The Rights of a Wisconsin Personal Representative in the Real Estate of His Decedent

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INTRODUCTION

The main purpose of this Article is to show the inadequacy and uncertainty of the Wisconsin law governing the rights of a personal representative in regard to his decedent's real estate. A secondary aim is to clarify to some extent a number of the rules in this area. Many of the conclusions herein are of necessity based upon inference and dicta rather than upon clear holdings in decided cases. The bases of these conclusions are sufficient, however, to reveal the potential perils that await the personal representative who endeavors to protect the real property in an estate. They are also sufficient to provide a background for clarifying legislation. This discussion will be limited to those powers of a personal representative other than the power to sell or mortgage.

The Problem

A decedent may leave an estate which needs immediate and continuing attention. It may include real estate such as a farm which must be kept in operation or an apartment or office building which require constant maintenance and regular collection of rents. Ordinarily, an administrator or executor is appointed as quickly as possible to assume the duties of handling the estate, and if any delay is foreseen in securing such appointment, a special administrator is appointed immediately to temporarily assume these duties.

Upon letters being issued the executor or administrator has title to the personal property of the decedent, complete authority to take possession of it in a fiduciary capacity, and authority to do all things necessary for its protection.[1] A special administrator may be granted similar authority pending the appointment of an ex-

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[1] WIS. STAT. § 310.14 (1957).

ecutor or administrator.[2] The real estate of the decedent, however, presents a disturbing problem because a personal representative's rights in regard to it may be severely limited or nonexistent, and there may be no one available to assume the necessary duties and responsibilities.

As to Wisconsin real estate the devisee under the will of a Wisconsin decedent or the heir, if there is no devise, has title to the real estate from the moment of the decedent's death. He has an immediate right to take possession of the real estate and use it as his own so long as it is not liable for the debts of the decedent or the expenses of the administration of the decedent's estate.[3] But in many cases the heir or devisee is unknown or unavailable or is unable to protect the real estate. For example:

(1) The devise may be to the widow who is considering electing to take her rights under the statute[4] rather than under the will. She does not dare exercise rights of ownership by collecting rent or paying fire insurance premiums for fear that such an act would irrevocably commit her to take under the will.[5]

(2) In an intestate situation the heir may as a part of his estate plan be considering renouncing his inheritance during the 180 day period allowed him by statute.[6] He should hesitate to exercise any rights of ownership in the real estate for fear he may thereby waive his right to renounce.

(3) In the event of a will contest it will not be known until an appeal is decided in the supreme court whether the heirs or the devisees are the owners.

(4) A will construction may be required in which it will not be known until final determination by the supreme court which of several possible devisees is the owner of the real estate.

(5) The problems are at least equally difficult when the devisee is *in esse* but as yet unborn.[7]

Even when the heirs or devisees are known, there is always the practical problem of how co-owners take immediate possession when none are residents of Wisconsin and several are minors. If any heir or devisee is not *sui juris,* a general guardian should be appointed

[2] WIS. STAT. §§ 311.06, .09 (1957).

[3] Marsh v. Board of Supervisors, 38 Wis. 250 (1875); Carpenter v. Fopper, 94 Wis. 146, 68 N.W. 874 (1896); Hinman v. Hinman, 126 Wis. 191, 105 N.W. 788 (1905); Neelen v. Holzhauer, 193 Wis. 196, 214 N.W. 497 (1927).

[4] WIS. STAT. §§ 233.12-.15 (1957).

[5] Will of Schaech, 252 Wis. 299, 31 N.W.2d 614, 33 N.W.2d 319 (1948).

[6] WIS. STAT. § 237.01(8) (Wis. Laws 1959, ch. 406).

[7] One must be in being to be a "person" and able to hold title to real estate. 42 AM. JUR. *Property* § 36 (1942). The Wisconsin statutes provide for appointment of a guardian only for a "person." WIS. STAT. § 319.01 (1957).

immediately to take possession of the real estate. When real estate is devised in trust, the trustee should be appointed as quickly as possible after the will is proved so that the trustee as owner of the legal title may take possession, and where the same individual or corporation is both executor and trustee, completely separate accounts will be required in each capacity.

Historical Background

Many of our present rules of probate law have their basis in history, and history is particularly active in today's interpretation of the law concerning a personal representative's rights and duties in regard to his decedent's real estate.

