Dalhousie Law Journal

Volume 46 | Issue 2 Article 4

7-2023

Beneficial Interests Under the Chattels Real Act

Gregory French

Gregory French*

Beneficial Interests Under the *Chattels Real Act*

This paper examines the Chattels Real Act *of Newfoundland and Labrador and the strict treatment of property interests thereunder. Historical treatment of property interests under the Act had been pragmatic and flexible, however later jurisprudence took a stricter interpretation and restricted the interpretation of beneficial interest under the Act. The author suggests that a review of first principles and jurisprudence supports a broader interpretation of property interests under the Act, which should be followed for the better administration of justice and practical expectations of the people of Newfoundland and Labrador.*

Cet article examine la Chattels Real Act *de Terre-Neuve-et-Labrador et le traitement strict des droits de propriété qu'elle prévoit. Le traitement historique des intérêts de propriété en vertu de la loi a été pragmatique et flexible, mais la jurisprudence ultérieure a adopté une interprétation plus stricte et a restreint l'interprétation de l'intérêt bénéficiaire en vertu de la loi. L'auteur suggère qu'un examen des premiers principes et de la jurisprudence soutient une interprétation plus large des droits de propriété en vertu de la loi, qui devrait être suivie pour une meilleure administration de la justice et des attentes pratiques de la population de Terre-Neuve-et-Labrador.*

* BA (Hons), LLB, barrister and solicitor, partner at Mills, Pittman & Twyne, Clarenville, NL.

Introduction

This paper explores the application of the *Chattels Real Act* of Newfoundland and Labrador to the interests of beneficiaries of estate property. Based on law, practice and social expectations, and notwithstanding the leading decisions of the Newfoundland and Labrador Court of Appeal on point, beneficiaries of estates should be recognized as having a cognizable and transmissible interest in estate property, subject to the superior rights of estate creditors. Part I briefly explains the origin of the *Chattels Real Act*. Part II explores the treatment of property interests under the Act and how it developed through history, and the divergence of modern caselaw from past practice. Part III examines the modern approach in contrast to past practice, to reconcile Newfoundland and Labrador's law to what the author suggests is its appropriate application today.

I. *A brief history of the* Chattels Real Act

As with many issues that persist in Newfoundland and Labrador's law of real property, the *Chattels Real Act* arose from the confusion surrounding the status of real property in the Colony of Newfoundland.[1] Such confusion germinated from a disconnect between the laws of the Imperial Parliament in London and reality on the ground in Newfoundland from the 17th to

1. I refer to "Newfoundland" alone when referring to the colonial era, such being the proper name of the Colony. The name "Newfoundland and Labrador" was not introduced at law until 2001, and rights to Labrador were unsettled until 1927. Nevertheless, such issues affected all territory under the control of the Newfoundland government at the time.

19th centuries. London, concerned for the preservation of the interests of the English fishing fleets, sought to prohibit a settler population from developing in Newfoundland, as the British government's intended use for Newfoundland was only as a station for the English fleets.[2] However, the fact that settlement was officially prohibited did little to dissuade actual settlement from taking hold.[3] By the time statute law had caught up to reality, Newfoundland had a settler population numbering into the tens of thousands, and a confused system of law arising from centuries of official neglect. The Supreme Court of Newfoundland was created by statute in 1792 and had to grapple with the uncertainties of applying English law to Newfoundland, "as near as can be applied" in the absence of a domestic legislature.[4] This included the application of property law, beginning some twenty years before English law would even recognize property interests in Newfoundland.

On June 12th, 1834, the colonial legislature of Newfoundland passed the law known today as the *Chattels Real Act*.[5] The express intention at the time of its enactment was to address matters of inheritance of property interests in Newfoundland.[6] The particular concern at the time of passage of the Act is apparent from its preamble:

> Whereas the Law of Primogeniture, as it affects Real Estate, is inapplicable to the condition and circumstances of the people of this Island: And whereas the partibility of small Estates, by Descent in Coparcenary, or otherwise, would tend to diminish the value thereof, and would, in its application, be attended with much expense and inconvenience […][7]

The *Chattels Real Act* had the effect of creating a system of equal distribution of real property to all next of kin on an intestacy, rather than the system of primogeniture, or inheritance to the firstborn son.[8]

---

2. See discussion in Gregory French, "Property Interests in Resettled Communities" (2015) 66 UNBLJ 210 at 211–214 [French, "Property Interests"]; Gregory French, "The Abolition of Adverse Possession of Crown Lands in Newfoundland and Labrador" (2020) 71 UNBLJ 227 at 228-230 [French, "Abolition of Adverse Possession"].
3. French, "Abolition of Adverse Possession," *supra* note 2 at 228-229. See also DW Prowse, *A History of Newfoundland from the English, Colonial and Foreign Records*, 2nd ed (London, UK: Eyre & Spottiswoode, 1896) for a detailed history of settlement of Newfoundland.
4. French, "Abolition of Adverse Possession," *supra* note 2, at 229-230.
5. *An Act for Declaring All Landed Property, in Newfoundland, Real Chattels*, 1834, 4 Will IV, c 18 [*Real Chattels 1834*].
6. Trudi Johnson, "Defining Property for Inheritance: The Chattels Real Act of 1834" in Christopher English, ed, *Essays in the History of Canadian Law: Two Islands, Newfoundland and Prince Edward Island* (Toronto: University of Toronto Press, 2005) 192 at 200. The author is indebted to Dr. Johnson's thorough review of the history leading to the passage of the *Chattels Real Act*.
7. *Real Chattels 1834*, *supra* note 5 at preamble.
8. Johnson, *supra* note 6 at 201.

One should take note of the scope of operation of the *Chattels Real Act*. It is not limited to cases of intestacy but applies with equal force to testamentary dispositions.[9] All estate assets "shall go to the executor or administrator of a person dying seized or possessed of them as other personal estate now passes to the personal representatives, a law, usage or custom to the contrary notwithstanding."[10] With or without a will, the *Chattels Real Act* governs the transmission of property interests to beneficiaries.

Similar provisions to Newfoundland and Labrador's *Chattels Real Act* exist in all other common-law provinces and territories today, which vest the title to estate property in the executor or administrator of the estate, rather than in the beneficiary directly.[11] The statutory provisions of most other provinces make clear that the administrator is only a trustee for the beneficiaries of the estate who can demand transfer of the property.[12] Some provinces clarify that the estate administrator holds the land pending payment of estate liabilities.[13] However, while the title to estate property may be vested in the estate administrator, some caselaw suggests that the

9. *Kelloway Estate, Re; Blandford v Ricketts*, (1987) 64 Nfld & PEIR 141, 197 APR 141 (TD) [*Kelloway Estate* cited to Nfld & PEIR] remains the leading case on the authority of the estate administrator to dispose of assets independent of the beneficiary, holding that such power rests in the administrator alone. *Kelloway Estate* involved an administration *cum testamento annexo*, with a specific bequest of real property in a will being the issue before the Court: see paras 3 and 24 of *Kelloway Estate*.

10. *Chattels Real Act*, RSNL 1990, c C-11, s 2.

11. *Wills, Estates and Succession Act*, SBC 2009, c 13, ss 160–162 [*BC Act*]; *Estate Administration Act*, SA 2014, c E-12.5, ss 21, 31 [*Alberta Act*]; *Administration of Estates Act*, SS 1998, c A-4.1, s 50.3 [*Saskatchewan Act*]; *Law of Property Act*, CCSM c L-90, s 17.3 [*Manitoba Act*]; *Estates Administration Act*, RSO 1990, c E.22, s 2 [*Ontario Act*]; *Devolution of Estates Act*, RSNB 1973, c D-9, s 3 [*NB Act*]; *Probate Act*, SNS 2000, c 31, s 46 [*NS Act*]; *Probate Act*, RSPEI 1988, c P-21, s 103 [*PEI Act*]; *Devolution of Real Property Act*, RSY 2002, c 57, s 2 [*Yukon Act*]; *Devolution of Real Property Act*, RSNWT 1988, c D-5, ss 2–3 [*NWT Act*]; *Devolution of Real Property Act*, RSNWT (Nu) 1988, c D-5, ss 2–3 [*Nunavut Act*].

