tions. If the Supreme Court in the principal case has abandoned its use of the canon of construction under discussion, the result should be an aid toward determination of true legislative purpose.

DECEDENTS' ESTATES

RIGHT OF ADMINISTRATOR TO APPEAL

The administrator of an estate applied to the court for leave to sell realty to pay debts. A bid of $3500 was received for a tract of 40 acres which the court subsequently approved. Before the sale had been completed, a second bid of $3500 was received for 20 of the 40 acres, *i.e.*, an equal amount was offered for one-half the land. The administrator therefore filed a petition in court asking that the uncompleted sale to the first bidder be set aside. The court refused to set aside the sale and ordered that the deed be delivered to the first bidder. On appeal by the administrator, the Appellate Court affirmed the judgment on the ground that the administrator had no appealable interest. The Supreme Court reversed the judgment, holding that the administrator had a duty to sell real estate for the best obtainable price, and to that extent at least he was "trustees for the heirs" and as such was authorized to appeal from the order directing him to sell at the low price. *Ohlfest v. Rosenberg*, 75 N.E. 2d 147 (Ind. 1947).

The problem before the court in the instant case was to determine whether the judgment ordering the completion of the sale to the lower bidder affected the interest of the estate which the administrator represented in such a way that he should be allowed to appeal from it. Since there was no controlling authority on this point,[1] the problem had to be resolved in the light of the more general rights of an administrator to appeal in his representative capacity.

The rights of a representative to appeal in his represent-

1. In Simpson v. Pearson, 31 Ind. 1 (1869) and Staley v. Dorset, 11 Ind 367 (1858), appeals by administrators were dismissed on other grounds, implying that orders for the sale of real estate could be appealed by administrators. However in Hetzell v. Morrision, 115 Ind. App. 512, 60 N.E.2d 150 (1945), it was held that the administratrix could not appeal the denial of such an order, but there were other facts to justify the dismissal of this appeal. Thus there was no explicit authority on the proposition.

ative capacity are and should be determined by the nature and limits of his position and his relationship to those represented. The cost of such appeals is paid out of the funds of the estate, trust, or receivership, as the case may be. Consequently, an appeal will not be allowed unless the representative alleges such an injury to the interest which he represents that if relief be granted on appeal the benefits will accrue to that interest. In the field of administration of estates courts have adhered to this rule closely. Thus an administrator cannot appeal from judgments which injure him personally[2] or which operate against a stranger and not against the estate.[3] Likewise a judgment construing a will cannot be appealed by an administrator,[4] because such a judgment injures only individual legatees and not the estate, the unit which the administrator represents. On the other hand, the administrator's right to appeal from a judgment allowing claims against the estate is universally recognized.[5] And although other states have held to the contrary,[6] Indiana courts allow the administrator to appeal from a final order of distribution.[7]

That a court's conception of the nature of the representative capacity determines the right or absence of right of the representative to appeal is amply demonstrated by the conflicting opinions rendered in the instant case by the Appellate and Supreme Courts. The Appellate Court stated that real estate descends directly to heirs or devisees subject only to the right of the administrator to sell if necessary to pay debts. Therefore, it said, the administrator was not harmed by the order to sell 40 acres instead of 20 acres for $3500. Several inferences may thus be drawn as to the Appellate

2. Ansel v. Kyger, 60 Ind. App.259, 110 N.E. 559 (1915).
3. McCollister v. Greene County National Bank, 171 Ill. 608, 49 N.E. 734 (1898).
4. Stoner v. Gloystein, 193 Ind. 614, 140 N.E. 435 (1923); Case v. Deal, 177 Ind. 288, 98 N.E. 56 (1912).
5. Gillette's Appeal, 82 Conn. 500, 74 Atl. 762 (1909); Harper v. Stroud, 41 Tex. 367 (1874); See Note, 118 A.L.R. 743 (1938). Indiana provides by statute that administrators and executors may appeal without bond. Ind. Stat. Ann. (Burns, 1933) §6-2003 and §2-3217.
6. McDonald v. McDonald, 291 Mass. 299, 197 N.E. 3 (1935); Bryant v. Thompson, 128 N.Y. 426, 28 N.E. 522 (1891); First National Bank v. Rawson, 54 Ohio App. 285, 7 N.E.2d 6 (1936); See Note, 117 A.L.R. 99 (1938).
7. Ruch, Adm. v. Biery, 110 Ind. 444, 11 N.E. 312 (1886); followed in Keener v. Grubb, 44 Ind. 564, 89 N.E. 896 (1909).