Historically, under the common law the real estate of a decedent descended to his heirs free of all claims of his creditors other than those who had secured special rights against the real estate during his lifetime. Only his personal property was liable for payment of the claims of his general creditors. For this reason the personal representative when appointed by the court had title to all of the personal property of a deceased but had no right of any kind to his real estate, all rights to the real estate being in the heir.[8]

The Wisconsin Supreme Court has stated many times that under the common law a personal representative has no right to the possession of the real estate of his decedent or to the rents and profits thereof.[9] Neither does he have the right to convey or encumber the real estate. Any rights which the personal representative has in the real estate of the deceased must be based upon authority given to him in the will or by statute, and this authority being in derogation of the common law will be strictly construed.[10]

While originally a decedent's real estate was exempt from the claims of his general creditors, before Wisconisn became a state

[8] 3 AMERICAN LAW OF PROPERTY § 14.6 (Casner ed. 1952).

[9] Jones v. Billstein, 28 Wis. 221, 227 (1871); Jones v. Graham, 80 Wis. 6, 49 N.W. 122 (1891); McManany v. Sheridan, 81 Wis. 538, 542, 51 N.W. 1011, 1012 (1892); Carpenter v. Fopper, 94 Wis. 146, 68 N.W. 874 (1896); Volk v. Stowell, 98 Wis. 385, 389, 74 N.W. 118, 120 (1898).

[10] In Wisconsin Trust Co. v. Chapman, 121 Wis. 479, 485-86, 99 N.W. 341, 344 (1904) for example, the court in affirming a mortgage placed on real estate by an administrator in accordance with the statute stated:

> "That he, as such administrator, has no interest in the real estate of the deceased, nor power to sell or incumber it, is elementary in the law of administration. The only authority to deal with real estate must come from the court from which he received his appointment, under the statutes providing for the disposition of lands by executors and administrators. . . . In exercising these powers, administrators act as the instruments of the law, and they are strictly bound by the special authority vested in them for this purpose."

See also Newcomb v. Ingram, 211 Wis. 88, 243 N.W. 209, 248 N.W. 171 (1933).

this rule had changed to permit general creditors to secure payment from the real estate after all of the personal property in the estate had been exhausted.[11] Clearly, in Wisconsin today a decedent's real estate is liable for the expenses of administration of his estate and payment of his general creditors, but just as clearly unless there is a testamentary provision to the contrary, the real estate may not be used for this purpose until all the personal property in the estate has first been used.[12] To the extent that general creditors have secured rights in a decedent's real estate, the personal representative has been give such rights and duties as have been necessary to protect the creditors. But any greater rights and duties on the part of the personal representative relative to his decedent's real estate have been resisted by the courts.

NONSTATUTORY RIGHTS

The basis for refusing rights on the part of the personal representative to a decedent's real estate is that all rights of ownership are vested in the heirs or devisees at the moment of the decedent's death. Where an interest in real estate is treated as personal property, there are no possible rights on the part of heirs or devisees and, therefore, the personal representative during probate or administration should have exclusive possessory rights to his decedent's real estate. If the will directs the executor to sell the real estate during probate, it is treated as personal property, and the executor should have unquestioned right of possession pending sale.[13]

A real estate mortgagee does not own real estate. He owns a chose

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[11] 3 AMERICAN LAW OF PROPERTY § 14.6 (Casner ed. 1952).

[12] Estate of Esch, 4 Wis.2d 577, 91 N.W.2d 233 (1958). As to limitations on statutory power of sale see note 22 *infra*.

[13] There are several Wisconsin cases concerning equitable conversion resulting from a mandatory direction to sell real estate being given in the will but all deal with the question only in the context of the effect of the rule against perpetuities or suspension of the power of alienation. In this context the court, in Will of Schilling, 205 Wis. 259, 276, 237 N.W. 122, 129 (1931), stated:

> "It is the conclusion of the court that the provisions of this will plainly indicate an intention on the part of the testator to have the properties belonging to his estate converted into personalty and that the doctrine of equitable conversion therefore applies, effective as of the date of his death.
>
> "Having concluded that the terms of this will require all of the property to be considered as personalty, under the doctrine of equitable conversion . . . ."

In Estate of Hustad, 236 Wis. 615, 620, 296 N.W. 74, 76 (1941) there appears the following: "Application of the doctrine of equitable conversion must rest on the fact that a deed or will expresses intent that land must be sold and the proceeds distributed. In such case land is treated as personal property."