12. Statutory language varies across provinces regarding the rights of the beneficiaries. The *Alberta*, *Saskatchewan* and *NB Acts* state only that the property vests in the personal representative. The *BC*, *Manitoba*, *NS*, *Ontario*, *PEI*, *NS*, *NWT*, *Nunavut* and *Yukon Acts* expressly state that the personal representative of the estate is a trustee for the beneficiaries. See *BC Act*, *supra* note 11, s 162(2)(a); *Manitoba Act*, *supra* note 11, s 17.3(3); *NS Act*, *supra* note 11, s 46(6); *Ontario Act*, *supra* note 11, s 2(1); *PEI Act*, *supra* note 11, s 103(5); *NS Act*, *supra* note 11, s 46(6); *NWT Act*, *supra* note 11, s 3(a); *Nunavut Act*, *supra* note 11, s 3(a); *Yukon Act*, *supra* note 11, s 3. The *BC*, *Manitoba*, *PEI*, *NWT*, *Nunavut* and *Yukon* Acts go further, and specifically provide for the right of the beneficiaries to "require a transfer" from the personal representative. See *BC Act*, *supra* note 11, s 162(2)(b); *Manitoba Act*, *supra* note 11, s 17.3(3); *PEI Act*, *supra* note 11, s 103(5); *NWT Act*, *supra* note 11, s 3(b); *Nunavut Act*, *supra* note 11, s 3(b); *Yukon Act*, *supra* note 11, s 3.

13. Most provinces' statutes specify that the property is held by the personal representative of the estate "subject to" liabilities, debts, duties, etc. See *Manitoba Act*, *supra* note 11, s 17.3(3); *NB Act*, *supra* note 11, s 3(1); *NS Act*, *supra* note 11, s 46(6); *Ontario Act*, *supra* note 11, s 2(1); *PEI Act*, *supra* note 11, s 103(5); *Saskatchewan Act*, *supra* note 11, s 50.4(a).

estate beneficiaries' interest is assignable, though subject to the ordinary course of administration of the estate.[14]

While Newfoundland and Labrador has a unique legislative structure, which in substance follows a similar approach to the laws in the rest of Canada, Newfoundland and Labrador's approach goes beyond the estate context and declares that "all lands, tenements and other hereditaments in the province, which by the common law are regarded as real estate, shall in all courts in the province, be held to be chattels real," and deals with "all rights or claims which have accrued in respect to lands or tenements in the province and which have not already been adjudicated upon."[15] This was noted to be a "progressive step" in dealing with real property law generally that "avoids the tedious incidents of the common law of real property."[16] When combined with the unsettled history of property law predating the *Chattels Real Act*, one may understand the confusion that would follow passage of the *Act* and its application going forward.

II. *Treatment of property rights under the* Chattels Real Act

1. *Grappling with property interests—Early caselaw in Newfoundland*

Rather ironically, while the *Chattels Real Act* created clear rules about the treatment of real property, early caselaw was preoccupied with establishing what the status of property had been prior to the passage of the *Act*. Was the *Chattels Real Act* merely a declaration of the state of existing law, or did it amount to a fundamental change in the law of Newfoundland? In *Walbank v Ellis*, the Supreme Court held that the *Act* fundamentally changed the received British law of primogeniture and prevented land from vesting directly to the heir-at-law.[17] This decision is notwithstanding certain earlier cases of the Supreme Court, which held the opposite, and treated real property interests as chattel.[18] The Court's criticism of these earlier decisions in *Walbank* turns on both the language of the statute, which implicitly supports the view that British common law governed previously thereto, and on the absence of proof of an established and consistent custom that differed from the British rule.[19]

---

14. *In Re Knapman; Knapman v Wreford*, (1881) 18 Ch D 300 (CA); *Re Thompson Estate*, [1944] 1 DLR 354, [1944] OR 31 (ON SC), rev'd [1944] 3 DLR 74, [1944] OR 290 (ON CA), aff'd [1945] SCR 343, [1945] 2 DLR 545.
15. *Chattels Real Act*, *supra* note 10, ss 2, 3(1).
16. Raymond Gushue, "The Law of Real Property in Newfoundland" (1926) 4:5 Can Bar Rev 310 at 314.
17. (1853), 3 Nfld LR 400 [*Walbank*].
18. *Ibid* at 407-409.
19. *Ibid* at 408-409.

Although *Walbank* holds that the rules of Britain regarding inheritance of real property had applied prior to 1834, there is conflicting evidence on the accuracy of that proposition.[20] This confusion must also be contextualized in the larger scheme of Newfoundland property law, wherein the Supreme Court had to grapple with understanding what interest any person in Newfoundland had to the property they claimed to own.[21] Newfoundland's legal system had to adapt to local practices and local understandings to give effect to societal expectations for some time.[22] For the first forty years of the Supreme Court's existence, there was no domestic legislature. For the first twenty of those years, there was a prohibition on the ownership of land in Newfoundland.[23] It fell to the Supreme Court to fashion practical remedies for a population underserved, if not wholly disserved, by its government. In such a context, it is understandable that there may have been a disconnect between the citizenry and the practice and effect of law. The *Chattels Real Act* would ensure that society could agree on the rules going forward, whatever historical practice may have been in the field of inheritance law.

Given this historical confusion on the law, one can appreciate that social expectations may have followed a like course. The foregoing illustrates that there may have been some degree of understanding, at least in some circles, that inheritance before 1834 vested an absolute proprietary interest into the beneficiaries of an estate. The *Chattels Real Act* made clear that the legal title would be vested into the estate administrator. What is less clear is what interest is held by the beneficiaries entitled to share in the estate under this new structure. In *Doe dem. Evans v Doyle*, Robinson J. affirms a distinction between "estates in possession and estates in expectancy," in determining whether an individual had acquired an interest in land prior to the passage of the *Chattels Real Act*, although that case still had

20. Legislative records indicate that the *Chattels Real Act* had been intended to effect a change in the law, as it appears that the Legislative Council (the upper chamber of the legislative branch) recommended amendments to the statute to except out claims already reduced into possession prior to the passage of the *Act*. See Newfoundland, House of Assembly, *Journal of the House of Assembly*, 1-3, (1834) at 117, 123. Such an amendment would be unnecessary if the statute were declaratory of the existing state of the law. However, see *Williams v Williams* (1818), 1 Nfld LR 103 (SC) [*Williams*], as well as the discussion of earlier decisions in *Walbank*, *supra* note 17 at 407-409, which indicate that the approach codified by the *Chattels Real Act* had been followed by the court in the past.

21. *R v Row* (1818), 1 Nfld LR 126 at 127 (SC); *R v Kough et al* (1819), 1 Nfld LR 172 at 173 (SC); *Doe dem Evans v Doyle* (1860), 4 Nfld LR 432 at 436 [*Doyle*].

22. *Chancey v Brooking* (1823), 1 Nfld LR 314 at 316–317 (SC) [*Chancey*].

23. See discussion in French, "Property Interests," *supra* note 2 at 211–212. Restrictions were lifted in St. John's by the *Saint John's, Newfoundland Act* (UK), 1811, 51 Geo III, c 45, and lifted throughout Newfoundland by the *Newfoundland Fisheries Act* (UK), 1824, 5 Geo IV, c 51, ss 14-15.

to deal with the unsettled state of property law in that era.[24] Subsequent cases would confirm that the beneficiary of the estate has an interest which permits such a beneficiary to compel the administrator to assign particular assets.[25]

The ability to compel conveyance of property, subject to the rights of third parties, appears to vest a practical interest in the beneficiary. Estate property can be transferred on demand to the beneficiary, subject to prior encumbrances and creditors. If that is the case, then the beneficiary must have some cognizable interest in the estate property, akin to a trust collapsible at the behest of the beneficiary.[26] Such an approach has been followed in the context of an express testamentary trust in Newfoundland and Labrador in the case of *Re Doyle's Estate*, the ratio of which would appear to have relevance to the overall estate context:

> The Rule [in Saunders v Vautier] is based upon the theory that, though title and management vest in the trustees, the significance of the property lies in the right of enjoyment. This enjoyment is in the beneficiaries of the trust, and it is for them to decide how they will enjoy the property.[27]

The theory of beneficial entitlement creating a proprietary interest in the beneficiary would be upheld by the Newfoundland and Labrador Supreme Court. In the case of *In Re Murphy's Estate*, Dunfield J had to determine the scope of a bequest under a will, in circumstances where the testatrix was apparently unaware of her claim to land.[28] One Peter O'Reilly died intestate in 1890. One of O'Reilly's daughters married Michael Murphy, but O'Reilly's daughter died in 1901, survived by her husband Michael Murphy and leaving no children. Michael Murphy remarried Agnes Murphy, and he died in 1930, survived by Agnes Murphy. Agnes Murphy died in March 1953, and her executor discovered that Agnes Murphy held an interest in Peter O'Reilly's estate, same being transmitted by marriage from O'Reilly's daughter to her surviving husband Michael Murphy, and

