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SALES BY EXECUTORS AND ADMINISTRATORS

It is the purpose of the writer in this note to set out briefly some of the general principles and rules applicable to sales by executors and administrators. A summary treatment of the following topics it is hoped will accomplish the object in view: (1) general rules as to personal property, and (2) as to real estate; (3) time of sale, (4) manner of sale; (5) purchases by representatives at their own sale, (6) rights of purchasers and (7) rights of the owners of the beneficial interest in the estate.

I.

GENERAL RULES AS TO PERSONAL PROPERTY

Executors and administrators, in the absence of statutory regulations, are vested with broad discretionary powers with reference to the sale and disposal of the personal property of the decedent. The following quotation is a typical statement of the common law on the subject:

"No general rule of law and equity is better settled than that an executor or administrator has an absolute power of disposal over the whole personal estate of his testator or intestate; and that it cannot be followed by creditors, much less by legatees, either general or specific, into the hands of the bona fide alienee."

The breadth of a representative’s power to transfer chattels is in part illustrated by the fact that he may pledge or mortgage the assets for purposes of administration; that he may sell personally specifically bequeathed; that private sales bona fide are valid; and

1 The first three topics are treated in this note, and the others will be discussed in a subsequent one.

2 Williams v. Ely, 13 Wis. 1, 7 (1860); Weyer, Admr v. Second Nat’l Bank of Franklin, 57 Ind. 198, 203 (1877); Lark v. Linstead, 2 Md. Ch. 162, 167 (1850); 11 R. C. L. 347; 21 Am. Jur. 695-696; Equitable Life Assurance Society of United States v. Mallers, 104 Fed. (2d) 567 (1939) (Illinois statute allowing personalty of an estate to be sold at private sale, where so directed by court, did not repeal Illinois common-law rule that sale of personalty in course of administration of estate to bona fide purchaser for valuable consideration but without approval of court is valid); In re Dooper’s Will, 212 N. Y. S. 616, 624 (1925) (Executor required no specific power of sale to dispose of stock in corporation owning real estate); Williams on Executors (12th ed. 1930) p. 560; Woerner, The American Law of Administration (3rd ed. 1923), sec. 331; Evans, Contractual Obligations and Transfers by Personal Representatives (1929) 17 N. Y. U. L. Q. Rev. 17, at 34. (Notice that as pointed out by Dean Evans, Lord Mansfield seemed to have had the view that even a creditor of the personal representative could levy execution upon the chattels to satisfy a personal judgment against the representative).


4 Williams on Executors (12th ed. 1930) p. 561.

5 Evans, Contractual Obligations and Transfers by Personal Representatives, (1929) 7 N. Y. U. L. Q. Rev. 17, at 35.

that the transfer by a single co-executor is binding on the other co-
executors.\footnote{See Fesmyer v. Shannon, 143 Pa. 201, 22 Atl. 898, 899 (1891); Woerner, The American Law of Administration (3rd ed. 1923), sec. 346; Williams on Executors (12th ed. 1930) p. 603; and Evans, The General Powers and Relations of Co-executors (1937) 14 N. Y. U. L. Q. Rev. 127, 131.} Two of the reasons assigned for this broad discretionary power of the personal representative are (1) that the debts of the decedent should be paid and (2) that sales would be few should purchasers be subjected to risk of loss for failure to make a careful check of the representative's authority.\footnote{Williams on Executors (12th ed. 1930) p. 560.} An executor or administrator, however, can not bequeath the effects, nor can his administrator take them; and personality was not forfeited on attainder of the representative nor seizable by the trustee in a commission of bankruptcy against the representative.\footnote{Evans, Contractual Obligations and Transfers by Personal Representatives, (1929) 7 N. Y. U. L. Q. Rev. 17, at 34; 11 R. C. L. 347.} Although the Tennessee court at one time held an executor or administrator could make a gift of the effects, the rule throughout the United States forbids such gifts today.\footnote{Sneed v. Hooper, Cooke (Tenn.) 200 (1812); 11 R. C. L. 347.}

