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The Executor and the Real Property

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solus Deus heredem facere potest, non homo.

Glanville, VII 1

I. Introduction

Title to a decedent's real property vests in his heirs or legatees at the time of death.[1] Yet, the executor has extensive powers over it: He may sell it, mortgage it, lease it, collect rents, make repairs, and evict occupants, among other powers. Even where there is no dispute as to who the rightful heir is, and there is no dispute that the heir took fee simple at the time of death, the executor may still demand rent from the owner and evict him. But if the estate is otherwise solvent or if the testator specifically devised that real property, the executor may have no powers over that real property.[2] The law governing the relationship between the executor and the decedent's real property is counter-intuitive. This article explains the historical accidents leading to our current law and proposes a test to determine whether an executor has a specific power. Despite the existence of a modern statute listing the powers of executors, it appears that, as to real property, the powers are very much construed by the courts in light of their history. The reasons for this, whether due to a persevering atavistic tendency or an intrinsic notion of fairness—if there is such a distinction—are beyond this article.

II. Succession to Land at Common Law

In the twelfth century, Glanville, the first jurist of the common law, boasted that, unlike the laws of the Continent, there was no law in England which prohibited a man from disposing of his property by will. What he meant, however, was that a man could bequeath one-third of his *personal* property—the other two-thirds being reserved for his widow and heir-at-law, respectively—*and none of his real property*.[3]

As to the personal property, the policy that one-third passed to his widow and another third to the heir-at-law is easily understood. Practically every jurisdiction in the United States today protects the surviving spouse against disinheritance, and some, New York among them, continue to dedicate the same one-third of the decedent's estate to the surviving spouse.[4] The underlying policy hardly differs from Glanville's time.[5] While some states and many court decisions protect children against disinheritance, this does not seem to be the same policy that protected the heir-at-law. The heir-at-law in England was usually the eldest son,[6] or if there was no son, the daughters jointly. But more importantly, the heir-at-law continued the person of the decedent. He became liable for the decedent's debts (originally, without limitation) and acquired the right to enforce and collect on his contracts. The reservation of one-third to the heir-at-law was primarily meant to allow the heir-at-law to continue the person of the decedent, lest he inherit the debts but no means to pay them. This was necessary not only for the protection of the decedent's heir, but also for the benefit of society.

Real property passed at the time of death by operation of law to the heir-at-law for the same reason why he received one-third of the personal estate: to continue the person of the decedent. But unlike ownership of personal property, ownership of real property defined one's place in society and continued to do so for most of the history of the common law.[7] In the original feudal model, all land was owned by the feudal lords who allotted it to their tenants (and the tenants to their sub-tenants) in exchange for their oath of fealty and other covenants. Common covenants were military aid, personal services, or rent (often in the form of produce or cattle).[8] This feudal structure encases principles that are worth expanding on. The triangular organization is akin to a modern corporate structure. An allotment of land implies rights and duties on the holder similar to filling a position in a modern corporate structure. The specific individual may change from time to time, be it on his performance or the whim of the feudal lord, but the position itself—*i.e.*, the space or slot in society for someone to cover those rights and duties—is eternal. Feudal society, seen this way, is no different from the modern office. One person leaves and the next one comes in to take over the same desk and undertake the same duties with the same (or lower) pay. The allotment of land coupled with the oath of service or rents determined the individual's role in society. The specific individual may change from one day to the next, but the position itself does not. This notion that holding real property carries certain rights and duties that attach from one holder to the next is the origin of what we today call the *privity of estate*: that fiction by which the current owner is the same person as his predecessors in title. The individual is accidental, the position, eternal. It also explains why land had to vest in the heir-at-law at the time of death. Otherwise, the position would be vacant. Neither the feudal lord would receive his rent or services, nor would the family of the decedent benefit from the allotment of land or be entitled to the feudal lord's covenant to protect his tenants.[9] So settled in the feudal mind was the heirship at death by the eldest son that in 1272

the same principle of private law was unquestionably applied to the succession of the English Crown. In 1272, Henry III died in England while his son Edward I was absent in the Holy Land. Edward I began ruling from the distance and was not required to wait until his formal coronation in 1274 to be recognized as king. Although there was no litigation, these facts settled the questions of whether there could be an *interregnum* (*i.e.*, a time between kings, when royal law and royal dues phase out because there is no king), and whether the coronation itself with the anointment by the Church constituted the king or whether it was merely a formal act.[10] To this day in the State of New York, the common law cannot tolerate land without an owner and title to real property vests in the successor at the time of the owner's death, even if it might take us years to determine who the successor is.[11]

III. The Law of Wills, the Executor and the Influence of the Church

So in the early common law, a man could make a will disposing only of one-third of his personal estate and his heir-at-law was his successor, the residuary beneficiary, and the party in charge of distributions under the will. Needless to say, this was a conflict of interests: What the heir-at-law might fail to distribute remained part of the residuary and his property. More importantly, if the heir-at-law was, for legal purposes, the same person as the testator, how could a will beneficiary enforce a gift without consideration? Couldn't the heir-at-law, being the same person as the testator, change his mind and decide not to make the gift?

The law of succession was dissatisfactory to the Church, which, like most religious organizations today, realized that its flock was most generous when facing death. It did not like heirs-at-law who failed to distribute gifts. As countermeasures, the Church arrogated to its Courts Christian (or "church courts") jurisdiction over probate matters and imported from the Continent the institution of the executor. The executor would be chosen by the testator and appointed by the Courts Christian. His only duty would be distributing specific gifts under the will. He was not a personal representative; he was only a trustee with instructions to make specific distributions. Since the right of an executor to sue the heir-at-law to recover property for distribution was uncertain, the testator might, at times, give the executor the property during his lifetime to deliver to the beneficiary upon his death. The universal representative continued to be the heir-at-law. A man's heir—his successor and personal representative—was chosen by God, not man.[12]

Another import of the Church from the Continent was the institution of the trustee and the usufructus (or *use*) to avoid the prohibition against devising real property.[13] The usufructus, drawn from Roman Law,[14] is the concept that the right to benefit from a thing (the usufructus or use) is separable from its legal title or *nuda proprietas* (the corresponding term in modern law would be *reversion*[15]). A landowner could transfer his legal title to a trustee, but retain the unrestricted right to use and enjoy. The right to use, much like a lease today, was considered *personal* property, therefore transferable by will.[16] To prevent any challenges that might ensue upon the death of the legal owner, legal ownership was placed in the hands of the trustee by *inter vivos* transfer. While the individual trustee may die, the trust would remain in place with successor trustees, thus avoiding the passing of title by death.[17] To summarize, one could place the property in trust by *inter vivos* conveyance reserving the use, and then convey the use by will, thus avoiding the prohibition against conveying real property by will.[18]

IV. The Statutes of Henry VIII

Although the above concepts and practice were introduced in twelfth century England by cannon lawyers, over four centuries uses and trusts spread throughout the kingdom for secular purposes, too. The king was not pleased. The fact that estates were held in trust meant that the king was deprived of the dues owed to him upon the death of the owner.[19] It also appears that uses may have been used to defraud creditors by creating uncertainty as to the ownership of land[20] and to deprive widows of their right of dower.[21] In response, Henry VIII pressed Parliament to pass the Statute of Uses. "By the Statue of Uses of 1536 [Henry VIII] boldly put a stop to the fiction that the man in enjoyment of the land was not its legal owner. Wills again became impossible, and the common law heir was restored. Land could not be devised away from the male heir…."[22] In effect, the informal conveyances by uses and trusts, which had only been recognized by Courts Christian and courts of equity, became reviewable by courts of law as legal conveyances, and thus could not devise land by will.[23] The Statute of Uses, in many ways, would have reverted property law back to the eleventh century, but for the landed opposition, which was not willing to give up the ability to devise real property. Two years later, in 1538, Henry VIII relented and allowed the Statute of Wills to pass, by which most land became devisable by will. Uses and trusts remained valid, but limited, and *title* to land (as opposed to only *uses*) could now be devised by will.[24]

V. The Common Law at the Time of the American Colonization

By the time the English began settling in America in the early seventeenth century, the first part of our inquiry was settled. Real property passed at death to the heir-at-law, unless it was devised by will. By a legal fiction created by the interplay of the Statute of Uses and the Statute of Wills, a devise operated legally (and continues to operate legally) as a deed delivered to the devisee at the time of death. The executor, being concerned only with personalty, took no part in the distribution of real property. "When a person died in England, the property left behind was under the regime of two quite

different set of rules. Common law rules and courts governed the land; church law and courts the personal property. If the deceased left no will, the common law gave the land to the eldest son; the church courts divided the money and goods in equal shares among the children."[25]