24. *Doyle*, *supra* note 21 at 438.
25. *Webbee, Admr v Mansfield* (1873), 5 Nfld LR 513, per Hoyles CJ [*Webbee*] ("[s]he could sustain no damage by the administrator being plaintiff, as he would recover the land for her, and could be compelled to execute an assignment of it in her favour" at 514). In *Re McGrath* (1930), 12 Nfld LR 444, per Kent J [*McGrath*] ("[u]nder these circumstances—the interest of third parties not being affected—I can conceive no reason why the trustees should not convey the title to Francis T McGrath, and I so direct" at 445). This common-law approach would seem to be consistent with the statutory language in other provinces. See generally *supra* note 12.
26. *Saunders v Vautier* (1841), 41 ER 482, 1 Cr & Ph 240.
27. *Re Doyle's Estate* (1976), 11 Nfld & PEIR 83, 1976 CarswellNfld 70 (TD) [*Doyle's Estate*, cited to Nfld & PEIR].
28. In *Re Murphy Estate* (1954), 35 MPR 238, 1954 CarswellNfld 29 (Nfld SC) per Dunfield J [*Murphy Trial Decision* cited to MPR].

thence to Agnes Murphy as Michael Murphy's surviving spouse. The total interest of the widow Agnes Murphy was determined by the parties to be 8/27th of the estate. The Court had to determine whether or not the interest of Agnes Murphy fell into the distribution of her "lands" in her will, or into the rest and residue. Justice Dunfield did hold that "Agnes Murphy owned 'a collection of rights' in her character as beneficiary of the estate, rather than any specific land."[29] However, it appears that, by consent of the litigants, Justice Dunfield ordered that Agnes Murphy held an 8/27th interest in specific lands formerly of O'Reilly.[30]

The decision was appealed to the Supreme Court en banc.[31] Chief Justice Walsh, writing for the unanimous court, held as follows with respect to the operation of the *Chattels Real Act* on Mrs. Murphy's interest in the O'Reilly estate:

> By the Chattels Real Act, which has been in operation in this jurisdiction for over a century, lands are deemed to be chattels real and go to the executor or administrator as other personal estate passes to the personal representative. The land in the estate of Peter O'Reilly passed to his Administratrix for the purpose of carrying out the administration. It is presumed that the testamentary debts and expenses were paid long before the date of Agnes Murphy's death. The next of kin, after such payment, became absolutely entitled to the land as tenants in common (Cooper v Cooper (1874) L.R. 7. H.L. 53). Peter O'Reilly's daughter, Anne O'Reilly, was at the date of her death in 1901 entitled, as a tenant in common with other next of kin of her father, to 8/27ths of the land. She died intestate and her right in and to the land, with any other property that she might have had passed to her husband. Upon his death in 1930 he left all his property by his will to Agnes Murphy, his second wife, and she became entitled to the 8/27ths of the land as a tenant in common with the surviving next of kin of Peter O'Reilly and those who had acquired the rights of any of his deceased next of kin. Her right was to require the personal representative to administer and distribute the estate and to receive 8/27ths of the land (Sudley (Baron) v Atty.-Gen., 66 Q.B. 21). The next of kin were beneficially entitled to the land as tenants in common, the personal representative having dominion over it for the purpose of distribution (it being assumed that all debts had been paid).

29. *Ibid* at para 12.
30. *Ibid* at para 9.
31. Until the establishment of the Court of Appeal in 1974, appeals were heard by a panel of three Supreme Court justices. However, until 1957, the Supreme Court of Newfoundland consisted of only three judges. This meant that the trial judge would sit in appeal of his own decision. This undesirable situation was resolved by SN 1957, No 33, ss 3-4, 27, although a fourth judge was not appointed until 1963. See Michael Collins, "History of the Court of Appeal" (31 March 2023), online: *Court of Appeal of Newfoundland and Labrador* <www.court.nl.ca/appeal/about-the-court/history-of-the-court-of-appeal/> [perma.cc/W4ZX-KPL6]. The panel in this case consisted of Walsh CJN, Winter J, and Dunfield J, who had been the trial judge in first instance.

> Our legislation respecting the distribution of estates of intestates does not provide for a trust for sale. While Agnes Murphy was beneficially entitled to 8/27ths of the land, she was not so specifically entitled as to enable her to claim any particular part of it, there being no agreement with the other persons entitled to a share of the land that any particular part was hers (Vanneck v Benham (1917), 86 L.J. Ch. 7). At no time could she say of any particular part of the land: "This is mine." Her right to a share was property of which she could dispose by her will. That property was however not land and was not included as land in the sub-clause "all other land on the Penneywell Road and elsewhere of which I may die possessed."[32]

The statement of law, unanimously supported by a panel consisting of the entire Supreme Court of Newfoundland at the time, sets out the nature of the interest of beneficiaries. One must recall that Mrs. Agnes Murphy was the beneficiary of the beneficiary of the beneficiary of the deceased. A portion of Peter O'Reilly's estate went on his death to his daughter Anne (O'Reilly) Murphy, which went on her death to her husband Michael Murphy, which went on his death to his widow Agnes Murphy, whose estate was under examination in the *Murphy* case. The decision is unclear about whether there is a specific conveyance of interest from Anne Murphy to Michael Murphy in 1901, though the decision implies there was neither probate nor a will.[33] It is also unclear if Michael Murphy's estate was probated. Based on this, it is evident that the Court understood the beneficiaries of deceased persons to have a transmissible equitable interest. The Court, both at trial and on appeal, approaches the interest at issue as being the interest of Agnes Murphy, and not of Peter O'Reilly's daughter, who died in 1901. The appellate decision makes clear that the beneficiaries have a beneficial entitlement which can legitimately be said to amount to an undivided interest in the land. The estate administrator's control of the land is solely for distribution.

The recognition of such a beneficial interest in estate property was followed later by Goodridge J in *Laing and Chard v Jackson*.[34] In that case, the Court gave declaratory relief setting out the particular interests of the litigants in certain real property at Bonavista. Of note in Justice Goodridge's reasons are the following excerpts:

> Upon her death the legal interest in the property would have passed to her personal representatives (but none had been appointed) and the

32. *Re Murphy*, [1955] 5 DLR 768, 37 MPR 107 (Nfld SC en banc) [*Murphy Appeal Decision* cited to MPR].
33. *Murphy Trial Decision*, *supra* note 28 at para 2.
34. (1978), 20 Nfld & PEIR 352, [1978] NJ No 139 (TD).

> beneficial interest therein would have passed to her husband and children in accordance with the provisions of the Intestate Succession Act.
>
> […]
>
> Mr. Chard could not leave to his widow any greater interest than he had. This was a one-third undivided interest undivided beneficial interest in the property and that is all that she could convey to Mr. Jackson.[35]

The *Laing* decision follows the reasoning of Chief Justice Walsh in *Murphy*, although without citation thereto. The beneficial interest in estate property was transmissible and ascertainable, such that the court could make a declaration of the respective interests of the litigants in the land at issue. It would appear that the question of beneficiaries' interests in estate property had become settled law. Such a belief would not last long.

2. *Increasing legalism—1980s and onward*

The first departure from established precedent arose in *Re Farrell's Estate*.[36] The facts of *Farrell's Estate* are straightforward. A father (James Farrell) deeded a portion of his land to his son Gerald Farrell in 1953. Gerald Farrell died in 1957, intestate, unmarried and without children. Pursuant to the *Intestate Succession Act*, the sole beneficiary of Gerald Farrell's estate was his father, James Farrell. Gerald's estate remained unadministered during James' lifetime. James died in 1961, and his will, made in 1955, left "the remainder of my land on the north side of Topsail Road" to his two other sons, Philip and Joseph. The residue of James' estate was left to Joseph alone. The Supreme Court had to determine whether the land deeded to Gerald in 1953 was included in the specific bequest or in the residue. Steele J. held that Gerald's land remained in Gerald's estate, and James had acquired no interest in it during his lifetime. Accordingly, it could not form part of the specific bequest of land, and could only be included in the residue of James' estate.

