

THE LAW
of
REAL PROPERTY

BY

R. E. MEGARRY,
Q.C., M.A., LL.D.(Cantab), Hon.LL.Đ.(Hull)

*A Bencher of Lincoln's Inn;
Book Review Editor of The Law Quarterly Review;
Reader in Equity in the Inns of Court*

AND

H. W. R. WADE, LL.D., D.C.L.

*of Lincoln's Inn, Barrister-at-Law and Honorary Bencher;
Professor of English Law in the University of Oxford*

THIRD EDITION

LONDON
STEVENS & SONS LIMITED
1966

IV. PERSONALTY

In the case of personalty, the old rules never apply to deaths occurring after 1925.³⁶ These rules still retain some of their importance, however, particularly in showing title to leaseholds, and in the practice of reversion conveyancing. Thus if in 1920 personalty was settled upon A for life with remainder to B absolutely, and B died intestate in 1924, B's reversion (which is called by this name, although technically a remainder³⁷) passed to his next-of-kin. If the person at present entitled to B's reversion (A still being alive) wishes to sell or mortgage it, he will have to prove that he is duly entitled to it, thus invoking the old rules of intestacy.

Part 3

DEVOLUTION OF LEGAL ESTATES

Sect. 1. Introductory

1. Vesting of property. Hitherto we have examined only the beneficial devolution of property on death. We must now turn to machinery by which the property becomes vested in those beneficially entitled. The general rule today is that all property first vests in the personal representatives of the deceased, who in due course transfer to the beneficiaries any of the property not required in the due administration of the estate, *e.g.*, for payment of debts. In this context, "estate" is used not in the technical sense of an estate in land, but as a collective expression for the sum total of the assets and liabilities of the deceased.

2. Executors. "Personal representatives" is a phrase which includes both executors and administrators. If a person makes a will, he may (but need not) appoint one or more persons to be his executor or executors, with the duty of paying debts, death duties and funeral expenses, and ultimately of distributing the estate to those entitled. The executor derives his powers from the will,³⁸ although he must obtain confirmation of his position by "proving the will," *i.e.*, obtaining a grant of probate from the court. If a sole or only surviving executor who has obtained probate dies having himself appointed an executor, the latter, on proving the original executor's will, becomes executor of the original testator also. This "chain

³⁶ A.E.A., 1925, s. 45 (1).

³⁷ *Ante*, p. 185.

³⁸ See, *e.g.*, *Chetty v. Chetty* [1916] 1 A.C. 603; *Bainbridge v. I. R. C.* [1955] 1 W.L.R. 1329 at 1335; *Biles v. Caesar* [1957] 1 W.L.R. 156.

of representation" may be continued indefinitely until broken by failure to appoint an executor, or failure of an executor to obtain a grant of probate.³⁹

3. Administrators. If a person dies without having appointed an executor, or if none of the executors he has appointed is able and willing to act, application must be made to the court by some person or persons interested in the estate for "letters of administration" appointing an administrator or administrators. The duties of an administrator are substantially the same as those of an executor. If the deceased left no will, simple administration is granted; if he left a will, administration *cum testamento annexo* ("with the will annexed") is granted.⁴⁰ Provision is also made for certain limited grants of administration, such as grants confined to settled land,⁴¹ grants "save and except" settled land,⁴² and grants *durante minore aetate* ("during the minority" of the sole executor).⁴³ There is no "chain of representation" for administrators. If a sole or last surviving administrator dies without completing the administration of the estate, application must be made for a grant of administration *de bonis non administratis* (more shortly, *de bonis non*), which is a grant "in respect of the goods left unadministered."

