CONVEYANCES UNDER THE ONTARIO DEVOLUTION OF ESTATES ACT *

The present article is not a complete discussion of the Act in all its bearings, but merely an attempt to deal with the problems which have confronted, and still confront, conveyancers whose clients have bought or propose to buy from the representative of a deceased owner, or from a beneficiary whose title is derived through such representative either by vesting under the statute or by conveyance from him. Throughout this article the representative, who includes the administrator as well as executor, will be described by the term " executor ".

The problem to be solved in most instances has two aspects: (1) Who must join with the executor or otherwise approve the transaction? and (2) How far is the purchaser's title rendered doubtful by debts due by the deceased owner? The first problem, namely the parties to the grant, though important and sometimes difficult will be but lightly touched upon; the second, namely the bearing of creditors' claims upon the title of a purchaser will be chiefly discussed.

The position of a purchaser for value has varied during different periods and some historical account of the changes which have taken place is necessary not only because titles depend on grants made years ago; but also because the existing legislation can not be understood without some review of that which has preceded it. It will be convenient, therefore, to consider the topic under the following heads :

1. The period prior to 1886 when the statute was first enacted.
2. Conveyancing between 1886 and 1891.
3. Conveyancing between 1891 and 1902.
4. Conveyancing between 1902 and 1910.
5. Conveyancing between 1910 and 1927.
6. Conveyancing since 1927.

Many statutory changes were made at other times. The Act has been consolidated five times and amended twenty-five times, but the above divisions provide a fairly convenient method of reviewing such legislation as there is time and space to discuss.

Before, however, considering the foregoing periods, one or two remarks of a general character may be permitted. One of

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the tragedies of this Act is that while it affects very many transactions, they are frequently of small financial importance with the result that decisions upon them have been made without full argument, and without consideration by the Appellate Courts. A review of the cases forces one to the conclusion that if more cases had justified a full review in an appeal there would not have been any need for so many amendments. Further, when amendments were made, many of them were clearly drawn without a full appreciation of the points involved, and with some exceptions the legislative history of the statute constitutes a veritable tragedy in draughtsmanship.

Another interesting feature is that, while there are very many cases and numerous amendments dealing with the rights of creditors of deceased owners, but few of the decisions are based upon litigation in which creditors were engaged. Nearly all the decisions are on litigation between vendor and purchaser or on motions made in an attempt to clear the title for purposes of sale. The creditor has figured very little directly in the litigation, but he has caused an immense amount of trouble to conveyancers.

Another general remark, and the last, is that there is still nothing to prevent testators from conferring express powers of sale upon executors, and also that it can be inferred from testamentary directions to pay debts out of the estate that executors have an implied power of sale. Just before the statute was passed the Court of Appeal reminded the profession of this in *Yost* v. *Adams*,[1] and this testamentary power is preserved by The Devolution of Estate Act[2] and by The Trustee Act.[3] The courts have repeatedly pointed this out, but it has been frequently overlooked. One of the latest cases is *Re McCutcheon*.[4] If the will is carefully examined it may be found in many instances that one need not invoke the statute because there is a power under the will to give a purchaser a good title free from debts of the testator. This subject can not be elaborated here, but it deserves to be remembered.

We now proceed to discuss our main theme under the headings already suggested.

1. *Conveyancing before the Statute.*—Though prior to 1886 executors had, generally speaking, no direct concern with lands

[1] (1885), 8 O.R. 411; 13 A.R. 129.
[2] R.S.O. 1927, c. 148, s. 2 (1).
[3] R.S.O. 1927, c. 150, ss. 40, 41.
[4] [1933] O.W.N. 692 at p. 695. See also *Re Cassidy* (1927), 33 O.W.N. 191.

which passed directly to the heir or devisee, yet in Ontario there had been for years a statute providing that lands should be assets available for debts of the deceased.[5] This Act passed in 1732 was applicable to all colonies and in 1833 the great case of *Gardiner* v. *Gardiner*[6] held that under certain circumstances lands became assets in the hands of the executor for the satisfaction of debts of the deceased. Though much criticised this remained the law in Ontario, and was supplemented by legislation which is still in our Execution Act.[7] We had, therefore, in embryo a principle quite foreign to English common law, namely that simple contract creditors might through the executor, resort to lands of the deceased for satisfaction. The procedure was cumbersome, but the principle existed.

