impractical to join all the participants in one suit,[60] but perhaps a representative group could be joined in any particular proceeding. Another difficulty arises in situations in which the seller's defense fails. All efforts should be made to assure the buyer of a valid attempt on the seller's part to prove that his cost savings would permit granting price reductions to the buyer. If the seller cannot justify his prices, the presumption must be that they are unlawful unless the buyer can himself sustain the burden of cost justification.

Much of the criticism which has been leveled at Section 2(f) of the Robinson-Patman Act could be dispelled if proper measures are enacted to insure the effectiveness of the provision and, concurrently, provide for sensible enforcement.[61] The Section could be administered to avoid needless harassment of large buyers while at the same time safeguarding the small competitor from unfair price practices.

POSSESSION AND CONTROL OF ESTATE PROPERTY DURING ADMINISTRATION: INDIANA PROBATE CODE SECTION 1301

Statutory reform of the law generally follows a pattern of piecemeal enactment in response to particularly pressing needs. The changes wrought by codification can more often be traced to shifts in basic social and economic conditions, to the consequent evolution of fresh legal concepts, and to the need for a more systematic organization of the law. In recent years, the development of probate law has proceeded increas-

60. In Automatic Canteen Co. v. FTC, 346 U.S. 61 (1953), for example, there were some 80 sellers granting the buyer allegedly illegal discounts. Various other buyers were receiving price discounts on candy products contemporaneously with Automatic Canteen, as appeared in the facts of another case. That case involved in part a charge against the Curtiss Candy Company of granting discriminatory prices to Automatic Canteen, Confection Cabinet Company, Berlo, Sanitary Automatic, and "several other buyers." Curtiss Candy Co., 44 F.T.C. 237, 263 (1947).

The matter is further complicated by the fact that violations of the Act in this situation extended back beyond the buyers and sellers of candies involved. Two companies, Corn Products and Staley, were found guilty of allowing discriminatory prices on glucose, a basic ingredient of candy, to various manufacturers of confections. A. E. Staley Co., 34 F.T.C. 1362 (1942); Corn Products Refining Co., 34 F.T.C. 850 (1942).

61. See Austern, *Tabula in Naufragio—Administrative Style; Some Observations On The Robinson-Patman Act,* ANTITRUST LAW SYMPOSIUM 105, 107-109 (1953 ed.). This writer comments on the fact that there is a great deal of business support of the Act in spite of the criticism leveled at it from many other sources.

ingly by means of codification.[1] The new Probate Code,[2] the first major modification of Indiana law relating to the administration of decedents' estates in more than half a century,[3] presents an enormous problem of analysis and interpretation to the lawyers and the courts of this state.[4]

Since some of the Code is a carry-over from existing statutes, a number of sections will be familiar and others may be easily integrated with former practices.[5] Manifold changes have been made, some of which are so fundamental that it is questionable whether a knowledge of past and present probate law, in Indiana at least, will assist counsel in anticipating the consequences when the task is to draft a will or to advise the administrator or executor of a decedent's estate. A cardinal example is Section 1301[6] which bestows possession of the entire estate, both real and personal property, upon the personal representative.[7]

1. "Probate law is on the march. In no area of property law has there been more legislative activity in the past two decades than in the law of decedents' estates. . . . Since 1930 ten codes of probate law have been enacted in as many states." Simes, *Ten Probate Codes,* 50 MICH. L. REV. 1245 (1952).

2. Indiana Acts 1953, c. 112. IND. ANN. STAT. §§ 6-101 to 8-218 (Burns 1953). Hereinafter the Indiana statute will be referred to simply as the "Code".

3. The bulk of former Indiana law in reference to decedents' estates is derived from the Acts of 1881 (Spec. Sess.), c. 45. See IND. ANN. STAT. §§ 6-101 to 6-2355 (Burns 1933).

4. The new Code became effective on January 1, 1954. INDIANA PROBATE CODE § 2502. Different consequences may develop if a person dies before January 1, 1954, and probate proceedings are pending as of that date. Section 102 (a) [IND. ANN. STAT. § 6-102 (a) (Burns 1953)] of the Code states that the new law will govern "all further procedure in probate proceedings then pending, except to the extent that in the opinion of the court their application in particular proceedings or parts thereof would not be feasible or would work injustice, in which event the former procedure shall apply." Impliedly then, the Code may control even though the decedent passed away prior to January 1, 1954, and the administration of his estate has already commenced. No attempt is made here to predict when the court should exercise its discretion and apply the new law. Subsection (b) of Section 102 concerning substantive rights apparently is intended to afford some direction to the court in this regard. And see Van Fleet v. Van Fleet, 49 Mich. 610, 14 N.W. 566 (1883). As to the procedural aspect of the problem compare FED. R. CIV. P. 86 (a), which evidently served as a model for Section 102 (a) of the Code.

5. See INDIANA PROBATE CODE, Part II, which is an explanatory supplement compiled by the Indiana Probate Code Study Commission. Under each new section its relation to prior law, if any, is discussed. The Commission's Comments are included under the appropriate sections of the 1953 Replacement to Vol. 3 of Burns.

6. "Sec. 1301. Every personal representative shall have a right to, and shall take, possession of all the real and personal property of the decedent except the homestead of the surviving spouse and minor children. He shall pay the taxes and collect the rents and earnings thereon until the estate is settled or until delivered by order of the court to the distributees. He shall keep in tenantable repair the buildings and fixtures under his control and may protect the same by insurance. He may maintain an action for the possession of the real property or to determine the title to the same." This is IND. ANN. STAT. § 7-701 (Burns 1953).

7. As an indication of the importance of Section 1301, see IND. ANN. STAT. § 7-701 (Burns 1953). The Commission's Comment thereunder states: "This section is essential to the smooth operation of the Code."

"It has been estimated that the title to all real estate passes through the Probate

"Every personal representative shall have a right to, and shall take, possession of all the real and personal property of the decedent except the homestead of the surviving spouse and minor children."

Awarding possession of the decedent's real estate to the executor or administrator under any circumstances is a far-cry from the common law doctrine that only the personal property may be controlled by the personal representative, while the realty passes at once to the heirs or devisees.[8] Under this rule, an end-product of feudal concepts, the personal representative had no interest whatsoever in the real property of the deceased.[9] Realty is no longer completely excluded from administration, however, inasmuch as it is now provided by statute in every state that the executor or administrator may sell the real property in order to pay debts and legacies.[10] Nevertheless, it is purely a statutory power of sale, and ordinarily the personalty must be exhausted. Furthermore, the personal representative must prove to the court that such a sale is necessary for the purposes specified in the statute.[11] In case of a sale

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court at least once in every fifty years. At any rate, the volume of real property involved in probate proceedings is very large." Shepherd, *Real Estate Sales in Probate—Suggested Reform in Procedure,* 15 CALIF. S.B.J. 65 (1940).

8. Comment, 21 IOWA L. REV. 793 (1936); Comment, 2 MONT. L. REV. 148 (1941). There is some indication that the early American practice did not always follow the common law. In discussing colonial county court records of the period 1671-1680, a recent writer says: "The court still distributed land as well as chattels. The personal representative sued for land and seems to have exercised as much control over the realty as the personalty, though doubtless in many instances he left all the tangibles in the custody of the family." Atkinson, *The Development of the Massachusetts Probate System,* 42 MICH. L. REV. 425, 437 (1943).

9. Barry, *Modernizing the Law of Decedents' Estates,* 16 VA. L. REV. 107 (1929), describes the medieval system used by the common law courts in reference to the devolution of real estate. "Upon the death of the holder of the fee the title vested in the heir designated by that law [law of primogeniture and the canons of descent]. It did not await administration of the decedent's estate, nor was it dealt with by an executor or administrator. Furthermore, the land was not alienable by the holder, nor could he charge the inheritance with his debts; therefore on his death his creditors must look to his personal estate. The land was not included in the administration." *Id.* at 116, 117.

"This distinction is a vestige of the feudal system of estates under which the fee to real property reverted to the feudal lord at the death of the feudal tenant." Comment, 21 IOWA L. REV. 793 (1936).

Prior to the English Land Transfer Act 1897, "an administrator had nothing whatever to do with the intestate's realty. That was a matter for the heir-at-law." 137 L. T. 336 (1914).

10. "At the present time statutory grants of authority to sell real property for the payment of debts are almost universal. But since the proceeding is statutory there must be a strict compliance with the statute." Nylund, *Sale of Real Estate of Decedents Under the Probate Act,* 5 JOHN MARSHALL L. Q. 548 (1940); Comment, 21 IOWA L. REV. 793 (1936). See IND. ANN. STAT. § 6-1107 (Burns 1933).

11. *See* Fiscus v. Moore, 121 Ind. 547, 553, 23 N.E. 362, 364 (1890); Hochstedler v. Hochstedler, 108 Ind. 506, 512, 9 N.E. 467, 470 (1886); Humphries v. Davis, 100 Ind. 369, 372 (1885); Smith v. Dodds, 35 Ind. 452, 456 (1871).

An administrator has so little control over the real property of the estate that his

of the real estate by the administrator, the heirs have the right to possession until the personal representative makes the deed.[12] Thus, despite the gradual modernization of land law, the common law distinctions between real and personal property survive, at least in part, to the present time.

Whether Section 1301 will serve to further eradicate an important point of differentiation depends to a considerable extent upon the construction which the Indiana courts place upon the initial sentence; *i.e.*, does the statute impose a duty on the personal representative or does it merely give him a discretionary right?

As is stated in the explanatory supplement to the Code,[13] Section 1301 is based upon the Model Probate Code, Section 124, and also follows Section 571 of the California Probate Code.[14] Actually the language of the Indiana statute is virtually identical with the terms of the Model Probate Code.[15] The authors of the Model Probate Code expressly prefer the California statute,[16] which states that the personal representative "must" take possession of the real estate and which is held to be imperative in its effect.[17] When this is considered in conjunction with

promise to pay taxes on the land to a purchaser at an administrator's sale was not binding on the estate in the absence of facts showing a right to charge the estate or that consideration for the promise arose prior to the intestate's death. Moody v. Shaw, 85 Ind. 88 (1882).

12. *See* Cole v. Lafontaine, 84 Ind. 446, 447 (1882). "The power to sell the real estate for the payment of debts was conferred upon the personal representative by statute, in England, and in many of our states, long before the power to take the rents and profits thereof was given . . .; and until sale thereof, the heir was entitled to the exclusive possession, and could maintain actions against those who interfered with it, precisely as the ancestor might have done." Jones v. Billstein, 28 Wis. 221, 231 (1871).

13. INDIANA PROBATE CODE, Part II, at 50 [see Comment under IND. ANN. STAT. § 7-701 (Burns 1953)]. Part II apparently is a sort of handbook of legislative intent. "The report of the Probate Code Study Commission made pursuant to the provisions of Chapter 302 of the Acts of the 86th Session and Chapter 347 of the Acts of the 87th Session of the General Assembly of the State of Indiana may be consulted by the courts to determine the underlying reasons, purposes and policies of this Act, and may be used as a guide in its construction and application." IND. ANN. STAT. § 6-104 (Burns 1953). What weight the courts will accord these interpretative notes remains to be seen.

14. MODEL PROBATE CODE § 124 (1946); CAL. PROB. CODE ANN. § 571 (Deering 1944).

15. The first sentence of Section 124 states: "Every personal representative shall have a right to, and shall take, possession of all the real and personal property of the decedent except the homestead *and exempt property* of the surviving spouse and minor children." (The italicized words are omitted from the Indiana Code.) The difference presumably is insubstantial since the exempt property in Indiana is not included in the inventory in the first instance. See IND. ANN. STAT. § 7-602 (Burns 1953).

16. See the Comment following Section 124 of the Model Probate Code, *supra* note 14, at p. 133.

17. Wood v. American National Bank of San Bernardino, 24 Cal. App.2d 313, 74 P.2d 1051 (1938). *See In re* Palm's Estate, 68 Cal. App.2d 204, 222, 156 P.2d 62, 66 (1945); Richards v. Blaisdell, 12 Cal. App. 101, 106 Pac. 732, 736 (1910).

the language used in Section 1301, it seems reasonably clear that the intention of the draftsmen was that the executor or administrator should have not only the right but also the duty of possession of the entire estate during the period of administration.[18] The failure to use more positive phraseology may invite argument to the contrary, particularly should a testator attempt to provide otherwise in his will[19] or should a personal representative balk at assuming his full responsibilities.[20] In view of the avowed genesis of this section, it is somewhat perplexing that the Code did not impose the duty of possession in clearly unmistakable terms and that the Model Probate Code was written as it is.[21]

Statutes giving possession and control of realty to the personal representative are now in effect in over one-half of the United States

18. The term "shall" ordinarily carries a mandatory or imperative meaning, as a matter of statutory construction. The burden of proving otherwise is on the attacking party. Morrison v. State of Indiana *ex rel.* Indianapolis Free Kindergarten and Childrens Aid Society, 181 Ind. 544, 105 N.E. 113 (1914).

