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Probate and Administration: Disposition of Rents and Profits of Realty

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PROBATE AND ADMINISTRATION: DISPOSITION OF RENTS AND PROFITS OF REALTY

In this article it is my purpose to briefly trace the development of the law concerning the rents and profits of realty, particularly as it is treated during the period of probate administration. I propose to compare the law as applied in our Montana courts with that existing in other jurisdictions, showing their common origin and the apparent reason for their differing, especially as regards the problem of who has a right to the possession of the rents and profits of realty during the period that an estate is before the probate court for administration.

It will be well, before answering several questions that come to mind on this subject, to outline concisely the treatment accorded to realty of a deceased person from earliest common law to the present. In doing this we should remember that the rents and profits of realty are universally construed as an incident to ownership of realty and must be treated as such, the rents and profits following ownership of the fee;[1] or as it is defined in Black's *Law Dictionary*[2], rents and profits commonly signify a chattel real interest in land.

The common law of England took form and growth under the influences of the feudal system in its original vigor; feudal principles constitute one of its essential features and determine wholly its policy in respect of real estate. Whatever rights of ownership are now enjoyed by English landholders have been granted by acts of parliament in derogation of the common law as in conflict with feudal principles.[3] Since at common law no English subject could hold land allodially, or in absolute ownership, but held it on condition of rendering services and duties, and under purely voluntary grants from the feudal lord, it follows that feudal grants could not be taken for the debts of the tenant, either before or after his death, nor devolve by succession upon his heir or devisee.[4] Nor had the personal representative of a deceased feudal tenant the slightest claim to, or interest in, the fee held by the decedent, for the fee reverted to the lord; neither creditors nor next of kin were entitled thereto, and if it passed on to the heir it was not by

[1] 36 WORDS & PHRASES (Perm. ed. 1940) 908, 921, 926 and cases cited.
[2] Third edition 1933.
[3] 1 WOERNER, THE AMERICAN LAW OF ADMINISTRATION (3rd ed. 1923) §14 and statutes cited.
[4] 2 BLA. COMM. §§51 to 54.

descent or in the right of the ancestor, but by a renewed grant from the lord.[5]

Feuds finally became hereditary, and the unconditional descent of lands from the ancestor to the heir was secured by a statute which abolished the court of wards and liveries along with various other oppressive services and duties which had attached to the holding of property.[6] This statute operated as a confirmation of title in the heir, but creditors were not allowed to subject lands in the hands of the heirs to the satisfaction of their claims against the ancestor. Consequently executors and administrators whose principal function is to pay creditors out of the estate left by decedents had no interest in or duties with reference to such lands. The law subsequently gave recognition to the rights of creditors in a series of statutes, culminating in 3 & 4 WILLIAM IV. c. 104 which makes real estate of a deceased person liable for simple contract debts as well as for specialties.

This dual nature of the English law (statutory recognition of the right to own land with all its coincident rights and duties as against the common law feudal system of enforcing such rights and duties) sometimes produces antagonism between its content and form, and thus violates in its provisions the strict requirements of logic. A notable instance of this may be found in the rule that the legal ownership of personal property descends to the executor or administrator but that of real property to the devisees or heirs. The rule arose out of the feudal tenure of lands, which could not, as shown above, go to the personal representative, because neither the creditors nor the heirs had any right thereto. The gradual conversion of this tenure into an ownership possessing all the essential qualities of property except the name, removed the foundation and reason of the rule; but the rule remained—a form void of essence, a body from which the soul had fled.[7]

Under the civil law the acceptance of the succession by the heirs rendered them personally liable for the ancestor's debts, and in Louisiana the heir has the right to so qualify his acceptance that he may avoid such personal liability by abandoning the effects so received to the ancestor's creditors.[8] It is

[5] *Id.* §§54 *et seq.*
[6] STATUTE 12 CHARLES II c. 24.
[7] The foregoing historical sketch is largely an excerpt from 1 WOERNER, *op. cit. supra* note 3, §§15, 16, with additional matter gleaned from ATKINSON ON WILLS (1937) §§198, 199, 218, 219; 2 PAGE ON WILLS (2d ed. 1926) §1296.
[8] Succession of Murray (1889) 41 La. Ann. 1112, 7 So. 126. And see ATKINSON ON WILLS (1937) §§198, 199 and cases cited.