2. *Conveyancing between 1886 and 1891.*—The Devolution of Estates Act was passed March 25th, 1886, becoming effective on July 1st, 1886.[8] It consisted of only nine sections. It preserved dower and curtesy to some extent, but vested all real as well as personal property in the executor, and by section 9 it conferred upon the executor the widest kind of power over lands as well as goods. The section still exists,[9] but its wide terms are greatly abridged by its present surroundings. The only check upon the executor was that when infants were interested in lands the Official Guardian, or the Court, must be consulted.[10] This section is also in our latest revision[11] but it is now only one of the many restrictions imposed upon the executor. Soon after its enactment Sir John Boyd said "the effect of the Act is to abolish the distinction between real and personal property for the purposes of administration and to devolve the whole estate upon the personal representative. No greater change has been effected in the law by any recent legislation".[12] It will be seen later that that very learned Judge had much to do in bringing about a considerable abridgment of its scope.

The idea was apparently borrowed from a New South Wales Statute passed in 1862, which, however, was limited to the estates of persons dying intestate.[13] The Australian Act was

[5] 5 Geo. II, c. 7 (Imp.).
[6] 2 O.S. 520.
[7] R.S.O. 1927, c. 112, s. 36.
[8] 49 Vict., c. 22.
[9] R.S.O. 1927, c. 148, s. 19.
[10] This was sec. 8.
[11] As sec. 18.
[12] *Re Reddan* (1886), 12 O.R. 781 at p. 782.
[13] See *Re Wagner* (1903), 6 O.L.R. 680.

interpreted by the Privy Council in *Wentworth* v. *Humphrey*,[14] where it was said that "the intention of the Act of 1862 was to introduce a new rule of succession to real estate and to enact that in cases of intestacy it should be administered and should devolve precisely as chattels real did before". It is a matter of great regret that our statute never reached the Privy Council in its original form as we might then have had a similar broad view taken of it and have saved ourselves much difficulty and confusion and have avoided all the legislative vacillation expressed in obscure language which has proved so difficult for the conveyancer during the last 50 years.

As the Act operated down to 1891 the executor sold both for debts and to make distribution amongst beneficiaries, and if there were no infants the purchaser bought with what he thought was a good title.

If there were infants and the Official Guardian approved, the purchaser thought himself equally secure. In 1890, however, a case arose in which it was contended that if there were no debts the executor had no further control over the lands and they vested, for all the equitable estate at least, in the beneficiaries, the executor being a bare trustee and otherwise without title.[15] As so often happened in these decisions this was at first a minor point in the case; but being decided by a Divisional Court it had an important and disturbing effect upon many existing titles and curtailed greatly the powers of future executors. The case was reversed by a Court of Appeal on May 12th, 1891,[16] but it still left the executor shorn of many of his supposed powers. The legislature, however, did not wait for the judgment of the Court of Appeal, but eight days earlier passed an Act which forms the next topic for consideration.

3. *Conveyancing between 1891 and 1902.*—The last mentioned Act is 54 Vict., c. 18. Part of it is devoted to an attempt to confirm titles rendered doubtful by *Martin* v. *Magee*,[17] and this is also a feature of a good deal of the later legislation. It is an unflattering comment on draughtsmanship when such confirmatory legislation becomes necessary.

This Act did not attempt to restore to the executor the wide unfettered powers which it had been thought belonged to him under the Act of 1886. Instead, it adopted the theory

[14] (1886), 11 App. Cas. 619.
[15] *Martin* v. *Magee*, 19 O.R. 705.
[16] 18 A.R. 384.
[17] *Supra.*

expounded in *Martin* v. *Magee* that after debts were paid the land should pass to the beneficiary, and it proceeded to regulate this operation, and to a limited extent, to leave to executors certain powers over the lands even after debts were paid. It did this by providing:

(a) that land should remain vested in the executor for 12 months (s. 1).

(b) that after 12 months lands should vest in the beneficiaries unless a caution were registered (s. 1).

(c) that the executor might sell

  (a) for debts (the Official Guardian consenting for infants);

  (b) to make distribution amongst beneficiaries if adult beneficiaries, and the Official Guardian concur, or the Official approves though some adult beneficiaries do not concur (s. 2).

