CHAPTER XXXI.

Of Actions by and Against Executors and Administrators.

§ 584. In what cases may sue in justice's court.—Actions against executors and administrators as such, except in the cases specially provided by law, are not cognizable by justices of the peace.[1] Jurisdiction to inquire into and settle claims against the estate of the deceased is vested in the probate court, and no action can be commenced against an executor or administrator, except actions of ejectment, or other actions to recover the seizin or possession of real estate, and actions of replevin.[2] But, in a suit by executors or administrators before a justice, on a demand of the estate, the defendant may set off any claim he may have against the deceased, and if the set-off is established, and the defendant is entitled to judgment, such judgment must be rendered against the plaintiffs in their representative character, &c.[3]

Executors and administrators may sue, but cannot be sued as such in justice's court.

In the case of personal contracts which *run not with the land,* where the party with whom they were made is dead, the executor of such party is entitled to maintain an action for the breach of them. But it is otherwise if the covenants run with the land.[4]

1—C. L., § 704. Justices of the peace have no jurisdiction in suits against executors and administrators, either as principal defendants or garnishees for the recovery of the distributive amounts due creditors under C. L., § 9408: Basom v. Taylor, 39 Mich., 682.

2—C. L., § 9381; Singer Mfg. Co. v. Benjamin, 55 Mich., 330, 21 N. W., 358; 23 N. W., 25; Willard v. Van Leeuwen, 56 Mich., 17; 22 N. W., 185. The manifest object of these statutes is to protect the executor and administrator from being harassed with suits by creditors of the estate and compel presentation of claims before commissioners, on claims, and at the same time permit the trial of title to real and personal property during the settlement of the estate: Singer Mfg. Co. v. Benjamin, 55 Mich., 330; 21 N. W., 358; 23 N. W., 25.

3—C. L., § 780.

4—Webb v. Russell, 8 Term. R., 401, 403; Brandon v. Pate, 2 H. Bl., 310.

Executors may sue in their representative character, in all cases where the money, when recovered, would be assets.[5] Such personal actions as are founded upon any obligation, contract, debt, covenant, or other duty, survive the death of the testator, and are transmitted to his executor.[6]

The common law rule, that *personal actions die with the person*, has never been applied to causes of action on contracts. But no action can be maintained by an executor or administrator upon an express or implied promise to the deceased where the damage consisted entirely in the personal suffering of the deceased, without any injury to his personal estate. Thus, for a breach of promise of marriage merely.[7]

Replevin will lie for or against executors, where the goods taken away continue still in specie in the hands of the wrong-doer, or of his executor.[8]

§ 585. On contracts made with executors, etc.—Executors or administrators may sue on contracts entered into with themselves, in all cases where the money, when recovered, would be assets. An executor may sue for goods sold by him as executor;[9] for money paid by him as such;[10] for money had and received to his use as executor;[11] upon an account stated with him respecting money due to him as executor;[12] for money lent by him as executor.[13]

The personal representatives may also sue in many cases upon a cause of action occurring in their own time, upon a contract made with the deceased in his life-time, on which the deceased himself could not have sued. Thus, if A covenant with B to make him a lease of certain lands by a certain day, and B dies before the day, and before a lease is made, upon refusal on the day to grant the lease to the executor, he may sue on the covenant.[14]

5—King v. Thom, 1 Term. R., 487; Petrie v. Hannay, 3 *Ibid.*, 659.

6—Wheatly v. Lane, 1 Saund., 216, *a. n.*, 1.

7—Chamberlain v. Williamson, 2 M. & S., 408.

8—LeMeson v. Dixon, W. Jon., 173; Wheatly v. Lane, 1 Saund., 217, n. 1.

9—Cowell v. Watts, 6 East., 405.

10—Ord v. Fenwick, 3 East., 104.

11—Petrie v. Hannay, 3 Term. R., 659; Smith v. Barrow, 2 *Ibid.*, 477.

12—Heashall v. Roberts, 5 East., 150; Richardson v. Griffin, 2 Chitt. R., 325.

13—Webster v. Spencer, 3 B. & A., 365.

14—Went. Exrs., 188; 1 Saund. Pl. & Ev., 5 Am. ed., 1110.

§ 586. Actions by, for torts.—It is a maxim of the common law that *actio personalis moritur cum persona.* Therefore, at common law, executors could not sue in the case of torts. The statute has very materially changed the rule of the common law. It provides that in addition to the actions which survive by the common law, the following shall survive, that is to say: actions of replevin and trover, actions for assault and battery, or for false imprisonment, or for goods taken and carried away, and actions for negligent injuries to the person, and for damage done to real and personal estate.[15] When any action mentioned in the preceding section shall be prosecuted to judgment *against* the executor or administrator, the plaintiff shall be entitled to recover only for the value of the goods taken, or for the damage actually sustained, without any vindictive or exemplary damages, or damages for any alleged outrage to the feelings of the injured party.[16] By statute enacted in 1897,[17] it is provided that *assumpsit* will lie to recover for an injury to the person, property or rights of any party, resulting from the fraudulent representations or conduct of another, in all cases where an action on the case for fraud or deceit might by law be brought; and that such actions should survive. Any action for the malfeasance, misfeasance, or non-feasance of a sheriff or any of his deputies may be prosecuted against the executors or adminis-