19. Since the operation of this Section is not delimited by any phrase such as "unless the will provides otherwise", a directive by the testator in clear derogation thereof no doubt would be rejected. However, as the statute does not say that the personal representative *must* take possession, the courts may be reluctant to give it an obligatory construction when faced with a contrary expression by the testator. The Michigan statute, at one time interpreted to limit the personal representative's power of possession to a case of absolute necessity, Streeter v. Patton, 7 Mich. 341 (1859), now reads, ". . . and it shall be his duty to take possession thereof immediately following his appointment." MICH. COMP. LAWS § 707.1 (1948).

And, if it is established that the Code imposes a duty on the personal representative, a testator should designate the person whom he wishes to have possession as executor in his will. Of course, the personal representative does not hold the assets for his own benefit primarily, rather he holds the property for the benefit of the estate and generally must account for his use and occupation. In many instances, the person that most likely will be the primary object of the testator's bounty is the surviving spouse who is now entitled (husband as well as wife) to the possession of the homestead to the exclusion of the personal representative for one year after the decedent's death. Minor children are given the same right even though there is no surviving spouse. IND. ANN. STAT. § 6-401 (Burns 1953).

20. Not all executors and administrators are hyper-zealous. See discussion at p. 274 *infra.*

21. It should be noted, however, that the originators of the Model Probate Code were possibly more interested in assuring the control of the probate court over the land of the decedent throughout the course of administration than they were in unequivocal terminology. Simes and Basye, *The Organization of the Probate Court in America: II,* 43 MICH. L. REV. 113 (1944). "One of the most serious defects in the English probate system of the period prior to the middle of the nineteenth century was the great divergence in the treatment of real and personal estate. The ecclesiastical courts had no jurisdiction whatever over the decedent's land. They admitted wills of personalty to probate; but wills of land were not probated there nor anywhere else." *Id.* at 121. The authors reached the conclusion that statutes granting possession and control of the real estate to the personal representative were a valuable determinant in reference to the jurisdictional issue. *Id.* at 129. This may have been the *raison d'etre* of Section 124 of the Model Probate Code, although the Comment thereto contains no inference to that effect.

The estate of a decedent passes into the custody of the state to be managed until creditors are paid and rights of devisees and heirs are established, and, while reposed

and two territorial possessions.[22] In a majority of these states the statute is mandatory either in language or construction.[23] In other states the executor or administrator is entitled to take possession, but it is not imperative that he do so unless, of course, the property is needed to satisfy claims.[24] The matter may be left to the discretion of the probate court,[25] and, in at least one state, the representative of the estate may intercept

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in the custody of the state, the Superior Court sitting in probate can determine the rights of rival heirs, the necessity of sales, and other incidents of winding up the estate. *In re* Kennedy's Estate, 87 Cal. App.2d 795, 197 P.2d 844 (1948).

An executor or administrator has the duty of taking possession of the property of the estate and of preserving it for the benefit of heirs and creditors, but his possession and handling of the property are subject to the control of the probate court. *In re* Palm's Estate, 68 Cal. App.2d 204, 156 P.2d 62 (1945).

See also CAL. PROB. CODE ANN. § 300 (Deering 1944).

22. ALA. CODE tit. 61, § 242 (1940); ARIZ. CODE ANN. §§ 38-809, 38-1101 (1939); ARK. STAT. ANN. § 62-2401 (Supp. 1951); CAL. PROB. CODE ANN. §§ 571, 581 (Deering 1944); COLO. STAT. ANN. c. 176, § 115 (1935); CONN. GEN. STAT. § 7035 (1949); FLA. STAT. § 733.01 (1951); GA. CODE ANN. § 113-908 (Supp 1951); IDAHO CODE ANN. §§ 15-410, 15-802 (1948); KAN. GEN. STAT. § 59-1401 (1949); MICH. COMP. LAWS § 707.1 (1948); MINN. STAT. ANN. § 525.34 (West 1947); MONT. REV. CODES ANN. §§ 91-2210, 91-3201 (1947); NEB. REV. STAT. § 30-406 (1943); NEV. COMP. LAWS §§ 9882.106, 9882.191 (Supp. 1941); N. Y. DECEDENT ESTATE LAW §§ 13, 123; N. D. REV. CODE § 30-1304 (1943); OKLA. STAT. ANN. tit. 58, §§ 251, 290 (1951); ORE. COMP. LAWS § 19-301 (1940); PA. STAT. ANN. tit. 20, § 320.501 (1950); S. D. CODE § 35.1101 (1939); TEX. STAT., REV. CIV. art. 3314 (1948); UTAH CODE ANN. § 75-11-3 (1953); WASH. REV. CODE § 11.48.020 (1951); WIS. STAT. § 312.04 (1951); WYO. COMP. STAT. ANN. §§ 6-1309, 6-1901 (1945); ALASKA COMP. LAWS ANN. § 61-18-2 (1949); CANAL ZONE CODE tit. 4, §§ 1440, 1521 (1934).

23. ARIZ. CODE ANN. § 38-1101 (1939); CAL. PROB. CODE ANN. § 571 (Deering 1944); COLO. STAT. ANN. c. 176, § 115 (1935), Galligan v. Hayden Realty Co., 62 Colo. 477, 163 Pac. 295 (1917) (Personal representative's obligation as to possession held to be absolute and exclusive.); CONN. GEN. STAT. § 7035 (1949) (unless the realty has been specifically devised or inconsistent directions are given by the will); FLA. STAT. § 733.01 (1) (1951); IDAHO CODE ANN. § 15-802 (1948); MICH. COMP. LAWS § 707.1 (1948); MONT. REV. CODES ANN. § 91-3201 (1947); N. D. REV. CODE § 30-1304 (1943); OKLA. STAT. ANN. tit. 58, § 251 (1951); ORE. COMP. LAWS ANN. § 19-301 (1940) (But where the property is in the possession of a third person by virtue of a lease, the possession and control of the executor or administrator is subordinate to the right of the lessee.); PA. STAT. ANN. tit. 20, § 320.501 (1950); (except real estate occupied by an heir or devisee, but the court may direct otherwise if necessary); S. D. CODE § 35.1101 (1939); TEX. STAT., REV. CIV. art. 3314 (1948); UTAH CODE ANN. § 75-11-3 (1953); WYO. COMP. STAT. ANN. § 6-1901 (1945); ALASKA COMP. LAWS ANN. § 61-18-2 (1949); CANAL ZONE CODE tit. 4, § 1521 (1934).

24. GA. CODE ANN. §§ 113-907 (1939), 113-908 (Supp. 1951), Smith v. Fischer, 52 Ga. App. 598, 184 S.E. 406 (1936); KAN. GEN. STAT. § 59-1401 (1949); MINN. STAT. ANN. § 525.34 (West 1947); NEB. REV. STAT. § 30-406 (1943), J. H. Melville Lumber Co. v. Maroney, 145 Neb. 374, 16 N.W.2d 527 (1945); NEV. COMP. LAWS § 9882.106 (Supp. 1941); N. Y. DECEDENT ESTATE LAW § 13 (2) (Power to take possession does not include real property specifically devised unless it is necessary for payment of administration expenses and debts and then only upon approval by the surrogate.); *In re* Skewry's Will, 33 N.Y.S.2d 610 (Surr. Ct. 1942); WASH. REV. CODE § 11.48.020 (1951); WIS. STAT. § 312.04 (1951), Edwards v. Evans, 16 Wis. 193 (1862) (Until personal representative takes possession, the right of the heirs to the possession remains unimpaired.).

25. ARK. STAT. ANN. § 62-2401 (Supp. 1951).

possession of the realty only where such is necessary for the best interests of the estate.[26]

Where, in pursuance of a duty, the personal representative assumes possession of the entire estate immediately upon the issuance of letters,[27] there is a marked divergence from the early common law doctrine and the later statutes making the realty answerable for debts and charges under certain circumstances.[28] However, where the executor or administrator merely has a right to possession, unless he exercises that prerogative, the situation may remain much the same.[29] In fact, the potential consequences incident to the occupation and control of the real estate are of sufficient magnitude that it would seem provident to unequivocally delineate the matter of possession of the estate property.[30] If a would-be representative of the estate is reluctant to take-over and manage the realty, it would be better to let him decline the position rather than necessitate a petition to the court by the creditors or heirs to compel him to act at some later date.[31]

In contrast with the modern majority view that possession of the entire estate is in the hands of the personal representative or subject to his control, most states still follow the early English view that title to

26. ALA. CODE tit. 61, § 242 (1940); See Layton v. Hamilton, 214 Ala. 329, 107 So. 830 (1926); Powell v. Labry, 210 Ala. 248, 97 So. 707 (1923). This refers to possession for purposes of renting the lands, and, thus, it differs from former Indiana law directing a seizure of the real property from the heirs or devisees when the personalty was insufficient and a sale of the realty was essential for the payment of liabilities of the estate. IND. ANN. STAT. § 6-1107 (Burns 1933); Globe Mercantile Co. v. Perkeypile, 189 Ind. 31, 125 N.E. 29 (1920). *Cf.* Fralich v. Moore, 123 Ind. 75, 24 N.E. 232 (1890).

It is similar, though, to the provision which empowered the court by special order to authorize an administrator or executor to take possession of lands and lease or mortgage the same to obtain money to pay debts. IND. ANN. STAT. § 6-1145 (Burns 1933); First National Bank v. Hanna, 12 Ind. App. 240, 39 N.E. 1054 (1895).

Moreover, Section 1301 supplants two sections of prior Indiana law which permitted the personal representative to take possession and manage the real estate when no heirs or devisees were within the State. IND. ANN. STAT. §§ 6-1151, 6-1152 (Burns 1933); Kidwell v. Kidwell, 84 Ind. 224 (1882); Lockridge v. Citizens Trust Co. of Greencastle, 110 Ind. App. 253, 37 N.E.2d 728 (1942).

27. IND. ANN. STAT. §§ 7-401, 7-403 (Burns 1953).

28. See notes 8 through 12 inclusive *supra.*

29. Under prior Indiana law, *supra* note 26, the heirs or devisees might be ousted from possession when a sale of the realty became necessary. If it is not imperative that the personal representative take possession, they may still remain in possession until a sale is unavoidable. See Edwards v. Evans, 16 Wis. 193 (1862). The principal difference possibly would be that the executor or administrator may demand possession without demonstrating the necessity of a sale, as was formerly the case. Bowen v. Willard, 203 Minn. 289, 281 N.W. 256 (1938); Miller v. Hoberg, 22 Minn. 249 (1875).

30. See generally discussion pp. 261 *et seq., infra.* See also notes 18 and 19 *supra.* While it is apparent that the Code is intended to impose a duty upon the personal representative, the avenue of challenge has not been completely blocked-off.

31. See *In re* Bartels' Estate, 238 Mo. App. 715, 187 S.W.2d 348 (1945); *In re* Baker's Estate, 164 Misc. 92, 298 N.Y.S. 261 (Surr. Ct. 1937).

personal property passes to the representative and that title to realty passes to the heirs or devisees.[32] In a few jurisdictions, notably California and Texas, a further change has been made in the old common law rules of probate in that title to both the real and personal property of the decedent devolves upon the devisees and heirs, subject to the possession of the personal representative.[33] This is in marked contrast with present English law which holds that both title to, and possession of, real property devolve upon the personal representative just as chattel interests have always descended to him.[34] Apparently no state in this country has gone quite as far, although in three states title to land registered under the Torrens system of registration vests in the personal representative per statutory direction.[35]

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32. Smith v. Ferguson, 90 Ind. 229 (1883); Hooker v. Porter, 271 Mass. 441, 171 N.E. 713 (1930); Richards v. Pierce, 44 Mich. 444, 7 N.W. 54 (1880); State Bank of Loretto v. Dixon, 214 Minn. 39, 7 N.W.2d 351 (1943); *In re* Merrill's Estate, 165 Misc. 161, 300 N.Y.S. 671 (Surr. Ct. 1938); Murphy v. Tillson, 64 Or. 558, 130 Pac. 637 (1913).

33. CAL. PROB. CODE ANN. § 300 (Deering 1944); TEX. STAT., REV. CIV. art. 3314 (1948). See also IDAHO CODE ANN. § 14-102 (1948) (Real and personal property of an intestate passes to his heirs subject to control of the court and possession of the administrator.); MONT. REV. CODES ANN. § 91-402 (1947) (same as Idaho); N. D. REV. CODE § 56-0605 (1943) (applies only to a specific devise or legacy); OKLA. STAT. ANN. tit. 84, § 212 (1951) (same as Idaho); S. D. CODE § 56.0102 (Title to property not disposed of by will passes to heirs subject to control of court and possession of administrator.), § 56.0407 (applies to a specific devise or legacy) (1939); UTAH CODE ANN. §§ 74-3-9, 74-4-2 (1953) (same as South Dakota).

Professor Simes has commented more recently on the question of title during administration. After restating the present English law, he continues, "[n]ow with feudalism dead for centuries past we find a trend on both sides of the Atlantic to unify the rules as to real and personal property. In most states in this country it is still the rule that title to chattels passes to the executor or administrator, but title to land passes to the heir or devisee. In a small number of states, however, . . . we find statutes to the effect that title to both real and personal property passes to the heir or devisee, subject to the powers of the executor or administrator to administer the estate. I don't think that makes very much difference in the practical working out of the problems involved in administration, but I do think that the theory is quite different." Simes, *Important Differences Between American and English Property Law*, 27 TEMPLE L. Q. 45, 48 (1953).