evident that under such a system it was hazardous for the heir to accept unless in the most favorable circumstances, since the ancestor's debts might absorb not only the property so received but also the individual estate of the heir. Thus, under the civil law great injustice might be done the heir by absorbing both the ancestor's and his own property, and under the common law a like injustice might result to the creditors by allowing the heir to take valuable lands free of debts where he had not been bound by any specialty. Even after the heir was made liable by statute for simple contract debts of the decedent, the heir or devisee could escape liability by transferring to a bona fide purchaser before suit by the creditors. The reason this could be done at common law was that the ancestor's debts, even by specialty, were not charged as a lien on the lands. As a consequence of these extremely opposed views, when the legislatures of the various states came to enact statutes for control of probate of decedent's estates, most of them made radical departures from both in order to do equal justice to creditors on the one side, and heirs, devisees, and legatees on the other.[9] With the exception of certain specified exemptions, homestead rights and the like, a debtor's entire estate both real and personal may be taken under these statutes for his debts while he lives and is charged with them at his death. A testator can not deprive his creditors of property out of which they may enforce payment of their debts by disposing of it by will in a manner inconsistent with the rights of the creditors.[10]

Turning now to the first question for consideration, where land has been specifically devised, does the devisee or the executor take the rents and profits from the land during the period of probate administration?

As was pointed out *supra,* the general common law rule applied in this country in the absence of statutory provisions was that realty, or lands, tenements, and hereditaments went directly to the heirs or devisees. Since most states have adopted the common law except as modified by statute, this rule would prevail; but there have been placed on the books a maze of statutory exceptions and modifications. Among the more important are those which subject realty and personalty alike to administration, those which make realty subject to administration only when needed to pay debts of the decedent, and those which allow the realty to descend subject to a power in

[9] Blinn v. McDonald (1899) 92 Tex. 604, 606, 607, 46 S. W. 787, 788; and see 2 JARMAN ON WILLS (Bigelow, 5th ed. 1881) p. 582; 2 PAGE ON WILLS (2d ed. 1926) p. 2153; 3 WOERNER *op. cit. supra* note 3, §490.
[10] 2 PAGE ON WILLS (2d ed. 1926) p. 2156 and cases cited.

the executor or administrator to sell if necessary, or on the happening of a contingency named.[11] It naturally follows that rents and profits accruing after the deceased owner's death belong to the heirs or devisees as an incident to the ownership of the land which descends to them, subject of course to the above mentioned statutory modifications and a different intent expressed by the testator in the will.[12]

The states which have modified the common law by statute fall roughly into two classifications. The first comprises those states, including Montana, which have abrogated the old common law distinctions between realty and personalty almost entirely as far as liability to administration of decedent's estates goes and give full power and control over the realty to the personal representative.[13] The other (which includes the larger number) comprises those in which the legislature, and more particularly the courts, have proceeded with hesitation in cutting away from the common law and thus occupy a middle ground between the former and the common-law states. In the latter group of states the executor or administrator has only a qualified right over the real estate, the right being permissive, not imperative, and depending on the realty being necessary for the payment of debts of the decedent.

In the former class the personal representative is given full control over both realty and personalty during the period of probate administration. The right to possession of the realty, and incidentally to the rents and profits thereof, is solely with the representative whether the estate be solvent or not. He may bring any of the usual possessory actions in regard to realty in his own name as against third persons, or even against the heirs or devisees.[14] In these states the representative is in privity with and represents the owner of the realty, the

[11]In re McGovern's Estate (1926) 77 Mont. 182, 250 P. 812; 2 WOERNER *op. cit. supra* note 3, §276.

[12]In re Higgins' Estate (1895) 15 Mont. 474, 39 P. 506: Murphy v. Nett (1915) 51 Mont. 82, 149 P. 713; In re Dolenty's Estate (1916) 53 Mont. 33, 161 P. 524; In re Bradfield's Estate (1923) 69 Montana 247, 221 P. 531; In re Jennings' Estate (1925) 74 Mont 449, 241 P. 648; Estate of Woodworth (1867) 31 Cal. 595; In re De Bernal's Estate (1913) 165 Cal. 223, 131 P. 375. Also see ATKINSON ON WILLS (1937) §219; 2 WOERNER *op. cit. supra* note 3, §300 and cases cited.

[13]Includes these other states: California, Colorado, North Dakota, Oklahoma, South Dakota, Texas, Utah, probably Oregon, and perhaps Washington, Idaho, and Arizona. See 2 WOERNER *op. cit. supra* note 3, §337.

[14]R. C. M. 1935, §§10138, 10257 *et seq.*; Black v. Story (1887) 7 Mont. 238, 14 P. 703; In re Higgins' Estate (1895) 15 Mont. 474, 39 P. 506; Page v. Tucker (1880) 54 Cal. 121; Rice v. Carey (1915) 170 Cal. 748, 151 P. 135; Bishop v. Locke (1916) 92 Wash. 90, 158 P. 997.

heir or devisee being concluded by such representative's acts.[15] However, even in these states the title to the realty vests at once in the heirs or devisees, the personal representative having only a possessory right.[16]