By the seventeenth century, the executor had secured his position in the common law. He had won his long battle with the heir-at-law over the representation of the decedent. After centuries of conflicting case law, the law became settled that creditors of the decedent had recourse against the executor and that the executor, in turn, could sue the heir-at-law to recover assets for the payment of debts and bequests. The executor was the personal representative and had fiduciary duties, not only to make distribution under the will, but also to see the decedent's debts paid.[26] However, real property remained beyond the executor's reach. Real property preserved its aura of sanctity, as something meant to pass from generation to generation within the family. Although it was possible to convey and devise real property, and even to mortgage it, unsecured creditors could not reach real property. The remedies available to creditors allowed them to reach rents and profits, and, if necessary, obtain temporary possession of a portion of the debtor's land to generate income to repay the debt. It was unthinkable, however, that creditors should be able to seize and auction off their debtors' real property. Only personal property was liable to be sold to satisfy debts. Even when the debt was secured by a mortgage, courts could be persuaded not to allow the foreclosure if it seemed that the debt could be repaid by other means, such as income from the land, or sale of personalty.[27]

Needless to say, there were other ways of losing title to real property, such as failure to comply with the covenants due to the feudal lord (e.g., military aid, fealty or rent). For example, treason was punishable by divestment of the title of the traitor because it implied disloyalty—*i.e.*, breach of the covenant of fealty.[28] Because this punishment affected not only the criminal but also deprived his heirs of their birthright, the punishment was called *corruption of the blood*.[29] The U.S. Constitution, Article III, Section 3, expressly forbids Congress to pass this form of punishment, presumably because it affected innocent heirs.[30]

VI. Colonial Law

Despite many experiments by early settlers to create a new law for the New World,[31] the colonies largely followed—or eventually reverted to—English real property law. A real property law developed to protect aristocratic interests—*i.e.*, the preservation of estates—in England, where land was scarce, became the law of the land in the new vast largely unpopulated continent. It is no surprise that the protections of real property embodied in English law were challenged in America. The surprise is that the challenge did not come from the colonists, but from the English Parliament.

As much as the English merchant and aristocratic classes enjoyed the protections of real property law, they did not feel the same way about them when they were the creditors. English merchants[32] could not bear their debtors to live in poverty while owning large estates. They could not hope to amend the laws in England, where the interests of members of Parliament would be affected, but the new continent was another matter. After unsuccessful attempts to persuade colonial governors to pass statutes to facilitate debt collection, English merchants complained to Parliament. In 1732, Parliament enacted the *Act for the More Easy Recovery of Debts in His Majesty's Plantations and Colonies in America* (the "Debt Recovery Act"), which in essence declared that real property in America would be treated as personal property for the purposes of debt collection. Creditors would now be able to seize and conduct public auctions of their debtors' real property, just as they might bring execution against personal property.[33]

More important for our topic, the Debt Recovery Act disrupted the feudal structure by subordinating the interests of heirs to those of unsecured creditors. As we have seen, by 1732 the executor had become the decedent's personal representative and had the recognized duty to see the decedent's debts paid, but had still nothing to do with the real property. Some colonies, like New York, interpreted the Debt Recovery Act as allowing execution of the decedent's real property for the payment of debts, just as the creditors of the decedent might bring actions to execute the personal property of the decedent. Other colonies read the Debt Recovery Act more broadly and interpreted that real property was now in the hands of the executor to distribute and not just for the payment of debts.[34]

VII. The American Revolution

Years after the passing of the Debt Recovery Act, the English government attempted to placate the colonists' indignation to the Act by pointing out that the Act had resulted in greater credit availability and greater economic development—not to mention a more flexible land market—in comparison to other English colonies.[35] Indeed, shortly after the American Revolution, the new states and commonwealths re-enacted the Debt Recovery Act in an attempt to foster economic growth.[36] New York passed its own Debt Recovery Act in 1787.[37] About one hundred years later, England followed suit and went one step further: By the English Land Transfer Act of 1897 the decedent's title would henceforth vest in the executor to ensure the payment of debts and legacies.[38]

VIII. The Executor in New York

i. A Brief History of the Surrogate's Court

The rest of our inquiry follows the development of the executor's powers over real property in New York. The reader should bear in mind that what follows is a discussion of the default rules. Even if the law at

any time did not *per se* give the executor the power to act on real property, the testator could stipulate otherwise in his will. The testator could, and many did, charge his real property with the payment of debts and legacies and grant his executor fee title or a power of sale. Such will covenants have always been honored in New York.[39]

The Debt Recovery Act introduced the notion that real property was subject to a sheriff's execution in the same manner as personal property. A creditor could bring execution against the executor *as if* he owned the real property, but the executor did not enjoy any powers over the real property. As will be seen, it was not until the twentieth century that the executor was vested with powers over real property as an incident of his appointment. Before that time, the notion persisted that real property belonged to heirs and devisees. An executor who saw it necessary to reach the real property to satisfy debts and legacies had to make an application to the surrogate for an order directing him to act on the real property. But who is the surrogate? There was no Surrogate's Court in England and, in any event, the English courts having jurisdiction over probate, the Courts Christian, had no jurisdiction over real property by operation of the Statute of Uses. We will briefly review the history of the Surrogate's Court as it stands as a landmark between the notion that real property is the birthright of the descendant and the notion that real property is available for the payment of the decedent's debts and legacies.

As we have seen, in England jurisdiction over probate (and administration) was in the Courts Christian. Even after the separation of the Church of England from the Holy See in 1533 (also under Henry VIII), jurisdiction over estates remained in the Courts Christian, but with final appeals to the Archbishops of York and Canterbury instead of the Holy See. Jurisdiction over probate was not turned over to lay courts until 1847 when it was given to the Supreme Court of Judicature, renamed in 1981 the Supreme Court of England and Wales, and known today, subsequent to the 2005 constitutional reform, as the Senior Courts of England and Wales.

In the Province of New York in the seventeenth century things were different. There was no more than one court per each one of the four jurisdictions: the Mayor's Court for New York City, and a Court of Sessions for each of the three ridings that comprised the rest of the province. These courts attended to all matters, including probate. In 1686 Governor Dongan received a letter of instructions from King James II (formerly, the Lord Proprietor, the Duke of York) which, among other things, charged his office with the discharge of probate and other "ecclesiastical" matters. The governor began monitoring probate and soon, by 1691 under Lieutenant Governor Ingoldsby, the governor's office took over the issuance of letters testamentary and of administration, the hearing of accounts and the final discharge of personal representatives.[40]

Until 1778, jurisdiction over probate was with the governor and was organized as follows. The governor appointed a deputy to discharge this office, and the deputy, in turn, appointed a delegate for each county. The delegates were little more than notary publics. They would receive evidence and testimony regarding probate and forward them with their certificate to the governor's deputy (whose office was originally in New York City and since the War of Independence in Albany). The deputy would examine the evidence and return letters testamentary or of administration executed under the Great Seal of the Province (and later the State). If the will or the administration was contested, the entire proceeding had to occur before the deputy. First the deputy and then his local delegates came to use the title of *Surrogate* to indicate that they were exercising an office in lieu of someone else (the governor). Following English nomenclature, the office of the deputy became known as the Prerogative Court (which was the name of English ecclesiastical appeal courts) and the probate records held by the secretary of the colony, as the Registry of the Prerogative. Shortly after the Revolution, in 1778 the Legislature created a judicial court, the Court of Probates, which took over the duties of the Prerogative Court, except the appointment of local surrogates.[41]

In 1786, the Court of Probates was given the power to order the sale of the decedent's real property if the personal estate was insufficient to pay its debts. Beginning in 1787, this and other powers (such as the powers to hold hearings, issue letters testamentary and of administration, and discharge personal representatives) were transferred from the Court of Probates to the local county surrogates. By 1819 the Court of Probates had become mostly an appeals court, and in 1823 it was abolished, with any remaining jurisdiction it might have held transferred to the Court of Chancery.[42]

Significantly, county surrogates were legislative courts: they were created by and existed at the pleasure of the Legislature. Even when they were first included in the New York Constitution in 1846, they were described merely as an office ancillary to the county judge[43] and with no specified jurisdiction.[44] By implication, the Legislature reserved the ability to define their jurisdiction, which it did by the Judiciary Act of 1847.[45]

But despite the inclusion of the surrogates in the New York Constitution and the enabling acts of the Legislature, the surrogates' jurisdiction over real property was limited. Every New York Constitution, including the very first of 1777, guaranteed that all actions that were subject to trial by jury at common law would continue to be subject to trial by jury.[46] The common law was protective of real property and dictated that divestitude of real property was subject to trial by jury. The surrogate, however, was an independent office and

not a court of law. Any decisions it might render concerning the ownership of real property were subject to review by a court of law sitting with a jury as to the portions relating to real property, but not the portions relating to personal property.[47] The constitutional objection persisted beyond the nineteenth century, as indicated by the worthy commentator Robert Ludlow Fowler in his annotated Decedent's Estate Law of 1911: "The surrogate's probate of a will of real property is not conclusive and unfortunately cannot be made so, as that would be to deprive a person claiming under or against a devise of the old common-law right of trial by jury."[48] The objection was finally cured in 1914 when an extensive revision of the Code of Civil Procedure finally gave the surrogate the power to hold jury trials.[49] Our current Constitution, passed in 1938, recognizes the surrogate's court as a court of law and gives it jurisdiction over estates, among other matters.[50]

