach v. Dalston* (1634), Toth. 188, 21 E.R. 164.
76. 1540 (32 Hen. VIII), c. 1.
77. By the *Military Tenures Abolition Act*, 1660 (12 Car. 2), c. 24.
78. I refer the reader to a succinct summary of the law of uses and the development of trusts in Oosterhoff, *Trusts*, *supra*, footnote 3, §§1.2.2, 1.2.3, 1.2.4.
79. (1671), 85 E.R. 1181, 2 Wms. Saund. 380 (Eng. K.B.).

treated as a legal contingent remainder and not as an executory interest.

This meant that such interests were just as destructible as in the past. Thus, if the owner of land devised it "to A for life and then to B in fee at age 30", B's interest could be destroyed artificially if she was not yet 30 when A died.[80] For the devise could comply with the common law remainder rules and therefore it had to. It was relatively easy to avoid the rule by using a use upon a use, as explained above. Another way was to deliberately phrase the devise so that it could not comply with the rules, as follows: "to A for life and one day after A's death to B at age 30."

But the rules make no sense in a modern society. They are remnants of a feudal age and should have been abolished many years ago. It was partly to overcome the problem that England enacted the statutory trust in the *Land Transfer Act 1897*.[81] Astbury J. discussed the reason and effect of the Act in *Re Robson, Douglas v. Douglas*.[82] The testator had left real property to his daughter for life, with remainder to such of her children as should attain age 21. The daughter survived the testator. When she died, she was survived by four children. Two were older than 21; the others were under that age. Did the 1897 Act save the remainder to the children,[83] or did *Purefoy v. Rogers*, apply so as to exclude the two younger children?[84] Astbury J. held that *Purefoy* did not apply, because the 1897 Act made the limitations to the children equitable. Moreover, the fact that the personal representative had completed the

80. The rule applied also to grants incorporating successive uses (as distinct from a use upon a use), as in a grant "to X to the use of A for life and then to the use of B in fee at age 30".
81. Of course that Act did not have the effect of saving a grant that incorporated successive uses.
82. [1916] 1 Ch. 116 (Ch. D.).
83. In fact the court also considered whether the *Contingent Remainders Act 1877*, 40 & 41 Vict., c. 33 saved the gifts, but did not decide the point.
84. The case also engaged another rule, *Festing v. Allen* (1843), 12 M. & W. 279, 152 E.T. 1204. That case applied *Purefoy* to a devise of the following format: "to A for life and then to all her children who shall attain the age of 21, and for want of such issue, to B" When A died, her three children were all under 21, and the court held that the property went to B. Although *Festing* was mentioned in argument in *Robson*, Astbury J. did not mention it in his reasons. *Festing* was often disapproved of. Thus, in *Astley v. Micklethwaite* (1880), 15 Ch. D. 59 (Ch. D.) at 63, Malins V.C. called rule in *Festing v. Allen* a "monstrous doctrine".

administration of the estate, divested himself of the legal title and vested it in those entitled did not make a difference.[85]

It is important to note that *Robson* was decided in a legal climate in which there was a strong aversion to the continued application of the common law remainder rules. This is evidenced by statutory attempts to limit the reach of those rules and also by a number of cases that excoriated their continued use. This suggests that, as Astbury J. held in *Robson*, the 1897 Act was directed, *inter alia*, also to curb those rules.

Section 2(1) of the *Land Transfer Act 1897*[86] became effete with the enactment of Lord Birkenhead's property legislation in 1925. Section 1(1) of the *Law of Property Act 1925*[87] provides that the only estates in land capable of subsisting at law are an estate in fee simple absolute in possession and a term of years absolute. And subsection (3) provides "All other estates, interests, and charges in or over land take effect as equitable interests". Thus, at one stroke legal executory interests ceased to exist and the power of the common law remainder rules was emasculated in England.[88]

85. On the latter point Astbury J. applied *Re Freme (No. 1)*, [1891] 3 Ch. 167 (Ch. Div.).
86. *Supra*, footnote 11.
87. 15 & 16 Geo. 5, c. 20.
88. It may interest aficionados of murder mysteries that the *Law of Property Act 1925* featured prominently in Dorothy L. Sayers' third Lord Peter Wimsey murder mystery, *Unnatural Death*, published in 1927. A young woman was the caregiver to her elderly great-aunt, who refused to make a will. The great-niece stood to inherit a large amount of money on the intestacy of her great-aunt under the old law, under which next of kin of any degree could inherit. But she learnt that she was at risk of being disinherited under the 1925 Act. Therefore, she murdered her great-aunt in 1925, so that her death would happen under the old law before the new Act would come into force on 1 January 1926. The Act was referred to as "the Property Act" in the book, but in fact the relevant statute is the *Administration of Estates Act 1925*, *supra*, footnote 11, Part IV of which regulates the distribution of intestate estates. It makes provision for the surviving spouse and issue, and failing them, in succession, for parents, brothers and sisters, grandparents, and aunts and uncles of the intestate. It makes no provision for next-of-kin beyond uncles and aunts. If none of the persons mentioned survive the intestate, the property belongs to the Crown, the Duchy of Lancaster, or the Duke of Cornwall. Thus more remote next-of-kin are excluded. Alberta and British Columbia also exclude remote next-of-kin by providing that persons of the 5th or greater degree of relationship are deemed to have predeceased the intestate. See *Wills and Succession Act*, S.A. 2010, c W-12.2, s. 67(2); *Wills, Estates and Succession Act*, *supra*, footnote 68, s. 23(3). See also *Indian Act*, R.S.C. 1985, c. I-5, s. 48(8), which provides "in no case shall representation

Regrettably, Krever J. (as he then was) seems not to have been advised of the *Robson* case when he decided *Re Crow*.[89] The testator devised land to his grandsons, Robert and William for life. On their deaths the parcel was to be divided and each part transferred to their respective children. If any of the testator's grandchildren did not have children, the children of those that did would become entitled to the property of any grandchild dying without children. William died in 1944. He had no children. The executors conveyed the land to Robert in 1948. He died in 1983 and had no children. At the time of William's death, none of the testator's grandchildren had children. But after William's death and before Robert's death, two grand-children had children and they were living at the time the case was decided. Justice Krever held, applying *Purefoy*, that those children could not take William's undivided share, since they were not alive when William died. However, they could take Robert's undivided share. With respect, I submit that the case was decided *per incuriam*, because the court was not informed of *Robson* and similar cases.[90]

Consequently, the statutory trust in s. 2(1) of the Ontario *Estates Administration Act*[91] and similar legislation did not create a true trust. One of its purposes was to ensure that executory interests could no longer be destroyed by archaic rules.

