Trusteeship and the Office of Personal Representative

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A recent decision of the High Court has once again illustrated the troublesome differences of function which, in spite of recent statutes, still exist between trustees and personal representatives. In *Hawkesley v. May*,1 Havers J. said:

So far as the executor is concerned, I am bound by the decision of the Court of Appeal in *In re Lewis*2 to hold that there is no legal duty upon him to give notice of the terms of the legacy to the legatee. I see no reason, however, to extend this doctrine, which has no attraction for me on the merits, to a trustee under an express trust. The position of an executor and a trustee, although now, for many purposes, they have been assimilated under the Law of Property Act, 1928, is still not identical, and there is a distinction between a will, which is a public document in the sense that anybody can go to Somerset House and see it, and a trust deed, which is a private document to which the cestui que trust has no access. In the absence of any authority to the contrary I decline to extend this doctrine to trustees under an express trust.

In this case, trustees of a settled fund had failed to inform infant beneficiaries on coming of age of the nature of their interests under the trust and had failed to transfer the capital of the fund to them, as the settlement had contemplated. They were therefore held liable for this breach of duty.

The case therefore illustrates yet again the difficulties which frequently arise in practice as a result of the imperfect assimilation of the two offices—a process which has been taking place for at least two centuries but which is still incomplete, and which has involved courts of Equity in some curious developments.

At an early date after the Norman Conquest, the church acquired jurisdiction over wills of personal property,3 and from the acquisition of

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2. [1904] 2 Ch. 656 (C.A.).
3. 2 Pollock & Maillard, History of English Law 332-3 (2nd ed. 1923).
this jurisdiction the office of executor developed.\(^4\) It was his function to realize the assets of the deceased, to pay his debts and to distribute the remainder of the estate in accordance with the deceased's last will, as embodied in a testament. An executor could renounce his office, but once he had accepted it and proved the will, the executor swore that he would duly administer it, and the courts of the judge ordinary (who was normally the bishop of the diocese) would control him in his administration. As early as the reign of Edward I the court ordered executors to publish advertisements for creditors, calling on them to appear and prove their debts under penalty of going unpaid.\(^5\) Jurisdiction of the King's courts was not finally excluded however. The executor had to have recourse to them for writs to collect the debts due to the deceased and for actions of trespass against those who had carried off the deceased's goods.\(^6\) About the same time, the King's courts allowed him to be sued by those who had the benefit of sealed covenants which did not bind the heir. With the growth of the action of assumpsit, the executor came to represent the deceased in a more general sense. He became, in fact, the deceased's personal representative. Thus, for a time, the jurisdiction of the King's courts and the ecclesiastical courts was concurrent, but in the Middle Ages, the ecclesiastical courts, in consequence of the control which they exercised over the personal representative, assumed a general jurisdiction over the administration of the estate.\(^7\) This jurisdiction was exclusive of real property, which continued to pass directly to the heir who, however, was not liable for the debts of the deceased unless they were charged on the realty, or unless the deceased had expressly bound the heir to pay by a sealed writing.

Throughout the Middle Ages, there was a strong feeling against dying intestate. This was probably due to the fact that the lord not infrequently seized the chattels of intestates, though in Bracton's time this was regarded as oppressive. Moreover, Magna Carta, Chapter 27, provided that the distribution of an intestate's chattels was under the control of the Church. In practice that meant that they were distributed first by the ordinary, himself, and later, under the control of the ordinary, by a relative of the deceased who made provision out of them for the widow and children and for pious uses. Gradually, the status of the administrator was assimilated to that of the executor.