To sum up, the powers of the surrogate over real property are not based in the common law. Its English ancestor, the Courts Christian, did not have any authority over real property. Real property passed by will or intestacy at the time of death and without probate. If any questions of title arose, they would be resolved by the courts of law, not the Courts Christian. The powers of the surrogate over real property in New York are based on a long succession of statutes, commencing with the 1786 statute that allowed the Court of Probates to order the sale of real property. For present law, this history has an important implication. The jurisdiction of the surrogate's court is defined by statutes and, at least as to real property, there is no common law to shed light as to whether a question may be entertained by the surrogate.[51] For the purposes of this article, this history serves a more practical purpose: if the powers of the executor and the surrogate over real property are based on statute, then the statutes will be our stepping stones as we follow their history.

ii. By Order of the Surrogate: The Revised Statutes and the Code of Civil Procedure

The Revised Statutes of 1829 may illuminate where the law stood in the nineteenth century.[52] In the relevant sections, they provided:

> §1….[I]f the [executors or administrators] discover the personal estate of their testator or intestate, to be insufficient to pay his debts, they may…apply to the surrogate for their authority to mortgage, lease or sell so much of the real estate…as shall be necessary to pay such debts.
>
> §14. The surrogate shall make no order for mortgaging, leasing, or sale of real property…, until he shall be satisfied [that the debts are just and the personal estate insufficient].
>
> §15. The surrogate, when so satisfied, shall in the first place inquire and ascertain whether sufficient moneys for the payments of such debts can be raised, by mortgaging or leasing….
>
> §20. The order shall specify the lands to be sold. […] If it appear that any part of such real estate has been devised,…the surrogate shall order that the part descended to the heirs, be sold before that so devised;…[53]

There are five important points here. First, unlike today, the executor could not take possession of the real property or collect rents. Not even the surrogate could place the executor in possession. Second, also unlike today, the executor did not have the power to sell, mortgage or lease, except pursuant to a specific order of the surrogate and for the payment of debts only (not legacies). Third, the execution of real property was only available if the personal estate was insufficient. Fourth, the powers to mortgage and lease were offered only as limitations to the power of sale.[54] Land should not be sold if the debt might be paid by mortgaging or leasing. The point was to strike a balance between the competing interests of heirs and creditors. Lastly, and like today, real property passing by intestacy was to be sold before property devised. Notably, the statute distinguished between property passing by *descent* and by *devise*. There is no mention of *specific devise*.[55]

The notion that the surrogate could allow the executor or the administrator to enter into possession of the real property and collect rents was only introduced decades later, in the 1914 revision of the Code of Civil Procedure.[56] The comments of the commission justifying the new provision illuminate the policy:

> It has always worked out as an injustice to creditors that the heir or devisee should be able to collect rents for many months from real estate which equitably belonged to the creditors. It has also worked injustice to resident and competent part owners that their interests should be sold when a few months' rent would have discharged all the debts. Therefore, it has seemed to be wise and just, and within the power of the court, to authorize the representative to enter into possession of the real estate, when all of it may eventually be required to be mortgaged, leased or sold, and to collect the rents and bring them into court upon his judicial settlement to be accounted for and applied as may be necessary. This plan will also put someone in charge of real estate owned by nonresidents, absentees or incompetents,

> where now no one has the right to collect the rents.[57]

The ability of the executor or administrator to enter and remain in possession of the real property depended on whether the decedent's personal estate was insufficient to pay its debts. A party having an interest could deliver to the surrogate a bond covering the debts and the executor or administrator would be excluded from possession.[58] The debts chargeable on the estate, however, as determined by the Code of Civil Procedure, were lifetime debts, funeral expenses, administration expenses, transfer taxes, and any legacies made a lien on the land by the will, but not general legacies.[59]

In 1920, upon the recommendation of the Joint Legislative Committee on the Simplification of Civil Practice, the Legislature passed the Surrogate Court Act. The provisions relating to the surrogate were substantially transcribed from the Code of Civil Procedure into the Surrogate Court Act.[60] This was part of a larger plan to simplify the civil practice code which culminated in the Civil Practice Act of 1921, which was the predecessor of the current Civil Practice Law and Rules (passed in 1962). In 1921 the Surrogate Court Act was amended to be renamed the *Surrogate's Court Act* "to meet the requirements of the Constitution of the State of New York, article VI, § 16, which recognizes and perpetuates 'Surrogates' Courts,' but not 'Surrogate Court.'"[61]

iii. Possession by the Executor Is Tested: *In Re Mould's Estate*

The power to take possession of real property, even if subject to the approval of the surrogate, was an important departure from the common law in 1914. It was tested in *In re Mould's Estate*.[62] In *Mould*, the testatrix made several bequests of personal property to her family and bequeathed and devised the residue to a friend. The friend quickly transferred the real property to a third party before the will was probated. Upon the probation of the will, the executor sought an order pursuant to CCP § 2701 to be placed into possession of the real estate. The executor showed that the personal estate would be insufficient to pay the cash legacies and alleged that the will gave him a power of sale over the real property. However, whether the will indeed charged the land with the payment of the legacies was a question pending in a separate action. The transferee challenged that the property had already been transferred by the devisee, that the land had not been charged with the payment of legacies, and that therefore the surrogate was without jurisdiction. The surrogate disagreed and granted the order on the basis that the purpose of CCP § 2701 was to preserve, and that if it was later ruled that the land was not charged with the legacies, then the order could be set aside.

On appeal, the Appellate Division, Second Department, noted that there was no decision construing the new statute and that the reviser's notes (transcribed above) only referred to the protection of creditors. Nevertheless, the court held that the statute also applied to protect legatees, and further that it could be invoked to preserve the *status quo* pending a determination of the interests of all parties concerned.

iv. The Decedents Estate Law: Victory of the Executor

A. The 1929 Statute and the 1947 Amendment

Ostensibly, the Legislature in 1929, with the enactment of Decedent Estate Law ("DEL") § 13,[63] intended to give to the executor the power to enter into possession, manage and collect rents from real property without specific order from the surrogate.[64] The same power was given to administrators the same year with the enactment of DEL § 123. But because of unclear drafting, the statute was construed to require executors, but not administrators, to procure an order of the surrogate prior to taking possession. This was resolved by an amendment in 1947.[65] Case law between 1930 and 1947 conflicts as to whether the executor may enter into possession without order of the surrogate, while administrators do enjoy that power.[66] DEL § 13, as amended in 1947 and in the relevant portions, read as follows:

> 1. Notwithstanding the absence of a valid power therein, every will…shall be construed to give the executor or trustee…the power to take possession, collect rents, and manage, and to sell, mortgage and lease all of the real property, and any interest in any real property, owned by the decedent at the time of his death….
>
> 2. Such power to take possession, collect rent, and manage, and to sell, mortgage or lease, shall not be exercised, however, (a) where the will expressly prohibits the exercise thereof; (b) or as to such real property as the will expressly provides shall not be sold, mortgaged or leased; (c) and shall be deemed to include property as has been specifically devised…; (d) except that the power[s]… may be exercised, in the case of property devised and within subdivisions a, b, and c of this subdivision, where such power is necessary for the payment of administration expenses, funeral expenses, debts, or transfer or estate tax, upon approval by the surrogate….
>
> 3. This additional grant of power to sell, mortgage and lease shall not be deemed to affect any existing authorization or judicial proceeding….

This statute went beyond the ability to enter into possession: it also gave the executor the power to

lease, mortgage and sell real property without court order, with a few limitations.[67] The result was substantially the law as we know it today in our current statute.[68]

B. Heirs and Devisees Owe Rent

Case law gave the executor another important victory during the same period. The common law vests title at the time of death in the distributee or devisee. If the devisee or distributee is the owner, should a distributee or devisee in occupancy pay rent to an administrator or executor? In the more common scenario, there is more than one devisee or distributee (usually siblings) and the one who is not in possession wishes the other to pay rent. But the common law is also well-settled that one tenant-in-common does not owe rent to the other, except as to commercial uses or in the event one co-tenant excludes the other from the enjoyment of the property,[69] neither of which exceptions necessarily applies to estate distributions. Are owners and co-tenants subject to the payment of rent to the executor or administrator?

