THE LIABILITY OF PERSONAL REPRESENTATIVES UNDER LEASES

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The office of personal representative is an onerous one. Executors and administrators are required to administer the estate of their testator or intestate according to well-known rules. They must get in the estate of the deceased, pay his debts and distribute the remainder to his beneficiaries or next of kin. They owe duties arising from their acceptance of office to such persons. If they misapply the assets of the deceased they will be responsible for the loss sustained in the same way as trustees are. Clearly, the office is one which should not be undertaken lightly. This article seeks to examine one common situation where the onerous nature of the responsibility undertaken by executors and administrators is perhaps underestimated, and in which answers which might initially appear straightforward to questions of liability are in fact complex. The situation under consideration is the not unusual one where the deceased has been holder of a leasehold estate in property. The difficulties which arise for the deceased's personal representatives exist because of the potential for claims to arise after the deceased or his personal representatives have parted with that estate. How that can come about is considered later. For present purposes it is sufficient to illustrate the danger for anyone undertaking the office of personal representative to say that if the deceased was at his death an original lessee (as opposed to assignee of a leasehold estate) then the liability which the deceased had undertaken by executing the lease survives so as to render the personal representatives liable for breaches of covenant which take place even after the death of the deceased, and even after they have assigned the lease to a third party.[1] Worse still, the same liability exists even though the deceased was not the owner of the leasehold estate at the time of his death.[2] If he had ever been the original lessee of property, then at common law his liability (and that of his personal representatives) continues until the term of the lease expires. The particular difficulty here for personal representatives is of course that in many instances they will not know whether the deceased had, at some time in his life, been an original lessee of property.

The position at common law just described has been altered, to the benefit of deceased parties to a lease, in both England and Ireland. In cases to which it applies, the Landlord and Tenant (Covenants) Act 1995 now provides for England and Wales that the liability of a lessee comes to an end on assignment of the lease. Unless therefore the deceased was at his death the

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[1] See *Iremonger* v *Newsam* (1627) Latch 260; *Jenkins* v *Hermitage* (1664) 1 Freem 377; *Helier* v *Casebert* (1665) 1 Lev 127; *Coghill* v *Freelove* (1689) 2 Vent 209; *Walker's Case* (1587) 3 Co Rep 22a, note (Y). Where the deceased was assignee of the lease, so that as between the lessor and the deceased there was privity of estate but not privity of contract, his executors will bring their liability to an end upon assigning the premises over, *eg* by selling to a purchaser. The position at common law has been amended in Ireland, where section 14 of Deasy's Act provides that the assignment of a leasehold estate by someone who was himself an assignee will not discharge his liability unless and until notice in writing of the particulars of the assignment is given to the landlord.

[2] *Arthur* v *Vanderplank* (1734) Kel W 167; *Wilkins* v *Fry* (1816) 1 Mer 244.

holder of the leasehold estate, personal representatives need not concern themselves about any continuing liability. The position of personal representatives was one of the concerns of the Law Commission Working Party examining privity of contract and estate before the 1995 provisions were enacted. The response received by the Working Party however was that the difficulty faced by personal representatives because of contingent liability under leases was "more theoretical than practical".[3]

In Ireland the difficulty faced by original tenants is dealt with by section 16 of Deasy's Act. This provides as follows:

> From and after any assignment hereafter to be made of the estate or interest of any original tenant in any lease, with the consent of the landlord, testified in manner specified in section ten, the landlord so consenting shall be deemed to have released and discharged the said tenant from all actions and remedies at the suit of such landlord, and all persons claiming by, through, or under him in respect of any future breach of the agreements contained in the lease, but without prejudice to any remedy or right against the assignee of such estate or interest.

Where the terms of the section apply, the tenant and his estate are safe from future claims. To what extent consent of the landlord is sought in practice solely for the purposes of the section is unknown. Unless the terms of the lease require the landlord's consent to assignment, it is questionable whether many tenants will seek consent for the purposes of section 16. Whether that be so or not, insofar as the section requires the *consent* of the landlord (who cannot be compelled to give it, and would seem to have nothing to gain by doing so) in order that the tenant be discharged from liability, rather than providing merely that notice be given to the landlord (as under the proviso to section 14), it is likely there are numerous instances where, the lease not requiring consent for assignment, original tenants assign without consent and whose position therefore remains that at common law. It should also be noted that the section has no bearing on the position of an original landlord who assigns his estate in land subject to the lease.[4] The benefit of the section can therefore most clearly be seen in cases where the lease does contain a provision prohibiting or restricting assignment by the tenant. In such cases the consent of the landlord will not only validate the assignment itself, it will by virtue of section 16 operate to discharge an original tenant (and his estate) from future liability. The section is therefore likely to be of most benefit to tenants of commercial or investment property, where restrictions on assignment are commonplace. The practice of selling residential property by way of long lease, with no restriction on assignment, means however that there is likely to be a large number of cases where assignment can take place without the consent of the ground landlord being needed, save for the purposes of section 16.

This potential liability for claims arising after the death of the deceased is not of course limited to claims brought by lessors for breach of covenants in leases. Similar considerations apply where for example the deceased was a shareholder in a company and a call is made on the shares after the deceased dies,[5] or where the deceased was a Name at Lloyd's.[6] The case of breach of

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[3] See Law Com WP No 95 (1986) and Law Com No 174 *Landlord and Tenant Law: Privity of Contract and Estate* (1988) para 3.1.

[4] See Wylie, *Landlord and Tenant Law* (2nd edn, 1998) para 21.30.

[5] See *Taylor* v *Taylor* (1870) LR 10 Eq 477; *Re Bewley's Estate* (1871) 24 LT 177; *Newcastle etc Banking Co (Official Managers)* v *Hymers* (1856) 22 Beav 367.

[6] *Re Yorke deceased* [1997] 4 All ER 907.

covenants by a lessee is however interesting as not only has Parliament enacted measures to attempt to deal with the potential liability, but the courts have evolved a number of rules in their own attempt to make the problem faced by executors and administrators manageable, and to avoid the situation that no estate would ever be administered because of the dangers faced by personal representatives in this regard.

Unravelling the solution to the problem of the liability of personal representatives for breach of lessees' covenants is less than straightforward, necessitating consideration of much ancient authority amassed in days when practice and procedure were very different from the conduct of proceedings today, making it difficult on occasion to ascertain whether or how much of any particular decision is of relevance now. Perhaps because of this, discovery of the relevant principles requires an excursus into the history of civil procedure in addition to an inquiry into the law of succession. Nor does the infrequency in recent times of the occasions on which the courts have had to consider the issue of liability for potential claims make discovery of the law any the easier. With the notable exception of *Re Yorke deceased*,[7] there are few 20th century cases in England or Ireland in which there has been any detailed explanation of the law in question. It is hoped that the following analysis will therefore fill a gap in the literature by providing a contemporary explanation of the principles of law applicable in Northern Ireland to claims against personal representatives arising as the result of the breach of covenants undertaken by a lessee.

NATURE OF LIABILITY UNDER LEASES

Leases create contractual rights and obligations as well as proprietary rights. While the obligations entered into by the parties are invariably couched in terms of covenants by the one and the other, it is also the case that there are consequences which flow from the relation of tenure created by the parties. This hybrid nature of leases has been the subject of some scrutiny in recent years.[8] One Australian authority illustrates the difficulties which arise from the nature of leases in the context of liability of personal representatives for rent. In *Commissioner of Stamp Duties (New South Wales)* v *Brasch*[9] the deceased was at his death the holder of leasehold estates in two properties. The value for death duty purposes of one of these properties was assessed at nil. Within three years of the death of the deceased the executor incurred a liability to the lessor for rent under the lease of this property, and the executor sought to deduct the amount of the liability to reduce the value of the estate for calculation of the duty payable. Under the relevant legislation, in calculating the value of the estate an allowance could be made for "all debts actually due and owing by [the deceased] at the time of his death". No allowance could be made

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[7] [1997] 4 All ER 907.

[8] See generally Bright and Gilbert, *The Nature of Tenancies* (1995). For issues arising from the conceptual nature of tenancies see *Hussein* v *Mehlman* [1992] 32 EG 59; *Re Olympia and York Canary Wharf Ltd* [1993] BCC 159; *Chartered Trust plc* v *Davies* [1997] 49 EG 135; *Nynehead Developments Ltd* v *Fibreboard Containers Ltd* [1997] 02 EG 139 and the House of Lords' decisions in *Clydesdale Bank Plc* v *Davidson* 1997 SC (HL) 51, *Ingram* v *Commissioners of Inland Revenue* [1999] 1 All ER 297 and *Bruton* v *London and Quadrant Housing Trust*, *The Times*, 25th June 1999. In Ireland section 3 of Deasy's Act provides that the relation of landlord and tenant is deemed to be founded on the express or implied contract of the parties. The provision is (in)famous for the uncertainty of its meaning. For a full discussion of section 3 see Wylie, *Landlord and Tenant Law* (2nd edn, 1998) ch 2.

[9] (1937) 57 CLR 69.

however for "contingent debts" unless the debt became payable within three years of the death. The court had therefore to consider whether the potential liability under the lease was a debt "due and owing" at the death of the deceased, or a "contingent debt" which had become payable within the period stipulated by the legislation. In either case however credit would be given. The court held that the executor was entitled to a refund of death duty on the basis that an allowance should be made for the liability, as the liability was a contingent debt which had become payable within three years. The members of the court differed however in their analysis of the liability incurred by the executor, which is relevant for present purposes. Latham CJ took the view that the whole amount of the rent was a contingent debt for the purposes of the legislation, whereas Dixon J, with whom the other members of the court concurred, considered that the "contingent debt" was only the amount of the difference between the rent payable to the lessor and the profits received or which might have been received by the executor from the property. In the event, the difference of opinion of the members of the court did not matter, as the parties had agreed to proceed on the basis of Dixon J's view.

The reasoning articulated by Dixon J, for his view that only the difference between the rent payable and the profits receivable by the personal representatives was the contingent debt, is based on the difference between the liability of a lessee for rent arising as a result of tenure on the one hand, and as a result of the lessee's covenant to pay the rent on the other:

> "Rent issues out of the land, and what may be considered as the primary liability to pay it arises from privity of estate and not from covenant. The lessor's [*sic*] covenant imposes upon him a second liability, which may be considered secondary, and this liability binds the executors independently of the devolution of the term. It is this liability which forms the contingent debt for the satisfaction of which resort is made to the deceased's assets. But the liability from the reddendum, as distinguished from covenant, passes with the term, at any rate when the assignee is accepted by the lessor. . . [T]he first source for payment of the rent is the rents and profits arising from the land after the deceased's death, and these never did form part of his estate, that is, of the property of which he died possessed."[10]

His Honour went on:

> "Now, if it be true that under the reddendum considered apart from the covenant, a lessee's liability for rent not already accrued ends when the term passes from him, and that this liability affects only the person in whom the term vests, it would follow that no allowance under any of the provisions of sec. 107 could be made for rent accruing after the lessee's death, except in respect of his liability under the covenant. His liability under the reddendum would cease on his death or, at any rate, upon his executor's entry. If the term became vested in a legatee to whom it was bequeathed, the liability in covenant of the executor, as such, for future rent would remain unimpaired, but the secondary character of the liability would be apparent. The legatee would be liable as assignee of the term and, as between the estate and him, his liability would be primary. The lessor's right of recourse against the executor would not become

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[10] *Ibid*, 82. See also *Dean & Chapter of Bristol* v *Guyse* (1667) 1 Wm Saund 111, 112 n(1); *Buckley* v *Pirk* (1710) 1 Salk 316; *Tremeere* v *Morrison* (1834) 1 Bing NC 89; *Allott* v *Walker* (1825) Sm & Bat 446; *Minford* v *Carse* [1912] 2 IR 245.

> conditional. He could exercise it without first exhausting his remedies against the land and against the legatee in whom the term has vested. But, if, after the term so vested, the questions were considered whether the liability of the executors to future rent was contingent within the meaning of sec. 107(2)(*d*) and whether there was a right of reimbursement within sec. 107(2)(*d*), I think the correct answers would be that the liability to future rent was contingent, and one for which there was a right of reimbursement."[11]

There is therefore, according to Dixon J, a clear distinction between liability arising as a result of tenure and as a result of the covenant entered by a lessee to pay rent. It is only in relation to the latter that a contingent debt can be said to exist. The liability of personal representatives on covenants made by the deceased therefore requires examination.

PERSONAL REPRESENTATIVES' LIABILITY ON COVENANTS MADE BY DECEASED

It has long been established that personal representatives are liable on contractual obligations of the deceased broken in his lifetime, and the same is true for contracts broken after the deceased's death, though the position may be different in the case of contracts requiring the exercise of personal skill.[12] In the words of Coke CJ, "[t]he executors do represent the person of testator, as to the performance of covenants, by him to be by covenant performed."[13] The fact that the terms of the obligation undertaken by the deceased do not make reference to the personal representatives makes no difference: "[a]lthough the executors are not expressed in an obligation, yet the law shall charge them, because they represent the estate of the testator. The law is the same of administrators. . ."[14]. As Lord Macclesfield explained in *Hyde* v *Skinner*,[15] the executors are implied and bound without naming.[16] The extent of this liability of executors and administrators to perform the covenants of the deceased whom they represent can be seen in *Phillips* v *Everard* [17] and *Stephens* v *Hotham*,[18] where orders were made against personal representatives for specific performance of covenants by deceased lessees to

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[11] *Ibid*, 83.

[12] *Siboni* v *Kirkman* (1836) 1 M & W 418. See now Law Reform (Miscellaneous Provisions) Act (NI) 1937, s14.

[13] *Thurseden* v *Warthen's Executors* (1613) 2 Bulst 158. Although liable for breach of the obligation undertaken by the deceased, there was a distinction between actions brought against the personal representatives on the basis that they were liable for performance of the covenant undertaken by the deceased, and actions which might be brought on the basis of an obligation undertaken by the personal representatives themselves. Where under the old forms of action the action was debt, the action would be brought in the *detinet* rather than the *debet et detinet*, signifying that the personal representatives unlawfully detained the assets of the deceased rather than having assumed a personal responsibility to the obligee. In cases of personal liability, the action was brought in the *debet et detinet*. See *eg Overton* v *Sydall* (1597) Poph 120; *Hargrave's Case* (1599) 5 Co Rep 31a; *Rich* v *Frank* (1610) Cro Jac 238; *Bailiffs & Commonalty of Ipswich* v *Martin* (1664) Cro Jac 411; *Boulton* v *Canon* (1675) 1 Freem 336; *Buckley* v *Pirk* (1710) 1 Salk 310.

[14] *Core's Case* (1536) 1 Dyer 20a; *Anon* (1536) 1 Dyer 14a.

[15] (1723) 2 P Wms 196.

[16] See also *Hunt* v *Swain* (1665) 1 Keb 890.

[17] (1831) 5 Sim 102.