At the time of the Reformation the power of the ecclesiastical courts had declined, and abuses in administration were frequent and virtually impossible to redress.\(^8\) The decay of ecclesiastical jurisdiction was acceler-

\(^4\) Id. at 335-6.
\(^5\) Id. at 343.
\(^6\) Id. at 347.
\(^7\) 1 HOLDSWORTH, HISTORY OF ENGLISH LAW (5th ed. 1942) and 3 HOLDSWORTH, HISTORY OF ENGLISH LAW, § 5.
\(^8\) 3 HOLDSWORTH, op. cit. supra note 7 at 536-8.
ated by the writs of prohibition issued in the reign of James I. Clearly some improvement was long overdue, and Holdsworth shows that the Statute of Distribution, 1670, grew out of an attempt by Parliament to strengthen the jurisdiction of the ecclesiastical courts to call administrators to account. Unfortunately, the Act failed in this purpose, though the clauses which defined the persons entitled to take on intestacy became part of the modern law. Other proposals were made to strengthen the ecclesiastical courts, but they failed to become law, not only because of the jealousy of the Common Law Courts, but also because the Court of Chancery had now entered the lists and, by ignoring the ecclesiastical courts, gradually took over jurisdiction in respect of the administration of assets of deceased persons. In this the Chancery was successful, largely because the court had elaborate machinery for the taking of accounts which the Common Law courts had not.

In so far as the office of executor itself was concerned, the main outlines were clear before the close of the Middle Ages. There might be one or more than one. If more than one was appointed, then, on the death of one, the office survived to the others, and, on the death of the last surviving executor, it passed to his executor if he left a will. A person who assumed the functions of an executor without being duly appointed was chargeable as an executor *de son tort.* He had the liabilities, but not the powers of an executor. The deceased's property vested in the executor, by virtue of the will, from the death of the deceased, but he could not sue until he had obtained probate.

Insofar as the administration of intestates' estates was concerned, the administrator was appointed by the ordinary and, being a mere delegate, could not transmit his office as the executor could (on his death or removal). A new grant of administration became necessary. Traces of the older system that the ordinary himself administered remained in the rule that until an administrator was appointed, the deceased's goods vested in the ordinary himself. It was not until a statute of 1357 that the administrator was given the powers of administration possessed by executors, and so became, in a real sense, the personal representative of the deceased.

In the ecclesiastical courts, the executor was allowed to retain any surplus of property remaining after debts and legacies had been paid. He was bound to administer properly, and if he did not, he was personally liable; if, however, he administered properly, he was not liable to creditors beyond extent of the assets which came into his hands, and if he were sued, he could plead *plene administravit.* No legacies were payable until all the debts had been paid. If he traded with the assets of the deceased, he could sue in his own name, and he could use the assets of the deceased

10. 3 Holdsworth, *op. cit. supra* note 7 at 565-6.
for payment of trading debts, but he was bound to account to the estate for all profits. The Common Law rules relating to the duties of the executor were, on the whole, strict, but they related only to particular transactions. It was only in the ecclesiastical courts that there was an attempt to supervise the entire administration, e.g., by compelling the executor to prepare and produce an inventory. Moreover, the executor, once appointed, could only retire with the permission of the ordinary, who could always remove him for misconduct. He could only purchase the deceased’s goods under stringent conditions, and at the close of an administration, the personal representative was compelled to account. It is easy to see in these rules some striking resemblances to the Chancery’s rules in relation to trustees, and when the ecclesiastical machinery of supervision collapsed, the need for the intervention of the Chancery was very strong. As we have seen, this collapse was not entirely due to the weakness of the church courts themselves. It was intensified by the interferences of the Common Law Courts, even though the latter were unable to remedy the abuses which developed. To a limited extent equitable intervention was already taking place before the close of the Middle Ages. It increased during the reign of Elizabeth I and in the period prior to the Civil War.