I should have thought that if s. 2(1) of the 1897 Act was intended to have a wider reach, the issue would have been considered in

---

be admitted after brothers' and sisters' children, and any interest in land in a reserve shall vest in Her Majesty for the benefit of the band if the nearest of kin of the intestate is more remote than a brother or sister".

89. (1984), 12 D.L.R. (4th) 415, 17 E.T.R. 1, 1984 CarswellOnt 556 (Ont. H.C.). The case does not refer to *Festing v. Allen*, *supra*, footnote 84.

90. For an excellent discussion of this case and of the feudal doctrines it applied, see Timothy Youdan's Annotation, "Future Interests and the Rule in *Purefoy v. Rogers*: The Unnecessary Application of Archaic and Capricious Rules" (1984), 17 E.T.R. 1. Youdan relates earlier unsuccessful statutory attempts in England, followed but later abandoned in Ontario, to prevent the artificial destruction of executory interests. He also notes in his Annotation that legislation similar to s. 2(1) of the *Land Transfer Act 1897*, *supra*, footnote 11, was adopted in other Commonwealth jurisdictions as well and he discusses a number of Australian cases to the same effect as *Re Robson*, *supra*, footnote 82. And see also Anger and Honsberger, *Law of Real Property*, 3rd ed. by Anne Warner La Forest (Aurora: Canada Law Book, 2006), §§9:50.20, 9:50.30; 9:90.10, 9:90.20, and 9:90.30.

91. *Supra*, footnote 68.

the leading cases discussed above, especially *Livingston*, which was an Australian case and legislation similar to s. 2(1) of the 1897 Act had been enacted in the Australian states.[92] But that did not happen, although Viscount Radcliffe was certainly aware of the issue. Thus, he said:[93]

> What equity did not do was to recognise or create for residuary legatees a beneficial interest in the assets in the executor's hands during the course of administration. Conceivably, this could have been done, in the sense that the assets, whatever they might be from time to time, could have been treated as a present, though fluctuating, trust fund held for the benefit of all those interested in the estate according to the measure of their respective interests. But it never was done. It would have been a clumsy and unsatisfactory device from a practical point of view; and, indeed, it would have been in plain conflict with the basic conception of equity that to impose the fetters of a trust upon property, with the resulting creation of equitable interests in that property, there had to be specific subjects identifiable as the trust fund. An unadministered estate was incapable of satisfying this requirement. The assets as a whole were in the hands of the executor, his property; and until administration was complete no one was in a position to say what items of property would need to be realised for the purposes of that administration or of what the residue, when ascertained, would consist or what its value would be.

Section 2(1) is occasionally discussed in the cases, but only on the point that the full title to the estate assets vests in the personal representatives and the beneficiaries do not have a property interest in the assets.[94] In *909403 Ontario Ltd. v. DiMichele*,[95] a case involving a contingent residuary gift, Gillese J.A. noted that s. 2(1) permitted the estate trustee to grant a mortgage on estate property while the estate was unadministered. She also stated that the beneficiaries' entitlement under the will did not amount to a property interest.[96] The cases do not discuss the trust point. Although s. 2(1) is not mentioned in *Frye v. Frye Estate*,[97] the court does say with respect to a specific bequest of shares that the shares vested in the estate trustees in trust for the

92. See Youdan Annotation, *supra*, footnote 90.
93. *Livingston*, *supra*, footnote 19, p. 708 A.C.
94. See, *e.g.*, *Bueti v. R.*, 2015 TCC 265, 2015 CCI 265, 2015 CarswellNat 10766 (T.C.C. [General Procedure]). The gifts under consideration in that case were gifts of residue.
95. *Supra*, footnote 41, paras. 53 and 59.
96. *Supra*, para. 103.
97. 2008 ONCA 606, 299 D.L.R. (4th) 184, 42 E.T.R. (3d) 190 (Ont. C.A.), leave

beneficiary and they had a duty to try to transfer the shares to the beneficiary *in specie*.[98] Thus the case seems to conform to s. 2(1), but it would have been preferable if that section had been mentioned, so that it would have been clear that the trust the court spoke of was of limited reach.

3. The Law of Assent

3.1 Generally

As I have demonstrated, it is necessary for the orderly administration of an estate that the personal representative receive the full unfragmented title to the estate assets. Residuary beneficiaries do not have a property interest in any specific assets until administration is complete and specific beneficiaries have only an inchoate interest in the property left to them until administration is complete, or the personal representative gives her assent, or when she transfers the assets to the beneficiaries. The assent, when made, releases the property that the testator left to the beneficiaries in his will. An assent is required for gifts of both personal and real property.

3.2 Alternatives to Assent

3.2.1 Transfer to Beneficiaries

Of course an assent is not necessary if the personal representative transfers the assets to the beneficiaries. Such a transfer makes an assent superfluous. And in practice the necessity of an assent is bypassed in many estates because the personal representative, having paid the debts, promptly transfers the assets to the beneficiaries. But the doctrine remains relevant if distribution is delayed for any reason.