(d) that *bona fide* purchasers where sales are made by the executor with the formalities required by the Act should hold the lands discharged from debts (s. 5).

(e) that *bona fide* purchasers from beneficiaries to whom lands have been conveyed by the executors or whose devise has been assented to in writing by the executor, should be similarly protected (s. 6).

This, however, did not relieve the beneficiary from liability for such debts to the extent of the value of the land he received (s. 6).

From the purchaser's point of view this statute was fairly satisfactory in most cases. He had to see that the comparatively simple formalities prescribed by the statute were complied with, and if they were the statute protected him. There was, however, one situation where no protection was afforded him, namely where the lands vested in the beneficiary under the statute and the latter then sold. The statute did not then protect the purchaser in any set terms. It was held, however, in 1900, that a devisee in whom lands had vested under the statute was not liable for debts of the deceased owner.[18] This decision, therefore, would be a sufficient protection to a purchaser; but owing to the fact that the beneficiary escaped and the creditor had no recourse against him some new amendments were made which are dealt with under the next heading.

[18] *Ianson* v. *Clyde* (1899), 31 O.R. 579.

4. *Conveyancing between 1902 and 1910.*—The Acts of 1886 and 1891, with their amendments, had formed part of R.S.O. 1897, c. 127, ss. 1–21, and it was this Act which was now made the subject of amendment.

By 2 Edw. VII, c. 1, s. 4, it was enacted that lands which vest in the beneficiary by virtue of the statute shall continue to be liable to answer for the debts of the deceased owner, but section 5 provided that any *bona fide* purchaser from such beneficiary without notice of any such unpaid debts should hold the land freed from such debts. Thus the purchaser continued to be protected, but the beneficiary ceased to derive any benefit from the decision in *Ianson* v. *Clyde.*[19]

By 2 Edw. VII, c. 17, some important changes were made which, while not seriously affecting purchasers at the time, were a factor, along with later legislation, in rendering his position more difficult after 1910. By section 3 the time for vesting in beneficiaries was extended from 12 months to 3 years, thus giving the executor a much longer time to administer the estate. Also by section 8 executors were empowered not only to sell for purposes of distribution but to divide the estate in specie amongst the beneficiaries. Then in 1906, by 6 Edw. VII, c. 23, some of these sections were recast, but by 6 Edw. VII, c. 19, s. 18, the Act was not to operate until proclaimed. There is no statutory record as to when if ever, it was proclaimed, but it forms part of the 1910 period of legislation and is discussed in *Re Allison,*[20] and for that reason is now mentioned. Speaking generally it may be said that no serious change occurred during this period which made the position of a purchaser for value more difficult. It merely forms a link in the important legislation dealt with under the next heading.

5. *Conveyancing between 1910 and 1927.*—It is after 1910 that the courts and the Legislature began to display more concern about creditors of the deceased owner and to make the position of the *bona fide* purchaser for value more precarious.

As already mentioned this was not due to litigation instituted by creditors; but rather to doubts about the meaning of the statute raised between vendor and purchaser or arising when beneficiaries sought to have themselves registered as owners under the Land Titles Act. The Act of 1910[21] was a consolidation made preparatory to the revision of 1914, but it also

[19] *Supra.*
[20] (1927), 61 O.L.R. 261 at p. 269.
[21] 10 Edw. VII, c. 56.

made changes which in the result rendered necessary in some cases a resort to the courts before purchasers could safely buy lands from executors or beneficiaries free from debts owing by the deceased owner.

Before specifying these changes it is necessary to recall that in 1902 the period for vesting was extended from 12 months to 3 years as this amendment also entered into the problem.

The relevant changes in 1910 were :—

1. Where sales were made for distribution and not for debts the Court might dispense with the concurrence of beneficiaries (s. 21(2)).

2. The Court might direct the executor to divide or distribute the estate before the lapse of three years (s. 21(4)).

3. A purchaser buying from a beneficiary to whom lands have been conveyed "*by leave of the High Court or a Judge* shall be entitled to hold the same freed and discharged from any debts and liabilities of the deceased owner, etc." (s. 24 (4)). The words in italics were added in 1910.