The *Farrell's Estate* decision marks the beginning of a departure from the earlier holdings of the Supreme Court in both *Murphy* and *Laing*. Applying those earlier cases, it would have been open to Steele J to declare that James Farrell had the whole of the beneficial interest in the land deeded to Gerald Farrell. Taking a practical approach to the matter, the late James Farrell held the beneficial estate in Gerald's land at the time of his death. Whether James' will encompassed Gerald's land may be debatable on the specific drafting of the bequest, given that the will was

35. *Ibid* at paras 16, 41.
36. (1983), 44 Nfld & PEIR 251, [1983] NJ No 110 (TD) [*Farrell's Estate* cited to Nfld & PEIR].

drafted while Gerald was alive and referred to James' "remaining land" on Topsail Road. However, this issue is sidestepped by declaring that James could have no interest in Gerald's land at the time of his death. It is interesting that Steele J. does not cite to *Laing* or to *Murphy*—the latter being a unanimous decision of the Supreme Court en banc on appeal—in determining James Farrell's interest in the land at issue. Following the *Murphy Appeal Decision*, James Farrell would have a 100% interest in the land of his late son Gerald Farrell. However, also following the *Murphy Appeal Decision*, the same outcome would be reached as was reached by Steele J; the land would fall within the residue of James Farrell's estate. Unlike the *Murphy Appeal Decision*, wherein the beneficiary held only a fractional but indivisible interest in the property at issue, James Farrell was sole beneficiary of the estate at issue.[37] Compared to the facts of *Murphy*, where Chief Justice Walsh held that "at not time could she say of any particular part of the land: 'this is mine,'"[38] James Farrell could do so, as he stood to inherit the whole of the estate and thus the whole of the property therein. But rather than expressing the nature of James Farrell's 100% interest in the estate lands, Steele J held that James Farrell had no interest in the estate assets at all. In support of this proposition, he cites to English caselaw referenced in *Halsbury's Laws of England* and *Theobald on Wills*, both of which take a strict approach that the beneficiary of an estate can have no interest in the specific estate assets.[39]

The approach in *Farrell's Estate* was confirmed by the Court of Appeal's decision in *Mugford v Mugford*.[40] *Mugford* involved a more complex estate dispute. Unlike *Farrell's Estate*, which involved a single beneficiary of the unadministered estate, *Mugford* involved two cousins litigating claims to their grandfather's land, which had been deeded to the cousins by their respective fathers. The litigants' fathers were two of seven sons of the late Thomas Mugford, the original landowner, whose estate was unadministered. The Court of Appeal expressly follows the *Farrell's Estate* approach by deferring to the English principles, stated by Viscount Radcliffe in *Lord Sudeley et al v Attorney General*:

> A second line of criticism has occasionally been expressed to the effect that it is incredible that Lord Hershell should have intended by his

37. *Ibid* ("Gerald died intestate and was survived by his father as the sole statutory next of kin and sole beneficiary of his son's estate by virtue of the *Intestate Succession Act*" at para 3).
38. *Murphy Appeal Decision*, *supra* note 32.
39. *Farrell's Estate*, *supra* note 36 at paras 12, 17. Both sources cited in this decision appear to be British. The 14th edition of *Theobald on Wills*, cited in *Farrell's Estate*, was published in London in 1982.
40. (1992), 103 Nfld & PEIR 136, [1992] NJ No 349 (CA) [*Mugford* cited to Nfld & PEIR].

> proposition to deny to a residuary legatee all beneficial interest in the assets of an unadministered estate. Where, it is asked, is the beneficial interest in those assets during the period of administration? It is not, ex hypothesi, in the executor: where else can it be but in the residuary legatee? This dilemma is founded on a fallacy, for it assumes mistakenly that for all purposes and at every moment of time the law requires the separate existence of two different kinds of estate or interest in property, the legal and the equitable. There is no need to make this assumption. When the whole right of property is in a person, as it is in an executor, there is no need to distinguish between the legal and equitable interest in that property, any more than there is for the property of a full beneficial owner. What matters is that the court will control the executor in the use of his rights over assets that come to him in that capacity; but it will do it by the enforcement of remedies which do not involve the admission or recognition of equitable rights of property in those assets. Equity in fact calls into existence and protects equitable rights and interests in property only where their recognition has been found to be required in order to give effect to its doctrines.[41]

The principles of this excerpt from *Sudeley* were held determinative, and "resolved the issue that arises" in *Mugford*: the estate beneficiaries have no beneficial interest in the particular assets of an estate, and thus the vendors in the deeds at issue had no lawful interest to convey to the two litigants.[42] This decision creates a rigid rule about beneficiary interests in estate property which marks a significant departure from decades of jurisprudence assessing such interests. Although there is no reference made in *Mugford* to the 1955 *Murphy Appeal Decision*, the decision effectively overturns the earlier law. *Mugford* continues to be the dominant law to the present day, and has been held time and again for the proposition that an estate beneficiary has no cognizable interest at law in particular property.[43]

III. *Criticisms of the modern* Mugford *approach*

Those familiar with Newfoundland and Labrador's property law system may rightly question the merit in taking a stringent, hardline approach toward beneficial interests in real property. From the very establishment of the Supreme Court of Newfoundland in 1792, the Court was expected to apply the law of England "as far as the same can be applied" to the circumstances of Newfoundland.[44] Early caselaw on beneficiary

41. *Ibid* at para 39, citing to *Lord Sudeley and Others v Attorney General*, [1897] AC 11, [1895–99] All ER Rep Ext 1904 (HL) [*Sudeley* cited to AC].
42. *Ibid* at paras 40-41, 55-57.
43. *Petten v Petten* (1999), 177 Nfld & PEIR 1, [1999] NJ No 117 (TD); *Re Chatman*, 2020 NLSC 139, aff'd *sub nom Pye v Chatman*, 2022 NLCA 18; *Power Estate v Hayward*, 2021 NLCA 58.
44. *An Act for Establishing Courts of Judicature in the Island of Newfoundland and the Islands Adjacent* (UK), 1792, 32 Geo III, c 46, s 1.

entitlements had developed independent of the strictures of English law, following a unique course based on domestic practice in Newfoundland.[45] The Newfoundland and Labrador Supreme Court has cautioned against such rigidity in the treatment of property interests. As noted by Green J (later Green C.J.N.L.):

> If courts take too formalistic an approach to the application of property law concepts in such circumstances, the result may be the frustration of normal social expectations. I note that in other contexts relating to real property law in Newfoundland, the courts have in fact modified traditional legal principles to take account of local conditions. […] The categories of legal principles must be applied, but in applying the court ought to fashion those principles to take account of local conditions.[46]

Courts should take account of the common belief in the interests anticipated by beneficiaries to estate property in Newfoundland and Labrador, to the extent that such belief can accord with the existing body of law. This approach of accommodation of local practice should be distinguished from suggesting that the court should ignore inconvenient legal requirements that must be imposed. The former had been the practice of the Supreme Court of Newfoundland since its inception.[47] *Mugford* takes the latter approach, strictly enforcing a legal rule felt to be absolute, without regard to common practice or understanding. Such an approach takes a strict reading England's common law in express reliance on the *Sudeley* decision to apply in Newfoundland and Labrador, but disregards the evolution of such interests in Newfoundland's domestic law. *Mugford* marks an official reversal of the law as previously understood in Newfoundland and Labrador. It is not a reversal based on any change of policy or legislative amendment, but rather a reversal for no apparent reason. It was open to the Court of Appeal to ascertain the quantum of the claimants' interests in their grandfather's estate, and declare their interests, as was done in *Laing* and *Murphy*. This would have left the litigants with some practical relief, in accounting the interests distributed. Instead, the absolutist approach is followed, declaring that none of the underlying transactions were of any value and conveyed nothing. This marks the first time the law of Newfoundland and Labrador had taken such a strong position, effectively ruling against both litigants. There is no accounting for what changed

45. See *Williams*, *supra* note 20, and cases cited in *Walbank*, *supra* note 17.
46. *Hollett v Hollett* (1993), 106 Nfld & PEIR 271 at paras 110-111, [1993] NJ No 103 (TD).
47. *Chancey*, *supra* note 22. One should note the persistence of this approach in the judiciary: see discussion of Dunfield J in *Power v Winter* (1952), 30 MPR 131 at 148, 1952 CarswellNfld 1 (Nfld SC *en banc* on appeal).

in the law between 1955 and 1992 to reverse course on the treatment of beneficiaries' interests, except for strict reliance on an 1896 House of Lords decision.