For additional discussion in this area see, Ford v. Ford, 70 Wis. 19, 33 N.W. 188 (1887); Becker v. Chester, 115 Wis. 90, 91 N.W. 87 (1902); Estate of Dusterhoft, 270 Wis. 5, 70 N.W.2d 239 (1955).

in action with real estate as security.[14] A land contract vendor is in a similar position.[15] Upon the death of the mortgagee or land contract vendor this asset is part of the personal property in his estate.[16] In the event of default on the part of the mortgagor or land contract purchaser, the personal representative has the same right to possession of the security as the deceased would have had if he had lived.[17]

Consistent with the historical doctrine that a personal representative has only such rights in his decedent's real estate as are necessary for the protection of creditors, the Wisconsin court has never failed to hold that a personal representative is excluded from possession of the exempt homestead.[18] Also, it has never failed to hold that the personal representative has an unquestioned right to the possession of the decedent's real estate other than the exempt homestead when there is insufficent personal property to pay the debts and administration expenses.[19] However, when there is uncertainty about whether the personal property is sufficient, the burden is on the personal representative to prove the insufficiency of the personal property when his right to possession of the real estate is questioned.[20]

It is in estates in which there is real estate other than the exempt homestead and where the personal property exceeds the debts and administration expenses that confusion and doubt exists about the rights and duties of the personal representative in regard to the real estate of his decedent.

No consideration will be given to a personal representative's authority to sell or mortgage the real estate of his decedent. However, it is well to point out that, although the court under the statutes has the right to authorize any sale or encumbrance, if it would be for the best interest of the estate or the decedent's heirs,[21] all sales or mortgages except as authorized by will can be blocked by any person interested in the estate who will give bond to guarantee the payment of so much of the administration expenses and

[14] Estate of Hart, 187 Wis. 629, 205 N.W. 386 (1925); Marshall & Ilsley Bank v. Greene, 227 Wis. 155, 278 N.W. 425 (1938).

[15] Mueller v. Novelty Dye Works, 273 Wis. 501, 78 N.W.2d 881 (1956).

[16] As to land contracts see WIS. STAT. § 312.01 (2) (Wis. Laws 1959, ch. 415).

[17] As to land contracts see Estate of Greeneway, 236 Wis. 503, 295 N.W. 761 (1941).

[18] McManany v. Sheridan, 81 Wis. 538, 51 N.W. 1011 (1892); Curtis v. Gillie, 239 Wis. 207, 300 N.W. 911 (1941).

[19] Crow v. Day, 69 Wis. 637, 35 N.W. 45 (1887); see also, note 27 *infra*.

[20] Volk v. Stowell, 98 Wis. 385, 74 N.W. 118 (1898).

[21] WIS. STAT. § 316.01 (1) (1957).

the debts of the decedent as remain unpaid after all of the personal property has been used for that purpose.[22]

STATUTORY RIGHTS

The only Wisconsin statute[23] which can be claimed to give a personal representative a general right to possession of a decedent's real estate provides as follows:

> The executor or administrator shall have a right to the possession of the real estate of his decedent, except the exempt homestead, and may receive the rents and profits thereof until the estate shall be settled, or until delivered by order of the court, to the heirs or devisees, and he shall keep in good tenantable repair all buildings and fences thereon which are under his control.

This statute was adopted in Wisconsin in 1849[24] and its wording has remained virtually unchanged since that time.[25] Its meaning, however, changed tremendously during the first fifty years after its adoption. In the first two cases in which the statute was considered, the court did not question the personal representative's right to take and maintain possession of the real estate and refused possession to a devisee[26] and to an heir and his vendee[27] who attempted to oust the personal representative before the estate was closed. With *Jones v. Billstein*,[28] in 1871, the interpretation of the statute began to change. The court indicated that a personal representative may take possession of a decedent's real estate if he so desires or if the court directs but that the statute "does not imperatively require him to take possession thereof." From then on the historic common law was increasingly read into the statute. Succeeding cases discuss the statute as truly applying only to the situation in which there is insufficient personal property in the estate to pay debts and the costs of administration so that the real estate or its rent are necessary to meet these expenses. These cases hold that where the personal property is sufficient, the personal representative has no right to oust an heir or devisee who takes possession of the real estate

[22] WIS. STAT. § 316.13 (1957). After the time for filing claims has expired, any interested person should be able to determine the amount of debts and administration expense, and if the personal property in the estate exceeds that amount, he runs no risk in filing a bond to prevent the sale.

[23] WIS. STAT. § 312.04 (1957).

[24] WIS. REV. STAT. ch. 69, § 7 (1849).

[25] As originally adopted the statute applied to personal property as well as to real estate and made no exception for the exempt homestead.

[26] Phillips v. Sleusher, 3 Wis. 457 (1852).

[27] Edwards v. Evans, 16 Wis. 193 (1862).