As to No. 1 It was held that though the Official Guardian might consent for non-concurring heirs he could only do so in minor matters, otherwise the power must be exercised by the Court.[22]

As to No. 2. It was stated that the three years before vesting "creates an interregnum during which it is supposed that all claims . . . . . will be ascertained and the estate will be administered", but that "if the period is found to be too long then the remedy is an application under sec. 21, sub. sec. 4"; that is the executor or beneficiary may ask for an earlier distribution.[23]

As to No. 3. If the Court makes an order for an earlier conveyance to the beneficiary, then the latter can confer on a *bona fide* purchaser a good title free from debts of the deceased owner.[24]

This Act of 1910 became R.S.O. 1914, c. 119, but it was only in 1922 in *Re Shier*[25] that the practice was formally explained by the courts. As so explained it continued until 1927, with the following results :—

1. If the executor sells to pay debts the purchaser takes a good title free from debts. No concurrences are necessary except by the Official Guardian on behalf of infants.[26]

[22] *Re Logan* (1927), 61 O.L.R. at p. 326.
[23] *Re Shier* (1922), 52 O.L.R. 464at p. 465.
[24] *Re Shier, supra.*
[25] *Supra.*
[26] R.S.O. 1914, c. 119, ss. 19, 21 (1).

2. If the executor sells for distribution of proceeds amongst beneficiaries and if he has the necessary statutory consents or waivers, the purchaser takes a good title free from debts.[27]

3. If the executor conveys before three years to a beneficiary who desires to sell, the purchaser can not obtain a good title unless the Court has authorized this earlier conveyance to the beneficiary.[28]

4. In Land Titles matters if such sale takes place before three years the executor must first register himself as owner and then an order must be made authorizing a transfer to the beneficiary, after which the beneficiary as registered owner can sell free from debts.[29] On any such application the Court will require evidence that debts have been ascertained and paid, and that it is no longer necessary to retain the lands for purposes of administration, and this course was frequently adopted.[30]

5. After three years the beneficiary in whom lands have vested by virtue of the statute may sell and the purchaser is protected against debts of which he had no notice.[31]

This practice continued down to 1927, but in that year an Act was passed which became part of the Revision of 1927,[32] and this and later changes are next dealt with.

6. *Conveyancing since 1927.*—By 17 Geo. V, c. 35, s. 2 there was added to R.S.O. 1927, c. 148, s. 20, a new subsection (8) and the correlative sections of the revision of 1914 were renumbered as sections 20, 22, 23, and 25. Subsection (8) declared that "the powers of a personal representative under subsections (2), (3) and (5) have heretofore been and shall hereafter be exercisable" during the three years without an order," provided

(a) that lands conveyed under such powers shall continue liable for debts for three years and longer if a caution or lis pendens is registered within that time.

(b) that a purchaser for value shall have relief over against the beneficiary and under some circumstances against the executor.

[27] *Ibid.* s. 21 (1) and (2) and s. 23. *Re Allison* (1927), 61 O.L.R. 261 at p. 271.
[28] Sec. 21 (4) and s. 24 (1). *Re Shier, supra.*
[29] *Re Shier, supra.*
[30] *Re Allison* (1927), 61 O.L.R. at p. 271.
[31] R.S.O. 1914, c. 119, s. 26 (1).
[32] R.S.O. 1927, c. 148.

(c) that after three years the purchaser's lands are free from such debts under s. 23 (2) and 25 if there is no prior lis pendens or caution.

From the reference to subsection (2) as well as subsection (3) it would seem that lands sold by an executor for distribution as well as lands conveyed to a beneficiary and sold by the latter were to remain charged with debts during the three years, and this view is suggested in *Re Allison*;[33] but a much more serious suggestion was that *Re Shier*[34] was in fact overruled and that no order should be made within the three year period authorizing a beneficiary to sell free from debts.[35] The fact that this provision was retroactive made this view even more disturbing since it threw doubt on many existing titles. *Re Allison*, however, was appealed and reversed; the Appellate Court holding that *Re Shier* was not overruled.

It was decided that while subsection (8) provided a means of conveying to a beneficiary without an order before three years had elapsed, it had not repealed the older method prescribed by s. 20 (4) and s. 23 (1) so that it was still open to a purchaser to buy free from debts if the Court had by order permitted an executor to convey the lands to the beneficiary.