[18] (1855) 1 K & J 571.

renew their leases, albeit that in the latter case the court emphasised that the form of lease to be made should not subject the personal representatives to *personal* liability.[19]

If such is the liability generally of executors and administrators in respect of obligations undertaken by the deceased, is there any difference where the obligation undertaken is not certain to arise, but merely contingent?[20] Clearly if the personal representatives are aware that a liability is bound to arise, they must make provision for it. If the deceased has undertaken to pay a sum on a future date, the liability is certain and the personal representatives must make the payment on the specified date notwithstanding the death of the deceased meantime. In *Atkinson* v *Grey*[21] the court refused to allow payment out of funds retained against future liability on a bond, as the liability was certain and not contingent. The more difficult question arises where there may or may not be a liability in the future under the deceased's obligation. If for example the deceased had undertaken to keep premises in repair, should the personal representatives retain the deceased's estate until the duration of the obligation is at an end, in case of a potential claim? The cases are far from consistent. In *Woodcock* v *Hern*[22] a creditor brought an action of debt against an executor. The executor pleaded that the testator had made a statute staple to pay £1,000 to a third party, and that over and above that the executor had nothing. Holding that the executor's plea was good, Gawdie J said:

> "The plea is good without question. I have heard divers learned men doubt of that; for if testator were bound in a statute to perform covenants which are not yet broken, and it may be they never will be broken, and then he shall never be chargeable by this statute, and yet he shall never be compelled to pay any debts, which will be a great inconvenience; and again, I think there will be a greater mischief of the other part; for, put the case if the executors do pay this debt, and the statute is broken, after he shall be chargeable by a *devastavit* of his own proper goods, the which will be a greater inconvenience."

On the other hand, in *Foster's Case*[23] the court held that a replication by the plaintiff to a similar plea by the defendant executor was good, as the obligation entered into by the deceased had not yet been broken.

If the personal representatives choose to distribute the estate without making provision for the possible liability it may be that the court will not prevent them. In *Read* v *Blunt*[24] the court refused to restrain executors from paying simple contract debts until they had set aside a fund for payment of an annuity, unless a case of past or probable misapplication of assets had were made out. Similarly, in a Scottish case the court held that an executor was not bound to retain funds to meet the possible claim for aliment.[25] The executors run the risk however that they will have to pay any claim later arising. As the Lord Chancellor explained in *Knatchbull* v *Fearnhead*,[26] if an executor passes his accounts in court he is discharged

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[19] For the difference between the personal liability and representative liability of executors and administrators, see discussion below.

[20] See discussion by Coke CJ in *Nector and Sharp* v *Gennet* (1595) Cro Eliz 466.

[21] (1853) 1 Sm & G 577.

[22] (1601) Gouldsb 142.

[23] (1588) 2 Leon 212.

[24] (1832) 5 Sim 567. See also *Collins* v *Crouch* (1849) 13 QB 541.

[25] *Edinburgh Parish Council* v *Couper* 1924 SC 139.

[26] (1837) 3 My & Cr 122.

from further liability and the creditor is left to his remedy against the legatee, but if the executor pays away the residue of the deceased's estate without passing his accounts, he does so at his own risk. Thus for example in *Taylor* v *Taylor*[27] and *Re Bewley's Estate*[28] executors who had distributed the estate were held liable for calls on shares held by the deceased. In *Re Yorke deceased* [29] Lindsay J undertook an extensive review of the authorities in an action where the possibility of a claim against executors existed by reason of the deceased having been a Name at Lloyd's. The learned Judge concluded that while the executors had the right to distribute in the circumstances, they had no obligation to do so and had the right to come to court for protection to avoid personal liability.[30]

Notice of possible claims

If the personal representatives do choose to distribute the estate without making provision for possible claims arising in the future, then subject to statutory provisions regarding advertising for creditors,[31] the better view is that the fact that the personal representatives have no notice of the possibility of a claim arising will be no answer if a claim does materialise.[32] In *Governor and Company of Chelsea Waterworks* v *Cowper*[33] an action was brought against an executor on a bond executed by the testator some 30 years earlier. The executor admitted having received assets sufficient to pay the bond, but pleaded that he had administered the estate some 22 years before, and now had nothing left. Lord Kenyon held that where an executor had administered an estate with no notice of a subsisting demand, then "provided he had not done it too precipitately", there would be a good answer to the claim. In *Davis* v *Blackwell*[34] the court held that payment of legacies six months after the testator's death had been too precipitate. In *Norman* v *Baldry*[35] however the absence of notice was held no answer to the executor's claim to be allowed payment of legacies in answer to a debt brought on a bond of the testator, Shadwell VC saying he had always understood the law to be that an executor was liable if he paid legatees, notwithstanding he had no notice of the bond, and that he (the Vice-Chancellor) was not disposed to agree with what was attributed to Lord Kenyon in *Governor and Company of Chelsea Waterworks* v *Cowper*.[36] Again, in *Hill* v *Gomme*,[37] the absence of notice of a claim was held to be no answer to a claim by the plaintiff, even

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27 (1870) LR 10 Eq 477.
28 (1871) 24 LT 177.
29 [1997] 4 All ER 907.
30 For discussion of the principles involved, see below.
31 Trustee Act (NI) 1958, s 28.
32 See however *Clough* v *French* (1845) 2 Coll 277. Before 1869 debts of the deceased ranked in priority, with specialty debts taking precedence over simple contract debts, and the question arose whether notice by personal representatives of a debt in a higher degree was relevant to their liability should they have paid debts in a lower degree and exhausted the assets. See *Harman* v *Harman* (1686) 3 Mod 115; *Davies* v *Monkhouse* (1729) FitzG 76; *Sawyer* v *Mercer* (1787) 1 TR 690; *In re Fludyer* [1898] 2 Ch 562. Since 1869 the priority of specialty debts over simple contract debts has been abolished: see Administration of Estates Act 1869, s1; *In re Hastings* (1877) 6 Ch D 610.
33 (1795) 1 Esp 275.
34 (1832) 9 Bing 5.
35 (1834) 6 Sim 621. See also *Hawkins* v *Day* (1753) Amb 160, 803 and *Knatchbull* v *Fearnhead* (1837) 3 My & Cr 122.
36 See also *Spode* v *Smith* (1827) 3 Russ 511.
37 (1839) 1 Beav 540.

though the executors had advertised for claims against the testator in newspapers.[38]

REPRESENTATIVE LIABILITY UNDER LEASES

In addition to pointing out the differences between liability arising as a result of the tenure between landlord and tenant on the one hand and as a result of the lessee's covenant to pay rent on the other, *Commissioner for Stamp Duties (New South Wales)* v *Brasch*[39] also points to a difference between the liability of executors and administrators as representatives of the deceased on the one hand and as assignees of the leasehold estate on the other. This distinction between *representative* liability and *personal* liability is fundamental, and it is essential to bear the distinction in mind when considering the position of personal representatives under leases.[40] This section examines the nature of the liability of personal representatives merely as such, while in the next the personal liability of executors and administrators is considered. A Canadian case conveniently illustrates that different consequences may ensue for the plaintiff according to the nature of the defendants' liability. In *Ryckman* v *Trusts & Guarantee Co Ltd* [41] an action was brought by the lessor against the executors of a deceased lessee for rent and other money due under the a lease. The court held that the plaintiff was bound to make an election as to whether he wished to claim against the executors as representatives of the deceased, or personally: if the former, he should be allowed $15,244 and interest, whereas in the event that the plaintiff sought recovery against the executors personally, the amount to be allowed (for reasons explained below) would be $2,240.

A number of points concerning the representative liability of personal representatives may be noted:

Election by plaintiff

It is open to the plaintiff to bring his action against the personal representatives either in their representative capacity or in their personal capacity[42] or both, but as *Ryckman* v *Trusts & Guarantee Co Ltd* [43] shows, the plaintiff will have to make an election as to the liability he wishes the defendants to bear before the court makes an order in his favour. In many cases it is likely that establishing that executors or administrators are liable in their personal capacity will be of greater benefit to the plaintiff, as he will not be limited to seeking to recover out of the deceased's assets which will likely have been dispersed by the defendants; hence the cases considered below where plaintiffs who have recovered against executors in their representative capacity have later brought actions based on a *devastavit*. As *Ryckman* v *Trusts & Guarantee Co Ltd* itself illustrates however, an order against personal representatives in their personal capacity will not always be preferable to the plaintiff.

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[38] For protection now afforded by advertising for claims, see Trustee Act (NI) 1958, s 28.

[39] (1937) 57 CLR 69.

[40] See generally *Dean & Chapter of Bristol* v *Guyse* (1667) 1 Wm Saund 111, 112 n(1); *Jevens* v *Harridge* (1666) 1 Wm Saund 1 n(1); *Hargrave's Case* (1599) 5 Co Rep 31a n(A); *Boulton* v *Canon* (1675) 1 Freem 336; *Buckley* v *Pirk* (1710) 1 Salk 316; *Minford* v *Carse* [1912] 2 IR 245; *IRC* v *Stannard* [1984] 2 All ER 105.

[41] [1929] 1 DLR 545.

[42] *Boulton* v *Canon* (1675) 1 Freem 336; *Buckley* v *Pirk* (1710) 1 Salk 316.

[43] [1929] 1 DLR 545.

No taking of possession

It will be seen in due course that where personal representatives take possession of the deceased's leasehold property, they become personally liable as assignees of the lease. Representative liability therefore can be claimed by executors and administrators only where they have not taken possession of the property. In what circumstances this is likely to occur is considered later.

Liability to extent of deceased's assets only

Thirdly, the liability incurred by executors or administrators where they are liable only as representatives of the deceased extends only to the value of the deceased's estate.[44] The personal representatives have to meet the debts of the deceased out of the deceased's assets and the claim against the personal representatives in their representative capacity stands on the same basis. The personal representatives are however liable for the full rent, in contrast, as will be seen, to the case where they are sued in their personal capacity.[45] Also, limitation of the claim to the value of the deceased's estate extends only to the debt as opposed to the costs, which may be awarded against the executors personally.[46]

Plea of plene administravit

The problem identified at the outset of this article, and upon which discussion has proceeded, is that there is a danger that at some time after personal representatives have completed the administration of the estate of a testator or intestate, a claim may arise which has to be met by the personal representatives. What then should be done by personal representatives against whom an action is brought after distribution of the estate has been completed? Although it will be seen[47] that where such a claim does materialise, any judgment obtained by the creditor will be a judgment which may be levied out of the asssets of the deceased, it is essential that the personal representatives enter a plea of *plene administravit* in the action brought by the creditor. Although such plea will not be an answer to any liability found to exist to the creditor,[48] failure to enter the plea will have serious consequences in regard to any steps the creditor may subsequently take to enforce the judgment obtained in his favour.

(i) Nature of plea

The plea of *plene administravit* signifies that the personal representatives have administered all the estate of the deceased and now have none of the assets of the deceased in their possession. The alternative plea of *plene administravit praeter* signifies that the personal representatives have administered and now have no assets in their possession save those specified. Both derive from the older plea of *rien enter mains*. The plea

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[44] *Pitcher* v *Tovey* (1692) 4 Mod 71; *Wilkins* v *Fry* (1816) 1 Mer 244; *Youngmin* v *Heath* [1974] 1 All ER 461.

[45] *Howse* v *Webster* (1607) Yelv 103; *Helier* v *Casebert* (1665) 1 Lev 127.

[46] *Youngmin* v *Heath* [1974] 1 All ER 461.

[47] See below.

[48] *Lydall* v *Dunlapp* (1743) 1 Wils KB 4 and *Wilson* v *Wigg* (1808) 10 East 313 must be understood as meaning no more than the plea can be entered where the action is brought against the executors in their representative capacity rather than in their personal capacity.

cannot therefore succeed where the executors have still got control of the estate.[49]

(ii) Effect of plea

By entering a plea of *plene administravit* personal representatives admit a debt owing to the plaintiff, but not the amount, so that in addition to proving that assets have come into the personal representatives' hands, the plaintiff must establish the quantum owing, otherwise he will recover nominal damages only.[50] A successful plea of *plene administravit* on the part of executors or administrators against whom an action is brought by a lessor was originally sufficient to defeat the plaintiff's action, the plea being a plea in bar,[51] and to entitle the defendants to costs, even though the plaintiff succeeded in establishing his claim.[52] Where therefore a plea of *plene administravit* was entered by executors or administrators, the plaintiff ran the risk that by joining issue on the plea and proceeding to trial he would be unable to recover at all, should the jury find that the assets of the deceased had indeed been fully administered by the defendants. Later, a successful plea of *plene administravit* came to mean only that the plaintiff would be responsible for the costs of the defendants.[53] The plaintiff could however still obtain judgment in his favour on the claim itself. It is thus necessary to appreciate the difference between a dispute as to the liability of personal representatives on the plaintiff's claim on the one hand, and the issue whether the personal representatives can show that they have no assets of the deceased on the other.

As noted above, at a time when a successful plea of *plene administravit* would defeat the plaintiff altogether, a plaintiff faced with such a plea clearly ran a risk if he joined issue on the plea. The decision in *Shipley's Case*[54] afforded him a solution however. The court there held that where a plea of *plene administravit* is entered, the plaintiff can accept the plea and immediately seek judgment in his favour on his claim.[55] The plea itself

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49 *Smith* v *Day* (1837) 2 M & W 684.

50 *Shelly's Case* (1693) 1 Salk 296.

51 *Brickhead* v *Archbishop of York* (1617) Hob 197; *Dorchester* v *Webb* (1633) Cro Car 372; *Erving* v *Peters* (1790) 3 TR 685.

52 *Hogg* v *Graham* (1811) 4 Taunt 135; *Ragg* v *Wells* (1817) 8 Taunt 129; *Edwards* v *Bethel* (1818) 1 B & Ald 254.

53 See *Millar & Co* v *Keane* (1888) 24 LR Ir 49, where the court, finding the debt to be due to the plaintiff but that the defendant had fully administered, ordered that the plaintiff was entitled to sign judgment for the debt and costs of the action, to be levied off the testator's estate, which should thereafter come into the defendant's hands, but that the plaintiff should pay the defendant the costs of the suit and the motion for judgment.

54 (1610) 8 Co Rep 134a.

55 The view that on a plea of *plene administravit* the plaintiff might accept the plea and take judgment immediately, though not to be executed until assets would come into the defendants' hands, was seen as erroneous in *Dorchester* v *Webb* (1633) Cro Car 372, by analogy with the case where the plaintiff proceeded to trial on the plea and lost. The right to accept judgment *quando acciderint* was however affirmed in *Noell* v *Nelson* (1670) 1 Vent 94. For the form of judgment, see *Findlater & Co* v *Tuohy* (1885) 16 LR Ir 474. By taking judgment *quando acciderint* the plaintiff admits that the defendant does not, at the time the action was brought, have assets to satisfy the plaintiff's claim: *Re Smith* [1924] 4 DLR 1288.

operates as an admission by the defendants of their liability on the claim.[56] Judgment in such a case is known as a judgment *quando acciderint* or *in futuro*, as the price the plaintiff pays in taking judgment is that he cannot execute the judgment until assets of the deceased later come into the hands of the defendants. It is also a judgment *de bonis testatoris* (or *intestati*) in that the plaintiff can seek execution of the judgment only out of assets of the deceased.