3.2.2 Appropriation

In some cases an alternative to assent is an "appropriation". This occurs when the personal representative sets aside a specific portion of an estate to answer a vested absolute legacy. At that point the personal representative becomes a trustee of the property for the legatee. Thus, the assets included in the appropriation become the

---

to appeal refused (2009), 259 O.A.C. 400 (note), 395 N.R. 389 (note), 2009 CarswellOnt 615 (S.C.C.).

98. The shares were subject to a shareholders' agreement and the estate trustees were constrained by it in carrying out their duty.

property of the legatee and he can maintain proceedings to recover it.[99] The concept of appropriation was mentioned in two recent Ontario Court of Appeal decisions. The first, *Spencer v. Riesberry*,[100] was not an estate, but rather an *inter vivos* trust that gave a contingent interest in the trust property as a whole to a number of beneficiaries. However, the settlor's intention was that eventually, when the contingencies were satisfied, each beneficiary would receive a specific property. Gillese J.A. said in the course of the judgment:

> 37. Unless the terms of the trust expressly provide otherwise, a beneficiary has no property interest in any specific asset of the trust, prior to or absent an appropriation of such asset to the beneficiary by the trustee.

Justice Gillese applied that concept to an estate in *909403 Ontario Ltd. v. DiMichele*.[101] The will in that case gave a contingent interest in the residue to a number of beneficiaries and the estate had not yet been fully administered. Justice Gillese said:

> 104. A contingent beneficial interest in an estate does not give rise to a property interest in any specific asset of the estate, prior to or absent an appropriation of such asset to the beneficiary by the trustee.

Perhaps the reference should have been to an assent, rather than an appropriation.

3.3 Formalities of Assents

3.3.1 Generally

Whether the personal representative has given her assent is a question of fact.[102] At common law, the personal representative could give an assent only with respect to personalty.[103] However, after real property was made to descend to the personal representative,[104] an assent could be made also with respect to real property.[105] Thus, an assent can be made with respect all types of property, including residue.

99. See Williams, *Assent*, *supra*, footnote 1, p. 11; *Re West, West v. Roberts*, [1909] 2 Ch. 180 (Ch. Div.).
100. 2012 ONCA 418, 17 R.F.L. (7th) 94, 2012 CarswellOnt 7589 (Ont. C.A.).
101. *Supra*, footnote 41.
102. Williams, *Executors*, *supra*, footnote 3, §81.07; *Solomon v. Attenborough & Son* (1912), [1913] A.C. 76 (U.K. H.L.) at 82.
103. Williams, *Assent*, *supra*, footnote 1, p. 97.
104. By the *Land Transfer Act 1897*, *supra*, footnote 11, s. 1. And see comparable Canadian legislation discussed above in §2.7.
105. Williams, *Assent*, *supra*, footnote 1, p. 97. And see *Land Transfer Act 1897*, *supra*, footnote 11, s. 3(1).

3.3.2 Real Property

In England since 1925, the personal representative must give an assent in writing to a devise of real property.[106] The only Canadian legislation that seems to have mentioned assents was the British Columbia *Estates Administration Act*.[107] Section 79(1) provided that the personal representatives may assent to a devise by instrument, or they may convey the real property to the devisee. And subsection (5) provided that production of the written assent authorized the registrar of land titles to register the devisee as owner. However this provision was not carried forward into the *Wills, Estates and Succession Act*.[108] Nitikman notes that s. 162(3) of that Act provides that every common law rule that applies to the administration of personal property by an executor applies to land and concludes that therefore "clearly an assent will be required for land as well as for personal property".[109] This is undoubtedly true, but the common law did not know of an assent of real property and therefore it did not make provision for it to be in writing either. Thus, the provision in s. 79(1) for an assent in writing to a devise appears to have been lost.

3.3.3 Other Property

Apart from legislation such as that just discussed, an assent with respect to real property, or personal property, does not have to be in writing. Assents may be formal, written documents, but it is very rare for them to be reduced to writing, whether with respect to personal property, or with respect to real property. Thus informal and oral assents are common.

3.3.4 Implied Assents

Much of the case law on assents is concerned with circumstances in which there has not been a formal or an informal assent. Rather, with the passage of time, after the debts have been fully paid, it has become clear that the personal representative no longer holds title in that representative capacity, but in her capacity as trustee for the beneficiaries. This typically happens in an estate the residue of which cannot yet be distributed because the residuary beneficiaries are

106. *Administration of Estates Act*, *supra*, footnote 11, s. 36(4). See *Re King's Will Trusts*, [1964] Ch. 542 (Ch. D.).
107. R.S.B.C. 1996, c. 122.
108. *Supra*, footnote 68.
109. Nitikman, *supra*, footnote 2, p. 682, note 55.

minors or for other reasons. In these circumstances the law will often infer from the facts that an assent has taken place.

The leading case on implied assents is *Attenborough v. Solomon.*[110] The testator gave the residue of his estate to his executors and trustees, A.S. and J.S., upon trust for sale and distribution. The executors paid the debts and legacies within one year and passed their accounts. However, the residue was not yet fully distributed. Fourteen years after the testator's death, A.S., without J.S.'s knowledge, improperly pledged some silver plate that belonged to the estate to the appellant pawnbrokers. They took without notice that A.S. was an executor and trustee. A.S. then died and J.S. and a new executor brought proceedings to recover the plate. They were successful. Viscount Haldane delivered the decision of the House. He said:[111]

> . . . The general principles of law which govern this case are not doubtful. The position of an executor is a peculiar one. He is appointed by the will, but then, by virtue of his office, by the operation of law and not under the bequest in the will, he takes a title to the personal property of the testator, which vests him with the *plenum dominium*[112] over the testator's chattels. He takes that, I say, by virtue of his office. The will becomes operative so far as its dispositions of personalty are concerned only if and when the executor assents to those dispositions. It is true that by virtue of his office he has a general power to sell or pledge for the purpose of paying debts and getting in the money value of the estate. He is executor and he remains executor for an indefinite time . . . The office of executor remains, with its powers attached, but the property which he had originally in the chattels that devolved upon him, and over which these powers extended, does not necessarily remain. So soon as he has assented, and this he may do informally and the assent may be inferred from his conduct, the dispositions of the will become operative, and then the beneficiaries have vested in them the property in those chattels. The transfer is made not by the mere force of the assent of the executor, but by virtue of the dispositions of the will which have become operative because of this assent.