This still left in doubt the question whether the executor could sell for distribution and confer a good title free from debts. No order had been required for that purpose if the proper parties concurred, but subsection (8) by including the power of sale under subsection (2) as well as the power of distribution in specie under subsection (3) in the same category left it open to argument that if the executor sold for distribution only, the lands would remain charged with debts during the three year period.[36] The point, however, appears to be set at rest by a further amendment made in 1930 by 20 Geo. V, c. 21, s. 11 (4) which recast subsection 8, and which as altered now reads in part as follows :—

(8) The powers of a personal representative under subsections 2, 3 or 5 *have heretofore been and shall hereafter be exercisable during the period of three years* from the death of the deceased without an order of the Supreme Court or a Judge thereof, provided, however, that,—

(a) Real property conveyed, divided or distributed by virtue of such powers *to or among the persons beneficially entitled thereto, shall be*

[33] (1927), 61 O.L.R. at p. 271.
[34] *Supra.*
[35] *Re Stone* (1927), 33 O.W.N. 19; *Re Allison* (1927), 33 O.W.N. 21; 61 O.L.R. 261; *Re Gilchrist* (1927), 33 O.W.N. 23.
[36] See *Re Cassidy* (1927), 33 O.W.N. 191 at p. 192; *Re Richardson* (1928), 35 O.W.N. 31.

> *deemed to have* been and to be liable for the payment of the debts of the deceased owner as if no conveyance, division or distribution had been made, even though it has subsequently during such three-year period been conveyed to a purchaser or purchasers in good faith and for value; but in the case of such purchaser or purchasers such liability shall only continue after the expiry of such three year period if some action or legal proceeding has been instituted by the creditor, his assignee or successor to enforce the claim and a lis pendens or a caution has before such expiry been registered against the property.

Clauses (b) and (c) are reproduced with some necessary but minor changes and need not be repeated, but the important changes are the affirmation that the powers of the executor are exercisable during the three years without an order, and the provision in clause (a) that the lands which are charged with debts for three years in the hands of purchasers are lands "conveyed divided or distributed by virtue of such powers to or among the persons beneficially entitled thereto".

By s. 20 (2) the power of an executor to sell for distribution of the proceeds, as distinguished from his power to distribute in specie, is not covered by the new phraseology and so the former long established power of the executor to sell himself for purposes of distribution and confer a good title free from debts is re-established though he must of course obtain such consents or approval as section 20 (2) prescribes.

The concurrences and consents necessary have been altered by 20 Geo. V, c. 21, s. 11 (2), allowing the Public Trustee as Committee to consent for a lunatic, and by 21 Geo. V, c. 32, s. 3, providing for a sale with the consent of a majority of the beneficiaries including the Official Guardian acting on behalf of a lunatic or infant.

To sum up the result of this legislation it would appear—

1. That, as always, the executor may sell for debts and the purchaser takes a good title free from debts, and no order is necessary, but the Official Guardian or a Court must approve for infants under section 18.

2. That the executor may sell for purposes of distribution if a majority of the beneficiaries consent (the Official Guardian acting for infants and lunatics) and no order is now necessary and the purchaser takes free from debts.

3. That before three years have elapsed the executor may convey to beneficiaries so that they may sell free from debts, provided he satisfies a Court of the propriety of the sale and where an order is thus obtained the purchaser takes title to the lands free from debts.

4. That the executor may without an order convey to beneficiaries before three years have elapsed, but if the beneficiary sells, the purchaser, though *bona fide* and for value, takes the lands charged with debts, and this charge will exist till three years from the death of the deceased owner and longer if a caution or lis pendens is registered within the three year period.

5. That after three years the beneficiary may sell free from debts and a *bona fide* purchaser is protected from creditors if no caution or lis pendens has been filed in time.

6. Where a purchaser has had to pay a debt he has relief over against the beneficiary and also against the executor, if the latter has not advertised for creditors or knew of the claim.

In closing it is desirable to repeat (1) that the term "executor" includes "administrator" throughout this article, and (2) that no attempt has been made to refer to all amendments; not even to a number which have been enacted since 1927.

J. SHIRLEY DENISON.

Toronto.