

December 1935

Executors and Administrators—Liability of Real Estate for Expenses of Administration

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Estates and Trusts Commons](#)

Recommended Citation

Executors and Administrators—Liability of Real Estate for Expenses of Administration, 42 W. Va. L. Rev. (1935).

Available at: <https://researchrepository.wvu.edu/wvlr/vol42/iss1/6>

This Student Note is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

West Virginia Law Quarterly

and The Bar

Published by the Faculty of the College of Law of West Virginia University, and issued in December, February, April and June of each academic year. Official publication of The West Virginia Bar Association.

Subscription price to individuals, not members of The West Virginia Bar Association, \$2.00 per year. To those who are members of the Association the price is \$1.00 per year and is included in their annual dues. Single copies, 50 cents.

BOARD OF EDITORS

Faculty of College of Law, *ex officio*

EDITOR IN CHARGE

C. C. WILLIAMS, JR.

ASSOCIATE STUDENT EDITORS

GUY OTTO FARMER, *President*

MARLYN EDWARD LUGAR, *Secretary*

STEPHEN AILES, *Note Editor*

HOUSTON ALEXANDER SMITH, *Case Editor*

PHILIP ANDERSON BAER

GEORGE GILBERT BAILEY

JAMES ATKINSON BIBBY

EDWARD WILSON EARDLEY

R. DOYNE HALBITTER

HERSCHEL H. ROSE, JR.

WILLIAM VICTOR ROSS

WILLIAM HENEY WALDRON, JR.

RALPH MILTON WHITE

CHARLES CHILTON WISE, JR.

STUDENT NOTES

EXECUTORS AND ADMINISTRATORS — LIABILITY OF REAL ESTATE FOR EXPENSES OF ADMINISTRATION

A federal revenue law levied a gross estate tax upon all real estate of a decedent "which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as a part of his estate."¹ The United States Court of Claims has held that the real estate of a West Virginia decedent is not subject to the tax because in this state the common-law rule that such real estate is not liable for the expenses of administration is unaltered, since "all lawful

¹ Revenue Act 1921, § 402 (a). This statute has since been modified to include all real estate of a decedent, without qualification. Revenue Act 1926, § 302 (a); U. S. C. A. Title 26, § 1094.

demands against his estate", for which such realty is made liable by the Code,² does not include expenses of administration.³

The Fourth Circuit Court of Appeals has recently held that the Virginia statute,⁴ identical with that here presented, did not modify the common-law rule in that state,⁵ drawing its conclusion from Virginia decisions which hold that real property descends directly to the heir, and that the personal representative is concerned only with personalty.⁶ The West Virginia court has not directly passed on the point, but it has indicated it would accord.⁷

Under the early common law,⁸ as by the civil law,⁹ the acceptance of the succession by the heir rendered not only the inheritance, but the heir's own estate liable for his ancestor's debts. But in the thirteenth and fourteenth centuries, with the introduction of the personal representative who administered the personal estate of the decedent, the heir's responsibility was narrowed to liability on his ancestor's specialties only.¹⁰ In England the decedent's realty thus continued exempt until 1807, when by statute the lands of a deceased trader were subjected to the payment of his "just debts . . . as well debts due on simple contract as on specialty."¹¹ In 1833 this liability was extended to the land of all debtors.¹² By virtue of statutes, the universal

² "All real estate of any person who may hereafter die, . . . shall be assets for the payment of the decedent's debts and all lawful demands against his estate. . . ." W. VA. REV. CODE (1931) c. 44, art. 8, § 3.

³ *McFaddin v. United States*, 10 F. Supp. 286 (Ct. Cl. 1935).

⁴ VA. CODE (Michie, 1930) § 5395.

⁵ *United States v. Wilcox*, 73 F. (2d) 781 (1934); accord, *Ballard v. Helburn*, 9 F. Supp. 812 (1933).

⁶ *Street's Heirs v. Street*, 11 Leigh 498 (Va. 1841); *Gaw v. Huffman*, 12 Gratt. 628 (Va. 1855); *Fitzhugh's Ex'r v. Fitzhugh*, 11 Gratt. 300 (Va. 1854); *Whitten v. Bank of Fincastle*, 100 Va. 546, 42 S. E. 309 (1902); *Catron v. Bostic*, 123 Va. 355, 96 S. E. 845 (1918); *Peirce v. Graham*, 85 Va. 227, 7 S. E. 189 (1888); *Bruce v. Farrar*, 156 Va. 542, 158 S. E. 856, 75 A. L. R. 872 (1931).