In the Chancery, the executor was not strictly a trustee, unless the will made him one, but there was a manifest tendency to extend the rules governing trustees to him. He must account for benefits received. He could not plea any statute of limitation, and, although the Chancery permitted him to take undisposed-of residue, he must apply it for the benefit of the testator’s kin and charitable uses. The development of this rule in the eighteenth century created some problems, discussed more fully later, which have not yet been completely solved. At the same time, the Chancery gave greater precision to the rules governing the rights of executors inter se. Its extensive machinery for the taking of accounts was available to unravel the intricacies of complicated estates, and it would not hesitate to order legatees to refund, if they had been paid and other creditors subsequently appeared. Moreover, where the legatee was an infant, it could control the investment and use of the legacy, and again, it permitted the executor, like the trustee, to apply to the court for advice upon administration, and, if he followed it, he was free from liability. Equity would also relieve an executor against the purely accidental loss of assets, when the Common Law courts held him liable, and it extended to the executor a similar degree of immunity from liability for the acts of a co-executor, as a trustee enjoyed in respect of the acts of a co-trustee.

11. Id. at 590.
13. Id. at 317. And see Foster v. Munt 1 Vern 473, 23 Eng. Rep. 598 (Ch. 1687).
TRUSTEESHIP & THE PERSONAL REPRESENTATIVE

In Nicholas v. Nicholas,¹⁵ "the Lord Chancellor agreed . . . that this Court had a jurisdiction to see that the executor, who was but a trustee, performed his trust, and that was the jurisdiction this Court exercised in such cases."

Thus, the rules governing trustees were extended, as far as circumstances permitted, to executors, and the process of assimilation of the two offices, begun by the Court of Chancery, was continued by statute. Thus, Section 68 (17) of the Trustee Act, 1925, now provides that "... ‘trustee’ where the context admits, includes a personal representative.” This provision has by no means removed pre-existing differences, however, and it will also be shown that, in some respects, the efforts of Equity to assimilate the two offices has done something to complicate the law of trusts. Some of the more important problems arising from this assimilation will be considered under the following heads:

1. PRECATORY WORDS IN WILLS
2. SECRET TRUSTS
3. THE STATUTES OF LIMITATION
4. THE POSITION ON INTESTACY
5. THE POWER OF APPROPRIATION
6. THE POSITION OF A SINGLE EXECUTOR
7. IN RE DIPLOCK AND ITS APPLICATION

1. PRECATORY WORDS IN WILLS. The Court of Chancery continued to be troubled by the right of the executor to take undisposed-of residue in wills. This was a common situation, for the will spoke from the time of making, and not from death, in respect of the property to which the will was applicable. Equity would have preferred to make the executor a trustee of the residue for the next-of-kin but did not feel inclined to depart so radically from the practice both of the Common Law and of ecclesiastical jurisdictions. Accordingly, even so early as Lord Chancellor Jeffreys, it was decided¹⁶ that a legacy given to an executor was to compensate him for his trouble, so that in these circumstances the executor became a trustee of the residue for the next-of-kin. A new set of problems arose, however, where there were several executors. If a legacy was given to them jointly, they became trustees for the next-of-kin once again. Moreover, if one of the executors, through receiving a legacy, was a trustee, then they were all trustees, because they took jointly.¹⁷ If, however, the testator gave the executors unequal legacies, they were apparently in this case not receiving them in the character of executors, and so, paradoxically, they could claim the residue beneficially.¹⁸ In the nineteenth century, the

tide finally set against this claim of an executor, however, and a statute of 1830 provided that thereafter an executor should hold undisposed-of residue for the next-of-kin unless the testator had shown an intention that the executor should take beneficially.

