WHEN DOES AN EXECUTOR BECOME A TRUSTEE?

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THIS well-known problem arises for many purposes, and is notoriously a difficult one. Mr. Augustine Birrell quotes Sir John Leach V.C. for the proposition that the change always occurs at the dead of night, but adds that he himself deprecates so close an inquiry. Motives of delicacy, however, must not prevent our search for the truth. Some of the confusion is perhaps due to the fact that the word "trustee" is often used loosely, and is not always reserved for the legal relationship strictly so called.[1]

The question propounded in the title to this article may have to be answered for a variety of reasons. It has arisen for example, in relation to the power which one of several executors has, but which one of several trustees has not, to deal with the assets of the estate (*Attenborough* v. *Solomon*)[2]; in relation to the power to make advances to infants (*Re Smith*[3]); in connection with the power to appoint new trustees (*Re Ponder*[4], *Re Pitt*[5]) in connection with the recovery of duty payable on the estate (*Re Claremont*,[6] *Smith* v. *Inland Revenue Commissioners*[7]); for Settled Land Act purposes (*Re Rowe*[8]); in connection with powers of sale (*Re Molyneux and White*[9], *Re Tanqueray Willaume*[10], *Re Hird and Hickey's Contract*[11]); as to the liability of one for the default of others, there being such liability only if they are trustees (*Dix* v. *Burford.*[12]) The question may also arise in connection with the application of Statutes of Limitation. Claims against an executor to recover a legacy are barred at the end of fifteen years,[13] whereas claims against a trustee are, subject to the important exceptions of fraud, conversion to his own use and retention of the fund, barred in six years,[14] but in cases within Subsection 1 (b) of Section 67 of the Trustee Act 1928 the claim must be one to which no existing Statute of Limitations applies. If therefore the claim is against an executor to recover a legacy, as distinct from a claim against a trustee, it will not be barred until fifteen years have run. (*Re Richardson*[15]). It is in connection with the application of Statutes of Limitation that the present problem becomes most difficult.

1. See *per* Lindley M.R. in *Re Jane Davis* [1891] 3 Ch. 119, *per* Kekewich J. in *Re Rowe* 58 L.J. (Ch.) 703 and *Re Adams* 1906 W.N. 220 the last case being a somewhat bold decision that an administrator was a trustee within Section 43 of the Conveyancing Act 1881, and as such entitled to make advances to infants. See also the definition of "trustee" in Section 3 of the Trustee Act 1928 where the term "where the context admits" includes a personal representative. But the two offices are quite distinct and each has its peculiar attributes.
2. [1913] A.C. 76.
3. 42 Ch. D. 302.
4. [1921] 2 Ch. 59.
5. 44 T.L.R. 371.
6. [1923)] 2 K.B. 719.
7. [1930] 1 K.B. 713.
8. [1926] V.L.R. 452.
9. 13 (Ir.) 382, 15 L.R. (Ir.) 383.
10. 20 Ch. D. 465.
11. [1919] V.L.R. 717.
12. 19 Beav. 409.
13. Property Law Act 1928, Sec. 304.
14. Trustee Act 1928, Sec. 67.
15. [1920] 1 Ch. 423.

The solution is sometimes said to be facilitated by supposing that the Testator had appointed as his executors persons other than those whom he had appointed as his trustees, and by asking when would the functions of the first set of trustees be completed and when would those of the second set commence. This is an accurate enough test, but does not contribute to a solution of the real problem, as it still leaves for determination the question when the functions of the executors are completed. Further, the frame of the will and the administration of the estate varies greatly. Frequently the testator simply appoints his executors and devises his realty and bequeaths his personalty directly to those whom he desires to get it; in other cases, he appoints the persons named to be both executors and trustees, and devises and bequeaths his whole estate to them to be held on the trusts declared in the will. The question may arise in relation to specific devises or bequests, or in relation to the residuary estate. Sometimes the administration of one portion of the estate is completed long before that of another portion, so that the executorial functions are completed in respect of some of the assets, and not in respect of other assets. Further, the same problem arises in the administration of an intestate estate. It will be convenient to consider the problem under three heads:—(a) Where the property concerned is a specific or pecuniary legacy; (b) where it is residue; (c) where there is an intestacy.

(A) Specific or Pecuniary Legacies.