[28] 28 Wis. 221, 228 (1871).

prior to the personal representative, and has no standing to bring an action for that purpose.[29]

In *McManany v. Sheridan*,[30] in 1892, the question was whether a personal representative in possession could be ousted by one claiming through the devisee. The testator left the residue of his estate which included several parcels of real estate to his son whose whereabouts were unknown. The will provided that if the son was not heard from within ten years after the testator's death, this residue should go to other named legatees. An executor was appointed who took possession of the real estate and collected the rents. Some months after the testator's death, the son's wife secured a divorce and was given title to one of the parcels of real estate in the divorce judgment. About a year and a half later she took possession without the knowledge or consent of the executor, and the executor brought ejectment to regain possession. In affirming judgment against the executor the court found that the wife through the divorce judgment held all the rights which the son received as devisee under the will and stated:

> All the rights which the executor has to the possession of this real estate he derives from this statute, [Wis. Rev. Stat. § 3823 (1891) now Wis. Stat. § 312.04 (1957)] because he has none at common law. . . . If there are no claims against the estate, or if all claims have been paid, the administrator or executor is held not entitled to possession as against the heir or devisee, even though the estate be not finally settled.We see no reason why the same result should not follow where it appears that there is enough personal property in hand to pay all debts and legacies.

The court apparently did not question the executor's rights in the remaining parcels of real estate pending possession being sought by the devisee.

Six years later the court took a further step when it prohibited joinder of a personal representative as a party plaintiff with devisees seeking to gain possession of real estate occupied by a tenant of the deceased. The court held that the personal representative was not a proper party to the action because, "When there are no debts or legacies to be paid, there is no valid reason why the executor or administrator should have the possession of the real estate."[31]

A series of cases since that time has reiterated the statements that

[29] Flood v. Pilgrim, 32 Wis. 376 (1873); Marsh v. Board of Supervisors, 38 Wis. 250 (1875); Filbey v. Carrier, 45 Wis. 469 (1878).

[30] 81 Wis. 538, 542, 51 N.W. 1011, 1012 (1892).

[31] Volk v. Stowell, 98 Wis. 385, 389, 74 N.W. 118, 119 (1898).

were the bases of the earlier holdings. Sometimes the statements have been necessary to the holding in the case and sometimes they have been clearly dicta, but they have been sufficient to keep the severely limited interpretation of section 312.04 very much alive.[32]

Though there are no statutes other than 312.04 which specifically give a personal representative right to possession of his decedent's real estate, there are several which seem to assume that he has the right to take possession and collect rents. For example, the statute in regard to bond of personal representatives[33] provides as follows:

> No person shall act as personal representative, nor shall letters be issued to him until he has given a bond, with one or more sureties, conditioned on the faithful performance of his duties, to the judge of the court in such sum as the judge may direct but not less than the estimated value of the personal property *plus one year's income from real estate.* (Emphasis added.)

If a personal representative has authority to collect rents from real estate only in that small percentage of estates in which there is insufficient personal property to pay debts and administration expenses, why should he be refused appointment until he posts bond in an amount at least equal to one year's income from real estate?

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[32] "Under the statute [the administrator] has no right to the possession unless there are claims against the estate unpaid." Carpenter v. Fopper, 94 Wis. 146, 147, 68 N.W. 874, 874 (1896).

"When there are no debts or legacies to be paid, there is no valid reason why the executor or administrator should have the possession of the real estate." Volk v. Stowell, 98 Wis. 385, 389, 74 N.W. 118, 119 (1898).

"It has been held that if there are no debts [the administrator] has no right to take possession." Hinman v. Hinman, 126 Wis. 191, 194, 105 N.W. 788, 789 (1905).

"The doctrine of *Jones v. Billstein,* . . . has never been overruled, and from that and other decisions affirming it, it is plain that an administrator has no concern with the real estate unless it is necessary for him to have the rents and profits and dispose of it for the purpose of paying expenses, legacies, and the just debts of the deceased." Neelen v. Holzhauer, 193 Wis. 196, 200, 214 N.W. 497, 499 (1927).

The holdings of many of the earlier cases are restated in Estate of Rieman, 272 Wis. 378, 75 N.W.2d 564 (1956).

It should be noted that in occasional cases, such as Volk v. Stowell, *supra,* the court included legacies in addition to debts and administration expenses as items to be included in the amount which, if it exceeded the personal property in the estate, enabled the personal representative to take possession of the decedent's real estate. The inclusion of legacies has always been dicta, as no Wisconsin cases have been found in which the issue of the personal representative's right to possession was raised in an estate in which there was sufficient personal property to pay the debts and administration expenses but insufficient personal property to pay the legacies. The court, however, in Estate of Esch, 4 Wis.2d 577, 91 N.W.2d 233 (1958) has indicated its desire to protect specific devises of real estate from being invaded in order to secure money to pay general bequests.