Sect. 2. Devolution of Property on Personal Representatives

The devolution of the property of the deceased upon his personal representatives can be divided into three stages:

1. Before 1898;
2. Between 1897 and 1926; and
3. After 1925.

A. Before 1898

I. REALTY

The common law rule was that the realty of the deceased did not vest in his personal representatives but passed immediately to the heir or devisee as the case may be. If any dispute arose as to who was entitled under the will or intestacy, it was settled by the common law courts. There was never any need for the grant of probate or letters of administration. Even if executors had been appointed,

³⁹ A.E.A., 1925, s. 7, replacing 25 Edw. 3, St. 5, c. 5, 1351.

⁴⁰ J.A., 1925, s. 166.

⁴¹ J.A., 1925, s. 162; *ante*, p. 317.

⁴² See A.E.A., 1925, s. 23; *ante*, p. 317.

⁴³ J.A., 1925, s. 165.

they had no power over the realty of the deceased and were thus unable to sell it to pay debts. Instead, the creditors had to sue the heir or devisee, and their right to do this did not extend to all debts until the Administration of Estates Act, 1833; even then, the claim did not arise against an assignee who took in good faith before action brought.⁴⁴ The position was the same if, there being no executor, someone had obtained a grant of administration. The only case in which the personal representatives could exercise control over the realty was if the deceased gave them some express or implied power to deal with it, as by devising it to them for the purposes of administration or by charging it with the payment of debts.⁴⁵

II. PERSONALTY

In the case of personalty the position was very different. All personalty (including, as usual, leaseholds) vested in the personal representatives. If an executor was appointed, the property vested in him from the moment of death, although it was necessary for him to confirm his position by obtaining probate of the will. If no executor was appointed, a grant of administration had to be obtained by some person interested in the estate, and until then the property vested in the Ordinary (*i.e.*, the Bishop⁴⁶) or (after the Court of Probate Act, 1858⁴⁷) in the Probate judge, now the President of the Probate, Divorce and Admiralty Division.⁴⁸ When the grant is made, the administrator's title for most purposes⁴⁹ relates back to the moment of death.⁵⁰ In either case the personal representatives had full control over the property and could use it for the payment of debts and other liabilities, handing over the surplus to those entitled under the will or intestacy. Probate and letters of administration were originally granted by the ecclesiastical courts, but the Court of Probate Act, 1857, substituted a Court of Probate which was subsequently replaced by the High Court under the Judicature Acts, 1873 and 1875.

B. Between 1897 and 1926

1. Vesting in personal representatives. The Land Transfer Act, 1897, was passed to establish a "Real Representative." Under the Act,⁵¹ in the case of deaths after 1897, all property, whether real or

⁴⁴ *Re Atkinson* [1908] 2 Ch. 307.

⁴⁵ L.P.(Am.)A., 1859, ss. 14-18.

⁴⁶ Statute of Westminster II, c. 19.

⁴⁷ s. 19.

⁴⁸ A.E.A., 1925, ss. 9, 55 (1) (xv); see, *e.g.*, *Smith v. Mather* [1948] 2 K.B. 212 (notice to quit served on President).

⁴⁹ See *Hilton v. Sutton Steam Laundry* [1946] K.B. 63 (invalid writ not retrospectively validated).

⁵⁰ *Foster v. Bates* (1843) 12 M. & W. 226 at 233.

⁵¹ s. 1 (1). Part I of the Act has been called "one of the worst-drawn enactments of modern times": Jarman, 6th ed., 64; and see *post*, p. 546, n. 74.

personal, vested in the personal representatives in the same way as leaseholds had vested before 1898, save that on an intestacy the legal estate in realty vested in the heir (instead of the Probate judge) until an administrator was appointed.⁵² The personal representatives thus became "real" as well as "personal" representatives, although their old name is still used. They had full powers of administration⁵³ and could thus sell realty to raise money for the payment of debts. There were a few exceptions to the rule that all property vested in them,⁵⁴ including legal (but not equitable⁵⁵) interests in copyholds; and in one case property not owned by the deceased vested in them, namely, property over which he had a general power of appointment which he exercised by his will.⁵⁶