The Appellate Division, Second Department, answered this question in the affirmative in *Limberg v. Limberg*.[70] In that case, an administratrix brought an action to collect rents against a son of the decedent (i.e., a co-tenant by intestacy), who was in possession of the real estate. The Court wrote:

> The defendant's resistance to paying rent to the administratrix is solely on the ground that he is one of the heirs at law of the decedent and as such has title to the property. […] The language of the statute expresses no exception to the administratrix's power, such as would indicate that it was intended to exempt defendant from the payment of rent; and we believe it must be construed to mean that upon the administratrix's making a demand, she is exercising the power conferred by statute, and that the title of the heir at law in possession is, during the administration, subject to the representative's power to possess, manage and collect rents of realty.[71]

Curiously, notwithstanding the different statutes for executors and administrators, courts did not resolve the same question as to executors and devisees until 2006, where in *In re Seviroli*, the court relied upon the authority of *Limberg*.[72]

The personal representative's power to collect rents reached its zenith in *Johnson v. Depew*.[73] In that case, two tenants in common owned real property, apparently in equal shares. One died and his administrator brought an action against the survivor to collect rents. Needless to say, the defendant had not acquired her title through the decedent. Nevertheless, the Court ruled for the administrator:

> The language of the statute expresses no exception to the administrator's power to collect the rentals where the tenant is not a distributee but merely, as here, a surviving co-tenant. If the Legislature had intended to carve out an exception premised on the status of the tenant in occupancy, it would have said so clearly in the statute.[74]

v. Decedents Estate Law § 127 and the Estates, Powers & Trusts Law

A. The Fiduciaries' Powers Act

In 1961 the Legislature created a new temporary commission with the stated purpose, once again, of simplifying the law of estates.[75] The commission completed its work in 1966 with the legislative enactment of two major consolidated statutes: the Estate, Powers & Trusts Law ("EPTL") and the Surrogate's Court Procedure Act, which replaced the Decedent Estate Law and the Surrogate's Court Act, respectively. But before the commission prepared and recommended these new Consolidated Statutes other laws were passed on its recommendation.

In its Third Report to the Legislature, dated March 31, 1964, the Commission recommended the codification of the powers of executors, administrators and trustees under one single "Fiduciaries' Powers Act."[76] The recommended statute was passed in 1964 and became DEL § 127.[77] But, the statute's life was short because in 1966 the EPTL was enacted,[78] and DEL § 127 was recodified into the current EPTL § 11-1.1 with few changes. This means that the legislative history of our current fiduciaries powers statute—*i.e.*, EPTL §11-1.1—is in fact in the legislative history of DEL § 127—*i.e.*, in the Third Report.

With respect to real property, neither DEL § 127 nor EPTL § 11-1.1 appear to have been intended to alter the powers of the executor from where they stood in 1947. The innovation appears to have been mostly in powers over securities. As to real property, the EPTL simplified a few things. For example, prior to the EPTL case law conflicted as to whether a devise could be considered "specific" if made to more than one person.[79] The EPTL settled the question in the affirmative. The EPTL also settled the question of the extent of the executor's leasing power to three-year leases.[80] But by codifying the powers the EPTL has also brought some confusion, which we will review below.

B. Power to Mortgage but Not to Borrow

The EPTL does not give to the executor the power to borrow. The Third Report notes that fiduciaries do not have the power to borrow and expressly recommends against granting that power by statute.[81] With respect to the power to mortgage, the Third Report merely notes that this power was already given in 1930 by enactment of DEL §§ 13 and 123, and that prior to 1930 real property

could be mortgaged by order of the surrogate.[82]

The only plausible reading is that the executor may mortgage only to pay existing obligations. For example, the executor could cash out equity to pay debts and legacies, or refinance an existing mortgage to benefit from a lower interest rate. This reading is consistent with the history of this power. As shown above, the power to mortgage was introduced as a limitation to the power of sale, as a way to balance the interests of creditors and heirs-at-law. If the debts could be paid by mortgaging, then the surrogate would order the property mortgaged rather than sold, thereby preserving the property in the decedent's family or devisees. The statute as drafted is a potential trap for both lenders and fiduciaries because the executor may lack the power to mortgage or borrow for any purpose other than paying or consolidating existing debts.

C. Power to Grant Options for the Sale of Real Property

EPTL § 11-1.1(7) gives the executor the power "to grant options for the sale of property for a period not exceeding six months." "Property" by definition includes real property.[83] What is odd about this power is that, unlike the power of sale in the same statute, it makes no exception for specific devises.[84] On the face of it, the statute gives the power to sell by option what the fiduciary cannot sell directly. The Third Report does not explain this. It merely indicates that the purpose of including that power is to derogate common law that prohibits fiduciaries from granting options.[85] It may be argued that this section does not enlarge the power of sale, but allows for its exercise by way of option.

D. Power to Make Ordinary Repairs

A similar question arises under the power "to make ordinary repairs to property of the estate or trust."[86] It does not except property subject to a specific devise. That could be explained following the decisions in *Mould* and *Johnson v. Depew*, commented above: Executors should be allowed to reach and protect all real property while the questions of whether there was a specific devise and who are the beneficiaries are pending with the courts. This view has been adopted by the courts.[87]

This reading, however, is not supported by the legislative history. The Third Report, in the relevant section, reads: "An executor lacks authority to repair or improve real property at the expense of the estate which is not under his management, but he may repair personal property comprising the estate and the real property which he has power to sell or manage."[88] The Third Report shows no intention of granting the power to repair specifically devised property.

E. Power to Settle Claims over Real Property

The EPTL grants the power to contest, compromise or otherwise settle any claims in favor or against the estate.[89] However, nothing in the EPTL or other related enactments has revoked the common law rule that real property vests in the distributee or legatee at the time of death. The Commission was well aware of this rule.[90] Hence, what actions over real property, if any, may the executor bring or settle? The legislative history offers no help as it does not address real property claims, but personal claims.[91] It appears that the intention of the Commission was merely to codify the law rather than to expand it.

To determine what actions the executor may bring or settle we must look elsewhere. Notably, the Real Property Actions and Procedures Law recognizes that the executor is not the title owner, and therefore the executor is declared a necessary party to most actions by force of statute.[92] As for all other actions, there is no answer. It appears that the best approach is to turn the question around and focus on his powers and assume that every power is enforceable. For example, if the executor can manage property, then we can also expect him to be able to enforce a right of way to access it.[93] If he succeeds to a realty purchase contract, he can sue for specific performance. If the estate includes property that the decedent acquired by adverse possession, then he can act on it, even if the executor is not mentioned in Article Five of the RPAPL (adverse possession).[94] In short, the statutory language is cryptic and broad. In the absence of any other controlling statutes, we should concentrate on his powers to determine what actions he may have.

vi. Defining the Executor's Powers and Limitations

A. General

The executor's powers over real property are vast and include some of the most important incidents of ownership. But the executor is not the fee simple owner and he does not enjoy every incident of ownership. The common law that vests title in the distributee or devisee at the time of death is still good law in New York. Between the executor's powers and fee simple ownership, between the statute and the common law, falls the shadow. In this last section we will attempt to define his powers and limitations.

To begin with, the executor is a fiduciary. Whatever powers he may hold he can only use for the benefit of someone else. He can take possession and manage real property, for example, but he cannot take occupancy himself without owing rent.[95] This point is important because the identity of the ultimate beneficiaries (*i.e.*, creditors and devisees) is not always known at the time the executor commences his administration. The executor can hardly know whom he will have to account to for his actions. Straying from the statutory powers and duties, even with the consent of the presumptive beneficiaries, can be a risky practice.

The history we have reviewed shows that the executor holds two powers over real property: the power to liquidate it for the payment of

debts and legacies, and the power to take possession and manage it during his administration. These two powers have distinct origins and purposes. Every other power we may come across can be recognized as an incident of one of these two.

B. Power of Sale

The power to liquidate real property—*i.e.*, the power of sale—has its origin in a long line of statutes commencing with the colonial 1732 Debt Recovery Act. Its purpose is the satisfaction of monetary debts and legacies, not distribution in kind. It follows, then, that the executor cannot transfer property, or exercise any incident of this power, for no consideration.[96] Title insurers today correctly object to executor's deeds made for no consideration.[97] There appears to be an exception for circumstances where a conveyance for no consideration may increase the aggregated value of the estate. For example, dedicating title to proposed streets to the local municipality may allow the executor to sell subdivided lots at a higher aggregated price than the unsubdivided parcel.[98] More importantly, despite the express policy of the EPTL to treat all personal and real property in equal manner,[99] courts allow distributees to prevent executors from selling family homesteads when it is not necessary for the payment of debts and legacies.[100]

As shown above, the powers to lease and mortgage were introduced as alternatives to selling. They were introduced to allow the satisfaction of debts and legacies where funds might be raised without divesting the distributees of their title. In effect, they are incidents of the power of sale. As to the power to mortgage, nothing suggests that it may have evolved into something in and of itself. On the contrary, the Third Report expressly recommended against giving the executor the power to borrow. The executor can only mortgage to pay existing obligations.