⁷ Administration costs will not displace a mortgage lien created by the decedent. *Mahan v. Bank of Pax*, 109 W. Va. 595, 155 S. E. 664 (1930). And where part of a sum lent to an executor was used to pay expenses of administration, there is no lien on decedent's real estate favoring such costs, so that the lender must take the position of a common creditor as to that balance. *Yokum v. Yokum*, 110 W. Va. 221, 157 S. E. 579 (1931).

⁸ 7 GLANVILLE c. 8. Debts were then regarded as a family matter and responsibility. JENKS, A SHORT HISTORY OF ENGLISH LAW (2d ed. 1922) 63.

⁹ See *Montgomery v. Culton*, 18 Tex. 736, 749 (1857).

¹⁰ 1 HOLDSWORTH, A HISTORY OF ENGLISH LAW (2d ed. 1922) 628. The heir, being deprived of handling the increasingly important personalty, naturally declined responsibility for his ancestor's liabilities. JENKS, *op. cit. supra* n. 8, at 64.

¹¹ 47 GEO. III, Sess. 2, c. 74 (1807).

¹² 3 & 4 WILLIAM IV, c. 104 (1833).

rule in the United States now is that the real estate of a decedent can be sold for the payment of his just debts,¹³ but a majority of courts hold that no sale of real estate can be ordered to pay expenses of administration.¹⁴ A minority does allow such sale, some states by judicial decision,¹⁵ some by statutory extension.¹⁶

In Virginia, by 1842, the lands of a decedent were assets "for the payment of all the just debts of such person, as well debts due on simple contract, as on specialty."¹⁷ At this time, actions for personal injuries died with the person, and when a provision was inserted in the 1849 revision allowing action against a personal representative for an injury done by his decedent,¹⁸ the liability of the decedent's land was increased to payment of all "debts and lawful demands against his estate,"¹⁹ to accommodate the survival of the tort.²⁰

To hold that the legislature also intended to include expenses of administration in "all lawful demands" would be a possible and genuine interpretation.²¹ Our theory of descent, however, vests real estate in the heirs immediately on the decedent's death, subject to divestment by the insufficiency of the personalty.²² It does not pass through the process of administration, as does property devised to be sold,²³ and hence theoretically is not subject to the toll for such passage. But it seems that if the realty is actually benefited by administration, it should contribute to the expenses thereof.²⁴ Since administration does give the realty a clear title, perhaps a legislative extension of the statute to include "expenses of administration" should occur.

¹³ 3 WILLIAMS ON EXECUTORS (7th American ed. 1895) 166.

¹⁴ 3 WOERNER, ADMINISTRATION OF ESTATES (1923) 1627.

¹⁵ *Falley v. Gribbling*, 128 Ind. 110, 26 N. E. 794 (1890); *Personette v. Johnson*, 40 N. J. Eq. 173, 177, 4 Atl. 778 (1885); *In re Estate of Houck*, 23 Ore. 10, 17 Pac. 461 (1888); *In re Reynold's Estate*, 195 Pa. 225, 45 Atl. 726 (1900); *In re Thorn*, 24 Utah 209, 67 Pac. 22 (1901).

¹⁶ CAL. CIV. PRO. CODE (1923) § 1536; MONT. REV. CODE (1921) §§ 7052, 10195; NEBR. COMP. STAT. (1929) §§ 30-233.

¹⁷ Acts of the General Assembly of Virginia (1842) c. 98, § 1.

¹⁸ CODE OF VIRGINIA (1849) c. 130, § 20.

¹⁹ CODE OF VIRGINIA (1849) c. 131, § 3.

²⁰ The purpose of the extension is shown in the "Report of the Revisors of the Civil Code of Virginia, Made to the General Assembly at December Session 1846", 672.

²¹ See Pound, *Spurious Interpretation* (1907) 7 COL. L. REV. 379.

²² *Laidley v. Kline*, 8 W. Va. 218 (1875).

²³ Where realty is devised to be sold, the realty is converted into personalty at the death of the testator. *Lynch v. Spicer*, 53 W. Va. 426, 44 S. E. 255 (1903).

²⁴ See *Buxton v. Shaffer*, 43 W. Va. 296, 299, 27 S. E. 319 (1897).