15—C. L., § 10117. See, Bigelow v. Kalamazoo, 97 Mich., 121, 125; 56 N. W., 339, and Van Brunt v. Cincinnati, J. & M. Ry. Co., 78 Mich., 530; 44 N. W., 321. That clause of this statute with reference to "damage done to real and personal estate" was intended to include only those cases where the injury is occasioned to property by the direct wrongful act of a party upon the property: Stebbins v. Dean, 82 Mich., 385; 46 N. W., 778. An action for malpractice survives: Norris v. Judge of Kent County, 100 Mich., 256; 58 N. W., 1006. The right of action for negligent injuries given by this statute is an entirely different action from that given to personal representatives under C. L., § 10428, for pecuniary injury resulting from his negligent killing: Hurst, Admr., v. Detroit City Ry., 84 Mich., 539; 48 N. W., 44. Actions for injuries sustained from defective highways given by C. L., § 3441, survive by virtue of this section 10117; Rachs v. Detroit, 90 Mich., 92; 51 N. W., 360; Roberts v. Detroit, 102 Mich., 67; 60 N. W., 450. An executor or administrator may bring the action when the right accrued but was not sued upon in the decedent's lifetime: Rogers v. Windoes, 48 Mich., 628; 12 N. W., 882.

16—C. L., § 10118.

17—C. L., §§ 10421 and 10422. A declaration under this statute should plead the statute though it is not essential that it should: Hallett v. Gordon, 128 Mich., 364; 87 N. W., 261. An action will lie under this statute against an agent for fraudulent representations by which plaintiff was induced to contract with the principal: Hallett v. Gordon, *supra.*

trators of such sheriff, in like manner as if the cause of action survived at common law.[18]

§ 587. Declarations in actions by executors, etc.—In any declaration by an executor or administrator, as such, he should describe himself accordingly in the commencement, though it will be sufficient if the fact appear in other parts of the declaration.[19] But when the cause of action accrues after the death of the testator, or intestate, the executor or administrator may sue as such or not, at his option.[20] Executors who contract for the sale of their testator's effects, or make any other agreement in their representative character, are not bound to declare in that capacity, but may sue in their individual right.[21]

In stating a debt or promise to an administrator or executor, the word "*as*" executor, &c., must be inserted, or the omission will be fatal even after verdict.[22] It is not enough to say "executor," or "being executor."[23] In actions of debt, the words "owes to" should be omitted in the commencement of

18—C. L., § 2588.

19—Gallant v. Bonteflower, 3 Doug. (Eng.) 36; see, Patchen v. Wilson, 4 Hill, 57.

20—*Ibid.;* and Grissel v. Robinson, 3 Bing. N. C., 10; see, Bright v. Currie, 5 Sandf., 433; and cases cited. If the goods of the deceased be tortiously taken or wrongfully converted after his death, the executor or administrator may sue for them in his own name without describing himself as executor or administrator: Patchen v. Wilson, 4 Hill, 57; Reynolds v. Collin, 3 Hill, 441. And an executor can maintain a suit in his own name or as executor on a note given to him as executor for a debt due to the testator at the time of his decease, but if such action is brought by the executor in his own name, the defendant cannot set off a demand which existed against the testator at the time of his death: Merritt v. Seaman, 6 N. Y., 168; Root v. Taylor, 20 John., 137; Bailey v. Burton, 8 Wend., 350; Mercein v. Smith, 2 Hill, 210. It is competent for an executor or administrator to sue either in his individual or representative character, for money had and received after the death of the testator or intestate, for the use of the estate, but in order to recover for money received in the lifetime of the deceased, the executor or administrator is required to sue in his representative character, and to allege that it was received to the use of the deceased: Barnum v. Stone, 27 Mich., 334.

21—Bassington v. Ault, 2 Bing., 177.

22—Heashall v. Roberts, 5 East., 150; Powley v. Newton, 2 Marsh., 151.

23—*Ibid.;* see Middlesworth v. Nixon, 2 Mich., 425. Where the declaration commences "C.... H. M....., executor of the last will and testament of J.... S....., deceased, plaintiff in this suit, by A.... K....., his attorney, complains," &c., but nowhere else in the declaration described the plaintiff *as executor; held,* that the suit was brought by the plaintiff in his individual capacity merely, and that the words "executor of," &c., were to be regarded merely as a description of the person of the plaintiff, and did not constitute it the declaration of the plaintiff *as executor:* Merritt v. Seaman, 2 Selden, 168, 171.

the declaration; it should be that the defendant "detains" only,[24] where it was held that the allegation might be rejected.