The power to lease, on the other hand, appears to have changed its purpose. There is little doubt that it was introduced to settle estate debts either by giving the creditor temporary use of the property, or assigning temporary rents therefrom.[101] However, in our day, and especially given the limitation of the leasing power to three years, as introduced in the EPTL,[102] leasing can hardly be considered a means of settling debts. It would appear that it is no longer an incident of the power of sale, but of the power to take possession, manage and collect rents during his administration.

C. Power to Take Possession, Manage and Collect Rents

The power to take possession, manage and collect rents came into existence with the 1914 amendment to the Code of Civil Procedures. Its primary purpose is the preservation of estate assets, including future rents. The executor may collect rents as a measure to preserve estate assets even if the estate is solvent. However, there is case law that prevents the executor from taking possession if there is no legitimate estate purpose. To illustrate, what is the point of taking possession, if the property vested in the ultimate distributee at the time of death, if that distributee is already collecting rents or in occupancy, and the estate can meet all of its obligations without recourse to the real property? There is no point in entering into a fight with the distributee over possession if there is no doubt that the executor would only hold the asset and any associated rents solely for the benefit of that distributee.

The law appears to be settled that the power to take possession and manage real estate is discretionary, depending on the needs of the creditors and beneficiaries of the estate.[103] In 2006, the Appellate Division, Second Department, ruled: "[n]onetheless, merely because a fiduciary, here the executrix, is "authorized" to take possession of real property, the statute cannot be read to compel a fiduciary to take possession in every case where real property is devised as part of the residuary estate."[104]

An important implication of this is that rents may not be owed until the executor demands them, if ever. Hence, if an executor demands rents from an occupant, the occupant may owe rents from the date of the demand, and not necessarily from the time of the death or the appointment of the executor.

D. Scope, Incidents, and Limitations of the Powers

The difficulty in defining the two powers of the executor over real property is two-fold. On the one hand, the powers are usually interpreted broadly. The executor can displace the fee owner,[105] create easements,[106] and even deed for no consideration in limited circumstances.[107] On the other hand, the interpretation often goes against the plain reading of the statute. The executor can take possession, but only for a legitimate estate purpose. He can sell property, but he sells subject to liens that may have attached to the distributees as fee owners.[108] He can mortgage property, but not borrow except to pay off existing obligations. The statute gives him no powers over property specifically devised, but yet he can reach it in certain cases.

The interpretation of the powers, however, is not arbitrary. It generally follows the historical intent. It appears that whether the executor has any given power over real property may be determined through the following test: *Is the power reasonably necessary for the preservation of the decedent's property (during administration and pending distribution) or for the liquidation of the decedent's property for the payment of debts and legacies?* An affirmative answer suggests that the power exists.

The powers to collect rents, evict occupants and make ordinary repairs, for example, are necessary for the preservation of estate assets. They are not necessary for liquidation: the executor can sell subject to them. The power to take possession is not necessary for preservation, if the property is already in the hands of the correct distributee and the estate

is known to be solvent. The power to create a right of way easement is not necessary for preservation, but it may be necessary for liquidation, as a sale of a lesser property interest, or if it is incidental to the sale of land-locked property.[109] The power to build out, develop, materially alter or change the legal use of property, on the other hand, is neither necessary for preservation nor liquidation. An executor might be allowed to apply for a building permit to cause ordinary repairs (preservation), but not for a building permit to alter the property. And yet there is one instance where the executor might have that power: if the contract purchaser requires the executor as seller to join in a building permit application prior to the closing, for example, the executor would very likely have the power to join in the permit application as "contract vendee," even if the executor would not have had the power to apply for such permit *in motus proprio*. In that case, the execution of the permit as "contract vendee" could be deemed necessary for the sale (liquidation).

IX. Conclusion

Our objective was to discover the nature of the executor and his relationship to the decedent's real property. The executor was introduced in the early medieval common law to distribute legacies, which duty the heir-at-law neglected for his own benefit. Over centuries later, the executor took charge of the entire personal estate. He collected and paid the decedent's debts, and could even sue the heir-at-law to recover the decedent's property. But this was all only as to personal property. According to English law at the time of the American Colonization, real property passed at death by a different set of rules and the executor did not have any title, interest or powers over real property whatsoever.

By a colonial 1732 English statute aimed at facilitating debt collection in the American colonies, a creditor could sue the executor and foreclose on the decedent's real property *as if* it was personal property in his general administration. After the American Independence, the new State saw the market benefits of facilitating debt collection and expanded on the executor's powers. In the early nineteenth century the surrogate was given the power to cause the sale of real property for the payment of debts (but not legacies) upon application of the executor. Beginning in 1914, the surrogate could place the executor in possession of real property and collect rents pending administration and distribution of the estate. In 1947, the executor was given the powers to sell and to take possession without application to the surrogate, except in limited instances. Notably, while the executor may be rooted in the common law, his powers over real property are statutory in nature. More importantly, no statute has given the executor title to the decedent's real property. Title to real property vests at the time of death in the distributees *subject to* the powers of the executor.

In 1965, the Legislature attempted to simplify the powers of executors, administrators, and trustees by creating one single "Fiduciaries' Powers Act" (today, EPTL § 11-1.1). As to the executor, the powers listed in that statute appear to have been and continue to be construed in light of his two historical powers over real property: the power to liquidate to pay obligations and the power to take possession to preserve assets. As a consequence, the statutory powers tend to be construed broadly when echoing either historical power. For example, the statute does not give the executor the power to create easements, but it appears no case has questioned it when necessary for the partial sale of the decedent's real property, notwithstanding the encumbrance they may cause on the distributee's remaining real property.

If our reading is correct and the interpretation of the executor's powers over real property is guided by their history, then it would follow that the powers of trustees, even though governed by the same statute, will be interpreted differently. It should be remembered, for example, that trustees generally do hold title to real property, while executors do not. Therefore, the powers over real property listed in EPTL § 11-1.1 have a twin-nature: they are a *codification* of the common law as to trustees, but a *modification* of the common law as to executors. The notion that they may be interpreted differently as to trustees and executors is only offered for discussion. We have not compared the powers of executors with those of trustees in this article.

Endnotes

1. *See* Waxson Realty Corp. v. Rothschild, 255 N.Y. 332 (1931); In Re Seviroli, 31 A.D.3d 452, 818 N.Y.S.2d 249 (2d Dep't 2006); DiSanto v. Wellcraft Marine Corp., 149 A.D.2d 560, 540 N.Y.S.2d 260 (2d Dep't 1989); Limberg v. Limberg, 256 A.D. 721, 11 N.Y.S.2d 690 (2d Dep't 1939), *aff'd*, 281 N.Y. 821 (1939); Estate of Horton v. Comm'r of Internal Revenue, 388 F.2d 51 (2d Cir. 1967).
2. *See* N.Y. Est. Powers & Trusts Law § 11-1.1(b)(5) (McKinney 2011).
3. R.J.R. Goffin, The Testamentary Executor in England and Elsewhere 37 (1901).
4. *See* N.Y. E.P.T.L. § 5-1.1-A. The actual election in New York may vary depending on circumstances, but the one-third rule remains the default rule.
5. Although this paragraph addresses only personal property, it should be remembered that the common law recognized the right of dower, which New York only abolished in 1930. The right of dower was a tenancy for life for the benefit of the widow over one-third of the decedent's real property. Hence, the widow at common law received ownership of one-third of the decedent's personal property, and life tenancy over one-third of the decedent's real property. In effect, she enjoyed one-third of the estate.
6. Primogeniture, though the most familiar English rule of succession, was not applicable in all of England. Even in the Middle Ages some communities maintained a different immemorial custom, such as equal distribution among sons. *See* 1 Sir William Blackstone, Commentaries on the Laws of England II *214-15. The Dutch in America did not agree with primogeniture. Article XI of the Articles of Capitulation on the Reduction of New Netherland (to the English forces led by the Duke of York in 1664) translates to read: "The Dutch here shall enjoy their own customs concerning inheritances."
7. *See generally* Eileen Spring, Law, Land & Family: Aristocratic Inheritance in England, 1300-1800 (1993), for a historical discussion of the social effect of the rules of inheritance.

A passage in *The Importance of Being Earnest*—where Jack is examined by Lady Bracknell to determine whether he can be a suitor to Gwendolen—illuminates how ownership of land was losing its status by the end of the 19th century:

> LADY BRACKNELL….What is your income?
>
> JACK. Between seven and eight thousand a year.
>
> LADY BRACKNELL. In land, or in investments?
>
> JACK. In investments, chiefly.
>
> LADY BRACKNELL. That is satisfactory. What between the duties expected of one during one's lifetime [*i.e. property taxes*], and the duties exacted from one after one's death [*i.e. death taxes*], land has ceased to be either a profit or a pleasure. It gives one position, and prevents one from keeping it up. That's all that can be said about land.