34. Land Transfer Act 1897, 60 & 61 VICT., c. 65, §§ 1 (1), 2 (2) (vested the entire estate in executors); Law of Property Act 1922, 12 & 13 GEO. V, c. 16; Administration of Estates Act 1925, 15 & 16 GEO. V, c. 23, § 1 (extended title and possession to administrators as well).

This may be the law in Canada as well. "Section Two [Devolution of Estates Act] provides for the vesting of all real and personal property of the deccased in his personal representative, and that *'subject to the payment of his debts* the same shall be administered, dealt with and distributed as if it were personal property not so disposed of'." Comment, 18 CAN. B. REV. 799, 801 (1940).

35. GA. CODE ANN. § 60-508 (1937); ORE. COMP. LAWS ANN. § 70-368 (1940); VA. CODE § 55-112 (1950)—this section provides that the act establishing the Torrens system (Acts 1916, c. 62) be continued in force. Section 61 of that Act as amended stipulates that title to registered land vests in the personal representative.

Georgia is further unique in that title to devised land remains in the executor during administration and does not pass to the devisee. GA. CODE ANN. § 113-801 (1937): "All

Ostensibly, the English statutes have virtually abolished all distinctions in the administration of real and personal property of decedents' estates,[36] perhaps justifiably since some of the principal differences were founded upon outmoded feudal customs. At least two motivating factors are evident as to the rationale of such legislation: first, to make real property clearly an asset for the payment of the debts of the estate,[37] although it would scarcely seem necessary to place the title in the personal representative to accomplish this purpose; and secondly, to facilitate the transferability of realty.[38] American jurisdictions have declined

property, both real and personal, being assets to pay debts, no devise or legacy passes the title until the assent of the executor is given to such devise or legacy." And see Willingham v. Watson, 165 Ga. 870, 142 S.E. 458 (1928). "If the title does not pass to the devisee or legatee until the executor has assented thereto, the title must be in the executor from the moment of the death of the testator until such assent is given. Title to the property must be vested in someone during the period of administration, and, in case of a will, it vests in the executor." *Id.* at 872, 142 S.E. at 459.

Comparing the Georgia law with the English rule, the court said: "We did not undertake to put an executor in this State upon the same footing, as to his powers, as are conferred upon executors in England." Peck v. Watson, 165 Ga. 853, 869, 142 S.E. 450, 457 (1928).

On the other hand, title to intestate land in Georgia vests in the heirs at the owner's death. GA. CODE ANN. § 113-901 (Supp. 1951): "Upon the death of the owner of any estate in realty, which estate survives him, the title shall vest immediately in his heirs at law, subject to be administered by the legal representative. . . . The title to all other property, owned by a decedent shall vest in the administrator of his estate for the benefit of the heirs and creditors." And see Smith v. Fischer, 52 Ga. App. 598, 184 S.E. 406 (1936).

36. The California and Texas statutes have a similar effect but of a reverse nature. See note 33 *supra* and accompanying text.

37. The Land Transfer Act 1897 "equated the position of freeholds . . . with that of leaseholds for the purpose of availability for the payment of the deceased's debts, etc., and in order to effect this purpose it was necessary to put the personal representative in temporary possession or control of freeholds, as he had always been in relation to leaseholds." 94 SOL. J. 264 (1950). The Comment points out that the Administration of Estates Act 1925 extended to administrators the power to transfer freehold estates to heirs aud devisees by assent. Prior to 1926 only executors had such power.

Comment, 18 CAN. B. REV. 799, 802 (1940), states that the Devolution of Estates Act does not make debts a specific charge on the realty, rather it makes land assets in the hands of the personal representative.

38. Sims, *Notes on Codifying Real Property Law in the United States,* 36 HARV. L. REV. 987 (1923), discusses the English Law of Property Act 1922. "Its main purpose is to simplify rights, to make land alienable . . . and to assimilate the law of realty as far as practicable to the law of personalty.

"To that latter end, the land of a decedent passes to his executor or administrator, just as his personalty; in the case of an intestate, in trust for sale, including the setting apart of funds for the widow and minor children; and in case of a will, to hold for administration, and to assent to the vesting of the legal estate in the proper heir or devisee. The personal representative may also assent to the vesting of any realty of an intestate in a person interested, without a sale. *By this plan the interests of minors and insane persons are not permitted to clog alienation.*" (emphasis added) *Id.* at 995.

"It follows from the foregoing enactments [Land Transfer Act 1897, Conveyancing Act 1911] that the executors have substantially the same powers of alienation over the testator's freeholds for purposes of administration as they have over the personal estate." 134 L. T. 132 (1912).

See also 153 L. T. 116 (1922); 94 SOL. J. 264 (1950).

to emulate; Professor Simes thinks rightly so, as he believes the English rule would not work well in the United States.[39] Professor Simes favors the California statute because it tends to simplify title determination;[40] however, in the corresponding section of the Model Probate Code, of which he is the principal author, less explicit language is used.[41]

The title provision of the new Code substantially follows the Model Probate Code[42] which admittedly is based upon the California law, and yet the explanatory supplement to the Code, in effect, both admits and denies that the title to personalty as well as to real property of the estate goes directly to the heirs or devisees.[43] Litigation of the particular point probably will ultimately be necessary in order to settle the title situation

39. Simes & Basye, *supra* note 21, at 125. Sims, *supra* note 38, at 1002, asserts that "[t]he pressing need in England is to break up the present crystallization of titles to land, and make them freely alienable, as they are by no means now. With us there is little inconvenience as yet in most of the states on that score. . . . The market for land in the United States, except perhaps in the great cities, has by no means the certainty of the market in England; and the inconveniences of a joint-ownership are far more bearable in many cases than the sacrifice of the inheritance."

40. Simes & Basye, *supra* note 21, at 125: "Frequently estates are not administered at all. And in such cases the matter of determining title would be simplified if legislation like the California statute [see note 33 *supra* and accompanying text] were in force. The title is then in the distributees whether the estate has been administered or not."

Rheinstein, *The Model Probate Code: A Critique,* 48 COL. L. REV. 534 (1948), in referring to Section 84 of the Model Probate Code, contends: "If real estate is to be subject to administration, the direct devolution of the estate to the distributees rather than to the personal representative is, indeed, indispensable.[59]" Footnote 59 reads: "Otherwise there would be necessary a formal conveyance from the personal representative to the heir or devisee. Since parties would frequently be unaware of this necessity or would be unwilling to comply with it, confusion of land titles would be the inevitable result." *Id.* at 549.

41. This is MODEL PROBATE CODE § 84: "When a person dies, his real and personal property, except exempt property and homestead interests, passes to the persons to whom it is devised by his last will, or, in the absence of such disposition, to the persons who succeed to his estate as his heirs; but it shall be subject to the possession of the personal representative. . . ."

42. "When a person dies, his real and personal property, except homestead interests, passes to persons to whom it is devised by his last will, or, in the absence of such disposition, to the persons who succeed to his estate as his heir; but it shall be subject to the possession of the personal representative. . . ." IND. ANN. STAT. § 7-123 (Burns 1953).

43. INDIANA PROBATE CODE, Part II. Under Section 7-123 (Burns 1953) the explanation states: "It provides in substance that the estate property, real and personal, shall pass to the parties entitled thereto but it will be subject to the possession of the personal representative until distributed and will be liable to all claims and obligations of the estate. (See comment under Sec. 124, M.P.C.)"

From the Comments following Sections 84 and 124 of the Model Probate Code plus the preference expressed by Simes, *supra* note 40 and accompanying text, one may reasonably infer that the Model Probate Code was patterned after the California legislation in regard to title and possession.

Beneath Section 7-701 (Burns 1953), the Indiana Probate Code Study Commission flatly asserts: "He [personal representative] takes title to the personal property but not to the real estate, the same as under the present law."

in Indiana probate proceedings, although it should be beyond dispute that title to the real estate continues to pass to the heirs or devisees.[44] Of course, where the personal representative holds possession of the entire estate, even though the title may be located in someone else, the executor or administrator has a considerable interest in the property during the period of administration.[45]

"He shall pay the taxes and collect the rents and earnings thereon. . . ."

One potentially large measure of protection available to creditors who file claims against the estate is the additional asset of rents, income and profits from the real estate accruing during the period of administration. The creditors of a decedent have experienced an uphill struggle in their efforts to assure maximum protection for the full satisfaction of their claims. At one time they could not look beyond the personal estate. Later, statutes authorized resort to the realty, but these were hedged with restrictions.[46] Furthermore, until the real property was ordered sold, the heirs or devisees were entitled to the possession and all the increment therefrom.[47] In an estate comprising mostly income-producing property, the rents and profits from the realty may be a potentially valuable asset, particularly when it is realized that many decedents' estates are rarely settled within eighteen months. Quite often it is three or more years before the final decree. So, even though the land ulti-

44. *I.e.*, since the title trend, if any, in this country is away from the present English position, see notes 33 and 34 *supra*. Moreover, it is highly doubtful that the courts would hold the title to the land to be in the personal representative in the absence of unequivocal legislation to the contrary, inasmuch as such a view would be clearly repugnant to all prior Indiana law. See Clendenning v. Lanius, 3 Ind. 441 (1852), establishing that a naked power or direction given by a will to an executor to sell land for the purpose of paying legacies or making distribution, does not vest in him any title to the land.

For the personal representative to have title to the realty, it must be *devised* to him, to sell or to control in some specified manner. Merely giving him the power to sell or to take possession should not pass title.

45. Simes & Basye, *supra* note 21, at 125. See Home Insurance Co. v. Latimer, 33 Ariz. 288, 264 Pac. 103 (1928); Dumont v. Heighton, 14 Ariz. 25, 123 Pac. 306 (1912); Murphy v. Crouse, 135 Cal. 14, 66 Pac. 971 (1901); Estate of Woodworth, 31 Cal. 595 (1867); O'Connor v. Chiascione, 130 Conn. 304, 33 A.2d 336 (1943).

46. See notes 10 and 11 *supra*.

47. See note 12 *supra*. The emblements and annual crops with which an administrator is chargeable do not include those planted and grown after the decedent's death. Rodman v. Rodman, 54 Ind. 444 (1876).

Rents accruing on leased land after the death of the lessor descend with the land and are collectible by the heir. King v. Anderson, 20 Ind. 385 (1863); Jennings v. Hembree, 71 Ind. App. 370, 124 N.E. 876 (1919); Vawter v. Fraine, 48 Ind. App. 481, 96 N.E. 35 (1911); Foteaux v. Lepage, 6 Iowa 123 (1858); Stinson v. Stinson, 38 Me. 593 (1854).

Of course, a certain amount of property consistently has been exempt from administration and still is. See *e.g.*, IND. ANN. STAT. §§ 6-401, 6-402 (Burns 1953).

mately has to be sold to help pay the debts or expenses of administration, the creditors conceivably would be deprived of a considerable sum which might otherwise have enabled them to realize a greater percentage on their claims since the heir could not be compelled to return the rents for the payment of debts.[48]

With very few exceptions, in those states where the personal representative has at least a right to the possession of the real property pending administration, he also is given the accompanying task of collecting the rents and profits.[49] This was true even under former Indiana law in the one situation where the executor or administrator might take possession of the realty.[50] Most statutes expressly assert that such increment from the lands shall constitute an asset in the hands of the personal representative for the satisfaction of debts,[51] an evident attempt to broaden the benefits to the creditors.

At first glance it might seem unimportant whether the statute is construed to confer either a right or a duty upon the personal representative to take possession and collect the rents,[52] inasmuch as where it is held to be simply a right, the prerogative must be exercised if the income from the real estate is needed to pay the debts.[53] Nonetheless, where it is a right and the representative does not exercise it until possibly several months or a year has elapsed, may he collect back rent from the heirs or

48. Rauschkolb v. Ruediger, 325 Ill. App. 342, 348, 60 N.E.2d 250, 253 (1945). The reception by an administrator, except when otherwise specifically provided, of the rents, issues and profits of the real estate of an intestate, accruing after his death, makes the administrator the trustee of the heirs and not of the creditors. Evans v. Hardy, 76 Ind. 527 (1881).

49. The following states have some limitations on the power. ALA. CODE tit. 61, § 242 (1940), Boyte v. Perkins, 211 Ala. 130, 99 So. 652 (1924) (duty to collect rents if needed to pay creditors); ARK. STAT. ANN. § 62-2401 (Supp. 1951) (if the court finds it necessary for preservation of the property); CONN. GEN. STAT. § 7035 (1949) (He may not collect the rents if realty is specifically devised or the will says otherwise; and, a husband, being tenant by the courtesy, is entitled to the possession plus the rents and profits of his wife's estate during settlement thereof.); PA. STAT. ANN. tit. 20, § 320.501 (1950) (Personal representative is not entitled to the income of real estate occupied by an heir or devisee, although the court may direct otherwise if necessary.).

50. IND. ANN. STAT. § 6-1152 (Burns 1933). Such rents could be applied to payment of debts after the personalty had been exhausted.