Before this desirable change had been achieved, however, one well-established doctrine of Equity had been thrown into confusion as a result of the influence of equitable practice in respect of executors. Equity, as is well-known, looks to the intent and not the form. From this it follows that no stock phrases were required to create a trust, even a trust of land, so long as the intent was plainly manifested. No special difficulties existed concerning certainty of words, so long as the property and the objects of the trust were defined with certainty. If a testator leaves £500 to X “in full confidence that he will use it for the benefit of Y,” the opinions of laymen and lawyers would coincide that the testator intended to make X a trustee for Y. The position is much less clear if the testator leaves £10,000 to X, “in full confidence that he will use as much as need be for the benefit of Y”; and if for Y there is substituted “my relations”, the intention becomes vague indeed. Problems such as these recur in the eighteenth century reports, and there is a tendency at first to say that if the property and objects are certain, then this raises an inference that the words expressing the hope or desire (the precatory words, in fact) were intended to be imperative. This is a clear enough principle, but it became hopelessly confused when the same Chancery judges, in other cases, were called upon to deal with executors (whose office they were fast assimilating to that of trustee) who claimed the undisposed-of residue under wills. Here, the courts seized on any expressions of hope or desire to negative the presumption that the executor was intended to take beneficially, and to establish the fact that he took as trustee for the next-of-kin. In these cases, the problem of certainty of objects and property did not arise. Then, in turn, the Equity judges applied this laxer rule to words in wills not affecting the executor. Lord Eldon did what lie could to clear tip this muddle, but he was not completely successful. When the problem of the executor was at last settled by the statute of 1830, the way was at long last clear for a more precise rule. Hence, it is no surprise to find that starting with Shaw v. Lawless in 1838, the Courts reintroduced the older rule relating to certainty of property and objects.

2. Secret Trusts. The confusion between ecclesiastical and equitable rules is here, unfortunately, of more modern growth, and is as yet very far from being resolved. From the time of Lord Chancellor Jeffreys onwards, courts of Equity have consistently enforced secret trusts in wills.

19. 11 Geo. 4 and 1 Will. 4, c. 47.
20. These cases are discussed more fully in Keeton, Law of Trusts, 83-93 (6th ed.).
22. See Keeton, op. cit. supra note 20 at 52-69.
The secret trust could be communicated to the legatee either verbally or in writing, either before or after the will was made, so long as the communication occurred before the testator died. It was this fact of communication before the testator’s death which took the secret trust out of the Wills Act, 1837, or its predecessors. For some considerable time, the reported cases related only to what are called fully-secret trusts; i.e., where the legatee apparently took beneficially in the will itself. The ground of equitable intervention was that it would be a fraud to allow a legatee to retain a legacy beneficially, when otherwise the testator could have altered his will. Incidentally, the doctrine goes further than cases arising on wills. It has been applied to an heir, who took on intestacy following a promise to the deceased who, relying on it, refrained from making a will.23

Before long, however, the same rules were extended to half-secret trusts; i.e., those in which the legatee in the will takes, as trustee, the objects for which he holds being communicated, as in fully secret trusts, in the testator’s lifetime. For some time, no difference in the principles applicable to the two types of case is discernible, and in Moss v. Cooper,24 Page-Wood, V. C. was of opinion that it made no difference, in half-secret trusts, whether communication of the objects to the trustee occurred before or after the making of the will, so long as it occurred in the testator’s life-time. However, in In Re Keen25 the Court of Appeal thought that communication of objects in half-secret trusts, to bind the trustee, must be made before, or at the latest at the time when the will was made.

The reasons for this differentiation between the two types of secret trust will be discussed later, but something more must first be said about this latter, remarkable case. The testator in his will gave a sum of money to his executors “. . . to be held upon trust and disposed of by them among such person, persons, or charities as may be notified by me to them or either of them during my lifetime.” At the time when the will was made, the testator told one of his executors that he wished the money to be held for the benefit of an unnamed person, whose name was contained in a sealed envelope which he handed to the executor, to be opened after the testator’s death. It has already been decided that to give a trustee a sealed envelope containing the name of the beneficiary is a sufficient communication, and no difficulty arose on that point. Moreover, it will be noticed that the communication was made at the actual time when the will was made, and therefore it should have followed that, in any event, the communication should have been in time. The Court of Appeal, however, involved itself in a labyrinthine mode of construction

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which has very little to commend it. They decided (1) that the word "may" in "such person etc. as may be notified by me to them" necessarily implied futurity. This is at least arguable. Grammatically, "may" usually denotes the subjunctive. Having decided this point of construction, the Court of Appeal then decided (2) that an indication of intention to communicate in the future was not satisfied by a present communication; and (3) even if there had been a future communication, it would have been ineffective, as a testator cannot reserve to himself the right to alter his will in the future. If this is true, it is equally an objection to fully-secret trusts, where there is a communication after the will is made. In neither case, however, can the argument be supported, as the whole basis of the doctrine of secret trusts is the assumption that the trust operates outside the will. In any case, the third proposition is obiter only.