Court's conception of the nature of an administrator. Implicit in the emphasis on the fact that the administrator had no title to the land is a decision that the nature of the administrator's duty differs, depending upon whether the subject matter of the duty is real or personal property. The implication is that in the sale of land the administrator owes no duty to the heirs to obtain the best price or to preserve for them as much land as possible. The Appellate Court also stressed the fact that there was other land available to the administrator sufficient to pay all creditors. It implied that it would have allowed the appeal had the trial court's order to sell affected adversely the interests of creditors. The Appellate Court's opinion was thus obviously framed on the premise that an administrator has a greater duty to creditors than he has to heirs.

The opinion of the Supreme Court in its basic assumption that an administrator owes a fidicuiary duty to the heirs and devisees reveals a different conception of his function. Under this assumption the conclusion that he may appeal an order adverse to their interests, as in the instant case, is unavoidable.

Although conceptions of the nature of the representative capacity of administrators and executors are demonstrably of vital significance, it is virtually impossible to find an analytical description of the nature of this representative capacity. Such expositions as may be found are given in terms of the law of trusts, the courts saying that administrators are trustees for the creditors and heirs.[8] The unreality of such language is apparent when it is realized that creditors and heirs are inevitably adverse parties.[9] The words "trust," "trustee," and "fiduciary duty" are merely convenient but inaccurate descriptions of a result, concealing rather than clarifying the fundamental considerations which should guide the courts in analysis. As regards creditors, it is clear that the administrator is not a trustee as that word is used in

8. Stone et al. v. Elliott, 182 Ind. 454, 106 N.E. 710 (1914), and cases there cited.

9. It is true that when one person is to take the earnings of a trust and another the principal after a period of time, there may be some question as to whether particular assets are earnings or part of the principal. To the extent that this occurs, the trustee serves persons with interests somewhat adverse. In that situation, however, the task is classification of assets. There are no conflicting interests in trust property once it has been classified.

trust law to indicate a fiduciary acting on behalf of others. At many stages in the administration he acts adversely to the interests of creditors. He disputes any claim[10] which he deems to be without merit.[11] If by chance a creditor fails to appear in court his claim will be dismissed.[12] At every point in the proceedings the creditor is required to protect his own interest. It can hardly be said that the administrator is acting as the creditor's trustee.

If analogy is desirable, perhaps a closer analogy for the administrator-creditor relationship is that of receivers or trustees in bankruptcy toward creditors. There is a distinct parallel between receivers and administrators of *insolvent* estates. Insolvency has dispelled the expectancy of heirs and beneficaries. The duty of the administrator is thus, like that of the receiver, merely to pay debts in the order and proportion set out by the court to the extent of the available assets. But since the law does not operate on the assumption that all estates are insolvent, this analogy too breaks down when the facts change.

Probably the best way to determine the true nature of the administrator's capacity is to look to the purpose underlying the legal institution of administration of decedent's estates. This purpose may be said to be to establish one person who will have the responsibility of settling the deceased's business affairs and distributing his property as his will or as the law of descent and distribution prescribes. As a practical matter there must be some one person to whom all interested parties may look. Any other course would lead to complete confusion with no creditor knowing with whom to file a claim, no debtor knowing to whom to pay his debt, and no heir or devisee knowing to whom to look for payment. It is apparent, therefore, that the administrator needs broad authority to accomplish his task.

The law seems to recognize that the principal duty of the administrator is toward the devisees and heirs. If there is no will, the statute provides that the nearest heir may become the administrator.[13] Only if all the heirs decline will

10. Ind. Stat. Ann. (Burns, 1933) §6-1001. All claims against the estate must be filed in the office of the clerk of court.
11. Ind. Stat. Ann. (Burns, 1933) §6-1013. The administrator is required to set up all available defences to any claim filed.
12. Ind. Stat. Ann. (Burns, 1933) §6-1014.
13. Ind. Stat. Ann. (Burns, 1933) §6-301 provides that letters of

a creditor be selected as an administrator. Thus personal interest is utilized to assure that the interest of devisees and heirs is protected. In addition, the extensive accounting and supervision required by law,[14] while sometimes protecting creditors if the estate is insolvent or near insolvency, protects the interest of heirs and devisees in the ordinary circumstance, viz., the case of a solvent estate. In the same way, the duty of the administrator to contest claims of creditors will ordinarily operate to the benefit of heirs and devisees.