Viscount Haldane then considered the fact that the residuary account had been passed, that 14 years had elapsed since the testator died, and that in the interval the executors had not done any act as executors. He went on to say:[113]

---

110. *Supra*, footnote 102.
111. *Supra*, at 82 A.C.
112. *I.e.*, full ownership.
113. *Supra*, at 83-85 A.C.

> . . . I am of opinion that the true inference to be drawn from the facts is that the executors considered that they had done all that was due from them as executors by 1879, and were content when the residuary account was passed that the dispositions of the will should take effect. That is the inference I draw from the form of the residuary account; and the inference is strengthened when I consider the lapse of time since then, and that in the interval nothing was done by them purporting to be an exercise of power as executors. My Lords, if this be so, this appeal must be disposed of on the footing that in point of fact the executors assented at a very early date to the dispositions of the will taking effect. It follows that under these dispositions the residuary estate, including the chattels in question, became vested in the trustees as trustees. That they were the same persons as the executors does not affect the point, or in my opinion present the least obstacle to the inference. But if that was so, then the title to the silver plate of A. A. Solomon as executor had ceased to exist before he made the pledge of 1892 . . . If that be true, upon no hypothesis did the appellants get a legal title to the property in the plate. When A. A. Solomon handed over these articles of silver to Messrs. Attenborough he had no property to pass as executor; and they got no contractual rights which could prevail against the trustees. The latter were the true owners and they are now in a position to maintain an action . . . My Lords, the property, if I am right in the inference which I draw from the circumstances of the case, was vested not in A.A. Solomon, but in A.A. Solomon and his co-trustee jointly in 1892, when the attempted pledge was made; and I see no answer to the case made for the respondents that the present trustees, in whom that property is now vested, are entitled to recover it.

The duties of executors, as described in *Attenborough*, and when they become trustees are often described in similar ways in Canadian cases.[114]

Viscount Haldane thus applied the long-standing rule that one executor can grant a valid title to personal property to a third person, without the concurrence of his co-executors, but that trustees hold title to the personal property jointly and must act together to dispose of it.[115]

There are quite a number of Canadian cases dealing with implied assents, a number of which predated *Attenborough*. So the doctrine was known well before it was decided. The first case appears to be *Teahon v. Leamy*.[116] A testator inherited an unexpired term of years. He appointed an uncle as executor and devised the term to another uncle for life, with remainder to the plaintiff, his (the testator's) son,

114. See, *e.g.*, *Re Baty* (1958), 16 D.L.R. (2d) 164, [1959] O.R. 13, 1958 CarswellOnt 131 (Ont. C.A.); *Lemon v. Charlton* (1919), 45 D.L.R. 604, 46 N.B.R. 228, 1919 CarswellNB 4 (N.B. C.A.).

115. Waters, *supra*, footnote 10, pp. 53, 918.

116. (1861), 21 U.C.Q.B. 216, 1861 CarswellOnt 106 (U.C. Q.B.).

M. The executor administered the estate and then conveyed the unexpired term of years to a stranger. M sued to recover the term. The court held that the evidence was sufficient to allow an inference that the executor had assented to the bequest to his brother, as there were no debts to pay. Moreover, the assent extended also to the remainder interest given to the plaintiff. There are also several other early cases.[117] Of these, only one concluded that an assent happens only by a positive act of the executors divesting themselves of the estate property as executors and receiving it as trustees.[118] However, the Supreme Court of Canada distinguished and disapproved of that case.[119] In all the other early cases the facts disclosed that there were no debts or they had been paid, and that the estate accounts had been passed. Consequently, an assent could be implied.[120]

Later cases also consider the law of assent. *Re Box Estate (No. 2)*[121] is an example. The testator appointed his wife executor and trustee. He gave her a life interest in the assets of the estate, together with a general power to appoint the assets. The will also provided that after the wife's death the corpus was to be divided equally between the testator's two daughters. The wife deposited the entire corpus into her personal account, thereby making use of the general power to appoint. Then she made a will leaving her property to others. The two daughters contested the validity of the will. The court held that by her actions and conduct in administering the estate, the wife assented to the legacy of the whole corpus of her husband's estate to herself.[122]

---

117. Other early cases include *Ewart v. Gordon* (1867), 13 Gr. 40, 1867 CarswellOnt 4 (U.C. Ch.); *Cumming v. Landed Banking & Loan Co.* (1893), 22 S.C.R. 246, 1893 CarswellOnt 16 (S.C.C.); *Robertson v. Junkin* (1896), 26 S.C.R. 192, 1896 CarswellOnt 17 (S.C.C.); *Dover v. Denne* (1902), 3 O.L.R. 664, 2 O.W.R. 297, 1902 CarswellOnt 234 (Ont. C.A.); *Lemon v. Charlton*, *supra*, footnote 114; *Roche v. Roche*, [1930] 4 D.L.R. 310, 2 M.P.R. 234, 1930 CarswellNS 40 (N.S. C.A.); and *Re Cassidy*, [1931] 3 D.L.R. 392, [1931] O.R. 259, 1931 CarswellOnt 158 (Ont. S.C. [In Chambers]).
118. *Ewart v. Gordon*, *supra*.
119. In *Cumming v. Landed Banking & Loan Co.*, *supra*, footnote 117.
120. In *Re Cassidy*, *supra*, footnote 117, the court did not refer to the concept of implied assent, but did say that once the executors had paid the debts and legacies, and had rendered an account, they became trustees. To the same effect, see *Re McLean* (1982), 135 D.L.R. (3d) 667, 11 E.T.R. 293, 37 O.R. (2d) 164 (Ont. H.C.); and *Re Munsie*, [1941] 2 D.L.R. 778, [1941] 1 W.W.R. 334, 1941 CarswellBC 7 (B.C. S.C.).
121. (1957), 7 D.L.R. (2d) 478, 20 W.W.R. 636, 1957 CarswellMan 4 (Man. C.A.).
122. *Supra*, para. 40.