[33] WIS. STAT. § 310.15(1) (1957).

Another statute[34] provides, "Whoever steals or converts to his own use property of any decedent's estate shall be liable to an action by the executor or administrator for double the value of the property stolen or converted." By statutory definition "property" means both real and personal property.[35] "Steal" applies to an unlawful taking of fixtures as well as personal property.[36] Unless "decedent's estate" is interpreted to mean only that real estate to which the personal representative has a right of possession, the statute seems to provide the rather unusual result that often when the fixtures on a decedent's land are wrongfully taken or used by a third party, the personal representative may recover double damages for the estate but has no right to recover the property itself.

It is also provided: "In an action for the recovery of real property if any plaintiff shall die before judgment his heir or devisee or his executor or administrator, for the benefit of the heir, devisee or creditors, may be admitted to prosecute the action in his stead."[37] This statute indicates that any personal representative has rights in regard to his decedent's real estate in these limited circumstances, but in the one case in which this statute was considered and was necessary to the decision it was held that regardless of whether the personal representative was a party, any heir who might be divested of title was a necessary party to the action.[38]

While these statutes indicate that a personal representative may have some rights in the real estate in any estate, they are as susceptible of being limited exclusively to estates in which there is insufficient personal property to pay the debts and funeral expenses as is section 312.04. To date none of these statutes have been used by the court to extend a personal representative's right to real estate beyond that which he had at common law.

SPECIAL ADMINISTRATOR

What rights does a special administrator have in the real estate of a deceased? The powers of a special administrator are strictly limited and do not go beyond those which are expressly granted

[34] WIS. STAT. § 312.05 (1957). As originally adopted, as WIS. REV. STAT. ch. 68, § 10 (1849), the statute clearly applied only to personal property which was "embezzled or alienated" prior to the granting of letters testamentary or administration. The present wording is the result of piecemeal amendment through the years.

[35] WIS. STAT. § 990.01 (31) (1957).

[36] See generally WIS. STAT. § 943.20 (1957).

[37] WIS. STAT. § 269.19 (1) (1957). There has been little change in this statute since its adoption 110 years ago. See WIS. REV. STAT. ch. 96, § 10 (1849).

[38] Jones v. Graham, 80 Wis. 6, 49 N.W. 122 (1891).

by law or by court order.[39] When there is no statutory basis for the appointment of a special administrator, the court is without jurisdiction to appoint one.[40] When "it appears to be necessary to conserve or administer the estate of a decedent before letters testamentary or of administration can be issued,"[41] a special administrator may be appointed with power "to care for, gather and secure crops"[42] or "with leave of the court to lease for a term not exceeding one year the real property of the deceased"[43] and "to do such other things as the court may direct for the best interests of the estate."[44] If appointed and if it appears that anything of value will come into his hands, the special administrator must post bond similar to that required of a general administrator[45] and it therefore must include an amount equal to one year's income from the real estate of the decedent.[46]

No cases have been found in which the court has dealt with the question whether a special administrator can collect the rents from or take possession of a decedent's real estate. The statutory language indicates that a special administrator has at least some possessory rights in the real estate of his decedent. But where there are any continuing administrative responsibilities, a special administrator is appointed to act only until a general administrator or executor can be appointed and "upon the granting of letters testamentary, or of administration of the estate of the decedent, the power of the special administrator shall cease and such special administrator shall forthwith file an account and deliver to the executor or administrator all the goods, chattels, moneys and effects of the deceased in his hands."[47] It seems hardly reasonable that a special administrator should collect and turn over to the general administrator, rents which a general administrator would have had no right to collect. If the common law limits the statutory possessory rights of an administrator or executor to those estates in which there is insufficient personal property to pay the debts and administration expenses, it should similarly limit the possessory rights of a special administrator.[48]

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[39] WIS. STAT. § 311.09 (6) (1957).
[40] Guardianship of Rundle, 245 Wis. 274, 13 N.W.2d 921 (1944).
[41] WIS. STAT. § 311.06 (4) (1957).
[42] WIS. STAT. § 311.09 (3) (b) (1957).
[43] WIS. STAT. § 311.09 (3) (d) (1957).
[44] WIS. STAT. § 311.09 (3) (g) (1957).
[45] WIS. STAT. § 311.08 (1957).
[46] WIS. STAT. § 310.15 (1957).
[47] WIS. STAT. § 311.10 (3) (1957).
[48] Read in this light all the statutory provisions in regard to special administrators would be applicable to rights in real estate only in estates where there