51. IND. ANN. STAT. § 7-1107 (Burns 1953). Section 7-1108 (Burns 1953), which provides that "[g]eneral legacies shall not bear interest unless a contrary intent is indicated by the will," apparently is intended to contribute to the theory of making as much income as possible free to satisfy debts by abrogating the former rule that interest should be paid on legacies after the expiration of one year from the testator's death. See Stimson v. Rountree, 51 Ind. App. 207, 99 N.E. 439 (1912). *Cf.* Alig v. Levey, 219 Ind. 618, 39 N.E.2d 137 (1942) *superseding* 33 N.E.2d 803, *rehearing denied,* 38 N.E.2d 302 (1941).

52. See notes 23 through 26 *supra,* and accompanying text.

53. *In re* Baker's Estate, 164 Misc. 92, 298 N.Y.S. 261 (Surr. Ct. 1937); Boyte v. Perkins, 211 Ala. 130, 99 So. 652 (1924); Paine v. First Div. St. Paul & P. R. Co., 14 Minn. 65 (1869). See also cases cited note 24 *supra.*

devisees who took possession at the time of death? If the estate is insolvent or thereby rendered so, the answer should be yes. Since one of the apparent aims of such statutes is to safeguard creditors, a delay by the executor or administrator in taking possession should not be allowed to defeat their claims. The cases are not completely settled however.[54]

A further hazard to creditors' interests may arise as a result of the expressed intent of the testator. Claimants will no doubt be concerned over what happens to the rental income from a piece of real estate which has been specifically devised.[55] The language of the Code indicates that it becomes a part of the general assets of the estate.[56] Apparently the executor or administrator could, in his judgment, use it to pay debts or expenses; unquestionably, he should so apply the rents and earnings if there are no other liquid assets available. Or, if the income is not expended, since it is an incident of the realty, presumably it would be distributed in the final accounting to the devisee.[57] The

54. Rents accruing after the death of the owner of real estate vest in the devisee, subject to the claims of creditors. Hahn v. Verret, 143 Neb. 820, 11 N.W.2d 551 (1943); *cf. In re* Dow's Estate, 82 Cal. App. 2d 675, 186 P.2d 977 (1947).

Where the heir is in possession under his own right and the personal representative has not asserted his right under the statute to take possession, the heir is not accountable to the personal representative for rents and profits received by him during his possession. Howard v. Patrick, 38 Mich. 795 (1878); *accord,* Bowen v. Willard, 203 Minn. 289, 281 N.W. 256 (1938).

55. Comment, 2 MONT. L. REV. 148 (1941) discusses the question: "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?" The states are placed into three categories: (1) those following the common law view (as modified by statute) that rents and profits go to the heirs or devisees as incident to ownership of the land (subject to sale for debts if necessary); (2) those giving full power and control over the realty to the personal representative, such as Montana, where the personal representative has a right to the rents and profits; (3) those giving the personal representative a permissive or qualified right over the realty, where there is no right to the rents and profits except on court order after a showing of need for the payment of debts. *Id.* at 150 to 153. *But cf.* Bowen v. Willard, 203 Minn. 289, 281 N.W. 256 (1938); Miller v. Hoberg, 22 Minn. 249 (1875).

56. IND. ANN. STAT. § 7-1107 (Burns 1953).

57. IND. ANN. STAT. § 7-1001 (a) (Burns 1953) stipulates that the personal representative is chargeable in his accounts with all of the estate coming into his possession, including the income therefrom. Comparable statutes are: ARIZ. CODE ANN. § 38-1401 (1939); ARK. STAT. ANN. § 62-2801 (Supp. 1951); CAL. PROB. CODE ANN. § 920 (Deering 1944); IDAHO CODE ANN. § 15-1102 (1948); MONT. REV. CODES ANN. § 91-3402 (1947); NEB. REV. STAT. § 30-1401 (1943); NEV. COMP. LAWS § 9882.203 (Supp. 1941); N. D. REV. CODE § 30-1317 (1943); OKLA. STAT. ANN. tit. 58, § 522 (1951); ORE. COMP. LAWS ANN. § 19-1007 (1940); S. D. CODE § 35.1601 (1939); UTAH CODE ANN. § 75-11-20 (1953); WASH. REV. CODE § 11.48.030 (1951); WIS. STAT. § 317.03 (1951); WYO. COMP. STAT. ANN. § 6-2002 (1945); CANAL ZONE CODE tit. 4, § 1562 (1934); M. P. C. § 172(a) (1946).

ARK. STAT. ANN. § 62-2907 (b) (Supp. 1951), expressly states: "Unless otherwise provided in the will, a specific devise of property shall be construed to include income or increment accruing to such property while in the hands of the personal representa-

devisees should not complain too vociferously inasmuch as a sale of the real property might be averted if the rents and profits therefrom may be applied to claims against the estate. Likewise, a call for contributions may be forestalled.[58]

Conceivably, a testator may bequeath the income from his property, for example, to his wife or to one of his children for a term of years or,

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tive." See also, *Re* Bernial, 165 Cal. 223, 131 Pac. 375 (1913); Washington v. Black, 83 Cal. 290, 23 Pac. 300 (1890); *In re* Jameson's Estate, 93 Cal. App. 2d 35, 208 P.2d 54 (1949); Holliday v. Price, 146 Ga. 782, 92 S.E. 533 (1917); *In re* Williams' Estate, 55 Mont. 63, 173 Pac. 790 (1918).

The question may arise whether the devisee of realty can complain if the executor uses rents from the devised real property to pay general debts of the estate when there is more than enough personal property over and above such income from the realty and the result is to increase the amount distributed to the residuary legatee.

In Estate of Woodworth, 31 Cal. 595 (1867), it was ruled that the rents and profits of the real estate accruing subsequent to the death of the testator are not personal property in the hands of the executor to be first applied to the payment of debts in exoneration of the general personalty, even though such income is an asset for the satisfaction of claims.

In Remington v. The American Bible Society, 44 Conn. 512 (1877), the residuary legatees were contesting with the heirs at law the right to approximately $1000 in rents and profits from a farm, which had been deposited in court by the administrator on a petition for interpleader. The court held in favor of the heirs, saying, "when it is known that the real estate is not needed for the payment of debts and it goes to those whom the law points out as the owners, there would go with it in each case as its proper incident the rent earned by it during the period of litigation, and that they are to profit by the earnings of the land as freely as if no unfounded claim had prevented them from taking possession upon the death of the intestate. We cannot see that any other person can rightfully ask for this money. It is true, the statute says that the income of such real estate 'shall vest in the executors and administrators in the same manner as personal property;' but we think this expression is descriptive simply of the manner in and the extent to which the administrator is to be vested with the right to enforce payment of this rent money and thereafter hold it against all claimants while the true ownership remains uncertain and until his final settlement; that it does not, and was not intended to, put a statutory stamp upon it as personal property for the mere purpose of separating it from its principal. . . ." *Id.* at 517-518.

In re Balok's Estate, 151 Pa. Super. 592, 30 A.2d 664 (1943), states the rule that, in the absence of a manifest contrary intention, debts are to be paid out of the residuary estate. Further, it is held to be the general rule that when a court authorizes an executor to collect and apply rents for the payment of a decedent's debts, the proceeds from the real estate should be accounted for separately and only the net distributed to creditors and legatees.

58. See IND. ANN. STAT. §§ 7-1103, 7-1104 (Burns 1953), in reference to abatement and contributions.

In Cornet v. Guedelhoefer, 219 Ind. 200, 36 N.E.2d 933 (1941), *rehearing denied,* 37 N.E.2d 681 (1941), after decedent's death, certain devisees recognized that there would be an insufficiency of personal assets to pay liens superior to their rights, that it was desirable to avoid a sale of the real estate, and that the executor should collect the rents to be used in payment of the obligations of the estate. The executor collected the rents, with their knowledge and without their objection until a date when the executor filed a current report, to which the devisees filed objections. It was shown that had these rents been paid to the devisees, sale of some part of the real estate could not have been avoided unless at least $2000 were advanced to meet the deficiency. It was held that the trial court was justified in sustaining the executor's action with respect to the rents at least to the extent of their use for payment of all the items of the will preceding legacies.

as is most likely, for life. The question then arises, who is to receive the benefit of the rents and earnings during the period of administration. The pertinent provision of the Code admonishes, "[u]nless the decedent's will provides otherwise, all income received . . . shall constitute an asset of the estate. . . ."[59] The Supreme Court of Colorado faced this problem under a substantially similar statute and decided that the testator's will should prevail, even though in derogation of the principles underlying possession and control in the personal representative.[60] A nicer question would be presented where the testator expressly orders that the rents and profits are to be paid to a specific legatee commencing with the testator's death, and the estate subsequently is discovered to be insolvent.[61] The Code impliedly provides that the produce of the realty is not to be an asset of the estate if the will so directs; yet, if such income is absolutely needed to meet the liabilities of the decedent, it is unlikely that the testator's wishes could be given recognition. Beyond statutory exemptions, a testator generally cannot exonerate any of the property of his estate.[62]

59. IND. ANN. STAT. § 7-1107 (Burns 1953).

60. In Davis v. Harbaugh, 76 Colo. 73, 230 Pac. 103 (1924), the testatrix' will gave the rents and profits from the residue of her property (real and personal) to her daughter for life after debts and expenses of administration were paid. The corpus was sufficient to pay all of these charges, but could the personal representative apply the rents and profits thereto, to the detriment and expense of the life tenant? The trial court said the executor could do so for the first year. The appellate court reversed and said the life tenant had preference to use the rents and profits for her maintenance from the time of the testatrix' death, that such would be true at common law and Section 5262, Colo. Laws 1921, had not changed it. "The section is cited by the executor as authority for applying the rents, issues and profits to the payment of the prior claims. We do not think it is. The statute says such application may be made 'unless otherwise provided by will.' Mrs. Thompson's will has 'otherwise expressly provided' that the rents . . . shall go to the plaintiff, and her right thereto, which is the usufruct of the devised estate, begins with the death of the testatrix." *Id.* at 82, 230 Pac. at 106. The court went on to hold that the prior claims must be satisfied by sale or mortgage of the principal or corpus. *Cf. In re* Platt's Estate, 21 Cal. 2d 343, 131 P.2d 825 (1942).

61. Josselson v. Josselson, 116 N. J. Eq. 180, 172 Atl. 812 (Ch. 1934). The court decreed testator's estate to be insolvent and ordered realty sold to satisfy debts. No purchasers were found. The devisee asked instructions as to the rents and profits accumulated since the order of sale and collected by her in her capacity as executrix. A New Jersey statute provided that the testator's lands remained liable for his debts and could be sold. It was held that the rents and profits belonged to the complainant as devisee until the actual sale of the property and were not assets for the benefit of creditors.

Note, 48 HARV. L. REV. 130 (1934), criticizes the above case, saying that modern statutory policy mitigating the original common law rule which defeated the claims of creditors favors a construction of the statute making liable the rents and profits accruing since the testator's death as more in accord with legislative intent, particularly as to rents accumulated after the decree of insolvency.

Although the foregoing does not involve a statute duplicating Section 1707 of the Code, it does illustrate the attitude which courts occasionally adopt when dealing with a specific devise or bequest. As noted in Comment, 2 MONT. L. REV. 148, 153 (1941), probate courts generally try to get the realty to the person intended in its original state.

62. See Scherer v. Ingerman, 110 Ind. 428, 11 N.E. 8, 12 N.E. 304 (1887); Duncan v. Gainey, 108 Ind. 579, 9 N.E. 470 (1886).

Protection of the creditors of an estate is further buttressed by Section 1501 of the Code which removes the rigid priority that formerly existed regarding the sale of real and personal property for the payment of debts.[63] Now the personalty does not necessarily have to be exhausted before the personal representative may resort to the realty. In fact, the real property may be sold first if it would be better for the estate to do so.[64] This flexibility contributes to the welfare of the beneficiaries as well in that some valuable items of personal property, such as stocks and bonds, now may be retained more easily, and perhaps a family-owned corporation may be kept intact. Similar provisions may be found in the probate codes of many other states.[65]

Having placed the personal representative in possession and control of the realty in response to the pressure of creditors' interests, the Code takes the position that the duty to pay taxes on the estate property follows possession rather than title. Under previous law, when possession as well as title to the real estate passed to the heirs and devisees, the personal representative was not responsible for the taxes accruing subsequent to the death of the owner.[66]

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63. IND. ANN. STAT. §§ 6-1107, 6-1144 (Burns 1933), Fiscus v. Moore, 121 Ind. 547, 23 N.E. 362 (1890) (Personalty must be exhausted before realty can be sold.).

64. There are limitations however. IND. ANN. STAT. § 7-901 (Burns 1953) provides: "In determining what property of the estate shall be sold, mortgaged, leased, or exchanged for any purpose provided in Section 1503, there shall be no priority as between real and personal property, except as provided by the will, if any, or by order of the court, or by the provisions of Section 1703 [on Abatement]." Moreover, under Section 1504 any person interested in the estate may prevent the sale, mortgage or lease of the realty by filing a satisfactory bond with the court. See IND. ANN. STAT. § 7-904 (Burns 1953).

65. ARIZ. CODE ANN. § 38-1201 (1939); ARK. STAT. ANN. § 62-2701 (Supp. 1951); IDAHO CODE ANN. § 15-701 (1948); MONT. REV. CODES ANN. § 91-2801 (1947); NEV. COMP. LAWS § 9882.139 (Supp. 1941); OKLA. STAT. ANN. tit. 58, § 381 (1951); PA. STAT. ANN. tit. 20, § 320.541 (1950) (when not specifically devised); S. D. CODE § 35.1501 (Supp. 1952); WYO. COMP. STAT. ANN. § 6-1701 (1945); CANAL ZONE CODE tit. 4, § 1501 (1934).