On the other hand, in *Re Baty*[123] the court concluded that there had not been an assent. The testator died in 1927 and left a legacy to his widow. The executors paid part of the legacy to the widow in 1929. She died later that year. At that point the only asset remaining in the estate was a farm and it was not sold until 1956, although the will contained a discretionary power of sale. The testator's administrator brought a motion for advice and the court's opinion on the question whether the widow's legacy should be paid with interest or whether it was barred. This raised the question whether the administrator was an express trustee, in which case the widow's claim might not be barred. The court held that he was acting as an administrator and not as an express trustee. Then it considered the argument that the executors had assented to the widow's legacy when making a payment on account in 1929. However, the court held that such a general payment does not amount to an assent and did not make the executors trustees of the legacy. Consequently, the claim of the widow's estate was barred. The court quoted from *Thorne v. Thorne*,[124] where Romer J. said that an executor often makes a general payment to a widow, who is a legatee, but without thereby intending to assent to all the legacies in the will.

More recent cases also consider the concept. *Booty v. Hutton*[125] is an example. A testator died in 1976. He appointed his sons, Gordon and James, his executors and left the residue equally to his three children, Charlein, Gordon, and James. James died in 1992 and appointed Charlein and Gordon his executors and left the residue equally to them. Charlein brought proceedings for an accounting against Gordon for moneys still held in an account in the testator's estate. Gordon then appointed his son, Allen, as "co-trustee" with him of the account. The court held that Gordon had not completed his responsibilities as executor when he purported to appoint Allen as co-executor. Hence, he had not yet assented. Therefore, Allen's appointment was invalid. While a trustee can appoint another person as co-trustee, an executor cannot.[126]

Our fiscal authorities have also taken note of the law of assent. *Dushinsky Estate v. M.N.R.*[127] is an example. A testator bequeathed his herd of cattle to his wife. She did not think that she could feed

123. *Supra*, footnote 114.
124. [1893] 3 Ch. 196 (Ch. D.) at 202.
125. (1999), 30 E.T.R. (2d) 159, 30 E.T.R. (2d) 158, 1999 CarswellMan 447 (Man. Q.B.).
126. *Trustee Act*, C.C.S.M. c. T160, s. 8(8). *Cf.* Ontario's *Trustee Act*, *supra*, footnote 8, s. 2(2), and see also s. 37(1).
127. [1990] 2 C.T.C. 2012, 39 E.T.R. 211, 1990 CarswellNat 387 (T.C.C.).

them during the winter so she sold the cattle with the concurrence of the executor. The executor said that he had transferred the cattle to the widow before the sale. However, he kept the proceeds. The Minister reassessed the estate by including the cattle in computing the income of the estate. On appeal, the court agreed that the executor did not expressly assent to vesting title to the cattle in the widow. But his conduct in retaining the proceeds was inconsistent with his assertion that title had already been transferred. Consequently, there was no implied assent either. The court held that the proceeds of sale were taxable in the estate.

A very instructive recent case on the law of assent is *Seah Teong Kang v. Seah Yong Chwan.*[128] The shareholder of a corporation died. In his will he bequeathed his shares to a number of specific legatees. One of them was his wife. He also named his wife the sole beneficiary of the residue of his estate. When he died, the corporation was being wound up. The liquidators declared a surplus and the executor of the will did not seek to transfer the shares to the specific legatees, but instead took steps to distribute the testator's share of the surplus to the specific legatees according to their shares under the will. The wife argued that s. 259 of the *Companies Act*[129] governed the case. It provides that any transfer of shares made after a winding up has commenced is void, unless the court orders otherwise. She maintained that since the executor did not seek the court's approval, no interest in the shares was transferred to the legatees and therefore they were not entitled to receive any portion of the liquidation surplus, for the right to such payment springs from one's right as a shareholder. Thus, the wife argued that the specific gifts failed and the liquidation surplus fell into residue, to which she was solely entitled.

The court rejected this argument and held that the specific gift did not fail. It focused on the law of wills and held that a specific legatee can acquire an equitable interest in the bequeathed shares, quite apart from a consideration of s. 259, if the executor has assented to the shares. The court concluded that the executor's actions demonstrated that he had assented.[130] For when the executor attempted to pay the proportionate shares of the liquidation surplus to the specific beneficiaries, he thereby indicated unequivocally that these moneys were no longer required for the administration of the estate. In other words, he impliedly assented to the payment of these moneys.[131]

128. *Supra*, footnote 39.
129. *Singapore Statutes Online*, c. 50, 2006 Rev. Ed.
130. *Seah Teong Kang*, *supra*, footnote 39, para. 2.
131. *Supra*, para. 34.

The court observed that the whole interest in the shares passed to the executor by transmission and not by transfer.[132] Then, when the executor acknowledged, by an assent, that the subject matter of a specific bequest was no longer necessary for the payment of the debts of the estate, funeral expenses, and general pecuniary legacies, the executor became a trustee of the bequeathed assets and the beneficiaries acquired the equitable interest in the assets. They acquired the equitable interest by virtue of the gift in the will, which had become operative by the assent.[133]

Of course, this did not mean that s. 259 was irrelevant. However, it applied only to prevent the registered *transfer* of shares once liquidation had begun. It did not bar the *transmission* of the equitable interest in the shares.