The distinction between the common law's approaches to beneficiaries' interests in the estate context is explained in an article by Professor Donovan Waters: *The Nature of the Trust Beneficiary's Interest*.[48] Dr. Waters notes that there are two competing lines of jurisprudence on the interests of the beneficiary of an estate, both lines of which arose from 19th century British caselaw.[49] *Mugford* follows the line of jurisprudence relying on the *Sudeley* decision, the ratio of which was explained previously. The alternative line of jurisprudence comes from the 1874 decision of the House of Lords in *Cooper v Cooper*.[50] *Cooper* case is in some respects similar to *Farrell's Estate*. A testator made a bequest of his estate to certain trustees for liquidation to his three children in such shares as his widow would designate before his children reached 25 years of age. All three children survived the testator, but one predeceased the widow and died intestate. The widow made a codicil to her will leaving the deceased son's share to that son's children and siblings. All three children had reached the age of 25 years in their lifetimes and before the death of the widow. The issue before the House of Lords was one of election of certain beneficiaries to take under the widow's will or to contest same, but of note for the purposes of this paper is the holding of Lord Cairns, LC:

> In point of form, no doubt, by the appointment he was entitled to one-third of the proceeds, and not to one-third of Pain's Hill in specie; but this is to be considered only as a point of form, and is altogether immaterial. In a court of equity he must be held to be the owner of one-third, and as such is bound to elect. […] It has been urged at the Bar that the interest of the next of kin of an intestate is of an undefined and intangible nature, and is merely a right to have the residue converted into money after all debts have been discharged; and if so it can only be ascertained by calling upon the administrator to do his duty, which may require that the estate should be so converted. But the rule of law and the statute which require this conversion into money were introduced for the benefit of creditors, and to facilitate its division as substantive property. The next of kin has a right to the whole subject to this paramount claim of the creditors.[51]

48. (1967) 45:2 Can Bar Rev 219. Dr. Waters would later author the seminal text *Waters' Law of Trusts in Canada*.
49. *Sudeley*, *supra* note 41.
50. *Cooper v Cooper* (1874), LR 7 HL 53, [1874-80] All ER Rep 307 (HL) [*Cooper*].
51. *Ibid*.

Lord Cairns' reasoning takes a practical view of the matter. The purpose of vesting the estate assets in an administrator is for the protection of creditors. If there are no such debts to satisfy, there is no practical distinction to be made on the interests of the beneficiaries of an estate as having an interest in the estate as a legal concept, versus an interest in its specific assets. For practical purposes, they are one and the same: a beneficiary can elect to take the specific property or the monetary value on liquidation. The estate administrator does not hold the property in his or her own personal capacity for his or her own personal benefit; the practical decision rests with the beneficiaries who can challenge such an exercise of power by the personal representative of the estate.

Dr. Waters' paper examines the line of jurisprudence under *Cooper*, noting that *Cooper* had been infrequently cited, perhaps owing to its context as a case of election under a will, or to the fact that it was not cited in *Sudeley*, the "landmark" case in the revenue context and which had broader impact.[52] The line of reasoning in the *Cooper* cases followed the practical logic above: absent any estate debts (whether there were none in existence, or the debts settled by beneficiaries), the property of an estate was, for all intents and purposes, the property of the beneficiaries at their election.[53] This concession is made in the *Sudeley* decision itself in the concurring reasons of Lords Shand and Davey, which suggest that there are circumstances where the *Sudeley* outcome would have been different (as summarized by Dr. Waters):

(a) There is a single person entitled to the estate;
(b) There are multiple people entitled to the estate, and they have agreed to a specific division of estate assets amongst themselves; and
(c) There are multiple people entitled to the estate, and they have come to a division agreement with the executors.[54]

These exceptions would be relied upon, and further carved out, as time passed.[55] As Dr. Waters indicates, *Sudeley* has not been uniformly treated as an absolutist approach to the interests of estate beneficiaries, and its holding has been criticized where circumstances make it impractical or inappropriate. Perhaps the most practical method of distinguishing the *Sudeley* and *Cooper* decisions arises from their contexts. *Sudeley* involved

52. *Waters*, *supra* note 48 at 250.
53. *Ibid*. See discussion at 251-257, and cases cited therein.
54. *Ibid* at 253-254; *Sudeley*, *supra* note 41 at 1909-1910. Compare these exceptions to the similar statement of Mahoney J in *Doyle's Estate*, *supra* note 27 at para 24.
55. *Waters*, *supra* note 48 at 254-257.

assessing ownership for revenue collection, as against a government attempting to impose liability for probate duty. *Cooper* involved beneficiaries actively seeking to uphold their asserted interests in property.

Until *Farrell's Estate*, Newfoundland and Labrador fell into the *Cooper* line of jurisprudence. The *Murphy Appeal Decision* confirms this approach, and citing to both *Cooper* and *Sudeley*, reconciles them into a single approach: the beneficiaries of the estate have a beneficial interest, subject to estate creditors, and the estate administrator can be compelled to convey the legal interest at the beneficiaries' request.[56] The beneficiaries thus have an absolute beneficial interest in the estate property once the estate debts are settled, and have a right to demand same. When there is an estate debt, one could liken the beneficiary's interest to that of the right of redemption by a mortgagor: they can settle the debt and retain the property. *Farrell's Estate* arose in a unique circumstance: it was the beneficiaries of the beneficiary of an unadministered estate who argued about the categorization of the interest. In context, James Farrell's will made a bequest of the "remainder of my land," which was written during the period between James Farrell's conveyance of land to Gerald, and Gerald's death. Justice Steele relies heavily on British caselaw in coming to his conclusion that the Estate of James Farrell had no beneficial interest in the land at issue, however he neglects to refer to the earlier caselaw of the Supreme Court of Newfoundland and Labrador which applied to the issue. Nor does he remark on the concurring reasons of Lord Shand in *Sudeley*, which implies a potentially different outcome had *Sudeley* not involved multiple beneficiaries:

> *If Mr. Tollemache's executors had held the entire estate for behoof of his widow, the case might have been different*; but, with other persons interested in an undivided and unrealized residue, none of the beneficiaries had in themselves a right of ownership in particular assets of Mr. Tollemache's estate.[57]

The Supreme Court of Canada has considered the status of the beneficiaries of unadministered estates in the revenue context in *Minister of National Revenue v Fitzgerald*[58] and in *Minister of National Revenue v Bickle*.[59] Both cases follow the *Sudeley* rule, although one should note that both arise in the revenue context, regarding the imposition of succession duty on the beneficiary. Justice Kerwin in *Fitzgerald* appears open to acknowledging

56. *Murphy Appeal Decision*, *supra* note 32; *Waters*, *supra* note 48 at 243-260.
57. *Sudeley*, *supra* note 41 at 1909 [emphasis added].
58. [1949] SCR 453, [1949] 3 DLR 497 [*Fitzgerald* cited to SCR].
59. [1966] SCR 479, 58 DLR (2d) 194.

that the beneficiary has a "nebulous interest" in the unadministered real property of the estate, having an interest in "a loose and general way of speaking," but holds that it is not applicable for the purposes of imposing succession duty.[60]

Perhaps the most succinct reconciliation of the interests of beneficiaries in an unadministered estate comes from the Irish courts in the case of *Villiers v Holmes*, which synthesizes the holdings of the leading English cases, including *Sudeley* and *Cooper* as follows:

> The interest of a next-of-kin in the unadministered estate of an intestate is a specific interest sub modo. It is sufficiently specific for some purposes, e.g. to be capable of being assigned or of being mortgaged, or of being made the subject of a binding agreement, or of raising a case of election. But it is not sufficiently specific for all purposes. It is not sufficiently specific to prevent an administrator from realizing chattels real for the purposes of making a proper distribution.[61]

Applying the foregoing to the case of *Farrell's Estate* as a simple example, the father being the sole beneficiary of his late son's estate means that he would take the entirety of the estate, subject to the claims of any creditors. *Farrell's Estate* was decided in 1983, some 26 years after the death of the son, and long after the expiration of the limitation period for any creditors against the son's estate.[62] There is a purely academic division of the late father's entitlement in this circumstance, between an interest in the estate property and an interest in the estate itself. In either instance, there is but one person entitled to claim recovery against the assets, who may elect to keep them or to sell them, there being no other claimant whose interests must be considered. There is no "uncertainty" about the beneficiary who is entitled, or as to the determination of debts, the estate being unadministered for the statutory period necessary to bar both the claims of creditors and enforcement of a judgment.[63] However, in its factual context, there was no challenge to the interest of the father's estate. Both litigants in *Farrell's Estate* claimed through their father, and the court needed only to determine which clause of the father's will dealt with the distribution of this particular interest. From this perspective, although Steele J. goes

60. *Fitzgerald*, *supra* note 58 at 459-460.
61. *Villiers v Holmes*, [1917] 1 IR 165 at 167. Note the provisions of the *Chattels Real Act*, *supra* note 10. Whether intestate or testate, assets vest in the administrator. *Murphy Appeal Decision*, *supra* note 32, echoes the holding in *Villiers*.
62. The law of Newfoundland and Labrador has long held the limitation period for collecting on a debt to be six years. See *Limitations Act*, SNL 1995, c L-16.1, s 6(1)(h). See also predecessor legislation at RSN 1970, c 206, s 2; RSN 1952, c 146, s 2; CSN 1916, c 90, s 1.
63. *Ibid*.

farther than necessary in declaring the father had no interest in the property in his deceased son's estate, he reaches the correct conclusion: the interest would be disposed of by the residue clause of the will. The estate interest is a "chose in action," but it is not uncertain and not unascertainable as regards specific property, in practical terms. This is the same outcome reached in the *Murphy Appeal Decision*.

