

now not to be considered legal assets. But in *Dent v. Maddox supra*, it was determined that by a rightful sale under the Act, real estate was converted into personalty and represented entirely by the executor, and that the proceeds of sales were to be accounted for as personalty accordingly, from which it would seem that they are legal assets. And see *Smithers v. Hooper*, 23 Md. 273. As to the rule of distribution, however, there is no distinction here between legal and equitable assets.

Power of sale by implication.—Where a will authorizes lands to be sold for the payment of debts, and omits to confer on any one the power to make sale, but appoints executors, they have by implication power to make the sale,⁵ it was determined in *Magruder v. Peter*, 11 G. & J. 217, that this implied authority was not taken away by the Act of 1785, ch. 72, sec. 4, Code, Art. 16, sec. 66.⁶ The Court there explained that their expressions in *Magruder v. Peter*, 4 G. & J. 323, had been misunderstood by the Supreme Court in *Peter v. Beverly*, 10 Pet. 563, that they only said that a different practice with respect to such cases, as are provided for by the Act of 1785, ch. 72, had obtained here in consequence of that Act.

⁵ Such a power in the executor will be implied wherever the proceeds of the sale are to be disbursed and distributed by him. *Poterfield v. Poterfield*, 85 Md. 664; *Ogle v. Reynolds*, 75 Md. 150. But where the will does not provide how the sale is to be made and appoints no executor, then the sale can only be made under decree of a court of equity. *Baumeister v. Silver*, 98 Md. 418.

⁶ Code 1911, Art. 16, sec. 94. Proceedings under this statute to appoint a trustee in place of an executor or trustee, who dies or fails to act, are generally *ex parte*. *Kennard v. Bernard*, 98 Md. 513; *Sloan v. Safe Dep. Co.*, 73 Md. 239; *Fulton v. Harman*, 44 Md. 251; *Dorsey v. Thompson*, 37 Md. 46; *Davis v. Clabaugh*, 30 Md. 508. See also note 1 *supra*.

In connection with the notes on this Statute, see also notes to 4 & 5 W. & M., c. 24.

CAP. V.

What Fees ought to be taken for Probate of Testaments.

V. Provided always, That if the person so deceased will by his Testament, or last Will, any Lands, Tenements, or Hereditaments, to be sold, that the Money thereof coming, nor the Profits of the said Lands, for any time to be taken, shall not be accounted as any of the Goods or Chattels of the said person so deceased.

The Profits of the Lands to be sold shall not be accounted the Testator's Goods. *Dyer*, 264, 310. *Fitz. Exec.* 1, 37, 51.