Oscar Wilde, *The Importance of Being Earnest*, act 1, pt. 2 [emphasis added].

8. *See* BLACKSTONE, *supra* note 6, ch. 4-5, for an account of the early feudal system and tenures in land.

9. *See generally* OLIVER WENDELL HOLMES, THE COMMON LAW, lectures X-XI (Little, Brown and Company 1881), for a discussion of the development of the privity of estate from feudal to modern times.

10. *See* ERNST H. KANTOROWICZ, THE KING'S TWO BODIES 328 et seq. (7th prtg. 1997) (1957).

11. *See generally* Waxson Realty Corp. v. Rothschild, 255 N.Y. 332 (1931).

12. *See* GOFFIN, *supra* note 3, at 35-40.

13. "But when ecclesiastical ingenuity had invented the doctrine of uses, as a thing distinct from the land, uses began to be devised frequently, and the devisee of the use could in chancery compel its execution." BLACKSTONE, *supra* note 6, *375.

14. *See* J. INST. 2.4.

15. The terms "reversion" and "remainder" are often confused. A reversion is the residuary ownership interest reserved by the grantor. A remainder is a residuary ownership interest conveyed by the grantor. If A conveys land to B for a certain time (e.g., a lease or life estate), but reserves the rest, A holds a reversion. If A conveys land to B for a certain time, but grants a successor fee simple to C, C holds a remainder. *See* N.Y. EST. POWERS & TRUSTS LAW §§ 6-4.3, -4.4.

16. 1 ROBERT F. DOLAN, RASCH'S LANDLORD AND TENANT 5-6, 8 (4th ed. 1998).

17. *See* SPRING, *supra* note 7, at 31. *See also* ROBERT LUDLOW FOWLER, REAL PROPERTY LAW OF THE STATE OF NEW YORK 32-33 (3rd ed. 1909).

18. The Church had a broader motive to introduce uses and trusts in England. Medieval law not only prohibited devising property. It also prohibited any *inter vivos* transfer to the Church or any other corporation. Lands that came into the ownership of the Church were said to fall in the "dead hand" because the feudal lord effectively lost the benefit of it. *See* BLACKSTONE, *supra* note 6, *375-76 (statutes of mortmain). Interestingly, uses and trustS had also been used in the Continent to avoid the prohibition of ownership of land by Jews. *See* GOFFIN, *supra* note 3, at 26.

19. *See* BLACKSTONE, *supra* note 6, *64 et seq.; SPRING, *supra* note 7, at 31.

20. *See* FOWLER, *supra* note 17, at 33.

21. *See* SPRING, *supra* note 7, at 42 et seq.

22. See *id.* at 31. This summary of the Statute of Uses suffices for our present purposes. The complete intent and actual effect of the Statute of Uses is a complex topic and exceeds the scope of this article.

23. It has also been suggested that the real purpose behind the Statute of Uses was an attack on the Holy See, an incident of the quarrel that culminated in the severance of the Anglican Church from Rome. By having courts of law take cognizance of uses and trusts, the jurisdiction of Courts Christian was effectively undercut. *See* ROBERT LUDLOW FOWLER, DECEDENT ESTATE LAW OF THE STATE OF NEW YORK 13 (1911).

24. According to Blackstone the Statute of Wills was the cause for the passing of a more familiar statute.

> Innumerable frauds and perjuries were quickly introduced by this parliamentary method of inheritance: for so loose was the construction made upon this act by the courts of law, that bare notes in the hand writing of another person were allowed to be good wills within the statute. To remedy which, the statute of frauds and perjuries, 29 Car. II., c. 3, directs that all devises of lands and tenements shall not only be in writing, but signed by the testator, or some other person in his presence, and by his express direction; and be subscribed, in his presence, by three or four credible witnesses. And a similar solemnity is required for revoking a devise.

BLACKSTONE, *supra* note 6, *376.

25. *See* LAWRENCE M. FRIEDMAN, HISTORY OF AMERICAN LAW 65 (2d ed.1985). The reader may remember that we started off saying that the rule at common law was that personal property was not divided equally, but descended one-third to the widow, one-third to the heir at law, and one-third to the will beneficiary, or to the heir-at-law as well, if there was no will. In the 1680s, the time period commented on by Friedman, the statute 22 & 23 Car. II, c. 10 was passed which mandated equal distribution of the *personal* estate among the children of the decedent. *See* BLACKSTONE, supra note 6, *515.

26. *See* GOFFIN, *supra* note 3, at 62 et seq.

27. Claire Priest, *Creating American Real Property Law: Alienability and its Limits in American History*, 120 HARV. L. REV. 385, 398-408 (2006).

28. *See generally* FREDERIC W. MAITLAND & FRANCIS C. MONTAGUE, A SKETCH OF ENGLISH LEGAL HISTORY 61 (1913) (stating that the property of felons was confiscated if convicted).

29. Corruption of the Blood. In English law, the consequence of *attainder*, being that the attainted person could neither inherit lands or other hereditaments from his ancestors, nor transmit them by descent to any heir, because his blood was considered in law to be corrupted. *See* BLACK'S LAW DICTIONARY *126-27 (6th ed. 1990). *See also* Avery v. Everett, 65 Sickels 317, 324, 110 N.Y. 317, 324, 18 N.E. 148, 150 (1888), for a historical account of the development of this punishment.

30. U.S. CONST. art. III § 3, cl. 2. "The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of the Blood, or Forfeiture except during the Life of the Person attainted."

31. For example, the Puritan colony of Massachusetts Bay originally did not adopt the common law, but based its law on the Bible. *See* FRIEDMAN, *supra* note 25, at 34.

32. Under 17th and 18th century mercantilism colonies were only allowed to trade with their mother country.

33. The history and politics behind the Debt Recovery Act is thoroughly explained in PRIEST, *supra* note 27, at 408-427. Interestingly, Priest points out that the Debt Recovery Act actually had some support among American merchants for the same reasons advanced by English merchants.

34. *See id.* at 429.

35. *See id.* at 427.

36. *See id.* at 440.

37. *See* Waters v. Stewart, 1 Cai. Cas. 47 (1804).

38. "Before 1898, the rule [in England] was that an executor took no estate or interest by virtue of his office in any of his testator's real estate; any devise of such real estate was entirely independent of the executor's assent or interference; and, as we have seen, a will of real estate, as such did not require probate." 1 CYPRIAN T. WILLIAMS, TREATISE ON THE LAW OF VENDOR AND PURCHASER OF REAL ESTATE AND CHATTELS REAL 186 (1906) (internal citations omitted). Although English executors were properly vested with

decedents' real property beginning in 1898 by the Land Transfer Act of 1897, a practice had previously evolved for testators to grant their executors the power to dedicate their real property to the payment of debts and legacies. This practice was upheld by the courts and facilitated by Lord St. Leonards' Act of 1859, which removed some of the common law barriers to the divestment of the heir-at-law's title. *Id.* at 187.

39. *See generally* In re Fitzpatrick's Will, 252 N.Y. 121, 169 N.E. 110 (1929); Coann v. Culver, 188 N.Y. 9, 80 N.E. 362 (1907); In re Ballesteros, 20 A.D.3d 414, 798 N.Y.S. 131 (2d Dep't 2005); *see also* N.Y. DECEDENT ESTATE LAW § 110.

40. For a detailed history of the Surrogate's Court see In re Brick's Estate, 15 Abb. Pr. 12 (N.Y. Sup. Ct. N.Y. Cnty. 1862) (Daly, J., Acting Surrogate).

41. *See id.*

42. *See id.*

43. "There shall be elected in each county of this state…one county judge, who shall hold his office for four years. He shall hold the county court and perform the duties of the office of surrogate." N.Y. CONST. of 1846 art. 6, § 14.

44. *Id.*

45. *See* Ch. 276, 1847 N.Y. Laws. For a history of the jurisdiction of the surrogate, *see* In Re Brick's Estate, 15 Abb. Pr. 12 (N.Y. Sup. Ct. N.Y. Cnty. 1862).

46. *See* N.Y. CONST. of 1777 art. XLI; N.Y. CONST. of 1821 art. VII, § 2; N.Y. CONST. of 1846 art. I, § 2; N.Y. CONST. of 1938 art. I, § 2.

47. In 1825, the Court of Chancery, resolving an appeal from the surrogate, wrote:

> Thus, a will of personal and real estate may be there adjudged both valid and void, by different tribunals. This result of an artificial division of jurisdictions can never be proper, where it may be avoided. That a will should be adjudged valid, because the testator who made it, was sound of mind; and that the same will should be adjudged void, because the same testator was insane, is a result which should never take place under one system of laws.