3.4 Who Assents

3.4.1 Generally

At common law only an executor could assent, an administrator without a will could not do so.[134] This has not changed, except with respect to real estate in England.[135]

3.4.2 Executor Is Compellable

An executor cannot withhold her assent except for good reason. If she does withhold assent unreasonably, the court will compel her.[136] This point is illustrated by *Reznick v. Matty*.[137] The testator died in 2000. He left the residue of his estate equally to his four children, Chad, Suzan, Craig, and Kim and he named Chad as his executor and trustee. The estate held a large amount of cash, as well as an interest in a corporation that owned three lots on an island. The lots had been listed for sale. Neither the estate, nor the corporation, had any significant liabilities. Chad had made an interim distribution in

132. *Supra*, para. 22.
133. Quoting Viscount Haldane in *Attenborough*, *supra*, footnote 102, at p. 83, and Nitikman, *supra*, footnote 2, p. 673.
134. Williams, *Executors*, *supra*, footnote 3, §81-12; Williams, *Assent*, *supra*, footnote 1, pp. 95-96. In the latter text the author suggests that no administrator can assent, *ibid.*, p. 96, but this seems unnecessarily strict.
135. *Administration of Estates Act 1925*, *supra*, footnote 11, s. 36.
136. *Martin v. Wilson*, [1913] 1 Ir. Rep. 470; Williams, *Assent*, *supra*, footnote 1, p. 20; *Re Gracey* (1928), [1929] 1 D.L.R. 260, 63 O.L.R. 218, 1928 CarswellOnt 246 (Ont. C.A.). *Cf. Re Melvin* (1972), 24 D.L.R. (3d) 240, [1972] 3 W.W.R. 55, 1972 CarswellBC 64 (B.C. S.C.).
137. 2013 BCSC 1346, 91 E.T.R. (3d) 94, 230 A.C.W.S. (3d) 1237 (B.C. S.C.).

2009, but nothing since. So his siblings brought an application for an order directing distribution forthwith of a further portion of the estate to each of the children. The court held:[138]

> In the circumstances of this case, where the administration of the Estate has taken already over a decade and there is significant value and liquidity, the executor's assent should be compelled.

The court applied *Austin v. Beddoe*,[139] which held that an assent of part of the residue of an estate is permissible. Accordingly, the court made an order for a partial distribution and authorized future applications if necessary.

3.4.3 Assent by One Executor

The law is clear that one executor of two or more can assent to a gift of personal property.[140] Indeed, this principle was recognized and applied in *Attenborough v. Solomon*.[141] In England all executors must assent to a gift of real property.[142] The law is clear that trustees must act jointly in all their decisions, unless the trust instrument provides otherwise.[143] However, there is some uncertainty in Canada about the question whether all executors must assent to a gift of real property. Nitikman argues that in Canada there is only one rule for executors, namely, that one of several executors may assent to a gift of real property as well as a gift of personal property. He refers[144] to inconsistent passages in Waters on this point.[145] At page 918 Waters says, citing *Willcocks v. MacLennan*,[146] that executors may act individually and bind the estate when the assets are personalty, but must act jointly if the assets are real property. However, at page 55 Waters notes that in making that statement in *Willcocks*, Hogg J.A. relied on *Gibb v. McMahon*[147] as authority for

138. *Supra*, para. 44.
139. (1893), 41 W.R. 619 (Ch. Div.).
140. Williams, *Assent*, *supra*, footnote 1, p. 96; Williams, *Executors*, *supra*, footnote 3, §81.18.
141. *Supra*, footnote 102.
142. *Administration of Estates Act 1925*, *supra*, footnote 11, s. 2(2).
143. *Gibb v. McMahon* (1905), 9 O.L.R. 522, 5 O.W.R. 554, 1905 CarswellOnt 227 (Ont. C.A.), per Maclennan J.A., at para. 11, at 525 [O.L.R.], affirmed (1906), 37 S.C.R. 362, 1906 CarswellOnt 744 (S.C.C.).
144. Nitikman, *supra*, footnote 2, p. 673, note 3.
145. Nitikman refers to the third edition of Waters' text, but I shall refer to the identical passages in the fourth edition: Waters, *supra*, footnote 10, pp. 55 and 918.
146. [1946] O.W.N. 490, 1946 CarswellOnt 212, [1946] O.J. No. 153 (Ont. C.A.).
147. *Supra*, footnote 143.

this proposition. But Waters rightly points out at page 55 that *Gibb* involved executors who had completed the administration of the estate and were acting as trustees when they purported to sell some real property, whereas in *Willcocks* the executors were still acting in that capacity when they tried to sell some real estate. Nitikman notes that s. 3 of the Ontario *Estates Administration Act*[148] provides:

> The . . . rules of law . . . as respects the dealing with personal property before probate . . . and other matters in relation to the administration of personal estate and the powers, rights, duties and liabilities of personal representatives in respect of personal estate apply to real property vesting in them.

He acknowledges that the section concludes by saying that one of several personal representatives may not "sell or transfer" real property without a judge's authority. But he rejects the argument that this means that, as regards real property, the common law rule that the assent of one executor is sufficient does not apply. And then he concludes that this does not mean that one executor cannot *assent* to a gift of real property, for an assent is not the same as a sale or transfer.

I agree with Nitikman that an assent is not the same as a sale or transfer. But apart from that, I am not convinced by his argument. First, there was no common law rule for an assent by an executor with respect to real estate, since real estate did not devolve upon the executor, but devolved directly upon the heir, or passed to a devisee under a will. Second, the language in s. 3, forbidding a sale or transfer of real property by one of several executors is the same as that contained in s. 2(2) of the *Land Transfer Act 1897*[149] and presumably came from that Act. But s. 3(1) of that Act went on to provide:[150]

> At any time after the death of the owner of any land, his *personal representatives* may *assent* to any devise contained in his will, or may convey the land . . .