2. Vesting in beneficiaries. During the administration of the estate, the ownership of all assets not specifically devised or bequeathed was in the personal representatives; the beneficiaries had no equitable interest in them,⁵⁷ but merely a right to compel the personal representatives to administer the estate properly.⁵⁸ But subject to due administration, the personal representatives held the property on trust for those beneficially entitled, who could call for a transfer of it to themselves.⁵⁹ If the heir was entitled, the realty had to be transferred by a conveyance; but if a devisee was entitled, the personal representatives might either assent to the devise or convey the land to the devisee.⁶⁰ An assent did not even need to be in writing; any conduct by the personal representatives showing that they assented to the gift would suffice, as, for example, allowing the beneficiary to take possession of the property.⁶¹ This was unsatisfactory, since the title to a legal estate might depend upon facts which were difficult to prove, instead of appearing plainly from title deeds.

To make a valid transfer of realty, all the personal representatives who had taken out a grant had to concur⁶²; but over personalty

⁵² *Re Griggs* [1914] 2 Ch. 547.

⁵³ s. 2.

⁵⁴ s. 1 (4); see *post*, p. 546.

⁵⁵ *Re Somerville and Turner's Contract* [1903] 2 Ch. 583.

⁵⁶ s. 1 (2).

⁵⁷ *Commissioner of Stamp Duties (Queensland) v. Livingston* [1965] A.C. 694; *Eastbourne Mutual B. S. v. Hastings Corporation* [1965] 1 W.L.R. 861; *ante*, p. 158.

⁵⁸ See *Williams v. Holland* [1965] 1 W.L.R. 739 (executor entitled to possession as against beneficiary).

⁵⁹ s. 2 (1).

⁶⁰ s. 3 (1).

⁶¹ *Wise v. Whitburn* [1924] 1 Ch. 460.

⁶² s. 2 (2), as amended by C.A., 1911, s. 12. Before 1912 all persons named as executors had to concur: *Re Pawley and London & Provincial Bank's Contract* [1900] 1 Ch. 58. There was an exception where the deceased was a sole surviving mortgagee or trustee: C.A., 1881, s. 30, for the main provisions of which see *ante*, p. 466, and *post*, p. 946.

(including leaseholds) they had a joint and several power, so that one of several personal representatives could make a good title by himself.⁶³

C. After 1925

1. Vesting of property. The Administration of Estates Act, 1925, substantially repeats the provisions of the Land Transfer Act, 1897. In the case of deaths after 1925, all land owned by the deceased, including leaseholds⁶⁴ and Crown land,⁶⁵ vests in the personal representatives⁶⁶ with the following exceptions:

- (i) Entails, unless disposed of by the deceased's will.⁶⁷ Probably entails did not vest in the personal representatives before 1926, but the position was somewhat uncertain.⁶⁸
- (ii) Property to which the deceased was entitled as a joint tenant⁶⁹; this was so before 1926.⁷⁰
- (iii) Property to which the deceased was entitled as a corporation sole.⁷¹ This repeats the former rule.⁷²
- (iv) Interests which ceased on the death of the deceased, such as an interest for his life.⁷³ This was probably so before 1926 also.⁷⁴

As before 1926, property subject to a general power of appointment exercised by the will of the deceased passes to his personal representatives.⁷⁵

2. Assents

(a) *Writing required.* Before 1926 an assent was a mere recognition by the executor that the land was not needed for purposes of administration, and the devisee's title was founded on the will, not the assent.⁷⁶ After 1925 an assent operates as a conveyance whereby an

⁶³ *Anon.* (1536) 1 Dy. 23 (b); *Simpson v. Gutteridge* (1816) 1 Madd. 609; *Warner v. Sampson* [1958] 1 Q.B. 404, reversed on other grounds [1959] 1 Q.B. 297.

⁶⁴ A.E.A., 1925, s. 3 (1).