The later *Mugford* decision is closer in form to *Sudeley*, in that it involved a more complicated scenario of multiple beneficiaries of the estate, whose assigns were in direct contest with one another over their respective claims to specific property of an unadministered estate. The facts of *Mugford* do not fall into any of the suggested exceptions in the concurring reasons of *Sudeley*. However, *Mugford* follows a similar context to *Cooper*, in that the beneficiaries, as litigants before the Court, asserted their respective ownership interests. *Mugford* goes unreasonably far in holding that the litigants had no interest in the land. While *Farrell's Estate* perhaps marks the beginning of a "zero tolerance" approach to beneficiaries' interests in estate property, *Mugford* makes it an absolute rule. Beneficiaries were thereafter unable to assign their interest in estate property, a proposition that had been accepted prior to *Mugford*.

As late as 1990, the Joint Committee on Continuing Legal Education in Newfoundland noted that "Regrettably, until recently solicitors did not consistently prepare and register Deeds of Assent or Deeds from Administrators to Beneficiaries after the Grant of Administration or Probate. The question becomes, for how long a period is it reasonable to insist that all Deeds of Assent and Administrator's Deeds be provided?"[64] The Committee concluded that possession for the applicable limitation period would obviate the need for obtaining paper title from administrators, and correctly notes that the *Chattels Real Act* vests legal title in the administrator.[65] In support of the administrator's authority, the Committee cites to the decision of Russell J in *Re Kelloway Estate* for the proposition that an estate administrator can convey clear title to estate property without requiring the permission of the beneficiaries.[66] This is an undoubtedly correct proposition under the *Chattels Real Act*. However, this does not negate that the administrator has an obligation to the estate's beneficiaries, which must manifest in some meaningful and enforceable form. *Kelloway Estate* confirms that a *bona fide* purchaser is not bound to inquire into the

64. "The Lack of a Deed of Assent" in "What Is Good Title?" (Seminar materials, Law Society of Newfoundland and Labrador Joint Committee on Continuing Legal Education, 17 May 1990).
65. *Ibid*.
66. *Kelloway Estate*, *supra* note 9.

exercise of the administrator's authority, and can rely upon the grant of probate or administration as allowing a vendor to provide clear title. The case did not involve a challenge by estate beneficiaries; rather, it involved an estate administrator versus a reluctant purchaser of real property. On the issue of the necessity of joining the estate beneficiaries to the conveyance, Russell J noted that "counsel have not cited any authorities dealing directly with this point" and relied solely on the language of the *Chattels Real Act* as to the vesting of title.[67] However, later jurisprudence would endorse the view that "a bequest in a will takes from the time of death of the testator, even though the formal document probating the will and assenting to the bequest may not be completed for some time, even years later."[68] Such a view would seem at odds with both the *Mugford* rule and the language of the *Chattels Real Act*.

One should take note of the concluding remark under this chapter of the Committee's materials:

> It is submitted that we should not lose sight of the fact that ownership of land must always be regarded as relative and not absolute. As long as there is every reasonable probability based on the evidence of title available that the purchaser will receive and enjoy uninterrupted possession of the lands, the title should be considered to be good and marketable by generally acceptable conveyancing standards.[69]

One should take particular note of the recent article by Professor A.H. Oosterhoff, "*Locus of Title in an Unadministered Estate and the Law of Assent*."[70] Professor Oosterhoff confirms the current law, that a beneficiary has no interest beyond the right to seek proper administration of the estate and that no trust exists in favour of the beneficiary until there is due administration. This is a correct statement of the current state of the law nationally, and it is an uncontroversial statement of the standard of good title in Newfoundland and Labrador pursuant to the *Chattels Real Act*, as held in the *Kelloway Estat*e decision. However, one must question the practicality of such an approach when considering certain contexts where title interests exist, but fall short of "good title" yet still require an assessment of respective claims. This may include proceedings under the *Quieting of Titles Act*, or proceedings as to comparative strength of title between two litigants, where objectively good title may not be a

67. *Ibid* at para 11.
68. *Kennedy v Watton*, 2014 NLTD(G) 62 at para 48. See also *Hanlon v Hanlon*, 2003 NLSTD 144 at para 66 (TD).
69. *Supra* note 64.
70. Albert Oosterhoff, "Locus of Title in an Unadministered Estate and the Law of Assent" (2018), 48 Adv Q 41.

requirement to determine the case.[71] In such a contest, the beneficiary of an estate would have superior title interest to a perfect stranger to the land at issue, though the interest of the beneficiary may be subordinate to others. The "chose in action" interest is a superior interest to nothing, and may substantively amount to a satisfactory interest in certain circumstances.

Consider the *Farrell Estate* context as an example. James Farrell was the sole beneficiary of the whole estate of his son Gerald Farrell. Two decades later, the beneficiaries of James Farrell's estate litigate over James' interest in Gerald's land. The litigants' interest in the unadministered estate of Gerald Farrell may be a chose in action, to seek the right of administration of Gerald's estate on behalf of the Estate of James Farrell. Justice Steele determined that the interest in Gerald Farrell's land was not the same as an interest in James Farrell's land under James Farrell's will, but it was nevertheless an ascertainable interest that could be conveyed by the will of James Farrell to the appropriate beneficiary via the residuary clause. For all practical intents and purposes, the substantive beneficial interest in Gerald Farrell's property arrives at the appropriate beneficiary of James Farrell's estate. Substantively, the rights of the litigants were determined by the Court.

The *Mugford* case marks a turning point where the "chose in action" is taken farther than necessary. While correct as confirmed by Professor Oosterhoff's statement of law, the practical consequences of the decision are ignored. The litigants in *Mugford* understood themselves to have some interest in title. The previous decisions of the Supreme Court of Newfoundland and Labrador in *Murphy* and *Laing*, and even in *Farrell's Estate*, would confirm that the Court has authority to rule on what those interests would be. The litigants would find some practical relief and clarity under such a determination. The Court instead held that no interest could be conveyed or created absent administration, leaving the *lis inter partes* effectively unresolved. On due administration, barring any estate debts, the beneficial interest would be transmissible to the beneficiaries of the estate. Those beneficiaries would hold a right to demand conveyance of the property to them.[72] The administrator may elect to sell the property

71. See e.g. *Bowaters (Nfld) Ltd v Pelley Enterprises Ltd* (1977), 12 Nfld & PEIR 251 at para 8, [1977] NJ No 15 (CA) (*jus tertii* defence of the existence of a superior titleholder is no defence to a trespass claim); *House v Toms*, 2017 NLCA 40 (good title not required to sustain a trespass action); *Jefford v Eason*, 2022 NLSC 84 at paras 23-26 (rule 7.16 of the *Rules of the Supreme Court, 1986* permitting a limited determination of "better" title between two claimants with defective title). As to the *Quieting of Titles* context, see Gregory French, "On the Operation of the *Quieting of Titles Act* in Newfoundland and Labrador" (2022) 45:1 Dal LJ 131 [French, "Quieting of Titles"].