PERILS OF THE PERSONAL REPRESENTATIVE IN POSSESSION

The bondsman of a personal representative is not liable for any loss that occurs in regard to any real estate which is being held by the personal representative without authority. Even though he takes possession of the real estate with the specific approval of all interested parties, he is incapable of acting in his official capacity as personal representative. Instead he acts in his individual capacity as an agent of the interested parties with the result that his bondsman is not liable in the event of loss for which the personal representative is held liable.[49]

A personal representative who is properly in possession of his decedent's real estate has the duty to pay the real estate taxes, interest on mortgages and any other reasonable expenses that may be necessary to preserve the value of the real estate. Having made the payments he is entitled to reimbursement out of funds going to those entitled to the real estate.[50]

A personal representative who is in possession without proper authority may find himself in a less desirable position. As to reimbursement for payment of real estate taxes, there should be no difficulty as long as he secures court authority in advance of payment.[51] If he pays the reasonable costs of maintaining income pro-

was insufficient personal property to pay the debts of a decedent and the expenses of administration of his estate.

[49] In Newcomb v. Ingram, 211 Wis. 88, 243 N.W. 209, 248 N.W. 171 (1933), three bondsmen were attempting to escape or allocate liability for the amount for which the executor had been found liable on an accounting. One of the grounds urged was that they were relieved from liability because the executor had increased his own liability by selling certain real estate of the deceased and taking possession of the proceeds after bond was secured. In denying relief on this ground the court stated:

> "We consider that this rule is not applicable to the instant case because it was beyond the power of the beneficiaries to increase the liabilities of Ingram as executor. His liabilities as executor are fixed by law, and his obligation as executor is to account for funds and property coming into his hands as executor. It is true that, pursuant to arrangement between the parties interested in the estate, land was sold and the proceeds of the land came into his hands, and his liability to the parties was thereby increased. But this was a personal liability, not a liability as executor. The will did not give Ingram power to sell any land. No occasion to sell land to pay debts or expenses of administration arose. Under these circumstances his only liability as executor was to account for such personal property as came into his hands as executor, and that liability was no more increased by his acquiring funds through sale of lands through agreement of the parties than it would have been had he incurred liability to the parties for borrowing money from them." *Id.* at 95, 243 N.W. at 211.

[50] Will of Hurley, 193 Wis. 20, 213 N.W. 639 (1927).

[51] WIS. STAT. § 317.05 (1957). This statute has not been discussed in any cases; however, it is always possible that this statute, too, may be construed as applicable only in cases where there is insufficient personal property to pay debts and administration expenses.

ducing property, even though he does so without authority, the personal representative should be entitled to reimbursement out of the income, for in most instances to hold otherwise would unjustly enrich the heirs or devisees.[52]

Casualty insurance secured for or maintained on the real estate by the personal representative presents a much greater problem. In insuring the property the personal representative is acting as an unauthorized agent of the heirs or devisees. In the event of fire or other loss they would undoubtedly ratify his act and collect the insurance payments. However, if no loss occurred during the period in which the personal representative was in possession, the heirs or devisees might well refuse to ratify and leave the personal representative with no opportunity to secure reimbursement for the premiums which he had paid. It may be argued that there would be no liability on the part of the insurance company in the event of loss because the personal representative has no insurable interest. Wisconsin law, however, seems to indicate that those entitled to the real estate would receive payment from the insurance company whether or not the personal representative has an insurable interest.[53]

A personal representative in possession of real estate either with or without authority may be personally subject to the same tort liability as an owner or landlord for injuries suffered on the premises by third persons.[54] He should carry liability insurance for his own protection as well as for the protection of those who have title to the real estate. If he is in possession without authority, it is difficult to see where he can secure reimbursement for his expenditures for such insurance.

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[52] But in some instances in the somewhat analogous situation of a mortgagee in possession of real estate, the mortgagee has been held personally liable for the following: reasonable rental value; severe fall in rents; being excessively liberal to tenant; not checking financial responsibility of tenant as tenancy was created; failure to make necessary repairs; making improvements rather than repairs; penalties for failure to pay taxes; workmen's compensation insurance. For further discussion and case citations, see Leesman, *Corporate Trusteeship and Receivership*, 28 ILL. L. REV. 238 (1933); Note, 35 COLUM. L. REV. 1248 (1935).

[53] WIS. STAT. § 203.13 (2) (1957). Kludt v. German Mut. Fire Ins. Co., 152 Wis. 637, 140 N.W. 321 (1913); Emmco Ins. Co. v. Palatine Ins. Co., 263 Wis. 558, 58 N.W.2d 525 (1953); Doyle v. Allstate Ins. Co., 4 Wis.2d 411, 90 N.W.2d 562 (1958). The reasoning in the *Doyle* case is that an insurance company having received payment for accepting the risk and having had disclosure of the facts upon which ownership of the property is based is bound to pay when loss occurs.