If the plaintiff sue as executor or administrator in trespass to the goods of the deceased, after his death, he may declare that the deceased was possessed of the goods, and the trespass committed after his death, to the damage of the executors or administrators,[25] or as the property in the goods draws to it the possession in law, they may declare on their own possession as executors.[26] So in trover, where the goods are taken and converted after the testator's death, and before the executor has obtained possession of them, he may either sue in his own name without alleging himself executor,[27] or he may sue as executor, and declare either that the testator was possessed of the goods, and the defendant after his death converted them, or he may allege that he himself was possessed as executor, and the defendant converted them.[28]

After the conclusion, to the damage, &c., a profert of the letters testamentary, or letters of administration, should be made; unless where the plaintiff is unnecessarily described as executor. But the omission is ground of special demurrer only.[29]

If it is material for the plaintiff to avail himself of a promise or acknowledgment, or other cause of action, since the death of the testator, a count to meet it should be inserted.[30]

The estate of the testator or intestate vests in the executor or administrator from the time of the death, and the letters testamentary or of administration relate back to that time, and authorize the bringing of any appropriate action in relation to the property, for any cause of action which may have existed or arisen between the death and granting of letters.[31]

24—Collett v. Collett, 2 Dowl., 211; Hope v. Bague, 3 East., 2.

25—1 Saund. Pl. & Ev., 5 Am. ed., 1117.

26—2 Saund., 47 *n.*

27—Jenkins v. Plomb, 6 Mod., 181.

28—2 Saund., 47 *n.*; Fraser v. Swansea C. Co., 1 Ad. & E., 354.

29—1 Saund. Pl. & Ev., 1117; Vickery v. Bier, 16 Mich., 53.

30—Tanner v. Smart, 6 B. & C., 608; Sarell v. Wine, 3 East., 409.

31—Welchman v. Sturgis, 13 Ad. & Ell., N. S., 552. The one in possession of personal property of an intestate may maintain trover for the conversion of it against a mere wrong-doer, or one having no better right than himself; and if the one in possession die, his administrator may also maintain trover for a conversion of the property after his intestate's death, and prior to his appointment as administrator. Until administration and distribution of the estate, the next of kin of an intestate

§ 588. The evidence.—The cause of action is proved as in ordinary cases.

The plea of the general issue, in general, admits the character in which the plaintiff sues.[32] But it would not be an admission of his character if the cause of action accrued subsequently to the letters of administration or letters testamentary being granted as in trover, on the possession of the testator, and conversion in the time of the plaintiff.[33] In such case, strict proof of title is necessary, except where the executor, &c., had *actual* possession of the goods, which alone is *prima facie* evidence of title.[34]

In general, therefore, if the defendant would controvert the fact of the plaintiff's being executor or administrator, he must plead that he is not.

The plaintiff's character as executor may be proved by the letters testamentary, or a certified copy under the seal of the probate court.[35] The probate alone would not be evidence for that purpose, because if any person named executor in the will refuses to accept the trust, or neglects to give bond as required by law, he is prohibited from intermeddling or acting as executor.[36]

The fact that the plaintiff is *administrator* is proved by the letters of administration or a certified copy under seal of the probate court.

The defendant, when this question is in issue, must prove that the grant of letters was *void,* it is not sufficient to show them to be *voidable.* Thus he may prove that the person upon

has no more right to the possession of the personal property of the intestate than any other stranger: Cullen v. O'Hara, 4 Mich., 132.

32—Thyme v. Protheroe, 2 M. & S., 553; Vickery v. Bier, 16 Mich., 50. But where, after the plea of the general issue, the plaintiff dies and the suit is revived by his administrator, the plea does not admit his official character; he must prove that he is administrator: *Ibid.*

33—Hunt v. Stevens, 3 Taunt., 113.

34—1 Saund. Pl. & Ev., 5 Am. ed., 1126.

35—C. L., § 648. Proof of administration granted upon an estate, and of whom are administrators or executors, does not fall within the rule applicable to the proof of official character in the case of public officers, where it is in general sufficient *prima facie,* so far as the rights of third persons are concerned, to show that an individual has acted notoriously as such public officer. The appointment of administrators being the judicial action of a court of record, it should be proved by the letters of administration themselves, or by the record, or a certified copy of the proceedings, or of the appointment, as the action of courts is proved in other cases: Albright v. Cobb., 30 Mich., 360; Middlesworth v. Nixon, 2 Mich., 425.

36—C. L., § 9313.

whose estate the letters are granted is still living,[37] or that the probate court has not otherwise jurisdiction of the estate. He may also show that the letters were revoked, or that the office had terminated in any other manner.[38]

In all other points the evidence is the same as when the action is brought by and against persons in life.

37—Allen v. Dundas, 3 Term. R., 130; Woolley v. Clark, 5 B. & A., 744. Or that the letters testamentary or of administration were granted in another state: Vickery v. Bier, 16 Mich., 50.

38—C. L., § 9334.