Thus it is clear that all the personal representatives had to join in an assent to a gift of real property. It is true that this provision did not become part of the Ontario legislation. However, bearing in mind that an assent is often unnecessary because the property is transferred instead and the transfer requires all executors to join, it seems unlikely that the law in Canada would have allowed one of several executors to assent to a devise of land, even though it does not allow one executor to transfer the land.

148. *Supra*, footnote 68.
149. *Supra*, footnote 11.
150. Emphasis supplied.

3.5 Operation of an Assent

It is often said that an assent is made to a named legatee. But actually, an assent is not made to or in favour of a person, nor is it made in respect of particular property. That is not what an assent does. Rather, the personal representative assents to a gift in the will, so that it can take effect as intended by the will.[151] Nonetheless, an assent clearly benefits the beneficiary of the gift in respect of which the assent is made.

The executor should give his assent with respect to all property disposed of by the will. Thus, if the executor is also a beneficiary under the will, he should also assent to that gift and he may do so expressly, or his assent may be implied.[152] Until he assents with respect to the property left to him, he continues to hold it in his representative capacity.[153]

This is illustrated by *Re Box Estate (No. 2)*.[154] As we saw, the testator appointed his wife as executor and trustee. He gave her the income from his estate for life, with remainder to his daughters. However, he coupled the gift of the income with a general power of appointment in her favour. She did, in fact deposit the entire net assets into her own account. Then she made a will in favour of others. The court held that by her actions in administering the estate and making her will, she assented to the legacy of the whole estate.

Although an assent is not, strictly speaking, made in favour of a specific person, it is possible that an assent may benefit the wrong person. This is illustrated by *Re West, West v. Roberts*.[155] A testator left certain corporate shares to the defendant. The executor proved the will and transferred the shares to the defendant. Then a codicil was discovered that revoked the gift to the defendant and gave the shares to the plaintiff. The plaintiff sued to recover the shares, together with the dividends earned since the testator's death. The defendant resisted the claim for the dividends. The court held that the executor could only assent in favour of the right legatee, *i.e.*, the plaintiff, so the assent in favour of the defendant was void. Moreover, the assent related back to the testator's death, so the plaintiff was entitled to both the shares and the dividends earned since the testator's death.

151. Williams, *Assent*, *supra*, footnote 1, p. 97.
152. Williams, *Executors*, *supra*, footnote 3, §81-05; *Fenton v. Clegg* (1854), 156 E.R. 292, 9 Exch. 680; *Re Box Estate (No. 2)*, *supra*, footnote 121.
153. Williams, *Assent*, *supra*, footnote 1, p. 114.
154. *Supra*, footnote 121.
155. *Supra*, footnote 99.

3.6 Assent Not Retractable

The executor cannot retract his assent. However, before a legacy has been paid or possession has been given to the beneficiary, it seems that the executor can recall the asset to pay debts, so long as no innocent third party is injured.[156] On the other hand, the executor will usually be able to follow the assets into the hands of the beneficiary if he discovers that they are needed to pay subsequently discovered debts and liabilities.[157]

3.7 Effect of Assent

3.7.1 Perfects Beneficiary's Interest

The beneficiary of a specific gift is entitled to the property left her in the will, but her title is not perfect for the nonce, since the executor may need to take the property to pay the debts and liabilities of the estate. Hence, the beneficiary does not yet have equitable title to the property. However, the executor's assent to the legacy perfects what was, until then, an inchoate interest.[158] Thus, the assent does not confer a new title on the beneficiary, because she takes her title from the will. Rather, it makes her inchoate title absolute, marks the end of the executor's rights to the property, and vests the equitable title in the beneficiary.[159] In other words, the executor then becomes a trustee of the property for the beneficiary and the beneficiary can bring proceedings to recover the property.[160]

An assent is therefore not a conveyance and further action is usually necessary to give possession to the beneficiary. Although the executor can no longer deal with the assets as executor, he does retain the power and the duty to ensure that the property is passed to the beneficiary.[161] Thus, for personal chattels the executor will have to deliver possession to the beneficiary, for real property a conveyance or transfer will be required, and for choses in action, such as corpor-

156. Williams, *Executors*, *supra*, footnote 3, §81-21.
157. *Ibid.*; Williams, *Assent*, *supra*, footnote 1, p. 99; *Attenborough*, *supra*, footnote 102, p. 85 A.C.
158. See the quotation from Toller, *supra*, text at footnote 67; *Attenborough*, *supra*, footnote 102, at 83 A.C.; and see the argument in reply by the Hon. Frank Russell, K.C., in *Re West, West v. Roberts*, *supra*, footnote 155, endorsed by Williams, *Assent*, *supra*, footnote 1, pp. 22-23.
159. Williams, *Assent*, *ibid.*, pp. 99-100; *Attenborough*, *supra*, footnote 102, at p. 85 A.C.
160. Williams, *Executors*, *supra*, footnote 3, §81-20; *Bryen v. Reus*, *supra*, footnote 34, at p. 399; Nitikman, *supra*, footnote 2, pp. 674-75.
161. Nitikman, *ibid.*, p. 675.

ate shares, the executor will need to assign them to the beneficiary and they must be registered on the books of the corporation to complete the title.