66. Barnum v. Rallihan, 63 Ind. App. 349, 112 N.E. 561, 115 N.E. 333 (1916). As far as federal income taxes are concerned, the key question would seem to be, of what does the decedent's estate consist. Under Federal income tax laws the estate of a decedent, during the statutory period of administration, is treated as a trust estate, having a separate existence, charged with the duties of making its own tax return under the hand of the executor or administrator, reporting all income received, and taking all allowable deductions, including capital gains and capital losses occurring during the period of administration. Jones v. Whittington, 194 F.2d 812 (10th Cir. 1952). This case was decided under Texas law where the executor or administrator has exclusive possession and control of the entire estate, is charged with active and positive duties, and is an active trustee of the estate. In such a situation, the personal representative would pay the taxes on the net earnings of the realty.

In a case involving Wyoming law, which is similar to that of Texas, the residue of the estate was distributed to the residuary legatee under decree in August, 1937, but the 1937 income which was subject to federal income tax was taxable to the estate

". . . until the estate is settled or until delivered by order of the court to the distributees."

By implication the personal representative may be required to surrender possession of the real property prior to final settlement of the estate. If he does not retain the realty throughout the course of administration, how long does he keep it? When must he turn it over to the heir or devisee?

Of course, where the executor or administrator does not have a duty to take possession and the estate continues to be solvent, there may well be no necessity for the return of the realty. Nevertheless, where the personal representative does intercept possession, and unless it is sold in compliance with the statutory purposes, the real estate eventually must be delivered up to the persons named in the will or designated by the statutes of descent.[67]

In practically all of the states in which the problem might arise with any regularity, the situation is covered by a statute. A number of states have sections specifically devoted to petitions for the return of the realty, as well as a separate provision dealing with pro rata distribution of the whole estate.[68] In other jurisdictions there is merely a general provision for partial distribution prior to the final settlement with varying time restrictions;[69] in a few states the matter of possession apparently is left to the good judgment of the probate court.[70] It is noteworthy

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and not to the residuary legatee. Whitaker v. United States, 44 F. Supp. 484 (D.C. Wyo. 1941).

See also Brown, *Duties of a Personal Representative With Respect to the Federal Estate and Income Taxes,* 10 ALA. LAW 290, 297 (1949).

67. For a statement of the purposes for which the realty may be sold, see, *e.g.,* IND. ANN. STAT. § 7-903 (Burns 1953). No consideration is given here to the question of to whom the realty must go.

68. Most of these statutes have time limitations; the most common one being the period for filing claims. ARIZ. CODE ANN. §§ 38-810, 38-1501 (1939); CAL. PROB. CODE ANN. §§ 582, 1000, 1001 (Deering 1944); IDAHO CODE ANN. §§ 15-411, 15-1301 (1948); MONT. REV. CODES ANN. §§ 91-2211, 91-3701 (1947); OKLA. STAT. ANN. tit. 58, §§ 291, 621 (1951); ORE. COMP. LAWS ANN. §§ 19-1204, 19-1205 (1940) (covers real estate only); PA. STAT. ANN. tit. 20, § 320.735 (1950) (refers to possession of real estate alone); S. D. CODE §§ 35.1301, 35.1701 (1939); UTAH CODE ANN. §§ 75-12-1, 75-12-4, 75-12-5 (1953); ALASKA COMP. LAWS ANN. § 61-18-3 (1949) (for possession of realty); CANAL ZONE CODE tit. 4, §§ 1441, 1611, 1616 (1934).

69. ARK. STAT. ANN. § 62-2901 (Supp. 1951); MINN. STAT. ANN. § 525.482 (West 1947) (after time for filing claims but not until inheritance taxes are paid); NEV. COMP. LAWS § 9882.235 (Supp. 1941) (after three months from issuing of letters, bond optional with court); TEX. STAT., REV. CIV. art. 3450 (1948); WASH. REV. CODE § 11.72.010 (1951) (after six months from first publication of notice to creditors; bond required); WYO. COMP. STAT. ANN. § 6-2301 (1945) (Partial distribution may be ordered after six months from issuing of letters upon giving bond, but after the claim period the bond may be dispensed with.).

70. CONN. GEN. STAT. § 7035 (1949); N. Y. DECEDENT ESTATE LAW § 13 (2); N. D. REV. CODE § 30-1304 (1943).

that some of the statutes impose a qualified obligation upon the court to direct delivery of the real estate to the persons entitled thereto, in which case no affirmative action by an interested party would be essential.[71] Ordinarily, though, some form of petition is required, which may be filed by the executor or administrator as well as the distributee.[72]

Understandably, possession of the real property with the accompanying rents and profits may be a prize worth contesting should final settlement be delayed for a substantial length of time.[73] Section 1701 of the Code ostensibly covers exclusively the subject of partial distribution in Indiana probate proceedings without specific mention of the return of realty.[74] Patterned after the Model Probate Code and statutes of

71. IDAHO CODE ANN. § 15-411 (1948), states that the court must direct delivery after the end of the time for presenting claims. However, failure to do so will not deprive the court of jurisdiction of the estate and its property. Walker Bank & Trust Co. v. Steely, 54 Idaho 591, 34 P.2d 56 (1934).

MONT. REV. CODES ANN. § 91-2211 (1947). The court must direct the personal representative to deliver possession of the real property to the heirs or devisees at the end of the period for filing claims, unless it appears that the rents and profits are needed for a longer period or that the realty will have to be sold to pay debts. *See In re* McGovern's Estate, 77 Mont. 182, 198, 250 Pac. 812, 816 (1926). OKLA. STAT. ANN. tit. 58, § 291 (1951) (at end of ten months from first publication of notice to creditors); S. D. CODE § 35.1301 (1939) (at end of ten months from first publication of notice to creditors); UTAH CODE ANN. § 75-12-4 (1953) (after time for presenting claims has expired); CANAL ZONE CODE tit. 4, § 1441 (1934) (at end of time for filing claims).

CAL. PROB. CODE ANN. § 582 (Deering 1944): "When the time to file or present claims has expired, the executor or administrator must deliver possession of the real property to the heirs or devisees unless the income therefrom for a longer period or a sale thereof is required for the payment of the debts of the decedent."

Seemingly, no formal request by the heirs or devisees would be necessary in California; if the personal representative should delay or refuse to return the realty without justification, no doubt they would be forced to petition the court to order compliance. See Estate of Mitchell, 121 Cal. 391, 53 Pac. 810 (1898).

72. See statutes listed in note 69 *supra*. See also PA. STAT. ANN. tit. 20, § 320.735 (1950); the Commission's Comment thereto states: "This section applies when it is to the interest of all concerned that the real estate be under the early management of the person or persons who eventually will receive it in distribution. There is nothing to prevent the personal representative and parties in interest from accomplishing the same results subject to possible surcharge without the benefit of a court decree. By proceeding under this section possibility of surcharge will be avoided. It will also be possible for a distributee to force a personal representative to make early distribution to him." The Pennsylvania statute imposes no restriction as to the time when the application may be filed.

73. See discussion p. 261 *supra*.

74. "After the expiration of the time limited for the filing of claims and before final settlement of the accounts of the personal representative, a partial distribution may be decreed, with notice to interested persons, as the court may direct. Such distribution shall be as conclusive as a decree of final distribution. Before a partial distribution is so decreed, the court may require that security be given for the return of the property so distributed to the extent necessary to satisfy any distributees and claimants who may be prejudiced as aforesaid by the distribution." IND. ANN. STAT. § 7-1101 (Burns 1953).

other states,[75] this section withholds partial distribution until the period for filing claims has elapsed,[76] and even then it is within the discretion of the court to refuse to make the decree. In addition, the posting of a bond by the distributee is optional with the court.[77] Omission of particular reference to the party or parties who may request the partial distribution could be interpreted to mean that any interested person may so petition; or perhaps the court could act on its own initiative.[78]

Strangely, the Code specifically gives possession of the real estate to the personal representative, but there is no explicit proviso for its return prior to the final settlement.[79] Presumably, after approximately

75. MODEL PROBATE CODE § 182 (b) (1946): "After the expiration of the time limited for the filing of claims and before final settlement of the accounts of the personal representative, a partial distribution may be decreed, with notice to interested persons, as the court may direct. Such distribution shall be as conclusive as a decree of final distribution with respect to the estate distributed except to the extent that other distributees and claimants are deprived of the fair share or amount which they would otherwise receive on final distribution. Before a partial distribution is so decreed, the court may require that security be given for the return of the property so distributed to the extent necessary to satisfy any distributees and claimants who may be prejudiced as aforesaid by the distribution." See also note 69 *supra*.

76. The claim period is six months after the date of the first publication of notice to creditors. IND. ANN. STAT. § 7-801 (Burns 1953).

77. In most states which have such provisions, the posting of security is mandatory where partial distribution is allowed prior to the expiration of the period for presenting claims. Thereafter, generally the bond may be dispensed with. See statutes, notes 68 and 69 *supra;* Estate of Mitchell, 121 Cal. 391, 53 Pac. 810 (1898). The Pennsylvania statute, *supra* note 68, which permits delivery of the realty at any time, does not expressly require security, but the court may order delivery only if "claimants and other distributees are not prejudiced thereby."

78. However, INDIANA PROBATE CODE, Part II [See Comment under IND. ANN. STAT. § 7-1101 (Burns 1953)], in describing the functions of Section 1701, states that, ". . . [u]nder this section the court, upon petition, can safely distribute. . . ." Compare note 72 *supra*.

79. For comparative legislation which allows requests for return of the real property, see note 68 *supra*. The Model Probate Code, § 182 (a), permits such a petition without any designated waiting period: "Upon application of the personal representative or of any distributee, with or without notice as the court may direct, the court may order the personal representative to deliver to any distributee who consents to it, possession of any specific real or personal property to which he is entitled under the terms of the will or by intestacy, provided that other distributees and claimants are not prejudiced thereby. The court may at any time prior to the decree of final distribution order him to return such property to the personal representative, if it is for the best interests of the estate. The court may require the distributee to give security for such return." The Comment thereto asserts: "The purpose of subsection (a) is to take care of a case where there is a specific thing which can much more conveniently remain in the possession of an heir or devisee than of the personal representative." Section 320.735 of the Pennsylvania Code, *supra* note 68, adopted in 1949, very closely follows the Model Probate Code except that it applies solely to real property.

In discussing the California statute on partial distribution, one of the drafters of the California Probate Code contends: "Under present conditions there is no justification for such a long delay [four months]. After the lapse of sixty days, perhaps even of thirty days, the court should be able to make a fair estimate of the claims that are

six months the heir or devisee could petition under Section 1701 for delivery of the realty. It would seem only reasonable and fair that the devisee or heir be restored to possession of the real property where the estate is clearly solvent and the circumstances indicate that it almost certainly will not be necessary to sell the realty or to resort to the rents and profits thereof in order to satisfy claims. After all, the heir or devisee has been deprived of possessory benefits he would customarily receive at common law or under prior statutes; where there is no risk of harm to the creditors, the personal representative should not be able to withhold possession of the real property any longer than is necessary to ascertain the financial status of the estate.[80] However, in providing for premature distribution, Indiana only went half-way.[81] The explanatory Part II supplement's reference to Section 1301 indicates that the heir can obtain possession of the real estate sooner than the six-month restriction set out in Section 1701.[82] How is this accomplished? Since the draftsmen failed to include a specific modus operandi in the Code, it may be concluded simply that the court, after fully apprising itself of the situation, may order the executor or administrator to deliver the realty to the devisee or heir. Should the court neglect or refuse to make such an order, where the occasion otherwise would warrant it, the distributee probably would have to fall back on Section 1701 and wait until the period for filing claims has expired.

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likely to be presented, so as to determine the amount of the bond that is demanded. I suggest that partial distribution should be authorized at an earlier date." Evans, *Comments on the Probate Code of California,* 19 CALIF. L. REV. 602, 621 (1931).

80. The court, in Streeter v. Patton, 7 Mich. 341 (1859), had before it a statute which entitled the executor or administrator to take possession and control of the realty, and concluded, "[i]t is the duty of the personal representative to take possession of the real estate when it, or the rents and profits, may be needed in the settlement of the estate; but when this is not the case, although he may do so under the statute, we do not think it imperative on him, nor can we see any reason why it should be, as the personal and real estate under our present laws go to the same persons. The personal estate may be more than ample for all the purposes of administration, and years may be required in settling the estate. It would be a harsh construction of the statute that would deprive the heir of the inheritance in the meantime." *Id.* at 351.

81. That is, in drafting Section 1701, the Probate Study Commission followed M. P. C. § 182 (b), and ignored M. P. C. § 182 (a). See notes 75 and 79 *supra.* A provision particularly dealing with the return of the real estate may have been omitted through inadvertence, but more probably it was purposefully excluded—perhaps through some necessary compromise. See the Foreword to the draft of the Proposed Probate Code, September 5, 1952.