For cases in other jurisdictions see 4 APPLEMAN, INSURANCE LAW & PRACTICE § 2152 (1941).

[54] See Annot., 96 A.L.R. 1068 (1935), entitled "Liability of one exercising the rights of an owner of realty for injuries due to its condition, as affected by want of legal title."

To date the supreme court has not held a personal representative who was found to be in possession of his decedent's real estate without authority to be an insurer and liable for loss occurring without negligence on his part. The only relief given and apparently the only relief sought was the immediate transfer of possession and the accumulated net rents to the heirs or devisees.[55] It has been suggested in dicta that if a personal representative deals with real estate in any way in the absence of specific authority traceable directly to statute or the will of the deceased, he may be liable for any loss that occurs regardless of fault.[56] There is sufficient precedent in cases dealing with other types of wrongful holding of property by a personal representative to warrant the court to hold a personal representative liable for all losses even though those losses were due to factors beyond his control while he was holding real estate without adequate authority.[57]

Having taken possession of the decedent's real estate and having started collecting rents from the tenants without adequate authority and finding that the property is dropping in value or operating at a loss, what can the personal representative do to avoid the possibility of continuing and increasing personal liability? Clearly, if he can turn the possession over to the proper heir or devisee, who is *sui juris,* the personal representative should not be liable for further loss. A refusal of tendered possession should estop an heir or devisee from claiming damage for any loss occurring subsequent to the date of tender. But what if the whereabouts of the devisee are unknown, or the devisee is unknown pending the appeal of a

[55] Will of Bresnehan, 221 Wis. 51, 265 N.W. 93 (1936); Curtis v. Gillie, 239 Wis. 207, 300 N.W. 911 (1941).

[56] In Neelen v. Holzhauer, 193 Wis. 196, 200, 214 N.W. 497, 499 (1927), the court stated:

> ". . . it is plain that an administrator has no concern with the real estate unless it is necessary for him to have the rents and profits and dispose of it for the purpose of paying expenses, legacies, and the just debts of the deceased. While he may enter into the possession of it, and without question in a doubtful case the court would direct him to take possession of the real estate, *if he intermeddles with it he does so at his peril.*" (Emphasis added.)

[57] Coolidge v. Rueth, 209 Wis. 458, 245 N.W. 186 (1932) (for failing to close the estate within a proper period and thereby holding the assets without authority, personal representative held to he an insurer, and thus liable for loss due to bank failure); Black v. Hurlbut, 73 Wis. 126, 40 N.W. 673 (1888) (theft of funds by third party). See also, Shupe v. Jenks, 195 Wis. 334, 218 N.W. 375 (1928); Will of Robinson, 218 Wis. 596, 261 N.W. 725 (1935); Estate of Onstad, 224 Wis. 332, 271 N.W. 652 (1937).

A personal representative who continues to operate a business of the deceased without express authority may do so at his peril and be required to make up losses which occur. The Wisconsin Supreme Court has had no opportunity to apply this rule but discussed it in Estate of Onstad, 224 Wis. 332, 271 N.W. 652 (1937).

will construction action, or the devisee is the widow who has not yet decided whether to elect to take her statutory share rather than her devise under the will? Even though a personal representative takes possession of his decedent's real estate without authority and is an intermeddler while in possession, if he abandons it, he may well be liable for all loss which occurs as a result of his abandonment.[58]

Although a personal representative in unauthorized possession of his decedent's real estate is acting in an area of danger, it does not follow that he will necessarily be held financially responsible under any of the theories discussed in the preceding paragraphs, even though he manages the property at a loss. The personal representative who took possession of the real estate in good faith to protect the property and the interests of those who had rights in the decedent's estate and who managed the real estate in accordance with the degree of care ordinarily required of those in a fiduciary capacity is in a good position to convince the court that he should not be held liable on the basis of law which is not more clearly defined than that which we have in Wisconsin today. Liability of the personal representative based on unauthorized possession of his decedent's real estate can in almost every instance be sought only by the heirs or devisees entitled to the real estate.[59] An heir or devisee who though he had the opportunity to do so did not seek early termination of the personal representative's possession but instead acquiesced in that possession and stood ready to receive the benefits thereof, should be estopped from making any claim based on the fact that possession by the personal representative was unauthorized.

Whether or not a personal representative is ever held liable for having attempted to protect and preserve his decedent's real estate,

[58] Though one has no duty to rescue a drowning man and may ignore him without legal liability, once rescue is attempted the rescuer assumes a responsibility which requires reasonable care on his part which he cannot negligently abandon without liability. This rule of torts is also applied in cases where one has started performance in such matters as securing insurance or collecting a note as a gratuitous agent. See PROSSER, TORTS § 38 (1955).