The will gives the legatee no right to demand the property bequeathed. The executor's first duty is to pay the debts and the subject of the bequest may be required for this purpose. Where an executor once decides that he will not require the property for this purpose he should "assent" to the legacy. An assent may be express or implied from conduct. Its effect is to vest the legal title to the property in the specific legatee and to enable him to sue for it. If the executor does not assent, the legatee's remedy is not to sue for the property or money, but to institute proceedings for the administration of the estate. But assent has a further consequence. The executor becomes a trustee of the property or fund for the legatee—*Dix* v. *Burford.*[16] A mortgage was bequeathed to executors upon certain trusts. They assented to the legacy. Subsequently the fund was misapplied by one of them. If they were still executors the other would not be liable. But Lord Romilly M.R. said "The moment the executors assented to the bequest, they became trustees for their *cestui que trusts,* the £400 then ceased to be part of the testator's assets, and it became a trust fund . . . and the executors became mere trustees for them of that fund." See also *Phillips* v. *Munnings.*[17] These were cases where the bequest was to the executor as legatee to hold upon trust for the persons to be benefited. To such cases Section 304 of the Property Law Act has no application. The

16. 19 Beav. 409.
17. 2 Myl. & Cr. 309.

action is not one to recover a legacy, but to enforce a trust. *Phillips* v. *Munnings*[17] is an express decision to this effect. What is the position where the gift is direct to the legatee and not to a trustee for him? If in such a case also the executor becomes a trustee upon assent there does not seem much room for Section 304 at all. This question does not appear to have arisen in connection with specific bequests, but has arisen upon residuary gifts to which I now turn.

(B) Residuary Gifts.

In *Re Smith*[18] testatrix left the residue of her estate to an infant and appointed an executor. The will thus created no trust. Having paid the debts the executor desired power to advance income to the infant under Section 43 of the Conveyancing Act 1881, in accordance with the powers given to trustees. North J. applied the cases last cited, and held that the executor had become a trustee. He treated the case of a pecuniary legacy and the case of a bequest of residue as upon the same footing, and did not advert at all to the fact that in the two cited cases the executors were expressed to be trustees also. He said[19] "It is the duty of the executor to clear the estate—to pay the debts funeral and testamentary expenses, and the pecuniary legacies, and to hand over the assets specifically bequeathed to the specific legatees. When all this has been done, a balance will be left in the executor's hands, and I think it is plain that this balance will be held by him in trust for the infant within the meaning of Section 43." In *Re Hird and Hickey's Contract*[20] there was a devise of land to testator's widow for life, then to his children. The executors were not expressly constituted as trustees. Several years later the executors entered into a contract to sell the land. Now executors have a power of sale for purposes of administration, but trustees have not, unless it is given by the trust instrument. There is a further rule that persons dealing with executors are entitled to assume, even after a long lapse of time, that the sale is for purposes of administration. But here the purchasers knew that administration had been completed, and therefore required the beneficiaries to concur in the sale, which they would not all do. The Full Court, upholding the purchasers, said,[21] "When his executorial functions have been discharged —that is, when debts, funeral and testamentary expenses and legacies have been paid—he becomes a trustee, and is no longer clothed with this statutory power, but derives his authority solely from the terms of the will, upon the trusts and dispositions of which he thenceforward holds the testator's real estate."

The cases in which an executor was also appointed a trustee by the will are numerous. The leading case is *Attenborough* v. *Solomon*,[22] where it was held that the executors by paying debts and legacies and ascertaining residue, and passing their residuary accounts, had be-

18. 42 Ch. D. 302.
19. *Ibid*, at p. 304.
20. [1919] V.L.R. 717.
21. *Ibid* at p. 727.
22. [1913] A.C. 76.

come trustees, so that one of them could no longer deal with the assets without his colleague. Viscount Haldane said of the residuary account,[23] "It is not a document which is intended to have the operation of a declaration of trust, but it may be looked at as against the executor of what he regarded as the position of the estate. I think it is plain from that document that Mr. J. D. Solomon regarded the debts as having been all paid and the estate as ready to be held upon the trusts of the will." Later he said,[24] "This appeal must be disposed of on the footing that in point of fact the executors assented at a very early date to the dispositions of the will taking effect. It follows that under these dispositions the residuary estate, including the chattels in question, became vested in the trustees as trustees." The same principle was applied in *Re Claremont*[25] and *Smith* v. *Inland Revenue Commissioners*,[62] the effect of which is that the residuary account is *prima facie* evidence of an assent, but that the question of assent is one of fact. If there has been assent, then the character of trustee arises.

(C) Intestacy.

Similar decisions have been given in relation to intestate estates, viz., *Re Adams*,[27] *Re Yerburgh*,[28] *Re Ponder*,[29] *Re Pitt*,[30] and *Re Rowe*.[31] This conclusion is now strengthened by the provisions of Section 33 of the Administration and Probate Act 1928.