The position now therefore is that where a plea of *plene administravit* is entered by executors, the plaintiff can immediately obtain judgment *de bonis testatoris quando acciderint* in relation to his claim. Alternatively, he can join issue on the plea and proceed to trial at the risk of costs if the defendants are successful in showing they have fully administered. Even if they do however, the plaintiff may obtain judgment on the claim, assuming liability on that is not in issue. Judgment will again however be *de bonis testatoris.*

(iii) Onus of proof

Where personal representatives do plead *plene administravit*, the onus is on the plaintiff to establish that assets have come into their hands,[57] but on the personal representatives to show that they have duly administered the estate:[58] it is not necessary that the plaintiff reply alleging the personal representatives have been guilty of a *devastavit*.[59]

(iv) Failure to enter plea

Where a plea of *plene administravit* is entered by personal representatives in an action brought by a creditor for a debt arising after they have administered the estate, and the plaintiff does not accept the plea, issue will be joined and the court will be called on to pronounce on the issue whether the defendants have assets or not. If the court finds that the personal representatives cannot sustain the plea, the finding will be that they have assets of the deceased in their possession, against which the plaintiff can immediately proceed in the execution of a judgment in his favour on the claim. Where the court finds evidence of a *devastavit*, i.e. that but for misapplication of assets there would be assets of the deceased in the hands of the personal representatives, the position hitherto was that the personal representatives were deemed to have the assets of the deceased which had been misapplied. The court in other words would make a finding that assets remained, rather than a finding that a *devastavit* had occurred.[60] Whether such would be the position now is considered later in this article.[61]

A similar position obtains where personal representatives fail to enter a plea of *plene administravit* in the action brought by the plaintiff. If judgment goes against them on the claim, either by default or after trial, it will not be possible for the personal representatives in any later proceedings to deny that they had assets when judgment was obtained. Failure to enter the plea estops the personal representatives later from disputing they had assets.[62] On the basis of the hardship this may cause

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56 *Shelly's Case* (1693) 1 Salk 296.
57 *Giles* v *Dyson* (1815) 1 Stark 32; *Jackson* v *Bowley* (1841) Car & M 97.
58 *Jackson* v *Bowley* (1841) Car & M 97.
59 *Davis* v *Blackwell* (1832) 9 Bing 5.
60 *Reeves* v *Ward* (1825) 2 Bing NC 235.
61 See below.
62 *Rock* v *Leighton* (1700) 1 Salk 310 (the report in Salkeld is incomplete (see *Ramsden* v *Jackson* (1737) 1 Atk 292) and a fuller report may be found at 3 TR 690); *Treil* v *Edwards* (1704) 6 Mod Rep 308; *Ramsden* v *Jackson* (1737) 1

personal representatives, it has been suggested that reform of this aspect of the law might be considered.[63]

The effect of an executrix failing to enter a plea of *plene administrativit* was the question in *Re Max Brampton Inc and anor* v *Durish Investment Corporation Ltd*.[64] Here the plaintiffs brought an action against the defendant in 1987. In these proceedings a counterclaim was made by the defendant and the testator. The testator died in 1992 and the proceedings were continued by his executrix. In 1994 the plaintiffs obtained judgment against the defendant, and were awarded costs against the defendant and the estate of the testator. The question for the court was whether the executrix was personally liable for the costs awarded, on the basis that she had not entered a plea of *plene administravit* in the action brought by the plaintiffs. Chapnik J held that she was not. Neither the testator nor his executrix were defendants in the action brought by the plaintiffs, being parties only in the counterclaim. *Plene administravit* being a defence, it was not therefore open to the executrix to enter such a plea. In any event, as Chapnik J explained, it would not have been appropriate for the executrix to enter the plea:

> "Failure to make the plea is a tacit admission that there are sufficient assets in the estate to satisfy any judgment entered against it, the amount of which, if proved, is known at the outset. An award of costs, in contrast, (the only debt to the estate which could possibly have resulted from the litigation) is purely discretionary, the quantum of which is solely for the court to decide. It would not have been possible for an executrix to know at the outset of the litigation whether or not the estate would have sufficient assets to satisfy any costs award which might be levied against it as an unsuccessful plaintiff."

(v) Due administration

The plea of *plene administravit* means not only that the assets have been fully administered, but that they have been duly administered, or administered according to law.[65] Thus executors will not be able to succeed on the plea by showing that they have paid legacies,[66] as this amounts to a *devastavit*. In *Pearson* v *Archdeaken*[67] a lessor brought an action against the executors of a lessee for non-payment of rent and failure to keep the premises in repair. The defendant pleaded *plene administravit* and sought to support the plea by showing he had paid assets of the testator to a legatee some year before. Upholding the verdict of the trial judge in favour of the plaintiff, Bushe CJ said:

Atk 292; *Skelton* v *Hawling* (1749) 1 Wils 258; *Erving* v *Peters* (1790) 3 TR 685; *Hope* v *Bague* (1802) 3 East 2; *Re Higgins' Trusts* (1861) 2 Giff 562; *Thompson & Sons* v *Clarke* (1901) 17 TLR 455; *Re Marvin* [1905] 2 Ch 490; *Ruttle* v *Rowe* (1919) 50 DLR 346; *Langstaff* v *Langstaff* (1920) 55 DLR 429; *Commander Leasing Corp Ltd* v *Aiyede* [1983] 4 DLR (4th) 107. See also *Dawson* v *Gregory* (1845) 7 QB 756.

63 *Midland Bank Trust Co Ltd* v *Green (No 2)* [1979] 1 All ER 726 (Oliver J).

64 1996 Ont C J LEXIS 347.

65 *Commander Leasing Corp Ltd* v *Aiyede* [1983] 4 DLR (4th) 107.

66 See *Eels* v *Lambert* (1648) Aleyn 38; *Davis* v *Blackwell* (1832) 9 Bing 5; *Brown* v *Holt* [1961] VR 435; *Taylor* v *Deputy Federal Commissioner of Taxation* (1969) 123 CLR 206; *Commander Leasing Corp Ltd* v *Aiyede* [1983] 4 DLR (4th) 107. See also *Smith* v *Day* (1837) 2 M & W 684.

67 (1831) Al & Nap 23.

> "The plaintiff's right to recover is established as a legal right, and no case has been cited to shew that such a defence is available to a personal representative in a court of law. On the contrary, notwithstanding some *dicta*, it appears from may cases in equity, that such a defence would not be available in equity against the plaintiff's demand; payment of legacies being considered there as no answer to the claims of creditors. If then the defendant would have no equity in the Court of Chancery against this defendant, upon what principle can it be supposed that the defence can be available in this court?"

Again, if personal representatives have been able to derive profit from the land equal to or in excess of the rent, they will fail on a plea of *plene administravit*, as the profits must first be applied towards the rent. Where the land does yield some profit, but less than the rent, the proper course is for the personal representatives to plead *plene administravit praeter* the amount they have derived.[68]

Judgment de bonis testatoris / intestati only

(i) Meaning

Subject to the questions of costs and interest discussed below, it follows from the proposition that the personal representatives are liable only to the extent of the deceased's assets that any judgment obtained against them can be levied only out of the deceased's assets.[69] It will be convenient to continue to use the expressions *de bonis testatoris* and *de bonis intestati*[70] to distinguish judgments which may be levied only out of the assets of the deceased from personal judgments against the personal representatives which can be levied out of the personal representatives' *own* property (judgments *de bonis propriis*). Use of the expressions should not however be misunderstood: all property of the testator, real as well as personal, is now available to personal representatives for payment of debts.[71] Continued use of *de bonis* therefore needs to be treated carefully. An illustration of the difficulties which can occur is *Wahl* v *Nugent*.[72] Judgment was obtained by the plaintiff "to be levied out of the proper goods and chattels" of the deceased. The plaintiff later sought to levy execution against goods *and lands* of the deceased. The sheriff returned *nulla bona testatoris.* In subsequent proceedings to make the executor personally liable, on the basis that the sheriff's return showed the executor had committed a *devastavit*, Macdonald J held that since by statute land as well as chattels was available for payment of debts, a judgment against executors was conclusive that they had assets, real as well as personal, to

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[68] *Dean & Chapter of Bristol* v *Guyse* (1666) 1 Wm Saund 111, 112 n(1).

[69] *Anon* (1573) Dyer 324a; *Castilion* v *Smith* (1620) Hut 35; *Collins* v *Thoroughgood* (1631) Het 171; *Boulton* v *Canon* (1675) 1 Freem 336; *Vernon* v *Thellusson* (1844) 1 Ph 466. See also *Humphreys* v *Harwood* (1851) 3 Ir Jur 194 where although judgment was entered simply against the defendant, the latter had been sued as executor and execution was limited *de bonis testatoris*, and *Pim Bros Ltd* v *Cunningham* (1925) 59 ILTR where judgment *de bonis propriis* was refused with costs in an action against a defendant sued as *executrix de son tort*.

[70] It will be convenient hereafter to refer to executors and judgments *de bonis testatoris* without mention of administrators and judgments *de bonis intestati*. Precisely the same considerations however apply whether the personal representative is executor or administrator.

[71] Administration of Estates Act (NI) 1955, s 29.

[72] [1924] 1 DLR 155.

satisfy the plaintiff's debt, and that the return of *nulla bona* merely showed the executors had no *personal* property. Accordingly the return was not evidence of a *devastavit*.[73]

(ii) County Court judgments

The distinction between judgments *de bonis testatoris* and judgments *de bonis propriis* is fundamental. A difficulty may exist however in the case of judgments obtained in Northern Ireland in the County Court. In *Powell* v *Powell*[74] the Master of the Rolls held that a civil bill decree against an administrator was in the nature of a judgment *de bonis propriis*, saying:

> "The executor or administrator is, I believe, considered to be personally liable. At all events his own goods may be seized under the civil-bill decree. It is not necessary for me to offer any opinion whether the form which I believe is always adopted in civil-bill decrees against personal representatives be right: it is sufficient for me to state that the civil-bill decrees in this case are in the usual form, which form the Common Law Judges have recognised when cases have come before them on appeal, and the civil-bill decree is at all events equivalent to a judgment *de bonis propriis* in the Superior Courts."

The view that county court judgments against personal representatives are the equivalent of judgments *de bonis propriis* gives rise to difficulty. The point is illustrated by *The State (Hunt*) v *Circuit Court Judge*,[75] where an application to quash a decree made by the Circuit Court in the Republic was made by a personal representative. The basis of the application was that the applicant had been sued as personal representative, but the decree against him imposed personal liability. By a majority, the application was refused. The majority members of the Court took the view that the decree had been made in accordance with the forms and procedures regulating the Circuit Court and accordingly was valid. In his dissenting judgment however, Kennedy CJ considered that had an order in the form made by the Circuit Court Judge been made in the High Court, it would have been set aside and an order *de bonis testatoris* substituted. Nor in the opinion of the Chief Justice did the statutory provisions regulating the County Court and Circuit Court render it competent for the Circuit Court Judge to make an order imposing personal liability. This consideration however was in any event beside the point:

> "It is not indeed, in my opinion, a matter of procedure or practice at all, but a matter of substantive law and jurisdiction affecting legal rights and liabilities. It may be that in counties here and there, or by this or that County Court Judge from time to time, the practice of making such decrees at the suit of creditors crept into use for a time, but that could not alter the law or create a jurisdiction in the Court which was not given it by law."

(iii) Sum awarded

Where the plaintiff does establish that he is entitled to recover from the estate of the deceased, what order should be made by the court? Where the plaintiff is content to accept judgment *quando acciderint*, or where the personal representatives succeed in showing they have fully administered, so that they have nothing of the estate now in their possession, the plaintiff

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[73] See below. See also *Langstaff* v *Langstaff* (1922) 70 DLR 55.
[74] (1849) 12 Ir Eq R 501.
[75] [1934] IR 196.

is entitled to judgment for the whole debt.[76] It was originally the practice of the courts to make an order in favour of the plaintiff for the whole amount of the debt also in cases where the executors were found to have assets of the deceased in their hands, but of insufficient value to cover the debt.[77] Later however the practice changed, so that the court would make an order that the plaintiff recover the value of the assets proven to have come into the executors' hands, and an order *quando acciderint* for the balance.[78] It has been suggested however that the difference may not have mattered much in practice, save where there was more than one executor, as even under the former practice, judgment could be executed only to as much as was in the executors' hands.[79] The form of judgment contained in the Rules of the Supreme Court in England[80] is that the executor:

> "do pay the plaintiff £---- and costs to be taxed, the said sum and costs to be levied of the real and personal estate within the meaning of the Administration of Estates Act 1925 of the deceased at the time of his death come to the hands of the defendant as such executor [*or* administrator] to be administered, if he has or shall hereafter have so much thereof in his hands to be administered, and if he has not so much thereof in his hands to be administered, then, as to the costs aforesaid, to be levied of the goods, chattels and other property of the defendant authorised by law to be seized in execution [*or as may be according to the order made*]".[81]

(iv) Costs and interest

Although judgment for a liability of the deceased arising after distribution of the estate will be a judgment *de bonis testatoris*, the executors may nonetheless become personally liable for costs. The correct form of judgment appears to be that the plaintiff recover the debt and costs out of the assets of the testator in the hands of the executors if they have so much, and if not, then the costs to be recovered out of the executors' own property.[82] In *Cockle* v *Treacy*[83] Walker C summarised the position as follows:

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[76] *Brickhead* v *Archbishop of York* (1617) Hob 197.

[77] See *Anon* Moore 246; *Bracebridge & Baskervile's* Case (1588) 1 Leon 68; *Hargthorpe* v *Milforth* (1594) Cro Eliz 319; *Waterhouse v Woodstreet* (1598) Cro Eliz 592; *Shipley's Case* (1610) 8 Co Rep 134a; *Newman & Babbington's* Case (1610) Godb 178; *Brickhead* v *Archbishop of York* (1617) Hob 197; *Snape* v *Norgate* (1629) Cro Car 167; *Dorchester* v *Webb* (1633) Cro Car 372; *Gawdy* v *Congham* (1647) Aleyn 37; *Oxendam* v *Hobdy* (1673) 1 Freem 351. See also *Hancocke* v *Prowd* (1669) 1 Wm Saund 328, 336 n(10).

[78] *Harrison* v *Beccles* (1769) noted 3 TR 688; *Erving* v *Peters* (1790) 3 TR 685; *Jackson* v *Bowley* (1841) Car & M 97; *Vernon* v *Thellusson* (1844) 1 Ph 466.

[79] See *Hancocke* v *Prowd* (1669) 1 Wm Saund 328, 336 n (10).

[80] There is no corresponding form provided in the Northern Ireland rules.

[81] RSC O42 r1, App Form No 49. See *Cooper* v *Taylor* (1844) 6 Man & G 989; *Batchelar* v *Evans* [1939] 3 All ER 606; *Levy* v *Kum Chah* (1936) 56 CLR 159. See also Queen's Bench Masters' Practice Forms, form PF19.