⁶⁵ A.E.A., 1925, s. 57; e.g., land passing as *bona vacantia*. The Land Transfer Act, 1897, did not bind the Crown, so that land escheating to the Crown did not vest in the personal representatives: *In b. Hartley* [1899] P. 40.

⁶⁶ A.E.A., 1925, s. 1 (1).

⁶⁷ A.E.A., 1925, s. 3 (3).

⁶⁸ See Williams R.P. 116, 239.

⁶⁹ A.E.A., 1925, s. 3 (4).

⁷⁰ Land Transfer Act, 1897, s. 1 (1).

⁷¹ A.E.A., 1925, s. 3 (5).

⁷² Litt. 647; Challis 101; *ante*, p. 54. This was the exceptional case of an abeyance of seisin until a new holder of the office was appointed.

⁷³ A.E.A., 1925, s. 1 (1).

⁷⁴ See Williams R.P. 239, 240 on the "careless wording of the Land Transfer Act 1897," as regards life interests and entails.

⁷⁵ A.E.A., 1925, s. 3 (2).

⁷⁶ See *Attenborough v. Solomon* [1913] A.C. 76 at 83; Williams, *Assents*, 22 *et seq.*

estate or interest vested in the deceased which has devolved⁷⁷ upon his personal representatives is vested in the person named.⁷⁸ No assent made after 1925 (even if the deceased died before 1926⁷⁹) will pass a legal estate in land⁸⁰ unless it is in writing and signed by the personal representative.⁸¹ Thus the law now provides for a proper paper title to the legal estate. If A dies leaving land to B and B wishes to sell the land to C, B establishes his title by proving (i) the grant of representation to certain persons as A's personal representatives (ii) an assent or conveyance by those persons as personal representatives in favour of B. Before 1926 he also had to prove A's will, showing that he was beneficially entitled.^{81a}

(b) *Documents of title.* The effect of the new machinery is that both the grant of probate⁸² and the written assent⁸³ have a new character: they are essential documents of title, and if the land is subsequently sold the assent has the effect of overreaching the equitable interests declared by the will.⁸⁴ In other words, a bona fide purchaser for value⁸⁵ from a post-1925 devisee is not now concerned with the terms of the will: he is concerned only to see that the legal estate has devolved upon the personal representatives, and that they have in turn vested it by assent or conveyance in the vendor.⁸⁶ Unless the purchaser has evidence to the contrary,⁸⁷ he cannot require the will to be disclosed⁸⁸; and even if the assent is in favour of the wrong person the purchaser is protected, for the assent passes the legal estate,⁸⁹ and the purchaser will have no notice of the beneficiary's claim.⁹⁰ Interests arising under wills are therefore now kept off the title to the legal estate, just as are beneficial interests arising under trusts for sale and settlements.

⁷⁷ If the property was conveyed to the personal representatives by a third party, it has not "devolved" within A.E.A., 1925, s. 36 (1), and cannot be transferred by assent: *Re Stirrup's Contract* [1961] 1 W.L.R. 449. Contrast 25 Conv.(N.S.) 490 (Sir L. Elphinstone).

⁷⁸ A.E.A., 1925, s. 36 (2), (4).

⁷⁹ *Ibid.*, s. 36 (12).

⁸⁰ Including leaseholds: A.E.A., 1925, s. 55 (1) (xix).

⁸¹ *Ibid.*, s. 36 (4).

^{81a} See n. 76, *supra*.

⁸² *Re Miller and Pickersgill's Contract* [1931] 1 Ch. 511 at 514. The same applies to letters of administration: *ibid.* Grants of representation, being orders of the court, cannot be invalidated against purchasers on account of lack of jurisdiction, or the absence of any consent, even though there was notice of the defect: L.P.A., 1925, s. 204 (replacing C.A., 1881, s. 70); *Hewson v. Shelley* [1914] 2 Ch. 13; *Re Bridgett and Hayes' Contract* [1928] Ch. 163.