As to similar liability on the part of a gratuitous bailee upon whom goods are thrust involuntarily and who then exercises some degree of care for them, see BROWN, PERSONAL PROPERTY § 91 (2d ed. 1955).

The Restatement limits this liability to some extent by stating that there is no liability on the part of the one who abandons his voluntary rendering of services unless by so doing he placed the other in a worse position than he would have been in had there been no services rendered at all. RESTATEMENT, TORTS § 323 (1934).

[59] Creditors have an interest in a decedent's real estate only if the estate does not have sufficient personal property to pay the debts. If the personal property is insufficient to pay the debts, the personal representative has authority to take possession of the real estate.

the law concerning a personal representative's rights in regard to his decedent's real estate should not remain the confusing maze that it is today. Historically, the best way to protect a decedent's real estate for his heirs and devisees may have been to forbid the personal representative from exercising any rights in regard to it, but that is not true today. It must be assured that there is someone with authority to manage and preserve a decedent's real estate immediately after his death, and no one is in a better position to do this than his personal representative. Yet under present Wisconsin law a personal representative is in a much safer legal position if he completely ignores his decedent's real estate than if he attempts to protect it.

The necessary duty and authority should be given to executors in their decedent's wills and to all personal representatives by legislation. Before drafting any will, an attorney should learn from the testator whether he wants his executor to assume the responsibility of caring for his real as well as his personal property. If the testator desires this, the will should give the executor specific authority and direction to take possession of the real estate and do all things necessary to manage, preserve and maintain it. Merely giving the executor power to sell or encumber the real estate is not enough.[60]

PROPOSED LEGISLATION

Legislation can be enacted to give the personal representative the same right and duties, except legal title and unlimited power of sale, in decedent's real estate as he now has in regard to personal property.[61] Similar authority should be made available to the special administrator upon court order. It can be provided that the exclusive right of possession shall remain in the personal representative until the estate is settled, or that the heirs or devisees upon petition to the court and notice to the personal representative may secure exclusive possession from the personal representative if, after hearing and notice to all interested parties, the court in its discretion so orders.

Proposed amendments to existing statutes follow. These are presented not as the ultimate form for the necessary legislation but rather as a starting point to provoke further discussion.

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[60] The power to take possession of real estate and the power to sell it are two entirely separate and distinct powers and either power may be conferred or exercised without reference to the other. Jones v. Billstein, 28 Wis. 221, 231 (1871).

[61] Such legislation has been adopted in England and the United States. See 3 AMERICAN LAW OF PROPERTY § 14.33 (Casner ed. 1952).

312.04 Possession and care of lands. *Regardless of the amount of personal property in the estate,* the executor or administrator shall have ~~a right to the~~ *the duty to take* possession of the real estate of his decedent ~~except the exempt homestead~~ and ~~may~~ *shall* receive the rents and profits thereof *for the benefit of those entitled thereto* until the estate shall be settled, or until ~~delivered by order of the court~~, *the court after petition by one interested in the real estate and upon hearing subsequent to notice to all parties interested in the estate orders it delivered to the heirs or devisees.* ~~and he~~ *While in possession the executor or administrator* shall keep in good tenantable repair all buildings, ~~and~~ fences *and other improvements* thereon which are under his control *and shall carry thereon such insurance as may be reasonably necessary. As to real estate located outside the state of Wisconsin, the personal representative shall have only such duties as are consistent with the powers allowed by the law of the place where the real estate is located.*

310.14 Duties of personal representatives. *Regardless of the amount of personal property in the estate,* personal representatives, other than special administrators, shall collect and possess all the decedent's personal estate except that selected under s. 313.15 (1) *and all the decedent's real estate;* inventory and have appraised all the decedent's estate; collect all income and rent from such estate of which they have custody; preserve such estate and contest all claims except claims which they believe are valid and which are not objected to by an interested person; pay and discharge out of such estate all expenses of administration, taxes, charges, claims allowed by the court, or such dividends on claims as directed by the court; render just and true accounts; make distribution as the court directs and do such other things as are directed by the court or required by law. *As to real estate located outside the state of Wisconsin, the personal representative shall have only such duties as are consistent with the powers allowed by the law of the place where the real estate is located.*

Section 311.09 (3) (g) should be renumbered 311.09 (3) (h) and a new subsection created as follows:

311.09 (3) (g) *With leave of the court to take possession of the real estate of the deceased regardless of the amount of personal property in the estate.*