This common-law absolute right of alienation of personality by executors or administrators has been modified by statute or court decisions in a number of states. Departure from the common law may be confined to requiring a court order of sale or confirmation of a transfer of a particular type of personal property. For example, the Kentucky General Assembly has forbidden the sale of dividend paying securities of the decedent without authorization of the proper court.\footnote{Kentucky Statutes (Carroll’s 1936), sec. 4707; see Colwell v. Holliday, 250 Ky. 584, 63 S. W. (2d) 776 (1933) (An executrix authorized by the testator to dispose of stock may sell dividend paying stock without permission of the court); Interstate Public Service Co. v. Weiss, 208 Ind. 122, 193 N. E. 226 (1934) (Statute prohibiting sale of decedent’s stock without court order held mandatory); Evans, Contractual Obligations and Transfers by Personal Representatives, (1929) 7 N. Y. U. L. Q. Rev. 17, 36.} The courts are not in accord as to what defects in the sale proceedings render the transfer void and subject to collateral attack.\footnote{See “Grounds of collateral attack on judicial and execution sales,” 1 A. L. R. 1431 (1919).} A majority of the courts in keeping with the common law have held that title passes to a bona fide purchaser notwithstanding the circumstances of the particular case may not justify the sale, and that creditors, heirs, and legatees must look to the executor or administrator for indemnification.\footnote{Stamps v. Beatty, 3 Ky. (Hardin) 345 (1808); Overfield v. Bullitt, 1 Mo. 749 (1827); see Sale v. Roy, 2 Hen M. 69, 79 (Va. 1808).} By statute some jurisdictions require that sales of non-perishable personal property by representatives be
made only on order of the court or confirmed by it. Jurisdictions not requiring court approval in all cases may require that the personal representative receive permission of the court before making a private sale.

II. GENERAL RULES AS TO REAL ESTATE

Under the common law an executor or administrator had no power to sell land in the absence of testamentary authorization unless the land was expressly charged, for lands immediately descended to the heirs or vested in the devisees as the case may be. Testamentary authority to sell the real estate or so much of it as may be necessary for accomplishing a stated object may be impliedly or expressly conferred. Thus, "I desire said executor to make sale . . . of my real estate . . . necessary to carry out the purpose of this will . . ." was construed as an express authorization. The court held that "desire" meant to "empower" or to "authorize." Where a testator left the residue of his estate to X and directed his executor "to collect the last above specified property, as soon as can be done consistently, without sacrificing too much by forcing the sale thereof in an improper manner . . . and pay over the same," etc., a Massachusetts court held that by implication the executor was authorized to sell the realty designated—"it being necessary (to sell) to carry into effect the other purposes of the will." In the latter opinion there is a statement of the general rule with reference to necessity for court order before a testamentary power of sale may be effectively exercised; namely, "whenever an executor has a power under

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15 See Goldsborough v. De Witt, 189 Atl. 226, 245 (Md. 1937); "All sales of property must be reported under oath, and confirmed by probate court, before the title of the property sold passes." Idaho Sess. Laws 1929, ch. 278, sec. 3, Cummings v. Lowe, 52 Idaho 1, 10 Pac. (2d) 1059 (1932); Woerner, The American Law of Administration (3rd ed. 1923) 1093, 1094, and 1106 (Some statutes are construed as applying only to visible tangible personality. Woerner suggests that representatives should report to and have the court approve sales in all cases thus furnishing a source of information which may protect the latter).


18 Walter's Guardian v. Ransdell, 218 Ky. 267, 291 S. W. 399 (1927); Smith v. Mooney, 5 N. J. Misc. 1087, 139 Atl. 513 (1927) (Executors having a testamentary authority to divide and distribute the estate consisting of personality and realty, had an implied authority to sell).

19 Going v. Emery, 16 Pick. (Mass.) 107, 112-113 (1834); cf. Engstrom v. Anderson, 106 Kan. 175, 186 Pac. 751 (1920) (Executors had "full power to do all acts (in carrying out the provisions of the will) as legally as myself in person").

a will to sell real estate, no license of any court is necessary to, or
can give any additional validity to any sale and conveyance which he
may make. Some jurisdictions have statutes requiring that sales
of realty be confirmed by the court before the heirs or devisees are
divested of title, or have statutes making sales by executors subject
to approval of the court. Not only may an executor or administrator
be required to secure the necessary sanction of the court, but devisees
or heirs may prevent by an action in equity alienation of real estate
notwithstanding testamentary authorization to sell. The election
of the beneficiaries under the will to take the land instead of its pro-
cceeds, however, must be unanimous. A testamentary power to
sell real estate does not necessarily include a power to mortgage the
same property.

Where co-executors are authorized by will to sell realty and one
or more of them dies or refuses to exercise the power the question
arises as to whether a conveyance by the other co-executors is valid.
At common law a naked power of sale to named executors could not
be exercised by one of them. However, a power given to the office
of executor continues for the duration of the office. A discretionary
power of sale had to be exercised by all of the co-executors or
appointees in order to convey a valid title to the property.