[82] *Hancocke* v *Prowd* (1669) 1 Wm Saund 328; *Marshall* v *Willder* (1829) 9 B & C 655; *Gorton* v *Gregory* (1862) 3 B & S 90; *Langstaff* v *Langstaff* (1922) 70 DLR 55. Although in some of the cases (see *Terrewest* v *Featherby* (1817) 2 Mer 480; *Lord* v *Wormleighton* (1821) Jac 148; *Kent* v *Pickering* (1832) 5 Sim 569) it appears that judgment has been given in the form *de bonis testatoris si habent, et si non, de bonis propriis*, so that the whole amount due to the plaintiff is recoverable out of the executors' own property if they do not have assets of the deceased, it appears this form of judgment should be limited to

> "The following rules have been recognised as regulating the liability to costs in cases where an executor was sued at common law for the debt of his testator: -- 1. If a creditor sued an executor as such and got judgment against him, whether by default or after verdict, the judgment was for the debt and costs to be levied off the goods of the deceased in his hands, and if none then for the costs out of the proper goods of the executor; 2. If the executor pleaded *plene administravit*, and the plaintiff creditor replied admitting the plea and praying judgment against assets in the future, the judgment was for debt and costs to be levied out of such future assets; costs were not awarded against the executor personally, but neither did he get costs; 3. If the executor pleaded *plene administravit* (even with other pleas) and succeeded at the trial, the defendant got his costs of the action against the plaintiff.
>
> If a plaintiff seeks by a summary motion to get a judgment, the effect of which will, 1, conclude the existence of assets in the hands of the executor; and, 2, make the costs payable by the executor *de bonis propriis*, it would seem to me just and right that the executor should be at liberty to set up by affidavit the plea of *plene administravit* which prevents the happening of those consequences, and either get the motion refused with costs altogether; or, if the Court thought fit, on the statements in the defendant's affidavit, to give a judgment of assets *quando*, then to obtain the terms that such summary judgment should be given on the condition of the plaintiff paying the costs of the unfounded motion. That seems to have been the *ratio decidendi* of *Millar* v *Keane*, a case which has been followed in England."

A question which has not been discussed in any of the cases is the form of judgment where interest is awarded on the debt under statutory provisions. In some of the old cases, an award of damages was made to the plaintiff as compensation for the delay in payment of the debt by the executors. Where such was the case judgment was in the form *de bonis testatoris si*, as to the debt, damages and costs, *et si non, de bonis propriis* as to damages and costs.[84] The basis of imposing personal liability for damages was that the delay in payment was the fault of the executors and the testator's estate should not be penalised.[85] The argument would seem equally applicable where interest is awarded by the court on an unpaid debt.

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cases where the executors pleaded *ne unques executor* or a false release to them. See *Johns* v *Adams* (1607) Cro Jac 191; *Bull* v *Wheeler* (1622) Cro Jac 648; *Bridgman* v *Lightfoot* (1623) Cro Jac 671; *Erving* v *Peters* (1790) 3 TR 685; *Vernon* v *Thellusson* (1844) 1 Ph 466. Note however *IRC* v *Stannard* [1984] 2 All ER 105 where the court thought it would be appropriate to make an order *de bonis testatoris si et si non de bonis propriis* where it was established by pleading or otherwise that the defence of *plene administravit* is not available.

83 [1896] 2 IR 267.

84 *Hancocke* v *Prowd* (1669) 1 Wm Saund 328; *Woodward* v *Chichester* (1560) Dyer 185b; *Shipley's Case* (1610) 8 Co Rep 134a.

85 *Buchgrave* v *Heale* Noy 120. See also *Marshall* v *Willder* (1829) 9 B & C 655 in relation to costs.

Enforcement of judgment

If a creditor obtains judgment (not being a judgment *quando acciderint*) *de bonis testatoris* against personal representatives, then if the personal representatives do not pay the amount due to the plaintiff, it will be necessary for the plaintiff to seek to levy execution against the assets of the deceased in the hands of the personal representatives. If no plea of *plene administravit* has been entered, or if upon issue joined the personal representatives fail on the plea, they are deemed to have assets sufficient to meet the amount owing to the plaintiff. If however they have distributed the estate, there will be nothing available for the plaintiff. What is to be done?

Originally, where a judgment *de bonis testatoris* was obtained by a plaintiff, execution of such judgment took the form of the plaintiff suing out a writ of *fieri facias de bonis testatoris*, under which the sheriff would seek to seize assets of the deceased in the hands of the executors. Upon his inability to do so (the assets being already distributed) the sheriff would make a return of *nulla bona* to the writ. The plaintiff would then have to decide what further action was open to him. Although not the only possibility,[86] the likely course was for the plaintiff to seek to levy judgment against the goods of the executors which they owned in their own right, that is, to enforce the judgment *de bonis propriis*. To do so, they had to establish that the personal representatives had been guilty of a *devastavit*.

Under the old procedure,[87] it was possible for the sheriff seeking to execute a writ of *fieri facias de bonis testatoris* not only to make a return of *nulla bona*, but at the same time to make a finding that the personal representatives were guilty of a *devastavit*.[88] Such finding afforded the plaintiff the evidence he required to render the personal representatives liable *de bonis propriis*. The sheriff ran the risk however in returning a *devastavit*, that if no *devastavit* had in fact occurred, he himself might be open to an action. Where then he merely returned *nulla bona*, it was necessary for the plaintiff to institute an inquiry as to whether a *devastavit* had in fact occurred. It later became possible to institute a procedure known as a *scire fieri* inquiry, under which the sheriff was directed to ascertain whether a *devastavit* had occurred, and if so, then to levy execution *de bonis propriis*. The most popular means however which became available to a plaintiff who was unable to execute a judgment *de bonis testatoris* against executors was to bring a second action against the executors, for debt, the judgment in the first action it-self being the debt owing.[89] In this second action the return of *nulla bona* made by the sheriff following the judgment *de bonis testatoris* was conclusive that the executors had assets at the time of judgment, and sufficient evidence of a

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[86] The plaintiff might sue out the writ of *capias ad satisfaciendum*: see explanation as to enforcement generally in *Wheatley* v *Lane* (1669) 1 Wm Saund 216, 219 n(8).

[87] See generally *Wheatley* v *Lane* (1669) 1 Wm Saund 216; *Ennis* v *Rochfort* (1884) 14 LR Ir 215; *Levy* v *Kum Chah* (1936) 56 CLR 159.

[88] In Ireland after 1731 it was not possible for a sheriff to return a *devastavit* without an inquiry having been held for that purpose: Security of Trade Act (Ir) 1731, s 8. See *Crawford* v *Kehoe* (1832) Hay & Jon 1; *Belmore* v *Belmore* (1849) 12 Ir Eq R 493; Kelly, *A Treatise on the Law and Practice of Scire Facias* (1849), p 63. For later provisions to like effect, see Common Law Procedure Act (Ir) 1853, s 137.

[89] See *eg Barron & Co* v *Ryan* (1907) 41 ILTR 39.

devastavit, thus allowing the plaintiff to obtain a judgment *de bonis propriis*.[90]

In 1965 the Anderson Report pointed out that in Northern Ireland the procedure described had never been used in modern times.[91] In the legislative reform of the enforcement of judgments made following the Report, the writs of *fieri facias de bonis testatoris* and *fieri facias de bonis intestati* were abolished. No procedure specific to enforcement of judgments *de bonis testatoris* or *de bonis intestati* was put in their place, so that it would appear that enforcement of judgments against executors and administrators is regulated by the ordinary procedures established under the Judgments Enforcement Act (NI) 1969 and now contained in the Judgments Enforcement (NI) Order 1981. There is, it is suggested, some difficulty however in applying the provisions of the legislation to judgments *de bonis testatoris*. Many of the alternative procedures established under the legislation for enforcement of judgments are not available where the assets against which enforcement is sought are not held by the debtor beneficially.[92] In the case of seizure of goods,[93] two provisions of the legislation pose problems in relation to execution of judgments *de bonis testatoris*. First, article 32, which specifies goods which may be seized, refers to goods in which the debtor has a saleable interest *in his own right*, whereas executors and administrators hold the assets of the deceased in *auter droit*.[94] Secondly, article 33(*d*) specifically excludes from seizure goods held by the debtor in trust for others. If the power to seize goods in execution of a judgment applies to judgments *de bonis testatoris*, it would seem to require articles 32 and 33 to be read as if these provisions did not exist. Yet if there is no power to seize goods in execution of a judgment *de bonis testatoris*, how is a creditor to levy execution against goods forming the estate of a testator or intestate?

PERSONAL LIABILITY UNDER LEASES

Personal representatives are not only liable under leases as representatives of the deceased: they may be liable in their personal capacity, as assignees of the leasehold estate. As already noted, it is essential to bear the difference between representative liability and personal liability in mind when considering the liability executors and administrators may incur under leases.

Where possession taken

Where personal representatives take possession of property held by the deceased under a lease, they become personally liable as assignees of the

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[90] *Leonard* v *Simpson* (1835) 2 Bing NC 176; *Lee* v *Park* (1836) 1 Keen 714; *Palmer* v *Waller* (1836) 1 M & W 689; *Ennis* v *Rochfort* (1884) 14 LR Ir 689. See however *Wahl* v *Nugent* [1924] 1 DLR 155 (above) on the effect of a return of *nulla bona* following statutory provisions making realty liable for debts. For subsequent proceedings see [1924] 3 DLR 679. The return of *nulla bona* is conclusive as to the executors having assets at the time of judgment, but not as to a *devastavit*: see *Batchelar* v *Evans* [1939] 3 All ER 606 and discussion below.

[91] *Report of the Joint Working Party on the Enforcement of Judgments, Orders and Decrees of the Courts in Northern Ireland* (1965), para 81.

[92] See also arts 58, 61, 62, 66, excluding property not beneficially held by a debtor from enforcement action.

[93] Article 31.

[94] *Pinchon's Case* (1611) 9 Co Rep 86b.

lease,[95] although, as will be seen, the extent of this liability may be limited in the case of demands for rent. Subject to that limitation however, they are liable under the lease as assignees in the same way as is a purchaser of the lease. It is the taking of possession which subjects the personal representatives to such liability, so the questions which arise are to what extent do personal representatives have a choice to take possession of the deceased's leasehold property, and in what cases will a personal representative be held to have taken possession?

Personal representatives are under a duty to get in the estate of the deceased and administer it according to law.[96] Taking possession of the deceased's leasehold property would therefore appear to be required of them, whether in the form of physical possession or in the form of receipt of rents and profits. It is not therefore easy to imagine instances where personal representatives can decline to take possession of the property while at the same time avoiding a breach of their duties. Where however the deceased was not at his death the owner of leasehold property, then no taking of possession will be possible, and so no personal liability will exist. Thus in cases where the deceased was at some time during his life lessee, but had before his death assigned the property, any liability his personal representatives incur must be representative liability only.

The question whether executors had become personally liable arose in *Rendell* v *Andreae*,[97] where executors had paid two quarters' rent after the testator's death. Smith J said that had this stood alone, it would have been sufficient evidence to infer possession had been taken. In the light of other circumstances however (the fact that the executors had notified the lessor the estate was insolvent; that they had negotiated an arrangement that the testator's widow would be entitled to remain in occupation subject to payment of the rent; and that the executors had made it clear all along that they did not wish to make themselves personally liable), the court held the executors had not become personally liable. In *Stratford-upon-Avon Corpn* v *Parker*[98] the court held that where following the death of an assignee of a lease, her son continued to receive the rents out of the property, paying them to his sister, this would have been sufficient to constitute taking of possession and so incurring personal liability. As however the son was neither executor nor administrator, nor according to the court executor *de son tort*, he incurred no personal liability. Where however the court holds the person in possession is executor *de son tort*, he is as much liable as if he were legal personal representative.[99]

Burden of proof

Assuming that the plaintiff seeks to establish that the executors are liable in their personal capacity, but the executors wish to establish they are liable only in their capacity as representatives of the deceased, where does the onus of proof lie, and what must be established? In *Assignee of Green* v *Listowel*[100] the court was divided on these matters. In his declaration the plaintiff had averred that the estate of a lessee had become vested in the

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95 *Caly* v *Joslin* (1671) Aleyn 34; *Buck* v *Barnard* (1692) 1 Show KB 348; *Rubery* v *Stevens* (1832) 4 B & Ad 241; *Rendell* v *Andreae* (1892) 61 LJQB 630; *Minford* v *Carse* [1912] 2 IR 245.

96 Administration of Estates (NI) Order 1979, art 35(1).

97 (1892) 61 LJQB 630.

98 [1914] 2 KB 562.

99 *Fielding* v *Cronin* (1885) 16 LR Ir 379. See also *Williams* v *Healy* (1874) 9 CP 177.

100 (1840) 2 Ir LR 384.

defendant who had then entered the property. The defendant entered various pleas, one of which was that the estate did not vest in the defendant in the form and manner alleged. Issue was joined on the plea, and at trial the plaintiff put in evidence the lease and letters of administration of the lessee's goods which had been granted to the defendant. One question for the court was whether this was sufficient to establish that the defendant was liable personally. By a majority, the court held that the pleadings were sufficient to entitle the plaintiff to succeed. Pennefather B explained:

> "It appears to me that some confusion has arisen from the state of the law with respect to assignees generally. Formerly, entry was considered necessary to charge him, and the declarations all contain an averment to that effect; and that law was adopted not only as to assignee in fact or in law, but also whether he were subject to redemption or otherwise.
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> That law was laid down by Lord Mansfield in *Eaton* v *Jaques*; but that case came to be considered in *Williams* v *Bosanquet*, and it was held in the latter case that entry and taking possession were perfectly immaterial to the question whether the estate or interest vested. I protest it appears to me that the case of an administrator is an *a fortiori* one; because in his case entry ought to be presumed, being necessary for the preservation of the intestate's estate. . . It appears to me most clearly that all the estate and interest in these premises vested in the defendant, and that the production of the letters of administration proved that issue. . . The presumption of law is, that the administrator took possession of the premises, subject, however, to be denied; and that is clearly proved by his right to maintain possessory actions, the cause of which accrued after the death and before the grant of letters of administration."

The contrary view was taken by Richards B, dissenting:

> "In order to sue a defendant by privity of estate, the *onus*, in my opinion lies upon the plaintiff to shew him to be such an assignee as may be personally sued, and in such a case the plea that he is not assignee *modo et forma* puts every thing in issue. A personal representative may not possibly know the multitude of premises of which the deceased was lessee, where he has not taken possession of them; and therefore it would be a hard law to hold the doctrine contended for by the plaintiff; whereas an executor or administrator ought not to be discouraged from undertaking the trust of administering the property of the deceased."

It is suggested that the view of Richards B is to be preferred: the reason adumbrated by the learned judge is similar to that on which the rule limiting liability of personal representatives in possession in claims for rent is based. If it is in the public interest that individuals should not be deterred from becoming personal representatives, it is suggested that creditors wishing to make them liable to the extent of their own property should shoulder the burden of showing that the defendants have taken possession.