The conclusions from the foregoing discussion appear to be:—

(i) An executor who has assented to a legacy or devise, whether specific or residuary, becomes a trustee of the property for the persons entitled.

(ii) The same conclusion applies whether the will expressly constitutes the executor a trustee or not.

(iii) Whether he has assented or not is a question of fact; *prima facie*, the preparation and passing of his residuary account amounts to an assent as to residue; the assent may be express or implied, and lapse of time is a fact of importance.

(iv) The same principle applies to the administrator of an intestate estate.

I want to conclude by saying something about the special case of the Statute of Limitations. Section 304 of the Property Law Act 1928 prevents an action to recover a legacy being brought at the expiration of fifteen years "after a present right to receive the same has accrued." This section does not apply where the executor is himself the legatee, but is directed by the Will to hold the legacy upon trust. In such a case the claim is affected only by the Trustee Act 1928, Section 67—*Re Timmis*.[32] How far does Section 304 apply

23. *Ibid* at p. 81.
24. *Ibid* at pp. 83-4.
25. [1923] 2 K.B. 718.
26. [1930] 1 K.B. 713 (C.A.).
27. [1906] W.N. 20.
28. [1928] W.N. 208.
29. [1921] 2 Ch. 59.
30. 44 T.L.R. 371.
31. [1926] V.L.R. 452.

to the case where the legacy is bequeathed directly to the legatee and not to the executor as trustee for him? A present right to receive the legacy arises upon the death of the testator, although he cannot enforce the right until assent.[33] Can an executor by assenting take the case out of Section 304 and bring it within Section 67 of the Trustee Act? As he becomes a trustee upon assenting, it might seem that he can. But this view is not borne out by *Re Jane Davis*,[34] where a share of residue was bequeathed to grandchildren of the testator, their father being appointed executor, and being given a power to manage their share. He received the income for thirty years, and was then called upon for an account. The action involved events occurring before the Trustee Act 1888, from which our Section 67 is taken. The plaintiffs contended that the executor had become a trustee relying *inter alia* on the terms of a Court order of 1857 under which monies were directed to be paid to the representative, and therefore that the defendant could not rely on the Real Proprty Limitation Act 1874 Section 8 (our Section 304). The Court of Appeal, however, held that the suit was one to recover a legacy and that the account should be limited to twelve years. There is no discussion of the problem under consideration, nor of the authorities up to that date. Lindley L.J. after referring to the loose sense in which the word "trustee" is sometimes used of an executor said,[35] "An executor cannot be deprived of the benefit of the Statute by showing that he is a trustee; it is necessary to make out that he is an express trustee."[36]

The final citation is *Re Richardson*.[37] There an action was brought against an executor for an account more than six but less than twelve years after the death. It was held that an action by a residuary legatee against an executor for an account was really an action to recover a legacy and therefore barred in twelve years, and that this excluded the operation of the Trustee Act 1888 (our Section 67). No residuary account had been prepared, but the executor had completed his functions more than six years before and had informed the legatee of what he had done. It seemed at least open to argument that he had become a trustee, but this does not appear to have been raised, and the case is therefore inconclusive on the point. Incidentally, Younger L.J. kept open the interesting point whether a trustee can by setting up Section 67 prevent any account for the purpose of finding out whether the case may not fall within the exceptions.

It will be apparent that the application of the Statutes of Limitations to executors is attended by much difficulty. While, as indicated above, executors who assent to a bequest become trustees for many purposes, it must remain a matter of some doubt whether they are thereby able to raise Section 67 and not able to raise Section 304 as a defence. One explanation may be that the character of trustee does not necessarily mean the character of an express trustee for the pur-

33. Halsbury *Laws of England* (2nd Ed.), Vol. 14, p. 341.
34. [1891] 3 Ch. 119 (C.A.).
35. *Ibid* at p. 124.
36. See also *Re Lacy* [1899] 2 Ch. 149, at pp. 158-160.
37. [1920] 1 Ch. 423.

poses of the Statute. While it might have been better to have refrained from recognizing varying grades of trusteeship, *Re Davis*[38] and *Re Lacy*[39] do suggest that the Court would not be inclined to allow a claim against a person who was originally simply an executor for payment of a legacy to be treated on any basis other than as an action to recover a legacy, merely because of assent and lapse of time. Without assent, the legatee could not sue at law at all, but would have to sue in equity for administration to compel an assent, and mere lapse of time is the very thing with which Section 304 is concerned. The solution offered is that, except in cases where the executor is also made a trustee by the Will, Section 304 remains applicable as the relevant Statute of Limitation, and therefore Section 67 does not apply.

38. [1891] 3 Ch. 119 (C.A.).
39. [1899] 2 Ch. 149.