21 Going v. Emery, 16 Pick. (Mass.) 107, 113 (1834); Woerner,
The American Law of Administration (3rd ed. 1923) p. 1126.
23 In re Estate of George, 123 Cal. App. 733, 12 Fac. (2d) 86 (1932).
24 Kaufmann v. Kaufmann, 226 Mo. App. 172, 43 S. W. (2d) 879
(1931); 6 R. C. L. 1090; Woerner, The American Law of Administra-
tion (3rd ed. 1923) p. 1143.
25 Kaufmann v. Kaufmann, 226 Mo. App. 172, 43 S. W. (2d) 879
26 Woerner, The American Law of Administration (3rd ed. 1923)
p. 1150.
27 Woerner, The American Law of Administration (3rd ed. 1923),
sec. 339; see Evans, The Survival of Powers of Joint Executors to
Sell Land, (1936) 85 Univ. of Pa. L. Rev. 154 and notice the distinc-
tion between personal and real property (see p. 162 for a discussion
of naked powers); note 36 A. L. R. 826, at 827 (1925): "The rule at
common law was that a mere naked power to sell real estate, given
by a will to two or more executors nominatim individually, could
not be exercised by a part of the executors where some of those
named renounced or did not qualify."
1923) p. 1129; Evans, The Survival of Powers of Joint Executors to
Sell Land (1936) 85 Univ. of Pa. L. Rev. 154 at 157 (The tendency
of the courts is to interpret liberally the instrument as granting an
official power rather than as naming the executors).
29 "At common law a power to sell, which power was a matter of
personal confidence in the donees, could only be executed by all of
the donees named, even though it were a power coupled with an
interest." Note 36 A. L. R. 826, 834 (1925); Woerner, The American
Law of Administration (3rd ed. 1923) p. 1135; see Evans, The Sur-
vival of Powers of Joint Executors to Sell Land, (1936) 85 Univ. of
may provide for the survival of powers touching real estate granted to several co-executors; and a number of them allow the power to be exercised by such co-executors as shall qualify.

Although the states in general have statutes providing that realty may be sold to pay the debts of the decedent, most courts will not allow sales of realty solely for the purpose of paying the fees or commissions due the executor or administrator.

III
TIME OF SALE

One year is ordinarily considered a reasonable time to allow an executor or administrator for selling the personal estate of the decedent. This period is consistent with the rule that a general legatee is entitled to interest from one year after the testator's death until the legacy is paid. It should be noted, however, that no fixed period is set; the executor or administrator must sell the personal property to be sold within a reasonable time. An executor, of course, ought not to sell before probate of the will. And if sale is made before the granting of letters of administration or letters testamentary.

Pa. L. Rev. 154, 156 (In several states by statute one co-executor may exercise his discretion by granting a power of attorney to another of the co-executors to sign his name to a conveyance of the realty).

Woerner, The American Law of Administration (3rd ed. 1923) p. 1137 (Kentucky is among this number).

See note 95 A. L. R. 1143 (1935) for a general discussion of the various types of debt statutes and the interpretation thereof by the courts as regards the costs of administration of estates.


As to interest see, Ogden v. Patee, 149 Mass., 82, 21 N. E. 227 (1889); Jewell v. Appolonio, 75 N. H. 317, 74 Atl. 250 (1909); Darden v. Orgain, 45 Tenn. 211 (1867); Evans, The Payment of Legacies (1930) 2 Idaho L. J. 163 (1932); note 39 Yale L. J. 590.

See Griswold v. Chandler, 5 N. H. 492 (1831); In re Strasenburgh's Estate, 164 Misc. 445, 300 N. Y. S. 1016 (Surr. Ct. 1937); In re Lazar's Estate, 139 Misc. 261, 247 N. Y. S. 230 (Surr. Ct. 1930); Matter of McCafferty, 147 Misc. 179, 284 N. Y. S. 38 (Surr. Ct. 1933); In re Gardner's Estate, 328 Pa. 229, 185 Atl. 804 (1936); Williams on Executors (12th ed. 1930) p. 991: "... the result of the authorities seems to be, that there is no fixed rule that conversion must take place by the end of the year, but that is the prima facie rule, and that executors who do not convert by that time must show some reason why they do so"; note 92 A. L. R. 436, 441 (1934): Period within which sales of stock must be made "is a question with respect to which no rigid and arbitrary standards exist; what would be a reasonable time on one instance might not be in another; and each case must stand upon its own facts."