Limitation of liability

Assuming that personal representatives do take possession of leasehold property forming part of the deceased's estate, they become liable in their personal capacity as assignees of the lease. If a claim is brought by the lessor for breach of covenant, they are liable to the extent of their own solvency, and not just to the value of the deceased's estate. There is however a limitation on this liability where the claim brought by the lessor is for rent. In such cases personal representatives can limit their liability in their personal capacity, by proper pleading, to the amount which they

received, or should have received, from the property.[101] An executor *de son tort* cannot take advantage of the rule,[102] nor does the rule apply where the claim is based on anything other than non-payment of rent.[103] Where the action is brought for use and occupation rather than for rent, the rule can be invoked by the executors.[104]

(i) Rationale

In *In re Bowes*[105] North J put the reason for the rule down to the hardship that might be inflicted on an executor if he found himself in possession of property and had to pay out more in rent than the property was worth. In *Minford* v *Carse*[106] Holmes LJ explained:

> "The obvious reason for this exceptional privilege is to enable the personal representatives of a deceased man to carry out the administration of his estate without exposing themselves to serious personal liability. It often happens that an executor must choose between leaving derelict a term of years belonging to his testator, and entering into possession of the premises so as to make something out of them. He would hesitate to take the latter course were it not for the rule of law that no rent could be recovered from him beyond the actual value that could be realised by a person in occupation. But if, having gone into possession, he is prevented by a legal *vis major* from interfering in any way with the holding, the reason for the rule would apply still more strongly."

(ii) Formulation

The precise formulation of the liability is a matter of some uncertainty.[107] It has been expressed variously as what the property yields;[108] the value of the property;[109] the yearly value of the property;[110] the value of the occupation;[111] or so much of the rent as the premises are worth.[112] In *In re Bowes*,[113] after reviewing the authorities, North J measured the executor's

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101 *Prattle* v *King* (1674) 1 Mod 185; *Buckley* v *Pirk* (1710) 1 Salk 316; *Billinghurst* v *Speerman* (1695) 1 Salk 297.

102 *Armstrong* v *McInerheny* (1885) 7 ICLR 296.

103 *Tremeere* v *Morrison* (1834) 1 Bing NC 89; *Sleap* v *Newman* (1862) 12 CBNS 116. It appears that Lord Wensleydale and Vaughan Williams J considered that *Tremeere* v *Morrison* was wrongly decided: see Woodfall, 1 *Landlord and Tenant* (27th edn, 1968) p 852, n 68.

104 *Patten* v *Reid* (1862) 6 LT 281.

105 (1887) 37 Ch D 128.

106 [1912] 2 IR 245.

107 In *Hopgood* v *Whaley* (1848) 6 CB 744 Maule J described the authorities as "involved in some difficulty". The problem case is *Remnant* v *Bremridge* (1818) 8 Taunt 191, described in *Hornidge* v *Wilson* (1840) 11 Ad & El 645 as unintelligible.

108 *Tremeere* v *Morrison* (1834) 1 Bing NC 89.

109 *Hopgood* v *Whaley* (1848) 6 CB 744.

110 *Rendell* v *Andreae* (1892) 61 LJQB 630.

111 *Minford* v *Carse* [1912] 2 IR 245 (Palles CB).

112 *Rubery* v *Stevens* (1832) 4 B & Ad 241.

113 (1887) 37 Ch D 128.

liability at the yearly value of the premises; in *Whitehead* v *Palmer*[114] Channell J considered the measure of liability to be the same sum as a trespasser would be liable to pay as mesne profits; while in *Minford* v *Carse*[115] Holmes LJ considered that when the cases referred to the "profits" which the executors would receive, the term was equivalent to the actual value of the premises during the time the executor has been in occupation, and that the only satisfactory test of such actual value was what a skilful and industrious person could realise during his occupation. Whatever the precise formulation should be of the rule, it is clear that executors cannot rely on their failure to recover the rent from occupants of the property in order to reduce their liability,[116] and that the value of the property will be assessed on the basis that the executors have not been guilty of a breach of covenant.[117]

The question whether the rule applied to limit the personal liability of executors was at issue in *Minford* v *Carse*.[118] This was an application by executors to set aside a judgment obtained by the plaintiff at Belfast Spring Assizes for rent due under a lease to the testator. The executors claimed that the premises were of no value to them, and accordingly they were not personally liable, on the basis that a receiver had been appointed under an order for administration of the estate made by a court in England. By a majority, the judgment was set aside by the Irish Court of Appeal. Holmes LJ explained:

> "I have always understood that a receiver appointed in a suit for administration of the assets of a deceased man deprived the personal representative of the right to interfere therewith in any way . . . It seems to me to be unnecessary to discuss the question of possession. Even if the possession of the defendants technically continued, the premises ceased to have any actual value for them. The receiver had complete control; and no portion of the income derived from the management could have been obtained by the defendants. Thus, the premises, by the legal action of a Court of law, were rendered valueless to the executors."

Cherry LJ, dissenting, took the view that the receiver was in law the agent of the executors to manage the property, and that while the fact that he was in possession might be a good ground for the executors being entitled to an indemnity from the court which made the order for administration, it afforded no answer to the claim of the plaintiff landlord.

(iii) Form of plea

The form of plea which should be entered by an executor wishing to limit his liability under the rule may be found in the following form in *In re Bowes*:[119]

> "except as to £--- (being the full actual value of the demised premises during the period in respect of which the rent is claimed, and which should be paid into Court, or the claim for it be otherwise answered) that the term did not vest in him by assignment otherwise than as executor or administrator, and that he has not at any time since the death of the lessee

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114 [1908] 1 KB 151.
115 [1912] 2 IR 264.
116 *Hornidge* v *Wilson* (1840) 11 Ad & E 645; *Whitehead* v *Palmer* [1908] 1 KB 151.
117 *Hornidge* v *Wilson* (1840) 11 Ad & E 645.
118 [1912] 2 IR 245.
119 See also *Kearsley* v *Oxley* (1864) 2 H & C 896; *Humble* v *Morrisey* (1898) 33 ILTR 51.

> received or derived, nor could he during any part of that time receive or derive, any profit from the said demised premises, except sums amounting to the sum excepted, and that the said demised premises have not since the death of the lessee yielded any profit whatever, except as to the amount excepted."

No plea of plene administravit *possible*

Where the liability of executors or administrators is personal rather than representative, the fact that the executors or administrators have administered the estate of the deceased is irrelevant. Accordingly no plea of *plene administravit* can be made.[120]

Judgment de bonis propriis

The essence of the personal liability incurred by executors and administrators where they take possession of the deceased's leasehold property is that a creditor who obtains judgment against them is entitled to seek to enforce judgment against the assets of the executors or administrators, rather than against the assets of the deceased. Judgment, in other words, is *de bonis propriis*.[121]

Execution of judgment

Where a judgment *de bonis propriis* is to be enforced, the various means of enforcement available under the Judgments Enforcement (NI) Order 1981 are available. The inability to levy execution against assets not beneficially owned by the executor has already been noted. Before the legislation was enacted, assets of a deceased vested in the defendant as executrix were held not to be available to the sheriff in executing a judgment *de bonis propriis*.[122]

DEVASTAVIT

The ability of a creditor who has obtained judgment *de bonis propriis* against executors because the latter are liable personally to recover the money due to him depends on ordinary considerations such as whether the debtor has assets and whether it is worth pursuing him. The considerations for a creditor who has recovered judgment *de bonis testatoris* are slightly different. Although there may be no assets of the deceased available for execution of the judgment, the executors may have assets of their own which will satisfy the creditor's debt. The ability of creditors who have recovered judgment *de bonis testatoris* to bring a second action to endeavour to make the executors liable *de bonis propriis*, on the basis of their having committed a *devastavit*, has already been noted.[123] Some further comment is however required.

A *devastavit* is "a mismanagement of the estate and effects of the deceased, in squandering and misapplying the assets contrary to the duty imposed on them, for which executors or administrators must answer out of their own pockets, as far as they had, or might have had, assets of the

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[120] *Prattle* v *King* (1674) 1 Mod 185; *Sackill* v *Evans* (1674) 1 Freem 171; *Buckley* v *Pirk* (1710) 1 Salk 316; *Dean & Chapter of Bristol* v *Guyse* (1667) 1 Wm Saund 111, 112 n(1).

[121] *Tilny* v *Norris* (1700) 1 Salk 309.

[122] *Lord Talbot de Malahide* v *Moran* (1881) 8 LR Ir 307.

[123] See above.

deceased."[124] Where executors have failed to plead *plene administravit* or have failed to establish the plea, they are, as has been seen, deemed to have assets of the deceased sufficient to meet the plaintiff's claim. If no such assets now remain, that is evidence of a *devastavit*. Likewise, it has been seen that the payment of legacies before debts constitutes a *devastavit*.[125]

Order for administration

A *devastavit* signifies the misapplication of assets. Where there has been no misapplication there can be no *devastavit*. *Batchelar* v *Evans*[126] illustrates the point. There judgment was obtained by a plaintiff against executors of a mortgagor. The plaintiffs later tried to execute the judgment, and a return of *nulla bona* was made by the sheriff. The plaintiff brought a second action based on an alleged *devastavit*, and relied on the sheriff's return as evidence. Before the sheriff's return however, an order for administration of the mortgagor's estate had been made by the court, and the executors had been ordered to pay over assets of the deceased to a receiver. Farwell J held that the executors were not guilty of a *devastavit*. The judgment, while evidence that at the time it was made the executor had assets of the deceased, did not preclude the executors from showing that the absence of assets at the time of the sheriff's return was not due to a *devastavit*. Payment of the assets to the receiver under the order of the court for administration was not a *devastavit*.[127]

Order for administration of estate of deceased insolvent

A similar question arises as to the position of personal representatives where an order is in force for administration of the estate of a deceased insolvent under the Administration of Insolvent Estates of Deceased Persons Order (NI) 1991.[128] The difficulty is illustrated by *Levy* v *Kum Chah*.[129] Here an action was brought by the plaintiff against executors for a debt owing by the deceased under a moneylending arrangement. No plea of *plene administravit* was entered, and judgment was obtained by the plaintiff in the usual form, *viz* for the debt and costs to be recovered out of the assets of the testator if the executors had so much, and if not, then the costs to be recovered out of the executors' own assets. Before judgment was signed however an order was made for the administration of the estate of the deceased in bankruptcy. The plaintiff accepted that the effect of the order was that he could not proceed to recover against the assets of the deceased on foot of the judgment, but wished to proceed on the judgment in order to recover against the executors personally on the basis of a *devastavit*. Dixon and Evatt JJ pointed out the difficulties:

> "An order of the Court of Bankruptcy for the administration of the estate of a deceased person in bankruptcy goes much further than a decree in equity for administration. It divests the executor of the legal title to, as well as the control of, the assets. Unless it be true that it leaves him exposed to an action at law to which he cannot plead an answer, it converts claims against him into rights of proof only. It determines all priorities.

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[124] *Commander Leasing Corp Ltd* v *Aiyede* [1983] 4 DLR 107, adopting the definition in Williams Mortimer & Sunnucks, *Executors, Administrators and Probate*, (16th edn, 1982) p 710.

[125] See authorities cited above p 13.

[126] [1939] 3 All ER 606, followed in *Marsden* v *Regan* [1954] 1 All ER 475.

[127] See also *Ex p Croker* (1874) 8 ILTR 169.

[128] See Hunter, *Northern Ireland Personal Insolvency* (1992), ch 25.

[129] (1936) 56 CLR 159.

> Its operation, therefore, raises a number of difficulties in the case of a judgment in the usual form in an action for a debt of the deceased against the personal representative . . . [I]s it right for the sheriff to make a return of *nulla bona testatoris*? If he may, can the executor answer a *devastavit* by setting up the order of the Court of Bankruptcy? Prior to that order, he might have applied in satisfaction of the debt the assets which under the judgment he is conclusively supposed to have had. If he is liable as on a *devastavit*, what becomes of his right of recourse to a commensurate part of the assets? As to the costs, does not the order defeat the condition expressed in the "*et si non*"? The condition is based upon the possession by the defendant of all the assets of the deceased. If they are withdrawn alike from his possession and from execution, can he be held liable *de bonis propriis*? Yet suppose that the order for administration is made before verdict, can the defendant plead *plene administravit*? "

Their Honours went on to conclude:

> "These questions appear to us to show that when the Bankruptcy Court undertakes the administration of assets which was the function of the executor, just as when the Court of Chancery did so, the liabilities incurred by him as the person otherwise charged by law with the administration of the assets and his consequent claims upon the assets for recoupment or otherwise are matters which attend the administration and are not independent of the control and application of the deceased's property."

In any event, however, provisions of the relevant legislation existed to prevent creditors proceeding with actions against the bankrupt's property after an order for administration was in force,[130] which led the court to set aside the judgment obtained by the creditor.

Statute of Limitations

Apart from the provisions of the Law of Property Amendment Act 1859 and its successors considered below, executors and administrators received some comfort in relation to their continued liability under leases held by the deceased from the decision of the Court of Appeal in *In re Blow*,[131] where, by a majority, the Court of Appeal held that in an action for administration brought by a creditor against executors who had distributed the estate, the executors could rely on their own *devastavit* and the limitation period as a defence. The essence of the case was explained by Swinfen Eady LJ:

> "The plaintiffs are creditors of Samuel Blow, the testator, and it is not disputed that William Camden, the surviving executor, is liable to them upon the covenants for payment of rent contained in the leases. As such creditors they claim to administer the estate of the testator, and contend that, in taking the estate accounts under the direction of the Court, the estate of Frederick Dawkins, deceased, [the other executor] must be charged with all sums received by him, and can only be allowed proper payments -- that his executors cannot claim, as a payment which he ought to be allowed, any sum not paid away in a due course of administration -- that he cannot set up his own wrongful payment, and then say that as it

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[130] *Cp* Insolvency (NI) Order 1989, art 258, applied to orders for administration of the estate of deceased insolvents by the Administration of Insolvent Estates of Deceased Persons Order (NI) 1991 (Hunter, *op cit*, para 25.29).

[131] [1914] 1 Ch 233.

> occurred more than six years before suit he is under no liability for it. The result of this would be the disallowance of all sums paid to beneficiaries, although honestly and bona fide paid away more than six years before this action."

In re Marsden[132] and *In re Hyatt*[133] supported the plaintiffs' arguments. In those cases executors had been prevented from relying on their own *devastavit* and the statute of limitations to defend actions brought by mortgagees. In the former, Kay J said:

> "The argument is founded on what takes place at law. It is said at law a creditor by covenant gets the judgment against the executors *de bonis testatoris*, and if that judgment be executed by *fi. fa.*, and the sheriff finds the executor had once assets, but has parted with them, he may return a *devastavit*. Then it is said the remedy at law would only be against the executors by a personal action for *devastavit*, which personal action would be barred by the statute after six years.
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> All that is very familiar at law, but now the attempt is to apply this in equity . . . I have never yet heard that executors, by way of discharge in equity, as against a creditor, whose debt they acknowledge, . . . could set up their own wrong by way of *devastavit*, and say we admit a *devastavit*, knowing of your debt, because we have been paying interest all the while; but seeing that we did it more than six years ago we can set up a defence by treating the claim as founded on a *devastavit* committed more than six years ago. It is a novel doctrine to me . . . I certainly dissent from any doctrine of the kind."