82. "It works this way,—when the personal representative is appointed, if the real estate is in the hands of the persons entitled thereto, or they are in a position to take charge of it, the estate is solvent, and it will not be required to be sold to pay debts, legacies, etc., the court will enter an order directing the personal representative to turn the possession over to such party or parties. The income will go to the parties, and it is no longer a part of the estate. The real estate is always subject to be re-possessed by the personal representative and sold to pay debts as at present." INDIANA PROBATE CODE, Part II, at 50 [See Comment under IND. ANN. STAT. § 7-701 (Burns 1953)].

"He shall keep in tenantable repair the buildings and fixtures under his control and may protect the same by insurance."

Statutes which create a right or duty in the personal representative to take possession of the decedent's real property quite generally include an accessory obligation of care and maintenance.[83] This added responsibility may subject him to tort liability for injuries to third persons caused by a defective condition of the premises.[84] The cases are not altogether clear as to whether such liability is personal to the executor or administrator or whether it must be borne by the estate, although the general rule is stated to be that an estate cannot be held liable for a tort committed by the personal representative.[85] The basis for this doctrine—that the executor or administrator steps out of the line of his duty when he commits a tort and he therefore does not represent the estate—is largely fictional and has been aptly criticized.[86]

There are, of course, exceptions to the general rule, but no certainly definable area has been carved out. Inasmuch as the personal representative may be entitled to reimbursement out of estate funds in certain circumstances, such as where he was personally free from blame,[87] some courts have allowed the injured plaintiff to recover

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83. ARIZ. CODE ANN. § 38-1101 (1939), Home Ins. Co. v. Latimer, 33 Ariz. 288, 264 Pac. 103 (1928); CAL. PROB. CODE ANN. § 581 (Deering 1944); COLO. STAT. ANN. c. 176, § 115 (1935); CONN. GEN. STAT. § 7035 (1949); IDAHO CODE ANN. § 15-410 (1948); KAN. GEN. STAT. § 59-1401 (1949); MICH. COMP. LAWS § 707.1 (1948); MINN. STAT. ANN. § 525.34 (West 1947); MONT. REV. CODES ANN. § 91-2210 (1947); NEB. REV. STAT. § 30-406 (1943); NEV. COMP. LAWS § 9882.106 (Supp. 1941); N. Y. DECEDENT ESTATE LAW §§ 13 (1), 123; N. D. REV. CODE § 30-1305 (1943); OKLA. STAT. ANN. tit. 58, § 290 (1951); ORE. COMP. LAWS ANN. § 19-301 (1940); PA. STAT. ANN. tit. 20, § 320.501 (1950); S. D. CODE § 35.1101 (1939); TEX. STAT., REV. CIV. art. 3426 (1948); UTAH CODE ANN. § 75-11-3 (1953); WASH. REV. CODE § 11.48.020 (1951); WIS. STAT. § 312.04 (1951); WYO. COMP. STAT. ANN. § 6-1309 (1945); CANAL ZONE CODE tit. 4, § 1440 (1934).

84. Possessor of land is liable for bodily harm to others outside the land caused by a structure or other artificial condition thereon which possessor realizes or should realize involves an unreasonable risk of harm. Potter v. Empress Theatre Co., 91 Cal. App. 2d 4, 204 P.2d 120 (1949).

85. Daily v. Daily, 66 Ala. 266, 269 (1880); Sterrett v. Barker, 119 Cal. 492, 51 Pac. 695 (1897); Wahl v. Schmidt, 307 Ill. 331, 138 N.E. 604 (1923); Rose v. Cash, 58 Ind. 278 (1877); Ostheimer v. McNutt, 116 Ind. App. 649, 652, 66 N.E.2d 142, 143 (1946); Curry v. Dorr, 210 Mass. 430, 431, 97 N.E. 87, 87 (1912); Belvin v. French, 84 Va. 81, 3 S.E. 891 (1887).

Defendant held liable personally but not as administrator, and the allegation that defendant was administrator of an estate may be treated as surplusage and does not negative a personal liability for negligence. Brannigan v. Woodbury, 158 Mich. 206, 122 N.W. 531 (1909).

86. Note, 11 U. OF PITT. L. REV. 96, 100 (1949), contends that such objections to holding a personal representative liable as such are not valid, drawing the analogy that a master is liable for the acts of his servant in the scope of employment even though the master forbade the act.

87. See Willitts v. Schuyler, 3 Ind. App. 118, 121, 29 N.E. 273, 274 (1891); Smith

directly against the estate in order to avoid circuity of action.[88] This latter view is held by an extreme minority, however, and has been condemned as impractical and not protective of the estate.[89]

In a few cases the estate has been held liable to respond in damages on the ground that it has received the benefit of the tortious act.[90] This

v. Rizzuto, 133 Neb. 655, 276 N.W. 406 (1937); *In re* Lathers, 137 Misc. 226, 243 N.Y.S. 366 (Surr. Ct. 1930).

88. Ewing v. Foley, 115 Tex. 222, 280 S.W. 499 (1926). The court held the estate liable on the authority of English cases which provided that if a trustee acted reasonably and diligently, he was entitled to be indemnified out of his testator's estate. So, in order to avoid circuity of action, the injured plaintiff is allowed to recover directly against the estate, even though the weight of United States authority is to the contrary. *But cf.* Schepps v. Wilkins, 290 S.W. 909 (Tex. Civ. App. 1927), where the administratrix was personally negligent and the general rule was held applicable.

In Isbell v. Heiny, 218 Ind. 579, 33 N.E.2d 106 (1941), the court discusses the general rule that the estate cannot be held liable for a tort committed by the executor or administrator, but goes on to say, ". . . and the general rule has been and possibly should be relaxed in the interest of avoiding circuity of action. . . . For this reason therefore, we prefer not to rely too strongly upon a general rule to which there are exceptions and which may not always obtain." *Id.* at 585, 33 N.E.2d at 108.

Comment, 46 MICH. L. REV. 645 (1948), says that a suggested statutory change to give the injured person a direct action against the estate has not been widely accepted. "The Model Probate Code does not make such a change, and later cases indicate that many jurisdictions are satisfied with the common law rule which limits the injured party to his action against the personal representative." *Id.* at 647.

89. Note, 21 So. CALIF. L. REV. 199, 200 (1948), criticizes the Texas case (Ewing v. Foley, *supra* note 88) allowing the personal representative to be sued in his representative capacity in order to avoid a circuity of action. The writer thinks the personal fault of the executor and the matter of tort liability should be decided separately, otherwise divided loyalty might defeat the rights of beneficiaries of the estate. The Note favors the New York and California rule which allows the personal representative to be sued personally and if held liable, the executor may bring suit in probate court to prove lack of personal fault and be reimbursed to the extent of the judgment.

Comment, 46 MICH. L. REV. 645, 648 (1948), points out that the chief reason for not allowing a derivative suit is that the trial would involve the issue of tort liability plus the question of the representative's personal fault and that the latter would not be a "fighting issue" if the representative were sued in his official capacity; *i.e.*, the plaintiff would try to prove that the representative was not personally at fault and the representative would hardly be expected to argue strenuously that he was personally at fault.

90. In Bright National Bank v. Hanson, 68 Ind. App. 61, 113 N.E. 434 (1918), the administratrix fraudulently, but within the apparent scope of her powers, obtained certain notes and turned them over to the estate. Her fraud was held chargeable to the estate, the court saying, "an administrator as such has no authority to make such statements, representations, or warranties for or on behalf of his estate, and hence, if liable at all, he is individually liable. However, we do not believe that this principle should be applied to a case where the administrator by the order of the court was authorized to carry on the business of his deceased, and where, in so carrying on such business, he frauduently obtains and retains for such estate an unconscionable advantage and benefit." *Id.* at 71, 113 N.E. at 437.

The Iowa Supreme Court in Simpson v. Snyder, 54 Iowa 557, 6 N.W. 730 (1880), held the estate liable where defendant as administrator took possession of and sold, as assets of his intestate, thirteen head of cattle belonging to plaintiff, who then sued for the value of the cattle. Counsel for defendant insisted that the estate could not be liable for defendant's tort, but the court ruled otherwise since the "estate received the benefits of the proceeds of the cattle and ought to restore the amount thus realized to

argument would seem more logically applicable in the situation where the personal representative is ordered to continue the business of the decedent.[91] Nevertheless, under a statute authorizing the court to direct a continuation of the decedent's business, the California Supreme Court held an executor personally liable in a negligence action even though he was not personally at fault, saying, in effect, that the statute left the common law doctrine unchanged and did not make the estate liable.[92]

At first impression, to hold the personal representative individually answerable seems quite harsh, particularly when a statute requires him to assume possession and control.[93] Where the personal representative

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plaintiff. . . . The action is not to recover damages for the tort of defendant, but for the value of the property. . . . The position of defendant's counsel possibly would be correct if the judgment were for damages on account of the wrongful act of defendant."

See also Clark v. Knox, 70 Ala. 607 (1881); Miller v. Smythe, 92 Ga. 154, 18 S.E. 46 (1893); Note, 11 U. OF PITT. L. REV. 96, 99 (1949).

91. IND. ANN. STAT. § 7-711 (Burns 1953) provides that the court may authorize the personal representative to continue any business of the decedent "upon a showing of advantage to the estate." An early Indiana case is one of the few nonstatutory authorities for the view that the court has the power to authorize the continuation of the business of a decedent for sale as a going concern. Powell v. North, 3 Ind. 392 (1852).

"The estate receives all the income and profit from the business, so logically, the estate should assume responsibility in the first instance for the business torts, rather than incur liability by way of reimbursement to the executor." Note, 33 VA. L. REV. 775, 776 (1947).

For a thorough treatment of the problem, see Adelson, *The Power to Carry on the Business of a Decedent,* 36 MICH. L. REV. 185 (1937), which includes a proposed model statute.

92. Johnston v. Long, 30 Cal. 2d 54, 181 P.2d 645 (1947). An agent of the executor was operating a business garage for the estate. Plaintiff, a truckdriver, was injured by the falling of an overhead door on the premises. The District Court of Appeals interpreted the statute [CAL. PROB. CODE ANN. § 572 (Deering 1944)] as discharging the executor from tort liability where not at fault, but the Supreme Court reversed, one judge dissenting.

93. Eustace v. Jahns, 38 Cal. 3 (1869), involved an action against an administrator, as such, to recover damages for personal injuries alleged to have been sustained by the plaintiff in consequence of the neglect of the defendant to keep in proper repair a portion of a public street adjacent to a lot, of which defendant, as administrator was in possession by tenants. The court, assuming that it was defendant's duty as administrator to repair the defect in the street, held that the damages resulting did not constitute a legal claim against intestate's estate. It was said that the foundation of the action was the personal tort of defendant, and not the intestate; that the duty alleged to have devolved on defendant, cast on him by virtue of his possession and official or representative relation to the estate, was strictly a personal duty voluntarily assumed; and that a personal injury resulting from a neglect of that duty by him rendered him personally liable for the tort; but that the estate was no more liable for the neglect of this personal duty than it would be for a fine which might be imposed on the administrator by a criminal court for assault and battery committed by him while in possession of the estate. It was said further that there is a marked and wide distinction between liability of the estate for expenses of repairs and its liability for the personal tort of its administrator, not selected by or in any manner directed by or under control of parties interested in the estate, in neglecting to perform a personal duty imposed on him by law.

Cf. Dobbs v. Noble, 55 Ga. App. 201, 189 S.E. 694 (1937), a suit by a servant or invitee of the United States government, the tenant of a building, against an executor,

has merely a right and not a duty to take possession and manage the real property, it is not unrealistic to foresee that the threat of tort liability may deter him in the exercise of such authority. If in fact the executor or administrator must answer personally for all torts growing out of his control of the realty, whether committed by himself or by his agents,[94] he is in need of adequate protection; otherwise, a reluctance to assume the task of administration may manifest itself among capable and reliable personal representatives. Demonstrably, discretion is the better part of valor. The assurance that he can obtain reimbursement from the estate is small consolation when it is realized that the size of the tort judgment may well exceed the value of the estate. And the fact that estate assets are insufficient to indemnify the personal representative generally is no defense.[95] Moreover, in the California case[96] the estate had been closed and the executor discharged eight months after the accident and four months before the injured plaintiff sued for damages, but this did not serve to terminate the individual liability of the personal representative for the torts of his agent. Unless a statute provides otherwise, apparently the accountability continues until it is cut-off by a statute of limitations.[97]

Nevertheless, it appears no less unjust to subject the estate, and resultantly the heirs and devisees, to liability in connection with something over which they may have no influence. They may have had no voice in the appointment of the personal representative or in the management of the property. They may be unable to petition for the restoration of the realty for a stipulated period of time. They may, in fact, be many miles distant from the location of the land in question. Should the statute which bars these people from possession and control be con-

who was the landlord, on account of personal injuries sustained in a fall at night into an unprotected well, commencing at or near the edge of a city sidewalk and extending down to the cellar of the building. The court held that where the executor was given authority to manage and rent the building for the benefit of the estate, he would be liable as such executor for the injuries; ". . . but unless some duty or right of control over the property is vested in him beyond his mere representative power, he is not personally liable." *Id.* at 203, 189 S.E. at 695 (1937).