Vanderheyden v. Reid, 1 Hopk. Ch. 408 (N.Y. Ch. 1825), *rev'd*, 5 Cow. 719 (1826). In that case, the Chancellor was resolving an appeal from a decision of the surrogate concerning both personal and real property. The Chancellor concluded that he had jurisdiction to resolve both issues, but was reversed on other grounds.

48. *See* FOWLER, *supra* note 23, at 40. *See also* Bowen v. Sweeney, 89 Hun. 359, *aff'd*, 8 E.H. Smith 780, 154 N.Y. 780, 49 N.E. 1094 (Sup. Ct. Gen. T. 1st Dep't 1898); Corley v. McElmeel, 3 E.H. Smith 228, 149 N.Y. 228, 43 N.E. 628 (1896); Wallace v. Payne, 14 A.D. 597, 43 N.Y.S. 1119 (2d Dep't 1897).

49. "The jurisdiction of the Surrogate's Court is enlarged, so that a final determination may be made in that court of all matters pertaining to the affairs of a decedent. Provision is made for trial by jury of any controverted question of fact in the adjudication of which any party has a constitutional right to such trial." General Note, REPORT OF THE COMMISSION TO REVISE THE PRACTICE AND PROCEDURE IN SURROGATE'S COURT (Feb. 9, 1914) (discussing the changes to Article 18 of the Code of Civil Procedure). *See also* Ch. 443, 1914 N.Y. Laws.

50. "The surrogate's court shall have jurisdiction over all actions and proceedings relating to the affairs of decedents, probate of wills, administration of estates and actions and proceedings arising thereunder or pertaining thereto, guardianship of the property of minors, and such other actions and proceedings, not within the exclusive jurisdiction of the supreme court, as may be provided by law." N.Y. CONST. art. VI, § 12(d).

51. For an example of a modern jurisdictional challenge, *see* Estate of Piccione, 57 N.Y.2d 278, 288 (1982) (deciding that the surrogate has jurisdiction to resolve a summary eviction proceeding pursuant to RPAPL Art. 7, and even though one of the parties is not an estate beneficiary); *see also* Real Spec Ventures, LLC v. Estate of Deans, 87 A.D.3d 1000, 1002, 929 N.Y.S.2d 615, 617 (2d Dep't 2011).

52. The Revised Statutes were an attempt to codify, systematize and simplify the entire law of the State of New York, presumably following the lead of the pandectist movement in Europe. *See* ROBERT LUDLOW FOWLER, HISTORY OF THE REAL PROPERTY LAW OF NEW YORK: AN ESSAY INTRODUCTORY OF THE N.Y. REVISED STATUTES (New York, Baker, Voorhis & Company 1895) for a history of the Revised Statutes. "This they thought would reduce the statutes then in force to half their extent; it would render them so concise, simple, and perspicuous as to be intelligible not only to professional men, but to persons of every capacity . . . ." *Id.* at 92.

53. 2 N.Y. REVISED STATUTES, pt. 2, ch. 6, tit. 4, §§ 1, 14, 15, 20 (1829), *available at* http://nysl.nysed.gov/uhtbin/cgisirsi/?ps=XBOG1Iojyi/NYSL/304240061/523/82110.

54. In 1810 the Legislature had passed a statute that allowed the surrogate to order the leasing or mortgaging of real property, in lieu of selling, *if the decedent had left any infants. See* In re Brick's Estate, 15 Abb. Pr. 12 (N.Y. Sup. Ct. N.Y. Cnty. 1862).

55. The Revised Statutes also altered the nature of executors and administrators. Where before they may have been simply personal representatives, by the Revised Statutes they became trustees

> …and the property in their hands is a fund, to be disposed of in the best manner for the benefit of creditors, and not liable, as it once was, to be dissipated in bills of costs, created by the anxiety of creditors to obtain a first judgment, and thus secure the payment of their debts to the prejudice perhaps of others. Now a more equitable rule prevails. No preference is given among debts of the same class.

Dox v. Backenstose, 12 Wend. 542, 543 (N.Y. Sup. Ct. of Judicature 1834) (Savage, C. J.).

56. "An executor or administrator may present a petition to the surrogate's court praying for leave to enter into possession of real property left by his decedent and to manage and control the same and receive rents thereof." N.Y. CODE OF CIVIL PROCEDURE § 2701 (1914) ("C.C.P.").

57. *See* Reviser's Note to § 2701, SUPPLEMENT TO BLISS ANNOTATED N.Y. CODE OF CIVIL PROCEDURE AND STOVERS' ANNOTATED CODE OF CIVIL PROCEDURE OF NEW YORK 538 (Frank B. Gilbert et al. eds., 1919); *see also* Ch. 443, 1914 N.Y. Laws.

58. *See* N.Y. C.C.P. § 2704.

59. *See* N.Y. C.C.P. § 2703.

60. *See* N.Y. C.C.P. §§ 2701, 2702, 2703, and 2704. These provisions became N.Y. SURROGATE COURT ACT §§ 232, 233, 234, and 235, respectively. *See* Ch. 928, 1920 N.Y. Laws 634.

61. *See* L. 1921, ch. 438, § 1; *see also* CLEVENGER'S SURROGATE'S COURT PRACTICE (American Law Publishers 1922) (containing Editorial Notes to art. I, § 1).

62. 113 Misc. 602, 605, 185 N.Y.S. 250, 252 (Sur. Ct. Westchester Cnty. 1920), *aff'd*, 195 A.D. 822, 187 N.Y.S. 355 (2d Dep't 1921).

63. Ch. 229, § 13, 1929 N.Y. Laws 499. The N.Y. DECEDENTS ESTATE LAW was a codified statute passed in 1909 and was replaced by the N.Y. EST. POWERS & TRUST LAW in 1966. The original § 13 addressed property devised to aliens and was repealed in 1913. The above-mentioned § 13 was introduced in 1929 and amended in 1947.

64. "Every power to be exercised under this section is subject to the control of and subject to approval by the surrogate except the power to [take possession, manage, and collect rents from real property], which power may be exercised without prior approval." N.Y. DECEDENT ESTATE LAW § 13 (McKinney 1949) (quoting

Notes to § 13 from 1929 Decedent Estate Commission).

65. "Its purpose is to make more effective the grant of statutory power which was intended to be conferred by section 13 of Decedent Estate Law. Such grant is found in subsection 1 but the first sentence of subsection 3 effectively negates the power since it requires that it be exercised under the supervision of the court…." *See id.* (quoting Note of Commission—1947 Amendment).

66. *Compare* In re Coyne's Estate, 269 A.D. 853, 55 N.Y.S.2d 915 (2d Dep't 1945); Limberg v. Limberg, 256 A.D. 721, 11 N.Y.S.2d 690 (2d Dep't 1939), *aff'd*, 281 N.Y. 821 (1939); *and* In re Siegel's Will, 191 Misc. 323, 78 N.Y.S.2d 790 (Sur. Ct. Queens Cnty. 1948); *with* In re Merrill's Estate, 165 Misc. 161, 163, 300 N.Y.S. 671, 674 (Sur. Ct. Kings Cnty. 1937); *and* In re Ryan's Estate, 161 Misc. 313, 315 291 N.Y.S. 668, 670 (Sur. Ct. Bronx Cnty. 1936).

67. One of those limitations was the introduction of the *specific devise*, as it exists in our current statute, where all prior statutes had only differentiated between land passing by descent and by devise. The 1947 amendment to N.Y. Decedent Estate Law § 13 subtly subjected the interests of general devisees to the payment of legacies. Before 1947 the decedent's land could only be sold pursuant to a court order. The order, as we have seen, would only be granted if the sale was necessary for the payment of debts, funeral expenses, administration expenses, taxes, and any legacies made a lien on the land by the terms of the will, but not for the payment of general legacies. After 1947, the executor could sell any property that was not "specifically devised." This meant that the executor could, effectively, sell devised (but not "specifically devised") land for the payment of general legacies, even if the surrogate lacked the authority to grant a similar order. This is, apparently, the first and only instance where the powers of the executor exceeded those of the surrogate.

68. *See* N.Y. Est. Powers & Trusts § 11-1.1 (b)(5) (McKinney 2011).

69. *See* Jemzura v. Jemzura, 36 N.Y.2d 496, 503, 369 N.Y.S.2d 400, 407-08 (1975) (acknowledging that tenants in common cannot exclude one another, absent paying rent to the excluded tenant); *Limberg*, 256 A.D. at 722; Zapp v. Miller, 109 N.Y. 51, 57-58 (1888); Misk v. Moss, 41 A.D.3d 672, 673, 839 N.Y.S.2d 143, 145 (2d Dep't 2007); *see also* H & Y Realty Co. v. Baron, 160 A.D.2d 412, 554 N.Y.S.2d 111, 113 (1st Dep't 1990) (finding that the excluded tenant is not liable for expenses, including real estate taxes).