In *In re Hyatt*[134] Chitty J explained that the position was in fact the same at law and in equity insofar as the inability of executors to rely on their own misconduct was concerned:

> "An executor, by virtue of his office, owes certain duties to creditors, and the duties he owes are legal duties laid down in all the ordinary books on the subject. Among these are the duties of paying the creditors, where there is an order or priority according to their priorities. Where an executor sued as such at common law by a creditor puts in a plea of *plene administravit*, he is not allowed to set up his own *devastavit* in order to escape payment.
>
> The reason is plain. A man cannot take advantage of his own wrong, and consequently, when he is sued at common law in his character of executor, and only in that character, there must be disallowed to him all the payments which, in accordance with the duty he owes to the creditors, have been wrongfully made, and there can be no *devastavit* found in his favour. The result is that at law the executor is considered to hold still in his own hands assets which he has improperly paid away or wasted."

It was essentially the same reasoning as this which led Phillimore LJ to dissent in *In re Blow*. For the other members of the court however in that case, the crucial factor was section 8 of the Trustee Act 1888. *In re Marsden* and *In re Hyatt* had been decided before the statute was passed, and were accordingly distinguishable. Section 8 provided that in actions

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[132] (1884) 26 Ch D 783.
[133] (1888) 38 Ch D 609.
[134] (1888) 38 Ch D 609.

against trustees, the trustees could take advantage of the statute of limitations as if they had not been trustees, and that in proceedings to recover money where no other limitation period applied, the action would be treated, for the purposes of limitation, as an action for money had and received.[135] Cozens-Hardy MR and Swinfen Eady LJ thought the provision applied to the proceedings against the defendants in the present case, Swinfen Eady LJ saying that the effect of the provision was to allow an executor to plead the Act against a creditor in like manner as an express trustee could plead it against his *cestui que trust.*

One problem with holding that personal representatives can rely on the limitation period as a defence to an action by contingent creditors is that the limitation period is running against the plaintiff when he has no cause of action. *In re Blow* illustrates the problem. The plaintiffs' claim was for arrears of rent which became due in 1909 under various leases. The executors had distributed the estate to the beneficiaries in 1902. The relevant limitation period was six years, so that the plaintiffs were out of time. As however in 1902 the rent was being paid, the plaintiffs could not then have brought any action against the executors. The logic of the argument appealed to Phillimore LJ. Pointing out that the statutory provision put trustees in the same position as a recipient of money belonging to another, his Lordship held that the limitation period which the trustee was entitled to plead in bar ran from the date when a beneficiary could sue. In the case of a contingent creditor whose debt has not yet accrued however the position was different: his time had not yet begun to run. The other members of the court did not address the argument. In *Lacons* v *Warmoll*[136] however, where on similar facts the same argument was presented for the creditor, Buckley LJ explained that the argument was fallacious:

> "It is true that they [creditors] could not have sued on the guarantee; but the cause of action in respect of the *devastavit* is not the debt which was incurred on the guarantee. It has nothing to do with it. The debt on the guarantee was the testator's debt: the remedy for the *devastavit* is against the executor personally. The act of *devastavit* is parting with the assets in February, 1898. That act was either wrongful to the persons who were then contingently entitled to payment of something out of the estate, or it was not. If it was not a wrong to them, there is no liability for a *devastavit*, because there was no wrong. On the other hand, if it was a wrong to them, when was that wrong committed? Obviously in February, 1898. It is immaterial to say that until 1903 no cause of action arose upon which an action could have been maintained on the guarantee."

A second problem to be considered in *In re Blow* was whether the action was an action for the recovery of money within the meaning of the statutory provision. It was argued for the executors that the action was for administration of the estate of the deceased and accordingly outside the terms of the provision. Rejecting the argument, Swinfen Eady LJ said:

> "In my judgment it is an action to recover money. The whole object of the action is to recover money -- the rent due to the plaintiffs -- and

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[135] See now Limitation (NI) Order 1989, art 42(1) of which provides that in actions to recover money against trustees, where no other limitation period is applicable, the limitation period is six years. See also art 45(1) entitling personal representatives to the benefit of limitation defences.

[136] [1907] 2 KB 350.

> administration is merely the form of the remedy. . . The whole object of this action is to make the defendants pay money to the plaintiffs."

Likewise, Cozens-Hardy MR proceeded on the basis that the essence of the plaintiffs' case was a *devastavit* by the executors, and that it did not matter that the action took the form of a general administration suit in which a common account was directed: in such a case the statute equally protected the trustee when the account was taken. Similar considerations arose in *National Trustees Executors and Agency Co of Australia Ltd* v *Dwyer*[137] where in 1938 dissatisfied beneficiaries sought administration of the estate of a testator. The action of the executors giving rise to the plaintiffs' complaint had taken place in 1931. One question for the court was whether the plaintiffs' claim was out of time. This depended on whether the action was an action of *devastavit*, in which case the limitation period was six years and the plaintiffs were barred, or an action to recover a legacy, to which a limitation period of fifteen years applied. Latham CJ considered that the action was based on *devastavit*, and the shorter limitation period applied:

> "The terms "action of *devastavit*" (that is, an allegation based upon an allegation of *devastavit*) and "administration action" are not mutually exclusive. An administration action may or may not be an "action of *devastavit*." But an "action of *devastavit*" will usually, if not always, be an administration action. A breach of duty by an executor constituting a *devastavit* is a common basis for an administration action. . . . [I]n the present case it may be said . . . the legacy is what leads up to the remedy, but the real foundation of the suit is the *devastavit* as to which the remedy is barred by the lapse of six years."

Starke J however took the opposite view:

> "[T]his action, though not well pleaded, partakes more of the nature of an action to have the estate of the testatrix administered by the court and an account taken of such estate. In such an action, apart from the *Trustee Act* 1928, executors could not set up their own *devastavit* and claim protection . . . An action brought by a residuary legatee is, according to the authorities, an action for a legacy . . . And the period of limitation for such actions is fifteen years next after the present right to receive the same (*Property Law Act* 1928, sec. 304)."

The other members of the court did not decide the point.

JOINDER OF CLAIMS AGAINST PERSONAL REPRESENTATIVES

Before rules allowing joinder of actions against personal representatives in their representative capacity and in their personal capacity were made, a plaintiff wishing to bring an action against executors based on their use and occupation of the property since the death of the deceased as well as a claim based on their liability under a contract made by their testator was in some difficulty. In *Nixon* v *Quin*,[138] proceedings were brought against an executrix for rent due under a lease to the testator, and for use and occupation by the executrix after the testator's death. On demurrer by the executrix on the ground that an action against her in her representative

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[137] (1939-40) 63 CLR 1. *Cp* the similar issues raised in *Dunne* v *Doran* (1844) 13 Ir Eq R 546 and *Brereton* v *Hutchinson* (1853) 2 Ir Ch R 648.

[138] (1868) IR 2 CL 248. See also *Commissioners of Education* v *Loughnan* (1846) 9 Ir LR 167.

capacity could not be joined with an action which sought to make her liable personally, the court upheld the demurrer, as, if established, liability under the lease would be *de bonis testatoris* while liability for use and occupation would be *de bonis propriis*. The court distinguished *Atkins* v *Humphrey*[139] in which a declaration against executors for use and occupation had been upheld, on the ground that in the earlier case the claim was based on a contract made between the plaintiff and the testator, rather than with the executor.

Rules of Court now provide that it is possible to join causes of action in which personal representatives are sued in one capacity with causes where they are sued in the other.[140] A separate question exists however as to whether it is possible for the court, where an executor is sued in his representative capacity, to make an order imposing liability personally. The usual course for a plaintiff wishing to subject executors to personal liability after he has obtained judgment *de bonis testatoris* is to bring a second action on the basis of a *devastavit*. Is this however necessary? It will be recalled that where executors enter a plea of *plene administravit* and there is evidence of a *devastavit*, the old practice was for the jury to make a finding that assets remained rather than to find a *devastavit*.[141] Two modern cases suggest however that the practice may now be different. In *Inland Revenue Commissioners* v *Stannard*[142] the question was whether an order against an executor for payment of Capital Transfer Tax due on the death of the testator should be *de bonis testatoris* or *de bonis propriis*. An order in the *de bonis testatoris* form was made by a Master. On appeal by the Crown, Scott J held that the order should have been *de bonis propriis*. His Lordship went on however to point out that the executor had not pleaded *plene administravit* so that he would have been taken to admit assets. On failure of the plaintiff to recover against the executor *de bonis testatoris* the plaintiff could have sought to recover *de bonis propriis*. Scott J went on to say:

> "It does not, I think, arise as an essential matter for me to decide, but it seems to me that if the *de bonis testatoris* order made by Master Bickford Smith was correct, the order ought conveniently to have been made in the form *de bonis testatoris et si non de bonis propriis.* I can see no sense whatever, in a case which has, by pleading or otherwise, established that a *plene administravit* defence is not available, in requiring a second action to be brought in order to enable the creditor to have the full value of what he has established by his action."

Whether an order *de bonis propriis* could be made in an action brought against a personal representative in his representative capacity did have to be determined in *Commander Leasing Corp Ltd* v *Aiyede*.[143] An action was brought by the plaintiff against the executrix of her late husband under leasing agreements entered into by the latter. The plaintiff sued the defendant both in her representative capacity and personally. The trial judge dismissed the action against the executrix in her personal capacity but made an award against her as representative of her husband's estate. On appeal, it was argued for the executrix that the proper course for the plaintiff was to seek execution of the judgment *de bonis testatoris* which had been made, and on the return of *nulla bona* to bring a second action on the basis of a *devastavit*. Should the plaintiff have adopted this course

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139 (1846) 2 CB 654.
140 RSC (NI) O15, r1.
141 *Reeves* v *Ward* (1835) 2 Bing NC 235.
142 [1984] 2 All ER 105.
143 [1983] 4 DLR (4th) 107.

however, the executrix was intending to defend this second action on the basis that the question of personal liability was *res judicata* in favour of the executrix by the finding of the trial judge.[144] Whether a second action was necessary had therefore to be discussed by the court. Robins JA held that a second action was not required:

> "We do not agree that two judgments are required before a judgment creditor can obtain satisfaction of his debt from an executor personally. If the *devastavit* is alleged and successfully established in the first action, the plaintiff becomes entitled at once to a personal judgment. In many situations it may well be necessary that the matter be proceeded with on a two-stage basis but that procedure is not mandatory. There is no reason, practical or of principle, to preclude recovery of a judgment against an executor personally in an action in which the executor has impliedly admitted assets and the creditor has proved his claim against the estate and the *devastavit* alleged against the executor."

His Honour summarised the position as follows:

> "Stripped of formal language the case reduces itself to this. On the uncontroverted evidence, the respondent had clear notice of this claim against the husband's estate. Yet, notwithstanding, she saw fit to distribute the estate's assets. Those assets were impliedly sufficient to satisfy the judgment; and, indeed, no effort was made by the respondent to adduce any evidence to the contrary. Now, the estate is devoid of assets and the appellant's right to recover effectively defeated. A further action against the respondent personally can serve no realistic purpose. As executrix she could not disregard the appellant's claim with impunity. In administering the estate as she did, she must be taken to have acted on her own risk and must now be held personally liable for this indebtedness of the estate."

PROTECTION AGAINST LIABILITY

Although personal representatives who have distributed the deceased's estate are entitled to recoup from the persons to whom distribution was made the amount of any debt the personal representatives later have to pay,[145] their ability to recover is not guaranteed, but depends for example on their ability to find the persons in question, as well as the latter's solvency. The same applies where the personal representatives have taken an express indemnity from the beneficiaries of the estate when distributing. The longer the creditor's claim arises after the deceased's death, the more difficult it may become for the personal representatives to recover from the beneficiaries. Personal representatives not willing to take the risk, however small, involved in relying on the indemnity to which they are entitled have a number of other means available to protect themselves.

Distribution pursuant to court order

It appears now to be settled that personal representatives obtain full protection against claims being made against them that they have committed a *devastavit* where they distribute the estate of the deceased pursuant to an order of the court. Judicial sanction for distribution is not surprisingly the safest course open to personal representatives who fear the

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[144] *Cp Wahl* v *Nugent* [1924] 3 DLR 679.

[145] *Jervis* v *Wolferstan* (1874) LR 18 Eq 18; *Whittaker* v *Kershaw* (1890) 45 Ch D 320, *Brown* v *Holt* [1961] VR 435.

possibility of claims materialising against them in the future. It has recently been confirmed that personal representatives have the right to seek the protection of an order of the court in every case.[146]

The protection afforded by the order of the court can be traced to the practice of the courts of Equity. Before the reforms effected by the Judicature Acts in the last century, where a decree for administration of an estate had been made in Equity, it was open to executors to obtain injunctions preventing creditors pursuing actions in the Common Law courts to recover their debts.[147] As Lord Eldon explained in *Clarke* v *Lord Ormonde*:[148]

> "Ever since the case of *Morice* v *Bank of England* it has been the settled doctrine of the court that, where a decree has been obtained for payment of creditors, it is a judgment for all; and the court will not permit any particular creditor by proceeding at law to disturb the administration of the assets which this court will decree; and the court . . . will not, in the meantime, allow any to touch the assets."

Suggestions that a decree would not prevent creditors who were not party to the action bringing proceedings against the executors may however be found: in *Simmonds* v *Bolland*[149] Grant MR opined that the decree sought by a legatee for release of funds retained by the executor against future liability would not bind the creditor if a claim later materialised: accordingly the decree was only made on the legatee giving a sufficient indemnity to the executor.[150] In *Bennett* v *Lytton*[151] Page Wood VC, after posing the question whether someone who was not a party to the suit might be able to argue that the administration suit was *res inter alios acta*, went on to explain that such a possibility was removed by the consideration that in administering the assets on behalf of creditors the court has already assumed the jurisdiction to restrain any creditor who was not prepared to make his proceedings subservient to the directions of the court. Nonetheless, the interference with the rights of creditors who were not before the court troubled Neville J in *In re King*,[152] though his Lordship considered that the result of the authorities was reasonably clear.[153]

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146 *In re Yorke deceased* [1997] 4 All ER 907.

147 See *Brook* v *Skinner* (1816) 2 Mer 480n; *Terrewest* v *Featherby* (1817) 2 Mer 480; *Lord* v *Wormleighton* (1821) Jac 148; *Sutton* v *Mashiter* (1929) 2 Sim 513; *Kent* v *Pickering* (1832) 5 Sim 569; *Vernon* v *Thellusson* (1844) 1 Ph 466. Orders could however be refused: see *Lee* v *Park* (1836) 1 Keen 714; *Vincent* v *Godson* (1850) 3 De G & Sm 717.

148 (1821) Jac 108.

149 (1817) 3 Mer 547.

150 See also *Vernon* v *Earl of Egmont* (1827) 1 Bligh NS 554.

151 (1860) 2 J & H 155.