The origin of the error into which the Court of Appeal fell in In re Keen is once again to be found in the law of wills, and the confusion which doctrines of the ecclesiastical court have produced in Equity. There has long been in the law of wills the doctrine of incorporation by reference. This allows the incorporation of unattested documents into a will, by way of supplement, subject to certain clearly-established conditions. These are:

1). There must be a document. The difficulties of incorporating verbal communications, whether the executor or anyone else, is obvious, though Equity faced it in secret trusts verbally communicated.

2). The document must be identified with reasonable certainty in the will itself.

3). The document must be in existence before, or, at the latest, at the time when the will is made.

So long as this doctrine was applied only by courts of probate (until 1857 the ecclesiastical courts) there was no risk of confusing it with the equitable doctrine of secret trusts. The danger became a reality, however, when the Court of Chancery began to construe wills, as a preliminary to administering them. What is perhaps worse is that courts began to use cases decided upon incorporation by reference as authorities for the equitable doctrine of secret trusts. This was done, for instance, by Parker, V.C., in Johnson v. Ball, where Croker v. Marquis of Hertford is relied on, though it is purely a case of incorporation by reference. It is, of course, possible that Johnson v. Ball itself is a case of incorporation by reference, in which case it is wrongly relied on in In Re Keen. If it was not, both Johnson v. Ball and In re Keen were decided on an authority which was irrelevant.

26. 5 De G. & Sm. 85, 64 Eng. Rep. 1029 (1851).
28. Briggs v. Penny 3 De G. & Sm. 525, 64 Eng. Rep. 590 (1849), was also relied on in In re Keen, but this also was not in point, for the communication there was after the testator's death.
It should not be necessary to stress further that the two doctrines are quite distinct. One relates to documents only; the other relates to any kind of communication. One doctrine applies only to wills; the other applies to intestacy also. Finally, the document must be identified in the will; the communication need not be referred to at all in the will. Nevertheless, the confusion of the two doctrines has occurred and will not be easily eliminated.

3. THE STATUTES OF LIMITATION. Until the second half of the nineteenth century, no statute of limitation applied so as to excuse a trustee or personal representative from liability. However, the Real Property Limitation Act, 1874, barred the legatee’s action to recover his legacy after twelve years. The executor, as such, is not a trustee, though he has many of the liabilities of a trustee and is often also a trustee under the will for certain specific purposes. For a period of time no statute of limitations applied to trustees. Accordingly, for this period, where there were claims against executors, in which lapse of time was a factor, executors sought to establish that they had acted in the capacity of executors, and not as trustees. In 1888, however, the Trustee Act made a six-year period of limitation applicable to trustees. Thereafter, the tendency has been for executors to seek to establish that their actions were done as trustees, and not as executors. The solution of any particular problem is not easy. It does not necessarily depend upon the actual time when the act was done, for trusts may have been set up before the estate is fully administered. One thing at least is clear. It is impossible to be acting as an executor (or administrator) and as a trustee simultaneously.

4. THE POSITION ON INTESTACY. A further problem of a similar kind was created by the Administration of Estates Act, 1925. By Sections 46 and 47 of that Act, certain statutory trusts for the next of kin are declared to arise and to be imposed on the administrator, on the death of a person intestate. Do these sections at long last make a person at one and the same moment an administrator and trustee? In In Re Yerburgh, it was decided that the statutory trusts only arise when the administration is complete.