If the executor assents to a life interest, the assent also applies to the remainder interest.[162]

3.7.2 Relation Back

(a) Specific Gifts

Since an assent perfects the title of a specific beneficiary, which she was given under the will, her title relates back to the death of the testator.[163] This means that she is entitled to all the profits generated since the testator's death. But she is also liable for any expenses incurred after the assent, such as the cost of transferring the property to her.[164]

Indeed, it appears that the beneficiary is also liable for costs associated with the property since the testator's death.[165] This is illustrated by *Saxer v. Saxer*,[166] although it involved a contingent gift that later became absolute. The testator appointed Georgine, her late son's partner, executor. She directed that a piece of property she owned be subdivided and that, after the subdivision, a specifically described lot was to be conveyed to her great-nephew, Ulrich. The will said that the subdivision costs should be borne by the estate. Once the property was subdivided, Georgine told Ulrich that she would transfer his lot to him after he paid certain expenses relating to the cost of the subdivision and the municipal taxes on his lot after it was created. Ulrich demurred. He argued that his specific gift was contingent, since it was not at all certain that the planning authorities would allow the subdivision. The court agreed with him on this point and held that the expenses prior to the creation of Ulrich's lot were administration expenses. Ulrich argued that he was not responsible for the expenses claimed by Georgine thereafter either, since she had not yet given her unconditional assent. However, the court held that the assent, when given, would relate back to the time the contingency was removed by the creation of Ulrich's lot.

---

162. *Teahon v. Leamy*, *supra*, footnote 116. And see *Re Box Estate (No. 2)*, *supra*, footnote 121.
163. *Saxer v. Saxer*, 2011 BCSC 584, 68 E.T.R. (3d) 289, 2011 CarswellBC 1079 (B.C. S.C.); *Re West, West v. Roberts*, *supra*, footnote 99.
164. *Re Grosvenor*, [1916] 2 Ch. 375 (Ch. Div.).
165. *Re Pearce*, [1909] 1 Ch. 819 (Eng. Ch. Div.).
166. *Supra*, footnote 163.

(b) Gifts of Residue

Do these principles apply to an assent of residue? I have adverted to related questions earlier,[167] but it is necessary to consider this matter further at this point.

The problem is that in *Barnardo*[168] Lord Atkinson held that the principle of relation back after an assent to a specific legacy has no application to a gift of residue, because the residue does not exist at the date of the testator's death and indeed not until all claims against the estate have been satisfied.[169] This statement has been generally accepted.[170] However, Nitikman makes a strong counterargument.[171] He notes that in *Attenborough*[172] Viscount Haldane did not distinguish between the two types of gift when he said that the beneficiaries become entitled to a transfer not by virtue of the assent, but by virtue of the dispositions in the will which have become operative because of the assent. And then Nitikman argues, convincingly in my opinion, that although the residue does not exist at the testator's death, it is the will that gives the residuary beneficiaries the beneficial right to the residue. Further, he argues, although the law is clear that a residuary beneficiary does not have a proprietary interest in the residue, that does not mean that beneficial ownership vests only when the residue is ascertained. In passing, I query the clause, "that beneficial ownership *vests*", for since the beneficiary has no proprietary interest in the residue until it is ascertained, it cannot vest earlier. But I agree that logically there is no reason why the beneficial ownership cannot vest retroactively to the date of death, just as it does for specific gifts, for the residuary beneficiaries also acquire the right to the residue from the will. I also agree with Nitikman's further point that the assent that follows the ascertainment of the residue does not vest the residue in the residuary beneficiaries. It is the will that does that. He supports his argument by reference to *Hemming*,[173] discussed above, in which the Deputy Judge said:[174]

---

167. In §2.2 and 2.5.1.
168. *Supra*, footnote 16, at p. 11 A.C. See also *Re West, West v. Roberts*, *supra*, footnote 99.
169. See quotation in text at footnote 18, *supra*.
170. See, *e.g.*, Williams, *Executors*, *supra*, footnote 3, §81-22; Williams, *Assent*, *supra*, footnote 1, p. 112, who notes that early case law allowed assents of residuary gifts and finds that surprising, since there can be no residue until all liabilities have been met.
171. Nitikman, *supra*, footnote 2, p. 676.
172. *Supra*, footnote 102, at p. 82 A.C.
173. *Supra*, footnote 13.
174. *Supra*, para. 61.

> In summary, as I have indicated, the law has long recognised that a residuary legatee has an immediate "interest" of some kind in the assets that will in the future form the residuary estate of a testator. The precise nature of the interest is unclear, but at very least it must give the holder of the interest the right to receive the residue (if any) as and when ascertained.

Thus, it is arguable that a residuary legatee should be treated in the same way as specific beneficiaries as regards the doctrine of relation back.

Whether a personal representative can assent to part of the residue is debatable. In *Reznick v. Matty*[175] the British Columbia Supreme Court held that it is possible. The court cited *Austin v. Beddoe*[176] as authority. In that case North J. held that an assent of part of the residue is permissible. However, Williams maintains that it is not possible and distinguishes the case.[177]

4. Conclusion

It is important to remember that while an estate is being administered, the full, unfragmented title is in the personal representative. He needs that title to administer the estate properly and to allow him to use the assets to pay the debts and obligations of the estate. This is as true of the assets comprised in specific gifts and general gifts, as it is for assets comprised in the residue, although the personal representative can only use the assets for this purpose in accordance with the will or, failing special provisions in the will, in accordance with the well-established order of abatement for the payment of debts.

It seems that the law of assent is not well known in Canada, but it is an important doctrine, for it is by that doctrine that the beneficiaries acquire an absolute title to the property the will left them. When the personal representative assents to a gift of property, either when administration is complete, or earlier, she becomes a trustee of the property for the beneficiary and the beneficiary becomes entitled to possession of it.

Regrettably the law remains unclear about the nature of the right of a specific beneficiary before the personal representative's assents. The right of a residuary beneficiary also remains vague and undefined.

175. *Supra*, footnote 137, para. 46.
176. (1893), 41 W.R. 619 (Ch. Div.).
177. Williams, *Assent*, *supra*, footnote 1, pp. 112-13.

If you wish to subscribe or contribute to this publication, please contact us at:

THOMSON REUTERS

Thomson Reuters
One Corporate Plaza
2075 Kennedy Road
Toronto, ON M1T 3V4
Canada

Toronto: 1-416-609-3800
Elsewhere in Canada/U.S.: 1-800-387-5164

Fax: 1-416-298-5082

e-mail: www.carswell.com/email

Website: www.carswell.com