⁸³ A.E.A., 1925, s. 36 (2), (4); Williams V. & P. 281, n. (g); Emmet i, 154.

⁸⁴ A.E.A., 1925, s. 39 (1) (ii), giving personal representatives the overreaching powers of trustees for sale (for which see *ante*, p. 385); but a sole personal representative can receive purchase-money: L.P.A., 1925, s. 27 (2), as amended by L.P.(Am.)A., 1926, Sched.

⁸⁶ *Ibid.*, s. 36 (7).

⁸⁷ *Re Duce and Boots Cash Chemists (Southern) Ltd.'s Contract* [1937] Ch. 642.

⁸⁸ A.E.A., 1925, s. 36 (7).

⁹⁰ See also *post*, p. 586.

⁸⁹ *Ibid.*, s. 36 (4).

(c) *Precautions.* Two supplemental provisions further illustrate the functions of the grant of representation and of the personal representatives in the new machinery of devolution. (i) The person in whose favour an assent or conveyance of a legal estate is made may require notice of it to be indorsed on the grant of probate or letters of administration⁹¹; thus the grant of representation may be made a kind of register of dispositions,⁹² indicating that some specific assent or conveyance is the right one. (ii) A written statement by a personal representative that he has not disposed of a legal estate is sufficient evidence to a purchaser that no previous assent or conveyance has been made, unless notice is indorsed on the grant of representation as provided above⁹³; thus a purchaser can obtain from the personal representative a document which acts as a curtain over all the personal representative's acts. Both these provisions are permissive, not mandatory; but it is always advisable to employ them.

(d) *Changes of capacity.* A personal representative is often given power to act in some other capacity, as where the will appoints X and Y both personal representatives and trustees for sale. In such a case the legal estate will not vest in them as trustees for sale unless as personal representatives they make a written assent in favour of themselves as trustees for sale.⁹⁴ An assent thus remains an essential link in the title to the legal estate, showing that the property is no longer subject to the personal representatives' powers of administration, even where it is to remain vested in the same persons.

3. Ownership of assets. Although the personal representatives are in a fiduciary position, it is not right to regard them as holding only the legal estate in the assets, with the equitable interests in the beneficiaries. Not until there has been an assent can it be said whether any particular asset will be needed for the payment of debts or discharge of other liabilities, and so no beneficiary can assert that he has any interest in it, legal or equitable. Apart from any property specifically devised or bequeathed, the personal representatives thus have the whole ownership of the assets vested in them, and the rights of the beneficiaries, whether under a will⁹⁵ or an intestacy,⁹⁶ are protected, not by vesting in them any equitable interest in any of the assets, but by the rule that the court will control the personal representatives and ensure that the assets are duly administered in the

⁹¹ A.E.A., 1925, s. 36 (4).

⁹² See n. 82, *supra*.

⁹³ A.E.A., 1925, s. 36 (5).

⁹⁴ *Re King's W. T.* [1964] Ch. 542, criticised in 80 L.Q.R. 328 (R. R. A. Walker) and 28 Conv.(N.S.) 298 (J. F. Garner); cf. *Re Yerburgh* [1928] W.N. 208.

⁹⁵ *Commissioner of Stamp Duties (Queensland) v. Livingston* [1965] A.C. 694.

⁹⁶ *Eastbourne Mutual Benefit B. S. v. Hastings Corporation* [1965] 1 W.L.R. 861.

interests of the beneficiaries and all other persons concerned.⁹⁷ A beneficiary prospectively entitled to any such asset can thus at most be said to have a species of "floating equity" in it, which may or may not crystallise. Accordingly, even a beneficiary who is solely entitled under an intestacy cannot, for the purposes of a statutory right to compensation, claim to be "entitled to an interest" in a house which forms part of an unadministered estate⁹⁸; and a surviving spouse with the right to call for the matrimonial home to be appropriated to her⁹⁹ has no *locus standi* to defend an action for possession of it.¹

4. Powers of personal representatives. Personal representatives no longer have a several power of disposition over leaseholds if the deceased died after 1925,² though an act of forfeiture of a lease by one will affect all.³ They still have joint and several powers over pure personalty or, if the deceased died before 1926, over leaseholds; but over realty⁴ and, if the deceased died after 1925, over leaseholds, they have only joint authority.