152 [1907] 1 Ch 72.

153 In *In re King* itself the court dismissed the summons against the contingent creditor. For discussion of the present position regarding the ability to bring contingent creditors before the court, see *Re Yorke deceased* [1997] 4 All ER 907, Lindsay J holding that *In re Arnold* [1942] 1 All ER 501 was to be preferred to *In re King* on the question whether creditors should be before the court, and saying that it was not only possible that respondents joined as parties to represent contingent creditors may nowadays be heard, but desirable that their position should be considered. Where without inconvenience

While there is a statement in *Williams* v *Headland*[154] that a decree of the court is "generally speaking" an indemnity to the executor, the weight of authority is that an order of the court allowing or requiring distribution will be a full protection for personal representatives against a charge of *devastavit*. Thus Kindersley VC described the protection variously as a "complete indemnity", so that the executor could need no other[155] and a "complete and perfect indemnity".[156] Likewise Neville J held that the order of the court "exonerates [the executor] altogether".[157] Thus in a number of cases the court has refused to order a fund to be set aside against future liability, on the basis that a decree for administration is sufficient.[158] In *Re Yorke deceased*[159] Lindsay J explained:

> "The imprimatur of the court confers a protection not otherwise obtainable. In the event of a beneficiary complaining in such a case that the executors had sought the guidance of the court unnecessarily and had thus unnecessarily subjected the estate to delays and costs the executor would be able to point to the failure of that argument as long ago as 1837 in *Knatchbull* [v *Fearnhead*], even at a time when the 'crying evil' existed that if any question was required by the personal representatives to be decided by the courts then a general administration of the whole estate had to be sought."

Perhaps because of the effectiveness of the sanction of the court for personal representatives, and the adverse effect it may have on creditors who are not party to the proceedings, a number of caveats must be entered. First, it should be made clear that the order of the court protects personal representatives in their representative capacity, and will not protect them from any personal liability they incur by taking possession of the property. The injunctions formerly granted by courts of Equity to restrain creditors from proceeding at law did not prevent creditors from pursuing executors in their personal capacity.[160]

Secondly, in order for personal representatives to be protected by the order of the court, they must have made full disclosure of all relevant

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representatives could be found to put argument on their behalf it should be welcomed as this would obviate the need for the executors to do so.

154 (1864) 4 Giff 505.

155 *Smith* v *Smith* (1861) 1 Dr & Sm 384.

156 *Dodson* v *Sammell* (1861) 1 Dr & Sm 575.

157 *In re King* [1907] 1 Ch 72.

158 *Bennett* v *Lytton* (1860) 2 J & H 155; *Dodson* v *Sammell* (1861) 1 Dr & Sm 575; *Fitzgerald* v *Lonergan* (1874) unrep (see (1880) 5 LR Ir 203); *Buckley* v *Nesbitt* (1880) 5 LR Ir 199. For discussion of the need for a fund to be set aside where a decree for administration is in place see below.

159 [1997] 4 All ER 907. See also *Fletcher* v *Stevenson* (1844) 3 Hare 360; *Waller* v *Barrett* (1857) 24 Beav 413; *Adams* v *Ferick* (1859) 26 Beav 384. *Cp England* v *Lord Tredegar* (1866) LR 1 Eq 345.

160 See *Brook* v *Skinner* (1816) 2 Mer 480n; *Terrewest* v *Featherby* (1817) 2 Mer 480; *Kent* v *Pickering* (1832) 5 Sim 569; *Molyneux* v *Scott* (1854) 3 Ir Ch R 291. See also *Belmore* v *Belmore* (1849) 12 Ir Eq R 493; *Powell* v *Powell* (1849) 13 Ir Eq R 501.

information.[161] Fraud, misrepresentation or concealment will abrogate the protection afforded by the order.[162]

Thirdly, according to Page Wood VC, personal representatives are protected only where the order of the court is made in a suit for administration of the deceased's estate. Thus in *Bennett* v *Lytton*[163] the proceedings had to be amended so that the order of the court could be made in an administration suit. Similar *dicta* can be found elsewhere. In *Waller* v *Barrett*[164] Romilly MR wished to avoid being understood to mean that where an executor is ordered to pay a sum of money in a suit which was not for the administration of the deceased's estate it would protect him against creditors. In *In re King*[165] Neville J mooted the possibility that the protection afforded to personal representatives might be different where the direction of the court was given otherwise than in an administration suit.

The considerations which the court will take into account when an application is made for distribution in circumstances where there is a potential liability for debts arising at a later date are considered below. Where however the court does make an order for distribution of the estate in circumstances where there is a possibility of claims arising in the future, according to the form of order made in *In re Johnson*,[166] it will direct an account to be taken of the deceased's debts and liabilities,[167] and will authorise the personal representatives to complete the administration of the deceased's estate without retaining any part to meet any liability or possible liability of the estate under the lease.[168]

Finally, the ability of executors to obtain the protection of an order of the court became much easier following reforms made by Parliament in the mid-19th century. The quotation above from the judgment of Lindsay J in *In re Yorke deceased* refers to the "crying evil" which originally existed that if any question was required by executors to be determined by the court a general administration of the whole estate had to be sought.[169] A similar expression was used, to describe the situation of executors, on the second reading of the Bill which became the Court of Chancery Act 1850.[170] To remedy the situation, the Act contained measures which allowed executors and administrators to apply to the court by motion or petition for an account to be taken by a Master of the debts and liabilities

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161 *Dean* v *Allen* (1855) 20 Beav 1; *Bennett* v *Lytton* (1860) 2 J & H 155; *Smith* v *Smith* (1861) 1 Dr & Sm 384.

162 *Re Yorke deceased* [1997] 4 All ER 907.

163 (1860) 2 J & H 155.

164 (1857) 24 Beav 413.

165 [1907] 1 Ch 72.

166 [1940] WN 195.

167 The extension to include liabilities was considered necessary for the protection sought. The order in *Re Sales* (1920) 64 Sol Jo 308 had directed an account merely of debts.

168 For the form of order allowing personal representatives to distribute the estate where the deceased was a Name at Lloyd's, see Practice Direction [1998] 1 Lloyd's Rep 223.

169 Note however the practice which evolved of commencing a suit for administration and later staying further action once an order of the court on the particular point required was obtained: see *Re Medland* (1889) 41 Ch D 476, 492; Williams, Mortimer & Sunnucks, *Executors Administrators and Probate* (16th edn, 1982) p 738.

170 111 *HC Debs* (3rd Series) col 1132 (12 June 1850).

of the deceased. In cases where contingent liabilities were found to exist, section 23 of the Act empowered the court on the application of the executors to order a sum to be set aside out of the estate to answer such liabilities. Where an account was taken under this procedure, and if necessary a sum set aside, the executors would be safe in distributing, as section 25 provided that all payments made by the executors would be as good and effectual as if made under a decree of the court.

Similar provisions to those in the Act of 1850 were introduced in Ireland under the Chancery (Ireland) Act 1867.[171] Both measures were repealed towards the close of the century however,[172] as Rules of Court had by then been made, corresponding to those now contained in Order 85 of the Rules of the Supreme Court (NI), allowing personal representatives to obtain orders of the court by means of an administration summons.

Indemnity fund

One means whereby personal representatives may protect themselves against the possibility of claims arising at a later date is to set aside out of the deceased's estate a fund sufficient to cover any claim which later arises. Where the amount of any claim can be ascertained, then there should be no difficulty in quantifying the amount of the indemnity fund to be established. Where the amount of any potential claim is uncertain, as for example where a possibility of a breach of covenant to repair exists, personal representatives are more likely to err on the side of caution and set aside more rather than less. In either case however the effect of setting an indemnity fund aside is to tie up assets of the deceased for a possibly uncertain period, and thus to deprive the beneficiaries of the deceased's estate of such assets in the meantime. Where personal representatives do set a fund aside, the beneficiaries may apply to the court for an order for payment out, and if the court makes such an order the personal representatives will be protected as discussed above. The issue for consideration in this section is the role of the court in determining whether an order for distribution should be made, or whether funds should be retained against future liability. The issue is one where the law has on a number of occasions been described as being in an unsatisfactory state.[173] Conflicting views have been expressed about the retention of a fund to meet liabilities which may never arise: in *Johnson* v *Mills*[174] the Lord Chancellor said of the right of creditors to have monies set aside to meet liabilities in the future that there was no more useful jurisdiction of the court in the administration of assets, while in *Brewer* v *Pocock*[175] the Master of the Rolls spoke of his great reluctance to order a retention to meet contingent claims. Be that as it may, both the Court of Chancery Act 1850 and the Chancery (Ireland) Act 1867 contained provisions for the setting aside of funds to meet contingent liabilities.[176]

One issue which illustrates the confusion which exists in this area is the question for whose benefit the fund is established, or whose interests are

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171 A difference between the Irish enactment and its English counterpart existed in the means by which executors could apply to the court, section 145 of the Irish statute specifying that the application should be by summons.

172 Statute Law Revision Act 1883 (repealing Court of Chancery Act 1850); Statute Law Revision (No 2) Act 1893 (repealing Chancery (Ir) Act 1867).

173 See *Smith* v *Smith* (1861) 1 Dr & Sm 384; *Dodson* v *Sammell* (1861) 1 Dr & Sm 575; *In re King* [1907] 1 Ch 72.

174 (1749) 1 Ves 282.

175 (1857) 23 Beav 310.

176 Court of Chancery Act 1850, s 23; Chancery (Ir) Act 1867, s 148.

being protected if a fund is set apart. The setting aside of assets to meet future claims is relevant to three classes of individual: the personal representatives, the contingent creditor, and the residuary legatee or next of kin whose money the fund comprises. The precise nature of the function of the court in ordering a fund to be set aside, or in ordering distribution without retention of a fund, is unclear from the authorities. In a number of instances the court has said that the retention of a fund to meet possible claims is carried out for the protection of the personal representatives, while in other cases the court has indicated that it is desirous of protecting contingent creditors. Other cases draw attention to the position of legatees.

The weight of authority seems to favour the view that the retention of an indemnity fund is to protect the personal representatives.[177] In *Dobson* v *Carpenter*[178] Lord Langdale MR said it was the bounden duty of the court to protect executors against all outstanding claims which they might be called on to meet in the future, and that they ought to be protected out of the assets of the testator. The difficulty here is in reconciling the cases in which the court has ordered the retention of a fund with the principle established in the cases discussed in the preceding section that the order of the court itself grants the personal representatives all the protection they need, so that no further protection (in the form of an indemnity fund) is required.[179] An attempt to reconcile the conflicting authorities was recently made by Lindsay J in *In re Yorke deceased*.[180] The position, his Lordship explained, was as follows:

> "First, a distribution made pursuant to a decree of the court affords a complete protection to the executor and the executor need not and indeed should not look, for example to a retention, for any protection beyond that. Secondly, it had long been the practice of the court to enable personal representatives to set apart "a reasonable sum to cover any liability which might in any reasonable probability arise by reason of a future breach" of covenants in a lease held by the deceased: Kindersley VC in *Dodson* v *Carpenter*. These observations can comfortably co-exist if the case was that where an executor during his administration knew of no likelihood of any contingent debt maturing he could, by having an account taken in court of all known liabilities, obtain a decree which permitted him to distribute to legatees without making any retention but which nonetheless gave him complete freedom from a devastavit (save in exceptional circumstances such, for example, as fraud, misrepresentation or concealment). Where that was done a creditor with a later maturing contingent debt would be able to recover, if at all, only against the legatees.
>
> Conversely, if, during an administration some real possibility of some contingent debt maturing came to the executor's notice, the executor could, either of his own volition or under the guidance of the court, retain a sum out of the estate against that risk or seek security direct from the prospective recipient beneficiary. If there was a retention and if his retention was pursuant to a direction of the court then, again, he would be protected against *devastavit* once the fund retained or the security so given

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177 See *In re Nixon* [1904] 1 Ch 638; *In re King* [1907] 1 Ch 72; *Re Lewis* [1939] 3 All ER 269.

178 (1850) 12 Beav 370.

179 See *Dodson* v *Sammell* (1861) 1 Dr & Sm 575; *In re King* [1907] 1 Ch 72.

180 [1997] 4 All ER 907.

> was exhausted in application towards a risk against which it has been reserved. But if the executor failed to obtain the directions of the court in that he distributed with neither a retention, nor a security from a beneficiary, sanctioned by the court nor had obtained the sanction of the court upon the taking of an account and a decree then, in any such case, he remained at risk of personal liability."

In some cases it appears that the establishment of an indemnity fund is for the protection of contingent creditors, rather than the personal representatives. Thus in *Fletcher* v *Stevenson*[181] Wigram VC refused to order payment out of assets retained by the executors, saying that so far as the executors were concerned, they would be safe in acting under the direction of the court; but in considering what protection was due to the absent covenantee, the court was bound to consider whether, in taking the assets out of the executors' hands, it could do less than it would expect executors to do if the funds remained in their hands. Again, in *Bunting* v *Marriott*[182] the court explained that where an indemnity fund was set aside in respect of leasehold property, this was done for the protection of the ground landlord rather than the executors. According to Stuart VC in *Williams* v *Headland*,[183] the former practice of the court in requiring recognisances from legatees showed that what the court had in view was not merely the protection of the executor, but care with reference to those who might have demands against the estate not then appearing, so as to preserve those demands against the assets in the hands of those who were to receive them. Be that as it may, a number of cases proceed clearly on the basis that protection of contingent creditors is not the basis upon which an indemnity fund is set aside. In *King* v *Malcott*[184] Turner VC refused the application of a lessor to have a fund set aside to meet possible breaches of covenant in the future, on the basis that an indemnity fund was set aside for the protection of executors and not from any right creditors had to come in under administration decrees.[185] In *Re Yorke deceased*[186] Lindsay J considered that the position was that even though a contingent creditor had no strict right at law or in equity to insist upon a retention or security, the court would have in mind, in fixing a retention or security, that it was proper that creditors should to some extent be protected. The court should have it in mind to achieve a fair balance between the injustice of beneficiaries being kept out of benefit on account of liabilities that might never come to anything, and the risk of creditors finding their debts unmet. In weighing the interests of creditors however, his Lordship went on to explain that the sanction of the court can properly be given for distribution, even though provision for future creditors is not assuredly and in all possible events complete.

The third class of person whose interests are affected by any retention made by the executors or ordered by the court is residuary legatees or next of kin, out of whose share any fund retained will come. A retention will therefore

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181 (1844) 3 Hare 360.

182 (1861) 7 Jur NS 565. See however *Snowdon* v *Marriott* (1873) 28 LT 867.

183 (1864) 4 Giff 505.

184 (1852) 9 Hare 692. See also *Lynar* v *Mills* (1805) 2 Sch & Lef 338 where the Lord Chancellor suggested that it might be possible for a lessor to obtain an order for setting aside an indemnity fund against future breaches of covenant in the lease if it was alleged that the executors had wasted the assets, but apparently not otherwise.

185 See also *Smith* v *Smith* (1861) 1 Dr & Sm 384; *Dodson* v *Sammell* (1861) 1 Dr & Sm 575; *In re Nixon* [1904] 1 Ch 638; *In re King* [1907] 1 Ch 72.