72. See *Webbee* and *McGrath*, *supra* note 25.

or may convey it to the beneficiaries to untangle the various interests for themselves. If the law of Newfoundland and Labrador is that the beneficiaries of the estate can compel the personal representative of the estate to act in accordance with their respective interests, as is suggested in earlier Newfoundland caselaw,[73] then the matter comes full circle, and the litigants are back before the court with their fractional interests, seeking to assert their respective claims once more. *Mugford* may be read within its context: the absence of information about the preceding estate meant that the Court could not make a determination of the respective interests, and thus the application could not be decided. As noted in academic literature, the *Sudeley* rule is premised on the non-specific interest of co-beneficiaries and creditors that may result in the "impossibility of ascertaining any beneficiary's share."[74] This may have been a preferable framing of the issue, rather than the omnibus rule created by the *Mugford* decision. Contrarily, the Supreme Court en banc did determine the fractional rights of the beneficiary in in the *Murphy Appeal Decision*, which was an even more complex estate situation, involving the beneficiaries of beneficiaries of beneficiaries. Reconciling the *Murphy Appeal Decision* and *Mugford*, a discretion appears to exist that would permit the Court to make a determination of beneficiary interests, though the exercise of such discretion rests with the Court. It is nevertheless not prohibited to do so in Newfoundland and Labrador, notwithstanding the strong language in *Mugford*.

The *Mugford* approach is ultimately taken to the farthest extreme in the recent case of *Pye v Chatman*, where the Newfoundland and Labrador Court of Appeal affirms that no viable proprietary claim can be advanced by virtue of being entitled to inherit from an estate.[75] One could consider it a triumph of formalism that the practical nature of the interest—a right to pursue recovery of the property through the estate, at a minimum—is disregarded entirely. In proper form, the estate through which the litigants in *Pye* should have been probated to assert the interest. But under the *Quieting of Titles Act* (the Act under which *Pye v Chatman* was brought), it is not necessary for a litigant to hold an estate in the land to challenge the Applicant's application.[76] That the Court of Appeal affirms in *Pye v*

73. *Ibid*.
74. Valentine Latham, "The Right of the Beneficiary to Specific Items of the Trust Fund" (1954) 32 Can Bar Rev 520 at 527-530.
75. *Pye v Chatman*, *supra* note 43 at para 19.
76. *Crowley v Crowley* (1984) 51 Nfld & PEIR 140, [1984] NJ No 201 (TD); *In Re Coleman* (1934), 13 Nfld LR 149 at 159-160 (SC en banc on appeal). The Court hearing a Quieting of Titles Application is not tasked with investigating the adverse claimant's claim on the land, as it is not before the Court.

Chatman that "the Cousins' claims were not legally viable and could not form a basis to defeat Mr. Chatman's claim" is too rigid an approach to take.

1. *Modern day—An opportunity to revisit the* Mugford *rule?*

In certain contexts, it is appropriate to recognize that some beneficial interest exists in the beneficiaries of an estate, whether administered or not, and that such an interest is transmissible. Such an interest falls short of good title at law, but it is an interest that is more than nothing. It is not imaginary. It vests some right into those who are entitled to the estate. They are not without recourse against estate property, as a stranger to the dispute would be. One should consider the recent treatment of an estate administrator as a trustee for the beneficiaries of an estate. In the recent case of *Best v Hendry*, the Newfoundland and Labrador Court of Appeal has opined on the role of executor as trustee, holding expressly that executors are trustees within the meaning of the *Trustees Act*.[77] The *Best* case involved a claim of beneficiaries against an executor for the distribution of the proceeds of a deceased's bank account. Of note for the purposes of this paper, the Court unanimously held that "it is established law that an executor/trustee owes a duty of care to the beneficiaries of an estate whose property the executor/trustee is holding in trust pursuant to a will that the executor is administering."[78] The Court relies on a general statement of trust law from *Valard Construction Ltd v Bird Construction Co*, in defining what a "trust" is, and adopts the statement that a trust refers to "the relationship which arises whenever a person (called the trustee) is compelled in equity to hold property for the benefit of some persons for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustee, but to the beneficiaries or other objects of the trust."[79] Adopting this approach in the context of an executorship necessarily adopts a rule that an executor is a trustee for the beneficiary of the estate.[80] The Court of Appeal expressly holds as such, that the executor

---

The only question is whether or not the Applicant is the owner of the land. See French, "Quieting of Titles," *supra* note 71 at n 52.

77. *Best v Hendry*, 2021 NLCA 43 at para 20 ["*Best*"], citing to *Trustees Act*, RSNL 1990, c T-10, s 2(n).

78. *Ibid* at para 26, citing to *Fales v Canada Permanent Trust Co*, [1977] 2 SCR 302, 70 DLR (3d) 257.

79. *Ibid* at para 23, citing to *Valard Construction Ltd v Bird Construction Co*, 2018 SCC 8. See also *Best*, *supra* note 77 at paras 35, 38, which confirm the approach that "the alleged breach of trust [between executor and beneficiary] generally rests on a beneficiary's allegation that the trustee failed to carry out, or negligently carried out, the trustee's obligations respecting the beneficiary's interest as set out in the trust document" […] "the trust document in this case is a will."

80. See *Best*, *supra* note 77 at paras 35-38; Oosterhoff, *supra* note 70, and cases cited therein.

"as executor of Ms. Penney's will and trustee of her estate, held property in trust for Ms. Best as a beneficiary of the will."[81] While the assets at issue in *Best* did not involve a claim on real property, the effect of the *Chattels Real Act* reducing real property to a chattel interest means that the same logic must apply to the question of land. If an executor is a trustee for chattel interests and personalty, then land must also be impressed with this trust. If an executor is a trustee of property for the benefit of beneficiaries—an express and unambiguous statement in *Best*—then the effect must be that an enforceable beneficial interest in estate property exists for the beneficiaries.

The same principle should apply when considering the interests of a beneficiary in an unadministered estate. Consider the nature of the interest that the beneficiary can expect to receive—a right to a transfer of the property, subject to resolution of estate debts. The fact that no personal representative of the estate is appointed does not affect the nature of the interest that the beneficiary can obtain. It is a mechanical exercise: either the executor applies for probate and takes office under the will, or an administrator is appointed in the absence of testamentary appointment, or the Public Trustee is appointed in the absence of either.[82] Whoever may hold the office, the outcome is the same. There is always a party at law who can assume the mantle of representative to carry out the obligation. The rights that flow to the beneficiary flow from the estate itself, whether testate or on intestacy. It is not the interposition of the representative that creates a beneficiary's entitlement. The right to make the demand for redemption of the property or specific performance of a bequest rest with the beneficiary, who can either apply themselves, or can compel appointment of the Public Trustee.[83] The substance of the proprietary right rests in the beneficiary, though the legal title may vest in the personal representative of the estate. It is not the personal representative's property to handle with impunity or for his or her own personal gain or preference, as the *Best* decision indicates. An executor or administrator who deals with estate property on their own caprices or for their own benefit can face

81. *Best*, *supra* note 77 at para 70. One should note Professor Oosterhoff's criticism (*supra* note 70) of the use of "trustee" in the estate context, based on the common law rule that the whole of title, both legal and beneficial, is vested in the personal representative of the estate for administration purposes. The factual matrix underlying the *Best* decision may reflect the Court's reasons for departure from the original rule in this case, but if the Court's approach in *Best* reflects a true trust approach, it must apply in general in the estate context.

82. *Public Trustee Act*, SNL 2009, c P-46.1, s 4(1)(b).

83. *Rules of the Supreme Court, 1986,* SNL 1986, c 42, Sch D, rule 56.01 allows appointment of a beneficiary, as does rule 56.02, as beneficiaries on intestacy follow the same priority for right of administration.

an action brought against them. The Newfoundland and Labrador Court of Appeal has unanimously held that the executor of an estate "has no beneficial interest in the estate. His only duty is to administer the estate in accordance with the testator's intention as expressed in the will."[84] This indicates that the personal representative does not hold the whole "bundle of rights" of legal and beneficial ownership. Simply put, it is not the personal representative's property; the beneficial interest in the property or its equivalent value is intended to be bestowed onto the beneficiaries of the estate. The identity of the personal representative is immaterial to this right. While a personal representative can convey clear legal and beneficial title under the *Chattels Real Act*, as confirmed in *Kelloway Estate*, some power exists in the beneficiary to challenge that exercise, though as noted in *Kelloway Estate*, a purchaser is not bound to inquire behind the personal representative's authority.