Personal representatives now have all the powers of trustees for sale,⁵ and thus all the powers of a tenant for life and trustees under the Settled Land Act, 1925.⁶ Although they should sell the property only if this is necessary for the purposes of administration, *e.g.*, to pay the deceased's debts, a conveyance to a purchaser for value in good faith is not invalidated merely because he knows that all the debts and other liabilities have been met.⁷ Nor is a conveyance to a purchaser for value in good faith invalidated merely because the probate or letters of administration under which the personal representatives acted are subsequently revoked.⁸

⁹⁷ See *Commissioner of Stamp Duties (Queensland) v. Livingston*, *supra*, at pp. 712, 713, a passage of fundamental importance (not cited in *Williams v. Holland* [1965] 1 W.L.R. 739).

⁹⁸ *Eastbourne Mutual Benefit B. S. v. Hastings Corporation*, *supra*.

⁹⁹ See *ante*, p. 535.

¹ *Lall v. Lall* [1965] 1 W.L.R. 1249; and see Snell, *Equity*, 360, 361.

² A.E.A., 1925, s. 2 (2) (unless the conveyance is made under an order of the court: *ibid.*).

³ *Warner v. Sampson* [1958] 1 Q.B. 404; reversed on other grounds [1959] 1 Q.B. 297.

⁴ See, however, C.A., 1881, s. 30; L.P.A., 1925, 7th Sched. (deaths before 1926).

⁵ A.E.A., 1925, s. 39.

⁶ L.P.A., 1925, s. 28 (1); *ante*, p. 374. Probably they have the "*ad hoc*" powers (*ante*, p. 387) as being "approved or appointed by the court."

⁷ A.E.A., 1925, ss. 36 (8), 55 (1) (xviii). Before 1926 a purchaser would not be compelled to accept a title in such circumstances: *Re Verrall's Contract* [1903] 1 Ch. 65. *Quaere* what time had to elapse after the testator's death to raise a presumption that all debts had been paid: see *Re Venn & Furze's Contract* [1894] 2 Ch. 101; *Re Tanqueray-Willame & Landau* (1882) 20 Ch.D. 465 (20 years sufficient).

⁸ A.E.A., 1925, ss. 37, 55 (1) (xviii), retrospectively confirming *Hewson v. Shelley* [1914] 2 Ch. 13.

Sect. 3. Number of Personal Representatives*A. Maximum*

No grant of probate or letters of administration can be made to more than four personal representatives in respect of the same property.⁹ If more than four executors are appointed by a testator, they must decide among themselves who shall apply for probate.

B. Minimum

A sole personal representative, whether original or by survivorship, has full power to give valid receipts for capital money or any other payments.¹⁰ Therefore personal representatives have the powers of trustees for sale¹¹ without their disability as to receiving capital money severally.¹² But if any person interested in the estate is an infant or has a life interest in it, a sole administrator (other than a trust corporation) must not be appointed by the court after 1925.¹³ A sole executor can act under such circumstances, but the court has power to appoint additional personal representatives.¹⁴

⁹ J.A., 1925, s. 160 (1). This is strictly construed: see *In b. Holland (1936)* 105 L.J.P. 113.

¹⁰ L.P.A., 1925, s. 27 (2), as amended by L.P.(Am.)A., 1926, Sched.

¹¹ *Ante*, p. 374.

¹² *Ante*, p. 386.

¹³ J.A., 1925, s. 160 (1).

¹⁴ *Ibid.*, s. 160 (2).