186 [1997] 4 All ER 907.

deprive them of property to which they are entitled if no claim were to arise. The more remote the contingency against which the fund is retained the more such beneficiaries are likely to seek to prevent assets being held back. Two questions then arise: first, how should the court look on the claims of residuary legatees or next of kin, and to what extent if any should the court estimate the risk of a claim arising in the future?

Opposing views of the nature of the position of residuary legatees may be found in *Dobson* v *Carpenter*[187] and *Dodson* v *Sammell*.[188] In the former, after explaining that the purpose of retention of assets was to protect the executors, Lord Langdale MR went on:

> "The legatees may thereby be disappointed; but still, if the legatees are not entitled to the bequest until all the demands against the estate have been provided for, what right have they to complain?"

A more sympathetic view of the position of residuary legatees was however taken by Kindersley VC in *Dodson* v *Sammell*:

> "The effect of setting apart a fund to answer future breaches of covenant is to throw a great burden on the residuary legatee, for, instead of receiving the residue in the ordinary course, he would be kept out of a portion of it, possibly the whole, as long as any leaseholds were outstanding, for any period of time, however long. This is a very great evil to the legatee, and should not be inflicted on him unless absolutely necessary."

His Lordship went on to refuse to order a retention as it was unnecessary for protection of the executors, and the lessor had no equity to claim a retention.

Assessment of the risk of a claim arising at a later date is of course a matter for the personal representatives' judgment. It is they who will be liable if a claim arises for which no provision has been made. Where however a fund is retained and beneficiaries seek to have the court order payment out, it will be necessary for some estimation of risk to be carried out by the court.[189] The greater the risk of the personal representatives becoming liable in the future, the more the need for a retention to be made. In *Crook* v *Hendry*[190] the court ordered the whole of a retained fund to be paid out on being satisfied that the risk of any claim in the future was small, even though the leases under which claims could arise had still some 50 years to run. At the other end of the scale are cases where funds have been retained on the basis that liability is certain or practically certain to arise,[191] though this is not necessarily conclusive.[192] Factors which have been taken into account by the court in assessing whether a fund should be set aside or retained are the security afforded by indemnities

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187 (1850) 12 Beav 370.

188 (1861) 1 Dr & Sm 575.

189 The desirability mentioned by Lindsay J in *Re Yorke deceased* [1997] 4 All ER 907 of representation on the part of contingent creditors in any application for directions has already been noted.

190 (1878) 26 WR 325.

191 *Atkinson* v *Grey* (1853) 1 Sm & G 577; *Re Arnold* [1942] 1 All ER 501.

192 The decision to order payment out of the retention fund in *In re Johnson* [1940] WN 195, despite evidence of breaches of covenant in the past, has been explained on the basis of the ability of the residuary legatee to indemnify the executor should liability later arise: see *Re Yorke deceased* [1997] 4 All ER 907.

from the residuary legatees[193] or purchasers of the lease,[194] the likelihood of the lessor proceeding by ejectment rather than by an action for damages,[195] and the inability of personal representatives to rely on the provisions of the Trustee Act (considered in the following section).[196]

One particular matter which has been relied on to justify the retention or otherwise of a fund against future liability requires discussion. In *In re Nixon*[197] an application was made by a residuary legatee for funds retained by executors against possible liability under various leases to be paid out. None of the leases had vested in the deceased's executors on his death, as in one case the lease had been assigned by the deceased during his lifetime, and in the other cases the deceased had been a joint tenant and the other co-owners took by survivorship. In support of the application it was argued for the residuary legatee that the court would only set aside an indemnity fund where privity of estate existed between the lessor and the executors. Byrne J accepted the argument, in the absence of any authority showing that a fund had been set aside where there was no privity of estate, and of any statutory provision requiring a fund to be set aside for the protection of the executors. If correct, in limiting cases where a fund will be set aside to cases where liability is personal rather than representative, *In re Nixon* appears to restrict significantly the protection the court will afford to personal representatives. It is however arguable that it is precisely because liability is *representative* rather than *personal* that a fund is needed, rather than the other way round.[198] Whether that be so or not, some comments may be made concerning *In re Nixon*: first, while the argument was made on behalf of the executors that the important factor was the privity of contract which existed between the deceased and the lessor, rather than the privity of estate between the lessor and the executors, the executors did not oppose the application for payment out of the fund. Secondly, it was pointed out by the court that the executors would be protected under the order made by the court. Thirdly, there is the unusual statement by Byrne J that the case was one "in which the executors will be perfectly justified, if they see fit, . . . in taking another opinion upon this question." Nor is confidence in the distinction between cases involving privity and cases where there was no privity improved by the comment of Simonds J in *Re Lewis*[199] that if there was such a distinction he was unable to appreciate its importance, save possibly for purposes of the Limitation Act. Finally, two cases may be mentioned which appear to cast doubt on the validity of the proposition that it is only in cases involving privity of estate that a fund will be set aside. In *Cochrane* v *Robinson*[200] an order was made for sale of leasehold estates held by a testator at his death. Following the sales, the executor sought an indemnity from the residuary legatee against future liability which could arise under the leases. Shadwell VC held the executor was entitled to such indemnity. The significance of the case for present purposes is that the executor had not entered into possession of the property on the testator's death, so that protection was being afforded against the representative liability which the executor incurred rather than any personal liability which he would have incurred had he taken possession. The other case is

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193 *Dean* v *Allen* (1855) 20 Beav 1.
194 *Re Lawley* [1911] 2 Ch 530.
195 *Dean* v *Allen* (1855) 20 Beav 1; *Waller* v *Barrett* (1857) 24 Beav 413.
196 *Re Owers* [1941] 2 All ER 589.
197 [1904] 1 Ch 638.
198 See below.
199 [1939] 3 All ER 269.
200 (1840) 10 LJ Ch 109.

Reilly v *Reilly*.[201] There an indemnity fund had been set aside under an order of the court against possible liability under leases held by the deceased. Some years later, after all the leases had been either sold or surrendered, an application was made for distribution of the fund. The executor was protected against future representative liability by the provisions of the Law of Property Amendment Act 1859,[202] so that only his personal liability was relevant. Romilly MR ordered distribution, saying that the purchasers of the leases were liable for future performance of the covenants in the leases. It would appear therefore that the court took the view that the assignment of the leases brought the personal liability of the executor to an end, with the result that the fund could be released.

Nonetheless, the proposition that a fund would be ordered in cases of personal liability has been accepted in later cases.[203]

Statutory protection

In 1859 Parliament intervened to afford executors and administrators protection against the possibility of claims arising in the future under leases. Section 27 of the Law of Property Amendment Act of that year introduced provisions exonerating executors and administrators from future liability under leases where the conditions of the section were satisfied. The protection afforded by the 1859 Act was held to be the same as that provided by an order of the court entitling the personal representatives to distribute the estate of the deceased.[204] Section 27 of the 1859 Act has been replaced in Northern Ireland by section 27 of the Trustee Act (NI) 1958. Section 27(1) of the 1958 Act provides as follows:

> (1) Where a personal representative or trustee liable for --
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> (*a*) any rent, covenant, or agreement reserved by or contained in any lease;[205] or
>
> (*b*) any rent, covenant or agreement payable under or contained in any grant made in consideration of a rent charge; or
>
> (*c*) any indemnity given in respect of any rent, covenant or agreement referred to in either of the foregoing paragraphs;
>
> satisfies all liabilities under the lease or grant which may have accrued, and been claimed, up to the date of the conveyance hereinafter mentioned, and, where necessary, sets apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum which the lessee or grantee agreed to lay out on the property demised or granted, although the period for laying out the same may not have arrived, then and in any such case the personal representative or trustee may convey the

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201 (1865) 34 Beav 406.

202 See below.

203 See *In re King* [1907] 1 Ch 72; *Re Owers* [1941] 2 All ER 589.

204 *Buckley* v *Nesbitt* (1880) 5 LR Ir 199.

205 In *Millar* v *Sinclair* [1903] 1 IR 150 a fee farm grant was held to be within the comparable provisions of the Law of Property Amendment Act 1859. Fee farm grants are now specifically included in the Northern Ireland legislation: Trustee Act (NI) 1958, s27(3).

> property demised or granted to a purchaser,[206] legatee, devisee, or other person entitled to call for a conveyance thereof and thereafter --
>
> (i) he may distribute the residuary real and personal estate of the deceased testator or intestate, or, as the case may be, the trust estate (other than the fund, if any, set apart as aforesaid) to or amongst the persons entitled thereto, without appropriating any part, or any further part, as the case may be, of the estate of the deceased or of the trust estate to meet any future liability under the said lease or grant;
>
> (ii) notwithstanding such distribution, he shall not be personally liable in respect of any subsequent claim under the said lease or grant.

The provisions of section 27(1) do not prejudice the right of lessors to follow assets distributed by the personal representatives into the hands of the beneficiaries.[207]

With one important difference, the provisions of section 27(1) and (2) of the Northern Ireland statute are the same as those contained in section 26 of the Trustee Act 1925, applicable in England and Wales. The difference referred to is the presence of the words "as such" after "liable" at the beginning of section 26(1) of the English measure, and their absence in the Northern Ireland provision. Section 26(1) of the 1925 Act followed the provisions of the 1859 Act in referring to the liability of a personal representative or trustee *as such*. The significance of this limitation can be seen in *Re Owers*[208] in which Simonds J held that the provisions of section 26 of the 1925 Act did not exonerate personal representatives from the *personal* liability they incurred from having entered into possession of the deceased's leasehold property. Accordingly, the court ordered that an indemnity fund be set aside against the possibility of future liability under the leases. *Re Owers* was followed in *Re Bennett*,[209] where Uthwatt J held that if personal representatives have assented to the vesting of the property in the beneficiaries of the estate, no retention is needed.[210]

The absence in the Northern Ireland legislation of the words "as such" means that the problem identified in *Re Owers* should not arise here. It has accordingly been said that section 27 of the 1958 Act exonerates personal representatives from both representative and personal liability.[211]

There is, it is thought, some confusion regarding the statutory provisions. They are clearly required in order to protect personal representatives against future liability under leases where they are sued in their representative capacity, but are provisions needed to protect against the future personal liability they incur by having taken possession of the property? *Re Owers* is decided on the basis that, section 26 of the 1925 Act not applying, executors and administrators need protection by some other means in order to avoid such future *personal* liability after they have distributed. If however executors or administrators are sued in their

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[206] Held not to include an assignee where a reverse premium had been paid by the executors, with the result that the latter were entitled to retain funds to meet future liabilities: *Re Lawley* [1911] 2 Ch 530. The problem in *Re Lawley* is however now solved by the reference in the 1958 Act to "person[s] entitled to call for a conveyance".

[207] Trustee Act (NI) 1958, s 27(2).

[208] [1941] 2 All ER 589.

[209] [1943] 1 All ER 467.

[210] *Cp Shadbolt* v *Woodfall* (1845) 2 Coll 30.

[211] Carswell, *Trustee Acts (Northern Ireland)* (1964), p 62.

personal capacity, it is on the basis that the plaintiff has elected to treat them as assignees of the lease. The ordinary rule is that the liability of an assignee under the lease comes to an end when the assignee in turn assigns over.[212] Why then should personal representatives, if treated as assignees, be in need of protection against future liability after they have transferred the property comprised in the leases to beneficiaries? *Re Bennett*, although described as curious,[213] and *Shadwell* v *Woodfall*[214] would seem to support this view, as would *Reilly* v *Reilly*,[215] mentioned above.[216] The point can be seen again in *Boulton* v *Canon*[217] where Hale CJ explained that if an executor assigned over, he might, under the old forms of procedure, still be charged in the *detinet* if he had assets, but not in the *debet* and *detinet*, save for the time he occupied.

CONCLUSION

It would be wrong to exaggerate the difficulties faced by executors or administrators who represent the estate of someone who was lessee of property. A great many of the cases in which the courts had to work out the liabilities and protection of executors and administrators were decided when the procedure and adherence to formality were more rigid than they now are. The reforms effected by the Judicature Acts towards the end of the last century brought not only a new Supreme Court in place of the old Courts of Law and Equity, but a modern and more flexible system of civil procedure. The difficulties of joining actions where executors were sued in their representative capacity with actions where they were sued personally no longer exist. The dilemma for a plaintiff, faced with a plea of *plene administravit*, whether to accept the plea and accept judgment *quando acciderint*, or proceed to trial on the plea at the risk of losing altogether, though his claim was good, should no longer trouble him, given the ability to elicit information from defendants by interrogatories. Not only however have there been procedural reforms: legislation has improved the lot of personal representatives significantly. Personal representatives been able to protect themselves since 1859 by advertising for creditors, and the provisions now contained in section 27 of the Trustee Act greatly reduce the liability of executors and administrators under leases held by the deceased. These circumstances, together with the interpretation of section 8 of the Trustee Act 1888 adopted by the Court of Appeal in *In re Blow*,[218] *viz* that the limitation period may be relied on by personal representatives who commit a *devastavit*, notwithstanding that the creditor has at the time no right of action, mean that by the end of the nineteenth century the position of personal representatives was a lot more comfortable than it had been at the beginning of the century.

Nonetheless, problems remain. The liability personal representatives incur to the lessor of property by reason of the privity of contract which existed between the lessor and the deceased lessee remains. The provisions of the Trustee Acts both in England and in Northern Ireland specifically recognise the continued obligation of executors and administrators to satisfy all liabilities under the lease until they make over the property to

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[212] *Chancellor* v *Poole* (1781) 2 Doug 764; *Paul* v *Nurse* (1828) 8 B & C 486. The position at common law has been modified in Ireland by the provisions for notice contained in section 14 of Deasy's Act.

[213] Megarry & Wade, *The Law of Real Property* (5th edn, 1984) p 749.

[214] (1845) 2 Coll 30.

[215] (1865) 34 Beav 406.

[216] See preceding discussion.

[217] (1675) 1 Freem 336.

[218] [1914] 1 Ch 233.

purchasers or beneficiaries. During the period where administration is continuing, the various considerations discussed above as to their liability apply. In particular, it remains essential for personal representatives to protect themselves by proper pleading if a claim arises after they have distributed the estate of the deceased.

The cases concerning the liability of personal representatives under leases are useful however not only for the particular matter with which this article has been concerned. They illustrate the problem of contingent liabilities generally. While the particular problem of contingent liabilities under leases has to a large extent been alleviated for personal representatives, the provisions of section 27 of the Trustee Act (NI) 1958 apply only to liability under leases. No similar protection exists where the personal representatives face the possibility of claims arising from other sources, such as bonds or guarantees given by the deceased, calls on shares, or as *Re Yorke deceased*[219] illustrates, where the deceased was a Name at Lloyd's. In order to ensure that they do not ultimately have to meet such liabilities out of their own pocket, they will still need to secure adequate protection for themselves, whether it be in the form of an order of the court, the retention of a fund, or relying on an indemnity from the beneficiaries of the estate.

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[219] [1997] 4 All ER 907.