The principles expressed in *Best* require a re-examination of the strictures of *Mugford*. As an academic exercise, one should examine the purposes of the law and the principle and why the law is what it is in its current state. As a practical exercise, one should consider the impact of strictly applying the law in its current apparent form as a reflexive answer to the question of beneficiaries' interests. Based on law, practice and societal expectations, and notwithstanding *Mugford*, beneficiaries should be recognized as having a cognizable and transmissible interest in estate property, subject to the due administration of the estate and payment of creditors. While *Mugford* emphatically holds that there is no interest at all in the beneficiaries of an unadministered estate, the following points must be considered in opposition:

1. Certain contexts require the assessment of comparative interests, and it is appropriate to determine those interests even where they may be objectively weak. Applications under rule 7.16 for a limited determination of interests between litigants are one example, as are trespass actions, neither of which require the applicants to have good title to seek relief. Parties with legitimate interest in a property should have standing to pursue such claims, particularly in cases where their respective interests are in contest, such as in *Mugford*.
2. The law of Newfoundland and Labrador has historically recognized beneficiaries' interests in the absence of probate, prior to *Mugford*, most notably in the *Murphy Appeal Decision*. The Court in *Mugford* does not address the earlier unanimous ruling in

84. *Fitzgerald v Fitzgerald Estate* (1992), 111 Nfld & PEIR 268 at para 10, [1993] NJ No 282 (CA).

the *Murphy Appeal Decision*, which would otherwise appear to be binding precedent which applied for almost 40 years.

3. *Mugford* itself relies on part of the *Sudeley* decision, without regard to the exceptions noted elsewhere in the concurring reasons in *Sudeley*. Subsequent decisions have carved out exceptions to the hard and fast *Sudeley* rule employed in *Mugford*. The common law of Newfoundland and Labrador should recognize such exceptions as employed elsewhere in the evolution of its own law, but such has not been raised to the Supreme Court of Newfoundland and Labrador as of writing.
4. *Sudeley* arose in the revenue context, of an effort to levy probate tax. It was not an entitled party seeking to recover its interest, but rather the effort of government to foist a revenue obligation on the beneficiary. Thus arose the strict rule that the beneficiary had no interest in the property itself, since the proprietary interest would impose a burden. Compare with the context of *Cooper*, which involved the beneficiaries trying to recover their own interests in estate property. The latter context is on point with the *Mugford* facts, the former is not.
5. *Best* makes an express declaration that the executor is a trustee for the beneficiaries of the estate, holding property in trust for the beneficiaries. *Mugford* expressly held the opposite, that a beneficiary can have no interest except to seek due administration. A trustee with no beneficiary is an absurdity: a trust must have an object. That beneficiary must be the party or parties entitled to inherit from the estate. The Newfoundland and Labrador Court of Appeal confirms in *Fitzgerald Estate* that the beneficial interest in the estate does not rest with the personal representative.[85] In practical terms, it rests with the redemptive rights vested in the beneficiaries. On a review of first principles, the practical effect of the law, and the early caselaw of the Supreme Court of Newfoundland, the *Best* approach to an executor as trustee of estate property for the benefit of a beneficiary is the logical and practical course.
6. As concerns the law of real estate in Newfoundland and Labrador, law and practice operate on standards that are relative, and not absolute.[86] If in practice an individual acquires rights which will

85. *Ibid*.
86. Law Society of Newfoundland and Labrador Joint Committee on Continuing Legal Education, *supra* note 64.

guarantee peaceable enjoyment and occupation of property, then such a title has been endorsed by the Law Society of Newfoundland and Labrador's Joint Committee on Continuing Legal Education as being generally acceptable for marketability. When all beneficiaries entitled under an estate convey their interest, one must question the scope of risk that remains. Who else can raise issue with the purchaser's claim to title? Can the purchaser not seek to redeem the beneficial interest acquired from next of kin should an estate be administered in the future?

7. It is common in Newfoundland and Labrador for individuals to believe themselves to be vested with certain beneficial interests in property by virtue of inheritance alone.[87] It is not uncommon for children to take over the property of their deceased parents, without completing estate administration. Where a testator dies, it is commonly (mis)understood that the will is sufficient to vest title and probate is not pursued to formally convey the property.[88] In a legal sense, such an interest could be considered a defeasible estate: creditors may recover against it, but the beneficiaries' interest may be seen as akin to a right of redemption in the mortgage context. On payment of the debt, the beneficiaries may compel the transfer of title. The beneficiaries' interest is a practical and recognized reality.
8. One must be aware that the Supreme Court has taken a flexible approach when confronted with unadministered estates in the context of the *Quieting of Titles Act*, one which seems to follow the instruction of the Law Society's Joint Committee on Legal Education, where the applicant's claim is uncontested and the applicant can appear to enjoy uninterrupted and unchallenged

87. The author speaks from professional experience in resolving title issues with land in rural Newfoundland and Labrador, as probate is infrequently sought when land is not being sold on the open market, but is instead being taken over by the intended beneficiary. The absence of deeds of assent is remarked upon by the Law Society of Newfoundland and Labrador's Joint Committee on Legal Education in 1990, *supra* note 64. Consider also the position of the litigants in *Mugford*, *supra* note 40. See also *Young v Foley*, 2020 NLSC 106, a case involving a dispute arising after a purchaser acquired title from the beneficiary of an unprobated estate.

88. Registration of title is also poorly understood and followed in rural areas of Newfoundland and Labrador. Many parcels of land are held by unregistered title. Testamentary dispositions form part of this belief, since there is uninterrupted continuity of title from a recognized prior owner, though the claim is not documented on the public record. On public understanding of title standards and practices, see French, "Property Interests" and French "Abolition of Adverse Possession," *supra* note 2. See also the general discussion in Canadian Bar Association Newfoundland & Labrador Branch, "Reforming the Law on Adverse Possession" (2021), online (pdf): Law Society Newfoundland & Labrador <https://lsnl.ca/wp-content/uploads/2021/05/Reforming-the-Law-on-Adverse-Possession_CBA-NL-Final-Report-May-2021.pdf> [perma.cc/HL4P-DLEU].

> occupation of the property at issue.[89] The interest of a beneficiary in an unadministered estate may not constitute good title on the open market, but is in substance an ascertainable interest that can form the basis of a valid claim of title. The *Quieting of Titles Act* allows such an inchoate title to vest into clear title if unopposed.

Conclusion

One must bear in mind that property law in Newfoundland and Labrador is not an academic exercise, but rather a practical field of law that impacts the daily lives of tens of thousands of people. Decisions made by the courts of Newfoundland and Labrador must recognize the social context and reality in which they operate. Newfoundland and Labrador has long operated with an informal system of title and conveyance, with which the government and the legal profession has grappled for centuries.

It is in this spirit that the author suggests that it is appropriate for the courts of Newfoundland and Labrador to take a more flexible and pragmatic approach to beneficiaries' interests in the estate context under the *Chattels Real Act*. The beneficiaries' interest is a chose in action and does not provide clear title at strict point of law, but in certain circumstances the Courts may be called upon to enforce or determine rights descending therefrom. Legal formalism should not frustrate societal expectations and the ability of litigants to resolve a *lis inter partes*.

There is, at present, a conflict in the law arising from the underpinnings of the relevant jurisprudence about such authority. The courts of Newfoundland and Labrador deviated from the commonsense approach espoused by the provincial Supreme Court in the *Murphy Appeal Decision*, which reconciled two branches of English case law on point. Instead, relying on strict legal formalism, the Newfoundland and Labrador Court of Appeal has followed an increasingly stringent approach to beneficiary interests. There is a time and a place for each approach. The *Cooper* approach, previously followed by the Supreme Court and potentially rediscovered in *Best*, looks to the practical interests of the litigants before the court. The people involved claim their due entitlements from the estate administrator. The *Sudeley* approach has its place, when one attempts to fix liability and responsibility for estate assets and proper administration. The estate administrator remains fixed with that burden, upon which all estate property is charged. The estate remains liable for debts, the beneficiaries cannot be compelled to take ownership of a liability just because it has been bequeathed to them or because they are next of kin. The law does not foist

89. French, "Quieting of Titles," *supra* note 71 at 153-154.

such responsibility on unwilling beneficiaries. Beneficiaries are put to an election: assume responsibility for the debts and burdens associated with the estate property, and it can be transferred *in specie*. *Cooper* recognizes this benefit, *Sudeley* recognizes the concomitant burden. Both approaches can exist harmoniously and did under the *Murphy Appeal Decision*. It is suggested that the current state of the law, post-*Best*, allows for a return to this sensible state of affairs, and should be recognized by the courts of Newfoundland and Labrador.