94. See notes 85 and 92 *supra.*

95. In all states except Georgia and Oregon. Comment, 46 MICH. L. REV. 645, 649 (1948).

96. See note 92 *supra.*

97. Note, 11 GEORGIA BAR J. 95, 96 (1948), cites a Georgia statute which makes the discharge of the administrator final in every respect and relieves him of all liability. IND. ANN. STAT. § 7-1113 (Burns 1953) provides for the final discharge of the personal representative and evidently limits his liability thereafter to mistake, fraud and wilful misconduct. Also there is a one year Statute of Limitations. According to the Part II explanation this section is based upon Model Probate Code § 193, under which the personal representative is not relieved from liability for past acts by a discharge, but merely ceases to be under any further duties to act as personal representative. Suits must be commenced within two years from the date of the discharge, though.

strued so as to deprive them of their inheritance as a consequence of a transaction which they could not possibly have prevented?[98]

It is unlikely that the estate would be held accountable where the executor or administrator was personally at fault. Should this occur, however, the heirs or devisees might find it necessary to look to his bond.[99] Since the bond may, if the testator so directs and the court concurs, be dispensed with or possibly fixed in a reduced amount calculated to protect the creditors and taxing authorities, the beneficiaries of the estate may be without a safeguard. Section 1101 further provides that any legatee, devisee or heir may petition the court for a general bond which would be limited in amount, no doubt, by the appraisement of the estate. To obtain the court's order for a general bond an adequate reason must be shown. Possibly the threat of tort liability to the estate would be considered a qualifying ground.

Not only does the personal representative, and possibly the estate, require protection, but some consideration should be given to the position of the tort claimant. Where the estate is held to be immune from liability and the executor or administrator has no private wealth, the injured plaintiff may be virtually remediless. The bond of the personal representative primarily is designed to protect the estate and its creditors against unlawful acts of the executor or administrator such as misap-

98. Perhaps it should not be so interpreted if the heirs and devisees derive no apparent benefit from the management and control of the personal representative. See note 93 *supra*. However, where the executor or administrator continues a business of the decedent which the devisees or heirs would not be capable of operating, a different situation is presented. Note, 35 CALIF. L. REV. 586, 588 (1947), favors legislation placing primary liability on "the real owner of the business, the estate, by providing for suits against the executor in his representative capacity, with recourse against the executor personally only in the event of insolvency of the estate or of his own personal fault." But there are other situations in which unified management of the estate would benefit the heirs and devisees. See p. 281 *infra*. More generally, as noted at p. 264 *supra*, the rents and profits from realty subject to administration may forestall a sale thereof.

99. IND. ANN. STAT. § 7-501 (Burns 1953) prescribes the conditions and amounts of the bond of the personal representative, *viz.*, ". . . in an amount not less than the value of the personal estate to be administered plus the probable value of the annual rents, issues and profits of all the property of the estate; in case real estate is to be sold by the terms of the will, the amount of the bond shall not be less than the value of the personal estate to be administered, and the value of the real estate to be sold plus the probable value of the annual rents, issues and profits of all the property of the estate. . . ." This is Section 1101 of the new Code.

In conjunction with the power of possession in the personal representative per Section 1301, Section 1201 (a) now requires that the real property be included in the inventory to be returned by the executor or administrator. See IND. ANN. STAT. § 7-601 (a) (Burns 1953). The inventory under prior Indiana law covered the personal estate alone, except where the realty was devised to the executor or directed by the will to be sold for the payment of debts or legacies in which case it was included in the inventory. IND. ANN. STAT. §§ 6-701, 6-705 (Burns 1933).

propriation of assets and wrongful sales. The possibility that the bond may also be held to cover tort losses incurred due to control of the realty by the personal representative may not be of much assistance if the tort judgment exceeds the amount of the bond.[100] Furthermore, even though the personal representative is financially responsible, one court has limited recovery to the value of the estate, as the executor or administrator otherwise would be unable to obtain full reimbursement.[101] In such a case, it may be contended that the hardship to the tort creditor outweighs any burden on the personal representative.[102]

Should the personal representative face potential tort liability as an individual and not in his representative capacity,[103] presumably he would take out liability insurance to shield himself. But it is not certain whether the estate can be charged for this expense.[104] True, Section 1301 states that the personal representative "may protect the same [buildings and fixtures] by insurance." This evidently is not obligatory, however, and it may be construed to refer only to fire insurance and the like, which would cover any damage to the buildings and fixtures but would not safeguard against tort liability.[105] Moreover, if the executor or administrator must bear the cost of indemnity insurance out of his own pocket, he may neglect or refuse to purchase this protection and attempt to become a self-insurer—with perhaps disastrous results to a tort claimant or to the estate itself. Again, if the estate must respond in damages, would the heirs and devisees be able to insist that the personal representative purchase adequate liability insurance out of the assets of the estate? The answer probably would be yes since he has

100. See note 99 *supra*.

101. Smith v. Rizzuto, 133 Neb. 655, 276 N.W. 406 (1937).

102. Comment, 46 MICH. L. REV. 645, 650 (1948).

103. Apparently the question is not conclusively settled in Indiana. See Isbell v. Heiny, 218 Ind. 579, 33 N.E.2d 106 (1941); Rose v. Cash, 58 Ind. 278 (1877); Ostheimer v. McNutt, 116 Ind. App. 649, 652, 66 N.E.2d 142, 143 (1946); Bright National Bank v. Hanson, 68 Ind. App. 61, 113 N.E. 434 (1918).

104. Evidently it cannot be without the sanction of a statute. Note, 21 So. CALIF. L. REV. 199, 201 (1948), points out that the California court in Johnston v. Long, 30 Cal. 2d 54, 181 P.2d 645 (1947) *supra* note 92, suggested that indemnity insurance should be made a part of the cost of administration of the estate. "Yet this [tort] liability is personal, the protection of which should not be a liability of the estate. A suggested answer is that this personal liability of an executor should be a consideration in determining the amount of the executor's fees. Thus, the cost of the indemnity insurance would be borne by the person whose liability is insured, without placing an undue burden upon one who becomes an executor." Demonstrably, such a plan still would make the insurance a cost of administration, but vicariously so, apparently to get around the technical obstacle noted.

105. An administrator must be held to adopt such precautions against the loss of property by fire as prudent men are, under similar circumstances, accustomed to exercise. Rubottom v. Morrow, 24 Ind. 202 (1865).

a fundamental duty to protect the estate.[106] But if not, and they assume the cost themselves, could they seek reimbursement from the estate? It is doubtful that they could unless the court specifically authorized the expense.

Most statutes which award possession of the entire estate to the personal representative or which authorize him to carry on the business of the decedent do not expressly cover the question of tort liability.[107] In two states, however, there are legislative provisions particularly relating to these problems. The Michigan statute provides that whenever the fiduciary continues the business of the decedent he shall not be personally liable for any tort claims arising out of the conduct of the business or the act of any agent, employee or copartner of such business. Tort creditors are limited to the assets of the business in satisfying their claims though, and the fiduciary is not relieved of liability for his "own wilful fraud, gross negligence, or other wilful misconduct."[108] This, of course, does not directly concern possession of the real estate, but the principle of exemption from personal liability suggests a possible solution to that problem. The Pennsylvania legislature met the issue head-on in the Fiduciary Act of 1949 and provided that the executor or administrator might protect himself from liability to third persons by purchasing insurance at the expense of the estate.[109] In discussing this statute, which is without counter-part in previous Pennsylvania legislation, one commentator asserts that "this is certainly recognition of the premise that it is the estate and not the individual who should shoulder the risk of loss through tort claims."[110]

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106. *In re* Palm's Estate, 68 Cal. App. 2d 204, 156 P.2d 62 (1945); *see In re* Petition of Mulford, 217 Ill. 242, 247, 75 N.E. 345, 346 (1905).

107. Comment, 46 MICH. L. REV. 645, 651 n.28 (1948), lists the states which authorize the personal representative to carry on the decedent's business.

IND. ANN. STAT. §§ 7-711 (b), 7-711 (c) (Burns 1953), gives the court much latitude in making its order for the continuation of the business; *e.g.*, under subsections (b) and (c), the order may provide:

"(b) The extent of the liability of the state, or any part thereof, or of the personal representative, for obligations incurred in the continuation of the business;

"(c) As to whether liabilities incurred in the conduct of the business are to be chargeable solely to the part of the estate set aside for use in the business or to the estate as a whole. . . ."

No doubt these provisions will suffice as to the commercial property, but by their terms they are limited to the business and do not apply to the nonbusiness real property for which the personal representative may be responsible under Section 1301.

108. MICH. COMP. LAWS § 720.156 (2) (1948).

109. PA. STAT. ANN. tit. 20, § 320.503 (1950). The cost of liability insurance under this section for one year on specified devised real estate not in the devisee's possession at decedent's death is a proper administration expense and a properly deductible item for inheritance tax purposes. *In re* Anderson's Estate, 77 D. & C. 74 (Pa. 1952).

110. Note, 11 U. OF PITT. L. REV. 96, 101 (1949).

"He may maintain an action for the possession of the real property or to determine the title to the same."

Logically, if the personal representative has the duty to take control of the entire estate, he must be able to enforce his right to possession of the realty. Under previous Indiana law the executor or administrator could not bring an action in connection with the real estate unless it could be demonstrated that it was needed for the payment of debts.[111] At common law, of course, the real property was completely beyond his bailiwick. Consequently, a statutory provision similar to the foregoing is essential to validate any litigation relating to the real estate brought in the name of the personal representative.[112] Moreover, since the title to the real estate is in the heirs or devisees in almost every state, a statute authorizing the personal representative to bring suit would be necessary to make him the real party in interest.[113]

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111. Smith v. Dodds, 35 Ind. 452 (1871), involved a suit by the administrator of a deceased tenant against the landlord for forcible entry upon the death of the tenant, taking possession of the leased property during the continuance of the term, and converting crops growing on the premises. The court held that the administrator was the proper party to bring the action since terms for years are treated as chattels and go to the personal representatives as assets. "If it was personal property, then the action was properly brought; but if it was real estate, then the administrators could not maintain the action unless it was shown that it was necessary for the payment of the debts of the estate." *Id.* at 456.

An administrator with the will annexed has an interest in the real estate to the extent of the debts of the estate, and he may maintain an action against a railroad company for damages caused by the destruction of the buildings thereon by fire communicated to them by defendant's locomotive, but only to the extent required to pay the debts. The complaint also should show that the land in its present condition cannot be sold for a sum sufficient to pay all the debts. Pittsburgh, C., C. & St. L. R. Co. v. Verbarg, 89 Ind. App. 177, 166 N.E. 29 (1929).

See also Hochstedler v. Hochstedler, 108 Ind. 506, 9 N.E. 467 (1886); Comparet v. Randall, 4 Ind. 55 (1853).

112. "Ordinarily, the right to sue for the cancellation of a deed or other instrument of conveyance of land survives to and is enforceable by the heirs of the decedent and, in the absence of a statute conferring upon the personal representative title to or right to sue with respect to real estate, cannot be enforced by him unless it is necessary for him to have the rents and profits or dispose of the property for the purpose of paying expenses, legacies or the just debts of the decedent, the general rule being, in the absence of a statute providing otherwise, that the heir, and not the personal representative, must bring an action with reference to the real property of the decedent." Baker v. State Bank of Akron, 112 Ind. App. 612, 623, 44 N.E.2d 257, 263 (1943).

For statutes conferring such right upon the personal representative, see ARIZ. CODE ANN. § 38-809 (1939); CAL. PROB. CODE ANN. § 581 (Deering 1944); FLA. STAT. § 733.02 (1951); IDAHO CODE ANN. § 15-410 (1948); KAN. GEN. STAT. § 59-1401 (1949); MONT. REV. CODES ANN. § 91-2210 (1947); NEV. COMP. LAWS § 9882.191 (Supp. 1941); N. D. REV. CODE §§ 30-2401, 30-2403 (1943); OKLA. STAT. ANN. tit. 58, § 251 (1951); S. D. CODE § 35.1101 (1939); TEX. STAT., REV. CIV. art. 3314 (1948); UTAH CODE ANN. § 75-11-3 (1953); WYO. COMP. STAT. ANN. § 6-1309 (1945); CANAL ZONE CODE tit. 4, § 1440 (1934).

113. See notes 32, 33 and 35 *supra*, and accompanying text. But see note 35 *supra*

According to cases under statutory provisions similar to Section 1301, the executor or administrator is entitled to sue for possession immediately upon the issuance of his letters,[114] and he may maintain ejectment based on his right to possession, whether or not he is under a duty as in California.[115] In at least one state, however, he cannot bring an action for trespass upon the real estate after the decedent's death, unless he has first asserted his right under the statute by taking possession of such real property. If he does take possession, he may then maintain an action for a trespass committed thereon before he took possession since his possession relates back to the death of the decedent.[116] In two states, where the personal representative is given merely a right to take possession of the land, the court has said this was a possessory interest only and was insufficient to enable him to bring an action to quiet title.[117]

The California probate law expressly provides: "The heirs or devisees may themselves, or jointly with the executor or administrator, maintain an action for the possession of the real property, or for the purpose of quieting title to the same, against anyone except the executor or administrator; but they are not required to do so."[118] This has been construed to allow the statute of limitations to run against minor heirs in that the right of action likewise vests in the personal representative, who is under no legal disability, so the statute of limitations commences to run despite the disability of the minor.[119] The Kansas statute states:

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in regard to registered land and devised realty in Georgia. See also IND. ANN. STAT. § 7-703 (Burns 1953).