Montana has upheld and applied these principles in a number of decisions pursuant to the provisions of the Code. Among the more important decisions in this state may be included the following: *Black v. Story*[17] held that an administrator could bring an action of ejectment. *In re Higgins' Estate*[18] held that an executor, after duly qualifying, has a right to the possession of the realty and consequently the rents and profits. *Murphy v. Nett*,[19] which cites *In re Higgins' Estate* with approval, held that the executor or administrator has exclusive right of control over the estate for the purpose of administration, subject only to orders of the district court. In *In re Dolenty's Estate*[20] it was held that the personal representative was chargeable, not only with the assets of the estate which actually came into his hands but also with those—including rents and profits of realty which in the exercise of ordinary care and diligence ought to have been received from it—which by reason of his neglect he has failed to get into his hands. The court held, in deciding *In re Deschamp's Estate*,[21] that on the death of the testator the real property devised vests in the devisees from the moment of the testator's death; and, subject to the right of the executors to the possession of the property for purposes of administration, the devisees may sell or dispose of the property as they please. The rights of executors to possession intervene between the vesting of title in the devisee and his right to possession, but only for purposes of administration. It was held in *In re Bradfield's Estate*[22] that, while it was the testator's duty not to

[15] 2 WOERNER *op. cit. supra* note 3, §337 and cases cited.

[16] R. C. M. 1935, §§7040, 10138, 10139; In re Deschamp's Estate (1922) 65 Mont. 207, 212 P. 512; In re McGovern's Estate (1926) 77 Mont. 182, 250 P. 512; Swanberg v. National Surety Co. (1930) 86 Mont. 340, 283 P. 761; Estate of Woodworth (1867) 31 Cal. 595; Packer's Estate (1899) 125 Cal. 396, 58 P. 59, 73 Am. St. Rep. 58; In re De Bernal's Estate (1913) 165 Cal. 223, 131 P. 375; Ostlund's Estate (1910) 57 Wash. 359, 106 P. 1116, 135 Am. St. Rep. 990.

[17] (1887) 7 Mont. 238, 14 P. 703, overruling Carrhart v. Montana Mineral Land & Mining Co. (1870) 1 Mont. 245, which had held that an administrator could not bring ejectment, but which had been decided under statutes (modeled after Missouri statutes) then in force and differing from those applicable now.

[18] (1895) 15 Mont. 474, 39 P. 506.

[19] (1915) 51 Mont. 82, 149 P. 713.

[20] (1916) 53 Mont. 33, 161 P. 524. And see also In re Jennings' Estate (1925) 74 Mont. 449, 241 P. 648 to the same effect.

[21] (1922) 65 Mont. 207, 212 P. 512.

[22] (1923) 69 Mont. 247, 221 P. 531.

deliver possession of rents and profits of realty specifically devised until expiration of the time for filing claims against the estate and he did so at his peril, there was no injury where there were ample funds to pay debts without use of this money. The rule established in *Swanberg v. National Surety Co.*[23] was that decedent's realty may be included in assets of the estate—that term meaning all of the estate which may be subjected to the payment of debts and which the executor or administrator takes as such.

Thus we may conclude that the personal representative has a right to the rents and profits of realty during the period of probate administration in Montana. As indicated in the above discussion several other western states have similar laws,[24] whereas that prevailing in the rest of the country would give the representative no such right except on court order after a showing of need for purposes of paying debts of the estate, his right being permissive and not mandatory.[25]

The question now arises: Can the executor take the rents and profits of land specifically devised if needed to pay debts of the decedent?

Taking Montana as an example, where no priority as between realty and personalty as such is observed, and where a statute[26] gives the order of resorting to an estate for purposes of paying the debts of an estate, we find these general principles apply: The personal representative is required to take all the estate into his possession during the period of probate and to release the realty, and incident thereto the rents and profits accrued from such realty, to the devisees or heirs entitled only on express order of the court. This is also the rule in those states having statutes similar to Montana.[27] And where the property enumerated in the first four classes of R. C. M. 1935, Section 7053 has been exhausted or become otherwise unavailable, all property specifically devised becomes liable ratably to the payment of the debts regardless of the nature of the

[23](1930) 86 Mont. 340, 283 P. 761.

[24]See note 13 *supra*.

[25]Butler v. Quinn (1932) 40 Ariz. 446, 14 P. (2d) 250; Lee v. Moore (1927) 37 Ga. App. 279, 139 S. E. 922; McCarty v. McCarty (1934) 356 Ill. 559, 191 N. E. 68, 94 A. L. R. 1137; Hodgkinson v. Hodgkinson (1933) 281 Mass. 463, 183 N. E. 708; Thomas v. Kunkel (1935) 170 Okl. 100, 38 P. (2d) 527; In re Hornstra's Estate (1929) 55 S. D. 513, 226 N. W. 740.

[26]R. C. M. 1935, §7053.