70. *Limberg*, 256 A.D. at 722.

71. *Id.*

72. 31 A.D.3d 452, 454, 818 N.Y.S. 249, 251 (2d Dep't 2006) (holding that the decedent's son was liable to pay the executrix of the decedent's estate).

73. 38 A.D. 675, 327 N.Y.S.2d 183 (4th Dep't 1971).

74. *Id. at* 676-77 (referring to N.Y. E.P.T.L. § 11-1.1, the current collection of rents statute), *but cf.* (Witmer, J., dissenting) (stating that the statute was not intended to disturb the relationship of the decedent with his lifetime co-tenants, but only that of the estate distributees).

75. Ch. 731, § 1, 1961 N.Y. Laws 2063 (creating the Temporary State Commission on the Modernization, Revision and Simplification of Estates.)

76. Third Report of the Temporary State Commission on the Modernization, Revision and Simplification of Estate to the Governor and the Legislature, Report No. 6.4C, at 484 et seq. (1964) (Leg. Doc. No. 19) [hereinafter *Third Report*].

77. Ch. 681, § 14, 1964 N.Y. Laws 1794. The statute became effective as of June 1, 1965.

78. Ch. 952, 1966 N.Y. Laws 2761. The statute became effective as of September 1, 1967.

79. *Compare* Matter of Coyne, 269 A.D. 853, 853, 55 N.Y.S.2d 915, 915 (2d Dep't 1945); *and* In re Wolpert's Estate, 33 Misc. 2d 1080, 1081, 227 N.Y.S.2d 218, 219 (Sur. Ct. Nassau Cnty. 1962); *and* In re Heuss' Estate, 14 Misc. 2d 408, 409-10, 179 N.Y.S.2d 767, 768-69 (Sur. Ct. Nassau Cnty. 1958); *with* In re Ryan's Estate, 161 Misc. 313, 314-15, 291 N.Y.S. 668, 669-70 (Sur. Ct. Bronx Cnty. 1936).

80. N.Y. Est. Powers & Trusts Law § 11-1.1(b)(5)(C).

81. *See* Third Report, *supra* note 76, at 505, 518-519.

82. *See id.* at 490.

83. N.Y. E.P.T.L. § 1-2.15.

84. *cf.* N.Y. E.P.T.L. §§ 11-1.1(b)(5)(B), 11-1.1(b)(7).

85. *See* Third Report, *supra* note 76, at 494, 529.

86. N.Y. E.P.T.L. § 11-1.1(b)(6).

87. After enactment of the N.Y. E.P.T.L., *see* Matter of Estate of Payson, 132 Misc. 2d 949, 506 N.Y.S.2d 142 (Sur. Ct. Nassau Cnty. 1986); Johnson v. Depew, 38 A.D. 675, 327 N.Y.S.2d 183 (4th Dep't 1971). Prior to enactment, *see* In re Mould's Estate, 113 Misc. 602, 185 N.Y.S. 250 (Sur. Ct. Westchester Cnty. 1920), *aff'd*, 195 A.D. 822, 187 N.Y.S. 355 (2d Dep't 1921); In re Ledyard's Estate, 21 N.Y.S.2d 860 (Sur. Ct. Nassau Cnty. 1939), *aff'd*, 259 A.D. 892, 20 N.Y.S.2d 1006 (2d Dep't 1940); In re Levine's Estate, 158 Misc. 116, 285 N.Y.S. 754 (Sur. Ct. Kings Cnty. 1936).

88. *See* Third Report, *supra* note 76, at 491, 527. *See also* Estate of Burke, 129 Misc. 2d 145, 148, 492 N.Y.S.2d 892, 895 (Sur. Ct. Cattaraugus Cnty. 1985).

89. N.Y. E.P.T.L. § 11-1.1(b)(13).

90. *See* Third Report, *supra* note 86, at 484, 487, 493-494, and 521.

91. *See id.* at 499.

92. N.Y. Real Prop. Acts. §§ 641 (recovery of real property), 711(2) (summary proceeding to recover real property), 851 (trespass), 901(5) (partition), and 1501 (action to settle title).

93. *See* Klump v. Freund, 83 A.D.3d 790, 790-91, 921 N.Y.S.2d 121, 122 (2d Dep't 2011), where an executor litigated whether the estate had an easement by necessity.

94. On the other hand, if the ten-year adverse possession period was completed *after* the decedent's death, the executor would not be able to act on the property because it would not be part of the estate. It would have vested only in the hands of the distributee.

95. *See generally* Limberg v. Limberg, 281 N.Y. 463 (1939) (executor failed to account for the value of use and occupancy attributable to his own use and occupancy).

96. *See* N.Y. Est. Powers & Trusts Law § 11-1.1(b)(5)(B) (McKinney 2011), stating that the power "to sell the same at public or private sale, and on such terms as in the opinion of the fiduciary will be most advantageous to those interested therein."

97. *See* Recommended Practices, New York State Land Title Association, Inc. 3 (Revised Oct. 2011), available at http://www.nyslta.org/RecommendedPracticesMarch09-rev8310.

98. *See* U.S. v. Benedict, 280 F. 76, 82-3 (2d Cir. 1922). It should be noted that the cited case dates from the earliest days of zoning law. In our day, causing a subdivision is usually an extensive application procedure before multiple municipal boards and requires an array of experts. Causing a subdivision today is more likely to be seen as an investment of estate assets and not just as an efficient way of liquidating estate assets.

99. *See* N.Y. Est. Powers & Trusts Law §§ 1-2.15, 11-1.1, and 13-1.3.

100. *See* In re Seviroli, 31 A.D.3d 452, 818 N.Y.S.2d 249 (2d Dep't 2006) (stating that the executrix could not sell a condominium unit inhabited by testator's second wife and their infant son). "[T]he executrix made no showing that the sale of the condominium is necessary to the administration of the estate." *Id.* at 455. *See also* Matter of Sherburne, 95 A.D.2d 859, 464 N.Y.S.2d 531 (2d Dep't 1983), where the distributees acting together were entitled to prevent the sale of real property by the executor where the estate was otherwise solvent.

101. Until the early 20th century, assignment of ground rents was a form of investing in real property, much like a mortgage. In

Maryland, Pennsylvania and Ohio they were sometimes traded side by side with mortgages and the case law likened them to oil royalties. See CHARLES E. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND" 190, n. 12 (2d ed. 1947). The inclusion of the possibility of leasing side by the side with the possibility of mortgaging in the 1829 Revised Statutes (cited above), surely viewed leasing as a means of financing a debt, and not managing an asset.

102. N.Y. EST. POWERS & TRUSTS LAW § 11-1.1(b)(5)(C).

103. *Cf.* Blood v. Kane, 130 N.Y. 514, 517, 29 N.E. 994, 994-95 (2d Div. 1892) (stating that an executor takes unqualified legal title of all personalty not specifically bequeathed, and qualified legal title to that which is so bequeathed).

104. *Seviroli*, 31 A.D.3d at 455, 818 N.Y.S.2d at 251. *See also* Limberg v. Limberg, 256 A.D. 721, 722, 11 N.Y.S.2d 690, 690 (2d Dep't 1939), *aff'd* 281 N.Y. 821 (1939); *In re* Mould's Estate, 113 Misc. 602, 606, 185 N.Y.S. 250, 252-53 (Sur. Ct. Westchester Cnty. 1920).

105. *See Limberg*, 256 A.D. at 722, 11 N.Y.S.2d at 690; Johnson v. Depew, 38 A.D.2d 675, 676 327 N.Y.S.2d 183, 184 (4th Dep't 1971).

106. *See* Carver v. Rippetoe, 43 A.D.3d 627, 841 N.Y.S.2d 394 (3d Dep't 2007); Corrarino v. Byrnes, 43 A.D.3d 421, 841 N.Y.S.2d 122 (2d Dep't 2007); In re Goodell's Estate, 69 N.Y.S.2d 38 (Sur. Ct. Monroe Cnty. 1947). In all three cases the executor created easements upon the sale of a portion of the real property, either benefiting or encumbering other property held by the executor, and the ability of the executor to create the easements was not questioned in any of them.

107. *See* U.S. v. Benedict, 280 F. 76, 80-2 (2d Cir. 1922).

108. *See* DiSanto v. Wellcraft Marine Corp., 149 A.D.2d 560, 562, 540 N.Y.S.2d 260, 262-63 (2nd Dep't 1989).

109. *See generally* Carver v. Rippetoe, 43 A.D.3d 627, 841 N.Y.S.2d 394 (3d Dep't 2007); Corrarino v. Byrnes, 43 A.D.3d 421, 841 N.Y.S.2d 122 (2d Dep't 2007); In re Goodell's Estate, 69 N.Y.S.2d 38 (Sur. Ct. Monroe Cnty. 1947).

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