Smith v. Barham, 17 N. C. (2 Dev. Eq.) 337, 340 (1833); see Kentucky Statutes (Carroll's 1936), sec. 3886.
mentary, the party making the sale is known as an executor *de son tort*. Under the English common law an intermeddler (even a creditor) was under the doctrine of executor *de son tort* liable to be pursued by any creditor, by the representative who was subsequently appointed and by others interested in the estate. This rule was made severe to prevent intermeddling but it has resulted in injustice as between creditors. As a partial relief the doctrine of relation back has been applied to executors *de son tort* who subsequently to the wrongful act are granted letters of administration or letters testamentary. By this doctrine, as a general rule, "". . . all intermediate acts (respecting the estate), of the recipient of letters, which might rightfully have been done if he had already been appointed, are validated. By it, too, all acts for the benefit of the estate are ratified. The doctrine does not give immunity for wrongful acts."

What is a reasonable time for the sale of personalty after the granting of letters testamentary or letters of administration depends upon the circumstances of each case. Some of the circumstances to be considered are: The opinion of the executor or administrator as to the best time to sell; the existence of creditors and the matter of their desires; the wishes of the beneficiaries of the decedent's estate; the amount of discretion allowed the executor by the terms of the will; the economic conditions at the time; and the nature of the property. There may be other limitations by statute. For example, the Kentucky statute requires perishable chattels to be sold within a reasonable time regardless of whether the sale is necessary for the payment of debts, whereas other provisions requires sale only of sufficient non-perishable personal property to settle decedent's debts.


"Ibid.

"Note 26 A. L. R. 1364, 1371 (1923); Evans, The Intermeddler and the Fraudulent Transferee as Executor, (1936) 25 Geo. L. J. 78 at 87-89 for a contrast between the English rule and the American rule.

"In re Strasenburgh's Estate, 164 Misc. 445, 300 N. Y. S. 1016 (Surr. Ct. 1937); In re Lazar's Estate, 159 Misc. 261, 247 N. Y. S. 230 (Surr. Ct. 1930); In re Rielb's Estate, 321 Pa. 145, 147, 184 Atl. 118, 120 (1938); In re Nemon's Estate, 301 Pa. 425, 152 Atl. 555 (1930); "". . . that an executor or administrator, in retaining stock, acts upon the advice of counsel, may, it seems, be a factor in determining the question of his liability." 92 A. L. R. 436 at 449 (1934).


"Ibid; see Tyson's Estate, 80 Pa. Super. Ct. 29 (1922); note 92 A. L. R. 461 (1934).


"Ibid; Note 92 A. L. R. 436 at 446 (1934).


"Kentucky Statutes (Carroll's 1936), sec. 3851.

"Id. secs. 3853 and 3854.
Even where the testator has specified a time within which the executor is to sell, "the power (to sell) does not cease because of a failure to exercise it within the time prescribed, and it may be exercised after the expiration of the period in the absence of a clear expression to the contrary." But if the power of sale is given for a specified purpose which no longer exists, the executor may not sell thereafter.

The personal representative is, of course, subject to individual liability for failure to make disposition or distribution of the personality within the proper time. As a rule he must make good the loss to the estate. Thus for example, an executor who held cotton for fourteen to twenty months hoping to get better prices, while the price thereof was steadily dropping, was surcharged with the loss. In In re Tyson's Estate the administrator was charged the difference between the inventory value of certain jewelry and the amount realized on the sale of it.

CONFLICT OF LAWS: THE DEVELOPMENT OF THE DOING OF AN ACT THEORY OF JURISDICTION

Until comparatively recently, the traditional categorical bases by which jurisdiction is obtained in actions in personam had been: first, by the presence of the defendant within the state; secondly, by the allegiance or domicile of the defendant; and thirdly, by the consent of the defendant. But with the integration of business into large, incorporated units, and with the ever-increasing ease of travel between the states, the traditional means of obtaining jurisdiction became inadequate in the light of the new problems raised.

An early evidence of such inadequacy appeared in the corporation cases. As the law on obtaining jurisdiction over foreign corporations developed, the courts first attempted to apply one of the traditional theories, namely that service could be effected by consent. The initial argument stated that a corporation had domicile only in

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"Note 31 A. L. R. 1394, 1395 (1924).
"Id. at 1405.
"Pulliam v. Pulliam, Ex'r, 10 Fed. 53 (1881).
Darrah v. Watson, 36 Iowa 116 (1872). Under the traditional theory of "presence", a sub-classification is presented by the general appearance cases (see York v. Texas, 137 U. S. 15, 11 Sup. Ct. 9 (1890)).
Blackmer v. United States, 284 U. S. 421, 52 Sup. Ct. 252 (1932). The domicile cases also come logically under the traditional allegiance basis.