[27]R. C. M. 1935, §§10138, 10139; Murphy v. Nett (1915) 51 Mont. 82, 149 P. 713; In re Bradfield's Estate (1923) 69 Mont. 247, 221 P. 531; In re Gentry's Estate (1932) 158 Okl. 196, 13 P. (2d) 156; Morrell v. Hamlett (Tex. Civ. App. 1930) 24 S. W. (2d) 531. And see ATKINSON ON WILLS (1937) §262 and cases cited.

devise, whether made for a valuable consideration or for charitable purposes, and notwithstanding equities existing in favor of certain devisees which might entitle them to a conveyance of the land devised to them.[28] Because of the commendable view taken by most probate courts in making all proper efforts to get the realty to the person intended in its original state, it would seem that if the debts were small enough so that they might be satisfied by a use of the rents and profits accruing during the period of administration of an estate or within a short time thereafter, they ought to be applied to such payment in order to prevent a sale of the realty. A devisee would much rather lose the rents for a short while than lose the entire estate and have to take the balance of the purchase price in lieu thereof. Such a result may be inferred from the language of the court in the case of *In re Bradfield's Estate* noted above.

It should be noted here that it is generally held that where it appears that a sale of the realty will be necessary in order to pay the debts, an order of the court is necessary in all states—even those listed above in which the personal representative is entitled to possession of all property during the period of administration[29]—except of course where the power of sale is specifically given the executor under the terms of the will. In most states if there is no order to collect rents but only an order to sell the realty to pay the debts, the intermediate rents between the death of the decedent and the confirmation of the sale of the real estate to pay the debts go to the heir or devisee, not to the purchaser.[30] This last rule would prevail in all those states that do not give possession of the realty to the personal representative during administration. It would not apply in Montana because the representative would probably apply sums realized from rents and profits to payment of the debts along with the sums obtained from sale of the realty since he has both in his possession for that purpose.[31] Thus, it is safe to say that in Montana the executor may take the rents and profits of realty specifically devised if needed to pay debts, with some doubt as to other jurisdictions—the answer there depending on their particular statutes and decisions. California would probably reach the same result as Montana since our code is largely

[28] In re Tuohy's Estate (1905) 33 Mont. 230, 83 P. 486.
[29] 2 WOERNER *op. cit. supra* note 3, §§337, 338.
[30] 3 WOERNER *op. cit. supra* note 3, §§463, 464.
[31] R. C. M. 1935, §§7052, 7053, 7057, 10138, 10139, 10195, 10257, 10282. And see In re Tuohy's Estate (1905) 33 Mont. 230, 83 P. 486; In re Bradfield's Estate (1923) 69 Mont. 247, 221 P. 531; In re McLure's Estate (1926) 76 Mont. 476, 248 P. 362; Swanberg v. National Surety Co. (1930) 86 Mont. 340, 283 P. 761.

an adaptation of that of California. The decisions of the California courts seem to justify such a conclusion.[2]

An interesting question which would be likely to arise only in those states where the executor has a right to the possession of the entire estate during administration, now presents itself: If the rents and profits were not needed for payment of debts, could a legatee satisfy his legacy from such rents and profits at the expense of the specific devisee where the rents and profits were not specifically charged with the payment of such legacy?

Montana has held that in marshaling assets executors may take into possession everything that belongs to an estate, and may receive the rents and profits from real estate specifically devised, for the time named in R. C. M. 1935, Section 10138; but that he receives them as security for payment of debts or expenses of administration, and if they are not needed for that purpose he may not call on such security to enhance the amount which passes to the residuary legatee at the expense of the holder of title to the land specifically devised.[3] The language of the court is broad enough there to include any legatee. This holding seems right and just if rents and profits are to be considered and treated as realty and not as personalty by the courts. An additional ground for such a holding is that it was the probable intention of the testator that the rents and profits should go with the realty to the specific devisee where he has not mentioned them otherwise in his will.

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SURETYSHIP: DEFENSES OF SURETIES AND GUARANTORS UNDER R. C. M. 1935, SECTIONS 8188 AND 8201

C was surety upon B's bond to A. A and B agreed that the interest rate thereon should be reduced. C was held to be discharged.[1]

A leased certain property to B at a rental of $28,000 per year. C guaranteed due performance by B. Subsequently A agreed to reduce the rental to $23,000 per year.

[2] See especially In re De Bernal's Estate (1913) 165 Cal. 223, 131 P. 375. And also see Estate of Woodworth (1867) 31 Cal. 595; Washington v. Black (1890) 83 Cal. 290, 23 P. 300; In re Izedorio's Estate (1929) 100 Cal. App. 469, 280 P. 171.

[3] In re Bradfield's Estate (1923) 69 Mont. 247, 221 P. 531.

[1] Board of Commissioners of Fillmore County v. Greenleaf (1900) 80 Minn. 242, 83 N. W. 157.