5. THE POWER OF APPROPRIATION. The executor has wide powers of appropriation of legacies, and of funds to meet annuities. In Section 41 of the Administration of Estates Act, 1925, there is also a wide power of appropriation of real or personal estate, including choses in action, according to the respective rights of the persons interested in the property of the deceased. This statutory power is not shared by trustees, and their

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29. See e.g., In re Davis [1891] 3 Ch. 119 (C.A.); In re Swain [1891] 3 Ch. 233; In re Timmis [1902] 1 Ch. 176; In re Mackay [1906] 1 Ch. 25.  
31. (1928) W.N. 208.
powers are discussed by Lewin with some caution. He points out\textsuperscript{32} that Stirling, J. in \textit{In re Nickels}\textsuperscript{33} thought that trustees, acting fairly in the administration of a trust, had a power to appropriate shares of residue, even where there were infant beneficiaries. Even so, however, in cases of difficulty, resort was usually had to the courts and Lewin concludes:

Where trustees are directed to invest the infants' share on any particular securities, they might, it would seem, accept securities of the nature prescribed at the market price, as the transaction when resolved would be the payment of so much money, and the investment of it by the trustees in the requisite securities. Where there are no special powers, the trustees might be justified in turning the whole of the irregular species of property into money and dividing the proceeds.

It would have been simpler, and it would have assisted the process of assimilation of the two offices, if the statutory power had been extended to trustees.

6. THE POSITION OF A SINGLE EXECUTOR. The old practice of the ecclesiastical courts permitted a single executor, acting alone, to exercise full powers of administration. Whilst the law of trusts does not formally require two trustees in order to act at all, two trustees or a trust corporation are required by Equity to execute certain important transactions; e.g., the conveyance of land subject to the trust.\textsuperscript{34} These differences are sometimes irritating, and the value of perpetuating them may be questioned.

7. \textit{IN RE DIPLOCK AND ITS APPLICATION}.\textsuperscript{35} The decision of the House of Lords in \textit{In re Diplock} has indicated that there may be an important difference between the law relating to executors and that relating to trustees upon the recovery of funds wrongly paid to strangers, instead of beneficiaries. In both cases, it is clear that the possibility of recovery only exists when the rights of the beneficiary against the trustee or executor have been exhausted. In \textit{In re Diplock} the House of Lords, in addition to the remedy of tracing, applicable both to wills and trusts, permitted a remedy in personam against the strangers wrongly paid. In so deciding the House of Lords was careful to explain that this was a right available to legatees only, and the examination made by the members of the House of Lords indicate that this right was derived from older ecclesiastical practice. It is, of course, possible that the right might at some future date be extended to beneficiaries under trusts. If that should be done, it would be an extension of the principle, but at the present time it must be regarded as at least doubtful whether the unpaid beneficiary has a

\textsuperscript{32} Lewin on Trusts, 300 (15th ed. 1950).
\textsuperscript{33} [1898] 1 Ch. 630.
\textsuperscript{34} E.g., Trustee Act, 1925, Sect. 14; c.f. Administration of Estates Act, 1925, Sect. 2(1). And see Trustee Act, 1925, Sect. 15.
remedy which is unquestionably enjoyed by the unpaid legatee. There is no similar authority in favor of the beneficiary in the reports of the period 1660—1750.

The list of differences still prevailing between trustees and executors could be extended. As in the recent case of Hawkesley v. May\(^{36}\) they emerge upon occasion to emphasize that, however desirable it may be from the standpoint of principle, the differing functions of personal representative and trustee must perpetuate the more important of these differences. Nevertheless, it is desirable to consider, from time to time, whether a particular difference is functionally necessary, or whether it is simply the consequence of a distinct historical origin. On the other hand there are doctrines, of which precatory trusts and secret trusts are examples, in which elements of rules applicable to trustees and other rules applicable to executors have been intermingled, to the detriment of modern principles of Equity.