114. In Page v. Tucker, 54 Cal. 121 (1880), the devisee sold land to the defendant, and the plaintiff, special administratrix, successfully brought ejectment without alleging and showing that her possession was necessary to pay debts. The court said, at 123: "The executor or administrator cannot be kept out of [real] property until the Probate Court shall have settled his accounts, and the debts and expenses have been ascertained, and then, and not till then, have his action to recover possession; but immediately upon the issuance of his letters, he is entitled to have the possession of the estate of deceased, to the end that the rents and profits, and, if need be, the proceeds of the property itself, be applied to the payment of debts and charges, and the balance, if any, distributed, and by him delivered to the parties entitled."

115. Moragne v. Moragne, 143 Ala. 459, 39 So. 161 (1905); Curtiss v. Herrick, 14 Cal. 118 (1859); Moody v. Macomber, 159 Mich. 669, 124 N.W. 549 (1910); Tillson v. Holloway, 90 Neb. 481, 134 N.W. 232 (1912). *Contra:* Humphreys v. Taylor, 5 Ore. 260 (1874).

116. Noon v. Finnegan, 29 Minn. 418, 13 N.W. 197 (1882).

117. Youngson v. Bond, 64 Neb. 615, 90 N.W. 556 (1902). Administrators have a mere right of possession pending the administration. "Until that right is asserted and possession taken, the heirs may maintain ejectment for the land." Marsh v. The Board of Supervisors of Waupaca County, 38 Wis. 250, 253 (1875).

118. CAL. PROB. CODE ANN. § 581 (Deering 1944). Arizona and Wyoming have statutes which are virtually identical. See note 112 *supra*.

119. Lane v. Starkey, 59 Cal. App. 140, 210 Pac. 277 (1922). See also Miller v. Oliver, 54 Cal. App. 495, 202 Pac. 168 (1921), further interpreting the statute.

"He [the personal representative] may by himself, or with the heirs or devisees, maintain an action for the possession of the real estate or to quiet title to the same."[120] It has been held to mean that the administrator may maintain an action to obtain possession of the decedent's real property but that the heirs alone cannot bring an action to collect assets—the executor or administrator is a necessary party.[121]

Under prior Indiana law, the general rule was that an executor or administrator alone was entitled to bring an action for the recovery of the personal property of a deceased person.[122] There was a single exception to this rule that "where there is no administrator or executor to prosecute the action, and no debts to be paid by the estate, the heirs may prosecute the action."[123] From this a possible analogy may be drawn: Although the Code makes no specific reference to the right of the heirs or devisees to maintain an action for possession of the real estate, perchance they could do so under these conditions.

Manifestly, the early common law rules excluding the real property from liability for the decedent's debts worked to the disadvantage of the creditors of the estate. Subsequent statutes have demonstrated a tendency to allow claimants more and more access to the realty in seeking full compensation, culminating in provisions such as Section 1301 of the Code.[124] Statutes of the latter type are not of recent vintage in every state,[125] but in this country they represent the high point in regard to the powers of personal representatives in the administration of decedents' estates.

Inasmuch as the Code makes all of the property of the estate, including the rents and profits from the land, assets for the payment of debts and charges, one obvious reason for Section 1301 is to afford

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120. KAN. GEN. STAT. § 59-1401 (1949).

121. Waldorf v. Waldorf, 168 Kan. 690, 215 P.2d 149 (1950). A devisee cannot maintain ejectment until the estate is settled and the administration closed. Bilger v. Nunan, 199 Fed. 549 (9th Cir. 1912) (diversity case decided under Oregon statute).

122. Finnegan v. Finnegan, 125 Ind. 262, 25 N.E. 341 (1890).

123. *Id.* at 264, 25 N.E. at 342. Ferguson v. Barnes, 58 Ind. 169 (1877), is cited in support of this proposition.

124. Simes, *supra* note 1, at 1263, concludes: ". . . some trends are apparent. . . . Fifth, there is a pronounced trend in the direction of treating real and personal property in the same way. Sixth, . . . the policy in favor of clearing titles is apparent."

125. See the following early cases involving the California statute. Curtiss v. Herrick, 14 Cal. 118 (1859); Meeks v. Hahn, 20 Cal. 620 (1862); Estate of Woodworth, 31 Cal. 595 (1867).

Streeter v. Patton, 7 Mich. 341 (1859), which concerns the Michigan statute, has already been referred to. See note 80 *supra.*

Jones v. Billstein, 28 Wis. 221 (1871), discusses a statute [Wis. R.S. c. 100, § 7 (1849)] giving the personal representative the right to possession.

greater protection to creditors.[126] Additionally, in many instances there is a period after the testator's or intestate's death when a critical need arises for some responsible party to step in and take care of the real property. There may be several heirs or devisees who absolutely cannot agree as to the management and control of the realty. As a result, valuable farm land may lie fallow, crops may be harvested too late or not at all, and essential repairs may not be made. Awarding possession and control to the personal representative should bring about an orderly and efficient management of the real estate. A testimonial to the desirability of having the executor or administrator assume complete control is evidenced by the fact that in the past many competent and experienced Indiana lawyers have expressly included similar provisions in drafting wills to assure responsible management and supervision of the entire estate during the interim prior to final settlement and distribution.[127]

126. Comment, 21 IOWA L. REV. 793, 802 (1936), concludes that the assumed purpose of legislation (such as Section 1301) is ". . . to benefit the creditors without abolishing the vested common law rights of the owners." In other words, the claimants are enabled to reach the produce of the real estate, while the title continues to pass to the heirs or devisees.

127. Interview with Norman F. Arterburn of the Vincennes Bar. In Lockridge v. Citizens Trust Co. of Greencastle, 110 Ind. App. 253, 37 N.E.2d 728 (1942), the testator devised all of his property real and personal, to defendants (executors) in trust giving them full power and authority to manage and control his estate for its best interests as the executor should determine notwithstanding any bequests in the will. The defendants were directed to "pay out of any of the funds belonging to my estate all of my just debts and obligations." Plaintiffs, legatees, brought the action to recover damages allegedly caused by defendants in collecting and retaining or disposing of the rents and profits of the real estate devised by the will of the testator.

Defendants managed, rented, and operated the real estate (901.21 acres) from March 5, 1928 (the date the executor qualified), until May 20, 1935, when the realty was sold. They collected $27,518.60 in rents and profits during this period. Plaintiffs alleged that on testator's death they became equitable owners of his real estate and as such were entitled to the rents and profits thereof which were not an asset of testator's estate. This was not an action to enforce a claim against an estate represented by the defendants, nor did plaintiffs seek an accounting. "The theory of the action is that the appellees [defendants] are liable because they have retained or disposed of property that was the sole property of appellants [plaintiffs] as beneficiaries of the trust established by the will, or as heirs at law of the decedent, or as equitable owners of the real estate devised by the will." *Id.* at 259, 37 N.E.2d at 730. The lower court's judgment for defendants was affirmed. The Appellate Court said that the plaintiffs' action, in the form brought, must be sustained, if at all, as an action against the defendants as individuals and not in their representative capacities. Also, "it is our interpretation of the will that it was the intent of the testator that the executor, as executor, have possession of the real estate and the rents and profits therefrom until the estate of the testator was settled, and that then the possession thereof, with the right to the rents and profits, pass to it as trustee, until the trust estate was settled." *Id.* at 261, 37 N.E.2d at 731.

"There is no reason why a testator, by the terms and provisions of his will, could not give his executor the right to the possession and the collection of the rents and profits of his real estate." The plaintiffs contended that; even so, defendants held possession as trustee and had no right to apply rents and profits to payment of the testator's debts. The court disagreed, and referring to the terms of the will, said,

Furthermore, statutes of this type aid in determining whether the probate court has jurisdiction over the decedent's lands throughout the course of administration and whether the operation of the probate court is entirely an *in rem* proceeding.[128]

Finally, of course, probate provisions such as Section 1301 perhaps are motivated by a rejection of the common law view that both title and right to possession of real property pass to the heirs or devisees immediately upon the death of the decedent.[129] Under the new Code the

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"[t]his indicates that it was the intention of the testator that the rents and profits derived from the real estate be applied to the payment of indebtedness of testator if necessary." *Id.* at 262, 37 N.E.2d at 732.

"While rents and profits are incidents of the reversion and ordinarily pass therewith, there is no reason why the rents and profits of real estate cannot be devised by a testator to his executor and used by him for the payment of indebtedness without the real estate being changed into personal property." In other words, the doctrine of equitable conversion did not apply to this situation. The court went on to hold that the testator, by his will, intended to award possession and control of the entire estate to the executor plus a right to the income from the real property accruing prior to its sale, or prior to distribution to the beneficiaries in case the realty was not sold. "That it was further the testator's intention that his executor use such rents and profits the same as personal property was usable for the payment of the indebtedness of the testator or the liabilities of his estate." *Id.* at 263, 37 N.E.2d at 732.

128. See note 21 *supra*. For an extensive commentary on this subject, see Simes, *The Administration of a Decedent's Estate as a Proceeding in Rem*, 43 MICH. L. REV. 675 (1945). Patently, Section 1301 will also take care of the situation where the heirs or devisees are not within the State or their whereabouts is unknown. See note 26 *supra*.

129. There are those who advocate abolition of the distinctions between real and personal property as well as others who argue for their retention. These arguments generally relate to the title question, though. See notes 37 and 38 *supra*, and accompanying text.

Discussing the anomalies in the body of laws, Field, *Improvements in the Law*, 22 AM. L. REV. 57 (1898), asserts: "The first and most important is the distinction still kept up between the modes of dealing with real and personal property. The difference in the natures of the two kinds of estates undoubtedly requires some difference in the modes of using them, but why their acquisition and transmission should not be governed by the same rules it is not so easy to see. Why should not dealing in land be as free as dealing in cattle? That great inconvenience and uncertainty result from the present differences must be manifest. . . . I mention only the devolution of the two kinds of property, occurring at the death of an intestate owner; the real property going to the heir and the personal to the administrator." *Id.* at 61.

"Auother provision, and one in which the English lawmakers have taken a more advanced stand than our own, is the vesting of title to real estate as well as to personal property in the executor or administrator. Admittedly, this would simplify devolution of title and administration of estates. Such a provision was considered by the New York revisers, but they thought the subject better deferred. With the extensive changes already made, abolishing ancient differences in the treatment of real and personal property, this further change seems logical and may be looked for in the future." Barry, *supra* note 9, at 131.

Note, 49 YALE L. J. 151 (1939), favors maintenance of the differentiation between realty and personalty beeause of new considerations, such as the greater marketability of personalty and losses from forced sales of realty. The distinction insisted upon goes mainly to the question of title. Where the estate is insolvent, the Note argues that the executor should be able to collect the rents and use them in reducing the debts, since

granting of possession but withholding of title to the real estate as far as the personal representative is concerned seems to exemplify a compromise of interests between the creditors and the heirs or devisees, along with a partial repudiation of the strict common law concepts.[130]

The ultimate impact of the new law in Indiana naturally cannot be foretold at this time.[131] An attempt has been made here to define the scope of a few of the changes that have been accomplished by the Code and to suggest the possible reasons therefor. Although specific recommendations probably are not in order in advance of a span of living with the Code, the menace of tort liability seems sufficiently urgent to warrant the suggestion that Section 1301 should be amended along the lines of the Pennsylvania statute[132] to require expressly that adequate liability insurance be purchased by the personal representative immediately upon the granting of letters and at the expense of the estate. Meanwhile, it would seem incumbent upon counsel in advising executors and administrators to insist that they take every precaution to safeguard themselves and the estate from the harmful depletion of assets as a consequence of a tort judgment.

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it protects creditors and may forestall an eventual sale of the realty, but that such statutes (as Section 1301) should not apply to situations where the estate is clearly solvent. "The requirement of a showing of insolvency is predicated on the assumption that the preservation of the realty for the protection of creditors is the sole purpose of the statute. Since this consideration is non-existent where the estate is solvent, the fiduciary's employment of the statutory power in such a case would serve no useful function. He would merely collect rents from the heirs and devisees, extract additional commissions therefrom, and return the balance to them upon settlement of the estate." *Id.* at 153, 154.

Sims, *supra* note 38, attacks the present English law awarding both possession and title to the personal representative. "The last argument [see note 39 *supra*] applies with equal force against the approximate assimilation of realty to personalty with us. Except for the payment of debts, it is frequently a source of strength in the estate of a decedent that it consists largely of well chosen investment buildings and land; and to make its easy sale the rule, and its retention dependent upon the assent of the administrator or executor, would be the sad undoing of many a set of minor children." *Id.* at 1002, 1003.

130. For a concise statement on this point, see Comment, 21 IOWA L. REV. 793, 801 (1936).

131. Pearson, *Summary Probate Proceedings,* 19 MINN. L. REV. 833 (1935), in discussing the revision of the Minnesota Probate Code (Laws of 1935, ch. 72), says ". . . it is apparent that the object of the revision cannot be achieved to the fullest extent except through a lapse of time, intense study by the lawyers, construction by the courts, and perhaps some experimentation."

132. See note 109 *supra.*