Thus far, it might perhaps be defensible to say that the administrator is "trustee" for the heirs in that he acts for their interests. But when he finds it necessary to deal with realty, to which he does not have title, the strict analogy to trust law fails. It is at this point that the use of the analogy creates real and vital confusion. It is obvious error to reason that because the administrator has no title and is not a trustee he therefore does not act for the heirs. There is no reason why the administrator should not owe the same duty to the heirs when selling real estate as he owes when dealing with personal property. The duty with respect to the personal property arises not out of the title which he holds but out of the situation. This same situation obtains when real estate is being sold to pay debts. The fact that the title to land alone passes directly to heirs is merely a historical accident. Practical considerations should determine whether the administrator acts for the heirs. As a practical matter, although the heirs are made parties to any petition to sell land, the administrator is expected to look after their interest.[15] He is the one who has handled the affairs and the one to whom the

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administration shall be granted first to the widow or widower, second to the next of kin, and then to the largest creditor applying and residing in the state.

14. Ind. Stat. Ann. (Burns, 1933) §6-501 requires every executor or administrator to file a bond of at least double the amount of the personal estate to be administered. §6-1401 requires that the administrator keep a complete record of all assets of the estate received and disbursed. It is the duty of the court at the beginning of each term to call the estates pending before the court for reports due from the executors and administrators as provided in §6-1413. Any executor or administrator failing to file the account as required shall be proceeded against as for contempt by §6-1414.

15. Bell v. Shaffer, 154 Ind. 413, 56 N.E. 217 (1900). The courts in some states have construed statutes to require that the administrator take possession of the realty pending administration even though the title is in the heirs and devisees. Meeks v. Hahn, 20 Cal. 620 (1862); Bishop v. Locke, 92 Wash. 90, 158 Pac. 997 (1916); Balch v. Smith, 4 Wash. 997, 30 Pac. 648 (1892).

claims have been made. Although the heirs have title, this has no bearing on whether they are well enough informed about the affairs of the estate to know that there is occasion to contest a petition for the sale of land or to appeal an order for such a sale.

A clear understanding of the function performed by the administrator leads to the conclusion that his duty to the heirs is not limited to those subjects to which he has title. The Supreme Court, by recognizing this, has provided the basis for overruling some decisions of the Appellate Court which have emphasized title to the exclusion of the more realistic considerations which should be the basis for decision.[16]

EVIDENCE

INSPECTION OF OPPONENT'S CHATTELS BEFORE TRIAL

An action was brought for damages against a soft-drink bottling company on account of illness allegedly resulting from the presence of poisonous foreign matter in the bottle from which the plaintiff drank. Prior to the trial plaintiff refused defendant permission to have a chemical analysis made of the contents of the bottle and the court denied defendant's motion to require plaintiff to deposit the bottle with the court so that an analysis could be made. During the trial plaintiff's attorney stated that he had never had a chemical analysis made but objected to testifying that he had refused to permit the defendant to make such an analysis. Objection sustained, verdict and judgment for the plaintiff. On appeal the Supreme Court of South Carolina upheld the order denying defendant's motion but reversed the judgment and ordered a new trial. The evidence excluded was a circumstance which the jury should have been permitted to consider. *Welsh v. Gibbons*, 46 S.E. 2d 147 (S.C. 1948).

That litigants in a modern trial, where the main issue is whether or not deleterious substances were present in consumer's goods, can carry the case to judgment without sub-

16. Richcreek v. Richcreek, 116 Ind. App. 422, 64 N.E.2d 308 (1945). See also Hetzell v. Morrison, 115 Ind. App. 512, 60 N.E.2d 150 (1945), where although the correct result was undoubtedly reached in view of the other facts of the case, the Appellate Court argued in terms of title.